IN THE COURT OF APPEAL OF THE ST

THIRD APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, Petitioner, **v.** **THE SUPERIOR COURT OF EL DORADO COUNTY; HONORABLE JAMES R. WAGONER,** Respondent; **SOUTH LAKE TAHOE POLICE OFFICERS' ASSOCIATION, SOUTH LAKE TAHOE POLICE SUPERVISORS ASSOCIATION;** Real Party in Interest. **CITY OF SOUTH LAKE TAHOE; CHIEF OF POLICE BRIAN UHLER** Real Party in Interest.	Case No.

El Dorado County Superior Court, Case No. P16CRF0064
The Honorable James R. Wagoner, Judge
Department 1, (530) 621-6426

PETITION FOR WRIT OF MANDATE

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TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

STATUTES

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

LEGISLATION

OTHER AUTHORITIES

THE PEOPLE OF THE STATE OF CALIFORNIA, Petitioner, **v.** **THE SUPERIOR COURT OF EL DORADO COUNTY; HONORABLE JAMES R. WAGONER,** Respondent; **SOUTH LAKE TAHOE POLICE OFFICERS' ASSOCIATION, SOUTH LAKE TAHOE POLICE SUPERVISORS ASSOCIATION;** Real Party in Interest. **CITY OF SOUTH LAKE TAHOE; CHIEF OF POLICE BRIAN UHLER** Real Party in Interest.	Case No.

TO THE HONORABLE VANCE W. RAYE, PRESIDING JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT:

COMES NOW THE PEOPLE OF THE STATE OF CALIFORNIA AND BY THEIR PETITION ALLEGE:

I.

Petitioner seeks a writ of mandate from Respondent Superior Court of California, County of El Dorado's order quashing the subpoenas and terminating the grand jury investigation into the shooting death of Kris Jackson. Petitioner will demonstrate that Respondent's order quashing the

subpoenas and terminating the grand jury proceedings was in error because in California the People's common law, criminal grand jury has been constitutionally recognized and provided for. For this reason, while the Legislature may lawfully proscribe a *procedure* to make the criminal grand jury effective, the Legislature cannot make *substantive* changes to the criminal grand jury's function, authority, or jurisdiction. Investigating and indicting felonies is *the core* constitutional function of the criminal grand jury, and the People—through the Executive—have the constitutional prerogative to investigate and charge felonies though grand jury indictment. Therefore, the Legislature cannot constitutionally abrogate criminal grand jury jurisdiction by passing a law that seeks to remove the criminal grand jury's—and the Executive's— indictment jurisdiction and authority to investigate and charge peace officer fatal force cases.

II.

No charges have been filed by the District Attorney regarding this investigation. Pursuant to Penal Code section 904.6, the District Attorney requested that the El Dorado County Superior Court convene a grand jury to conduct an investigation into this matter. The Honorable James Wagoner presided over the grand jury. The prospective Grand Jurors were summoned on January 15, 2016. Witnesses were initially scheduled for January 28, 29, and February 1 and 2, 2016.

III.

On January 19, 2016, Real Parties in Interest filed Petitions for Writ of Mandamus and Prohibition, as well as a Complaint for Declaratory Relief and Injunctive Relief in the El Dorado County Superior Court. The Writ was initially assigned to the Honorable Judge Warren Stracener in El Dorado County Superior Court Department 9 on Friday, January 22, 2016. On January 20, 2016, Judge Stracener recused himself and the matter was sent to the El Dorado County Superior Court Presiding Judge Suzanne Kingsbury for reassignment. Pursuant to Code of Civil Procedure section

170.8, Judge Kingsbury then requested the Chairman of the Judicial Counsel reassign the case. The El Dorado County Superior Court then issued a Minute Order on January 20, 2016, indicating that the matter was assigned to Yolo County Superior Court Judge Timothy L. Fall under reciprocal order R-429 with a hearing date of January 22, 2016. The South Lake Tahoe City Attorney was not a Petitioner in that Writ.

IV.

On January 22, 2016, Yolo County Superior Court Judge Timothy L. Fall denied the Writs. (Exhibit 1 - January 22, 2016, Civil Law and Motion Minute Order, Certified)

The People agreed to continue the scheduled Grand Jury to allow Real Parties in Interest (South Lake Tahoe Police Officers Association) to file motions to quash subpoenas in the El Dorado County Superior Court.

V.

On February 1, 2016, the People issued a second group of grand jury subpoenas. South Lake Tahoe Police Department officers Eli Clark, King, Klinge, Sgt. Cheney, Lt. Williams and Chief of Police Uhler were subpoenaed for the grand jury investigation scheduled to start on March 1, 2016.

On February 4, 2016, the South Lake Tahoe Police Officers Association and South Lake Tahoe Police Supervisors Association filed motions in the El Dorado County Superior Court to quash and terminate the grand jury investigation. On February 12, 2015, the City of South Lake Tahoe filed a motion to join the motion and quash the subpoena of Chief Brian Uhler. The motions were scheduled for February 19, 2016, before the Honorable James R. Wagoner. The People filed an opposition on February 16, 2016.

VI.

On February 19, 2016, the matter was heard before the Honorable James R. Wagoner. Judge Wagoner ruled to quash the subpoenas and terminate the grand jury investigation into the shooting death of Kris Jackson. It is this ruling the instant petition seeks to overturn in this writ. (Exhibit 2 - February 19, 2016 Motion to discharge Grand Jury - Minute Order and Exhibit 3 - February 19, 2016 Transcript of Proceedings)

VII.

All exhibits accompanying this Petition, with the exception of legislative history obtained from the "Leginfo" website, are true copies of original documents on file with Respondent in case number P16CRF0064 or with Yolo County Superior Court in case number PC20160033. The referenced legislative histories are true copies as obtained from http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml .

PRAYER

WHEREFORE, PETITIONER PRAYS that this Court issue a writ of mandate directing Respondent to vacate its February 19, 2016, order quashing the grand jury subpoenas and terminating the grand jury investigation into the shooting death of Kris Jackson.

Dated: March 22, 2016

Respectfully submitted,

VERN PIERSON
District Attorney, El Dorado County

/s/ William M. Clark
Chief Assistant District Attorney
Attorneys for Petitioner

VERIFICATION

I, William M. Clark, declare as follows:

I am an attorney at law, duly admitted and licensed to practice law in this court. I am employed as the Chief Assistant District Attorney for the County of El Dorado located within the State of California. In that capacity, I am the attorney representing the People of the State of California. I have read the foregoing Petition for Writ of Mandate and have knowledge of its contents. The facts alleged in the Petition are within my own knowledge and I believe these facts to be true to the best of my knowledge. Because of my familiarity with the relevant facts pertaining to this matter, I verify this Petition.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge and that this verification was executed on March 22, 2016, at Placerville, California.

/s/ William M. Clark

Chief Assistant District Attorney
El Dorado County

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

On June 15, 2015, approximately 2:50 a.m., Officer Joshua Klinge was employed as a peace officer with the City of South Lake Tahoe Police Department. At about that time, Officer Klinge responded to a possible domestic violence call with few report details. The woman reporting the incident told South Lake Tahoe Police Department dispatcher that she could hear a man and woman arguing loudly in the room next door to her. The reporting woman stated that she was at the Tahoe Hacienda Motel, 3820 Lake Tahoe Blvd.

Officers Clark and Klinge responded to the call. Both officers were assigned uniformed patrol duties at the time and driving separate patrol cars. Officer Clark arrived first and tried to make contact at the front door of the motel room, Room B. This room was next door to the reporting woman's room, Room A. As Officer Clark was at the front door, Officer Klinge arrived and started to the rear of the motel room. As Officer Klinge was walking down a breezeway towards the back of the building, he heard a screen being removed from a window. Officer Klinge reported this observation over his radio and continued around the corner of the building.

As Officer Klinge approached the bathroom window of the motel room, he encountered Kris Michael Jackson exiting out the window. Officer Klinge subsequently shot Kris Michael Jackson in the chest. Kris Michael Jackson died of this gunshot wound. At the time, Kris Michael Jackson was dressed in a pair of dark shorts, no shirt and no shoes. Kris Michael Jackson was not armed with any weapons.

A criminal investigation followed involving members of the South Lake Tahoe Police Department, El Dorado County Sheriff's Office and the El Dorado County District Attorney's Office. During the course of that

investigation, Officer Klinge provided a voluntary audio and videotaped statement to investigators.

In the statement, Officer Klinge described approaching the rear of the building and expecting to see a person running away behind the building. Officer Klinge described being suddenly and unexpectedly confronted by Kris Jackson who was fully perched in the window facing out and towards Officer Klinge. Office Klinge described Kris Jackson looking at him intently or menacingly. Officer Klinge recognized Kris Jackson from a prior and recent investigation. During that prior investigation another person associated with Kris Jackson possessed a loaded handgun. Officer Klinge described drawing his duty sidearm and ordering Kris Jackson to show his hands. As Kris Jackson brought his right hand out into view, Officer Klinge described what he believed was a firearm in Jackson's right hand. In response to his perception, Officer Klinge fired once striking Kris Jackson in the chest.

JUDICIAL NOTICE

The Petitioner request that the court take judicial notice of the following legislative history from Senate Bill 227 (2015-2016 Regular Session):

Senate Public Safety – April 20, 2015 (Exhibit 4)
Senate Floor Analyses - May 4, 2015 (Exhibit 5)
Senate Floor Analyses - May 6, 2015 (Exhibit 6)
Assembly Floor Analysis - June 15, 2015 (Exhibit 7)
Assembly Floor Analysis - June 17, 2015 (Exhibit 8)

The legislative history is offered pursuant to Evidence Code section 452(c); *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal App 4th 26; *Crowl v. Commission on Professional*

Competence (1990) 225 Cal App 2nd 334, 337; *Hutnik v. United States Fidelity Guaranty Co* (1988) 47 Cal. 3d 456, 465; *People v. Baniqued* (2000) 85 Cal. App.4th 13, 27. The attached exhibits were obtained from the California Legislative Information website. http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml

ARGUMENT

I

INTRODUCTION

It is undisputed that, as of December 31, 2015, the criminal grand jury, and the Executive, had the authority and jurisdiction to investigate and charge felony indictments related to the wrongful death of citizens caused by police officers. However, effective on January 1, 2016, Penal Code section 917(b) was amended by the Legislature to provide in pertinent part as follows:

> . . . the grand jury shall not inquire into an offense that involves a shooting or use of excessive force by a peace officer . . . that led to the death of a person being detained or arrested by this peace officer . . .[1]

The California Constitution, today in article I, section 14, provides that "*[f]elonies shall be prosecuted* as provided by law, *either by indictment* or, after examination and commitment by a magistrate, by information" (emphasis added).[2] It is the People's position that amended

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[1] In the legislative history of this law, it is specified that "*the purpose of this legislation is to prohibit a grand jury from inquiring into an offense that involves a shooting . . . that led to the death of a person being detained or arrested by the peace officer . . .*" (Sen. Bill No. 227 (2015-2016 Reg. Sess.) p. 1, emphasis in the original.)

[2] As noted by the court in *Hawkins v. Superior Court* (1978) 22 Cal.3d 584, 594, footnote 9, "[c]urrent section 14 represents a streamlined version, not intended to introduce substantive changes, of former article 1, section 8".

section 917(b) is constitutionally invalid—and therefore a nullity—because the criminal grand jury's, and the Executive's, indictment authority and jurisdiction is recognized in and provided for in the Constitution, and such constitutional authority cannot be removed or lessened by the Legislature. *Put simply, if the Legislature can legally remove the criminal grand jury's indictment authority and jurisdiction to investigate and charge peace officer fatal force cases, then it can legally remove such indictment authority and jurisdiction to investigate and charge official government misconduct and wrongdoing, and it can legally remove such indictment authority and jurisdiction to investigate and charge any and even all felonies, thereby in effect abolishing the constitutional criminal grand jury.*[3] However, because the criminal grand jury and its indictment authority and jurisdiction have been constitutionally recognized and provided for, the Legislature has no constitutional authority to remove all—or any—of the criminal grand jury's indictment authority and jurisdiction. Thus, amended Penal Code section 917(b) is unconstitutional, and the People's writ should be granted.

The California *criminal*[4] grand jury (like its federal counterpart) is a hybrid system—common law in origin and original authority;

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[3] A similar concern was expressed by the court in *Bowens v. Superior Court* (1991) 1 Cal.4th 36, in response to the contention that the court should rule invalid all grand jury indictments on equal protection grounds. The court said that this would render without effect article 1, section 14—the provision of the state Constitution that explicitly sanctions prosecution of felony cases by grand jury indictment. (*Id*. at p. 47.)

Here, too, there is good cause for concern. At page 3 of the legislative history, a former judge is cited (with apparent approval) as recently having *called for abolishing the criminal grand jury entirely.*

[4] As will be seen, there is a fundamental difference between the *criminal* grand jury and its indictment function (or the "regular" grand jury being used in a *criminal* capacity), and the grand jury's being used in its "watchdog" or accusation capacities; only the *criminal* grand jury, in its indictment function, is constitutionally provided for.

constitutionally provided for; and statutory in regard to codifying common law procedure, or making necessary procedural changes. Three things follow from this: (1) the California *criminal* grand jury has retained its original common law authority and practice—except where this has been *legally* changed by constitutional or legislative enactment[5]; (2) *constitutional* grand jury provisions can be changed only by constitutional enactment or federal constitutional interpretation; and (3) *procedure* necessary to give effect to the grand jury may be provided for, or changed, by legislative enactment.

While all of these points are interconnected, it is the second one—grand jury constitutional provisions can be changed by only constitutional enactment—that is at issue here. Because the Legislature had never previously sought to abrogate core constitutional grand jury authority and jurisdiction, there is no case specifically on point on this issue. It is a question of "*first impression*". However, investigating and indicting felonies is jurisdictional, and it is *the* constitutional grand jury core function. Constitutional and case analysis make it clear that the Legislature *cannot* constitutionally abrogate the criminal grand jury's and the

[5] This is why, for example, there is no longer witness secrecy with the federal grand jury, and why hearsay evidence is not generally admissible before the California indictment grand jury, because, respectively, Congress provided otherwise in Rule 6(e) of the Federal Rules of Criminal Procedure, and the California Legislature provided otherwise in Penal Code section 939.6(b). Grand jury practice no longer changes by "common law" (judicial interpretation—excepting constitutional requirements), but by legislation. Therefore, the Legislature can codify grand jury common law procedure (which was already in existence in California, since the Legislature adopted the common law at its first session), or change it. But, the Legislature cannot abolish the grand jury, remove its felony indictment jurisdiction and authority, or diminish its core constitutional functions.

Executive's prerogative in this regard by removing grand jury indictment jurisdiction for one type of felony—peace officer fatal force cases.[6]

II

THE CRIMINAL GRAND JURY HAS BEEN SPECIFICALLY RECOGNIZED AND PROVIDED FOR IN CALIFORNIA'S CONSTITUTION, AND THE CRIMINAL GRAND JURY'S AND THE EXECUTIVE'S CONSTITUTIONAL AUTHORITY TO INVESTIGATE AND CHARGE FELONY INDICTMENTS CANNOT BE ABROGATED BY THE LEGISLATURE

A. **Constitutional History and Language**

In 1849, before statehood in 1850, California's Constitution was adopted at a constitutional convention.[7] In article I, section 8,[8] the Constitution specifically recognized and provided for the criminal grand jury as follows:

> No person shall be held to answer for a capital or other infamous crime [i.e., a felony] . . . unless on presentment[9] or indictment of a grand jury.

This language constitutionally requiring grand jury indictment for felonies was identical to the language constitutionally recognizing and providing for the federal grand jury in the United States Constitution, in Amendment 5 of the Bill of Rights.[10] (Felony indictment is still required for federal felony prosecutions.)

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[6] Depending on whether such change would be a constitutional "amendment" or "revision", such change could possibly be made by voter initiative instead of requiring a constitutional convention. (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 349-355.)

[7] The Constitution was adopted even before California's first legislature came into existence. (*Fitts v. Superior Court of Los Angeles County* (1936) 6 Cal.2d 230, 240.)

[8] As noted in footnote 2, article 1, section 8, has been moved to article 1, section 14.

[9] "Presentments" are discussed at pages 22-26 herein.

[10] As stated by the Court in *Smith v. United States* (1959) 360 U.S. 1, 8:

> The use of indictments in all cases warranting serious punishment was the rule at common law. The Fifth Amendment made the rule

Thus, as of 1849, and thereafter until 1879, all California felonies—like federal felonies—had to be charged by grand jury indictment (or presentment). In 1879, California had its second (and last) constitutional convention. At the convention, article I, section 8, of the California Constitution, which had previously recognized and provided for the criminal grand jury by its indictment requirement, was amended to provide as follows:

> Offenses heretofore required to be prosecuted by indictment [i.e., felonies] shall be prosecuted by information, after examination and commitment by a Magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law. A grand jury shall be drawn and summoned at least once a year in each county.

Based on the foregoing, it cannot be disputed but that the criminal grand jury is a constitutional entity. (See, also, *Kitts v. Superior Court of Nevada County* (1907) 5 Cal.App. 462, 468 ["[t]he grand jury is a *de jure* body created by the constitution"]; *Daily Journal Corp. v. Superior Court of Orange County* (1999) 20 Cal.4th 1117, 1130 [. . . "no California case over the last century since the California grand jury was constitutionally established . . ."].)

B. **Constitutional and Case Analysis**

The questions are (1) what, if anything, was different about the grand jury provided for in the Constitution of 1849 from that provided for in the Constitution of 1879, and, specifically, whether either Constitution authorized the Legislature to abolish or remove the criminal grand jury's and the Executive's constitutional investigative and indictment function; and, (2) what is the Legislature's role in regard to the constitutional criminal grand jury. *Fitts v. Superior Court of Los Angeles County* (1936) 6

> mandatory in federal prosecutions in recognition of the fact that the intervention of a grand jury was a substantial safeguard against aggressive and arbitrary proceedings. (citations omitted.)

Cal.2d 230 is the case that most thoroughly discusses these questions, and it is dispositive on the issue presented herein.

1. **The criminal grand jury has independent constitutional authority to investigate and charge felonies by indictment, and this may not be constitutionally abrogated by the Legislature.**

In *Fitts, supra,* 6 Cal.2d 230, the California Supreme Court had occasion to analyze the origin and workings of the grand jury in deciding the issue of whether an "accusation" (a grand jury charge to remove from public office) was valid when it had been returned by only eleven (of nineteen) grand jurors. (*Id*. at pp. 233, 247.) The position that prevailed with the court was that the state Constitution employed the words "grand jury" without definition or limitation; that these words must therefore be construed to have reference to the common law grand jury; and that at common law the rule requiring the concurrence of at least twelve grand jurors was settled. (*Id*. at p. 233.)

The court extensively discussed the common law grand jury in California.

> The common law was adopted in this state at the meeting of its first Legislature. *Prior to that time [i.e., the meeting of the first Legislature] the Constitution of 1849 had been adopted, which provided that, 'No person shall be held to answer for a capital or other infamous crime*[11] *. . . unless on presentment or indictment of a grand jury.'* The grand jury system is a product of the common law. . . . The members of the first constitutional convention in providing for a grand jury must have had in mind the grand jury as known to the common law.

(*Id.* at p. 240, emphasis added.)

Respondent Superior Court admitted this much, but contended that the constitutional convention of 1879 adopted an "entirely" different system than the common law system previously provided for in the

[11] All felonies are "infamous" crimes. (*In re Westenberg* (1914) 167 Cal. 309, 319.)

Constitution of 1849. (*Id.* at p. 241.) The California Supreme Court, however, found nothing to justify this conclusion either in the Constitution or in the debate of the constitutional convention of 1879. As stated by the court:

> *The later Constitution [of 1879] provided for the prosecution of criminal actions, either by information after examination and commitment by a magistrate, or by indictment with or without examination.*[12] It also provided that a grand jury should be summoned at least once a year in each county. (Article I, section 8.) *The convention of 1879, like the convention of 1849, by failing to make further provisions as to the grand jury left to the Legislature all questions affecting the grand jury not expressly covered by the Constitution.*[13] The Constitution of 1879 did not attempt to change the historic character of the grand jury, and the system its members had in mind was evidently the same system that had come down to them from the common law. It is in no sense a statutory grand jury as distinguished from the common-law grand jury as claimed by the respondents. *Practically the only change made by the Constitution of 1879 was to provide an additional system of prosecution for the higher grade of crimes, when before all such crimes were to be prosecuted by indictment of the grand jury. No change whatever was made in the grand jury system as such.* ***The Legislature was given no additional powers over the grand jury than those it had under***

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[12] Thus, previous to this constitutional change, the only constitutional and recognized way of charging felonies in California was by grand jury indictment (or presentment). The constitutional change in 1879 was to authorize to the Executive an alternative form of charging felonies, namely, by information after preliminary examination. (It was left to the discretion of the Executive to prosecute either by indictment or information, and it was the intent of the Legislature to make the provisions of the Penal Code equally applicable to prosecutions by information and indictment. (*People v. Carlton* (1881) 57 Cal. 559, 561-562.) *This change of having an alternative way of charging felonies by information after complaint and preliminary examination was required to be constitutionally accomplished. It was not something that was done—or could be done—by the Legislature.*

[13] What was left to the Legislature in this regard were two things: (1) providing for the *procedural* mechanisms necessary to give effect to the grand jury; and (2) the authority to change, establish, or abolish the grand jury's accusation and civil "watchdog" functions, since they, unlike the *criminal* grand jury and its investigative and indictment function, were not constitutionally provided for.

the Constitution of 1849. *We must conclude, therefore, that the Constitution of 1879 when it refers to the grand jury refers to it as it had always been known and understood prior thereto.*

(*Id.* at p. 241, emphasis added.)[14]

Under *Fitts*, there are three critically important points—(1) the only constitutional change was to provide for an alternative method of charging felonies, namely, by information following preliminary examination, when previously charging had to be done solely by grand jury indictment (or presentment); (2) no other change was made in the grand jury system, meaning that it remained the same as under the 1849 Constitution; and (3) the Legislature was given no additional powers over the grand jury than those it had under the 1849 Constitution.

Thus, even though the Legislature may make necessary *procedure* for the criminal grand jury, it is clear that the Legislature may *not* make

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[14] It is important to note that the grand jury's authority to return an accusation, the question involved in *Fitts*, was not something that was constitutionally provided for. Rather, as stated by the court at 6 Cal.2d at page 243, the Legislature in 1851 (in section 70 of the Criminal Practice Act) and again in 1872 (in Penal Code section 758) conferred to the grand jury the power of returning an accusation. (The court noted that the provisions of the Criminal Practice Act—substantially still in force—had been part of California's criminal procedure from its earliest history.) Since the accusation power came from the Legislature, it could be removed or changed by the Legislature. But, indictment authority does not derive from the Legislature, but from the Constitution, and, therefore, it cannot be removed or changed by the Legislature, but only by constitutional enactment.

This is similar to the grand jury's "presentment" authority. The Constitution of 1849, article I, section 8, authorized presentments, and the Criminal Practice Act was enacted (in 1851) to give effect to this, which statutes were later incorporated into the Penal Code upon its adoption in 1872. (*Id*. at p. 449.) However, presentments were omitted from the Constitution in 1879, and therefore no longer had any constitutional basis. (*Id*.) But, presentments still existed statutorily, until 1905, when the statutes providing for them were repealed. (*Fitts*, 6 Cal.2d at p. 235.) Thus, the Legislature could remove the grand jury's presentment authority, because this was no longer constitutionally provided for.

substantive changes to the grand jury's indictment jurisdiction and function of investigating and charging felonies. This fundamental point is clear, because the court states that grand jury questions were left to the Legislature unless they were *expressly covered by the Constitution*. Prosecuting felonies by grand jury indictment had been expressly covered by the Constitution, and, therefore, this was not a question left to the Legislature. Moreover, the court stated that "*the Legislature was given no additional powers over the grand jury than those it had under the Constitution of 1849"*. Since the Legislature, pursuant to the Constitution of 1849, had no authority in regard to the criminal grand jury's indictment jurisdiction and function, and it was given no additional powers over the grand jury pursuant to the constitution of 1879, it necessarily follows that the Legislature continued to have no authority in regard to the criminal grand jury's indictment jurisdiction, authority, and function.

Therefore, the Legislature simply does not have the lawful authority to remove the grand jury's felony indictment jurisdiction—if it did, there would have been no need to constitutionally provide for an alternative form of charging, by information following preliminary examination—this would have been done by a much easier legislative change.

Fitts 6 Cal.2d at page 240[15] was relied on by the Attorney General in 72 Ops. Cal. Atty. Gen. 128 (1989) in its statement that "the grand jury

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[15] *Fitts* has continued to be cited in later grand jury cases. See, e.g., *People v. Superior Court (1973 Grand Jury)* (1975) 13 Cal.3d 430, where the issue was whether the superior court had the authority to refuse to file a grand jury's "civic watchdog" report that exceeded the grand jury's lawful authority. In deciding that the superior court had such authority, the court discussed *Fitts* at length, quoting extensively its language that the grand jury system was a product of the common law, which was adopted by the California Constitution in 1849, and that this constitutional grand jury system did not change with the Constitution of 1879. (*Id*. at p. 441); *M.B. v. Superior Court of Los Angeles County* (2002) 103 Cal.App.4th 1384, where the court once again reaffirmed the common law origin of the California grand jury, and the continued importance of common law principles in

developed under the common law". The Opinion noted that the California Constitution of 1849 required indictments (or presentments) for felony charges, and that the initiation of criminal proceedings by indictment for felonies was the principal function of the early grand juries. (*Id.* at p. 1.) The Opinion went on to discuss that "the California Constitution adopted in 1879 changed the provision on indictments and the grand jury to read in article I as follows":

> Sec. 8. Offenses heretofore offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a Magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law. A Grand Jury shall be drawn and summoned at least once a year in each county.

(*Id.* at p. 3.) The Opinion then noted that this provision was the subject of considerable debate in the convention. Those who wanted to abolish the grand jury and substitute the information system compromised with those who wanted to retain only the grand jury system, by agreeing to a provision that authorized both systems.[16] The requirement that a grand jury be drawn once a year in each county was part of that compromise. (*Id.*)[17]

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analyzing the present day workings of the grand jury. The issue (of first impression) in *M.B.* was whether a California criminal grand jury had the power, under the common law, to issue a subpoena under duces tecum for records, where this was not specifically provided for by statute. (*Id.* at p. 1386.)

The court held that the grand jury retained such common law authority, stating, "we conclude California grand juries do indeed have the power, stemming from both common law tradition and statutory enactment, to issue subpoenas duces tecum". (*Id.* at p. 1391.)

The court also extensively relied on *Fitts*, 6 Cal.2d at page 1389, stating, *inter alia*, "[A]s the Supreme Court pointed out almost 40 years later (in *People v. Superior Court*, *supra*, 13 Cal.3d at p. 440, fn.11), '*Fitts* . . . establishes the propriety of considering common law principles as supplementary to the applicable California statutes relating to grand juries'."

[16] The Opinion noted that the Committee on Preamble and Bill of Rights reported out a provision that made little change in the grand jury system.

Besides *Fitts*, there are also other cases relevant to this issue. In *Ex Parte Wallingford* (1882) 60 Cal. 103, the issue was whether the Superior Court had jurisdiction over the misdemeanor crime of petit larceny. In deciding the issue, some relevant grand jury history was provided by the court. In the California Constitution of 1863, felonies were required to be charged by the grand jury. (*Id.* at p. 105.) Later, in 1879, the system of charging felonies was constitutionally changed by article I, section 8, from indictment only, to indictment or information (our current system).

Most important for purposes of the issue presented herein is the following statement from the California Supreme Court. *"Of course the Legislature can not* (sic) *take from the jurisdiction conferred by the Constitution on the Superior Court, except as expressly permitted by the Constitution itself."* (*Id.* at p. 103, emphasis added.) This constitutional principle has equal application to the grand jury's constitutional indictment jurisdiction for felonies such as peace officer fatal force cases. Here, too, the Legislature cannot take from the jurisdiction conferred by the Constitution on the grand jury and the Executive, unless such taking has been expressly permitted by the Constitution itself. Since such taking has not been expressly (or even impliedly) authorized by the Constitution itself, jurisdiction to investigate and charge peace officer fatal force cases similarly cannot be removed from the grand jury and the Executive by the Legislature.

In *Allen v. Payne* (1934) 1 Cal.2d 607, the issue was whether the Los Angeles grand jury could hire persons to investigate crime, and thereby require the county to pay for this expense. (*Id*. at pp. 607-608.) On appeal, the court held that the grand jury could not do this act, stating that "from

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The provision was referred to the Judiciary Committee, which recommended a section creating a dual system that was adopted by the convention. (*Id*. at p. 9, fn. 4.)

[17] The constitutional requirement that there be at least one grand jury a year in a county has been moved from article I, section 8, to article I, section 23.

the time of the adoption of our Constitution to the present, the accepted practice has been to leave the detection of crime in the hands of the sheriffs and district attorneys, and in our opinion the departure from that practice finds no support in authority or legislative policy." (*Id*. at p. 608.) The practice was to define and limit the grand jury's authority in this regard to express statutory grant, such as hiring interpreters, etc. (*Id*.) "It seems clear from these instances that the Legislature has considered the employment of persons by the grand jury a matter to be governed by statute." (*Id*. at pp. 608-609.)

This decision is undoubtedly correct. The grand jury could "investigate" by subpoena power, but there was no common law authority for the grand jury to hire investigators. And, if there was no common law authority to do this, then this was not incorporated into the California constitutional grand jury system in 1849. Nevertheless, *in dissent*, Chief Justice Waste makes some points that are relevant herein.

> *The grand jury is a body of citizens provided for and created by the Constitution* (article 1, section 8), impaneled and sworn to inquire of public offenses committed or triable within the county. (Code Civ. Proc., section 192.) *It was imported into California jurisprudence by the Constitution of 1849 (article 1, section 8). There is in the section no definition of the term 'grand jury'. Therefore, it follows that the reference necessarily recognized an existing institution with certain accepted characteristics and prerogatives—in other words, the grand jury known to the common law.* At common law, and at the adoption of the Constitution of the United States, the grand jury was a body with power of investigation, independent of the prosecuting officers . . . *The Legislature could not take this power away from the constitutionally created body having such common-law prerogatives.*

(*Id*. at p. 615, emphasis added.)

In *Gillett-Harris-Duranceau & Associates, Inc. v. Kemple, et al* (1978) 83 Cal.App.3d 214, the issue was whether "watchdog" grand jury members could be sued for defamation for alleged false statements in their grand jury report, where Penal Code section 930 had removed civil

immunity for this grand jury function. (*Id.* at pp. 216-217.) On appeal, the court first noted that this statute was based on an earlier statute from 1897. (*Id.* at p. 217.) The court concluded that the provisions of section 930 applied both to grand jury reports on county officers and to reports on special districts. (*Id.* at p. 220.)

The court noted that "*the only reference to the grand jury in the California Constitution concerns the indicting function of that body* and provides for the annual summoning of grand jurors (Cal. Const., art. I, §§ 14, 23.)," and that, as held in *Fitts v. Superior Court* (1936) 6 Cal.2d 230, 241, "by failing to make any further provision regarding the grand jury, the constitutional convention of 1879 left to the Legislature all questions affecting the grand jury not expressly covered by the Constitution." (*Id.* at p. 221, emphasis added.) The court continued as follows:

> Thus, as plaintiff suggests, an important distinction must be made between a grand jury's authority to indict and its authority to exercise a 'watchdog' function in matters of local government.[18] The latter activity is a unique creature of the California Legislature, which has a long and well respected heritage. (*People v. Superior Court (1973 Grand Jury)* (1975) 13 Cal.3d 430, 436 [the grand jury's reporting authority originated in an 1851 statute].) Since the grand jury's power to investigate and report on matters pertaining to local government is a creature of statute, the Legislature is at liberty to impose reasonable limitations upon the exercise of this watchdog function. Section 930 imposes such a limitation.

The cases relied upon by defendants, namely, *Turpen v. Booth*

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[18] In *McClatchy Newspapers v. Superior Court of Fresno County* (1988) 44 Cal.3d 1162, 1170, the court noted:

> The California grand jury has three basic functions: to weigh criminal charges and determine whether indictments should be returned (§ 917); to weigh allegations of misconduct against public officials and determine whether to present formal accusations requesting their removal from office (§ 922; see Gov. Code, § 3060 et seq.); and to act as the public's "watchdog" by investigating and reporting upon the affairs of local government (e.g., §§ 919, 925 et seq.).

(1880) 56 Cal. 65, and *Irwin v. Murphy* (1933) 129 Cal.App. 713, are readily distinguishable from the situation before us. Each of those cases upheld a claim of privilege in connection with statements made by grand juries *as a part of investigations which were conducted in order to determine whether their constitutional authority to indict should be exercised . . .*

Defendants have not established, nor have we been able to discern, any conflict between the provisions of section 930 and those of our state Constitution which deal with grand juries. *The simple truth is that the latter document does not deal with the grand jury's authority to act as a watchdog and prepare reports on local government.* Since the watchdog function of the grand jury was created by statute, there is no reason why its exercise cannot be limited by statute.

(*Id*. at pp. 221-222, emphasis added.)

The court went on to also state that the grand jury's function of investigating and reporting on local government was not inherently a part of the judicial system, and that the grand jury's watchdog role was different than its indictment role. (*Id*. at p. 222.) The court ultimately concluded that the Legislature acted well within its power in enacting section 930, and that this did not violate the California Constitution. (*Id*. at p. 223.)

The basis of the court's decision in *Gillett-Harris-Duranceau & Associates, Inc.* was that since the "watchdog" grand jury was created by the Legislature, not the Constitution, the Legislature was free to put limits on this "watchdog" function. Implicit in its opinion, however, is that the Legislature could not do this in regard to the constitutional criminal grand jury.

2. **The Legislature's constitutional role in regard to the criminal grand jury is only to proscribe necessary procedure for it to be effective.**

In *Kalloch v. Superior Court of San Francisco County* (1880) 56 Cal. 229, after the California Constitution was changed in 1879 to allow for charging and prosecution by information following preliminary examination, an information- related issue, not otherwise relevant here, was

appealed. In deciding the issue, however, the court started its discussion as follows:

> *The proceeding by information, as a substitute for the ordinary indictment, is a creature of the new Constitution, section 8, article 1,* of which provides, that 'offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law'.

(*Id*. at p. 233, emphasis added.) *To carry into effect the foregoing provision of the Constitution, the Legislature, in 1880, enacted Penal Code section 809*, providing for the District Attorney to file an information within thirty days following examination and commitment under Penal Code section 872. (*Id*. at pp. 233-234, emphasis added.)

For purposes of the present issue, the court's penultimate line is very important, ". . . *the Constitution of this State has made provision for this form of prosecution, and the Legislature has furnished the machinery to enforce it.*" (*Id*. at p. 241.)[19] Thus, the Legislature's legitimate role pursuant to the Constitution of 1879 was to provide the machinery to enforce the constitutional imperative by enacting statutes to enable the dual charging systems of grand jury indictment and complaint, examination, and information. This was the Legislature's role in regard to the grand jury following the Constitution of 1849 (once the Legislature came into existence), it was the continued role of the Legislature in this regard following the Constitution of 1879, and it remains the Legislature's legitimate role today. Such legitimate role never has been—and is not

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[19] In this regard, it is noteworthy that prosecution by information following preliminary examination, as with prosecution by indictment, was constitutionally provided for. The difference between the two, however, was that the former was "new" in the Constitution of 1879 and needed legislation to have it function, whereas the grand jury system already was existing and functioning in 1879. No new statutory enactment by the Legislature was needed for the grand jury.

today—to try and abolish or limit the charging system provided for in the Constitution by the criminal grand jury.

In *People v. Bird* (1931) 212 Cal. 632, the issue was whether the prosecutor could file an information for murder, when the magistrate had held the defendant to answer for only manslaughter. This was allowed by Penal Code section 809, where the last sentence of the section stated that the district attorney was permitted to charge in the information "the offense, . . . , named in the order of commitment, or any offense, . . . , shown by the evidence taken before the magistrate to have been committed." It was contended by the defense that doing this was violative of section 8 of article 1 of the Constitution of 1879, which provided as follows:

> Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, *as may be prescribed by law*.[20]

(*Id*. at p. 636, emphasis added.)

On appeal, the court rejected the defense contention that these words authorized the Legislature to prescribe the procedure for indictment only:

> *In our opinion these words do not place a restriction upon the Legislature in providing the necessary framework for prosecution by either method*. There is nothing in the constitutional section which would compel or authorize a contrary conclusion, and there would appear to be every reason why *the Legislature should be free to provide procedure consistent with constitutional requirements applicable both to indictment and information*. With or without these words, *the constitutional section is not self-executing as to the procedure to be followed by either method in bringing the accused to trial*.

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[20] *Bird* was cited in *Fitts*, *supra*, 6 Cal.2d at pages 234-235, for its statement that the 1879 Constitutional Convention had decided to continue the grand jury system, and provide for the alternative method of prosecution by information following examination, with *the procedure in either case to be left to legislative control*. By this, the legislature may prescribe the procedural steps necessary for the grand jury. (*Id*. at p. 235.)

(*Id*. at p. 636, emphasis added.)

Thus, as is clear in *Bird*, and in other relevant constitutional grand jury cases, the phrase "*as may be provided by law*" refers only to the Legislature's enacting necessary *procedure* to give effect to the two felony charging systems of information following examination and grand jury indictment. Such procedural legislation was done in 1851[21] and 1872, in regard to the Constitution of 1849 and the criminal grand jury, and these procedural grand jury statutes largely remained in effect following the Constitution of 1879, until 1959.

The court continued:

> There is much discussion of the effect of the constitutional debates when section 8 of article I of the Constitution was under consideration. They have been examined and we find nothing therein which is persuasive of an intention on the part of the framers of the Constitution of 1879 to deny to the Legislature the power to authorize the district attorney to charge in the information the offense or offenses shown by the evidence at the preliminary examination. It is apparent in these debates that there was a sharp conflict of opinion whether the power should be vested in the Legislature to adopt either the grand jury system or prosecution by information. It was finally decided to continue the grand jury system and provide for the alternative method of prosecution by information preceded by an examination and commitment by a magistrate, the procedure in either case to be left to legislative control.

(*Id*. at p. 643).

In *Daily Journal Corp. v. Superior Court of Orange County* (1999) 20 Cal.4th 1117, the issue was whether the superior court had the inherent authority to order the release of criminal grand jury materials after the criminal grand jury investigation was finished, and no indictments were returned (or asked for), when no statute provided for this. In deciding the

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[21] As stated by the court in *In Re Grosbois* (1895) 109 Cal. 445, 449, the Constitution of 1849, article I, section 8, authorized grand jury presentments, *and the Criminal Practice Act was enacted (in 1851) to give effect to this*, which statutes were later incorporated into the Penal Code upon its adoption in 1872 (emphasis added).

issue, the court mostly discussed grand jury secrecy law and practice, but it also mentioned other things that are relevant to the issue herein.

The court stated that, "[a]lthough the grand jury was originally derived from the common law, the California Legislature has codified extensive rules defining it and governing its formation and proceedings, including provisions for implementing the long-established tradition of grand jury secrecy". (*Id.* at p. 1122.)

More pertinent to our inquiry, the court cited *Fitts* and then noted the following:

> The California Constitution, as adopted in 1879, left to the Legislature the adoption of specific rules *for the operation of the grand jury* (emphasis added). It provided: 'Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law.' (Cal. Const., art. I, former § 8.)

(*Id*. at p. 1125.)[22]

Neither the grand jury, nor the court, has the "intrinsic" or "inherent" power to disclose grand jury testimony—this simply cannot be done unless authorized by the Legislature. (*Id*. at p. 1128.) ". . . [I]t is significant that no California case over the last century *since the California grand jury was constitutionally established* has permitted transcripts of testimony before a criminal grand jury to be disclosed based only on a court's inherent or its supervisory role over the grand jury." (*Id*. at p. 1130, emphasis omitted and

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[22] Thus, as noted by the court at page 1125, in its discussion of *People v. Tinder* (1862) 19 Cal. 539, 545, the Legislature had codified the common law rule of grand jury secrecy, and had provided some statutory exceptions to it. In *Tinder*, the court held that grand jury testimony could not be disclosed, unless this was expressly permitted by the Legislature. (*Id*.) Of particular note, however, is that this was done in reference to grand jury procedure and the 1849 Constitution, before the *"as may be prescribed by law"* phrase was included in reference to grand jury procedure in the Constitution of 1879.

added.)

In *Daily Journal Corp.*, the lower court had no inherent authority to release grand jury materials where no indictment had been returned and no statute authorized this. Nor could the grand jury itself do this, because by common law such material was secret. Since grand jury procedural law no longer changes by common law, but now by the Legislature, this grand jury material could not be released, unless this had been statutorily authorized—which it hadn't been.

In *People v. Superior Court of Santa Clara County (Mouchaourab)* (2000) 78 Cal.App.4th 403, the issue was whether an indicted defendant was entitled to production of the non-testimonial parts of a grand jury proceeding for the purpose of preparing a Penal Code section 995 motion. In deciding the issue, the court discussed at length grand jury secrecy, and provided some insight into early California grand jury law in this regard.

> The secret grand jury has been a part of California's criminal justice system since its beginning. In 1849, the first California Constitution provided that no person would be held to answer for a capital or infamous crime 'unless of presentment or indictment of a grand jury.' (Cal. Const. of 1849, art. I, sec. 8.) *The common law requirement of secrecy in grand jury proceedings was first codified in 1851 in the Criminal Practice Act (hereafter, the Act), and was maintained when California enacted its first Penal Code in 1872 . . .*
>
> 'Although the grand jury was originally derived from the common law, the California Legislature had codified extensive rules defining it and governing its formation and proceedings, including provisions for implementing the long-established tradition of grand jury secrecy . . . (*Daily Journal*, *supra*, 20 Cal.4th 1122.)

(*Id*. at p. 414, emphasis added.)

Based on these cases, the Legislature, previously in regard to the criminal grand jury, simply codified or changed grand jury procedure. It had not sought fit to try and change or reduce criminal grand jury jurisdiction.

3. Penal Code section 918 Does Not Remove the Constitutional Infirmity with section 917(b)

a) Because Penal Code section 918 provides for grand jury "*investigation*" not grand jury "*inquiry*", it does not allow for grand jury indictment, and therefore it does not remove the constitutional infirmity with section 917(b)

As stated, amended Penal Code section 917 seeks to abolish criminal grand jury jurisdiction to *inquire* into peace officer fatal force cases. However, said section does this *"except as provided in Section 918"*, which section itself provides:

> If a member of a grand jury knows, or has reason to believe, that a public offense, . . . , has been committed, he may declare it to his fellow jurors, who may thereupon *investigate* it.

In the legislative history of amended Penal Code section 917, it is specified that "*the purpose of this legislation is to prohibit a grand jury from* ***inquiring*** *into an offense that involves a shooting . . . that led to the death of a person being detained or arrested by the peace officer . . .*" and that the "effect of this legislation" would be to "prohibit a grand jury from *inquiring* into an offense that involves shooting . . . that led to the death of the person being detained or arrested" (Sen. Bill No. 227 (2015-2016 Reg. Sess.) p. 1, 5, emphasis added.) This clearly means that the grand jury cannot *inquire* into such cases. However, the legislative history, in its conclusion, then goes on to state:

> As currently drafted, this legislation could be read to limit the ability of a grand jury to, on its own, initiate an investigation into an offense that involves the shooting . . . by a peace officer that led to the death of a person being detained or arrested. In order to preserve the ability of the grand jury to *investigate* such matters on its own, members may wish to consider recommending an amendment stating that the prohibitions added by this legislation are not intended to impede the powers provided to the grand jury in Penal Code section 918.

(*Id.* at p. 6, emphasis added.)

This terminology immediately presents the question of what is the difference between the grand jury's *inquiring* into such a case or *investigating* such a case (and what powers were provided to the grand jury under Penal Code section 918). The meaning of "inquiry",[23] in the common law grand jury context, is to investigate and to decide whether to charge a criminal offense, and the meaning of "investigate" is just that, to investigate. This conclusion is borne out by Penal Code section 917(a), which itself states that "the grand jury may inquire into all public offenses . . . and present them to the court by indictment". While sometimes in grand jury cases—where any such distinction is not in issue—the terms "inquiry" and "investigate" are used interchangeably, in the present case the exact meaning of these words is at issue. The power to inquire (charge) includes the power to investigate, but the reverse is not true—the power to investigate does not include the power to charge.

Thus, section 918 authorizes the grand jury to, on its own, initiate felony investigations, but does not authorize the grand jury, on its own or otherwise, to charge felonies.[24] This point is supported by statutory history

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[23] See, e.g., *Beavers v. Henkel* (1904) 194 U.S. 73. There, the Court discussed that while some states have provided for trials on information without any previous inquiry by a grand jury, the federal Constitution requires an indictment as a prerequisite to a trial. (*Id*. at p. 84.) The grand jury is a body known to the common law, which has the duty of inquiring whether there is probable cause. (*Id*.) " . . . for the finding of an indictment is only in the nature of an inquiry . . . , which is afterwards to be tried and determined; and the grand jury are only to inquire . . . , whether there be sufficient cause to call upon the party to answer it". (*Id*., citing *Blackstone* [Vol. 4, p. 303].)

[24] The practical effect of this distinction would be that the grand jury, on its own, could initiate an investigation into peace officer fatal force cases, and then disclose the results of this investigation to the district attorney, who could then use this as the basis of a decision to bring criminal charges by information following examination. The district attorney, however, could not proceed by indictment, because this part of the grand jury's inquiry authority was removed. Also removed would be the Attorney General's

and analysis. Section 918 is not a new statute. In almost exact form, it was originally passed in the Criminal Practice Act in 1851, under section 213, which read as follows:

> If a member of a grand jury know, or have reason to believe that a public offense has been committed, . . . , he *must* declare the same to his fellow jurors, who *shall* thereupon investigate the same.

(Stats.1851, ch. 29, § 213.)

Later, when California enacted its first Penal Code in 1872, section 213 was maintained in section 922, which read as follows:

> If a member of a Grand Jury knows, or has reason to believe, that a public offense has been committed, . . . , he *must* declare the same to his fellow jurors, who *must* thereupon investigate the same.

Except for some grammatical changes, there is no difference between section 213 and section 922, and the only difference between these sections and current section 918 is the formers' mandatory "must" or "shall" and today's permissive "may".[25] But, this historical power of "investigation" under Penal Code section 918 (which statute today has questionable authority as noted *infra*) is distinct from the section 917(a) "inquiry" power; and, it is only an "inquiry" that can lead to an indictment. Therefore, section 918 does not remove the constitutional infirmity with section 917(b).

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authority to seek such indictments, since the Attorney General has the same authority as District Attorneys pursuant to Penal Code section 923. Such authority exercised by the Attorney General is particularly important in *peace officer fatal force cases* when a local prosecutor has a conflict of interest in charging a peace officer with whom that prosecuting office works, or with whom they may call as a witness in other criminal cases. But, such beneficial Attorney General conflict authority to investigate and indict with the grand jury has also been removed by the section 917(b) legislative fiat.

[25] This was done by amendment in 1976.

b) **Because Penal Code section 918 relates to constitutional "presentment" authority that no longer exists, it is of doubtful legality.**

The constitutional difficulty with section 918 is that it is rooted in the criminal grand jury's preexisting "presentment" authority as of the Constitution of 1849, and it has nothing to do with the grand jury's "indictment" authority of the Constitution in 1849, the amended Constitution in 1879, or California's Constitution of today. At the time sections 213 and 922 were passed, under the Constitution of 1849, all felonies had to be prosecuted by indictment or presentment.

As stated by the California Supreme Court in *In Re Grosbois* (1895) 109 Cal. 445, 447-448 (citations omitted):

> A presentment[26] is defined in section 916 of the Penal Code, . . . 'A presentment is an informal statement in writing by the grand jury, representing to the court that a public offense has been committed . . ., and that there is reasonable ground for believing that a particular individual, named . . . therein, has committed it'.
>
> A presentment differs from an indictment in that it wants technical form, and is usually found by the grand jury upon their own knowledge or upon the evidence before them, without having any bill from the public prosecutor. It is an informal accusation, which is generally regarded in the light of an instruction upon which an indictment can be framed . . .
>
> The chief distinction between an indictment and a presentment at common law was that the former was made at the suggestion of the

[26] This was previously section 207 in the Criminal Practice Act of 1851, which code sections read the same. At that time, in the Penal Code of 1872, section 917 defined an indictment "as an accusation, in writing, presented by the Grand Jury to a competent Court, charging a person with a public offense"; section 915—setting forth the "Powers of Grand Jury"—stated that "[t]he Grand Jury must inquire into all public offenses . . ., and present them to the Court, either by presentment or by indictment; and, section 919 stated that "[i]n the investigation of a charge for the purpose of either presentment or indictment, the Grand Jury can receive no other evidence than such as is given by witnesses produced and sworn before them, . . ."

> crown [the Executive], while the latter was made upon the knowledge of one or more of the jurors, and instead of being indorsed 'a true bill' by the foreman alone, was signed by all of the jurors. Blackstone defines a presentment as 'the notice taken by a grand jury of any offense from their own knowledge or observation, without any bill of indictment laid before them at the suit of the king.'

In other words, a presentment is a charging document initiated by the grand jury on its own, and returned by the grand jury on its own, without the involvement of a prosecutor, and without a proposed bill of indictment.[27]

More important for present purposes is the court's statement that "*[t]his form of accusation has fallen in disuse since the practice has prevailed, and the practice now obtains generally, for the prosecuting officer to attend the grand jury and advise them in their investigation*". (*Id*. at p. 448, emphasis added.) The development that presentments had given way to indictments was undoubtedly why presentments were omitted from, and not even mentioned in, the Constitution in 1879, a point made by the court, as discussed in the next paragraph.

The Constitution of 1849, article I, section 8, authorized presentments, and the Criminal Practice Act was enacted (in 1851) to give effect to this, which statutes were later incorporated into the Penal Code upon its adoption in 1872. (*Id*. at p. 449.) However, "the constitution of 1879 . . . omits all reference to a presentment as a mode of charging a person with a public offense, and *the provisions of the Penal Code upon*

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[27] As stated by another court more recently, the English common law grand jury did not only consider charges brought by prosecutors, but was expected to bring charges based on their own knowledge—acting as a quasi-prosecutor. A grand jury-initiated charge was a "presentment", while an "indictment" was prepared by the prosecutor and laid before the grand jury. The distinction between presentment and indictment is reflected in the text of the Fifth Amendment. (*United States v. Navarro-Vargas* (9th Cir. 2005) (*en banc*) 408 F.3d 1184, 1190.)

that subject that had been adopted with a view to the provision of the previous constitution thereupon *ceased to have any practical operation.*" (*Id*., emphasis added.)[28] Moreover, in 1905, Penal Code section 931, enacted in 1872 to provide for presentments under the Constitution of 1849, was repealed, along with the remaining sections of the chapter on presentments. (*Fitts*, *supra*, 6 Cal.2d at p. 235.)

It would appear, therefore, that section 918's predecessor statutes—section 213 (in 1851) and section 922 (in 1872) were the "enabling" statutes authorizing the criminal grand jury to investigate felonies on its own, and then, if the grand jury so chose, to charge them on its own pursuant to its *presentment* charging authority under sections 207 and 220 (in 1851) and sections 916 and 931 (in 1872). If so, then under the rationale of *Grosbois*, it would likely be that section 922—the then-existing enabling statute for presentments—was not meant to have any practical operation following the adoption of the California Constitution in 1879, and that, similarly, 918 may have no practical or legal operation today.

c) Section 917 Unconstitutionally abrogates the Executive's Constitutional Prerogative in Investigating and Charging Felonies through Grand Jury Indictment

Additionally, section 917 is separately constitutionally infirm, because it abrogates the *Executive's* constitutional prerogative to charge felonies by *either* grand jury indictment or information following preliminary examination. The California Constitution divides the powers of the state government into three distinct departments, the legislative, the executive, and the judicial. (*People v. Bird* (1931) 212 Cal. 632, 639.) The

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[28] As noted by the court in *Navarro-Vargas*, *supra*, 408 F.3d at page 1200, "the privilege of acting on 'their own personal knowledge' is, of course, a vestige of the earliest grand juries, which were expected to bring their own charges, and it is reflected in the Fifth Amendment's reference to 'presentment'".

prosecution of a case by the district attorney involves the exercise of Executive power. (*Esteybar v. Municipal Court* (1971) 5 Cal.3d 119, 126.) The district attorney is part of the executive branch, and is the public prosecutor charged with conducting all prosecutions on behalf of the People. (*Bradley v. Lacy* (1997) 53 Cal.App.4th 883, 890; Gov. Code § 26500.)

In *Gillett-Harris-Duranceau & Associates, Inc. v. Kemple, et al* (1978) 83 Cal.App.3d 214, the issue was whether Penal Code section 930 (which removed civil immunity for false statements in grand jury watchdog reports) constituted an unconstitutional impairment of judicial privilege. The court noted that article III, section 3, of the California Constitution divided state government into legislative, executive, and judicial departments, and that *it had long been settled that the Legislature could not exercise or place limitations upon judicial powers*. (*Id*. at p. 220, emphasis added.)[29] Similarly, here, the Legislature cannot exercise or place such limitations upon the Executive's authority.

Article 1, section 14, of the Constitution expressly provides that "felonies *shall* be prosecuted . . . either by indictment or . . . by information". (See *Hawkins v. Superior Court* (1978) 22 Cal.3d 584, 594 [the general indicting function of the grand jury is explicitly sanctioned in the California Constitution, and implemented by the Legislature].) It cannot be disputed but that the Executive can constitutionally freely choose which charging method to employ. The cases are replete in this regard. (See, e.g., *People v. Carlton* (1881) 57 Cal. 559, 561-562 [". . . it is left to the discretion of the district attorney to prosecute either by indictment or information, . . ."]; *Bowens v. Superior Court* (1991) 1

[29] As noted by the court, this principle was applied early on to the grand jurors in *Turpen v. Booth* (1880) 56 Cal. 65, where the court held that since a grand juror served in a quasi-judicial status, the grand juror was not civilly responsible, no matter how erroneous his findings or malicious his motive, for his action on the criminal grand jury. (*Id*.)

Cal.4th 36, 54 [*dissent*] [the People may prosecute all defendants by indictment; or they may prosecute all by information; or they may choose to prosecute some by indictment and some by information . . .]; *Hawkins, supra,* 22 Cal.3d 584, 592 [. . . "the prosecuting attorney is free in his completely unfettered discretion to choose which defendants will be charged by indictment rather than information . . ."]; *People v. Sirhan* (1972) 7 Cal.3d 710, 745 ["[i]t has long been the rule in this state . . . that felonies may be prosecuted by either indictment or information"].)

Penal Code section 917(b) precludes the Executive from using the grand jury to investigate[30] and inquire—have charged a felony indictment related to peace officer fatal force cases. Since an *indictment*, by its very nature, presupposes, is predicated upon, and requires the prosecutor's involvement, the effect of section 917(b) is to deprive the Executive of its constitutional prerogative in this regard, and to prevent the constitutional grand jury indictment process from taking place. This is unconstitutional.

As discussed *supra*, a *presentment* is a charging document that was initiated by the grand jury on its own, and returned by the grand jury on its own, without the involvement of a prosecutor, and without a proposed bill of indictment. An *indictment*, however, is a charging document that is proposed to the grand jury by the Executive as "a bill of indictment", which the grand jury considers and decides, based on the evidence presented before it by the Executive, whether there is probable cause to support the proposed charges contained in the "bill of indictment," and, if so, then the

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[30] "The role of the grand jury as an important instrument of effective law enforcement necessarily includes an investigatory function with respect to determining whether a crime has been committed and who committed it." (*Branzburg v. Hayes* (1972) 408 U.S. 665, 701.) The primary function of the grand jury is to investigate crime and determine whether probable cause exists to return an indictment for that offense. (*Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1037.)

grand jury indorses it as a "true bill."[31] Thus, an indictment, as distinguished from a presentation, by its very nature, presupposes, is predicated upon, and requires the prosecutor's involvement.

In many instances, the Executive's common law role in the grand jury indictment process has been codified[32] by the Legislature and recognized by the Court. "Penal Code section 935 permits, and Government Code section 26501 requires, the district attorney to attend and advise the grand jury". (*People v. Gordon* (1975) 47 Cal.App.3d 465, 476.) The district attorney draws indictments. (Gov. Code § 26502.) The district attorney may at all times appear before the grand jury for the purpose of giving information and advice relative to any matter cognizable by the grand jury, and may interrogate witnesses before the grand jury whenever he thinks it necessary. (Pen. Code § 935.) A district attorney has a right under section 935 to present information to a grand jury at all times. (*McFarland v. Superior Court* (1948) 88 Cal.App.2d 153, 160; 74

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[31] Of course, the grand jury is within its independent discretion to refuse to return the proposed indictment at all, or any of the specific charges contained in the proposed indictment, even if this is contrary to the prosecutor's advice or request. (See, e.g., *People v. Gordon* (1975) 47 Cal.App.3d 465, 476 [the grand jury is not required to accept such advice, and may act without reference without it]; *Vasquez v. Hillery* (1986) 474 U.S. 254, 263 ["the grand jury is not bound to indict in every case where a conviction can be obtained"].) Moreover, once the case is presented to the grand jury for its indictment consideration, the prosecutor cannot remove the proposed indictment from the grand jury, and the returned indictment is valid under California law even if the prosecutor does not sign the returned indictment. (*People v. Coleman* (1948) 83 Cal.App.2d 812, 817-818 [no other signature than that of the grand jury foreperson's indorsement of the indictment as a true bill is required].) (*Coleman* cites *People v. Ashnauer* (1873) 47 Cal. 98 in this regard. There, however, the court stated that "the provision of the Act . . . that the District Attorney shall *draw* all indictments, implies that he shall sign them . . ." (*Id*. at p. 100.))

[32] In regard to the criminal grand jury, such codification, in large part, is simply recognizing grand jury procedure that was already in existence in California, from the time the Legislature adopted the common law at its first session.

Ops.Cal.Atty.Gen. 186 (1991).) "A subpoena requiring the attendance of a witness before the grand jury may be signed and issued by the district attorney, . . . , or, upon request of the grand jury, by any judge . . . " (Pen. Code § 939.2.)[33] The district attorney may issue subpoenas for those witnesses whose testimony, in his opinion, is material in an investigation before the grand jury. (74 Ops.Cal.Atty.Gen. 186 (1991).) "Indictments are usually initiated by the district attorney who is authorized by section 935 to present evidence of crime to the grand jury". (*Id*.)

Although a grand jury is a separate entity and independent from the district attorney, it "must necessarily use the services and efforts of the district attorney in its investigation of criminal matters". (*Id*.) "A grand jury would be well advised to call upon the district attorney for his assistance and advice in its review of the information it has received. The district attorney's assistance will be essential in the conduct of any formal investigation of the matter and if an indictment is found it is the district attorney who must prosecute the case in the trial court". (*Id*., citing 7 Ops.Cal.Atty.Gen. 58, 62 (1984).) Finally, under Penal Code section 911, the grand jury takes an oath and swears to return indictments where it has or can obtain "*legal*" evidence—something impossible for the grand jury without the district attorney.[34] And, under Penal Code section 939.71, the

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[33] In this regard, generally, the grand jury itself has no statutory independent authority to issue subpoenas, but, instead, must rely on the district attorney or the court. However, the indictment grand jury may require the district attorney to issue process for witnesses, "if the grand jury believes that there is other evidence that will explain away the charge". (*Bradley v. Lacy* (1997) 53 Cal.App.4th 883, 892; Pen. Code § 939.7.) And, upon request of the grand jury, the court may issue subpoenas for such witnesses as the grand jury, upon an investigation pending before it, may direct. (*Id*.; Pen. Code § 939.2.)

[34] Similarly, hearsay evidence is generally inadmissible before an indictment grand jury, because, under Penal Code section 939.6(b), the grand jury, in deciding whether to indict, can receive only evidence that

district attorney must inform the grand jury about any exculpatory evidence the prosecutor is aware of, and the prosecutor must inform the grand jury of its duties in this regard under Penal Code section 939.7.

Finally, in deciding a grand jury accusation question in *Bradley v. Lacy* (1997) 53 Cal.App.4th 883, the court discussed "the allocation of discretion between the district attorney and the grand jury in the areas where their functions and responsibilities intersect". (*Id.* at p. 890.)

> The district attorney, part of the executive branch, is the public prosecutor charged with conducting all prosecutions on behalf of the People. This function includes instituting proceedings against persons suspected of criminal offenses, and drawing up informations and indictments (§§ 26500-26502). The discretionary decision to bring criminal charges rests *exclusively* in the grand jury and the district . . . attorney.

(*Id.* at pp. 890-891.)

Not only has the Legislature, by adopting new Penal Code section 917(b), abrogated the grand jury's own constitutional function, but, in foreclosing the Executive's authority to choose the indictment process in a whole class of cases— peace officer fatal force cases—it has violated the independent authority of a separate and equal branch of government. As such, this statute is unconstitutional.

CONCLUSION

The California *criminal* grand jury, and the Executive's role in it, are constitutionally recognized and provided for. While the Legislature can lawfully make necessary *procedural* changes to the *criminal* grand jury to give effect to the constitutional mandate, it cannot make substantive changes to the *criminal* grand jury's indictment authority, function, and jurisdiction. Investigating and indicting for felonies is *the* core

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would be admissible at trial. This, too, necessarily involves the district attorney's participation and advice.

constitutional function of the grand jury. This cannot be constitutionally abrogated by the Legislature. Thus, the grand jury's and the Executive's investigation and subpoenas in this matter are constitutionally valid, and the People's writ Petition should be granted. For these reasons, Petitioner seeks a writ of mandate to vacate Respondent's order on February 19, 2016, quashing the grand jury subpoenas and terminating the grand jury investigation into the shooting death of Kris Jackson.

Date: March 22, 2016

Respectfully submitted,

VERN PIERSON
District Attorney, El Dorado County

/s/ William M. Clark

Chief Assistant District Attorney
El Dorado County
Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

I certify that the attached **PETITION FOR WRIT OF MANDATE** uses a 13 point Times New Roman font and contains **13,383** words.

Dated: March 22, 2016

VERN PIERSON
District Attorney, El Dorado County

/s/ William M. Clark

Chief Assistant District Attorney
El Dorado County
Attorney for Petitioner

TABLE OF EXHIBIT LIST