Case No. C081603

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

SUPERIOR COURT OF EL DORADO COUNTY; HONORABLE JAMES R. WAGONER,
Respondents,

SOUTH LAKE TAHOE POLICE OFFICERS' ASSOCIATION; SOUTH LAKE TAHOE POLICE SUPRVISORS' ASSOCIATION,
Real Party in Interest.

CITY OF SOUTH LAKE TAHOE; CHIEF OF POLICE BRIAN UHLER
Real Party in Interest.

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

REAL PARTIES IN INTEREST SOUTH LAKE TAHOE POLICE OFFICERS' ASSOCIATION AND SOUTH LAKE TAHOE POLICE SUPRVISORS' ASSOCIATION'S RETURN BY VERIFIED ANSWER TO PETITION FOR WRIT OF MANDATE

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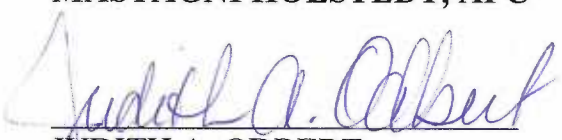
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
California Rules of Court 8.208

The following entities or persons have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves:

None known at this time.

May 23, 2016

MASTAGNI HOLSTEDT, APC



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I.
INTRODUCTION

The Petition for Writ of Mandate by Petitioner (hereinafter, "Writ"), The People of the State of California, Petitioner (hereinafter, "Petitioner"), should be denied because it asks this Court to order the Superior Court of El Dorado County (hereinafter, "Superior Court") to violate the law. Penal Code section 917(b) (hereinafter, "917(b)"), amended by Senate Bill 227 (hereinafter, "SB 227"), prohibits district attorneys from convening a grand jury to inquire into an offense that involves a shooting or use of force by a peace officer resulting in death. Petitioner violated this statute, and now asserts the statute is unconstitutional.

This Court should not issue a writ of mandate directing the trial court to reconvene the grand jury based on the following: (1) The Legislature has the power to enact Senate Bill 227 and amend the Penal Code as the Constitution does not limit the Legislature's authority to designate whether an accused is to be brought to trial by information or indictment; (2) even if the Legislature can only enact procedural changes, Senate Bill 227 is merely procedural and does not remove jurisdiction relating to officer-involved shooting deaths from the grand jury; and (3) the superior court properly discharged the grand jury because the grand jury has no jurisdiction to inquire into an officer-involved shooting death under 917(b) when convened by the district attorney.

Real Parties in Interest, South Lake Tahoe Police Officers' Association ("SLTPOA") and South Lake Tahoe Police Supervisors' Association ("SLTPSA") respectfully request this Court deny Petitioner's Writ and affirm the order of the trial court discharging the unlawful grand jury proceeding, quashing the related subpoenas, and denying the *Pitchess* motion.

II.
RETURN OF REAL PARTIES IN INTEREST BY VERIFIED ANSWER TO PETITION FOR WRIT OF MANDATE.

Comes now Real Parties in Interest, SLTPOA and SLTPSA, and submit a Verified Answer to Petitioner's, The People of the State of California, Petition for Writ of Mandate, admitting, denying, and alleging as follows:

1. SLTPOA and SLTPSA deny that Petitioner's Writ should be granted. Petitioner has not demonstrated that Respondent Superior Court's order quashing the subpoenas and terminating the grand jury proceedings was in error because the Legislature does have the power to enact Senate Bill 227 (SB 227) and, regardless, SB 227 only effectuates a procedural change.

2. SLTPOA and SLTPSA admit no charges have been filed by the District Attorney.

3. SLTPOA and SLTPSA admit to the procedural history as stated in Petitioner's Writ, paragraphs III-VI.

4. Real Party in Interest SLTPOA is the exclusive representative of City of South Lake Tahoe employees within the job classifications of "Law Enforcement Non-Supervisory". Real Party in Interest SLTPSA is the exclusive representative of the City of South Lake Tahoe employees within the job classification of "Law Enforcement Supervisory". SLTPOA and SLTPSA are authorized to represent their members regarding wages, hours and other terms and conditions of employment pursuant to the Meyers-Milias-Brown Act (Gov. Code §§ 3500, et seq.)[1] SLTPOA and SLTPSA's members are peace officers within the meaning of Government Code section 1299.3(e) and Penal Code section 830.1 and are entitled to all the rights and protections afforded under the Public Safety Officers Procedural Bill of Rights Act (Gov. Code §§ 3300, *et seq*.).

Real Party in Interest, Brian Uhler, is the Police Chief for the City of South Lake Tahoe Police Department. The other Real Party in Interest is the City of South Lake Tahoe.

Petitioner, The People of State of California, is the District Attorney of El Dorado County.

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[1] Government Code section 1299.3(e) provides: 'Law Enforcement Officer' means any person who is a peace officer, as defined in section 830.1 of, subdivision (b) and (d) of section 830.31 of, subdivision (a), (b), and (c) of section 830.32 of, subdivisions (a), (b), and (d) of section 830.33 of, subdivisions (a) and (b) of section 830.35 of, subdivision (a) of section 830.5 of, and subdivision (a) of section 830.55 of, the Penal Code, without respect to the rank, job title, or job assignment of that person.

5. SLTPOA and SLTPSA allege that on December 10, 2015, Assistant District Attorney, William Clark, informed the Mastagni Law Offices that he intended to convene a grand jury after January 1, 2016 in order to challenge the constitutionality of SB 227. (Declaration of Judith Odbert, Exhibit 1, Vol. 1, p. 6, ¶ 17.) Ms. Judith Odbert informed ADA Clark that his desire to challenge the law under the circumstances was unprofessional. (*Id*.) She further advised ADA Clark that she would ask Officer Joshua Klinge if she could accept service on his behalf in California so as not to upset his household during the holidays with a newborn and nursing mother. (*Id*.) On December 14, 2015, Ms. Odbert agreed to accept service after January 1, 2016. (*Id.*, ¶ 20.)

6. SLTPOA and SLTPSA allege that on December 22, 2015, the El Dorado County District Attorney's Office applied for an out of state witness subpoena to secure Joshua Klinge's attendance at the grand jury proceedings. (Application for Out of State Subpoena, Exhibit 2, Vol. 1, pp. 9-22.) Officer Klinge received a summons from the Ninth Judicial District Court of the State of Nevada in and for the County of Douglas on December 29, 2015, compelling him to appear before the court on January 11, 2016 and show cause why the court should not issue an order compelling him to testify as a witness in the grand jury investigation. (Summons, Exhibit 3, Vol. 1, p. 23-24.)

SLTPOA and SLTPSA filed a Motion to Quash the Summons to show cause. (Motion to Quash Summons, Exhibit 4, Vol 1, p. 25-79.) A licensed Nevada State attorney appeared on behalf of Officer Klinge and explained that SB 227 prevented the California grand jury from hearing the case. Petitioner withdrew the Application. (Letter dated January 14, 2016, Exhibit 5, Vol. 1, pp. 80-81.) The case was transferred to Yolo County, which ruled it was without jurisdiction to hear Real Party in Interest's Petition for Alternative Writ to halt the grand jury proceedings in this matter. (See Petitioner's Exhibit 1 at p. 3.) Finally, the case came before the El Dorado Superior Court.

7. On February 1, 2016, Petitioner issued a second group of grand jury subpoenas. These subpoenas included members of SLTPOA and SLTPSA. On February 4, 2016, SLTPOA and SLTPSA filed motions to discharge the grand jury and to quash the subpoenas issued by the Petitioner. (Motions to Quash Subpoena for Jason Cheney, Eli Clark, John King, Joshua Klinge, Jeffrey Roberson, and Brian Williams, Exhibits 6, 7, 8, 9, 10 and 11, respectively, Vol. 1, pp. 82-294, Vol. 2. pp. 295-505.) On February 12, 2016, Chief Uhler filed a motion to quash the subpoena that was served upon him for presentment at the grand jury. (Notice of Joinder by Brian Uhler, Exhibit 12, Vol. 2, pp. 506-518.)

8. SLTPOA and SLTPSA filed a Motion to Discharge the Grand Jury and Quash the related subpoenas. (Motion to Discharge, Exhibit 13, Vol. 2,

pp. 519-527.) SLTPOA and SLTPSA allege that Petitioner filed an untimely opposition on February 16, 2016, *not* February 12, 2016 as asserted in their Petition. (People's Opposition to Motions to Quash Subpoenas and Motion to Discharge Grand Jury, Exhibit 14, Vol. 2, pp. 528-552.) February 12th and February 15th, 2016 were in fact court holidays. SLTPOA and SLTPSA filed a response on February 18, 2016. (Reply to People's Opposition, Exhibit 15, Vol. 2, pp. 553-559.)

9. On February 19, 2016, the Honorable Judge James R. Wagoner ruled in favor of Real Parties in Interest, granting the motions to discharge the Grand Jury and to quash the subpoenas. Based on the Parties' motions, the Superior Court found the Legislature had the power to enact SB 227 and that the grand jury had been convened in violation of the law. (Petitioner's Exhibit 3 ("Pet. Exh. 3") at p. 10, ln. 10-12 & 15-17.) The Superior Court ruled that under SB 227 and amended 917(b), the Grand Jury did not have the jurisdiction to hear the case the district attorney intended to present. (Pet. Exh. 3, at pp. 16-17.) The Superior Court found it was necessary to quash the subpoenas for the same reasons. (Pet. Exh. 3, at p. 10:15-17.) As the Honorable James R. Wagoner stated, he is "charged by ... [his] oath to enforce the laws of the state of California until they are proven to be otherwise" and that while he recognized his "authority to declare [SB 227] unconstitutional," that was something he "would be loath to do when it has gone through this vetting process" through the Legislature. (Pet. Exh. 3, at

pp. 12:28-13:5.)

10. On March 22, 2015, Petitioner filed what appears to be an attempt at a Verified Petition for Writ of Mandate. (Writ Petition, pp. 41-46.) The Petition asserts that the Legislature lacks constitutional authority to enact SB 227 and asks this Court to issue a Writ of Mandate directing the trial court to reconvene the El Dorado County grand jury.

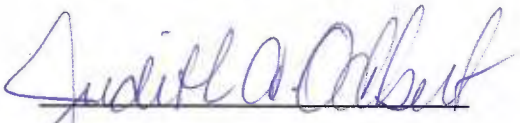
SLTPOA and SLTPSA submitted a Preliminary Opposition to the Writ pursuant California Rules of Court, rule 8.487(a). This Court has issued an order to show cause why Writ should not issue in this case.

III.
PRAYER FOR RELIEF

Real Parties in Interest Prays that this Court deny the Petition for Writ of Mandate, affirm the order of the trial court discharging the El Dorado County grand jury, quashing the related subpoenas, and *Pitchess* motion and other such relief as this Court deems just and proper.

Dated: May 23, 2016

Respectfully Submitted,



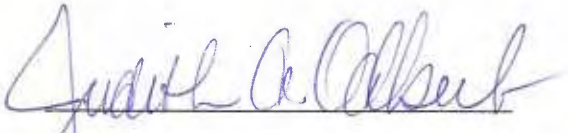
JUDITH A. ODBERT
Attorney at Law

IV.
VERIFICATION

I, Judith A. Odbert, declare as follows:

I am an attorney at law, duly admitted and licensed to practice law in this Court. I am employed as a Senior Associate for the law offices of Mastagni Holstedt, A Professional Corporation. In that capacity, I am the attorney representing the real parties in interest, South Lake Tahoe Police Officers' Association and the South Lake Tahoe Police Supervisors' Association. I have read the foregoing Return to Petitioner's Petition for Writ of Mandate and have knowledge of its contents. The facts alleged in the Return 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 Return.

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 May 23, at Sacramento, California.



JUDITH A. ODBERT
Attorney at Law

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DENIAL OF PETITION FOR WRIT OF MANDATE

V.

ISSUE PRESENTED FOR REVIEW

The issue is whether this Court should deny Petitioner's Writ of Mandate because SB 227 is constitutional and the Superior Court did not abuse its discretion by discharging the grand jury, quashing the related subpoenas, and denying the *Pitchess* motion.

VI.

STANDARD OF REVIEW

In an original mandamus proceeding, this Court reviews the trial court's ruling for abuse of discretion. (*State Farm etc. Ins. Co v. Superior Court* (1956) 47 Cal.2d 428, 432.) According to the Supreme Court, "[a]lthough mandamus does not generally lie to control the exercise of judicial discretion, the writ will issue [only] 'where, under the facts, that discretion can be exercised in only one way.'" (*Robbins v. Superior Court* (1985) 38 Cal.3d 199, 205 quoting *Babb v. Superior Court* (1971) 3 Cal.3d 841, 851.) Where there is no abuse of discretion, the reviewing court must dismiss the writ petition. (See *O.W.L. Foundation v. City of Rohnert Park* (2008) 168 Cal.App.4th 568, 587.)

"In deciding whether the Legislature has exceeded its power, [courts] are guided by well settled rules of constitutional construction. Unlike the federal Constitution, which is a grant of power to Congress, the California Constitution is a limitation or restriction on the powers of the Legislature. Two important consequences flow from this fact. First, the entire law-making authority of the state, except the people's right of initiative and referendum, is vested in the Legislature, and that body may exercise any and all legislative powers which are not *expressly* or by necessary implication denied to it by the Constitution. [Citations.] In other words, '[courts] do not look to the Constitution to determine whether the Legislature is authorized to do an act, but only to see if it is prohibited." [Citation] Secondly, all intendments favor the exercise of the Legislature's plenary authority: 'If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language used.' [Citations.]" (*Mendoza v. State* (2007) 149 Cal.App.4th 1034, 1050-51 [emphasis added].)

VII.
ARGUMENTS

A. THE LEGISLATURE HAS THE POWER TO ENACT SENATE BILL 227 BECAUSE THE CONSTITUTION DOES NOT LIMIT THE LEGISLATURE'S AUTHORITY TO DESIGNATE WHETHER AN ACCUSED IS TO BE

BROUGHT TO TRIAL BY INFORMATION OR INDICTMENT.

The California Constitution does not expressly or impliedly prohibit the Legislature's authority to enact SB 227. Moreover, any alleged limitation on the Legislature's authority must be strictly construed. Importantly, the Legislature may regulate matters of statewide concern even if the legislation impinges on powers reserved to other branches of the government.

1. Article I, Section 14 Does Not Limit the Legislature's Law-Making Authority to Proscribe the Manner in Which an Officer-Involved Shooting Death Is Brought to Trial.

Article 1, section 8 was amended in 1879 to read: "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." (Cal. Const., art. 1, § 8 [emphasis added].) Article 1, section 14 now reads: "Felonies shall be prosecuted *as provided by law*, *either* by indictment *or*, after examination and commitment by a magistrate, by information." [Emphasis added.]

Petitioner asserts the phrase "'as 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." (Petitioner's Writ of Mandate (hereafter "Writ"), at p. 33.) In challenging the constitutionality of SB 227, Petitioner has the burden to show the particular subject-matter of the legislation has been withdrawn from the Legislature by the Constitution. (*Hillborn v. Nye* (1911) 15 Cal.App.298, 303.) When weighing a challenge to duly enacted legislation, courts must "presume the constitutionality of the legislative act, resolving all doubts in favor of the act, and must uphold the act unless a conflict with a provision of the state or federal Constitution is clear and unquestionable." (*Foundation for Taxpayer and Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1354, 1356.)

Petitioner concedes that the case before the Court is a question of "first impression," and cannot cite any case law holding the Legislature lacks authority to substantively change the powers of the grand jury. (See Writ, at p. 19.) Importantly, "the fact that the Legislature may neglect or refuse to exercise any power … is no argument against the power." (*People, by Hamilton ex rel. Baird v. Tilton* (1869) 37 Cal. 614, 626.) Thus, Petitioner cannot rest its argument on the fact that the Legislature has not previously limited the ability of the grand jury to hear a certain type of felony placed before it by the district attorney. As a result, Petitioner has failed to overcome the presumption of constitutionality or demonstrate that SB 227 clearly and unquestionably violates either the federal or state constitutions.

The California Constitution was drafted with the foresight to grant the Legislature the authority to pass laws and exercise authority that was not expressly prohibited. (See *Hurtado v. People of State of Cal.* (1884) 110 U.S. 516, 533.) "The great office of statutes is to remedy defects in the common law as they are developed, and to adopt it to the changes of time and circumstances." (*Ibid.*) The California Legislature has codified extensive rules defining and governing the grand jury since its common law origins. (See *Daily Journal Corp v. Superior Court of Orange County* (1999) 20 Cal.4th 1117, 1122, 1125 [stating the history of the grand jury "revealed a practice of defining and delimiting [the grand jury's] powers … by express *statutory* grant") [emphasis added].)

Section 14 only provides that felonies shall either be prosecuted by information or indictment. This does not necessarily entail that all felonies must be able to proceed by *both* means as opposed to only one or the other. Not only is SB 227 presumptively constitutional, but the California Constitution does not limit the Legislature's ability to enact statutes proscribing the manner in which certain classes of crimes can be brought into the judicial system. Thus, Petitioner has failed to meet its burden to show the legislation is unconstitutional.

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2. The Constitution Does Not Expressly or by Necessary Implication Remove the Legislature's Authority to Enact Senate Bill 227.

First, neither section 14 nor any other constitutional provision expressly or necessarily removes the Legislature's law-making authority with respect to SB 227. (See *Mendoza, supra,* 149 Cal. App.4th at p. 1051.) SB 227 amended Penal Code sections 917 and 919 to prevent a grand jury from inquiring into officer-involved shootings resulting in death when brought before it by the district attorney. Section 14 specifically states that felonies shall be prosecuted "as provided by law."

The Constitution does not expressly or impliedly grant the grand jury authority to inquire and indict on any and all felonies. Rather, the Constitution simply provides that a grand jury shall be empaneled annually (Cal. Const. art. 1, § 23), and that a felony may be prosecuted by either indictment or information. (Cal. Const. art. 1, § 14.) Although the grand jury is constitutionally founded, and is a 'judicial body' and 'an instrumentality of this state,' its attributes and powers are controlled by the Legislature. (*People v. Superior Court (1973 Grand Jury)* 13 Cal.3d 430, 437-438.) The grand jury's powers are "carefully defined and limited by statute." (*Board of Trustees of Calaveras Unified School Dist. v. Leach* (1968) 258 Cal.App.2d 281, 285.)

Petitioner's reliance on the "common law" grand jury is misplaced. The common law does not serve to limit the Legislature's authority to

remove jurisdiction from the grand jury for certain felonies. Rather, common law principles are only *supplementary* to the applicable California statutes relating to grand juries. (*People v. Superior Court (1973 Grand Jury)* 13 Cal.3d 430, 440, fn. 11.)

For example, in *Fitts v. Superior Court of Los Angeles* (1936) 6 Cal.2d 230, the California Supreme Court considered whether an "accusation" removing an officer from public office was valid when it had been returned by only eleven jurors. (*Id.* at p. 247.) The Court held that a review of the common law indicated that twelve jurors should concur prior to accusation *absent* express legislative authorization permitting a lesser number. (*Id.* at 233) While the Court concluded the Legislature could prescribe procedural steps, it did not hold nor consider whether the Legislature was barred from making substantive changes. (See *Id.* at p. 235.) Petitioner asks this Court to deduce such reasoning from *Fitts*. (Writ at p. 24.) However, it is well settled that a case cannot be considered authority for a proposition it does not consider. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176; *People v. Strong* (2006) 138 Cal.App.4th Supp. 1; *Bates v. John Deere Co.* (1983) 148 Cal.App.3d 40, 53.) Thus, *Fitts* is not persuasive authority for the argument advanced by Petitioner.

In this case, the Legislature has defined and limited the grand jury's powers by enacting SB 227. Removing the grand jury's ability to inquire into officer-involved shooting deaths placed before it by the district

attorney does not violate section 14. Section 14 allows for prosecution by either indictment or information, and SB 227 still allows the enumerated felony to be prosecuted by information. There is no constitutional violation.

3. Any Limitation on the Legislature's Law-Making Authority Must Be Strictly Construed.

Secondly, section 14 must be strictly construed and cannot be extended to include matters not covered by the language used. (*Mendoza, supra,* 149 Cal.App.4th at p. 1051.) The phrase "as provided by law" does not make a distinction between procedure or substance. Reading the phrase as such violates cannons of constitutional construction.

Petitioner attempts to posit the "as provided by law" language prevents the Legislature from changing the grand jury's jurisdiction. (Writ at p. 27.) In supporting this argument, Petitioner cites *Ex Parte Wallingford ("Wallingford")* (1882) 60 Cal. 103, for the proposition that 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." [Emphasis added]. Petitioner then succinctly concludes this proposition applies to grand juries and that "such taking has not been expressly (or even impliedly) authorized by the Constitution itself…." (Writ at p. 27.)

Assuming for the sake of argument that (1) the Constitution has conferred "jurisdiction" on the grand jury and (2) the cited proposition not

only applies to Superior Courts, but also to grand juries, then Petitioner is incorrect in asserting that such a "taking" has not been authorized by the Constitution itself.

In *Wallingford*, the California Supreme Court considered whether the Legislature could remove misdemeanor jurisdiction from the Superior Court for crimes of petit larceny. (*Wallingford, supra,* at p. 103.) The Court stated the jurisdiction of the Superior Court was fixed by the Constitution in Article VI, section 5, and that "with respect to criminal matters," it is given jurisdiction of all criminal cases amounting to felony, "and cases of misdemeanor, *not otherwise provided for*." (*Ibid.* [emphasis added].) The Court then held the language "not otherwise provided for" gave the Legislature the power to remove misdemeanor jurisdiction from the Superior Court. (*Id.* at 104.) Thus, by exercising its power to "otherwise provide for," the Legislature constitutionally removed jurisdiction from the Superior Court. (*Ibid.*)

While Petitioner would have this Court require a constitutional grant of power to the Legislature, it would lead to the anomalous conclusion that the Legislature, though empowered to prescribe the manner in which felonies shall be tried, is powerless to prescribe how such a proceeding may be brought. (See *Fitts v. Superior Court of Los Angeles County* (1936) 6 Cal.2d 230, 234 [finding the Legislature had the power to proscribe how proceedings against officers tried for removal from office could be

brought].) Section 14's "as provided by law" language, like the language in *Wallingford*, does expressly permit the Legislature to remove jurisdiction from the grand jury. The Legislature has provided by law that officer-involved shootings resulting in death shall be charged by information, thereby constitutionally removing jurisdiction from the grand jury to indict on such cases presented by the district attorney. Likewise, under *Fitts*, the Legislature has the power to proscribe how such proceedings may be brought into the judicial system. (*Fitts, supra,* at p. 234.)

4. The Legislature May Regulate Matters of Statewide Concern.

The Legislature may regulate matters of statewide concern even if the regulation impinges "to a limited extent" on powers the Constitution specifically reserves to other entities. (See *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 287.)

The California Legislature has determined the national distrust relating to grand jury proceedings and officer-involved shootings is a matter of statewide concern and that transparency is such cases is crucial to establishing and keeping the trust of the public. (Petitioner's Exhibit at p. 25.) The Legislature has found the Michael Brown and Eric Garner cases to be examples of how prosecutors can manipulate the grand jury process. (*Id.* at p. 26.) As the National Association for the Advancement of Colored People stated in support, "[t]he option to proceed with a criminal grand jury

exonerates the prosecutor of their duties and allows them to use the grand jury as a pawn for political cover." (*Id.* at p. 31.)

In this case, the District Attorney of El Dorado County has similarly convened a grand jury as a political pawn in order to challenge the constitutionality of SB 227. (SLTPOA and SLTPSA's Motion to Discharge the Grand Jury, hereto attached as Exhibit 13, at p. 522.) ADA Clark admitted he intended to convene the El Dorado County grand jury *after* January 1, 2016, when SB 227 took effect, with the express purpose of challenging the constitutionality of the law. (Exh. 1, at p. 6, ¶ 17.) Were the El Dorado County district attorney's office primarily concerned with bringing officer Klinge to "justice," it could have convened a grand jury prior to SB 227 taking effect or by filing an information thereafter. The import of district attorney's actions is clear – both the El Dorado County grand jury and Officer Klinge have been used as political pawns to challenge a law ADA Clark has made it clear he personally disagrees with. Certainly the Legislature's concerns in enacting SB 227 is well-founded and apparent in the case.

By enacting SB 227, the Legislature sought to prevent district attorney offices from using the grand jury to indict officer-involved shooting deaths. In fact, some counties (specifically Los Angeles and Santa Clara) have adopted policies that preclude the criminal grand jury from being used in cases where an officer's actions may be the cause of the death

of a suspect. (Petitioner's Exhibit 4 at p. 25.) Effectively, each county could achieve the same effect as SB 227 by removing the discretion from its district attorneys to bring such cases before the grand jury. The transparency available by filing an information will increase the public's trust of the government and law enforcement.

Thus, even if SB 227 infringes on the grand jury's jurisdiction to hear felony cases, it only does so in an extremely limited manner. Moreover, the district attorney does not have a Constitutional right to determine whether to bring a case by information or indictment – the Legislature has full control over the procedures in both civil and criminal cases. (*People v. Bernstein* (1945) 70 Cal.App.2d 462, 469.)

Because the issue is one of statewide concern, the Legislature had the Constitutional power to enact SB 227.

B. EVEN IF THE LEGISLATURE CAN ONLY ENACT PROCEDURAL CHANGES, SENATE BILL 227 IS MERELY PROCEDURAL AND DID NOT REMOVE ALL JURISDICTION FROM THE GRAND JURY.

1. Senate Bill 227 and the Corresponding Amendments to the Penal Code Are Procedural.

The Legislature has full control over procedure of its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the federal constitution. (*People v. Bernstein* (1945) 70 Cal.App.2d 462, 469.) As Petitioner concedes, the

procedure for prosecution by information and indictment is left to legislative control under section 14. (Writ at p. 32; *People v. Bird* (1931) 212 Cal. 632, 636.) *Bird* recognized former section 8 (now section 14), is "not self-executing as to the procedure to be followed by either method in bringing the accused to trial." (*Bird* at 636.) "A constitutional provision [is] self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." (*Older v. Superior Court in and for Kern County* (1910) 157 Cal. 770, 780 quoting Cooley, Constitutional Limitations (7th ed. 1903) p. 121.)

Generally, in determining whether legislation is "procedural" or "substantive," a court will consider the effects of the legislation. (See *Aetna Cas. & Sur. Co. v. Industrial Acc. Commission* (1947) 30 Cal.2d 388, 394.) Legislation is considered substantive if it changes the legal consequences of past conduct or substantially affects rights; legislation is considered procedural if it governs the procedures to be followed to determine the legal significance of past events. (*Aetna, supra,* at 394; *Lozano v. Workers' Compensation Appeals Board* (2015) 236 Cal.App.4th 992, 998-999.)

Here, SB 227 does not alter the legal consequences possible for a felony conviction in an officer-involved shooting death. Rather, SB 227

only affects the procedural method for bringing such cases before the court. A defendant does not have a right to be indicted by a grand jury. (See *Hurtado v. People of the State of Cal.* (1884) 110 U.S. 516) And, contrary to Petitioner's assertions, a district attorney does not have a "right" to appear at all times before the grand jury. Thus, there is no right substantively affected.

Petitioner inaccurately claims the Executive has a constitutional right to charge felonies either by indictment or information. (Writ at p. 41.) Section 14 does not confer the power of choice on the district attorney, even if it is part of the executive branch. Petitioner string cites a list of cases that merely recognize that prior to SB 227, a district attorney was not limited in choosing whether to file an information or proceed before a grand jury. (Writ at p. 43.) Such ability is not a "right" conferred by the Constitution, but has been recognized in statutes enacted by the Legislature. (See e.g., Pen. Code, § 682, § 737.)

It is recognized that "[t]he whole system of procedure by information is subject to control and regulation by the Legislature." (*People v. Bird, supra,* 212 Cal. at p. 643; *Copeland v. Superior Court of Los Angeles County* (1923) 62 Cal.App. 316, 318 [reasoning that although the Legislature, having authority to regulate procedure in prosecuting crimes, could vest discretion in the district attorney in how to proceed after a demurrer is sustained on an indictment, the Legislature had not seen it fit to

do so].) In fact, Petitioner relies on legislation that permits the district attorney to appear before the grand jury to assert that such appearance is a "right." (Writ at p. 44 citing Penal Code, § 935.)

However, just as the Legislature enacted Penal Code section 935, describing the purposes in which a district attorney *may* appear before the grand jury, the Legislature has the power to limit such appearances. The Legislature has done so by enacting SB 227. Under amended Penal Code sections 917 and 919, the district attorney cannot appear before the grand jury for the purpose of giving information or advice in relation to an officer-involved shooting death. SB 227 does not work a denial of any fundamental right nor conflict with the federal constitution.

2. Senate Bill 227 does not Remove All Jurisdiction Over Officer-Involved Shooting Deaths from the Grand Jury.

Petitioner's argument that the Legislature has effectuated a Constitutional change to the grand jury system is incorrect. (Writ at p. 18.) The removal of a certain class of crimes does not change the grand jury system because one or more grand juries are still convened at least once a year in each county as set forth in the California Constitution. (Cal. Const., art. 1, § 23.)

Regardless, the Legislature has *not* entirely removed a class of crimes from the grand jury's purview. Penal Code section 917, subdivision (b) states that "*[e]xcept as provided in Section 918*, the grand jury shall not

inquire into an offense that involves a shooting or use of excessive force by a peace officer…" that results in death. (Pen. Code, § 917(b) [emphasis added].) Likewise, section 919, subdivision (c) also provides that "[e]xcept as provided in section 918…," the grand jury cannot hear cases concerning officer-involved shooting deaths put before it by the prosecutor. Section 918 still allows the grand jury to investigate officer-involved shootings, but only if the grand jury itself "knows, or has reason to believe, that a public offense, triable within the county, has been committed…." (Pen. Code, § 918.) As such, the Legislature did not change the function of the grand jury. Rather, the Legislature only prevented the *prosecutor* from requesting a grand jury be convened to investigate these cases.

Petitioner asserts section 918 does not "remove the constitutional infirmity" of Senate Bill 227 because the grand jury cannot indict under section 918. (Writ at p. 37.) In a footnote, the Petitioner cites *Beavers v. Henkel* (1904) 194 U.S. 73, in an attempt to support its argument that "investigation" does not carry indictment power. However, courts have recognized that before returning an indictment, the grand jury may "*investigate* at the instances of the court, or the district attorney, *or at their own instance*." (*Samish v. Superior Court in and for Sacramento County* (1938) 28 Cal.App.2d 685, 689 [emphasis added] citing *U.S. v. Philadelphia, etc. R. Co.* (1915) 223 F.301, 306.) "In performing its investigative function, the grand jury decides if a crime has been committed

and whether there is probable cause to indict the defendant." (*Bernardi v. Superior Court* (2007) 149 Cal.App.4th 476, 490.) "[Under section 918], the grand jury is not limited to matters initiated by the district attorney in performing its *accusatory* role." (67 Ops.Cal.Atty.Gen 58 (1984) [emphasis added].) Thus, the California Legislature has not removed all jurisdiction relating to officer-involved shooting deaths from the grand jury. The grand jury may choose to investigate and indict in an officer involved shooting death, but the district attorney has no authority to place these cases before it.

C. THE TRIAL COURT PROPERLY DISCHARGED THE GRAND JURY BECAUSE IT HAS NO JURISDICTION TO INQUIRE INTO AN OFFICER-INVOLVED SHOOTING DEATH BROUGHT BY THE DISTRICT ATTORNEY.

The California Penal Code specifically prevents a district attorney from convening a grand jury to inquire into an officer-involved shooting that results in death. Penal Code section 917, subsection (b), effective January 1, 2016, reads:

> Except as provided in Section 918, the grand jury shall not inquire into an offense that involves a shooting or use of excessive force by a peace officer described in Section 830.1, subdivision (a) of Section 830.2, or Section 830.39, that led to the death of a person being detained or arrested by the peace officer pursuant to Section 836.

Likewise, the Legislature amended section 919 to provide in subsection (c):

> "The grand jury shall inquire into the willful or corrupt misconduct in officer of public officers of every description within the county. Except as provided in Section 918, this subdivision does not apply to misconduct that involves a shooting or use of excessive force by a peace officer described in Section 830.1, subdivision (a) of Section 830.2, or Section 830.39, that led to the death of a person being detained or arrested by the peace officer pursuant to Section 836."

The Legislature carefully excluded this officer-involved shooting from the grand jury's jurisdiction. Joshua Klinge is a Police Officer employed by the City of South Lake Tahoe Police Department and a member of the SLTPOA. He is also a "peace officer" within the meaning of Penal Code section 830.1. Officer Klinge was on duty and acting in his capacity as a peace officer on June 15, 2015 when he shot Kris Jackson. Kris Jackson died as a result of his injury. This incident clearly falls under the definitions set forth by Penal Code section 917(b) and 919(c).

"[T]he grand jury is part of the court by which it is convened" and is under the control of the court. (*1973 Grand Jury, supra*, 13 Cal.3d 430, 438.) "[I]t is well established that the convening court may at any time, in the exercise of its jurisdiction, order the grand jury to be discharged." (*Id.* at 438-39 citing *In re Gannon* (1886) 69 Cal. 541, 547.)

The trial court, finding the grand jury of El Dorado County lacked jurisdiction, properly ordered it be discharged. (Petitioner's Exhibit 2 at p. 5-6.) Petitioner does not contest, and thereby concedes, that the trial court

has authority to discharge a grand jury acting in excess of its jurisdiction. As such, this Court should deny the Petitioner's Writ of Mandate and affirm the trial court's order.

D. MANDAMUS IS IMPROPER BECAUSE THE SUPERIOR COURT DOES NOT HAVE A MINISTERIAL DUTY TO IMPANEL AN ADDITIONAL GRAND JURY.

Each county must have a least one grand jury drawn and impaneled every year. (Cal. Const., art. I, § 23.) In 1991, the Legislature authorized all counties to have two grand juries. (Pen. Code, § 940.6.) Under section 940.6, the presiding judge of the superior court, or the judge appointed by the presiding judge to supervise the grand jury, *may*, upon request of the district attorney, order and direct the impanelment of one additional grand jury. (§ 904.6(a).) Once impaneled, the presiding or supervising judge may discharge the grand jury at any time. (§ 904.6(c).) Grand juries impaneled under Penal Code section 904.6 are only authorized, by statute, to hear criminal matters. (76 Ops.Cal.Atty.Gen. 181 (1993).)

Penal Code section 940.6 does not impose a mandatory duty on the superior court to impanel this second grand jury upon the district attorney's request. The law is permissive, stating that the judge "may" impanel the additional grand jury.

The word "may" is sometimes construed as equivalent to "must" in statutory construction, but such interpretation is proper only where sense of the entire enactment requires it or it is necessary to carry out the legislative

intention. (*People v. Dubrin* (1963) 218 Cal.App.2d 846, 849.) Absent such special circumstances, however, the word should not be interpreted as mandatory, but as merely permissive *or conferring discretion*. (*Id.* at p. 850.)

The legislative history demonstratives that it was not the Legislature's intent to impose a mandatory duty on the superior court. The Senate Committee on Judiciary report for the committee hearing on July 16, 1991, explained: "The purpose of this measure is to *permit* counties to establish additional grand juries to handle criminal indictments …." (See 76 Ops.Cal.Atty.Gen. 181 at p. 3 [emphasis added].) Prior law had allowed only certain counties to impanel criminal grand juries, and it was the purpose of the Legislature to extend such authorization "universally." (*Ibid.*) The purpose of the law was not to mandate such action. Thus, the word "may" in this context should be construed as permissive, conferring the discretion on the superior court on whether to empanel the grand jury at the district attorney's request.

Mandamus may not be employed to compel a court to decide in any particular way or to coerce as to manner or result of action. (*Friedland v. Superior Court in and for Sacramento County* (1945) 67 Cal.App.2d 614, 624.) Because the El Dorado County Superior Court does not have a ministerial duty to empanel a grand jury and because this Court cannot compel the superior court to decide to do so, mandamus should not issue.

VI.
CONCLUSION

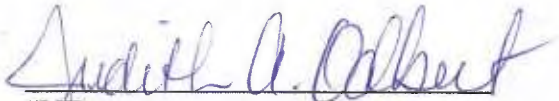
Petitioner has failed to meet its burden to prove SB 227 and the subsequent amendments to the Penal Code are unconstitutional. The Constitution does not limit the Legislature's authority to enact SB 227 and the legislation is presumptively constitutional. Moreover, even if, as Petitioner suggest, the Legislature can only regulate procedure, SB 227 is procedural. Finally, because the trial court determined SB 227 was constitutional and the grand jury lacked jurisdiction to hear the case before it, the court properly discharged the grand jury and corresponding subpoenas.

For these reasons, real parties in interest respectfully request this Court deny the Petitioner's Writ of Mandate and affirm the trial court's order.

Respectfully submitted,

May 23, 2016

MASTAGNI HOLSTEDT, APC



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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I certify that this brief consists of 8,031 words, as counted by the computer program used to generate the document.

May 27, 2016

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PROOF OF SERVICE

I am a citizen of the United States and a resident of the County of Sacramento. I am over the age of eighteen years and not a party to the within above-entitled action; my business address is 1912 I Street, Sacramento, California 95811.

On May 27, 2016 I served the within:

REAL PARTIES IN INTEREST SOUTH LAKE TAHOE POLICE OFFICERS' ASSOCIATION AND SOUTH LAKE TAHOE POLICE SUPRVISORS' ASSOCIATION'S RETURN BY VERIFIED ANSWER TO PETITION FOR WRIT OF MANDATE

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☒ **BY ELECTRONIC SERVICE:** I certify that all participants in the case are registered TRUEFILING users and that service will be provided by TRUEFILING to parties' attorneys of record, pursuant to Local Rule 5 and on the Supreme Court pursuant to rule 8.212(c)(2).

And;

Superior Court of El Dorado
Honorable James R. Wagoner
495 Main Street, Dept. 1
Placerville, CA 95667

☒ **BY U.S. MAIL:** By placing a true copy thereof enclosed in a sealed envelope(s) addressed as above, and placing each for collection and mailing following ordinary business practices. I am "readily familiar" with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the United States Mail today, with postage thereon fully prepaid at Sacramento, California in the ordinary course of business.

I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 27, 2016 at Sacramento, California.

PATRICK R. BARBIERI
Paralegal