SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2015 - 2016 Regular

Bill No:	AB 1766	**Hearing Date:**	June 28, 2016
Author:	Mark Stone		
Version:	March 30, 2016		
Urgency:	No	**Fiscal:**	No
Consultant:	MK		

Subject: ***Examination of Prospective Jurors***

HISTORY

Source: San Diego County District Attorney
California District Attorneys Association

Prior Legislation: AB 310 (Leach) 1999 Failed Assembly Judiciary Committee
SB 14 (Calderon) Juror anonymity portions deleted. 1997
AB 886 (Morrow) Failed 1997-1998
AB 2922 (Hawkins) Failed 1996
SB 508 (Campbell) – Chapter 964, Stats. 1995
SB 1199 (Mountjoy) Failed 1995

Support: Association of Deputy District Attorneys; California Police Chiefs Association

Opposition: California Attorneys for Criminal Justice; California Newspaper Publishers Association

Assembly Floor Vote: 78 - 0

PURPOSE

The purpose of this bill is to require that jurors in criminal cases be referred to by something other than their names.

Existing law allows a court, in a criminal case, to conduct an initial examination of prospective jurors. (Code of Civil Procedure § 223)

Existing law provides that after a court's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors. (Code of Civil Procedure §223.)

Existing law says the court may, in the exercise of its discretion, limit the oral and direct questioning of prospective jurors by counsel. (Code of Civil Procedure § 223)

Existing law provides that the court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allotted among the prospective jurors by counsel. (Code of Civil Procedure § 223)

Existing law provides that voir dire of any prospective jurors shall, where practicable, occur in the presence of other jurors in all criminal cases, including death penalty cases. (Code of Civil Procedure § 223.)

Existing law provides that the trial court's exercise of its discretion it the manner in which voir dire is conducted, including any limitation on the time which will be allowed or direct questioning of prospective jurors by counsel any determination that a question is not in aid of the exercise of challenges for cause, shall not cause any conviction to be reversed unless the exercise of discretion has resulted in a miscarriage of justice. (Code of Civil Procedure § 223)

Existing law provides that the names of qualified jurors drawn from the qualified juror list for the superior court shall be made available to the public upon request unless the court determines that compelling interest requires that this information should be kept confidential. (Code of Civil Procedure § 237(a)(1))

Existing law provides that upon the recording of a jury's verdict in a criminal jury proceeding, the court's record of personal juror identifying information of trial jurors, consisting of names, addresses and telephone numbers shall be sealed until further order of the court. (Code of Civil Procedure § 237 (a)(2))

Existing law provides that a person may petition the court to access sealed jury records with a petition that is supported by a declaration that includes facts sufficient to establish good cause for the release of juror's personal identifying information. (Code of Civil Procedure § 237 (b))

This bill provides that, in a criminal case, the court shall provide to counsel for each party the complete names of the prospective jurors, both alphabetically and in the order in which they will be called.

This bill provides that the court in each criminal trial shall determine a uniform manner by which each prospective juror shall be addressed by the court and counsel for each party according to one of the following:

- An identification number assigned by the court.
- The prospective juror's first name and the first initial of his or her last name.
- The prospective juror's title and last name.

This bill provides that before examining prospective jurors, the court shall advise them that, in accordance with state law, the court and counsel for each party are prohibited, in all criminal cases, from addressing prospective jurors by their full names during jury selection and are required to address each prospective juror by an identification number, by his or her first name and the first initial of his or her last name, or by his or her title and last name.

Existing law allows a trial judge in civil cases to examine prospective jurors in order to select a fair and an impartial jury. (Code of Civil Procedure § 222.5)

Existing law provides that after a trial judge's initial examination, counsel for each party may examine any of the prospective jurors, by oral and direct questioning, so that counsel may intelligently exercise both peremptory challenges and challenges for cause. (Code of Civil Procedure § 222.5.)

Existing law provides that during any examination conducted by counsel for the parties, the trial judge should permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case. (Code of Civil Procedure § 222.5.)

Existing law provides that to facilitate the jury selection process, the trial judge should provide the parties with both the alphabetical list and the list of prospective jurors in the order in which prospective jurors will be called. (Code of Civil Procedure § 222.5.)

This bill provides that in a civil case, the court shall provide to counsel for each party the complete names of the prospective jurors, both alphabetically and in the order in which they will be called.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several years this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In December of 2015 the administration reported that as "of December 9, 2015, 112,510 inmates were housed in the State's 34 adult institutions, which amounts to 136.0% of design bed capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed capacity, and has been under that benchmark since February 2015." (Defendants' December 2015 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).) One year ago, 115,826 inmates were housed in the State's 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants' December 2014 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).)

While significant gains have been made in reducing the prison population, the state must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for This Bill

According to the author:

> This commonsense and modest proposal provides privacy protections to prospective jurors during the jury selection process. This bill simply provides that during voir dire, a court or counsel in a criminal matter must address a prospective juror by a jury number, the juror's first name and last initial, or the juror's title and last name.
>
> It is not uncommon for prospective jurors to reveal their full names during voir dire. Prospective jurors are then asked to provide extensive private information, including their occupation, where they live, if they have children, and if they live alone or with others.
>
> When prospective jurors reveal both their full name and other personal information, they put themselves at-risk of being potentially victimized. It is true that a juror who feels uncomfortable about answering a particularly personal question during voir dire may ask the court to go into the judge's closed chambers to answer the question; however, jurors do not always invoke this privilege. Jurors who might already feel intimidated by the jury selection process (and who want to avoid interrupting the voir dire proceedings) may feel pressure to answer the personal question in open court rather than behind closed chambers.
>
> Jurors who feel reluctant about reporting to jury duty for privacy reasons should be put at ease. To the extent that voir dire contributes to instances of identity theft or juror intimidation among prospective jurors, this bill could curb those instances.

2. Statutory History

In California the selection of trial jurors has traditionally been by name, and qualified jurors' names are generally to be made available to the public upon request. In 1995 the Legislature passed, and the Governor signed, SB 508 (Campbell), Ch. 964, Stats. 1995 to address legislators' growing desires to protect juror privacy in criminal trials. Pursuant to SB 508, as of January 1, 1996, all juror information in a criminal trial in California is automatically sealed as soon as the jury verdict is recorded. Any person may petition the court for access to juror information. However, only if good cause for that information is shown on the face of the court pleadings will

a hearing on the release of that information even be scheduled. Otherwise, the court will bar the release of such personal information. (Code of Civil Procedure Section 237(b).)

Between the enactment of SB 508 in 1995 and 1999 a number of bills were introduced in the Legislature to "move up" the secrecy shield on juror identity information from the time of the verdict to the beginning of the voir dire process in all criminal trials. However, all constitutional questions were raised about those legislative proposals calling for automatic juror anonymity and no such proposals seeking automatic voir dire anonymity were passed.

3. *Press-Enterprise*

According to the United States Supreme Court, the presumptive openness of jury selection dates back to at least the 1500's in England, and was common practice in America at the time the Constitution was adopted. (*Press-Enterprise v. Riverside* (1984) 464 U.S. 501.) Allowing the public to observe the selection of jurors has historically been believed to provide the public needed confidence that the criminal justice system is fair and unbiased. In the voir dire process, the court and the attorneys involved in criminal cases have historically questioned prospective jurors to try to ensure a fair and impartial jury. Personal views have traditionally been elicited from the jurors to determine whether they have the ability to be fair and impartial in the case before them. Both prosecutors and defense attorneys have consistently argued in the Legislature over the years that access to such personal information about jurors is absolutely necessary to determine whether prospective jurors hold a potential bias.

In 1984, the United States Supreme Court considered this issue in the *Press-Enterpris*e case noted above. The Court held that there are indeed clear constitutional constraints limiting the degree to which access to juror information can be barred during a criminal trial.

In that case, the Press-Enterprise newspaper moved to have the voir dire examination of prospective jurors in a gruesome murder case opened to the press. The State of California opposed the newspaper's motion, asserting that the jurors in this trial would not be candid with their answers if the press were present during juror questioning. The trial judge agreed and prohibited the press from attending the individual voir dire proceedings. The voir dire lasted six weeks, and all but three days of it were closed to the public. When the press tried to get copies of the transcript of the voir dire, the trial judge denied the motion on the grounds that although most of the answers by the jurors were routine, there were some questions and answers that were of a personal nature, and release of the information would violate the privacy rights of the jurors. (*Press-Enterprise*, supra at 507.)

The Supreme Court rejected the trial court decision, finding that, based on long historical precedent, trials, including voir dire proceedings, are inherently public proceedings. The Court reasoned that a defendant is entitled to a fair and open trial under the First and Sixth Amendments. It found that openness in trials enhances both the basic fairness of the criminal trial and the appearance of fairness to the general public, thereby giving the public confidence in the jury system. (*Id.* at 508.) The Court cited *Globe Newspaper Co. v. Superior Court* (1982) 457 U.S. 596, for the important proposition that:

> Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness. (*Press-Enterprise*, supra, at 509.)

The Court found that a state's justification for closure of a public criminal proceeding must be a "weighty one." *(Id.*) The Court further held that trials may be held in secret only if the trial court determines on a case-by-case basis that the presumption of openness is overcome by an overriding interest (e.g., the defendant's right to a fair trial). The Court required that the overriding interest be based on the trial court's specific and articulated findings that secrecy is essential to meet the overriding interest that the secrecy is narrowly tailored to meet the interest, and that alternatives to secrecy have been clearly considered. In rejecting the trial court's order of secrecy in *Press-Enterprise*, the Supreme Court emphasized that, in that case, the trial court did not articulate specific findings as to why it needed to close voir dire; nor did it consider alternatives to closing it. *(Id.* at 513.)

The U.S. Court of Appeals for the Fourth Circuit, relying on *Press-Enterprise*, rejected jury anonymity in *In re Baltimore Sun* (4th Cir. 1988) 841 F.2d 74, stating :

> We think it no more than application of what has always been the law to require a . . . court . . . to [make public] the names and addresses of those jurors who are sitting. . . .[W]e recognize the difficulties which may exist in highly publicized trials . . . and the pressure upon jurors. But we think the risk of loss of confidence in the judicial process is too great to permit a criminal defendant to be tried by a jury whose members may maintain anonymity. If . . . the attendant danger[s] of a highly publicized trial are too great, [the court] may always sequester the jury and change of venue is always possible. . . .(841 F.2d at 76-77.)

More recent cases also affirm the need to approach anonymous juries as "an unusual measure that is warranted only where there is a strong reason to believe the jury needs protection or to safeguard the integrity of the justice system, so that the jury can perform its factfinding function…" (*United States v. Shryock*, 342 F.3d 948, 971 (9th Cir. Cal. 2003)) In order to empanel an anonymous jury the court must find:

> (1) there is a strong reason for concluding that it is necessary to enable the jury to perform its factfinding function, or to ensure juror protection; and (2) reasonable safeguards are adopted by the trial court to minimize any risk of infringement upon the fundamental rights of the accused." Id. (adopting the First Circuit's test from *United States v. DeLuca*, 137 F.3d 24, 31 (1st Cir. 1998)). Although these factors are neither exclusive nor dispositive, courts have recognized the need for jury protection based on a combination of factors, including:(1) the defendants' involvement with organized crime; (2) the defendants' participation in a group with the capacity to harm jurors; (3) the defendants' past attempts to interfere with the judicial process or witnesses; (4) the potential that the defendants will suffer lengthy incarceration if convicted; and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment. (citations omitted) (United States v. Fernandez, 388 F.3d 1199, 1244-1245 (9th Cir. Cal. 2004))

A California Supreme Court case found that the court did not abuse its discretion in identifying jurors by number stating:

> We find no abuse of discretion in the trial court's decision to order that the jurors be identified by numbers. The prosecutor informed the court that two witnesses had been threatened and one had been offered a bribe. These incidents provided

> reasonable grounds for concern that an attempt might be made to unlawfully interfere with the jurors' performance of their duties. Any interference with defendant's right to conduct voir dire was minimized because the jurors were not completely anonymous—counsel had access to the names of the jurors. Defendant contends that the procedure interfered with his ability to assist his counsel in jury selection because he was not personally allowed access to the jurors' names. Defendant argues that he might not have recognized a juror's face but might have recognized a name and realized he knew something about the juror or the juror's family that might cause the juror to be biased. Defendant's contention is speculative and in any event any minor interference with the conduct of voir dire that may have occurred was justified by the court's legitimate concerns for the safety and integrity of the jury (*People v. Thomas* 53 Cal. 4th 771, 786-789 (Cal. 2012))

4. Identifying a Juror by Other Than Their Name

This bill provides that in a criminal trial the court shall provide to counsel for each party the complete names of the prospective jurors, both alphabetically and in the order in which they were called. However, the court in each criminal trial, shall determine a uniform manner by which each prospective juror shall be addressed by the court and counsel for each party according to one of the following:

- An identification number assigned by the court.
- The prospective juror's first name and the first initial of his or her last name.
- The prospective juror's title and last name.

This bill prohibits the court and counsel for each party from addressing prospective jurors by their full names during jury selection and requires the court to inform the jury of the prohibition.

5. Constitutional Issues?

Having every juror in a criminal case addressed by something other than his or her name during voir dire raises Constitutional questions.

As noted in the cases above, the right to a public jury is important not just to the right of the defendant to get a fair trial but to the right of the public to have confidence in the jury system. Cases that have allowed for an anonymous juries or juries where the jurors were referred to by a number have been upheld when the Appellate Court has found that the trial court had made a finding that the jury needed protection or that it was necessary to protect the ability of a jury to perform its fact-finding duty in a particular case. It is not clear that it will be Constitutional to allow this automatically in every case. It is also not clear whether each of the options would have the same Constitutional problems, for example identifying a person by a number only seems to give complete anonymity, maybe addressing a person by last name does not since it may give some indication as to a relationship with someone involved in the case.

While this bill gives the prosecution and defense access to the prospective jurors names and thus may not infringe on one aspect of a defendant's right to a fair trial, by not making a case by case determination it appears as if it may violate the open jury requirement in *Press Enterprise.* This bill does not eliminate Code of Civil Procedure Section 237 which provides access by the public

to the names of qualified jurors until a verdict has been reached so is that enough to comply with *Press Enterprise's* requirement that trials be "inherently public" proceedings?

6. Support

According to the San Diego County District Attorney, a sponsor of this bill:

> A constituent brought this issue to our attention after experiencing the voir dire process in a local criminal case. While she waited her turn to be called, she witnessed a young lady, about the same age as her adult daughter, get called up by her full name. She sat in disbelief as the young lady divulged where she lived, that she lived alone, where she worked and other very personal information. The courtroom was filled with other prospective jurors. All hear the young lady's full name and, after a few moments of questioning knew details many of us would consider very private. AB 1766 provides a simple fix that would protect that privacy in courtrooms up and down the state.
>
> The measure simply requires the court and attorneys, in criminal and civil cases, to address prospective jurors by first name and last initial, rather than by the prospective juror's full first and last names. AB 1766 still allows the court to provide the complete names of potential jurors to both counsels, but the court and counsel just would not use the full names when calling or questioning the prospective jurors during the voir dire process.

7. Oppose

The California Newspaper Publishers Association opposes this bill stating:

> By eliminating use of a juror's full name, this legislation would remove important facts from the public process and make secret information that is readily available in a phone book — a person's full name. This blanket rule of secrecy is contrary to the presumptive First Amendment right of public access that applies to all portions of a trial, particularly in a criminal case.
>
> The United States Supreme Court recognized this presumption of openness in *Press-Enterprise Co. v. Riverside County Superior Court* (1984) 464 U.S. 501. The court held that voir dire proceedings in criminal trials are presumptively open to the public and can be closed only if a trial court determines that the presumption of openness is overcome by an overriding interest (i.e. the defendant's right to a fair trial).
>
> This is a high burden: the presumption should be overcome only in unusual circumstances, on a fact specific, case-by-case basis. But AB 1766 would make all potential juror names in California unknowable in criminal court proceedings.
>
> While the bill was amended to permit the public to access the qualified juror list upon request, pursuant to Code of Civ. Proc. Section 237, this amendment does not allay the constitutional concerns because it only permits access to the names of jurors who are actually empaneled. Thus, the public has no way of knowing which jurors were dismissed from the pool, information that could be essential to knowing whether there was bias in the jury selection process.

The open and public trial is a hallmark of the American legal system. It allows the public to oversee the courts, and fosters public trust that justice is being served. Hiding public information about those who may determine the status of another person's life and liberty is tantamount to denying the public this fundamental access to the courts. If openness to the courts is cut-off, the public's confidence in the courts is undermined and trust in this political institution is lost.

The court in *Press Enterprise* got it right. The appropriate process for a potential juror to protect private information is by affirmative request. This permits the court to make the constitutionally-required, fact-specific finding that there is an overriding interest in nondisclosure in that instance. The court recognized that there are instances where the interrogation of a juror touches "deeply personal matters," warranting nondisclosure, but a person's identity cannot be captured in that consideration.

CNPA believes AB 1766 would be unconstitutional because it would foreclose public access to all potential juror names, without any analysis of the interests involved, in every case. Because AB 1766 falls short of the *Press Enterprise* standard, we must respectfully oppose.

-- END –