
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: SB 1087 **Hearing Date:** March 29, 2016
Author: Anderson
Version: February 17, 2016
Urgency: No **Fiscal:** No
Consultant: MK

Subject: *Evidence: Production of Business Records*

HISTORY

Source: California District Attorneys Association

Prior Legislation: None

Support: California Police Chiefs Association

Opposition: None known

PURPOSE

The purpose of this bill is to provide for the admissibility of business documents produced by search warrant.

Existing law provides that if the original records would be admissible in evidence if the custodian or other qualified witness had been present and testified in matters stated in an affidavit accompanying copies of business records then the affidavit is admissible as evidence of the matters state therein and are presumed to be true. (Evidence Code § 1562)

Existing law provides that when a subpoena duces tecum is served upon the custodian of records of a business in an action in which the business is neither a party nor the place where the action is alleged to have taken place, it is sufficient compliance if the custodian delivers by mail or otherwise a true, legible and durable copy of all the records described in the subpoena to the clerk of the court together with an affidavit within five days of receipt. (Evidence Code §1560)

This bill would in addition provide that if a search warrant for business records is served upon the custodian of records in an action or investigation in which the business is neither a party nor the place where any cause of action is alleged to have arisen, the warrant will be deemed executed if the business cause the delivery of records described in the warrant to the law enforcement agency if the custodian delivers by mail or otherwise a true, legible, and durable copy of all the records described in the search warrant, together with an affidavit within five days or within such other time as set forth in the warrant.

Existing law provides what shall be in an affidavit accompanying records submitted by a business in response to a subpoena duces tecum. (Evidence Code §1561)

This bill provides that this section shall also apply to affidavits accompanying records submitted by a business in response a search warrant.

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:

When a prosecuting office is doing a criminal investigation, most business records are obtained via search warrant because there is very limited subpoena power until criminal charges are actually filed. In fact, it's not uncommon for records to be destroyed between the date the search warrant is executed and the time charges are eventually filed.

Business record, whether produced pursuant to a subpoena or search warrant, are usually provided with an accompanying affidavit intended to comply with Evidence Code sections 1560-1562. If the records were produced in response to a subpoena, these sections govern admissibility of the records at trial without live testimony from the custodian of record.

Unfortunately, since sections 1560 and 1561 only refer to the admissibility of documents obtained by subpoena and not by search warrant, the search warrant records may not be admitted at trial without testimony by the custodian of records—even if the exact same records are produced and even if they are provided with the exact same affidavit.

Prosecutors then face two choices. They can rely on EC 1560 *et seq* for admissibility, which requires them, after filing criminal charges, to subpoena the exact same records we obtained via search warrant. If these records still exist, they must be re-copied, re-sent, and re-discovered. This is a significant expenditure of material and human resources on the part of the court, the attorneys, and the target of entities of the subpoena.

Alternatively, or if the records have been destroyed in the intervening period, they must procure live testimony from the custodian of records in order to make the records received in response to the search warrant admissible. This requires the target entity to incur the cost and inconvenience of sending a live witness to testify.

SB 1087 seeks to solve this problem by amending the Evidence Code to refer to documents obtained by search warrants as well as subpoena. This would remove an artificial barrier to admissibility, promote trial efficiency by eliminating an otherwise unnecessary witness (and a hearing on the subpoena), and save resources for the court as well as the businesses that comply with records requests.

2. Admissibility of Business Records

As stated in the author's statement, business records that are submitted in a case pursuant to a subpoena duces tecum and accompanied by the appropriate affidavit are admissible in the criminal or civil case for which they were requested. However, since a subpoena duces tecum

can only be used once a case is filed, law enforcement will use a search warrant to seek documents while in the investigative stage of the case and those documents are not admissible under existing law, even though their veracity is identical to those submitted by subpoena. Because they are inadmissible, law enforcement must either get the custodian of record to testify in court as to the veracity of the documents or make a second request for the same documents with a subpoena duces tecum and thereby get another copy of the documents with the appropriate affidavit. This bill provides that documents submitted in response to a search warrant, with the appropriate affidavit, are admissible in the same manner as those documents submitted in response to a subpoena duces tecum.

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