SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair
2023 - 2024 Regular

Bill No:	SB 804	**Hearing Date:**	January 9, 2024
Author:	Dahle		
Version:	January 3, 2024		
Urgency:	No	**Fiscal:**	No
Consultant:	SC		

Subject: ***Criminal procedure: hearsay testimony at preliminary hearings***

HISTORY

Source: Redding Police Department
California Police Chiefs Association

Prior Legislation: AB 568 (Muratsuchi), Ch. 125, Stats. 2013
AB 557 (Karnette), Ch. 18, Stats. 2005
Proposition 115, approved by California voters on June 6, 1990

Support: Unknown

Opposition: ACLU California Action; California Attorneys for Criminal Justice; California Public Defenders Association; Initiate Justice; San Francisco Public Defender's Office

PURPOSE

The purpose of this bill is to authorize law enforcement civilians to provide hearsay testimony at preliminary hearings.

Existing law states that at the time the defendant appears for arraignment on a felony to which the defendant has not pleaded guilty, the magistrate, immediately upon the appearance of counsel shall set a time for the preliminary hearing and shall not allow less than two days for the district attorney and the defendant to prepare for the examination. (Pen. Code, § 859b.)

Existing law states that if it appears from the examination that there is sufficient cause to believe that the defendant is guilty, the magistrate shall hold the defendant to answer on the charges. (Pen. Code, § 872, subd. (a).)

Existing law defines "hearsay evidence" as evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. (Pen. Code, § 1200, subd. (a).)

Existing law prohibits hearsay evidence from being admitted unless otherwise provided by law. (Pen. Code, § 1200, subd. (b).)

Existing law provides, notwithstanding the law that prohibits hearsay evidence, the finding of probable cause may be based in whole or in part upon the testimony of a law enforcement officer or honorably retired law enforcement officer relating the statements of declarants made out of court offered for the truth of the matter asserted. (Pen. Code, § 872, subd. (b).)

Existing law states that an honorably retired law enforcement officer may only relate statements of declarants made out of court and offered for the truth of the matter asserted that were made when the honorably retired officer was an active law enforcement officer. (Pen. Code, § 872, subd. (b).)

Existing law states that any law enforcement officer or honorably retired law enforcement officer testifying as to hearsay statements shall either have five years of law enforcement experience or have completed a training course certified by the Commission on Peace Officer Standards and Training that includes training in the investigation and reporting of cases and testifying at preliminary hearings. (Pen. Code, § 872, subd. (b).)

Existing law states that a law enforcement officer who may provide hearsay testimony at the preliminary hearing is any officer or agent employed by a federal, state, or local government agency to whom all of the following apply:

- Has either five years of law enforcement experience or who has completed a training course certified by the Commission on Peace Officer Standards and Training that includes training in the investigation and reporting of cases and testifying at preliminary hearings; or,

- Whose primary responsibility is the enforcement of any law, the detection and apprehension of persons who have violated any law, or the investigation and preparation for prosecution of cases involving violation of laws. (Pen. Code, § 872, subd. (c).)

This bill states that notwithstanding the law that prohibits hearsay evidence, the finding of probable cause may be based in whole or in part upon the sworn testimony of a law enforcement civilian relating the statements of declarants made out of court offered for the truth of the matter asserted.

This bill defines "law enforcement civilian" to mean "uniformed, nonsworn, full-time paid employee of a law enforcement agency, such as a community service officer, police technician, or police services officer, whose primary functions may include, without limitation, writing police reports, investigating reports of property crime, interviewing victims and witnesses, collecting evidence, and processing crime scenes."

This bill requires any law enforcement civilian testifying as to hearsay statements to have either five years of experience as a law enforcement civilian or have completed a training course equivalent to the training course described for law enforcement officers in this section.

This bill states, declarative of existing law, that any perjured testimony given by a peace office for law enforcement civilian to establish probable cause at a preliminary hearing is subject to disclosure as impeachment evidence to the extent required under *Brady v. Maryland* (1963) 373 U.S. 83.

COMMENTS

1. Need for This Bill

According to the author of this bill:

> Law enforcement and the legal system must be given the tools needed properly serve our communities. As police departments receive less funding even with rising crime, efficiency is more important than ever. When sworn officers are forced to go re-interview victims, already limited resources are further spread out. Community service officers (CSOs) act as a bridge between victims and law enforcement. Allowing CSO's to perform hearsay testimony will streamline the process and will enable law enforcement to properly utilize its limited resources. Additionally, victims will not be forced to relive past trauma by being interviewed a second time. Once the CSO performs the initial interview, the victim will be free to rebuild and will not have to testify in court.

2. Proposition 115

Proposition 115, approved by California voters on June 6, 1990, made a number of procedural changes to criminal law and judicial procedures in California. As relevant to this bill, the initiative allowed probable cause to be established through hearsay testimony by peace officers at preliminary hearings.

Specifically, Proposition 115 added Section 30 to Article I of the California Constitution which provides, that in order to protect victims and witnesses in criminal cases, hearsay evidence shall be admissible at preliminary hearings. The proposition also required such an officer to have at least five years of law enforcement experience or have completed have completed a course certified by POST which covers the investigating and reporting of criminal cases, and testifying at preliminary hearings.

Proposition 115 also added Evidence Code Section 1203.1 to provide a preliminary hearing exception to the general requirement that a hearsay declarant be made available for cross-examination.

Proposition 115 amended Penal Code Section 872 to provide that notwithstanding the hearsay rule, the finding of probable cause can be based, entirely or in part, on the sworn testimony of a law enforcement officer relating the out-of-court statements of declarants which are offered for the truth of the matter asserted.

Supporters of the initiative argued that "would ease the burdens of victims and other witnesses who must make repeated appearances in criminal proceedings often plagued with delay. One provision, for example, would allow police officers to present hearsay evidence at preliminary hearings, relieving other witnesses of the duty to appear to support such testimony." (*California Elections/Proposition 115: Measure Seeks to Remodel Criminal Justice Procedures*, Los Angeles Times (May 20, 1990) < https://www.latimes.com/archives/la-xpm-1990-05-20-mn-170-story.html > [as of Dec. 19, 2023].)

This bill amends the section authorizing hearsay testimony by law enforcement officers at preliminary hearings which was put into law by Proposition 115. The Legislature may not amend an initiative statute without subsequent voter approval unless the initiative permits such amendment, and then only upon whatever conditions the voters attached to the Legislature's amendatory powers. (*Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1483-1484.) According to the text of Proposition 115, "The statutory provisions contained in this measure may not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors." (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 568-569.)

However, this bill is keyed majority vote, rather than 2/3, and does not require approval by the voters. Notably, previous bills that amended this same section required a 2/3 vote. (See AB 567 (Muratsuchi), Chapter 125, Statutes of 2013 and AB 557 (Karnette) Chapter 18, Statutes of 2005.)

3. Law Enforcement Officer Hearsay Testimony at Preliminary Hearings

When the district attorney files a felony complaint, a defendant is entitled to a preliminary hearing to ensure that there is enough evidence to hold the defendant to answer in the trial court. (Pen. Code, § 859b.) The preliminary hearing must be held within 10 court days of the date of arraignment or the date the defendant plead not guilty, whichever occurs later, unless time has been waived or good cause has been for a continuance has been found. (Pen. Code, § 859b.)

At the preliminary hearing, the prosecution must present sufficient evidence to convince the judge or magistrate that probable cause exists to believe that a crime has been committed and that the defendant committed it. (Pen. Code, § 872.) The prosecution can present live witnesses, hearsay from law enforcement witnesses, or a combination of both. The defense may call witnesses and cross-examine the prosecution's witnesses.

Existing law, pursuant to Proposition 115, approved by California voters on June 6, 1990, authorized probable cause at a preliminary hearing to be found based whole or in part on law enforcement testimony that testifies to another declarant's out of court statement offered for the truth of the matter stated. (Cal. Const., Art. I, sec. 30(b).) Prior to the passage of Proposition 115, victims had to testify at preliminary hearings because their statement made to a law enforcement officer would be hearsay if offered by the officer at a preliminary hearing.

Generally, hearsay evidence is inadmissible because it is inherently less reliable than testimony from a person who has personal knowledge of the events that occurred. When the evidence is in hearsay form, there is not a fair opportunity to challenge what is being said. However, there are many exceptions to the hearsay rule which are oftentimes based on the trustworthiness of the source and the necessity of the information. As stated above, allowing a law enforcement officer with certain qualifications to provide hearsay testimony at a preliminary hearing is one of such exceptions. Allowing a law enforcement officer with certain qualifications to provide hearsay testimony at a preliminary hearing is one of such exceptions. In permitting only officers with lengthy experience or special training to testify regarding out-of-court statements, Penal Code Section 872(b) contemplates that the testifying officer will be capable of using his or her experience and expertise to assess the circumstances under which the statement is made and to accurately describe those circumstances to the magistrate so as to increase the reliability of the underlying evidence. (*Whitman v. Superior Court* (1991) 54 Cal.3d 1063, 1070.)

However, multiple hearsay is not allowed, meaning the officer could relate what another person told them directly, but could not testify as to what a witness told another officer. (*Id.* at p. 1074.)

This bill would additionally allow a law enforcement civilian to provide hearsay testimony to establish probable cause at the preliminary hearing. The law enforcement civilian would also have to have either five years of experience as a law enforcement civilian or have completed a training course equivalent to the training course required for law enforcement officers who testify at preliminary hearings.

The purpose of allowing someone other than the victim to appear at a preliminary hearing is to relieve potential burdens on a victim of a felony who may have to testify at multiple court hearings, which for more serious offenses may involve sensitive or traumatic testimony. While CSOs do perform some of the same enforcement and investigation tasks as sworn officers, their main functions are responding to lower priority calls for service in order to allow law sworn officers to respond to more serious calls. The investigation of a minor offense may turn serious depending on the circumstances, however, this will not always or even often be the case. Thus, in those situations where a lower priority call results in arresting a person for a felony, it is unclear that requiring a sworn officer to re-interview the victim would be overly burdensome on the police department.

4. Confrontation Clause

A criminal defendant has the right under both the federal and state Constitutions to confront the witnesses against him or her. (U.S. Const., 6th Amend.; Cal. Const., art. 1, § 15.) In *Crawford v. Washington* (2004) 541 U.S. 36, 68, the United States Supreme Court held that "where *testimonial* hearsay is at issue," the Sixth Amendments forbids the prosecution from introducing it unless the declarant testifies at trial or the right to confrontation is otherwise honored. "Testimonial evidence" has been defined as including "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." (*Id*. at p. 52.) This description appears to match the hearsay introduced by investigating officers at preliminary hearings.

However, the California Supreme Court has held that the California Constitution does not require confrontation at a preliminary hearing. In doing so, the court recognized that the confrontation clause does not bar all hearsay evidence, and that the United States Supreme Court has repeatedly held that confrontation is a *trial* right. (*Whitman, supra*, at pp. 1077 and 1079.) Recently, the Ninth Circuit reconsidered this proposition in light of *Crawford*, *supra*, and for the same reasons came to the same conclusion. (*Peterson v. California* (9th Cir. 2010) 604 F.3d 1166, 1170.)

5. Brady v. Maryland

In *Brady v. Maryland* (1963) 373 U.S. 83, 87, the United States Supreme Court held that federal constitutional due process creates an obligation on the part of the prosecution to disclose all evidence within its possession that is favorable to the defendant and material on the issue of guilt or punishment. *Brady* evidence includes evidence that impeaches prosecution witnesses, even if it is not inherently exculpatory. (*Giglio v. United States* (1972) 405 U.S. 150, 153-155.) Further, the prosecution's disclosure obligation under *Brady* extends to evidence collected or known by other members of the prosecution team, including law enforcement, in connection with the

investigation of the case. (*In re Steele* (2004) 32 Cal.4th 682, 696-697, citing *Kyles v. Whitley* (1995) 514 U.S. 419, 437.) In order to comply with *Brady*, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." (*Kyles, supra*, 514 U.S. at p. 437; accord, *In re Brown* (1998) 17 Cal.4th 873, 879.)

Evidence is material under *Brady* if there is a reasonable probability that the result of the proceeding would have been different had the information been disclosed. (*United States v. Bagley* (1985) 473 U.S. 667, 682.) The prosecution's duty to disclose exists whether or not the defendant specifically requests the information. (*United States v. Agurs* (1976) 427 U.S. 97, 107.) Failure to disclose evidence favorable to the accused violates due process irrespective of the good or bad faith of the prosecution. (*Brady, supra*, 373 U.S. at p. 87.)

This bill states that any perjured testimony given by a peace office for law enforcement civilian to establish probable cause at a preliminary hearing is subject to disclosure as impeachment evidence to the extent required under *Brady*. This bill also states that this is declarative of existing law.

6. Argument in Support

According to the California Police Chiefs Association, a co-sponsor of this bill:

> Under current law, only sworn officers can deliver hearsay testimony (i.e. introducing statements made by witnesses and victims) during preliminary hearings. However, as more and more agencies are utilizing CSOs, who are non-sworn, take statements and reports for lower-level crimes, this has created complications in court rooms as those CSOs are not given that same authority as sworn officers. As such, victims and witnesses must either testify directly at preliminary hearings, or sworn officers are having to re-investigate the entire case, including re-interviewing victims and witnesses
>
> If a sworn peace officer is tasked with re-investigating and re-interviewing witnesses so they can testify in place of the victim, this takes significant time to complete, and keeps the officer off the street and away from their primary duty of responding to emergency calls. It also requires the victim to relive the crime again through additional interviews. SB 804 solves both these issues by allowing a properly trained or experienced non-sworn public safety officer to testify in the same way on officer may.

7. Argument in Opposition

According to the California Public Defenders Association:

> Under existing law, a police officer can testify at a preliminary hearing to one level of hearsay, including hearsay from a police civilian. Hearsay is generally prohibited because it is unreliable – with the exception for hearsay from trained, experienced law enforcement officers offered at a preliminary hearing. This exception was enacted in 1990 by the voters as part of Proposition 115. Since 1990 both prosecutors and criminal defense lawyers have become accustomed to

some level of hearsay in preliminary hearings. While it may be more convenient for some prosecutors and witnesses, many prosecutors elect to have their witnesses testify at the preliminary hearing to provide the witnesses with practice testifying before trial and to provide the prosecutor with a preview of how the witness will perform.

While not minimizing the value of civilian police employees, they are not sworn, they do not go through a police academy, and they do not have the breadth of experience that sworn officers have. There is a reason preliminary hearing hearsay testimony is limited to sworn officers and there is no reason to broaden it as this bill tries to do. Preliminary hearings remain a critical stage of a criminal proceeding. More hearsay is not needed.

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