SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair
2023 - 2024 Regular

Bill No:	SB 935	**Hearing Date:**	April 23, 2024
Author:	Becker		
Version:	March 20, 2024		
Urgency:	No	**Fiscal:**	Yes
Consultant:	SC		

Subject: ***Disorderly conduct: distribution of intimate images***

HISTORY

Source: Author

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

Support: Los Angeles District Attorney's Office

Opposition: None known

This Analysis Reflects the Bill as Proposed to Be Amended

PURPOSE

The purpose of this bill is to authorize an honorably separated police officer to provide hearsay testimony at a preliminary hearing.

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), italics added for emphasis.)

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), italics added for emphasis.)

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), italics added for emphasis.)

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 would additionally allow an honorably *separated* law enforcement officer to provide hearsay testimony at the preliminary hearing.

COMMENTS

1. Need for This Bill

According to the author of this bill:

> In 2005, California enacted AB 557 (Karnette) (Ch. 18/Statutes of 2005) which allowed an honorably retired peace officer to testify to hearsay statements at a preliminary hearing. For nearly 20 years this statute operated with no controversies or problems. However, a recent case brought to light a technical deficiency in current law.
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> The technical deficiency is not all peace officers who leave their position under honorable conditions are actually "honorably retired". According to the Senate Labor, Public Employment and Retirement Committee staff there is conflicting definitions of what it means to be retired. One definition requires a retired person to be collecting a pension/retirement income. The other definition only requires that a person be eligible to collect a pension/retirement income but does not

require the pension/retirement income to actually be collected in order to be considered retired.

In a recent case, a peace officer resigned their position with the LAPD after a 20+ year career. The former officer has not reached the age of 50 yet however so they are not eligible to collect their police pension. There was no disciplinary reasons pending that caused the individual to resign their position. At the time of their resignation the officer was serving as a detective. The decision to resign was rather abrupt however and did not provide enough time for another detective to take over the pending investigations. This detective was needed at a preliminary hearing and the prosecutor wanted the individual to provide Prop 115 testimony at the hearing. However because the former detective wasn't collecting their pension yet there was an issue whether or not the former detective was "honorably retired". In order to remedy this issue, it was determined that Penal Code Section 872(b) should include a reference to an "honorably retired or honorably separated" peace officer.

2. 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. 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, subd. (b) contemplates that the testifying officer will be capable of using their 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.)

Existing law authorizes a current law enforcement officer as well as an honorably retired law enforcement officer to provide hearsay testimony at a preliminary hearing if that officer meets the length of service and training requirements in the statute. This bill would additionally allow an honorably separated law enforcement officer to provide hearsay testimony at a preliminary hearing.

According to the proponent of this bill, not all peace officers who leave their position under honorable conditions are actually "honorably retired" because there are conflicting definitions of what it means to be retired. One definition requires a retired person to be collecting a pension or retirement income. The other definition only requires that a person be eligible to collect a pension or retirement income but does not require the pension or retirement income to actually be collected in order to be considered retired.

3. 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.)

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