

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 1972 (Ward)
Version: May 19, 2022
Hearing Date: June 28, 2022
Fiscal: Yes
Urgency: No
TSG

SUBJECT

Grand juries

DIGEST

This bill proposes several measures designed to increase diversity in the demographic composition of grand juries, most notably through a significant increase in compensation and through a system for monitoring and reporting demographic information about grand juries.

EXECUTIVE SUMMARY

Grand juries play two key roles in our legal system. They determine whether prosecutors have probable cause to proceed in some criminal cases and they conduct investigations into local government operations. Currently, most grand jury service is voluntary. It comes with a meager per diem. As a result, the composition of grand juries tends to be older, whiter, and more affluent than the community they serve and case judgment upon. This bill proposes several measures designed to increase demographic diversity on grand juries. Specifically, the bill would: (1) increase grand jurors' per diem to 70 percent of the county daily median income; (2) require the compilation and reporting of information regarding the demographic composition of grand juries; (3) allow courts to take demographic composition into account when making grand juror retention or recruitment decisions; and (4) authorize courts to include information about grand jury service as part of their trial jury summons.

The bill is sponsored by Western Center on Law and Poverty. Support comes from criminal defense attorney advocacy organizations who emphasize the importance of grand jury diversity to the delivery of criminal justice and the community's faith in the criminal justice system. Opposition comes from counties and a grand juror advocacy organization who like the idea but have concerns about the cost. The bill passed out of the Senate Public Safety Committee by a vote of 4-0. If the bill passes out of this Committee, it will next be heard in the Senate Appropriations Committee.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Requires each county to have a grand jury drawn and summoned at least once a year. (Cal. Const., art. I, §23.)
- 2) Defines a “grand jury” as a body of the required number of persons drawn from among the citizens of the county before a court of competent jurisdiction and sworn to inquire of public offenses committed or triable within the county. (Pen. Code § 888.)
- 3) Provides that a person is competent to act as a grand juror if the person possesses the following qualifications:
 - a) the person is a citizen of the United States;
 - b) the person is over the age of 18;
 - c) the person is a resident of the state and of the county or city and county for one year immediacy before being selected;
 - d) the person is in possession of their natural faculties, or ordinary intelligence, and is of sound judgment and fair character; and
 - e) the person has proficient and sufficient knowledge of the English language. (Pen. Code § 893.)
- 4) Provides that the grand jury of a county may inquire into all public offenses committed or triable within the county, and present them to the court by indictment. (Pen. Code § 917.)
- 5) Provides that the compensation for grand jurors is \$15 a day for each day’s attendance, and the mileage reimbursement applicable to county employees for each mile actually traveled in attending court, unless a higher fee or rate of mileage is provided by statute, county, or city ordinance. (Pen. Code § 890.)
- 6) Authorizes the board of supervisors in each county to specify by ordinance the compensation and mileage for members of the grand jury in that county. (Gov. Code § 68091.)
- 7) Directs courts to select the grand jurors by personal interview for the purpose of ascertaining whether they possess the qualifications to be competent to act as a grand juror. (Pen. Code § 895(a).)
- 8) Requires the grand jurors to be selected from the different wards, judicial districts, or supervisorial districts of the respective counties in proportion to the number of inhabitants therein. In counties with a population of 4,000,000 and over, the grand jurors may be selected from the county at large. (Pen. Code § 899.)

- 9) Authorizes the superior court to name up to 10 regular carryover jurors who served on the previous grand jury and who consent to serve for a second year and encourages the court to consider carryover grand jury selections that ensure broad-based representation. (Pen. Code § 901(a) & (b); Cal. Rules of Court, Standard 10.50(c).)
- 10) Requires the court to list the persons selected to serve as grand jurors and to place the list in the possession of the jury commissioner. (Pen. Code § 895(b).)
- 11) Requires the jury commissioner to file the grand juror list in the jury commissioner's office and have the list, which shall include the name of the judge who selected each person on the list, published one time in a newspaper of general circulation in the county. (Pen. Code § 900.)
- 12) Establishes an alternative grand jury selection procedure, which requires the jury commissioner, annually, to furnish a list of persons qualified to serve as grand jurors to the judges of the court. (Pen. Code §§ 903.1, 903.3.)
- 13) Provides that the judges shall examine the list of persons recommended by the jury commissioner for the grand jury and may select persons from the list to serve as grand jurors. (Pen. Code § 903.3.)
- 14) Provides that judges are not required to select any name from the list returned by the jury commissioner and may in their judgment, make every, or any selection from among the body of persons in the county suitable and competent to serve as jurors. (Pen. Code § 903.4.)
- 15) States that judges who nominate persons for grand jury selection are encouraged to select candidates from a list returned by the jury commissioner or to otherwise employ a nomination procedure that will ensure broad-based representation from the community. (Cal. Rules of Court, Standard 10.50(d).)
- 16) Provides that no challenge may be made to the panel of the grand jurors or to an individual grand juror, except when made by the court on the grounds that the juror is not qualified to act as a grand juror. (Pen. Code §§ 909, 910.)
- 17) Requires the jury commissioner to mail trial jurors jury summonses, as specified. (Code Civ. Proc. § 207.)
- 18) States that trial summonses shall contain the date, time, and place of appearance required of the prospective juror, and additional juror information as deemed appropriate by the jury commissioner. (Code Civ. Proc. § 210.)

This bill:

- 1) Provides that a jury summons may also contain information on how to become a juror on a grand jury.
- 2) Increases the fees for grand jurors to equal to seventy percent of the county median daily income for each day's attendance as a grand juror.
- 3) States that the list of persons selected and required to serve as grand jurors shall contain the person's gender, age, race or ethnicity, and residential zip code or supervisorial district of the respective.
- 4) Provides that the jury commissioner shall file the list of grand jurors and it shall include the name of the judge. A separate list with the name of the judge and the name of all the jurors selected should also be kept.
- 5) Provides that in addition to naming an additional 10 regular jurors for a grand jury who were on the previous jury this bill also allows the selection of those that are among the list of jurors not selected in an effort to balance the demographic diversity to reflect the general population of the country.
- 6) Requires that in addition to the list returned to the judges by the jury commissioner of the list of prospective jurors, the bill specifies that the list shall contain the person's name, gender, age, race, or ethnicity, and zip code and that a separate list of prospective grand jurors, carry-over grand jurors, persons recommended by the jury commissioner, persons selected by the court, and certified impaneled grand jurors which shall also contain the demographic information.
- 7) Provides that each superior court shall by March 15 of each year, starting in 2024, provide Judicial Council with the list of aggregate data of prospective regular grand jurors, any carry-over grand jurors, persons recommended by the jury commissioner, persons selected by the court, and certified impaneled grand jurors that contains the person's gender, age, race, or ethnicity, and residential zip code or supervisorial district of the respective counties, as well as the name of the judge who selected each person. Judicial Council shall report the information to the Legislature.

COMMENTS

1. The role of grand juries

Grand juries serve both criminal and civil functions within the legal system in California. On the criminal side, grand juries are intended to protect citizens against unfounded criminal prosecutions. (*People v. Flores* (1969) 276 Cal.2d 61, 65.) Before a prosecution can begin, a grand jury must conclude that it is probable that a crime has

been committed and that the accused is the guilty party. (*Branzburg v. Hayes* (1972) 408 U.S. 665, 687-90.)

On the civil side, grand jurors also have authority to investigate and report on the operations of local government. (*People v. Cohen* (1970) 12 Cal.App.3d 298, 311.)

2. How grand jurors are selected

As explained by the Senate Public Safety Committee in its analysis of this bill:

During the month preceding the beginning of the fiscal year of each county, the superior court of the county is required to estimate the number of grand jurors required for the year. Then, judges select the jurors through personal interviews in order to determine whether they possess the statutory qualifications. The selections must be made of persons who are not exempt and who are suitable and competent to serve. They must be selected from different wards, judicial districts, or supervisorial districts in proportion to the number of inhabitants in the county.

The judges then make a list of persons that they selected as grand jurors. The list is given to the jury commissioner, and filed in the commissioner's office. When the jury commissioner receives the list of persons selected by the judges, the commissioner must have it published once, in a newspaper of general circulation, naming each person selected and designating the judges who selected each of the listed persons.

Next, the commissioner has a choice of depositing the names on separate slips of paper for the drawing, or of depositing slips containing numbers that correspond to the names on the list into a grand jury box. The court orders a drawing, designating the number of names to be drawn and the time of the drawing. The names are then drawn by the jury commissioner. The persons whose names are drawn are summoned to serve as grand jurors. Before accepting a person drawn, the court must be satisfied that the person is qualified to serve as a grand juror.

An alternative procedure is authorized by Penal Code section 903.1, *et seq.* The jury commissioner, must "diligently inquire" of the qualifications of persons residing in the county who may be summoned for grand jury duty. Then, under instructions of the court, the jury commissioner lists the names of the potential jurors and submits the list to the judges. The judges can pick the jurors

from the list, and they may disregard any of the recommendations and make their own selections.

3. Does current composition of grand juries reflect the demographics of the broader population that the grand jury serves and upon whom they pass judgment?

Current law requires that judges selecting members of the grand jury do so based on the different wards, judicial districts, or supervisorial districts of the respective counties in proportion to the number of inhabitants therein. (Pen. Code § 899.) The lone exception to this rule is any county with a population of 4,000,000 or more; a category that, in practice, only includes Los Angeles County. (Ibid.)

While these rules ensure some geographic diversity in the composition of any grand jury apart from those in Los Angeles County, geographic diversity does not necessarily result in demographic diversity. Since there is only meager compensation available for serving on a grand jury, the author and sponsor of this bill state that as a practical matter only those citizens who can afford to go essentially unpaid for significant stretches of time will be able to serve on a grand jury. Given unequal distributions of wealth in California, the upshot is that grand jurors tend to be older, whiter, and more affluent than the population they serve and on whom they cast their judgments.

4. Proposed measures for monitoring and improving grand jury diversity

In order to promote grand jury composition that more closely reflects the demographic makeup of the community that the grand jury serves, this bill proposes four interrelated measures.

a. Increase compensation

In California, grand jurors receive just \$15 per day for each day's attendance plus reimbursement for the miles they travel to court for that purpose. (Pen. Code § 890.) The per diem amount is not pegged to inflation. Obviously, \$15 is insufficient to enable anyone to subsist on it. As a practical matter, therefore, only Californians' with sufficient savings or sources of income other than work will be able to afford to serve on a grand jury. California law does not require employers to pay employees for time lost from work due to jury service. (*People v. Kwee* (1995) 39 Cal.App.4th 1, 4.)

By comparison, federal grand jurors are paid \$50 a day and can get an additional \$10 per day after serving 45 days on a grand jury. Jurors at the federal level also receive reimbursement for their reasonable transportation expenses and parking fees. If they

must stay overnight in order to carry out their jury services, federal jurors receive money to cover the cost of their meals and lodging.¹

As a method for increasing demographic diversity among California grand jurors, this bill proposes a significant increase in grand juror compensation. Specifically, the bill would peg each grand juror's pay at 70 percent of the daily median income for the county in question.

Writing in opposition to the bill, the California Grand Jurors' Association mostly expresses concerns about the cost that this increase in compensation would involve. However, they also add that greater payment to grand jury members might have an effect on how grand jurors approach the role:

The jurors serve because they want to volunteer their time [...] to promoting the public good, through analyzing the operations of local governmental entities and developing recommendations on how those entities can operate more efficiently and with greater transparency and accountability. Significantly increasing the per diem could turn grand jury service into just another job.

b. Monitor and report grand juror demographics

Next, the bill proposes a mechanism for increasing transparency regarding the demographic makeup of California grand juries.

Currently, courts must maintain lists of the grand juror candidates who were considered and those who are selected, but this information does not include anything about demographics. Under this bill, courts would be required to begin compiling demographic information about who gets considered for a spot on the grand jury, who gets selected, and by what judge. Specifically, the courts would begin to gather information about each person's gender, age, race or ethnicity, and residential zip code or supervisorial district. Then, beginning in 2024, each court would have to report this information each year, in aggregate, to the Judicial Council. The Judicial Council would compile this information and present it to the Legislature. In this way, both the courts and the Legislature could monitor the demographic diversity of grand juries, spot any concerning patterns in the data, and develop appropriate corrective action if necessary.

Although it involves drawing distinctions based on legally protected characteristics, the courts have indicated that demographic data collection of this kind does not raise constitutional concerns.

¹ *Juror Pay*. U.S. Courts <https://www.uscourts.gov/services-forms/jury-service/juror-pay#:~:text=Grand%20Jury,transportation%20expenses%20and%20parking%20fees> (as of Jun. 19, 2022).

Accurate and up-to-date information is the sine qua non of intelligent, appropriate legislative and administrative action. Assuming that strict scrutiny is required, a monitoring program designed to collect and report accurate and up-to-date information is justified by the compelling governmental need for such information. So long as such a program does not discriminate against or grant a preference to an individual or group, Proposition 209 is not implicated. (*Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 46-47.)

Here, the data collection and reporting program does not discriminate and merely provides the courts and the Legislature with accurate, up-to-date information about the demographic composition of grand juries across the state.

c. Encourage consideration of demographic information in grand juror recruitment and retention decisions

Current law authorizes the superior courts to name up to 10 regular carryover jurors who served on the previous grand jury and who consent to serve for a second year. (Pen. Code § 901(a) & (b). The California Rules of Court go on to encourage courts to utilize these carryover grand jury selections to help ensure broad-based representation. (Cal. Rules of Court, Standard 10.50(c).) This bill would enshrine that encouragement in statute. More specifically, the bill suggests that the courts should make carryover grand jury selections “in an effort to balance demographic diversity to reflect the general population of the county.”

This provision could be read to suggest that courts should take grand jurors’ race, ethnicity, gender, and other protected characteristics into account in their decision-making, especially in light of the fact that the bill also equips courts with the requisite information for doing so. However, nothing in the language in the bill requires a set-aside or quota based on these characteristics of the kind that courts have generally found to violate equal protection doctrine, even when employed as a mechanism to promote diversity. (See, e.g., *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16.)

Moreover, in the context of grand jury selection, a court’s failure to ensure demographic diversity, including characteristics like gender and ethnicity, could cause constitutional problems of its own. Criminal suspects are entitled to have their cases heard by a grand jury selected in such a way that it “does not systematically exclude, or substantially underrepresent, the members of any identifiable group in the community.” (*People v. Newton* (1970) 8 Cal.App.3d 359, 388. See also, *Alexander v. Louisiana* (1972) 405 U.S. 625 (no adequate explanation for disproportionately low number of Black persons on a grand jury); *Castaneda v. Partida* (1977) 430 U.S. 482 (prima facie case of discrimination was established by evidence that, although Mexican-Americans comprise 79 percent of county’s population, the average percentage of Spanish surnamed grand jurors over a

10-year period was 39 percent); *People v. Navarette* (1976) 54 Cal.App.3d 1064 (underrepresentation of women on grand jury was discriminatory even though there was no apparent attempt to discriminate in selection process.) In light of these rulings, not only would it appear permissible for courts to consider demographic information, including protected characteristics, when developing the composition of their grand juries; it may be constitutionally necessary for them to do so.

- d. *Authorize the inclusion of information about how to become grand juror in trial jury summons*

When a citizen is called for jury duty, that citizen receives a summons from the Jury commissioner in the mail. (Code Civ. Proc. § 207.) That summons includes basic information about what is required of the prospective juror: when and where the prospective juror must appear and any other information that the jury commissioner deems appropriation. (Code Civ. Proc. § 210.) In the hope of spreading awareness about the possibility and importance of serving on a grand jury, this bill authorizes jury commissioners to include information about that process as part of what prospective trial jurors receive with their summons.

5. Expansion of concept to trial juries as well?

Trial juries – sometimes referred to as “petit juries” to distinguish them from grand juries – are the panels of citizens who receive instructions about the law from the judge, hear the evidence presented by the parties in a trial, and return a verdict in the case. This bill addresses grand jury demographic composition only; it does not touch on petit juries. Writing in support of this measure, the California Attorneys for Criminal Justice suggest:

If it is possible, CACJ would respectfully request that the component of the bill touching on the collection of demographic data by the jury commissioner be expanded to the collection of demographic data for petit juries as well. There have been a number of efforts in recent years to improve the diversity of petit juries, but is difficult to assess progress without the uniform collection of demographic data by the jury commissioner. Moreover, to enforce new laws prohibiting discrimination in jury selection, see Code of Civil Procedure 231.7, it is critical that the parties obtain data on petit juror gender, race, and ethnicity. However, direct questions regarding jurors’ race, ethnicity and gender in open court “may be offensive to some jurors and thus are not ordinarily asked on voir dire.” *People v. Motton* (1985) 39 Cal.3d 596, 604. Absent a juror questionnaires, which are not provided in most cases, it is thus often difficult to track critical demographic data necessary to enforce anti-discrimination laws. Uniform

collection of demographic data at the jury commissioner level is less likely to offend jurors and would be a critical step in improving the diversity of juries in this state.

AB 1981 (Lee, 2022), which this Committee passed last week, touches on the demographic makeup of trial juries contains elements intended to try to make those trial juries more reflective of the communities upon which they cast judgment. The proposals in this bill go further than AB 1981, however, particularly in relation to the amount of juror compensation and the collection of demographic data. Because there are more trial jurors than grand jurors, expanding the concepts in this bill to trial juries might well be cost-prohibitive. Nonetheless, the Legislature may wish to consider applying some of the concepts in this bill to trial juries in future legislation.

6. Arguments in support of the bill

According to the author:

Grand juries play a crucial role in California's criminal justice system and help provide municipal oversight. However, they are not always representative of the demographics of a particular area. Currently, the role of a grand juror is largely voluntary with very little compensation being given daily for their civic service. This leads to disproportionate representation within courtrooms. AB 1972 will help increase transparency around the process of jury selection and ensure jurors are fairly compensated for their time.

As sponsor of the bill, Western Center on Law and Poverty writes:

Juries play a critical role in the lives of Californians involved in the legal system — disproportionately people of color and those living in poverty who are over-policed. AB 1972 recognizes the influence of grand juries on the public's trust and confidence in our courts and makes necessary changes to increase the representation of low-income, historically discriminated against communities. [Footnotes omitted.]

In support, the California Public Defenders Association writes:

As public defenders and members of the community, we have watched as communities have been devastated and outraged by the decisions of all-white grand juries that failed to reflect the economic and racial makeup of the communities that they were selected to serve. Making sure that grand juries reflect the demographics of the local county would lead to greater confidence in the decisions

reached by grand juries, and ultimately in the criminal justice system.

7. Arguments in opposition to the bill

In opposition to the bill, the California Grand Jurors Association writes:

The concept of an increased per diem for grand jurors is laudatory. Paying higher per diems will likely expand the pool of citizens who are able to devote a year of their lives to grand jury service, thus increasing grand juries' economic and racial diversity. But this bill is based on serious misunderstandings of the activities and workloads of county grand juries. If the costs of this bill are not fully funded, the probable result will be that grand juries across the state will conduct fewer, less thorough investigations, thus decreasing the effectiveness of California's grand juries in their capacity as the watchdog over local government operations.

In further opposition to the bill, the California State Association of Counties, the Urban Counties of California, and the Rural County Representatives of California, collectively write:

We appreciate the intent of this measure, to encourage increased diversity on grand juries, but must respectfully oppose it due to the significantly increased costs it would impose on counties. [...] While the state's revenues have exceeded expectations and historical precedent year after year, in most counties per capita revenues have never recovered from the ravages of the Great Recession, in real dollars. We therefore request the provisions of the bill providing for increased compensation apply only in years the state budget has provided a sufficient appropriation for the purpose.

SUPPORT

Western Center of Law and Poverty (sponsor)
California Attorneys for Criminal Justice
California Public Defenders Association

OPPOSITION

California Grand Juries Association
California State Association of Counties
Rural County Representatives of California
Urban Counties of California

RELATED LEGISLATION

Pending Legislation: AB 1981 (Lee, 2022) seeks to increase diversity and participation in trial juries through increases in travel reimbursement, the provision of free public transit to and from jury duty, and a pilot study on the impact of increasing juror compensation generally. AB 1981 is currently pending consideration before the Senate Appropriations Committee.

Prior Legislation: None known.

PRIOR VOTES:

Senate Public Safety (Ayes 4, Noes 0)

Assembly Floor (Ayes 53, Noes 17)

Assembly Appropriations Committee (Ayes 12, Noes 4)

Assembly Public Safety Committee (Ayes 5, Noes 2)
