

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: CS/SB 234

INTRODUCER: Judiciary Committee and Senators Polsky and Martin

SUBJECT: Disclosure of Grand Jury Testimony

DATE: January 9, 2024

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	Fav/CS
2.	<u>Cellon</u>	<u>Stokes</u>	<u>CJ</u>	Favorable
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Technical Changes

I. Summary:

CS/SB 234 amends s. 905.27, F.S., that generally prohibits the disclosure of testimony or evidence received by a grand jury. There are currently three exceptions to this general prohibition: ascertaining whether the testimony is consistent with the testimony given by a witness before the court, determining whether a witness is guilty of perjury, or furthering justice.

The bill amends the third exception of “furthering justice” by expanding that concept to include furthering a public interest when the disclosure of testimony is requested by the media or an interested person. The testimony may be disclosed if:

- The subject of the grand jury inquiry is deceased;
- The grand jury inquiry is related to criminal or sexual activity between a subject of the grand jury investigation and a person who was a minor at the time;
- The testimony was previously disclosed by a court order; and
- The state attorney is provided notice of the request.

Even if these conditions are met, the court may limit the disclosure of testimony, which may include redacting parts of the testimony.

The bill also adds the custodian of a grand jury record to the list of persons in statute who may not disclose the testimony of a witness examined before a grand jury or disclose other evidence received by the grand jury.

The bill reenacts s. 905.17(1) and (2), F.S.

The Office of the State Courts Administrator expects a minimal fiscal impact to the State Court System from this bill. See Section V. Fiscal Impact Statement.

The bill takes effect July 1, 2024.

II. Present Situation:

The Grand Jury

“There is a tradition in the United States, a tradition that is “older than our Nation itself,” that proceedings before a grand jury shall generally remain secret. ... The rule of secrecy, however, is not without exceptions.”¹

Background

The state court system has two types of juries: grand juries and petit juries. While a petit jury, also known as a trial jury, weighs evidence and returns a verdict of guilt or innocence after hearing from both sides, a grand jury does not hear from both sides. A grand jury only hears witnesses presented by a state attorney and determines whether there is sufficient evidence to formally indict, or charge, an accused person with a crime.² In other words, the grand jury initiates the criminal prosecution.³

The modern grand jury is rooted in ancient tradition. It originated in England centuries ago and was brought to this country by the early colonists. A grand jury was formally recognized in the Magna Carta in 1215 but can be traced even earlier to 997 A.D., when an Anglo-Saxon king, unfortunately named “Ethelred the Unready,” tasked an investigative body to perform “its duty by accusing no innocent person and sheltering no guilty one.”⁴

The State Constitution

According to the State Constitution, no one may be tried for a capital crime, a crime punishable by death, unless he or she is indicted by a grand jury.⁵ This is the only instance in which a grand jury indictment is required. For all other crimes, the state attorney may initiate criminal charges.

¹ *CA Florida Holdings, LLC v. Aronberg*, 360 So. 3d 1149, 1153 (Fla. 4th DCA 2023) (quoting *In re Petition of Craig*, 131 F.3d 99, 101 (2d Cir. 1997)).

² The Supreme Court Committee on Standard Jury Instructions in Criminal Cases, *Chapter 30 Florida Grand Jury Handbook*.

³ Gregg D. Thomas, Carol Jean LoCicero, and Linda R. Norbut, The Florida Bar, *The Reporters’ Handbook on Law-Related Topics: The Grand Jury* (Revised Aug. 1, 2020) <https://www.floridabar.org/news/resources/rpt-hbk/#1619193085264-69d9d83a-2799>.

⁴ The Supreme Court Committee on Standard Jury Instructions in Criminal Cases, *supra* note 2.

⁵ FLA. CONST. art. I, s. 15(a). The full text of section 15 is “No person shall be tried for capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial.”

Composition and Investigative Power

A grand jury is composed of at least 15 and no more than 21 citizens who have been summoned and empaneled by a circuit court judge.^{6,7} In order to return an indictment, at least 12 grand jurors must agree.⁸ Although the grand jury is considered an agency of the circuit court, it works separately and independently from the court.⁹

To aid a grand jury in its broad power of investigation, it is given the authority to subpoena witnesses through the state attorney.¹⁰ While grand juries primarily focus on capital cases, they may also be used to investigate controversies involving the alleged illegal acts of public officials.¹¹

The Work of the Grand Jury

Secrecy

Grand jury evidence is rarely, if ever, disclosed to the public. By shielding the grand jury's work from public scrutiny, grand jurors can speak freely with one another, witnesses who appear may speak openly without fear of being identified, a potential defendant who is not aware of the proceedings is prevented from destroying evidence that could be damaging, and the reputation of a potential defendant who is not indicted is not damaged. The majority of a grand jury's work is focused on listening to witnesses and deciding whether the evidence presented justifies an indictment. For the proceedings to function as they are designed, it is essential that the proceedings are kept secret. Section 905.24, F.S., states:

Grand jury proceedings are secret, and a grand juror or an interpreter appointed pursuant to s. 90.6063(2) shall not disclose the nature or substance of the deliberations or vote of the grand jury.

Consistently and similarly applying the need for secrecy, s. 905.25, F.S., states:

A grand juror shall not be permitted to state or testify in any court how she or he or any other grand juror voted on any matter before them or what opinion was expressed by herself or himself or any other grand juror about the matter.

Who May Attend a Grand Jury Session

To underscore the importance of secrecy, the statutes provide the limited number and specific persons who may be present during a session. No person may be present at the grand jury sessions except:

- The witness under examination;
- One attorney who represents the witness and advises and consults the witness;

⁶ Section 905.01(1), F.S.

⁷ The Supreme Court Committee on Standard Jury Instructions in Criminal Cases, *supra* note 2.

⁸ Section 905.23, F.S.

⁹ The Supreme Court Committee on Standard Jury Instructions in Criminal Cases, *supra* note 2.

¹⁰ Section 905.185, F.S.

¹¹ Thomas, et al., *supra* at note 3.

- The state attorney and her or his assistant state attorneys;
- The court reporter or stenographer; and
- The interpreter.¹²

No one is allowed to be present while the grand jurors are deliberating or voting, except an interpreter who may be present after he or she swears to refrain from making any personal interjections and who also commits to uphold the secrecy of the proceeding.¹³

Confidential Nature of Notes and Transcripts

The notes, records, and transcripts of the stenographer or court reporter are filed with the clerk who is charged with keeping them in a sealed container that is not subject to public inspection. They are confidential and exempt from the disclosure requirements of the public records laws, and may be released by the clerk *only* upon the request by a grand jury for use by the grand jury or upon order of the court pursuant to s. 905.27, F.S.¹⁴

Grand Jury Testimony May Not Be Disclosed

Section 905.27(1), F.S., prohibits a grand juror, state attorney, assistant state attorney, reporter, stenographer, interpreter, or any other person who appears before the grand jury from disclosing the testimony of a witness who was examined before the grand jury or any other evidence received by it except when required by a court to disclose the testimony for the purpose of:

- Ascertaining whether it is consistent with the testimony given by the witness before the court;
- Determining whether the witness is guilty of perjury; or
- Furthering justice.¹⁵

Section 905.27(2), F.S., states that it is unlawful for any person knowingly to publish, broadcast, disclose, divulge, or communicate to any other person, or knowingly to cause, or permit to be published, broadcast, disclosed, divulged, or communicated to any other person, in any manner whatsoever, any testimony of a witness examined before the grand jury, except when the testimony is or has been disclosed in a court proceeding.

When the court orders the disclosure of the grand jury testimony for use in a *criminal* case it may be disclosed:

- To the prosecuting attorney in the court where the case is pending.
- By the prosecuting attorney to his or her assistants, associates, and employees.
- To the defendant.
- To the defendant's attorney.
- To the defendant's attorney to his or her legal associates and employees.¹⁶

¹² Section 905.17(1), F.S.

¹³ Section 905.17(3), F.S.

¹⁴ Section 905.17(1), F.S.

¹⁵ Section 905.27(1), F.S.

¹⁶ Section 905.27(2)(a), F.S.

When the court orders the disclosure of the grand jury testimony for use in a *civil* case, it may be disclosed to all parties to the case and their attorneys, and by the attorneys to their legal associates and employees.¹⁷

The unlawful disclosure of grand jury testimony is a first degree misdemeanor and constitutes criminal contempt of court.¹⁸

Jeffrey Epstein Grand Jury Testimony, 2006

In 2006, Jeffrey Epstein was investigated by the Palm Beach Police Department for allegedly sexually abusing five young girls, all under the age of 16 years, at his mansion. In addition, several other young girls who were not yet 18 years old also alleged that they were sexually abused by Jeffrey Epstein at his mansion.¹⁹

The Palm Beach Police Department contacted State Attorney Barry Krischer and asked that he charge Mr. Epstein with four counts of unlawful sexual activity with a minor and one count of lewd and lascivious molestation. If convicted of those charges, Mr. Epstein would have been sent to prison for decades. Instead of charging Jeffrey Epstein as the police recommended, State Attorney Krischer chose an unusual legal maneuver and presented the case to a grand jury. The grand jury returned only one charge, that of soliciting a prostitute. Mr. Epstein was arrested after the indictment and charged with one felony count of soliciting a prostitute.²⁰

According to the Palm Beach Post, this was the first time a sex crime case was presented to a grand jury by State Attorney Krischer's office. Although 13 teenage girls gave virtually identical accounts of their interactions with Mr. Epstein, the state attorney's office called only one 14-year-old girl to testify before the grand jury.²¹

Litigation

Trial Court

In November 2019, The Palm Beach Post sued the then current State Attorney, who was no longer Mr. Krischer, and the Clerk and Comptroller of Court in an effort to obtain a court order to unseal the grand jury proceedings and reveal why the grand jury returned only minimal charges. Because the grand jury's proceedings are private, The Post relied on s. 905.27(1), F.S., which allows a judge to disclose testimony for the purpose of "furthering justice."

¹⁷ Section 905.27(2)(b), F.S.

¹⁸ Section 905.27 (4) and (5), F.S. This first degree misdemeanor is punishable by up to 1 year in the county jail and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

¹⁹ Holly Baltz, THE PALM BEACH POST, *Why Was Jeffrey Epstein in 2006 Charged Only with Picking Up a Prostitute? Where We Stand* (Feb. 9, 2023) <https://www.palmbeachpost.com/story/news/2023/02/09/palm-beach-post-lawsuit-to-unseal-jeffrey-epstein-grand-jury-records/69867241007/>.

²⁰ *Id.*

²¹ Jane Musgrave, John Pacenti, and Lulu Ramadan, THE PALM BEACH POST, *How the Epstein Saga Could've Been Ended Years Ago: To His First Prosecutors, Victims Were Prostitutes* (Nov. 20, 2019). <https://www.usatoday.com/story/news/2019/11/20/jeffrey-epstein-saga-couldve-been-ended-attorney-barry-krischer/4237757002/>.

The Palm Beach Post, through its attorney, argued in part:

Access to the grand jury materials will allow the public to determine whether the grand jury process, and the secrecy that comes with it, was used to further justice or, instead, operated to shield Epstein and his co-conspirators from the consequences of their criminal activities.²²

In December 2021, the circuit judge determined that the court’s “inherent authority” had its boundaries and its authority to release the records was constrained by s. 905.27, F.S. Accordingly, the publisher’s access to the grand jury materials was denied and the documents and records would not be released.

In the final order the trial judge said:

Perhaps the circumstances presented above will induce the Legislature to amend section 905.27 to grant the courts additional authority or leeway in ruling on unique cases such as this one.²³

The Palm Beach Post appealed the ruling to the Fourth District Court of Appeal.

Appellate Court

The Fourth District Court of Appeal issued a decision on May 10, 2023. The appellate court held that the trial court was required to determine whether the disclosure of the requested grand jury proceedings would have furthered justice. In support of its conclusion, and after citing related cases on point, the court stated:

We extract from these decisions the court’s inherent authority to disclose grand jury materials despite the traditional rule of secrecy. In fact, this is contemplated and supported by section 905.27’s language.²⁴

The appellate court reversed the case and remanded it for further proceedings. The trial court was directed to conduct an in-camera inspection of the materials and decide whether disclosure of the grand jury materials would further justice. The trial court was instructed to evaluate the materials guided by the following non-exhaustive criteria cited in an earlier federal decision dealing with the disclosure of materials reviewed by a federal grand jury:

- The identity of the party seeking disclosure;
- Whether the defendant to the grand jury proceeding or the government opposes the disclosure;
- Why disclosure is being sought in the particular case;

²² *CA Florida Holdings, LLC, Publisher of The Palm Beach Post, v. Dave Aronberg, as State Attorney of Palm Beach County, Florida; Sharon R. Bock, as Clerk and Comptroller of Palm Beach, County, Florida*, Motion of Plaintiff for Summary Judgment, p. 3 (April 22, 2021).

²³ *CA Florida Holdings, LLC, Publisher of The Palm Beach Post, v. Dave Aronberg, as State Attorney of Palm Beach County, Florida; Sharon R. Bock, as Clerk and Comptroller of Palm Beach, County, Florida*, Final Judgment, p. 12 (Dec. 20, 2021).

²⁴ *CA Florida Holdings, LLC v. Aronberg*, 360 So. 3d 1149, 1153 (Fla. 4th DCA 2023).

- What specific information is being sought for disclosure;
- How long ago the grand jury proceedings took place;
- The current status of the principals of the grand jury proceedings and that of their families;
- The extent to which the desired material – either permissibly or impermissibly – has been previously made public;
- Whether witnesses to the grand jury proceedings who might be affected by disclosure are still alive; and
- The additional need for maintaining secrecy in the particular case in question.²⁵

On June 9, 2023, the trial court ordered the Clerk of the Circuit Court in Palm Beach County to provide him the materials presented to the grand jury in the Jeffrey Epstein case.²⁶ When the materials were delivered, the court determined that the materials were audio recordings and needed to be transcribed. On June 29, 2023, the court ordered the transcripts with the costs being paid for by the plaintiff seeking the information.²⁷ To date, the court has not released any testimony from the Epstein grand jury.

III. Effect of Proposed Changes:

The bill amends s. 905.27, F.S., which generally prohibits the disclosure of testimony or evidence received by a grand jury. There are currently three exceptions to this general prohibition that allow certain persons to disclose such testimony or evidence when a court requires the disclosure for one or more of the following purposes: ascertaining whether the testimony is consistent with the testimony given by a witness before the court, determining whether a witness is guilty of perjury, or furthering justice.²⁸

The bill amends the third exception of “furthering justice”²⁹ by creating paragraph (c) of s. 905.27(2), F.S., to include furthering a public interest when the disclosure of testimony is requested by the media or an interested person regardless of whether the purpose of disclosure is for use in a criminal or civil case. The testimony may be disclosed if:

- The subject of the grand jury inquiry is deceased;
- The grand jury inquiry is related to criminal or sexual activity between a subject of the grand jury investigation and a person who was a minor at the time;
- The testimony was previously disclosed by a court order; and
- The state attorney is provided notice of the request.

The bill further provides that even if the listed requirements are met, the court may limit the disclosure of testimony, including redacting certain testimony.

²⁵ *Id.* (citing *In re Petition of Craig*, 131 F.3d 99, 106 (2d Cir. 1997)).

²⁶ *CA Florida Holdings, LLC, Publisher of The Palm Beach Post, v. Dave Aronberg, as State Attorney of Palm Beach County, Florida, and Joseph Abruzzo, as Clerk of the Circuit Court and Comptroller of Palm Beach, County, Florida*, Order Directing Clerk of Court To Deliver Grand Jury Materials for In Camera Inspection (June 9, 2023).

²⁷ *CA Florida Holdings, LLC, Publisher of The Palm Beach Post, v. Dave Aronberg, as State Attorney of Palm Beach County, Florida, and Joseph Abruzzo, as Clerk and Comptroller of Palm Beach, County, Florida*, Order Directing Transcription of the Testimony in The Grand Jury Proceeding (June 29, 2023).

²⁸ Section 905.27(1)(c), F.S.

²⁹ *Id.*

The bill further amends s. 905.27(2), F.S., by creating a new paragraph (a) limiting the use of grand jury testimony disclosed by the court for use in a criminal case. This amendment provides that the testimony may only be used for the prosecution or defense of the case.

Similarly, the bill creates s. 905.27(2)(b), F.S., to reflect the requirement that grand jury testimony disclosed by a court for use in a civil case may only be used for that purpose.

The bill also amends s. 905.27(1), F.S., to include the custodian of a grand jury record in the current list of persons who may not disclose the testimony of a witness examined before a grand jury or other evidence received by a grand jury.

Section 2 of the bill reenacts s. 905.17(1) and (2), F.S., which relates to who may be present during a session of a grand jury, to incorporate the amendments made to s. 905.27, F.S.

The bill takes effect July 1, 2024.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Office of the State Courts Administrator expects a minimal fiscal impact to the State Court System from the bill.³⁰

VI. Technical Deficiencies:

None.

VII. Related Issues:

The Legislature may wish to consider whether it should incorporate into the bill all the interest-of-justice factors identified by the Fourth District Court of Appeal in *CA Florida Holdings, LLC v. Aronberg*, 360 So. 3d 1149 (2023).

VIII. Statutes Affected:

This bill substantially amends section 905.27 of the Florida Statutes.

This bill reenacts section 905.17 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on December 13, 2023:

A technical amendment was adopted to add the omitted word “for” to the end of line 67 of the original bill.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

³⁰ Office of the State Courts Administrator, 2024 Judicial Impact Statement for SB 234, December 10, 2023 (on file with the Senate Criminal Justice Committee).