

## WHY PROSECUTORS SHOULD GIVE GRAND JURIES INFLUENCE IN DECIDING WHETHER TO CHARGE POLICE IN LETHAL FORCE CASES

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The prosecutor is the most powerful figure in the criminal justice system, in large part because prosecutors exercise discretion when deciding what charges – if any – to bring against a defendant. In making this determination, prosecutors must consider three factors. The first is a legal question: whether there is probable cause that a defendant has committed a specific crime. The second is a practical consideration: the prosecutor must predict whether, if the case goes to trial, the evidence is sufficient to persuade a jury or judge to convict beyond a reasonable doubt. The third is an equitable question: even if the defendant is guilty, should he or she be charged? Prosecutors are, in general, uniquely well qualified to answer the first, legal question, and they often have good instincts as to the second and third. But when faced with cases involving police lethal use of force, prosecutorial judgment with regard to the second and third questions often becomes compromised. Political and interpersonal factors can cloud the prosecutor's decision, leading to shockingly low indictment and conviction rates for police officers whose use of force leads to the deaths of citizens.

Grand juries can and should be used to assist the prosecutor with the second and third questions. Many observers think of grand juries as impotent and irrelevant, since they are made up of lay people who typically know very little about the law and are not necessarily best qualified to determine if there are reasonable grounds for a given indictment. But if given the chance, grand juries could actually provide independent input to help prosecutors do a better job of weighing practical and equity issues, especially in cases involving police lethal use of force. An examination of three case studies illustrates how prosecutors should – and should not – use grand juries in such cases.

### **Freddy Gray and Grand Jury Business as Usual**

Baltimore City Attorney Marilyn Mosby aggressively brought charges against six police officers for their role in the death of Freddie Gray in a police van. Her prosecutors made a standard bare-bones grand jury presentation and received routine approval. A few months later, the cases imploded: the first trial ended in a mistrial, while the next three all resulted in acquittals. The prosecutor ended up dismissing the charges against the remaining defendants. There was nothing improper or even unusual about the way Mosby used her grand jury, but in treating it as a rubber stamp, she lost an opportunity to get valuable feedback on her case. Mosby clearly overreached in her charging decision (a miscalculation that is not uncommon in police lethal use of force cases), and the grand jury could have demonstrated this to her if she had given it the chance.

## **Tamir Rice and Grand Jury as Political Cover**

Although Mosby has been criticized for possible prosecutorial overreach, she at least took responsibility for her decisions. Unfortunately, police lethal use of force cases are so politically charged that prosecutors often use grand jury proceedings to avoid accountability. Cuyahoga County Prosecutor Tim McGinty, for example, took no official action for many months on the case of the shooting of twelve-year-old Tamir Rice in Cleveland, first waiting for a lengthy police investigation to be completed and then commissioning reviews by two outside experts considered to have a pro-police bias. Even after a Municipal Court Judge determined that there was probable cause to charge the officer who had shot Rice, the prosecutor delayed further before bringing charges, and then apparently manipulated presentations of evidence to the grand jury to undercut claims that the killing was unjustified. Predictably, the grand jury did not indict. This prosecutor did not want an indictment, but also did not want to take responsibility for that decision himself. Instead, he used the grand jury as a convenient tool to take responsibility for the decision; at the end of the process, he could disingenuously point to the grand jury as evidence that no charges were appropriate in the case.

## **Michael Brown and Grand Jury as a Legitimate Community Voice**

Michael Brown's shooting in Missouri by Officer Darren Wilson represented a very challenging case. Given conflicting testimony, it was hard to determine whether the evidence would support a guilty verdict at trial. And given the political and social repercussions of the event, it was hard to determine whether it was appropriate to charge Wilson even if he could technically be convicted of a crime. A prosecutor has the duty to make these decisions, and he or she has the right to do so without any meaningful input from the grand jury, as Mosby did in Baltimore. But a more sensible course of action is to let a grand jury help make these determinations. A grand jury can help a prosecutor determine whether a trial jury is likely to convict. And if the prosecutor does decide to go forward, the grand jury will have provided feedback on the potential weak points that need to be strengthened before trial. In the Michael Brown case, the prosecutors presented the grand jury with over 60 witnesses over a three month period, and the defendant himself testified and was subject to cross-examination. After the grand jury returned a "no true bill" – a refusal to indict – McCulloch released nearly the entire transcript of the grand jury proceedings so the public could get a full sense of the problematic evidence in the case.

## **Grand Juries as Meaningful Partners for Prosecutors**

In the Gray case, the grand jury served no actual purpose, while in the Rice case, the institution was used for political cover. But if the prosecutor makes a complete, unbiased presentation of the evidence, a grand jury is perfectly capable of evaluating the strength of a case and deciding whether charging the defendant is justifiable on equitable grounds.

Episodes of lethal police violence are especially appropriate for joint consideration by prosecutors and grand juries. Often political pressure compels prosecutors to bring charges that cannot be proven at trial – and grand juries become passive tools to level the charges. At other times prosecutors may manipulate grand juries in order to avoid responsibility for dropping cases because they do not want to undercut working relationships with local police. But if grand juries are taken seriously as a source of community input, they have the potential to assist prosecutors in the wise and equitable exercise of their powers to charge and try cases – including challenging cases involving the use of lethal force by police.