STATE BANS PROSECUTORS FROM USING GRAND JURIES TO REVIEW OFFICER-INVOLVED SHOOTINGS

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In the wake of controversial police shootings across the country, California's prosecutors have been banned by new legislation from using grand juries to decide whether to charge certain classes of peace officers in officer-involved shootings and excessive force cases resulting in death. Penal Code sections 917 and 919 were amended last month by SB 227 to prohibit grand juries from considering criminal charges in cases where the officer involved is a local police officer, deputy sheriff, California Highway Patrol Officer or peace officer from Nevada, Oregon or Arizona. The law takes effect January 1, 2016.

Behind the new law is the misguided notion that prosecutors use secret grand juries as political cover for the often unpopular decision not to indict a peace officer who has killed a criminal suspect. Having represented several peace officers in grand jury proceedings, including the first two open grand juries in San Joaquin County, I can attest the grand juries in those cases were hardly the tool of the prosecutor. While there is much truth to the old saying that a prosecutor can get a grand jury to "indict a ham sandwich," grand juries rarely indict peace officers for one simple but compelling reason: the evidence, often including testimony from the officers themselves, does not support an indictment.

Grand Juries Guarantee Due Process

Criminal grand juries are composed of persons from the community who have been called to serve two-year terms and, in the words of the Penal Code, "may inquire into all public offenses committed or triable within the county and present them to the court by indictment." (Pen. Code § 917(a).) In practice, district attorneys bring cases to the grand jury in closed proceedings when confidential informants are involved, the case is heavily dependent on live testimony, or the case is "high profile," such as a criminal charge against a public figure or public officer.

Grand jury proceedings can actually mitigate prosecution bias and guarantee due process to criminal defendants, including those who wear a badge. Unlike elected prosecutors, who are subject to political pressures and the whims of the voters, grand jurors are supposed to be immune from media hype and public controversy. As the California Supreme Court said long ago, "a grand jury should never forget that it sits as the great inquest between the State and the citizen, to make accusations only upon sufficient evidence of guilt, and to protect the citizen against unfounded accusation, whether from the government, from partisan passion, or private malice." (*In re Tyler* (1884) 64 Cal. 434, 437.)

The "Open Grand Jury" Alternative

Nonetheless, influenced by decisions last year by grand juries in Missouri and New York not to indict officers involved in controversial deaths, California has eliminated the criminal grand jury in cases involving police officers, deputy sheriffs, and highway patrol officers. Grand juries still may be used, however, in cases involving deputy probation officers, correctional officers, campus police, and a wide range of other peace officer classifications that traditionally are less

likely to be involved in on-duty homicides. In those cases, prosecutors have the option of using an "open grand jury" process to present evidence.

Penal Code section 939.1 allows the grand jury to request to hold its investigation of a criminal charge "involving the alleged . . . dereliction of duty of public officials or employees" in public rather than in secret. While the grand jury's deliberations and vote on whether to indict is still held in closed session, the presentation and examination of witnesses, including defense witnesses, takes place in public session. This "open" grand jury proceeding allows for the "transparency" sought by activists, civil rights attorneys and legislators while still vesting the decision on whether to prosecute a peace officer with representatives of the community at large.

In both of the open grand jury proceedings in which I was involved in San Joaquin County in the last decade, prosecutors presented their evidence through a series of witnesses, both cops and criminals, and the defense was presented through testimony from my clients, their training officers and, in one case, a police chief who provided character testimony. One case involved an alleged videotaped assault by a narcotics enforcement team; the other a death in custody allegedly caused by excessive force. The public setting did not affect the testimony, and grand jurors still asked their questions as they do in a closed proceeding.

Through the local media, the public heard not only the facts of the case but, more importantly, could see the grand jury was acting fairly toward both the officers and the alleged victims. The grand jury did not return indictments in either case. When there was public outcry in response, the District Attorney and indeed the defense attorneys could point to the grand jury proceeding as having been open, fair and unbiased.

California's new prohibition on prosecutors using grand juries to consider charges against peace officers in officer-involved shootings is likely to make the process more, not less, political. What district attorney will want to be responsible for setting another Ferguson ablaze by refusing to charge a police officer in a high-profile shooting? What judge will want that responsibility when she decides a deputy sheriff will not be held to answer after a preliminary hearing? When a grand jury refuses to indict, the decision is the will of the community rather than of a single elected official. Now, such decisions are far more likely to be driven by uninformed public outcry instead of carefully considered evidence.

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