



**To: Supreme Court of Ohio Task Force to Examine Improvements to the Ohio Grand Jury System**

**From: Maria Bruno, Policy Manager, ACLU of Ohio**

**Date: May 6, 2016**

**Re: Grand Jury Reform Recommendations**

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## **Introduction**

The use of grand juries has been under increased scrutiny as a result of the incidences of police violence occurring in Cleveland and nationwide. The criticisms tend to fall in two categories: 1) over-indictment of private persons and 2) failure to indict public officials (largely police officers) for perceived illegal misconduct. These criticisms are backed up by data, which, though limited in availability, indicate that for federal cases in 2010 (the most recent year for which we have data) the indictment rate for the general public was 99.99%.<sup>i</sup> The most direct comparison of our criminal justice system's treatment of criminal defendants versus law enforcement can be seen in comparing felony defendants from the general population versus law enforcement officers accused of misconduct: felony defendants are twice as likely to be convicted and four times as likely to be incarcerated compared to police officers.<sup>ii</sup>

Chief Justice O'Connor has created the Grand Jury Task Force in an effort to reach practical solutions to potentially problematic grand jury proceedings. The ACLU of Ohio, in an effort to preserve the civil liberties of Ohioans, recommends a variety of changes in the grand jury proceedings. These recommendations reflect the goal of making the process more fair and accurate by ensuring procedural safeguards and transparency.

### **1) Force grand juries to seek truth, not indictment**

While it may seem like an exaggeration to claim that grand juries currently seek indictment, not truth, this claim is supported by mounting data regarding high rates of indictment. The data suggest that the adage, "a prosecutor could indict a ham sandwich" is not too far from reality.

Grand juries should not be in the business of rubber stamping a prosecutor's case, but instead should be encouraged to be critical of evidence and unilateral claims of guilt. One way to ensure that grand juries seek truth is to give the grand jury the opportunity to hear the whole story. Two ways to ensure this is to require that a) defendants are given the right to counsel, to testify and call witnesses and b) exculpatory evidence is presented.

**a) Give defendant the right to counsel, to testify and call witnesses**

The Supreme Court of the United States has found that a criminal defendant's right to testify on his or her own behalf is fundamental and protected by the Fifth, Sixth, and Fourteenth Amendment of the Constitution.<sup>iii</sup> The Supreme Court noted that the right to testify is a "necessary ingredient[] of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law."<sup>iv</sup> Additionally, the Sixth Amendment grants the right to counsel, a right which is triggered at the initiation of "adversarial criminal proceedings" such as preliminary hearings, indictment, or arraignment.<sup>v</sup>

These constitutional rights are currently not extended to grand jury proceedings, with little justification for their absence. New York, by contrast, grants defendants the right to testify in grand juries, and some defendants have been vindicated because of it.<sup>vi</sup> Some critics suggest that the right to testify or call witnesses is rarely used, but even if that were to be true, the importance of preserving the right to defend oneself should remain paramount.

**b) Require that exculpatory evidence be presented**

During criminal trials, prosecutors are required to turn over any evidence that would help prove the defendant's innocence.<sup>vii</sup> This is a common sense rule that helps prevent malicious or inaccurate prosecutions. Even if one intends to be entirely truthful, a failure to reveal key details can lead to a one-sided and misleading version of events.

There is such a thing as lying by omission, and telling half of the story can mischaracterize events in a very dramatic way. Partial truths can be just as misleading as lies. The failure to present evidence that could go towards a defendant's innocence denies the grand jury the opportunity to make a fully-informed decision on whether to indict.

A requirement to present exculpatory evidence could limit potential abuses and inaccuracies in the grand jury process. If the prosecutor is truly convinced that the facts are sufficient for her to prove probable cause (as is the legal standard), then it should be inconsequential to reveal potentially exculpatory evidence. The usable standard for such a rule is already well-established, as the existing standards of Brady material<sup>viii</sup> should be sufficient.

**2) Preserve justice through procedural standards**

Prosecutors should know better than anyone that abuses of power happen regularly. Therefore, it should be uncontroversial to create basic procedural standards that prevent abuses of power by bad-apple prosecutors, however rare they might be. There are a variety of basic procedural standards that could be imposed on grand juries to ensure fairness in the grand jury process.

**a) Require a presiding judge**

A presiding judge in grand jury proceedings would create oversight in the grand jury process. Judges are elected and appointed to be unbiased arbiters of justice. As such, they could implement many of the suggestions outlined here such as enforcing the rules of evidence, instructing the jury, and screening for bias.

**b) Require instructions from judges to jurors about the grand jury's powers and its independence from prosecutors**

Grand juries maintain the reputation of being a tool for the prosecution due to the fact that prosecutors are left to run the entire proceeding. By having a presiding judge and specific instructions regarding the grand jury's independence, the grand jury would feel more empowered to delineate from recommendations by the prosecution. Many jurors enter the proceedings with little-to-no knowledge of criminal proceedings, and by making the jury's only formal resource the prosecutor, there is little separation between the role of the prosecutor and that of a grand jury. Judges would add objectivity to the process and give grand juries a sense of independence.

**c) Apply rules of evidence**

The rules of evidence were drafted to prevent discredited or unreliable evidence from manipulating trial results. These rules generally bar evidence that is found to be illegally obtained, unreliable, or unfairly prejudicial.

Unfortunately, grand juries are not required to obey rules of evidence, and therefore can rely on highly questionable evidence. Hearsay, which is barred by rules of evidence due to the inability to authenticate statements and the potential for misquoting, may be used. Evidence obtained through unconstitutional surveillance may be used. Irrelevant facts that seek only to prejudice the jury against the defendant may be used. The usage of all of these types of evidence increase the risk of wrongful conviction, unfair bias, police abuse of power, and prosecutorial misconduct.

We recommend that the Ohio rules of evidence be required for grand jury proceedings.

**d) Require right to counsel for grand jury witnesses who are not receiving immunity**

All testifying witnesses who are not receiving immunity should have the right to counsel. This is a necessary rule to ensure that the witness, who is likely aiding the state in her testimony, has the opportunity to protect her own freedom and not incriminate herself.

**e) Require production of witness testimonies to defense attorney**

Brady material (see endnote VII) requires that all evidence that goes towards proving a defendant's innocence be turned over to the defense attorney prior to conviction. Evidence of misconduct or procedural error in the grand jury process is surely relevant to proving the innocence of a defendant. Therefore, witness testimonies should be turned over to defense attorneys in order to preserve fairness and accuracy in a defendant's trial.

**3) Prevent bias through conflict-of-interest safeguards**

In our most recent report, "Looking Forward: A Comprehensive Plan for Criminal Justice Reform in Ohio,"<sup>ix</sup> we looked at disparities in the criminal justice system. The astounding rates of disparities due to race, mental health, and addiction, is—ironically-- an indictment of Ohio's current strategy for criminal justice.<sup>x</sup> The controversial handling of accusations of police misconduct in Cleveland<sup>xi</sup> does little to redeem the state. Two safeguards that could effectively curb bias in grand jury proceedings are: a) screen grand juries for bias and b) require a special prosecutor for qualifying county and city employees.

**a) Screen grand juries for bias**

At the trial level, juries are screened for biases to ensure a just outcome of the case. The justification for screening jurors is that certain biases--created by prejudice, traumatic personal histories, or varied moral beliefs, inhibit justice due to the reality that biases can cloud a juror's judgment and objectivity. We recommend that grand juries are subject to the same bias screenings as trial juries.

**b) Require a special prosecutor for qualifying city and county employees**

County and city employees are on the same payroll as the county and city prosecutors' offices. Because of this common thread, county and city employees often have personal and working relationships with employees of the prosecutor's office. This extends to everyone from the county commissioner to a police officer to a judicial clerk to public defenders, and it extends to city offices as well. One would hope that all prosecutors would be able to put aside their personal and professional relationships to do their duty unaffected by biases and ulterior motives; but unfortunately, additional safeguards are required.

Due to the working relationship of city and county employees, there is an inherent risk of bias in their prosecution. Additionally, there is an increased risk of politically motivated prosecution or leniency. As a result, it would be prudent to prevent this potential conflict through creating specific rules for the use of special prosecutors.

We suggest that the grand jury recommendations include a provision mandating the use of special prosecutors when prosecuting county and city employees with any formal or informal relationships with the respective prosecutor's office. Counties and cities would be required to refer all cases involving county and city employees that qualify to the Ohio Attorney General's office, which is a common sense solution to conflicts of interest. The Attorney General's office, as opposed to a non-adjacent county's prosecutor, allows for more centralized accountability and oversight.

**4) Prioritize Transparency - Include grand jury transcripts in FOIA-eligible documents**

An important component of fair governance is transparency. Therefore, grand jury transcripts should be made available in the same manner as other public records. Controversial indictments as well as non-indictments would be more accurately portrayed to the general public if all of the information were made available upon investigation.

**Conclusion**

The recommendations above would help Ohio become a model of success for grand jury reform. Through common-sense solutions that target the most blatant flaws in the grand jury process, this task force can encourage accurate and fair grand jury proceedings.

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<sup>1</sup> Only 11 of the 162,000 federal indictments pursued in 2010 resulted in no indictment. Bureau of Justice Statistics, 2013, available at <http://www.bjs.gov/content/pub/pdf/fjs10st.pdf>

<sup>2</sup> The general population of 2006 compared to law enforcement officers in 2009-2010: 68% conviction and 48% incarceration compared to law enforcement 33% convicted 12% incarcerated. "Allegations of Police Misconduct Rarely Result in Charges," Five Thirty Eight, Nov 25, 2014, available at <http://fivethirtyeight.com/datalab/allegations-of-police-misconduct-rarely-result-in-charges/>; See also, "National

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Police Misconduct Reporting Project 2010 Annual Report", Cato Institute, available at <http://www.policemisconduct.net/statistics/2010-annual-report/>

<sup>iii</sup> Rock v. Arkansas, 483 U.S. 44, 49-53(1987).

<sup>iv</sup> Id. at 51. The Compulsory Process Clause within the Sixth Amendment, which requires that defendants be allowed to call defense witnesses, has been justified by the same logic.

<sup>v</sup> United States v. Larkin, 978 F.2d 964 [7th Cir. 1992].

<sup>vi</sup> William Glaberson, "New Trend Before Grand Juries: Meet the Accused," New York Times, June 20, 2004, available at <http://www.nytimes.com/2004/06/20/nyregion/new-trend-before-grand-juries-meet-the-accused.html> ("[A] national expert on grand jury issues... said the indications that more suspects are testifying and that many of them are not indicted may mean that the New York grand jury system should become a national model to screen weak cases out of the criminal justice system. 'Maybe this means that the New York practice of allowing the defendant the right to have his lawyer in the grand jury and to testify is a really useful and desirable procedure that other states should think about adopting,' Professor Beale said.)

<sup>vii</sup> Brady v. Maryland, 373 U.S. 83 (U.S. 1963).

<sup>viii</sup> "Brady material refers to a piece of evidence known to the prosecution that is important for establishing the innocence or reducing the punishment of a defendant. Prosecution must disclose evidence that would help in proving the innocence of a defendant and also which helps in reducing the gravity of punishment." Brady Material Law & Legal Definitions, US Legal, available at <http://definitions.uslegal.com/b/brady-material/>.

<sup>ix</sup> March 2016, available at <http://www.acluohio.org/issue-information/aclu-and-ojpc-publish-new-plan-for-comprehensive-criminal-justice-reform>

<sup>x</sup> Our report noted that African Americans are incarcerated at six times the rate of whites, as they make up 12% of the population, 25% of arrests, and 45% of incarcerated population. African American men receive a 35% higher bond compared to white men. Additionally, 70% of inmates

<sup>xi</sup> Ida Lieszkówszky, "Cleveland Police Officer Michael Brelo Not Guilty," Cleveland.Com, May 23, 2015, available at [http://www.cleveland.com/court-justice/index.ssf/2015/05/brelo\\_verdict.html](http://www.cleveland.com/court-justice/index.ssf/2015/05/brelo_verdict.html), Carimah Townes, "Cleveland Gets Rid of Prosecutor Who Refused to Charge Tamir Rice Shooter," Think Progress, Mar. 16, 2016, available at <http://thinkprogress.org/justice/2016/03/16/3760734/tim-mcginty-ousted/>