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Not all grand juries are created equal

BY EJ HURST II, CONTRIBUTOR - 12/17/14 07:00 AM EST

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In the many reports about grand juries in Missouri and New York not charging police officers who used deadly force, few have discussed a reality that crosses racial, political and social lines. The officers in Ferguson, Mo., and Staten Island, N.Y., were graced with something relatively rare in the United States: an in-depth grand jury inquiry (though these are more common in New York, where favorable information can be required). Meanwhile, many average folks face felony indictment, an expensive trial and years in prison after just a few minutes of testimony from a single witness, offering information that cannot be used at a trial.

An old legal saw recognizes that prosecutors can indict a ham sandwich. This starts with prosecutors, who are advocates in an adversarial process, choosing which persons to investigate, and whom to try to indict. When prosecutors bring cases to the grand jury, the investigation is largely finished and they know who they believe committed the crime. Prosecutors are almost always asking for indictments to be returned, so that felony prosecution can begin.

Grand juries exist to decide whether there is probable cause to believe that a crime has been committed, and that the target is the person who committed that crime. A future trial is where mitigating evidence is to be presented (if it is actually given over to the defense, but discovery violations are for another article). Thus, prosecutors in many jurisdictions have no duty to show the grand jury any mitigating information. They need only show the information that supports indictment.

In fact, what prosecutors show a grand jury need not even be admissible evidence. Those rules are also reserved for a later trial jury. This means that indictments can be found with hearsay or illegally obtained evidence, which no trial juror will ever know about.

So to recap: Many grand juries see only materials, whether competent for trial, selected by an adversary who believes that the target is guilty. On top of that, many jurisdictions do not give targets any right to testify before the grand jury or present evidence on their own behalves. Targets can politely ask to testify, but the grand jury is free to say no. The prosecutor is the only lawyer that many grand juries ever see, and a single witness (the investigating officer) is often the only 20 or 30 minutes of

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unrebutted testimony they hear. Testing the government's case comes later, at the defendant's financial and personal expense, or on the taxpayers' dime if the defendant is indigent (and when prosecutors have frozen all assets to cover potential forfeitures or restitution, there are a lot more indigent defendants than one might think).

The grand jury process today is largely a secret rubber stamp of prosecutors' charging wishes. A recent *Washington Post* article illustrated as much about federal indictments between October 2009 and September 2010, the last period for which it reported available data. Of 193,000 cases pursued by prosecutors in that year, only 30,000 wound up not being prosecuted. Among those non-prosecutions, a grand jury's failure to indict was the reason only 11 times.

The data do not show the number of federal grand jury indictments actually sought, or the number of prosecutions for which indictments were deferred. But it is still striking that federal grand juries found "no true bill" less than a dozen times nationwide out of tens of thousands of cases.

Court data from Durham County, N.C. (the author's home), teach the same lesson, that prosecutors can indict almost anyone they want to. With just one of 24 grand jury sessions for 2014 left (the last was held on Monday, Dec. 15), the Durham District Attorney's Office has presented 2,292 bills of indictment. Those bills were either returned to the district attorney for additional investigation, or forwarded until a future proceeding (an event that might be captured as future indictment) a total of 555 times. Indictments ("true bills") were found 1,755 times. Only 15 times did the grand jury return a finding of "no true bill."

The grand jury in Ferguson spent weeks delving into reams of evidence, including target officer testimony. The Staten Island grand jury took evidence, including target officer testimony, over four months. Neither time did the grand jury find probable cause that the officers had committed a crime. Whatever one believes about the failure to indict, these cases suggest that when a grand jury considers all information and takes its time, not every ham sandwich will be indicted.

In a criminal justice system where the financial and social costs of criminal charges are so high, and the consequences of a failed defense are so severe, it only seems right that grand juries consider every detail for even average citizens before charging felony offenses. Because when grand juries are left with only a prosecutor's one-sided presentation, then even ham sandwiches can be indicted.

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