

## **Background on Grand Juries and Federal Civil Rights Suits for Berkeley Law Students**

Office of the Dean, Berkeley Law

In the wake of the recent decisions by grand juries in Missouri and New York not to indict white police officers on homicide charges related to the deaths of unarmed black men, many of you have requested a primer on grand juries, indictments, and federal civil rights suits to help you discuss these events with friends and family over the winter break. In particular, many of you have asked how the proceedings in Ferguson and Staten Island are different from a typical grand jury proceeding. In response, the Dean's office is releasing the following fact sheet prepared by several Berkeley Law faculty members and hope you find it helpful. This document is intended as a prompt response to specific legal questions students have asked, and is not intended to replace a comprehensive discussion of the important and recurring issues of racial justice these cases involve.

- *Sujit Choudhry*

### **What is a “grand jury,” and what is an “indictment”?**

To see where the grand jury fits into the criminal process, it is worth recalling the steps of a typical case in the American criminal justice system. Once a defendant is arrested, he is typically taken before a judge and charged (by way of a piece of paper – a complaint or information) with a crime.<sup>1</sup> If it is a petty offense – a misdemeanor – a judge typically sets a trial date, and the case is either dismissed, resolved by guilty plea, or goes to trial. If it is a more serious offense, a defendant has a right in every state to a determination early on that there is enough evidence – “probable cause” – for the case to go forward to trial. “Probable cause” is a very low bar – much lower than the “more likely than not” standard in civil cases. It is basically meant only to ensure that the prosecution is not arbitrary or unfounded.

In many states, including California, the probable cause determination is typically made by a judge in a “preliminary hearing,” usually based on the testimony of a police officer, in open court, subject to cross-examination by counsel for the criminal defendant.

In other states, the probable cause determination in cases involving certain felonies must also - or instead - be made by a group of citizens called the “*grand jury*.” Grand juries are chosen from the same jury pool as trial or “petit” juries, and can vary in number from 12 to 23 people. When you are called to be a grand juror, you are called for a specific period of time (say, two weeks) and might hear several cases. For a charge to go forward to trial, the grand jury must return a “true bill” or “bill of indictment” (commonly called an “indictment”). If the grand jury does not find probable cause for the case to go forward, it will return “no bill.”

### **What is the purpose of the grand jury?**

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<sup>1</sup> In some cases, the defendant is indicted before he is arrested, and his first court appearance is when he is “arraigned” – formally charged – by indictment.



The grand jury as an institution is over 800 years old. It started in England as a means for the monarchy to enlist the help of citizens in investigating crime. In the 1700s, in a handful of celebrated cases,<sup>2</sup> grand juries refused to indict a person the Crown was hoping to prosecute. Since then, the grand jury has been touted by many courts and scholars as a safeguard against abusive or arbitrary prosecutions.<sup>3</sup>

### **If the right to an indictment is in the Constitution, why don't all states require one?**

The 5th Amendment right to an indictment applies only in federal criminal prosecutions. The Supreme Court has not deemed the right to an indictment to be one of the rights so fundamental that it is applicable to the states via “incorporation” through the Fourteenth Amendment’s Due Process Clause. While Missouri does not appear to require an indictment for any criminal offense,<sup>4</sup> New York appears to require by rule that certain serious felonies – including homicide – be indicted unless the defendant waives the right to indictment.<sup>5</sup>

### **Is it hard to get an indictment?**

Generally, no. The former chief judge of New York’s highest court, Sol Wachtler, once famously said that you can “indict a ham sandwich.” And that is because the grand jury is not an adversarial proceeding like a regular trial. Instead, it is controlled by the prosecutor, both in terms of who is there, and what evidence is presented. As the federal handbook for grand jurors states, “[t]he grand jury normally hears only that evidence presented by an attorney for the government which tends to show the commission of the crime . . . usually without hearing evidence for the defense.”<sup>6</sup> The grand jury also need not be unanimous in its decision (in Missouri, the prosecutor need convince only 9 of 12 grand jurors to indict).

In terms of who is there, the only people in the grand jury are the grand jurors themselves, the prosecutor, and the witnesses. While the grand jurors themselves can ask questions of witnesses, no defense attorneys or judge are there to make or rule on objections or advise witnesses. If a witness has a question for his attorney about whether to answer a certain question, he typically has to go out into the hallway to meet with his attorney between questions.

The grand jury is also controlled by the prosecution in terms of the evidence presented. The prosecution is under no obligation to present “exculpatory” evidence – that is, evidence favorable to the defense – to the grand jury.<sup>7</sup> While a criminal defendant has a right to testify at trial, a criminal suspect has no constitutional right to present his side of the story to the grand jury,

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<sup>2</sup> One oft-cited example is a colonial New York grand jury’s refusal to indict German publisher John Peter Zenger in 1735 on libel charges for criticizing questionable tactics by the colonial governor at the time. *See Handbook for Federal Grand Jurors*, at 1, *available at* [http://www.ndd.uscourts.gov/jury/jury\\_handbook\\_grand\\_jurors.pdf](http://www.ndd.uscourts.gov/jury/jury_handbook_grand_jurors.pdf).

<sup>3</sup> *See id.*

<sup>4</sup> *See* Missouri R. Crim. Proc. 22.01, 22.09, 24.01; N.Y. Crim. Pro. L. § 1.20.

<sup>5</sup> *See* N.Y. Crim. Pro. L. §§ 195.10, 195.20.

<sup>6</sup> *Id.* at 2.

<sup>7</sup> *See* United States v. Williams, 504 U.S. 36 (1992).

though some states – like New York – give grand jury targets the right to testify by state rule.<sup>8</sup> The prosecution may also present to the grand jury evidence that might not otherwise be admissible at a later trial, such as evidence procured during an illegal search or seizure.<sup>9</sup> For these reasons, the evidence presented to a grand jury is typically a truncated recitation of evidence of guilt against a criminal suspect – enough to convince the grand jurors that the prosecution is not unfounded. The prosecution may well have a strategic reason not to unnecessarily place witnesses before the grand jury, because the witnesses’ testimony can be used to impeach them at a later trial.<sup>10</sup>

Not surprisingly, then, it is rare for grand juries not to indict. In 2010, only 11 federal grand juries out of over 162,300 cases prosecuted failed to return true bills.<sup>11</sup>

### **Why is the grand jury secret?**

Federal Rule of Criminal Procedure 6(e), like many analogous state rules, prohibits grand jurors and prosecutors from disclosing any “matter occurring before the grand jury,” including the identities of the witnesses who testify. While a grand jury *witness* is free to talk about her testimony, the witness need not do so. The typical reason given to justify this level of secrecy is to ensure the integrity of ongoing investigations and witness safety. In the Darren Wilson case, the St. Louis County District Attorney’s office took the unusual step of making the transcripts of the grand jury proceedings public, along with the documentary evidence such as the autopsy reports. In the Daniel Pantaleo case in Staten Island, District Attorney Daniel Donovan has declined to discuss the specifics of the evidence before the grand jury, except to say that the proceedings were thorough and fair.<sup>12</sup>

### **Did the grand juries in Ferguson and New York necessarily decide, by failing to indict, that the officers were “innocent”?**

No. The grand juries’ return of “no bill” does suggest that – assuming they followed their instructions – they believed that there was not probable cause, based on the evidence presented, that the officers had committed a crime. That finding does not, however, mean that the jurors determined, based on the evidence presented, that the officers were factually innocent of any crime. Note that the “no bill” decision is different from a “verdict” of not guilty; only *trial* juries

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<sup>8</sup> See N.Y. Crim. Pro. L. § 190.50 (5)(a).

<sup>9</sup> See *United States v. Calandra* (1974).

<sup>10</sup> Moreover, when used to impeach a witness, sworn grand jury testimony is admissible as substantive evidence, i.e., for its *truth*. See Fed. R. Evid. 801(d).

<sup>11</sup> See Federal Justice Statistics 2010, Bureau of Justice Statistics, Dec. 2013, at 12, available at <http://www.bjs.gov/content/pub/pdf/fjs10st.pdf>.

<sup>12</sup> NBC New York has reported that Donovan “had submitted an application to the court seeking authorization to publicly release specific elements of the proceedings but the only information released when a judge granted his request a day later involved the number of exhibits the jurors saw, how long they heard evidence and how many witnesses they heard it from. The application was sealed, so it's not clear if he had petitioned the judge to release information about the charges the jurors considered.” Andrew Siff, *Staten Island DA Didn't Ask Garner Grand Jury to Consider Reckless Endangerment Charge*: Source, Dec. 5, 2014, [nbcnewyork.com](http://nbcnewyork.com).

returns “verdicts” of guilty or not guilty, based on whether the prosecution has proven the defendant’s guilt “beyond a reasonable doubt.”

### **What was unusual about the grand jury proceedings in Ferguson?**

There are a number of ways in which the Darren Wilson case differed from typical grand jury proceedings and functioned more like a full-blown trial. *First*, the prosecution left it to the grand jurors themselves to decide what criminal charges, if any, to bring against Officer Wilson. In a typical grand jury proceeding, the prosecutor selects which charges to bring.

*Second*, the prosecution appears to have put nearly all the witnesses interviewed by media and law enforcement – not just the witnesses needed to prove guilt – on the stand for the jury’s consideration. In total, the prosecution put on about 60 witnesses, as well as numerous expert witnesses and autopsy records. Many witnesses’ accounts, as presented, were favorable to the defense in various ways, and several witnesses whose accounts were favorable to the prosecution were subject to rigorous questioning by the prosecutor. Ultimately, the grand jury heard testimony that spanned nearly 5,000 pages of transcript – a very different proceeding from the typical truncated version of facts given to a grand jury.

*Third*, the prosecution allowed Darren Wilson himself to testify for four hours with minimal questioning from the prosecutor. Remember that it is very unusual for criminal suspects to testify before the grand jury. Not only do they typically have no right to do so, but they usually choose not to – they may incriminate themselves, be subject to hostile cross-examination, and/or have their statements used against them. Here, Officer Wilson was allowed to give his side of the story to the grand jurors without such hostile questioning.

*Fourth*, the prosecution instructed the jurors that to find probable cause for homicide, they had to find not only probable cause to believe the elements of homicide were met, but “probable cause to believe that Darren Wilson did not act in lawful self-defense.”<sup>13</sup> In a typical grand jury proceeding, the prosecution does not present evidence on an affirmative defense that the grand jury target (here, Wilson) might raise at a later trial. Instead, the prosecution simply makes its case for probable cause with respect to the elements of the offense charged, secures an indictment, and proceeds to trial, where – if the defense fairly raises self-defense as an issue – the prosecution will have to disprove self-defense.

*Fifth*, the prosecutors initially gave jurors an outdated instruction on reasonable use of force that, on its terms, was highly favorable to the defense. On September 16, right before they heard Officer Wilson’s testimony, jurors were instructed, based on a Missouri statute, that Officer Wilson could use deadly force against Michael Brown so long as he “reasonably believe[d]” it was “immediately necessary to effect the arrest or to prevent the escape from custody.”<sup>14</sup> In 1985, in *Tennessee v. Garner*, the Supreme Court rejected a statute with similar language as the wrong standard for determining reasonable use of force by a police officer under the Fourth Amendment.<sup>15</sup> Instead, the Court held, an officer’s use of deadly force is unreasonable unless he

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<sup>13</sup> Grand Jury Transcript, Nov. 21, 2014, at 137.

<sup>14</sup> See Grand Jury Transcript, Sept. 16, 2014 (quoting Missouri Revised Statute § 563.046).

<sup>15</sup> See *Tennessee v. Garner*, 471 U.S. 1 (1985).

has “probable cause to believe the suspect poses a significant threat of death or serious physical injury to the officer or others.”<sup>16</sup> On November 21, a few days before the grand jury decision was announced, the prosecutors – possibly recognizing the tension between *Garner* and the instruction they had given – directed jurors to take the old instruction and “fold [it] in half just so that you know don’t necessarily rely on [it],” stating that “[i]t is not entirely incorrect or inaccurate, but there is something in it that’s not correct, ignore it totally.”<sup>17</sup> When a juror asked whether Supreme Court cases trumped Missouri cases, the prosecutor answered, “as far as you need to know, just don’t worry about that.” Another assistant prosecutor added, “[w]e don’t want to get into a law class.”<sup>18</sup> What is unusual about this exchange is not so much that the instruction may have been erroneously given, but that the prosecution allowed such a defense-friendly error to go relatively unexplained.

### **What, if anything, was unusual about the grand jury proceedings in Staten Island?**

Because the grand jury transcripts were not released in the Eric Garner case, we have less information about what evidence was in front of the grand jury in that case. We do know that jurors saw four videos showing various angles of a chokehold of Mr. Garner by Officer Daniel Pantaleo, that Officer Pantaleo himself testified, and that the grand jurors heard from over 50 witnesses, about half of them civilian and half of them police, first responders, and doctors. Unlike in Ferguson, the prosecutors in the Garner case chose which charges to bring before the grand jury – *reckless manslaughter* (an unintentional but unjustified killing done with a conscious disregard of a substantial and unjustifiable risk of death)<sup>19</sup> and *criminally negligent homicide* (an unintentional but unjustified killing where a reasonable person would be aware of a substantial and unjustifiable risk of death, constituting a “gross deviation” from the standard of care).<sup>20</sup> For reasons that have not yet been made public, the prosecutors apparently chose not to bring a charge of “reckless endangerment,” a lesser crime requiring proof only that the defendant “recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.”<sup>21</sup>

### **If the prosecutors did not believe charges were warranted, why did they put the cases before the grand jury at all? Why not just decline to prosecute the cases to begin with?**

There seems to be little dispute, based on the grand jury transcripts and St. Louis County District Attorney Bob McCulloch’s press conference statement, that McCulloch’s office did not believe that a homicide trial was warranted based on the evidence. As mentioned above, we have less direct information about the views of the Staten Island DA’s office toward the charges in the Garner case. One hypothesis that has been suggested in Ferguson is that the office feared being accused of racial bias in announcing a decision not to prosecute Officer Wilson, and that the office used the grand jury process as “cover.” Others have suggested that the prosecutor’s office

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<sup>16</sup> *Id.* at 3.

<sup>17</sup> Grand Jury Transcript, Nov. 21, 2014 (statement of Assistant District Attorney Kathy Alizadeh).

<sup>18</sup> *Id.* (statements of Assistant District Attorneys Alizadeh and Whirley).

<sup>19</sup> See N.Y. Penal Law § 125.15 (second-degree manslaughter); § 15.05 (defining “reckless”).

<sup>20</sup> See N.Y. Penal Law § 125.10 (criminally negligent homicide); § 15.05 (defining “criminal negligence”).

<sup>21</sup> See N.Y. Penal Law § 120.20.

was acting in good faith, to give community members a chance to move the case forward notwithstanding the prosecutors' own belief that Wilson should not be prosecuted.

### **Are the cases over at this point? Could the prosecutors still decide to go to trial?**

The District Attorney in these cases could convene a new grand jury and try again to get an indictment. The protection of “double jeopardy” against being tried twice for the same offense is not triggered in a felony case until the trial jury is sworn in. Assuming that the prosecutors themselves do not want these cases to go to trial, however, the likelihood of a repeat grand jury is presumably low. And while the governor of Missouri has the power to appoint a special prosecutor to seek an indictment, Governor Nixon has made clear he does not plan to invoke this power. Finally, if the criminal court having jurisdiction over the case believed the original prosecutor to be biased in some way, it could itself appoint a special prosecutor under Missouri state law.<sup>22</sup> In the wake of the Garner case, New York Public Advocate Letitia James has argued for the appointment of a special prosecutor in every case in which an officer kills a civilian.<sup>23</sup>

### **Could the federal government still bring federal criminal charges or a civil suit?**

Possibly. The federal government has no general power to make crimes into federal offenses; murder, for example, is generally only a federal offense if it involves a federal employee or officer, or affects interstate commerce (such as crossing state lines with the intent to murder). However, 18 U.S.C. § 242 permits the federal government to prosecute willful deprivations of civil rights. To prosecute the officers under § 242, the government would need to show the officers had a specific intent to deprive the victim of a federal constitutional right,<sup>24</sup> negligent – or even reckless – deprivations are insufficient. This is a high bar, and success would likely depend on demonstrating, for example in the Eric Garner case, that Officer Pantaleo *knew* the chokehold constituted excessive force under the Fourth Amendment's prohibition against unreasonable searches and seizures, not just that a reasonable officer would have known that.

Another mechanism for accountability at the federal level is 42 U.S.C. § 1983. That statute provides a civil remedy when a state or local official violates federal rights. To obtain money damages against an individual under that provision, one would need to show that the officer violated clearly established rights that a reasonable person would have known of at the time of the violation.

Finally, the federal government can investigate a police department under 42 U.S.C. § 14141 for engaging in a “pattern or practice of conduct” that deprives citizens of constitutional rights. There is an open § 14141 investigation of the Ferguson police department.<sup>25</sup>

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<sup>22</sup> See Missouri Rev. Stat. § 56.110.

<sup>23</sup> See Jennifer Peltz, *Eric Garner Chokehold Case Stirs Debate on Special Prosecutors*, New Haven Register Online, Dec. 8, 2014.

<sup>24</sup> See *Screws v. United States*, 325 U.S. 91 (1945).

<sup>25</sup> See Devlin Barrett, *Justice Department to Open Broad Inquiry into Ferguson Police*, WSJ Online, Sept. 4, 2014.

The families of the men killed might also choose to pursue private causes of action in state or federal civil court for wrongful death.

**Did either of these cases involve Stand Your Ground?**

No. “Stand Your Ground” laws are state laws that eliminate any “duty to retreat” outside the home as a condition for claiming self-defense in using deadly force in response to an imminent deadly attack. Police officers generally have no “duty to retreat,” even in states without “Stand Your Ground” laws. In addition, these cases involved claims by police officers that they used proportionate force in response to suspects who were resisting arrest, in the Garner case, or posing an imminent deadly threat, in the Michael Brown case. No one was claiming that these officers, based on their account, could have retreated in complete safety but failed to do so.