



THE SUPREME COURT *of* OHIO

REPORT *and* RECOMMENDATIONS *of the*
Task Force
to Examine Improvements
to the Ohio Grand Jury System



JULY 2016

REPORT AND RECOMMENDATIONS

I. POLICE LETHAL USE OF FORCE

Introduction:

Many of the state and national events that led to the creation of the Task Force involved instances of police lethal use of force (“PLUF”). In light of this, a primary goal of the Task Force was to address the use of grand juries in this context to determine if new processes or procedures are needed to ensure fairness and equality in cases involving PLUF. If so, the Task Force was to make recommendations for improved processes or procedures in such cases.

The Task Force recognized early in its deliberations that county prosecuting attorneys in whose jurisdiction a fatal police shooting takes place are in an inherently difficult position. To be effective, prosecuting attorneys must work on an almost daily basis with law enforcement personnel in their jurisdiction. This often includes extensive interaction during the course of felony investigations and trial preparation. And in a substantial percentage of felony prosecutions, the primary witnesses for the prosecution are police officers.

At the same time, however, county prosecuting attorneys are called upon to investigate the very same police officers they work with on a daily basis involving the reasonableness of the most difficult decision those officers make: whether to use lethal force. Though it is presumed that the prosecuting attorney is in fact objective, impartial, and deliberate in the investigation and charging decisions, PLUF cases present communities and prosecuting attorneys with highly charged issues that deserve the utmost consideration for objectivity in practice and in perception.

Judges are sometimes faced with similar challenges when judging certain cases. There are cases that come before judges in which they know they can be objective, fair, and deliberative in reaching a decision from which they must nonetheless disqualify themselves due to the appearance that they may not. Indeed, we expect judges to recuse themselves to avoid even the appearance of impropriety because the effectiveness of the justice system is dependent upon garnering and retaining the public’s trust and confidence in its integrity. This is precisely why Jud.Cond.R. 2.11(A) states in pertinent part, “A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality *might* reasonably be questioned ...” (emphasis added). There are cases that come before judges in which they know they can be fair and impartial, but from which they must disqualify themselves due to the appearances and the importance of retaining the trust of both individual litigants and the public in the integrity of the justice system.

This report does not question – and in fact it recognizes and commends – the high integrity and professionalism attributed to county prosecuting attorneys. Rather, it simply recognizes that public perception is not uniform in cases where law enforcement uses lethal force that results in civilian death. County prosecuting attorneys work quite closely on a daily basis with law

enforcement officers to prosecute those charged with crimes. When prosecuting attorneys take on a necessarily investigative and potentially adversarial role in PLUF cases, the need to preserve public confidence is significantly heightened.¹

Based on the foregoing, the Task Force strongly recommends the General Assembly establish a consistently applied system for investigating all PLUF cases, including, but not limited to the appointment of special prosecutors external from the county of the PLUF incident.² To that end, the Task Force has identified a specific system utilizing the resources of the Ohio Attorney General's Office that it believes would serve to engender and retain public confidence in the impartiality of the grand jury system in PLUF cases.

Recommendation 1:

The Task Force recommends the Ohio Attorney General's Office be granted exclusive authority to investigate and prosecute police lethal use-of-force cases through its Special Prosecutions Section and the Bureau of Criminal Investigation.³

Discussion:

The Ohio Attorney General's Office presently has the express statutory authority to prosecute several specific types of criminal cases, but only after the local county prosecuting attorney fails to exercise the right of first refusal. For example, in the prosecution of criminal cases developed by the Ohio Organized Crime Investigation Commission, the following right of first refusal system is in place (R.C. 177.03(D)(2)(a)):

If a prosecuting attorney who has been referred information under this division fails to notify the commission in writing, within thirty days after the referral, that the prosecuting attorney will present the information to the grand jury of the prosecuting attorney's county, the task force, except

¹ The prosecution of a sheriff's deputy might raise an additional and specific question that goes beyond appearances. R.C. 309.09(A) provides: "The prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections, all other county officers and boards ..." The county sheriff is a county officer under R.C. Chapter 311. Absent insurance counsel, the county prosecutor would represent a sheriff's deputy in an excessive use-of-force civil case. Therefore, if a sheriff's deputy uses lethal force, Prof.Cond.R. 1.7(a)(2) would be implicated for the sheriff's county prosecutor. Prof.Cond.R. 1.7 identifies a conflict in circumstances when "there is a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests." The same analysis would apply to township officers under R.C. 309.09(B)(1).

² There is legislation pending in nine other states that proposes this same solution as of the drafting of this report. Those states are California, Iowa, Kansas, Massachusetts, Missouri, Nebraska, New Jersey, New York, and Pennsylvania.

³ This includes only cases that result in a fatality.

as provided in division (D)(2)(b) of this section, shall refer a copy of all of the information to the attorney general, who shall proceed [to prosecute] according to division (B) of section 109.83 of the Revised Code.⁴

The Bureau of Criminal Investigation (“BCI”) within the Ohio Attorney General’s Office has similarly limited investigatory jurisdiction. Under R.C. 109.541, BCI generally only has authority to investigate crimes on the invitation of local law enforcement.

The Ohio Attorney General’s Office also houses a Special Prosecutions Section. The Section is comprised of more than a dozen trial prosecutors, all of whom had extensive criminal prosecution experience prior to joining the Attorney General’s Office. The Section can act, upon request of the appropriate local authority, as lead prosecuting attorney in cases where a conflict of interest exists. In addition, local prosecuting attorneys can call on the Section members to serve as assistant prosecutors in cases where their specialized knowledge can be utilized or if there is a lack of local resources to effectively prosecute a case.

Attorneys with the Special Prosecutions Section are routinely involved in the prosecution of unique and complex cases and have specialized backgrounds in prosecuting crimes, such as synthetic and prescription drug abuse, crimes against children, capital murder, cold case homicides, white collar crime, and public corruption. In 2015, the Section opened more than 505 cases in 67 counties.

The services of the Special Prosecutions Section currently come at no cost to the jurisdiction that requests the Section’s assistance. However, given the significant increase in workload required to investigate and prosecute PLUF cases statewide, the Task Force recommends that the budget of the Ohio Attorney General’s Office be increased as needed to accommodate the anticipated caseload increase.

The advantages to granting the Ohio Attorney General’s Office exclusive authority to investigate PLUF cases through BCI and, if necessary, prosecute PLUF cases through the Special Prosecutions Section include the reality that the Attorney General does not have the close working relationship that the local prosecuting attorney has with local law enforcement officers who may be subject to an investigation in a case involving a PLUF incident. This “step removed” from local law enforcement would serve to increase public confidence that decisions on the investigation and, if needed, presentation of a PLUF case to a grand jury are being made objectively, impartially, and with great deliberation.

An additional advantage is promoting a higher degree of uniformity as to how PLUF cases are investigated throughout the state. Requiring that BCI be the sole agency responsible to investigate PLUF cases would not only further serve to increase public confidence in

⁴ The Ohio Attorney General also has specific statutory authority to prosecute cases of workers’ compensation fraud (R.C. 109.84), Medicaid fraud (R.C. 109.85), and election fraud (R.C. 109.95), all subject to the right of first refusal of the local county prosecutor in whose jurisdiction the crime was committed.

impartiality, but also promote greater statewide uniformity in the investigative approach and, where necessary, presentation to a grand jury.

A third advantage would be continuity if BCI undertakes the investigation from the very beginning. It is the specific recommendation of the Task Force that any implementing legislation require that any PLUF case be immediately turned over to BCI to ensure this continuity from the initial investigation and throughout the remainder of the justice process.

It should be noted that there is a disadvantage in granting the Ohio Attorney General's Office exclusive authority to prosecute PLUF cases. This would be the first type of case for which the Attorney General is given *exclusive* authority to prosecute a matter without the local prosecuting attorney enjoying a right of first refusal or inviting the Attorney General to provide prosecutorial assistance. This "first" could be viewed as an encroachment by the state government into areas traditionally reserved for local government.

However, the Task Force strongly believes that the advantages to granting the Ohio Attorney General's Office exclusive authority to investigate and prosecute PLUF cases greatly outweigh that disadvantage. PLUF cases present unique challenges to prosecuting attorneys and courts generally not found in other types of cases relative to the investigation and the public's perception of the outcome of that investigation. Often much of the information concerning the PLUF is public, even before an in-depth investigation is opened. As a result, public perceptions can be formed, even in the absence of a complete review of the facts and circumstances of the case. It is particularly important, therefore, that the investigation of an incident, the possible presentation to a grand jury, and, where warranted, prosecution for PLUF cases be conducted with the utmost respect of the officers involved and the public's immediate and long-term interest in the integrity of the justice system. Based on the foregoing, the Task Force respectfully urges the Ohio General Assembly to introduce and pass legislation that gives the Attorney General's Office exclusive authority to investigate and prosecute PLUF cases through BCI and the Special Prosecutions Section.⁵

Finally, Representative Cupp states he generally supports this recommendation, but with limitations, as he finds the current recommendation to be overly inclusive. His position is based upon the following observations:

- Not every PLUF case produces distrust in the criminal justice system. Thus, there is not a need for every such case to automatically become the primary responsibility of the Ohio Attorney General's office.
- The recommendation would be needlessly expensive because it would produce no greater confidence in the grand jury system in the cases that do not address the societal concerns, which the recommendation seeks to alleviate;

⁵ This recommendation should not be construed as an endorsement of any pending legislation that may exist as of the drafting of this report.

- There are cases that need not become the primary responsibility of the Ohio Attorney General's Office (e.g., cases where the deceased intended to be killed as a form of suicide and hostage situations). A screening mechanism should be created to eliminate from the automatic authority of the Attorney General's Office those cases where the facts do not support a *prima facie* appearance of improper or unreasonable use of lethal force.