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Grand Jury

Recommendations for Reform

Introduction

In reviewing the Grand Jury provision of the Ohio Constitution, the question should not be whether we should have grand juries. The answer to that should be an unequivocal yes. Grand juries serve a vital and important step in the criminal justice process. When used correctly, a grand jury is the guard at the door of the courthouse. It acts as a barrier to keep the innocent out and as a first step to prosecuting those who have committed criminal acts. The danger is that is cloaked in secrecy. It is a process set apart from our justice system and our basic ideals about government. It is based upon secrecy without oversight. Nowhere else do we allow such unfettered, unchecked secrecy?

Our entire system of government is based on checks and balances. Even in in the arena of national security there are oversight committees. With the exception of the grand jury, our entire justice system is likewise based upon checks and balances. Trials are adversarial, in public, overseen by a judicial officer. Error correction is built into the system with appellate and post-conviction processes. Except for the grand jury. It is secret and only in the most limited of circumstances, is there any review of the testimony, and there is no error correction for a grand jury process that has gone wrong or been misused.

Secrecy:

The Ohio Constitution requires that a grand jury screen the prosecution's evidence of alleged felony violations; but it says nothing about secrecy. See Ohio Const. art. I §10. Secrecy of grand jury proceedings is addressed in O.R.C. §§ 2939.01 thru 2939.24, and Ohio R. Crim. P. 6(E). "Secrecy" applies to two categories: (1) grand jurors deliberations and votes; and (2) evidence and testimony presented to the grand jury.

The Ohio Constitution creates the right to a grand jury to protect those being accused of felonies but it says nothing about secrecy:

> Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law.
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> Ohio Const. art. I §10.

Various matters related to the specifics of the grand jury are codified at O.R.C. §§ 2939.01 thru 2939.24. The only references to anything "secret" in these statutes deals with ensuring that only grand jurors are in the room when deliberating and voting; that the court reporter cannot disclose any of the evidence presented "unless called upon in court to make disclosures"; and that no one can publically disclose the fact an indictment was found until it is filed in court.

"Secrecy" in the grand jury arises from common law. A good summary of the common law underpinnings of grand jury secrecy is found in **Douglas Oil Co. v. Petrol Stops Northwest**, 441 U.S. 211 (1979).

> "Although the purpose for grand jury secrecy originally was protection of the criminally accused against an overreaching Crown, see Calkins, Grand Jury Secrecy, supra, with time it came to be viewed as necessary for the proper functioning of the grand jury."
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> "In United States v. Procter & Gamble Co., 356 U.S. 677, 681-682, n. 6 (1958), we said that the reasons for grand jury secrecy had been summarized correctly in United States v. Rose, 215 F.2d 617, 628-629 (CA3 1954):
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> > (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witness who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

Post-Indictment – Does Grand Jury Secrecy Still Make Sense?

A. Prior Sworn Testimony

After an indictment is filed, it is public knowledge that an individual has been charged with a felony and the prosecution will have to disclose witness and evidence for an upcoming public trial (or plea bargain). There are no more privacy interests to protect. Nonetheless, prosecutors and case law insist on continued secrecy, blocking defendant's from the names and the testimony of those who appeared before the grand jury. The only exception is when defendants can prove they have a "particularized need" to get that information. That is nearly impossible. Defendants cannot give detailed accounts of what is in a secret transcript in order to get access to the secret transcript. The standard is that one has to show that testimony at trial could not have supported the indictment – an almost impossible standard.

Therefore, post-indictment secrecy begs the question, what policy is being served at that point in the proceedings? Is our Criminal Justice System in the business of insulating witnesses by protecting them from being confronted with prior contrary sworn statements; or helping prosecutors by protecting witnesses from being confronted with prior inconsistent statements? What does the prosecution have to hide by insisting on keeping secret what their witnesses told the Grand Jurors when those same witnesses testify at a public trial? If justice is the ultimate goal, then there is no supportable rationale for maintaining the secrecy of witness testimony before a grand jury when that same witness is in court giving testimony on the same matter.

There would be fewer wrongful convictions if trial lawyers could confront/cross-examine witnesses with any differences between their trial and grand jury testimony.

B. Police Shootings/Public Official

The second area where secrecy makes little sense is in the case of police shootings. In fact, it is legitimate to argue that this is too narrow and should include any matter where a public official is accused of wrongdoing related to his or her official duties.

Keeping evidence and testimony secret frustrates the general public in cases involving public officials like police shootings; and it arguably violates individual defendants' right to confront trial witnesses with prior sworn statements to the grand jury.

Just as with the post-indictment analysis above, the reasons for secrecy evaporate in cases involving government officials – like police shootings – being presented to the grand jury. Everybody already knows about the incident from media reports, everyone knows who was involved, and everyone knows police shootings are reviewed by the grand jury; so there are no viable privacy interests to protect that outweigh the public's valid interest in these types of proceedings.

And secrecy where public officials acting in his or her public capacity is antithetical to our notions of government. Secrecy regarding a government official breeds distrust in our system of government and undermines all notions of our justice system being fair. If we are confident in our system of justice, shine the light on it, open it for review, and be proud of the work being done. Cloaking it in secrecy and hiding the process breeds discontent and distrust.

To add confidence to the proceedings involving a public official it is also important to distance the local prosecutor from involvement in the presentation of the matter to a grand jury. Whether the prosecutor can be unbiased is not the issue. But the perception of bias is the issue. It is vitally important that the public have trust in our justice system and to accomplish that goal the standard of avoiding even the appearance of impropriety is a guiding principle. Because of the necessity of having a close and successful working relationship with the police, the local prosecutor is easily subject to accusations of bias and favoritism. To avoid this, a process that creates an independent authority that investigates and presents the matter to a grand jury is also needed.

Conclusion

Unfettered secrecy in the grand jury undermines the justice system in two ways: First, it can allow witnesses to give different and inconsistent testimony without repercussion and undermine the adversarial process. Second, secrecy undermines public confidence when the matter involves a police shooting, or any public official accused of wrongdoing in his or her official capacity. Therefore, the recommendations being proposed are:

1. The grand jury be kept as part of the criminal justice system.
2. After indictment, the secrecy protecting the testimony of witnesses who will appear at trial be eliminated and the witness' grand jury testimony be made available to the court and counsel.
3. The secrecy in grand jury proceeding involving a public official in the performance his or her conduct related to official duties be eliminated.
4. Where the case involves a police shooting, a separate independent authority should be charged with the investigation and presentation of the matter to a grand jury.