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New York State Joint Legislative Budget Hearing

Public Protection

Thursday,
February 26, 2015

Joint Testimony

of the

Police Conference of New York , Inc.

(PCNY)

and the

New York State Association of PBAs, Inc.

(NYSAP)

Submitted Testimony

Senate Bill 2011 / Assembly Bill 3011

Governor Cuomo's Program Bill to Reform the Criminal Justice System

(Modified to reflect Governor's 30-day amendments)

This proposed legislation has six separate component parts including the establishment of an independent monitor in police use of deadly force cases, modifications to the current system of grand jury reports, an expedited appeal process upon denial of change of venue motions in criminal cases, increased reporting by law enforcement agencies to the Division of Criminal Justice Services, the establishment of a statewide use of force policy and a requirement that any police officer applying for a search warrant must advise the judge he is applying to whether the application has previously been submitted to any other judge. The PCNY and NYSAP do not oppose the search warrant provisions because they are consistent with common courtesy, common sense and, so far as the PCNY and NYSAP are aware, common practice in the police community. We oppose all of the other provisions of this deeply flawed bill for reasons that will be set forth in detail below.

Before addressing those specific concerns, however, the PCNY and NYSAP are opposed to this bill for three fundamental reasons. First, this bill should not proceed as a part of the budget. The sponsor's memorandum recites under "budget implications" that "enactment of this bill is necessary to implement the 2015-16 executive budget due to the potential costs of an "independent monitor" appointed by the Governor". Even assuming that the independent monitor contemplated by this bill would be handsomely compensated, that single salary would have no more impact on the budget of the State of New York than the theoretical fly landing on the end of the steel beam. The provisions in this bill have nothing to do with the State budget. They should be considered during the ordinary course of the legislative session and stand or fall on their own merits rather than being coat-tailed on the budget.

Second, we oppose this bill because it would create a two-tiered system of criminal justice in this state: one for police officers who had the misfortune to have to use deadly physical force in the performance of their duties and one for everybody else. Police officers are not second class citizens.

Third, publicizing the details of grand jury proceedings that result in no bill or a decision not to prosecute would politicize the office of District Attorney and our criminal justice system. A person who has been investigated by a grand jury but not indicted avoids the stigma of that process by virtue of our longstanding tradition of secret grand jury proceedings. The bill would impose that stigma on any police officer who had the misfortune to have to use deadly force in performing his duties.

1. **The Independent Monitor**

The PCNY and NYSAP object to these provisions of the bill on the following grounds:

A. Inadequate Definitions - This bill would add provisions to Section 190.75 of the Criminal Procedure Law to require a District Attorney to submit to an independent monitor appointed by the Governor any case in which he declined to initiate a grand jury proceeding, did not present evidence to the grand jury or the grand jury declined to return an indictment in any case in which a police officer or peace officer took actions including "... the use of deadly physical force against an unarmed person and such encounter resulted in the death of such unarmed person." The phrase "deadly physical force" is defined in Section 10(11) of the New York State Penal Law to include, "... physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury." Given this broad definition, if a person dies in police custody, the force used, whatever it may have been, will clearly be considered deadly physical force.

The effective triggering phrase, therefore, is that the police officer used deadly physical force against an "unarmed person." The phrase "unarmed person" is not defined anywhere in the penal law or in the Criminal Procedure Law. The closest definition that can be found is set forth in Section 1.2 (41) of the Criminal Procedure Law defining "armed felony" to mean a felony involving the use of a loaded firearm. If "unarmed" were interpreted to mean not possessing a loaded firearm, then this bill would mean that District Attorneys would be required to turn over cases in which the police officer used deadly physical force against a person who attacked him with a rock, a knife, a club, a lead pipe, a chain, a bow and arrow or even an unloaded firearm. If a police officer is attacked with "deadly physical force", he should be allowed to respond with deadly physical force without sacrificing his grand jury rights. The term "unarmed is inappropriate.

B. The procedures contemplated by this bill won't work. This bill would not permit multiple grand jury presentations in the case of a no bill beyond that which is already permitted. Both the New York State and Federal constitutions prohibit the criminal prosecution of anyone who has not been indicted by a grand jury. See U.S. Constitution, Amendment No. 5 and New York State Constitution Article 1, Section 6. Section 190.75 (3) of the Criminal Procedure Law provides that once a grand jury has dismissed a charge, that charge may not again be submitted to a grand jury unless the court which empanelled the grand jury, in its discretion, authorizes or directs the people to resubmit such charge to the same or another grand jury and if, in such case, the charge is again dismissed, it may not again be submitted to a grand jury. Nothing in this bill changes 190.75 (3). This bill merely provides that if a grand jury dismisses charges or renders a no bill, then the independent monitor may review the situation and recommend the appointment of a special prosecutor to the Governor, who may in turn exercise his authority under Section 63 of the Executive Law to appoint the Attorney General as special prosecutor, a procedure that has been in place for many years. Even if the Governor were to appoint the Attorney General as special prosecutor in the case of a grand jury no bill, the Attorney General would still not be able to represent the matter to the initial grand jury or present the matter to a second grand jury unless authorized to do so by the judge who initially empanelled the initial grand jury by operation of Section 190.75 (3). Thus, this bill as written would only apply in practical effect to cases in

which a District Attorney elected not to present a matter to the grand jury or, in the vague terms of the bill, "does not present evidence to the grand jury".

C. The District Attorneys of New York State do not deserve this. This bill is an affront to the political independence of our locally elected District Attorneys. Police officers who commit crimes are regularly and routinely prosecuted and convicted by District Attorneys under the current system. The implication of this bill is that that is not the case and that our District Attorneys need adult supervision in the performance of their duties. That implication is unwarranted and should be rejected.

D. The police officers of New York State do not deserve this. Police officers are citizens of the State of New York and as such are entitled to the same protections that all New York State citizens enjoy from unwarranted criminal prosecutions. This bill would render them second class citizens subject to greater scrutiny than any other group in the State. This bill is a response to an unwarranted and unwise knee jerk reaction to the public clamor resulting from a very small number of highly publicized incidents in which the grand jury system functioned exactly as it was designed to function but certain groups don't like those results. The grand jury system is not broken and should not be fixed, particularly not at the expense of the police officers of this State.

2. **Grand Jury Reports by District Attorneys**

Section 215.70 of the Penal Law makes it a class E felony to intentionally disclose the nature of substance of any grand jury testimony or any decision, result or other matter attending a grand jury proceeding, and those provisions apply to everyone involved in the process other than a grand jury witness who may disclose his own testimony. Section 190.85 of the Criminal Procedure Law permits the grand jury itself to issue a very limited report to the Court by which it was empanelled which may address a) misconduct, nonfeasance or neglect in public office by a public servant as the basis for a recommendation of removal or disciplinary action; or b) stating that after investigation of a public servant it finds no misconduct, nonfeasance or neglect in office by him provided, that such public servant has requested this admission of such report or; c) proposing recommendations for legislative, executive or administration action in the public interest based upon stated findings. These statutes establish the principal of the secrecy of grand jury proceedings which have long been a part of our criminal justice proceedings in New York State.

The report permitted by this bill would be an entirely different kind of report and would end the secrecy of the grand jury in cases to which it applied. The report would have to be anonymized except as to experts and *public employees (which would include police officers)* and other than the name of the victim *or the subject of the investigation which, under the circumstances, would obviously include the police officer* who was the subject of the grand jury inquiry. The bill does not address the issue of to whom the report could be released, other than to say that the court, (presumably the court that empanelled the grand jury in the first place) must approve the contents of the report "consistent with this subdivision" prior to its release by the District Attorney "to any civilian or disciplinary oversight board". There is no further limitation on the disclosure of the District Attorney's grand jury report, so as this bill is written, the report,

including the officer's identity and all of the evidence presented against him would become a public document. In addition to, again, making police officers second class citizens by denying them alone the benefits of the secrecy of the grand jury, these provisions would also expose them and their municipal employer to civil suits in which the standard of proof is merely a preponderance of the evidence. This bill would be a bonanza for the plaintiff's bar.

Alternatively, this bill would allow the District Attorney to issue a letter explaining his or her decision not to present a police deadly force case to the grand jury or explaining the basis for the grand jury's decision to dismiss the indictment. There are no limits whatsoever on the dissemination of such a letter, nor is any prior approval required. This bill would bring the secrecy of the grand jury to an end, but only for police officers who had the misfortune to have to use deadly physical force against a person who ultimately turned out to be unarmed (whatever that may mean). It would politicize the office of District Attorney and our entire criminal justice system in cases to which it applied. Although the bill does not require the District Attorney to issue a grand jury report or letter, (the sponsor's memo states that such a report would be required, but the bill does not so provide), the political pressure that would be brought to bear on any District Attorney who chose not to issue a grand jury report or letter of explanation would be extreme and probably irresistible, and the impact of the information contained in the report would be devastating and probably career ending to the police officer and would disrupt and endanger his family. Contemplating the ramifications of this bill clearly demonstrates why our laws currently, and properly, provide for the secrecy of grand jury proceedings as to all citizens, and these should not be changed.

3. **Change of Venue**

Sections 4 and 5 of this bill provide that a party aggrieved by the Appellate Division's denial of a motion to change venue in a criminal prosecution could seek leave to appeal to the Court of Appeals. It further provides that if such an order is granted, the Court of Appeals would have to consider it on an expedited basis. Once again, the provisions of the bill do not match up with the sponsor's memo, which recites that this bill would establish an expedited appeals process directly to the Court of Appeals in cases where the Appellate Division declined a motion for a change of venue. The bill clearly does not do that. The only change to existing law that would be brought about by this bill would be that *if* leave were granted by the Court of Appeals, it would have to consider the matter on an expedited basis. The PCNY and NYSAP are opposed to either an automatic right of appeal to the Court of Appeals from denial of a change of venue motion or a requirement that the Court of Appeals consider such an application on an expedited basis. Since the Court of Appeals became a certiorari court due to the heavy demands on its time and personnel, it has been, and remains, very difficult to get important issues of state law heard by the Court of Appeals. That process should not be made more difficult by further burdening the Court with extra duties related to criminal defendants who wish to take further appeal from the confirmation of a denial of their change of venue motion.

4. **Increased Reporting Duties for Law Enforcement Agencies**

Section 7 of this bill would significantly increase the crime statistics that police agencies would be required to report annually to the Division of Criminal Justice Services, including all

arrests made or appearance tickets or summonses issued by a law enforcement officer for non-criminal violations and misdemeanors. The reported information would have to include the subject's age, sex, race and ethnicity. These are burdensome reporting requirements on police departments that are already short staffed. We further object to police officers being required to report on subjective matters like race and ethnicity which, in addition to being duplicative, are often ambiguous. The term "ethnicity" has a religious component that is fraught with difficulty. Police officers would be required to choose between guessing at a person's "ethnicity" or inquiring of the person, an event certain to be offensive to the person being asked. In this melting pot of a country, do we really want to be able to sort traffic tickets and summonses by race and ethnicity? Justice is supposed to be blind.

5. **Statewide Use of Force Policy**

Section 6 of this bill would require the Division of Criminal Justice Services to establish a state-wide use of force policy focusing on acts or techniques that a police officer may not use in the course of acting in his or her official capacity, and every local department would be required to adopt its own model law enforcement policy which could differ from the model policy *only* by imposing further restrictions on the use of force. In other words, it would establish a statewide use of force policy focused on things that a police officer fighting for his life could not do.

New York State already has a perfectly adequate definition of the circumstances under which deadly physical force may be used, by a police officer or anybody else, in the form of Article 35 of the Penal Law. Under that standard, a person is privileged to use deadly physical force against another if he reasonably believes that that person is about to use deadly physical force against him or another person. Most, if not all, departments in the state train to the standards set forth in Article 35, and those standards have served New York well and without substantial modification since 1968. Imposing any standard that categorically rules out any particular mode or technique of force regardless of circumstances, again for police and no one else, is inappropriate and ignores the realities recognized by Article 35. Police officers have families that they are entitled to go home to at the conclusion of their shifts, and any policy, rule or regulation that categorically prohibits any particular technique or mode of self defense without regard to circumstances seriously impedes their ability to do so and should be rejected.