Commonwealth of Pennsylvania

State Senate Judiciary Committee

Senator Stewart J. Greenleaf, Chairman

Senator Daylin Leach, Minority Chairman

S. B. 400 and the Investigation of Police-Involved Shootings

Testimony of

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Thank you for the opportunity to submit testimony to this Committee on S.B. 400 and the important issues it raises concerning the investigation and prosecution of cases involving uses of force by police that result in death. Laws like S.B. 400 have become necessary in order to confront a long-standing issue concerning the integrity of, and public confidence in, the Commonwealth's criminal justice system: the actual or perceived conflict of interest that exists when a district attorney, who works with local police in his or her county on a regular basis, attempts to investigate, and perhaps charge and prosecute, a police officer in a use of force case. The public has a right to expect that every case investigated and every set of charges brought by a district attorney will go through the process unaffected by any conflict of interest or even the appearance of a conflict; surely any elected district attorney would agree. Cases involving police

use of deadly force on citizens are a matter of great interest to every member of the public; the state has uses no greater power than when it acts, through its police officers, to take the life of a person. It is precisely because this power is so enormous that its use must be scrutinized with the utmost integrity, and even the appearance of a conflict may taint that scrutiny in the eyes of some citizens. That appearance must be avoided at all costs.

To be sure, elected district attorneys in this Commonwealth have prosecuted police officers. They have done so with the same vigor one expects in any case involving civilians, and have won justifiable and important convictions. No one would contend that district attorneys *cannot* conduct these investigations and prosecutions. The issue is different, however, when the question is not simply whether a police officer may have committed a criminal act, but when that act involves the infliction of injury or death or death on a civilian. Sadly, especially in the last several years, beginning with the events in Ferguson, Missouri and other places in the nation, the perception has grown that prosecutors may not handle cases involving police officers killing civilians in the same fair way that hey handle cases involvi9ng civilians – that some prosecutors are reluctant to investigate fully or bring charges in cases involving uses of force against citizens. Given that police officers have the awesome power to take life in proper situations, under the U.S. Supreme Court's decisions in Graham v. Connor, 490 U.S. 386 (1989), deciding whether the officer involved has exercised that power properly can involve singularly difficult legal and factual questions. And given the extremely high, and entirely justified, public interest in seeing that this fearsome power to take life is only used properly, no issue of conflict of interest, whether perceived or real, should cast a shadow on the investigation, the decision to prosecute, or the prosecution itself.

The relationship between local police and locally-elected district attorneys can give rise to the appearance of a conflict of interest. Members of the public know – in fact, they understand implicitly – that local police (whether city, town, township, or county) in any given county work regularly with elected county prosecutors to do the business of apprehending and arresting (police) and prosecuting (district attorneys) people who commit crimes. Police form the "front end" of system, bringing in people accused of crimes, building the cases against them through the collection of evidence, and handing the cases over to the district attorney's office for the next steps in the criminal justice process. Prosecutors handle those next steps, taking all of the police reports and evidence from the police, and getting the case in shape for the filing of charges and subsequent stages. For each part of the process – for example, preliminary hearings, hearings on motions to dismiss or suppress, and perhaps trials of the cases – police assist in the prosecution, and often serve as key witnesses; not infrequently, they are the *only* witnesses. This day in, day out relationship between police and prosecutors tells the public – correctly, in my opinion – that police officers and their departments and prosecutors and district attorney's offices are part of the same team. Both police and prosecutors work for and represent the Commonwealth; both focus on the crime and criminal accusations against individuals, and joint efforts often result in convictions. They are perceived by the public as – and in fact are – part of the same working group, operating at different points of the criminal justice process, with different powers and tools, but with joint goals.

This is not to say, of course, that there is necessarily an actual conflict of interest. We can find the phrase "conflict of interest" defined many ways, by many different sources. But we need not resolve what it might really or actually mean, because it is clear that there is, at the very least, the *appearance of a conflict of interest* in the eyes of the public. And that, by itself, is

enough to cause the legislature to look favorably on legislative proposals to clear away that appearance of conflict in cases as important as those involving deaths of civilians at the hands of police officers.

Putting the cases of police officers using deadly force on civilians in the hands of a different investigating and prosecuting authority does not in any way prejudge the guilt or innocence of any particular police officer, or the correctness of his or her actions. An investigation conducted by the Attorney General, and a prosecution if found to be warranted, is every bit as likely to be fair and impartial and careful as one conducted by the local district attorney. The legal standards in play would not vary, nor would the thoroughness of the investigation. What would differ is that there would be less reason for any member of the public to lack confidence in the process or the outcome, because there would not be any sense that law enforcement partners in a given community were investigating or policing each other.

It is worth noting that, as things stand, district attorney's offices do not prosecute every criminal case that arises in their jurisdictions. Several years ago, I received a summons for jury duty in Allegheny County, where I live. I dutifully showed up at the appointed time at the Court of Common Pleas, and eventually my fellow prospective jurors and I were brought to the proper place for questioning in a criminal case set for trial before a jury that day. In the course of questioning, we learned that even though the events had taken place in Allegheny County, the prosecuting authority would not be our own district attorney; instead, a prosecutor from the Attorney General's office would handle the matter; the prosecution had been handed over to that office. Further questioning of us prospective jurors by the attorneys involved revealed the reason for this: a key witness in the case – in fact, the victim of the crime – was an attorney who served on the staff of the district attorney's office. This made it important, we were told, to bring in an

"outside" prosecutor. Thus the case was in the hands of prosecutors from the Office of the Attorney General. Of course, this made eminent sense. We were *not* told that the law of the Commonwealth *required* that the case be handed over to the Attorney General's Office, or whether calling in the Attorney General's Office was an idea that originated with district attorney's office, the defense attorney, or someone else. But we understood without anything more than just the appearance of a possible conflict – the district attorney's office prosecuting a case that involved a victim employed in that very office – would have been enough to taint the case, or to have it appear tainted. It was, quite simply, a wise move, just for the sake of the appearance of a conflict, and to assure the public that impartial justice would be done.

There are already provisions in the law of the Commonwealth that allow for the attorney General's Office to take over criminal prosecutions from local district attorneys. Under the Commonwealth Attorneys Act, 71 P.S. § 732-205(a) (3), district attorneys can request that a criminal prosecution be handled by the Attorney General's Office when the district attorney "represents that there is the potential for an actual *or apparent* conflict of interest on the part of the district attorney or his office" (emphasis added). The existence of this provision in the law tells us that the possibility of conflict, either actual or apparent, has always been a concern in the Commonwealth's law.

What we know now is that the perception of a conflict in police use of force cases that result in death has become so real, and that distrust in these cases runs so deep and is so widespread that, for this category of cases, preserving the integrity of the system requires that the legislature move beyond permitting a district attorney to request that the attorney general handle

such cases, to mandating this course of action. The cost of failing to do so, in terms of the public perception that certain cases will get a different brand of justice, is potentially very great.

Consider what has happened in the last two years to two prosecutors in two American cities. Anita Alvarez was the incumbent Democratic State's Attorney in Cook County, Illinois. By every measure, going into 2016, she would have an easy re-election; the Democratic incumbent in that office does not lose in the modern era. In December of 2015, a court in Cook County forced the released of a video recording of the shooting death of Laquan McDonald, a young African American man, at the hands of a police officer. The State's Attorney's office and the police department, as well the full legal authority of City of Chicago, had suppressed the video recording for over a year. When at last the court forced the release of the recording, and it became clear that the young man was shot by an officer as he walked away from police, public outrage immediately exploded. State's Attorney Alvarez, who had argued against the release of the recording and had not moved to charge the police officer, suddenly reversed herself and filed murder charges. The public was not placated; just months later, Alvarez was defeated in what should have been an easy primary election. Timothy McGinty, another incumbent prosecutor in a safe seat – this time in Cleveland – also lost his election when he decided not to charge the officer who shot and killed twelve-year-old Tamir Rice, in a process widely perceived to favor the Cleveland police. His defeat, like that of Alvarez, came to symbolize the fact that the public simply would not settle for investigations of officer-involved shootings that seemed to be compromised by the close relationships between prosecutors and police. The crucial point is that the damage done in both instances was deeper than the defeat of two incumbent office holders. In both cases, considerable injury was done to the perceived integrity to the system. The incumbents were made to pay that price in the short run, but the perception of a rigged system

remains. That is a loss to the public at large – one that can be avoided with legislation such as S.B. 400.

In the Commonwealth of Pennsylvania, there is no need for us to go through the problems of prosecutions that will be seen by some substantial portion of the public as tainted. Legislation like S.B. 400 gets us ahead of these problems by acknowledging the keen public concern that these case be handled without a whiff of the appearance of a conflict of interest. As we've seen the last two-plus years, citizens have begun to insist on arm's length investigations of police, not because elected prosecutors cannot do a good and thorough job, but because the public expects an investigation and prosecution about which there can be no question of conflict. Other states, such as Wisconsin and Connecticut, have taken these steps. The citizens of the Commonwealth of Pennsylvania deserve no less.