OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE
JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD
THURSDAY, DECEMBER 10, 2015

Call to Order:

Chair Janet Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 2:40 p.m.

Members Present:

A quorum was present with Chair Abaray and committee members Jacobson, Kurfess, Mulvihill, Obhof, Saphire, Skindell, and Wagoner in attendance.

Approval of Minutes:

The minutes of the July 9, 2015 meeting of the committee were approved as amended.

Presentation:

Chair Abaray then turned the committee's attention to the ongoing consideration of the issue of the use of grand juries in Ohio, as provided in Article I, Section 10. She introduced two members of the Ohio Prosecuting Attorneys Association, Michael T. Gmoser, prosecuting attorney for Butler County; and Morris J. Murray, prosecuting attorney for Defiance County, who were present to provide their perspective on the use of grand juries in criminal prosecutions.

"The Grand Jury Process"

Michael T. Gmoser
Prosecuting Attorney
Butler County, Ohio

Morris J. Murray
Prosecuting Attorney
Defiance County, Ohio

Mr. Gmoser spoke first, indicating that 98 percent of felony prosecutions in the criminal division of his office begin with a grand jury indictment, as opposed to a bill of information. He remarked that law is an evolutionary institution, but there are some aspects of law that should be a constant. He said the grand jury process should be a constant, and is provided for under federal law in the United States Constitution. He added that the grand jury process is an Ohio institution that has changed very little over the years because it is based on the principle that no person shall be held to answer for a serious crime without a grand jury indictment, and that the process requires secrecy. Mr. Gmoser acknowledged that whenever there is an issue that demands transparency, the institutions that demand secrecy come under attack and that is only natural. But, he said, transparency is not a good thing when it comes to charging someone as opposed to trying someone. He cautioned the committee that it could do damage if it acts in favor of transparency, because the secrecy in the grand jury process benefits the guilty as well as the innocent.

Mr. Gmoser said he first wanted to emphasize that prosecutors do not, in the main, indict innocent people if they can avoid it. He said prosecutors have to be accountable to the public and do not want to try cases they cannot win. He said, unlike the popular saying, there is nothing to be gained by "indicting a ham sandwich," adding that might be true as an exception to the rule, "but we should not change the whole system because of it." He said secrecy prevents the innocent person from being maligned and abused based on improper charges. He said prosecutors have an interest in protecting suspects from the condemnation of public disclosure. He remarked that the other function he finds essential to the operation of his office is the use of the grand jury as a tool to obtain information in a private, secret way. He said prosecutors use the grand jury for investigatory purposes, so that, if the process becomes transparent, it will prevent opportunities for disclosure of crime.

He explained the end result of a grand jury proceeding is a charging instrument that results in a court proceeding in which the defendant has all the protections afforded a criminal defendant. At the time a criminal charge is brought, the accused has a right to the evidence, but he said this does not mean the evidence should be given to the defense before or during grand jury proceedings. Mr. Gmoser concluded his presentation by asking the committee to "protect a vital institution of our state" by making no modifications that will eliminate the confidential nature of the grand jury process.

Chair Abaray explained that an issue the committee has been asked to address, which was raised by communications from Sen. Sandra Williams and Ohio Supreme Court Chief Justice Maureen O'Connor, is whether there are any changes or recommendations that would help the public gain confidence in the grand jury system. She said, when things are done in secret, that requires trust, and if trust is eroded, that has a negative effect. She asked Mr. Gmoser whether he had any suggestions for ways to improve the process, beginning, specifically with a practice used in other states, such as Pennsylvania and New York. Chair Abaray described that, in those states, grand jury proceedings are recorded by a court reporter and then, at the end of the proceeding, are reviewed by a judge who signs off that the process was properly done. Chair Abaray wondered whether Mr. Gmoser is familiar with this practice and what his opinion is of it.

Mr. Gmoser responded that prosecutors are against that practice. He said this kind of oversight, particularly a method that uses a commission to review the proceedings, can create problems because if a controversy arises the public then wants to fire the commission. He said, regardless, the successful operation of the system always depends on the quality of the prosecutor, calling prosecutors "the most ethically-oriented people we have in our society dealing with criminal law." He said, as prosecutor, he is able to identify problems and knows how the system should work. He added having another layer of oversight would complicate speedy trial requirements. He said oversight would be impossible in the larger counties, maybe possible in smaller counties, but in little communities everyone knows everyone's business anyway. He said that is not a workable solution, adding that judges already are involved; every grand jury is instructed by a judge about its duties. He said if the committee would want to require the prosecutor to inform members of the grand jury that it is their jury and not the prosecutor's grand jury, he would be okay with that because he already does that. He said he insures the grand jury's independence, and that the grand jury never is told what it must do. He does inform the grand jury of the law, what the complicating factors are, and what the details of the case are, and if that practice were institutionalized by a law requiring it he would amenable to that. He added that the proceedings are recorded and transcripts are made. He said these are the practices he would suggest, rather than an additional layer of oversight.

Chair Abaray explained that the role of the Commission is to look into issues, and that the committee is not advocating a position.

Committee member Richard Saphire noted that one fifth of the states allow judicial review, wondering whether Mr. Gmoser is familiar with the experience in other states. Mr. Gmoser replied that he is not in a position to comment on that.

Senator Larry Obhof commented that the grand jury process provides fairness to the would-be defendant, meaning that if someone is not actually charged with a crime, all the things that could be said in that room could taint how that person is viewed publicly. Mr. Gmoser agreed, saying that is the secrecy that is required. He said that could be devastating for the person who is being investigated but not charged. He said justice comes first for the prosecutors, but not for defense attorneys, whose role is to defend their client.

Committee member Jeff Jacobson said he has no issue with secrecy, acknowledging that there is a danger to people who have not or may not be charged in having rumors become a matter for public conversation. But, he said, that is not the end of the story. He wondered whether Mr. Gmoser was familiar with a situation that developed in Wisconsin, in which a prosecutor decided to go after certain people for activity that was not actually criminal, with the result that multiple incidents of prosecutorial abuse and harassment of citizens occurred before two rulings by the state supreme court stopped the abuse of process. Mr. Jacobson said this all occurred because the prosecutor started with a theory that was not the law, then told the grand jury what the law is and was wrong. Mr. Jacobson wondered how oversight could have been helpful in preventing that abuse of the system.

Mr. Gmoser said the fact that the incident was publicized is evidence that the system works. He said an extra layer of oversight would not prevent unethical activity that perverts the system.

Mr. Jacobson followed up, asking, "if a prosecutor decides to investigate what is not a crime and tells the grand jury it is a crime, who can tell the grand jury that he is wrong?" He added that a system that would allow oversight in certain instances could prevent abuses. He commented, "someone could have died as result of those activities [in Wisconsin], and yet no one could challenge the prosecutor's interpretation of the law within the context of that investigation."

Mr. Gmoser answered that one size would not fit all, and that it would be impossible to establish specific categories that a judge would be able to look at. He said he would not want to see oversight required just because of a problem in Wisconsin. Mr. Jacobson continued that there was also a similar instance at Duke University, to which Mr. Gmoser replied that this is not that big of a problem if only two cases illustrate it.

Committee member Dennis Mulvihill asked whether Mr. Gmoser always asks the grand jury to return an indictment. Mr. Gmoser replied that he never asks the grand jury to return an indictment, and that he also informs assistant prosecutors that they should never ask the grand jury to do that. He said he suspects many prosecutors do it the same way. He said he may recommend one charge as versus another, but he never tells them they must do something. Mr. Gmoser said he tells the grand jury "here is the grocery list of offenses; your duty is to find probable cause, not proof." He added that the grand jury gets that instruction from a judge before they hear it from him. He said, if all the evidence that is ever produced in a case has been heard by the grand jurors, and in their minds the case will never arise above a probability, and they are convinced the case will not be proved beyond a reasonable doubt, he is not going to proceed. He said some juries will indict anyway, but in that situation he goes to the judge and asks for the case to be *nolle prosequi*.

Mr. Mulvihill asked how often the grand jury reaches a conclusion that Mr. Gmoser does not think is justified. Mr. Gmoser answered that this occurs less than 10 percent of the time.

Chair Abaray then recognized Morris J. Murray, prosecutor for Defiance County. Mr. Murray began by emphasizing that the grand jury process is "absolutely critical" to the fair and efficient administration of justice. He then read from the jury instructions that are provided to grand jurors at the time they are sworn by the judge. The instructions describe the grand jury as an "ancient and honored institution," indicating that jurors take an oath in which they promise to keep secret everything that occurs in the grand jury room, both during their service and afterward. The instructions further describe a two-fold purpose for secrecy, one being that it protects the reputation of the person under investigation, and the other being that a person who learns he or she is being investigated could then have the opportunity to escape. The instructions go on to describe the meaning and purpose of a criminal indictment, to describe the process by which information will be presented to the jurors, and to set out the requirements that must be met before an indictment is handed down. The instructions also caution the jurors that they must be fair and unbiased, must recognize that hearsay evidence is unreliable, and that, as the sole judges of the facts, are not to be influenced by the prosecutor in deciding whether to approve an indictment. The instructions describe that the jury's deliberations will be conducted outside the presence of others. Finally, the instructions state: "In the field of crime your authority for

investigation is almost unlimited. It must, however, be directed by honest and conscientious motives to determine if a person or persons should be charged with a specific crime."

Mr. Murray commented that grand jurors take these instructions to heart. He emphasized that prosecutors do not seek to indict innocent people and do not pursue cases in which it is clear that there is no probable cause. He noted that, on the other hand, if grand jurors decide a true bill should be returned, a prosecutor is obligated to pursue the case, even if it is difficult or controversial. Mr. Murray reiterated the importance of secrecy to the process because it protects the privacy of persons subject to a grand jury proceeding. He concluded by stating that the grand jury process is "not broken" but accomplishes the objectives set forth in the grand jury instructions.

Chair Abaray recognized Mr. Saphire, who asked whether jurors get the instructions in writing. Mr. Murray answered that the instructions are available in writing if the jurors want them. Mr. Saphire said he agreed that the instructions are comprehensive and give a juror a sense of responsibility, but said he wonders if jurors listening to instructions being read would have the ability to understand. Mr. Murray said he is not sure if jurors fully comprehend all they hear, but, based upon what jurors say and the kinds of questions they ask, he does believe that they understand the instructions. He added, "while there are examples of bad cases, when you consider the hundreds of thousands of cases nationwide, our batting average is pretty good."

Mr. Murray continued that law enforcement investigation is the first step, with the second step being the prosecutor's review of the evidence. He said there is an element of prosecutorial discretion, and a prosecutor has to determine if a case is even worthy of a grand jury proceeding. He noted that confidentiality comes into play for a lot of good reasons. He said high profile cases can cause people to want to try to fix something that is not broken, adding that "very little, if anything, needs to be done" with regard to Ohio's process.

Chair Abaray asked whether the grand jury instructions are required in Ohio. Mr. Murray answered that there are rules and statutory requirements regarding instructions that he believes are fairly consistent throughout the state. Chair Abaray then commented that the more the public can be informed about the grand jury process, the more it might benefit society as a whole. Mr. Murray replied that this is a good point, and that public servants could improve public education about the grand jury process.

Chair Abaray said she had heard jurors are allowed to consider evidence that is actually hearsay within hearsay, wondering how commonly that occurs. Mr. Murray noted that the instructions caution jurors that hearsay can be unreliable. He said, as a practical matter, he might have 15 to 20 cases that need review by a grand jury, so that for expediency he may present hearsay through a process that has the investigating officer reading a witness statement, for example. He said he might want the witness there in some cases, but that isn't always necessary, adding it would bog down the process to always require a live witness, or, alternately, to simply say the grand jury cannot consider hearsay.

Mr. Mulvihill asked about the close relationship between police and prosecutors. He said some public criticism now arises out of that close relationship when a police officer is under suspicion,

and that there is an appearance of a conflict of interest. He said his more specific question is whether, where there is a conflict of interest, there should be a separate body to investigate officers.

Mr. Murray said cases may already be publicized before a prosecutor even gets the file. He said he would prefer that as little as possible be in the media about a high-profile case. Regarding the prosecutor's relationship with the police department, he said the process requires working daily with police officers. If the people he works with get in trouble or are accused of wrongdoing, he said he does not handle that case. He said he does not think an oversight commission, or other review would help, but, rather, "we just need common sense." He said he would get special prosecutor to handle the case if it involves police officer conduct.

Mr. Mulvihill wondered whether it might be easier to have an independent body that would investigate police officers or public officials. Mr. Murray said he has no problem with people who are unconnected with the case from handling the matter. He said any attorney can be a special prosecutor, although usually it is someone with experience. He said, like all attorneys, prosecutors are required to avoid the appearance of conflict and impropriety. He said he would never stay on a case in which he has a conflict.

Committee member Charles Kurfess asked how often grand juries change. Mr. Murray said jurors serve for four months. Mr. Kurfess then asked whether there should be a limit on how many times a prosecutor takes the same case to a grand jury in an effort to continue to try for an indictment. He wondered if, barring additional evidence, there should be a limit. Mr. Murray answered that he can count on one hand the times he has taken a case back to a grand jury, and in those instances it was because there was new evidence. He said he does not want to tie the prosecutor's hands from a public perspective. He said, as an example, sometimes witnesses recant or tell a new story, or a child witness changes his or her testimony. He said he hopes the public elects prosecutors who are competent and ethical. He said he does not know how one could put a check on that.

Mr. Kurfess asked whether, in those instances, the second grand jury should be advised that the case already has been heard. Mr. Murray said if he were to say that, he would be unable to avoid a discussion of the evidence that was presented on the previous occasion, or to avoid the question of why there was no indictment after the previous hearing.

Mr. Kurfess asked how the prosecutor decides whether to invite the accused to appear before the grand jury. Mr. Gmoser answered that he has had the accused come before the grand jury in certain cases, specifically cases such as date rape, in which he thinks it is important for the jurors to hear both sides of the story. Mr. Murray answered that sometimes counsel will ask to let the defendant testify, and sometimes the defendant wants to.

Mr. Kurfess commented that the grand jury process is the least understood by the public of all parts of the criminal procedure.

Mr. Gmoser noted that petit jurors in his county get written instructions, but that the grand jurors do not. He said he tells them the instructions, because he does not believe they get the full

import of the instruction at the time they are sworn. Mr. Kurfess said that, when he was a judge, he always gave written copies of the instructions.

Mr. Kurfess then asked about the substantive difference between a grand jury indictment and a preliminary hearing procedure. Mr. Murray answered the preliminary hearing process is often happening at an earlier stage, where there has been an investigation that blows up in a hurry. He said the presentation of a minimal amount of testimony is the same, but much more comprehensive information is presented to a grand jury. Mr. Gmoser said preliminary hearings are handled by municipal prosecutors. Mr. Murray added that it is often new prosecutors who handle preliminary hearings.

Mr. Kurfess asked whether there is any substantial difference between the federal grand jury procedure and Ohio grand jury procedures. Mr. Gmoser said the federal procedure is extremely guarded. Mr. Murray said, in the federal system, access to testimony is easier after the grand jury process has concluded. He said, in Ohio, prosecutors provide a transcript of grand jury testimony if the defendant testifies, and sometimes provide the transcript of the testimony of an accusing witness, but other than that they do not provide a transcript.

Mr. Kurfess invited the prosecutors' observations as to the purpose gleaned from the constitutional provision.

Mr. Gmoser said a grand jury is a device that protects the administration of justice and the fairness of the system, and is a form of due process protecting all rights across the board. Mr. Murray added the protections include protecting those who might be falsely accused.

Mr. Jacobson said it is a problem to focus on prosecutors' potential conflict of interest in regard to law enforcement, as prosecutors also may work closely with others such as the attorney general. Mr. Jacobson asked whether there are phases in a grand jury presentation, and whether, when the prosecution has presented its evidence, the jurors are given general or specific instructions about the case.

Mr. Murray said jurors are told the code section and the elements of the crime, and then are told they need to decide whether the information they have heard satisfies the elements of that crime. Mr. Jacobson followed up, asking whether a prosecutor could suggest one crime but not name the other potential crimes the evidence might support. He said he wondered if those instructions at the end of the presentation should be what should be transcribed and reviewed by a judge.

Mr. Gmoser answered that a judge is not going to sit as a second prosecutor and examine what the first prosecutor did. Mr. Jacobson clarified that he is not asking to check sufficiency, but is asking whether what was said as an instruction was fair and legitimate, and not a violation of someone's rights. He asked "what is wrong with the suggestion that someone who has unchecked power for a short amount of time could, in theory, abuse that power?"

Mr. Gmoser answered that no prosecutors do what Mr. Jacobson is suggesting could happen. He said the idea of a judge reviewing the final instructions to the jurors would not work and is not a good idea. Mr. Murray clarified regarding the instruction, saying if a prosecutor misinstructs, the

check on the process is what happens after that. He said he does not think the statistics will support that the process needs to be changed. He said there are a lot of cases that do not result in an indictment.

Mr. Jacobson continued, suggesting that if prosecutors do not want a judge to review their actions, why not provide the defendant a copy of the instructions so if there is something wrong it can be brought to someone's attention. Mr. Gmoser said prosecutors get a charge from the police, but sometimes the charge should be less or should be more, and this is why the charges are not always the same. He explained it is in the discretion of the prosecutor to decide the charge, and in doing so, the prosecutor ends up owning the case. He added, if the prosecutor loses the case, it is on the prosecutor.

Mr. Jacobson said he admits the system generally works, but wondered what percentage of cases is subject to a plea bargain. He explained that the fact of indictment is enough to force a plea, and because a defendant pleads guilty does not mean the original charge was fair. Mr. Murray said most prosecutors are telling the jury: "here is the evidence, here are the potential offenses," and they will offer the grand jury the opportunity to charge one or more offenses and some may be higher level of crimes than the circumstances warrant. He said, there is a necessity for that plea bargaining process to happen, but the grand jury gets the first look at it. Mr. Gmoser added "just because we plea bargain does not mean the charge was not well founded."

Mr. Mulvihill asked who provides answers if jurors have questions. Mr. Murray said the jury instructions notify jurors they can ask the court, adding the prosecutor is by statute the legal advisor to the grand jury. Mr. Mulvihill asked whether Mr. Murray recommends to the grand jury what the indictment should be, based on what the evidence shows. Mr. Murray said the procedure is not like in a trial. He said, in the grand jury he is saying "here is the evidence, here are your options." He said he tries to be as literal as possible.

Chair Abaray noted that a failure to indict was of concern in some of the police shooting cases. She wondered if, in situations where everyone knows about the incident, there has been consideration to releasing to the public the jury instruction or the charges. Mr. Gmoser said prosecutors would not consider doing so. He said the public trust issue would not be solved by giving a tutorial to the public. He added, in Butler County, every police shooting goes to a grand jury, but some counties do not require those cases to go to the grand jury. He said he always takes it to the grand jury when police are involved.

Mr. Kurfess asked whether the prosecutors always allow jurors the possibility of charging a lesser-included offense. Mr. Gmoser said that depends. He gave an example of a murder of a two-year-old year old child in which the suspect was indicted for felony murder but also for involuntary manslaughter. He said the two crimes have very different penalties, but he charged both ways because he did not want an argument with the court and the defense about whether one is a lesser-included offense of the other. Mr. Murray answered that sometimes the defense does not want a compromise option, and that the decision goes back to the strength of the evidence.

Chair Abaray thanked the prosecutors for their presentations.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 4:10 p.m.

Approval:

The minutes of the December 10, 2015 meeting of the Judicial Branch and the Administration of Justice Committee were approved at the February 11, 2016 meeting of the committee.

/s/ Janet Gilligan Abaray
Janet Gilligan Abaray, Chair

/s/ Patrick Fischer
Judge Patrick F. Fischer, Vice-chair