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Memo To: Judicial Branch and Administration of Justice Committee
From: Paul Dobson, Wood County Prosecutor, President
Date: April 13, 2017
Re: Grand Jury issues

We wish to comment on two issues that the Judicial Branch and Administration of Justice Committee voted to support at its meeting on March 9, 2017. The first has to do with appointment of an independent counsel to advise the members of the grand jury "regarding matters brought before it." The other concerns the right of the accused to have a record of the grand jury testimony of any witness who is called to testify at trial.

First, we believe that neither of these issues should be addressed in the constitution. The General Assembly has full authority to enact laws dealing with either of these issues if it chooses to do so. The Supreme Court also has authority to deal with either issue in whole or in part through its rule making process. Writing these concepts into the constitution means that they will be very difficult to change once adopted. Statutes and rules, however, offer much more flexibility. They can be amended to fine tune their provision in the event changes are needed.

We also wish to point out that the Supreme Court's Task Force to Examine Improvements to the Ohio Grand Jury System, hardly a prosecution-dominated group, did not recommend either of these changes.

Independent counsel

We see the attorney advisor as both unnecessary and disruptive. The prosecutor advises the grand jury as to the law, and has no incentive to misrepresent the law, since the prosecutor must prosecute the resulting indictment. What is the point of securing an indictment under an incorrect application of the law when the resulting indictment probably cannot be successfully prosecuted? In any event, if the grand jury feels the need of independent advice on the law, a much more effective and efficient way to obtain that advice is to consult with the judge who appointed the grand jury. Grand jurors are instructed at the outset that they have this option.

There are also cost and logistical problems. In smaller counties, it might be difficult to find an attorney experienced in criminal matters who would be willing to take on this responsibility, especially if it means he will be disqualified to act as defense counsel in any case on which he provides advice, or perhaps even any case considered by the grand jury during the time he served as independent counsel. Then there is the cost issue. The counsel would no doubt be expected to be paid for the time devoted to this, even though the counsel might not be called on to give advice except in rare cases. This could be a substantial expense for all counties.

And what happens when the counsel and the prosecutor disagree? Probably go to the judge to resolve the issue. Which raises the question, why should the grand jury not consult the judge directly in the first place rather than contending with this intermediary counsel?

The prosecutor is a public official elected by the citizens of each county to inquire into and prosecute crimes in that jurisdiction. He or she is accountable to the electorate. If the prosecutor is going to be held accountable for prosecution policy and decisions, he or she must be able to conduct his or her office as he or she sees fit within, of course, legal and ethical bounds. The independent counsel is accountable to no one. Inserting this unelected, unaccountable independent counsel into the process is fundamentally at odds with the idea that the electorate will hold the prosecutor responsible for the conduct of the office.

So far as we know, Hawaii is the only state to require an independent counsel. The fact that no other state has adopted this idea is a good indicator of the wisdom behind it. Also, in the committee discussion, the only specific instances of prosecutor misconduct cited in support were from Milwaukee and the Duke University lacrosse case. From what we know of these cases, a battalion of independent counsel would not have made a difference. If a prosecutor is determined to ignore normal rules and ethical standards an independent counsel is not going to make any difference.

Providing transcripts to the accused

On providing transcripts of grand jury testimony to defendants, it is essential to keep in mind that witness intimidation is not uncommon. We have even had cases where witnesses have been assaulted and murdered. Releasing transcripts could exacerbate this problem.

Knowing that transcripts of one's testimony will be released to the defendant also may discourage some witnesses from coming forward and cooperating with law enforcement. This is especially true in sexual assault and domestic violence cases.

This is an issue that must be dealt with very carefully, where legislative flexibility is essential. This issue is especially inappropriate for the constitution because constitutional provisions are so difficult to change and fine tune.

For those who claim that this is essential for the defendant to receive a fair trial, there are other ways to deal with this issue. First, the prosecutor has a duty to provide to the defendant any evidence favorable to the defendant and material to guilt or punishment, as required by the Rules of Professional Conduct, Cr.R. 16, and *Brady v. Maryland*, 373 U.S. 83 (1963). Cr.R. 16 also requires the prosecutor to provide the defendant with a copy of any written or recorded statement of a witness in the state's case-in-chief, as well as a copy of any written or recorded statement of the defendant or co-defendant, but note that the prosecutor may refuse to provide any of this information if the prosecutor believes that disclosure will compromise the safety of a witness, victim, or third party or subject them to intimidation or coercion.

The value of the privacy of the grand jury has been repeatedly upheld by the U.S. Supreme Court:

> (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 witnesses who may testify before 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.

United States v. Proctor, 356 U.S. 677 (1958). The court went on to say, "The grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow. This 'indispensable secrecy of grand jury proceedings' (citation omitted), must not be broken except where there is a compelling necessity." The secrecy of the grand jury is not, as some suppose, to protect prosecutors, but to protect witnesses. The chilling effect of their knowledge that what they say in grand jury will be turned over to the defendant, who may be the perpetrator of serious offenses against them, may well prevent the most serious crimes from being properly presented.

The privacy of the grand jury was established long ago as a strength, not a weakness, of the criminal justice process. To alter this foundational aspect would endanger the innocent and chill the voice of truth.