

To: Ohio Constitutional Modernization Commission  
Judicial Branch and Administration of Justice Committee

From: Michael T. Gmoser, Butler County Prosecuting Attorney  
And on Behalf of the Ohio Prosecuting Attorneys Association

Date: December 10, 2015

Dear Members of the Committee:

My name is Michael T. Gmoser and I am the duly elected prosecutor of Butler County, Ohio.

I am testifying today personally and on behalf of the Ohio Prosecuting Attorneys Association in support of the Ohio Grand Jury system and in opposition to any proposed changes to it.

Our Grand Jury system is rooted in the 5<sup>th</sup> Amendment of the U.S. Constitution, our Ohio Constitution- Article 1- Bill of Rights and implemented by our Ohio Rules of Criminal Procedure- Rule 6.

Through the many years of the history of our jurisprudence there has been no significant legislative modification this system, except for minor procedural changes to the Rules. Nothing, however, has changed the basic concept that the Grand Jury system as implemented is vital to the overall protection of society from excesses of governmental authority driven by what we all now call political correctness.

In a nation of approximately 321 million people, it can well be expected that untoward aberrations of any system will occur and our criminal justice system is no exception. There have been isolated instances regarding grand juries where the perception is that transparency, instead of secrecy, will better serve justice and the buzz word

“transparency” is always seen as politically correct by the uninformed. What is known by the legally informed, however, is that transparency in the grand jury system – opening the proceeding in some manner legislatively to the public- will have the opposite effect on the protections afforded to the guilty, the innocent and ultimately the public.

It is fundamental to the success of the grand jury system that it be conducted in secret and not open to public view and review. Secrecy of proceedings guarantees that the grand jury will not be influenced by outside pressures- political correctness- and guarantees that one suspected of crime with nothing more will not be subjected to public disclosure and condemnation. Secrecy is also essential when the grand jury is called upon to exercise its ability to investigate criminal activity above what it is presented from law enforcement agencies. Simply stated, there would be a chilling effect on any such investigations if those involved were open to non- professional public scrutiny.

Ultimately, the grand jury system is an essential means by which one is informed that probable cause exists that a crime has been committed and that a trial is required in a public forum with all the transparency now permitted. That venue is where the press and public should live and not in the means where a charge is made. Nothing would be gained by such modifications and much would be lost.

All of what I have said and will say on this subject can be summarized by explaining the fallacy and popular misconception that a prosecutor can indict a ham sandwich if he chooses to and concluding this must be happening. For uninformed skeptics who seek

the worst in government, this resonates loudly enough to get your attention, but that is all it should get. The truth is from a current prosecutor and attorney with over 41 years of successful legal practice on both sides in a major county of this state, no prosecutor indicts cases they cannot win. All prosecutors know that any perceived gain from an unfounded indictment is quickly buried by a failed prosecution and the negative publicity that goes with it. Thus, if you indict it, you eat it one way or the other.

In practice, prosecutors do not dictate results to grand jurors who are instructed to be independent and on occasion are fiercely independent. They, too, are aware of the popular misconceptions of their role and from my experience they strive to dispel them by following the law and not emotion or political correctness.

As with all things concerning human kind, our judicial systems are not perfect and no amount of legislative modification will achieve perfection. The point is that with the grand jury system it is as good as it can be with a proven record best left alone to work as it has for centuries in our free society.

Michael T. Gmoser  
Butler County Prosecuting Attorney

To: Ohio Constitutional Modernization Commission  
Judicial Branch and Administration of Justice Committee

From: Morris J. Murray, Defiance County Prosecuting Attorney  
And on Behalf of the Ohio Prosecuting Attorney Association

Date: December 10, 2015

**Members of the Committee:**

Thank you for giving me the opportunity to speak with you today about the Grand Jury process in Ohio. I address you today both as an individual Prosecutor and on behalf of the Ohio Prosecuting Attorney Association. I am the Elected Prosecuting Attorney in Defiance County. I have served in law enforcement since 1980, originally as a police officer and since 1985 as a prosecutor in Defiance County.

In spite of various claims and negative media attention to Grand Jury proceedings, growing out of high profile, emotionally and politically charged cases, Ohio's Prosecutors firmly believe the Grand Jury process is an absolutely critical component to the fair and efficient administration of justice.

Frankly, I could find no better way to describe and defend the current process than by referring to what Judges in Ohio tell new Grand Jurors. Arguably the most articulate and comprehensive explanation of Grand Jury is found in those detailed instructions given to Jurors upon being sworn in for service.

Please allow me to quote from portions of these instructions:

*You have been sworn this morning as the Grand Jury of this county for the ensuing term of court. Your function will be to hear testimony and to determine whether persons suspected of crime should or should not be placed on trial. The court will instruct you concerning your duties. It is mandatory that you follow these instructions.*

*The grand jury is an ancient and honored institution. Its existence is firmly embedded in the system of Anglo-Saxon justice. The Constitution guarantees that no person be placed on trial for a felony unless he/she has been indicted by a grand jury. This provision is a barrier against unjust prosecution. The grand jury not only brings to trial persons accused of crime, but also protects persons from unfounded accusations.*

*Your oath contains important principles that govern you in your deliberations. The oath is your promise that you will keep secret everything that takes place in the grand jury room. You may not reveal the subjects discussed or the identity of those who appeared before you. This duty exists during the time of your service and continues forever afterwards. This is the only part of the judicial procedure where absolute secrecy is required.*

*The purpose of secrecy is two-fold: First, accusations may be brought before you which you find unfounded. If publicity were given to the fact that the grand jury investigated a person, his or her reputation might be*

*ruined, even though he/she is innocent. The second reason for secrecy is that if anyone, charged with a crime, learns of your investigation, he/she has an opportunity to escape and to defeat the process of criminal justice.*

*Secrecy demands that you do not communicate to anyone what has been said, done or seen in the grand jury room unless you are ordered by a judge in open court to reveal it.*

*No one may be charged with a capital or otherwise infamous crime except upon an indictment by the grand jury. An indictment is a formal, written accusation of a crime against one or more persons, approved by the grand jury. Your duty is to allow or to deny the issuance of an indictment. There are 9 members on the grand jury and 7 members must agree before you can approve an indictment.*

*You will hear only one side of a case. It is not your duty to decide the guilt or innocence of the accused. It is your duty to determine whether there is sufficient evidence or probable cause to require an accused to stand trial. If the evidence fails to establish a probability of guilt you must refuse to return a true bill.*

*No public purpose would be served by indicting a person when it appears to you that the evidence is not sufficient to sustain a conviction. Unjust or unfounded indictments should not be returned against*

*anyone. On the other hand, it is equally important that indictments be returned against those who, upon the evidence, appear to be probably guilty of criminal acts.*

*You must be fair and just in your deliberations to the best of your ability and understanding. Your oath requires that you do not indict any person through malice, hatred, or ill will; nor will you fail to indict any person through fear, favor, regard, reward or hope of reward. You must be guided by an impartial spirit, free from personal, social, racial, religious or political bias or feeling.*

*You are cautioned that rumor and hearsay testimony are unreliable. They should be disregarded. Note that no person may be compelled to be a witness against himself. A witness who testifies about his/her own participation in crime must first be advised in your presence of his/her constitutional rights by the prosecuting attorney before you may accept such evidence.*

*The prosecuting attorney is by law the representative of the State of Ohio in all criminal prosecutions. It is his duty to be present with the grand jury to present the evidence, to examine the witnesses and to give advice upon any matter of law which may be raised. You are, however, the sole judges of the facts. Neither the prosecuting attorney nor any of his assistants may influence you in your decision as to whether an indictment will be approved. In addition to*

*the prosecuting attorney and the witnesses there will be present in the grand jury room a shorthand reporter who will record the testimony of the witnesses.*

*After the testimony is taken and while you are discussing what action you will take, the prosecutor, his assistants and the court reporter will withdraw from your jury room. They are not permitted to be present during your deliberations or when a ballot is taken and they may not influence your decision upon any question of fact.*

*Although you have power to investigate any crime committed in this county under the laws of the state of Ohio, you are not a general inquiring body. You have neither the duty, nor the privilege, of inquiring into subjects which the desire of one of your members or current public feeling of the moment may dictate, unless it is related to crime. 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.*

Ladies and Gentlemen, Grand Jurors take these instructions to heart. Prosecutors utilize the process for the purposes for which it is intended. Investigations on felony crimes are conducted by Law Enforcement Agencies and are submitted to Prosecutors for review. Prosecutors then review reports, statements and all available evidence, consider laws and exercise initial discretion in deciding if probable cause appears to exist. This happens before a Grand Jury considers the

case. Some reasonable prosecutorial discretion is certainly contemplated by law and is an important part of the process. Prosecutors have a sworn duty to seek justice, which may mean pursuing vigorous prosecution of an accused, or it may mean determining that a case should not be pursued. After this initial screening by prosecutors, a determination is made that a case should go before a Grand Jury. Please keep in mind, Prosecutors do not seek to indict innocent people and do not pursue cases where it is clear from the outset probable cause is lacking. On the other hand, if the independent citizens serving on a Grand Jury determine a True Bill should be returned, a Prosecutor is obligated to pursue even the sometimes difficult or controversial cases.

It is also important to understand that the confidentiality of this process is essential to the effective administration of justice. The instructions explain this, but to reiterate, protecting all parties involved, including crime victims, witnesses and law enforcement, as well as those not indicted, is absolutely necessary.

While some high profile cases can create a misperception about how prosecutors or Grand Juries perform these duties, the truth is, the process works well and as intended. It is further worth noting that while statistics are kept on indictments returned and convictions, as you can understand, claims of criminal conduct may

not be true or may not be provable. The proper function of prosecutors and Grand Juries allow false or unreliable accusations or otherwise bad cases to get some review but, when appropriate, to be closed out while protecting the privacy of those involved, again highlighting the importance of Grand Jury confidentiality.

Sometimes as lawyers, judges or legislators, we spend a great deal of time trying to figure out what is wrong or to fix things. We urge you to consider that the Grand Jury process is not broken, it works well and accomplishes the lofty objectives set forth in those instructions.

Thank You

Morris J. Murray  
Prosecuting Attorney  
Defiance County, Ohio