February 23, 2011

The Honorable Jessica A. Little
Brown County Prosecuting Attorney
200 East Cherry Street
Georgetown, Ohio 45121

SYLLABUS: 2011-004

1. Pursuant to R.C. 2939.10 and Ohio R. Crim. P. 6(D), a deputy sheriff may not be present in the grand jury room during the testimony of an inmate who has been subpoenaed to provide testimony to the grand jury.

2. The unauthorized presence of a deputy sheriff during the testimony of an inmate who has been subpoenaed to testify before the grand jury is not sufficient to set aside an indictment unless prejudice to the accused is shown.

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OPINION NO. 2011-004

The Honorable Jessica A. Little
Brown County Prosecuting Attorney
200 East Cherry Street
Georgetown, Ohio 45121

Dear Prosecutor Little:

You have requested an opinion whether a deputy sheriff may be present in the grand jury room during the testimony of an inmate who has been subpoenaed to provide testimony to the grand jury. If the deputy sheriff's presence is not authorized, you also ask whether an indictment so obtained is defective.

Your letter indicates that the Brown County Sheriff has established a policy of requiring the presence of a deputy sheriff in the grand jury room while an inmate is testifying. The courts of common pleas are responsible for conducting grand juries in state court proceedings. Ohio R. Crim. P. 6(A) (court of common pleas judge "shall order one or more grand juries to be summoned at such times as the public interest requires"); *State ex rel. Shoop v. Mitrovich*, 4 Ohio St. 3d 220, 221, 448 N.E.2d 800 (1983) (grand jury "is under the control and direction of the court of common pleas"). It is the sheriff's duty to secure the court of common pleas. Pursuant to R.C. 311.07(A), the sheriff "shall attend upon the court of common pleas" and "shall have charge of the court house."

The conduct of grand jury proceedings is carefully prescribed. *See* R.C. Chapter 2939; Ohio R. Crim. P. 6. In particular, R.C. 2939.10 and Ohio R. Crim. P. 6(D) address who is authorized to be present in the grand jury room while the grand jury is in session. According to R.C. 2939.10:

> The prosecuting attorney or assistant prosecuting attorney may at all times appear before the grand jury to give information relative to a matter cognizable by it, or advice upon a legal matter when required. The prosecuting attorney may interrogate witnesses before the grand jury when the grand jury or the prosecuting attorney finds it necessary…. In all matters or cases which the attorney general is

> required to investigate or prosecute by the governor or general assembly, or which a special prosecutor is required by [R.C. 177.03] to investigate and prosecute, the attorney general or the special prosecutor, respectively, shall have and exercise any or all rights, privileges, and powers of prosecuting attorneys, and any assistant or special counsel designated by the attorney general or special prosecutor for that purpose, has the same authority.

Ohio R. Crim. P. 6(D) further states that "[t]he prosecuting attorney, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session."

The language of R.C. 2939.10 and Ohio R. Crim. P. 6(D) is clear and unambiguous and therefore should be applied as written rather than interpreted and expanded to authorize the presence of a person not included in the explicit language of those provisions. *See Wachendorf v. Shaver*, 149 Ohio St. 231, 78 N.E.2d 370 (1948) (syllabus, paragraph 5) ("[t]he court must look to the statute itself to determine legislative intent, and if such intent is clearly expressed therein, the statute may not be restricted, constricted, qualified, narrowed, enlarged or abridged"); *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944) (syllabus, paragraph 5) ("[w]here the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted"). Further, there is no provision either in R.C. Chapter 2939 or Ohio R. Crim. P. 6 that permits a deputy sheriff or any other law enforcement officer inside the grand jury room while the grand jury is in session. We therefore conclude that pursuant to R.C. 2939.10 and Ohio R. Crim. P. 6(D), a deputy sheriff may not be present in the grand jury room during the testimony of an inmate who has been subpoenaed to provide testimony to the grand jury.

The historical sanctity of grand juries and the importance of ensuring the secrecy of grand jury proceedings support this conclusion. *See In re Grand Jury Investigation*, 61 Ohio Misc. 2d 583, 594, 580 N.E.2d 868 (C.P. Hamilton County 1991) ("it is evident that the secrecy surrounding grand jury proceedings is a legal tradition older than the United States itself [and] that such secrecy is still upheld uniformly in the courts"). Courts routinely interpret statutes and rules in a manner that protects grand jury proceedings. *See id.* at 587 ("[f]rom earliest times it has been the policy of the law to shield the proceedings of grand juries from public scrutiny, and statutes relating to the secrecy of such proceedings should be given a reasonable and liberal construction which will result in the accomplishment of the purposes for which they were enacted" (quoting 38 Corpus Juris Secundum (1943) 1060, 1060-61, Grand Juries, Section 43)).

Ohio courts have applied a strict reading of R.C. 2939.10 and Ohio R. Crim. P. 6(D) when addressing challenges to the validity of indictments based on the presence of unauthorized persons in the grand jury room during grand jury proceedings. In order to protect the "very secretive nature" of grand jury proceedings, "[t]he information so given to the grand jury may not be revealed to any person other than the grand jury, *and others who by law are permitted to listen to grand jury testimony*." *In re Klausmeyer*, 24 Ohio St. 2d 143, 146, 265 N.E.2d 275

(1970) (emphasis added). Ohio courts consistently have found that a person not explicitly authorized by rule or statute may not be present while the grand jury is in session. *E.g.*, *State v. Jewell*, No. CA448, 1990 Ohio App. LEXIS 3859, at *24 (Vinton County Aug. 22, 1990) (erroneous for trial court to permit a children's services caseworker to be present while minor child testified); *State v. Ogletree*, No. 9768, 1987 Ohio App. LEXIS 8303, at *6 (Montgomery County Aug. 14, 1987) ("accused does not have the right to appear before or attend grand jury proceedings, either personally or by counsel").

Although we are not aware of any Ohio court decision specifically addressing the presence of a deputy sheriff or other law enforcement officer during an inmate's testimony, at least two decisions address situations where a law enforcement officer was present in the grand jury room while the grand jury was in session. In both cases, the courts held that the officer's presence was not authorized. *State v. Achberger*, No. 8282, 1977 Ohio App. LEXIS 9951, at *4 (Summit County Sept. 8, 1977) (unauthorized presence of deputy during grand jury testimony); *State v. Kracke*, No. C-75359, 1976 Ohio App. LEXIS 8551, at **3-4 (Hamilton County May 17, 1976) (police officer not authorized to be present in grand jury room during another witness's testimony). Additionally, at least one federal court has specifically addressed this issue and concluded that "a United States deputy marshal is not a person authorized to be in the grand jury room." *United States v. Carper*, 116 F. Supp. 817, 820 (D.D.C. 1953). The court applied Fed. R. Crim. P. 6(d), which is identical in substance to Ohio R. Crim. P. 6(D). In *Carper*, the defendant challenged an indictment based on the charge that unauthorized persons were in the grand jury room while the grand jury was in session. *Id.* at 818. Three United States deputy marshals were present during the testimony of prisoners in their custody. The government argued that the deputies' presence was necessary to guard the prisoner-witnesses. *Id.* Finding that "no provision is made for the presence of a deputy marshal in the grand jury room at any time," the court held that the deputies' presence was not authorized. *Id.* at 819-20.

Furthermore, Ohio courts have stated that it is necessary to protect the secrecy of grand jury proceedings to ensure that "grand jury deliberations are free from outside influence" and to encourage "free and open discussion by grand jury witnesses." *In re Grand Jury Investigation*, 61 Ohio Misc. 2d at 588; *see also State v. Patton*, Nos. 16745 and 16634, 1995 Ohio App. LEXIS 2040, at *12 (Summit County May 10, 1995) (one of five basic goals served by safeguarding grand jury proceedings includes the encouragement of "free and untrammeled disclosures by persons who have information with respect to the commission of crimes" (quoting *Petition for Disclosure of Evidence*, 63 Ohio St. 2d 212, 219, 407 N.E.2d 513 (1980))). "The grand jury must function independently as an arm of the court and must have only minimal contacts with both the police and the prosecution. Without the strict application of Crim. R. 6(D), the sanctity and secrecy of the grand jury is threatened." *State v. Achberger*, 1977 Ohio App. LEXIS 9951, at *4. The conclusion that R.C. 2939.10 and Ohio R. Crim. P. 6(D) must be read strictly and, therefore, that persons other than those explicitly listed in the statute or rule are not permitted during witness testimony is consistent with the goal of ensuring that the witness provides open testimony that is free from outside influence, particularly where the unauthorized person is a law enforcement officer.

We recognize that your question implicates not only the interest in preserving the sanctity of grand jury proceedings but also implicates the sheriff's competing duty to oversee court security. We find, however, that the sheriff's duty to "attend upon the court of common pleas" as required by R.C. 311.07(A) is not specific enough to override the clear and unambiguous language in R.C. 2939.10 and Ohio R. Crim. P. 6(D). Moreover, no provision in R.C. 311.07 or elsewhere in the Revised Code requires a sheriff to maintain a presence in a particular room or area of the court house. As the federal district court recognized in *Carper*, there arguably are less intrusive ways by which the sheriff may ensure the prisoner-witness's security as well as the security of the court without being present in the grand jury room while the grand jury is in session. *See Carper*, 116 F. Supp. at 821.

Having concluded that a deputy sheriff is not authorized to be present in the grand jury room during an inmate's testimony, we must now determine what effect such an unauthorized presence has on an indictment. Although neither R.C. 2939.10 nor Ohio R. Crim. P. 6(D) make any provision for such a situation, this issue has been addressed in many jurisdictions. There is a split among the jurisdictions whether the presence of an unauthorized person is sufficient to set aside an indictment without a showing of prejudice. Some jurisdictions take the position that the appearance of an unauthorized person is sufficient to set aside an indictment without a showing of prejudice to the accused. *See* Andrea G. Nadel, Annotation, *Presence of Unauthorized Persons During State Grand Jury Proceedings as Affecting Indictment*, 23 A.L.R.4th 397 (2010) (citing cases from various jurisdictions). Other jurisdictions, however, take the position that the appearance of an unauthorized person is not sufficient to set aside an indictment unless prejudice to the accused is shown. *Id.*

In Ohio, courts that have addressed this issue consistently have concluded that the presence of an unauthorized person during grand jury proceedings is not sufficient to set aside an indictment unless prejudice to the accused is shown.[1] *State v. Stull*, 78 Ohio App. 3d 68, 72, 603 N.E.2d 1123 (Sandusky County 1991) (trial court improperly dismissed indictment based on presence of unauthorized person in grand jury room as there was no showing that accused was prejudiced "in any respect"); *State v. Kracke*, 1976 Ohio App. LEXIS 8551, at **5-7 (judgment of conviction will not be reversed based on unauthorized presence of police officer in grand jury room while another witness testified because there was no showing of prejudice to the accused); *State v. Metzger*, 21 Ohio Dec. 72, 86 (C.P. Lucas County 1910) ("the weight of authority is to the effect that to invalidate an indictment by reason of the presence of an unauthorized person in the grand jury room, prejudice must affirmatively appear"); *see also State v. Jewell*, 1990 Ohio App. LEXIS 3859, at *24 (conviction of criminal defendant by jury "renders harmless any

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[1] In one case, the trial court did dismiss indictments based on the unauthorized presence of a deputy during the testimony of other witnesses. *State v. Achberger*, No. 8282, 1977 Ohio App. LEXIS 9951, at **3-4 (Summit County Sept. 8, 1977). In finding that the trial court acted properly in dismissing the indictments, however, the appellate court did not indicate whether the defendant was required to show prejudice.

conceivable error regarding the presence of unauthorized persons during grand jury proceedings"). Neither R.C. 2939.10 nor Ohio R. Crim. P. 6(D) set forth any sanction or penalty for a situation in which a person not explicitly authorized by statute or rule is present during witness testimony while the grand jury is in session. Further, there is no Ohio authority that finds that the presence of an unauthorized person in the grand jury room is sufficient to set aside an indictment where the accused has not shown prejudice. Accordingly, we conclude that the unauthorized presence of a deputy sheriff during the testimony of an inmate who has been subpoenaed to testify before the grand jury is not sufficient to set aside an indictment unless prejudice to the accused is shown.

In sum, it is my opinion, and you are hereby advised as follows:

1. Pursuant to R.C. 2939.10 and Ohio R. Crim. P. 6(D), a deputy sheriff may not be present in the grand jury room during the testimony of an inmate who has been subpoenaed to provide testimony to the grand jury.

2. The unauthorized presence of a deputy sheriff during the testimony of an inmate who has been subpoenaed to testify before the grand jury is not sufficient to set aside an indictment unless prejudice to the accused is shown.

Respectfully,

MICHAEL DEWINE
Ohio Attorney General