

OPINION NO. 2012-042

Syllabus:

2012-042

1. Pursuant to R.C. 1901.20(B) and R.C. 2931.03, a court of common pleas and a municipal court that has jurisdiction within the county served by the court of common pleas have concurrent jurisdiction to conduct proceedings in a felony case before the case is presented to a grand jury or the accused waives his right to an indictment. In exercising its jurisdiction in a felony case, a court of common pleas may in accordance with R.C. 2931.03, Ohio R. Crim. P. 4, and Ohio R. Crim. P. 5 conduct proceedings that occur before the case is presented to a grand jury or the accused waives his right to an indictment.
2. R.C. 2941.021 and Ohio R. Crim. P. 7(A) prohibit a county prosecuting attorney from filing an information to prosecute a felony case before the accused waives in writing and in open court his right to indictment by a grand jury. (1949 Op. Att’y Gen. No. 801, p. 465 and 1933 Op. Att’y Gen. No. 969, vol. II, p. 926, overruled.)

To: Kenneth W. Oswalt, Licking County Prosecuting Attorney, Newark, Ohio
By: Michael DeWine, Ohio Attorney General, December 17, 2012

You have requested an opinion about the procedures for commencing a felony case in a court of common pleas. Specifically, you ask:

1. Does a court of common pleas have concurrent jurisdiction with a municipal court that has jurisdiction within the county served by the court of common pleas to conduct proceedings in a felony case before the case is presented to a grand jury or the accused waives his right to an indictment, and, if so, may a court of common pleas conduct proceedings that occur before the case is presented to a grand jury or the accused waives his right to an indictment?¹
2. May a county prosecuting attorney file an information to prosecute a felony case before the accused waives in writing and in open court his right to indictment by a grand jury?²

Jurisdiction of a Court of Common Pleas and Municipal Court in Felony Cases

Article IV, § 1 of the Ohio Constitution declares that “[t]he judicial power

¹ In your particular situation, the Licking County Municipal Court and the Licking County Court of Common Pleas have countywide jurisdiction in criminal cases. See Ohio Const. art. IV, § 4(A); R.C. 1901.02(A)(7); R.C. 1901.02(B); R.C. 1901.20; R.C. 2301.01; R.C. 2931.03; see also R.C. 2931.04.

² An “information” is “[a] formal criminal charge made by a prosecutor without a grand-jury indictment.” *Black’s Law Dictionary* 849 (9th ed. 2009); see R.C. 2941.021; Ohio R. Crim. P. 7(A).

of the state is vested in a supreme court, courts of appeals, *courts of common pleas* and divisions thereof, *and such other courts inferior to the supreme court as may from time to time be established by law.*” (Emphasis added.) Each county in Ohio is served by a court of common pleas. Ohio Const. art. IV, § 4(A); R.C. 2301.01. The General Assembly has also established municipal courts throughout Ohio. R.C. 1901.01; R.C. 1901.02. And, under the Ohio Constitution, the judges of a court of common pleas and municipal court “have and exercise such power and jurisdiction, at chambers, or otherwise, as may be directed by law.” Ohio Const. art. IV, § 18; *see* Ohio Const. art. IV, § 4(B).

The jurisdiction of a court of common pleas and municipal court in criminal cases is established by R.C. 2931.03 and R.C. 1901.20, respectively. R.C. 2931.03 provides that “[t]he court of common pleas has original jurisdiction of all crimes and offenses, except in cases of minor offenses the exclusive jurisdiction of which is vested in courts inferior to the court of common pleas.” R.C. 1901.20(B) states that a “municipal court has jurisdiction to hear felony cases committed within its territory.” R.C. 2931.03 and R.C. 1901.20(B) thus vest a court of common pleas and municipal court with jurisdiction to conduct proceedings in a felony case.³

Neither R.C. 2931.03 nor R.C. 1901.20(B), however, confers *exclusive jurisdiction* upon a court of common pleas or municipal court to conduct proceedings in a felony case before the case is presented to a grand jury or the accused waives his right to an indictment.⁴ In legal parlance, “exclusive jurisdiction” is “[a] court’s power to adjudicate an action or class of actions to the exclusion of all other courts.” *Black’s Law Dictionary* 929 (9th ed. 2009). In other words, when a court has exclusive jurisdiction over a particular case, no other court may adjudicate that case.

Given that both a court of common pleas and municipal court have jurisdiction to conduct proceedings in a felony case, *see* R.C. 2931.03; R.C. 1901.20(B), a

³ A county court may conduct proceedings in a felony case: “[a] county court has jurisdiction to conduct preliminary hearings in felony cases, to bind over alleged felons to the court of common pleas, and to take other action in felony cases as authorized by [Ohio R. Crim. P. 5].” R.C. 1907.02(A)(1). As your first question concerns the jurisdiction of a court of common pleas and municipal court to conduct proceedings in a felony case, this opinion will not discuss the authority of a county court to conduct proceedings in a felony case.

⁴ In a felony case, a municipal court retains jurisdiction “until such time as a transcript of the appearance, docket entries, and other matters required for transmittal are filed with the clerk of the court in which the defendant is to appear.” Ohio R. Crim. P. 5(B)(8); *see* Ohio R. Crim. P. 5(B)(1); Ohio R. Crim. P. 5(B)(4)(a). *See generally* R.C. 1901.20(B) (“[i]n all felony cases, the [municipal] court may conduct preliminary hearings and other necessary hearings prior to the indictment of the defendant or prior to the court’s finding that there is probable and reasonable cause to hold or recognize the defendant to appear before a court of common pleas and may discharge, recognize, or commit the defendant”).

court of common pleas and a municipal court that has jurisdiction within the county served by the court of common pleas have concurrent jurisdiction, rather than exclusive jurisdiction, to conduct proceedings in a felony case before the case is presented to a grand jury or the accused waives his right to an indictment. *See generally Black's Law Dictionary* 928 (9th ed. 2009) (“**concurrent jurisdiction** Jurisdiction that might be exercised simultaneously by more than one court over the same subject matter and within the same territory, a litigant having the right to choose the court in which to file the action”). Moreover, a grant of jurisdiction to a municipal court to conduct proceedings in felony cases does not deprive a court of common pleas of its jurisdiction to conduct proceedings in felony cases. *See generally Small v. State*, 128 Ohio St. 548, 192 N.E. 790 (1934) (syllabus) (“[t]he grant of final jurisdiction to a justice of the peace does not deprive the Common Pleas Court of its original concurrent jurisdiction”); *Thomas v. Marshall*, Case No. 1504, 1985 Ohio App. LEXIS 7809, at *6 (Scioto County May 22, 1985) (“[i]f an inferior court is given jurisdiction of an offense, but not exclusive jurisdiction, the Court [o]f Common Pleas would have concurrent jurisdiction”). Therefore, pursuant to R.C. 1901.20(B) and R.C. 2931.03, a court of common pleas and a municipal court that has jurisdiction within the county served by the court of common pleas have concurrent jurisdiction to conduct proceedings in a felony case before the case is presented to a grand jury or the accused waives his right to an indictment.

Felony Proceedings in a Court of Common Pleas

Your first question also asks whether a court of common pleas may conduct proceedings in a felony case that occur before the case is presented to a grand jury or the accused waives his right to an indictment. Your question has arisen because it is a common practice in Ohio for a person who is accused of a felony to initially appear in a municipal court and for the municipal court to bind the person over to the court of common pleas when the person waives his right to a preliminary hearing or the municipal court finds probable cause to believe the crime alleged or another felony has been committed by the person. *See* R.C. 1901.20(B); Ohio R. Crim. P. 5. In light of this practice, you are concerned that some proceedings, *i.e.*, initial appearance, setting bail, and the preliminary hearing, in a felony case must be conducted by a municipal court, rather than by a court of common pleas.

Pursuant to R.C. 2931.03, a court of common pleas “has original jurisdiction” to hear felony cases. For purposes of R.C. 2931.03, “original jurisdiction” means “[a] court’s power to hear and decide a matter before any other court can review the matter.” *Black’s Law Dictionary* 930 (9th ed. 2009). *See generally* R.C. 1.42 (“[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage”). The language of R.C. 2931.03 thus authorizes a court of common pleas to take a felony case in the first instance or at its inception.

The Ohio Rules of Criminal Procedure set forth the procedures for initiating proceedings in a felony case. *See* Ohio R. Crim. P. 1(A) (except as provided in Ohio R. Crim. P. 1(C), the Ohio Rules of Criminal Procedure “prescribe the procedure to be followed in all courts of this state in the exercise of criminal jurisdiction”). *See*

generally Ohio Const. art. IV, § 5(B) (“[t]he supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right”). Ohio R. Crim. P. 4 provides that a complaint may be used to initiate proceedings in a felony case as follows:⁵

(A) **Issuance**

(1) **Upon complaint** If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed, and that the defendant has committed it, a warrant for the arrest of the defendant, or a summons in lieu of a warrant, shall be issued by *a judge, magistrate, clerk of court, or officer of the court designated by the judge*, to any law enforcement officer authorized by law to execute or serve it.⁶

. . . .

(D) **Warrant or summons: execution or service; return**

. . . .

(4) **Return** The officer executing a warrant *shall make return of the warrant to the issuing court* before whom the defendant is brought pursuant to [Ohio R. Crim. P. 5]

. . . .

(E) **Arrest**

. . . .

(2) **Arrest without warrant** Where a person is arrested without a warrant the arresting officer *shall, except as provided in division (F),⁷ bring the arrested person without unnecessary delay before a court having jurisdiction of the offense*, and shall file or cause to be filed a com-

⁵ A “complaint is a written statement of the essential facts constituting the offense charged.” Ohio R. Crim. P. 3.

⁶ As used in the Ohio Rules of Criminal Procedure, the term “judge” includes a “judge of the court of common pleas,” Ohio R. Crim. P. 2(E), and the term “magistrate” includes a magistrate of a court of common pleas, Ohio R. Crim. P. 2(F); *see also* R.C. 2931.01; Ohio R. Crim. P. 19.

⁷ Ohio R. Crim. P. 4(F) provides that, “[i]n *misdemeanor cases* where a person has been arrested with or without a warrant, the arresting officer, the officer in charge of the detention facility to which the person is brought or the superior of either officer, without unnecessary delay, may release the arrested person by issuing a summons when issuance of a summons appears reasonably calculated to assure the person’s appearance.” (Emphasis added.) This provision of Ohio R. Crim. P. 4 does not, however, apply in felony cases, and thus a person arrested without a warrant for a felony must be brought before a court having jurisdiction of the offense.

plaint describing the offense for which the person was arrested. Thereafter the court shall proceed in accordance with [Ohio R. Crim. P. 5]. (Emphasis and footnotes added.)

R.C. 2931.03 and Ohio R. Crim. P. 4(A)(1) authorize a court of common pleas to take a felony case in the first instance or at its inception and issue a felony arrest warrant in the case. And, a law enforcement officer who executes the arrest warrant is required to make return of the warrant to the court of common pleas for proceedings in that court in accordance with Ohio R. Crim. P. 5. *See* Ohio R. Crim. P. 4(D)(4). In addition, a law enforcement officer who arrests a person without a warrant for a felony may bring the person before a court of common pleas since a court of common pleas has the authority to take the case in the first instance or at its inception. *See* R.C. 2931.03; Ohio R. Crim. P. 4(E)(2). Thus, pursuant to R.C. 2931.03 and Ohio R. Crim. P. 4, a complaint may be used to initiate felony proceedings in a court of common pleas.⁸ *See generally State v. Carpenter*, Case No. 02CA001, 2002-Ohio-6555, 2002 Ohio App. LEXIS 6364, at ¶19 (Coshocton County Nov. 29, 2002) (in felony cases “[a] complaint pursuant to [Ohio R. Crim. P. 3 and Ohio R. Crim. P. 4] may . . . be used to initiate the criminal process in arresting an individual”).

When a person is accused of a felony and required to appear before a court of common pleas, the court is required to conduct the proceedings in accordance with Ohio R. Crim. P. 5. Ohio R. Crim. P. 4(D)(4); Ohio R. Crim. P. 4(E)(2). Ohio R. Crim. P. 5(A) establishes the procedures a court of common pleas must follow when a person accused of a felony first appears before the court. In such a situation, the court of common pleas must permit the person or his counsel to read the complaint or a copy thereof and inform him:

- (1) Of the nature of the charge against him;
- (2) That he has right to counsel and the right to a reasonable continuance in the proceedings to secure counsel, and, pursuant to [Ohio R. Crim. P. 44], the right to have counsel assigned without cost to himself if he is unable to employ counsel;

⁸ Although a complaint may be used to initiate felony proceedings in a court of common pleas, the complaint does not commence a criminal prosecution against the accused. Instead, the criminal prosecution of a person accused of a felony commences when an indictment or information is filed. *See* R.C. 2941.021; Ohio R. Crim. P. 7(A); *State v. Hess*, Case No. 02 JE 36, 2003-Ohio-6721, 2003 Ohio App. LEXIS 6028, at ¶¶14-17 (Jefferson County Dec. 2, 2003); *State v. Carpenter*, Case No. 02CA001, 2002-Ohio-6555, 2002 Ohio App. LEXIS 6364, at ¶19 (Coshocton County Nov. 29, 2002); *State v. Downs*, Case No. 96 CA 54, 1997 Ohio App. LEXIS 3413, at **4-5 (Miami County July 25, 1997); *State v. Fryman*, Case No. CA87-10-125, 1988 Ohio App. LEXIS 5296, at **16-17 (Butler County Dec. 30, 1988). *See generally Dowell v. Maxwell*, 174 Ohio St. 289, 290, 189 N.E.2d 95 (1963) (“[t]he jurisdiction of the court [of common pleas] is invoked by the return of a valid indictment and is not based on the process by which an accused is taken into custody or the findings made on the preliminary examination”).

(3) That he need make no statement and any statement made may be used against him;

(4) *Of his right to a preliminary hearing in a felony case, when his initial appearance is not pursuant to indictment;*⁹

(5) Of his right, where appropriate, to jury trial and the necessity to make demand therefore in petty offense cases.

In addition, if the defendant has not been admitted to bail for a bailable offense, the judge or magistrate shall admit the defendant to bail as provided in these rules.

In felony cases the defendant shall not be called upon to plead either at the initial appearance or at a preliminary hearing. (Emphasis and footnote added.)

Ohio R. Crim. P. 5(A).

If the person waives his right to a preliminary hearing, the common pleas court judge or magistrate “shall forthwith order the [person] bound over to the court of common pleas.” Ohio R. Crim. P. 5(B)(1). This means that the judge or magistrate is required to order the person to appear at trial in the court of common pleas pursuant to indictment by a grand jury or information filed with the court if the person waives his right to an indictment. *See Dowell v. Maxwell*, 174 Ohio St. 289, 290, 189 N.E.2d 95 (1963) (“[a]n accused . . . is, after he is arrested, entitled to be informed of the charge made against him, and the court . . . examines the merits of the charge to determine only whether grounds exist to bind the accused over to the grand jury. This is the purpose of the complaint and preliminary hearing”); *Black’s Law Dictionary* 190 (9th ed. 2009) (in criminal proceedings the phrase “bind over” means “[t]o put (a person) under a bond or other legal obligation to do something, esp. to appear in court To hold (a person) for trial; to turn (a defendant) over to a sheriff or warden for imprisonment pending further judicial action A court may bind over a defendant if it finds at a preliminary examination that there is enough evidence to require a trial on the charges against the defendant”); *see also* note 8, *supra*, (felonies are prosecuted in a court of common pleas by indictment or information). *See generally* Ohio R. Crim. P. 6(F) (“[a]n indictment may be found only upon the concurrence of seven or more jurors. When so found the foreman or deputy foreman shall sign the indictment as foreman or deputy foreman. The indictment shall be returned by the foreman or deputy foreman to a judge of the court of common pleas and filed with the clerk who shall endorse thereon the date of filing and enter each case upon the appearance and trial dockets”); Ohio R. Crim. P. 7(A) (“[w]here an indictment is waived, the offense may be prosecuted by information, unless an indictment is filed within fourteen days after the date of waiver. If an information or indictment is not filed within fourteen days after the date of waiver, the defendant shall be discharged and the complaint dismissed”).

⁹ Ohio R. Crim. P. 5(B)(1) states that “[i]n felony cases a defendant is entitled to a preliminary hearing unless waived in writing.”

If the person does not waive his right to a preliminary hearing, the common pleas court judge or magistrate “shall schedule a preliminary hearing within a reasonable time, but in any event no later than ten consecutive days following arrest or service of summons if the defendant is in custody and not later than fifteen consecutive days following arrest or service of summons if the defendant is not in custody.” Ohio R. Crim. P. 5(B)(1). At the preliminary hearing, evidence may be submitted to the court of common pleas regarding the charges set forth in the complaint. Ohio R. Crim. P. 5(B)(2)-(3). Upon conclusion of the preliminary hearing, the court of common pleas shall do one of the following:

(a) Find that there is probable cause to believe the crime alleged or another felony has been committed and that the defendant committed it, and bind the defendant over to the court of common pleas of the county or any county in which venue appears.

(b) Find that there is probable cause to believe that a misdemeanor was committed and that the defendant committed it, and retain the case for trial or order the defendant to appear for trial before an appropriate court.

(c) Order the accused discharged.

Ohio R. Crim. P. 5(B)(4).

Pursuant to Ohio R. Crim. P. 5(B)(4)(a), if a common pleas court judge or magistrate finds that there is probable cause to believe that a felony has been committed by the person against whom the complaint was filed, the judge or magistrate is required to order the person to appear at trial in a court of common pleas pursuant to indictment by a grand jury or information filed with the court if the person waives his right to an indictment.¹⁰ If a common pleas court judge or magistrate does not make such a finding or find that there is probable cause to believe that the person committed a misdemeanor, the judge or magistrate is required to order the person discharged.¹¹ Ohio R. Crim. P. 5(B)(4)(c).

¹⁰ When a judge or magistrate of a court of common pleas finds that there is probable cause to believe that a felony other than the one charged in the complaint has been committed by the person against whom the complaint was filed, the judge or magistrate is required to cause a complaint charging such felony to be filed and transmitted to the clerk of the court of common pleas in which the person is to appear. *See* Ohio R. Crim. P. 5(B)(4)(a); Ohio R. Crim. P. 5(B)(6)-(7).

¹¹ Except for misdemeanor cases in the juvenile division of the court of common pleas, misdemeanors are prosecuted in a court of common pleas by indictment or information, rather than by complaint. *See* Ohio R. Crim. P. 7(A); *see also* R.C. 2941.35. *See generally* *Thomas v. Marshall*, Case No. 1504, 1985 Ohio App. LEXIS 7809, at *6 (Scioto County May 22, 1985) (“[w]hile the Common Pleas Court has misdemeanor jurisdiction, it may only be invoked by the return of an indictment or an information filed by the prosecuting attorney”). Consequently, if a common pleas court judge or magistrate finds that there is probable cause to believe that a

R.C. 2931.03, Ohio R. Crim. P. 4, and Ohio R. Crim. P. 5 thus empower a court of common pleas to take a felony case in the first instance or at its inception and conduct the proceedings in the case before the accused in the case is ordered to appear at trial pursuant to indictment by a grand jury or information filed with the court if the accused waives his right to an indictment. Therefore, in exercising its jurisdiction in a felony case, a court of common pleas may in accordance with R.C. 2931.03, Ohio R. Crim. P. 4, and Ohio R. Crim. P. 5 conduct proceedings that occur before the case is presented to a grand jury or the accused waives his right to an indictment.¹²

person against whom a felony complaint is filed committed a misdemeanor, rather than a felony, the judge or magistrate is required, unless an indictment or information is filed with the court, to order the defendant to appear for trial on the misdemeanor before the appropriate municipal or county court and cause a complaint charging the misdemeanor to be filed with the appropriate municipal or county court. *See* Ohio R. Crim. P. 5(B)(4)(b); Ohio R. Crim. P. 5(B)(6); *see also* Ohio R. Crim. P. 5(B)(7) (“[u]pon the conclusion of the hearing and finding, the court or the clerk of such court, shall, within seven days, complete all notations of appearance, motions, pleas, and findings on the criminal docket of the court, and shall transmit a transcript of the appearance docket entries, together with a copy of the original complaint and affidavits, if any, filed with the complaint, the journal or docket entry of reason for changes in the charge, if any, together with the order setting bail and the bail including any bail deposit, if any, filed, to the clerk of the court in which defendant is to appear”).

¹² We are aware that it may be argued that felony proceedings are required to be initiated in a court inferior to a court of common pleas and that a complaint asserting the commission of a felony may never be filed with a court of common pleas. *See generally* *Thomas v. Marshall*, 1985 Ohio App. LEXIS 7809, at *6 (“[t]o the extent that the complaint seeks to charge a felony, if it does, the general statutory and rule procedure likewise requires that the complaint be filed with the Portsmouth Municipal Court”). The language used by the General Assembly and Ohio Supreme Court in the Revised Code and Ohio Rules of Criminal Procedure, respectively, does not, however, support these arguments.

Neither the Revised Code nor Ohio Rules of Criminal Procedure expressly (1) prohibits a court of common pleas from conducting proceedings before a felony case is presented to a grand jury or the accused waives his right to an indictment or (2) requires a court inferior to a court of common pleas to conduct such proceedings. To the contrary, as explained in the text above, the General Assembly and Ohio Supreme Court have empowered a court of common pleas to take a felony case in the first instance or at its inception and conduct the proceedings in the case before the accused in the case is ordered to appear at trial pursuant to indictment by a grand jury or information filed with the court if the accused waives his right to an indictment. *See generally* R.C. 2901.04(B) (“[r]ules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice”); Ohio R.

Use of an Information to Prosecute a Felony Case in a Court of Common Pleas

Your second question asks whether a county prosecuting attorney may file an information to prosecute a felony case before the accused waives in writing and in open court his right to indictment by a grand jury. Ohio R. Crim. P. 7(A) and R.C. 2941.021 authorize a county prosecuting attorney to prosecute certain felonies by information.¹³ Ohio R. Crim. P. 7(A) provides, in part:

A felony that may be punished by death or life imprisonment shall be prosecuted by indictment. All other felonies shall be prosecuted by indictment, *except that after a defendant has been advised by the court of the nature of the charge against the defendant and of the defendant's right to indictment, the defendant may waive that right in writing and in open court.* (Emphasis added.)

Similarly, R.C. 2941.021 states:

Any criminal offense which is not punishable by death or life imprisonment may be prosecuted by information filed in the common pleas court by the prosecuting attorney if the defendant, after he has been advised by the court of the nature of the charge against him and of his

Crim. P. 1(B) (the Ohio Rules of Criminal Procedure “are intended to provide for the just determination of every criminal proceeding. They shall be construed and applied to secure the fair, impartial, speedy, and sure administration of justice, simplicity in procedure, and the elimination of unjustifiable expense and delay”).

Moreover, our conclusion that a court of common pleas may conduct proceedings before a felony case is presented to a grand jury or the accused waives his right to an indictment does not divest a county court or municipal court of its jurisdiction under the Revised Code or Ohio Rules of Criminal Procedure to conduct proceedings in felony cases or require that such proceedings be conducted by a court of common pleas. Instead, local officials in each county must determine the most efficient and effective manner in which to commence felony proceedings against an accused. *See generally* Ohio R. Crim. P. 57(B) (“[i]f no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with [the Ohio Rules of Criminal Procedure]”); 1935 Op. Att’y Gen. No. 4882, vol. II, p. 1464, at 1471 (“[w]hether misdemeanor cases should be prosecuted in a court inferior to the Court of Common Pleas or in the Court of Common Pleas by means of Bills of Information filed by a prosecuting attorney is a question of policy which must be determined in each instance by the prosecuting attorney”).

¹³ 1933 Op. Att’y Gen. No. 969, vol. II, p. 926 advises that a felony must be prosecuted by an indictment, rather than an information. Insofar as Ohio R. Crim. P. 7(A) and R.C. 2941.021 authorize a county prosecuting attorney to prosecute certain felonies by information, we overrule 1933 Op. Att’y Gen. No. 969, vol. II, p. 926.

rights under the constitution,¹⁴ is represented by counsel or has affirmatively waived counsel by waiver in writing and in open court, *waives in writing and in open court prosecution by indictment*. (Emphasis and footnote added.)

Ohio R. Crim. P. 7(A) and R.C. 2941.021 mandate that a person accused of a felony that is not punishable by death or life imprisonment be prosecuted by indictment unless the person waives his right to indictment by a grand jury. An “indictment” serves as “[t]he formal written accusation of a crime, made by a grand jury and presented to a court for prosecution against the accused person.” *Black’s Law Dictionary* 842 (9th ed. 2009); see R.C. 2941.021; Ohio R. Crim. P. 6; Ohio R. Crim. P. 7; see also R.C. 2939.22; R.C. 2941.03; R.C. 2941.06. As explained in *State v. Luther*, Case No. 2003-A-0130, 2005-Ohio-950, 2005 Ohio App. LEXIS 970, at ¶15 (Ashtabula County Mar. 4, 2005):

[T]he grand jury, which handed down the indictments against [the defendant], was [the defendant’s] statutory accuser. “The grand jury, in its inquest of crimes and offenses, and in its finding and presentation of indictments to the court of common pleas * * * acts as the formal and constitutional accuser of crime and those it believes to be probably guilty thereof.” *State ex rel. Doerfler v. Price* (1920), 101 Ohio St. 50, 128 N.E. 173, at paragraph one of the syllabus. The preference for the grand jury as the formal accuser in felony cases, as opposed to the complaint of the victim or arresting officer, is founded on the “theory that [the grand jury] was one of the most substantial and serviceable guaranties against official tyranny, malicious prosecution, and ill-advised and expensive trials, which might generally be avoided if the formal accusation of crime were first made by one’s peers, as represented by the grand jury.” *Id.* at 54.

Thus, pursuant to Ohio R. Crim. P. 7(A) and R.C. 2941.021, a criminal prosecution for a felony must be commenced by indictment unless the accused waives his right to indictment by a grand jury. When an accused waives his right to indictment by a grand jury, a criminal prosecution for a felony may be commenced by information. R.C. 2941.021; Ohio R. Crim. P. 7(A); see notes 2 and 8, *supra*.

To execute a valid waiver, an accused must be advised by a court of his right to indictment by a grand jury. R.C. 2941.021; Ohio R. Crim. P. 7(A); *State v. Linton*, Case No. 99 CA 10, 1999 Ohio App. LEXIS 4251, at **3-5 (Licking County Sept. 16, 1999). After being so advised, the accused must then waive “that right in writing and in open court.” Ohio R. Crim. P. 7(A); see R.C. 2941.021; *State v. Linton*, 1999 Ohio App. LEXIS 4251, at **3-5.

If an accused does not execute a valid waiver of his right to indictment by a

¹⁴ Under Article I, § 10 of the Ohio Constitution, a person has a right not to “be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury.”

grand jury, the accused may not be prosecuted for a felony unless a grand jury returns an indictment. R.C. 2941.021; Ohio R. Crim. P. 7(A). In other words, the accused may not be prosecuted by any other means. Given that an “information” is a means by which an accused may be prosecuted for a felony, *see* note 2, *supra*, R.C. 2941.021 and Ohio R. Crim. P. 7(A) prohibit the filing of an information to prosecute a felony when the accused has not executed in writing and in open court a waiver of his right to indictment by a grand jury. Therefore, R.C. 2941.021 and Ohio R. Crim. P. 7(A) prohibit a county prosecuting attorney from filing an information to prosecute a felony case before the accused waives in writing and in open court his right to indictment by a grand jury.¹⁵

Conclusions

Based on the foregoing, it is my opinion, and you are hereby advised as follows:

1. Pursuant to R.C. 1901.20(B) and R.C. 2931.03, a court of common pleas and a municipal court that has jurisdiction within the county served by the court of common pleas have concurrent jurisdiction to conduct proceedings in a felony case before the case is presented to a grand jury or the accused waives his right to an indictment. In exercising its jurisdiction in a felony case, a court of common pleas may in accordance with R.C. 2931.03, Ohio R. Crim. P. 4, and Ohio R. Crim. P. 5 conduct proceedings that occur before the case is presented to a grand jury or the accused waives his right to an indictment
2. R.C. 2941.021 and Ohio R. Crim. P. 7(A) prohibit a county prosecuting attorney from filing an information to prosecute a felony case before the accused waives in writing and in open court his right to indictment by a grand jury. (1949 Op. Att’y Gen. No. 801, p. 465 and 1933 Op. Att’y Gen. No. 969, vol. II, p. 926, overruled.)

¹⁵ 1949 Op. Att’y Gen. No. 801, p. 465 advises that a county prosecuting attorney may file an information to prosecute a felony case while the case is pending before a grand jury. Because R.C. 2941.021 and Ohio R. Crim. P. 7(A) prohibit the filing of an information to prosecute a felony when the accused has not executed in writing and in open court a waiver of his right to indictment by a grand jury, 1949 Op. Att’y Gen. No. 801, p. 465 is hereby overruled.