OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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Jim Ryan
ATTORNEY GENERAL

FILE NO. 99-023

CRIMINAL LAW AND PROCEDURE:
Disclosure of Grand Jury Transcripts

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The Honorable Doug Floski
State's Attorney, Ogle County
110 South Fourth Street
Oregon, Illinois 61061-0395

Dear Mr. Floski:

I have your letter wherein you state that it has been the longstanding practice in Ogle County for the State's Attorney to file the transcripts of grand jury testimony in the court file at the time a copy is disclosed to the counsel for the accused pursuant to Supreme Court Rule 412 (134 Ill. 2d R. 412). You have inquired whether, under section 112-6 of the Code of Criminal Procedure of 1963 (725 ILCS 5/112-6 (West 1998)), that practice is improper. For the reasons hereinafter stated, it is my opinion that grand jury transcripts in the possession of a State's Attorney may be disclosed only to other government personnel when deemed necessary by the State's Attorney in the performance of his or her duties, when a court orders their

500 South Second Street, Springfield, Illinois 62706 (217) 782-1090 · TTY: (217) 785-2771 · FAX: (217) 782-7046
100 West Randolph Street, Chicago, Illinois 60601 (312) 814-3000 · TTY: (312) 814-3374 · FAX: (312) 814-3806
1001 East Main, Carbondale, Illinois 62901 (618) 529-6400 · TTY: (618) 529-6403 · FAX: (618) 529-6416

disclosure in the interests of justice or when a disclosure is otherwise directed by law. Consequently, it is my opinion that a State's Attorney is not authorized generally to place grand jury transcripts in an open court file.

According to the information you have provided, it has been the practice in Ogle County for at least 20 years to place the original transcript of grand jury testimony in the court file at the same time that a copy is released to the counsel for the accused in discovery. The transcript contains the testimony heard by the grand jury and its cumulative vote, but does not contain a record of the grand jury's deliberations or any information which would directly identify the jurors. You have also indicated that where the grand jury hears testimony but does not return an indictment, the transcript is sealed and impounded. Questions have recently been raised regarding the propriety of placing the transcripts of grand jury testimony in open court files.

In responding to your inquiry, it is helpful first to review the origins of grand juries and the need for secrecy related thereto. The institution of the grand jury is one of ancient origin:

" * * *

At its inception in England in 1166, the grand jury was not protected by principles of secrecy; its deliberations were open to the public, and it functioned solely in the interest of the Crown. This was an age when little regard was given to the rights of private citizens. The Grand Assize, as the grand jury was called, was invoked to augment the power of the Crown by acting as a public prosecutor for the purpose of ferreting out certain crimes. In 1368, after a long period of diminishing importance of the Grand Assize as an accusatory body, there emerged a wholly distinct body called '<u>le graunde inquest</u>,' which subsequently lodged all criminal charges whether or not private accusers came forward. Significantly, this body adopted the custom of hearing witnesses in private, thereby establishing some independence of action from the Crown.

However, the true independence of the grand jury and the institution of grand jury secrecy as a legal concept received their first real impetus in 1681 as a result of the <u>Earl of Shaftesbury Trial</u>. In that case, the King's counsel had insisted that the grand jury hear in open court testimonial evidence of certain treason charges that had been lodged by the Crown against the Earl of Shaftesbury. Following the hearing, the jurors demanded and were granted the right to interview the witnesses in private chambers. Although the Crown had expected full acquiescence, the indictment ultimately was returned by the jury with the word 'ignoramus' written across it. The jurors gave only their consciences as the reason for declining to indict. The case was thereafter celebrated as a bulwark against the oppression and despotism of the Crown.

> This procedure of receiving testimony in private, outside the presence of the prosecution and defendant alike, was a common practice for a considerable period of time. As fear of coercion from governmental influences subsided, however, a prosecutor for the Crown or state was permitted to be present during the taking of testimony in order that he might draw the form of the indictment desired by the jury. Gradually, in the late nineteenth and early twentieth centuries, there evolved greater freedom in the use of grand jury proceedings by the state, and, today, it is a commonly accepted right of the state.
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> In examining the evolution of grand jury secrecy, it is important to note that the common-law concept of secrecy that was imparted to American jurisprudence arose initially from a need to protect the grand jurors and private citizens from the oppression of the state. It was not intended to aid the prosecution in its discovery of facts or to protect the prosecution's case from disclosure.
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> (Footnotes omitted.) (Richard M. Calkins, Grand Jury Secrecy, 63 Mich. L. Rev. 455, 456-8 (1965).)

In Illinois, article 112 of the Code of Criminal Procedure of 1963 (725 ILCS 5/112-1 et seq. (West 1998)) provides for the impaneling of grand juries and sets forth the procedures related thereto. Section 112-6 of the Code addresses the secrecy of grand jury proceedings, providing, in pertinent part:

> " * * *
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> (b) Matters other than the deliberations and vote of any grand juror shall not be

disclosed by the State's Attorney, except as otherwise provided for in subsection (c). The court may direct that a Bill of Indictment be kept secret until the defendant is in custody or has given bail and in either event the clerk shall seal the Bill of Indictment and no person shall disclose the finding of the Bill of Indictment except when necessary for the issuance and execution of a warrant.

(c)(1) Disclosure otherwise prohibited by this Section of matters occurring before the Grand Jury, other than its deliberations and the vote of any grand juror, may be made to:

a. a State's Attorney for use in the performance of such State's Attorney's duty; and

b. such government personnel as are deemed necessary by the State's Attorney in the performance of such State's Attorney's duty to enforce State criminal law.

(2) Any person to whom matters are disclosed under paragraph (1) of this subsection (c) shall not use the Grand Jury material for any purpose other than assisting the State's Attorney in the performance of such State's Attorney's duty to enforce State criminal law. The State's Attorney shall promptly provide the court, before which was impaneled the Grand Jury whose material has been disclosed, with the names of the persons to whom such disclosure has been made.

(3) Disclosure otherwise prohibited by this Section of matters occurring before the Grand Jury may also be made when the court, preliminary to or in connection with a judicial proceeding, directs such in the interests of justice or when a law so directs.

> (d) Any grand juror or officer of the court who discloses, other than to his attorney, matters occurring before the Grand Jury other than in accordance with the provisions of this subsection or Section 112-7 shall be punished as a contempt of court, subject to proceedings in accordance to law." (Emphasis added.)

Section 112-7 of the Code (725 ILCS 5/112-7 (West 1998)) requires the preparation of a transcript of "* * * all questions asked of and answers given by witnesses before the grand jury".

It has long been established that the "veil of secrecy surrounding grand jury proceedings is fundamental to our criminal procedure". (People v. French (1965), 61 Ill. App. 2d 439, 441.) Under the language of section 112-6 of the Code, however, there are three circumstances in which the disclosure of matters occurring before a grand jury is permitted: (1) by the State's Attorney to other government personnel in the performance of his or her duties as prosecutor; (2) when a court orders disclosure in the interest of justice; and (3) when disclosure is directed by law. Your letter does not set forth any facts which suggest that the grand jury transcripts have been placed in the court files pursuant to an order of the court; consequently, I will assume that that disclosure has been authorized, if at all, by one of the other two exceptions in subsection 112-6(c) of the Code.

Subsection 112-6(c)(1)b permits the disclosure of grand jury transcripts by the State's Attorney to other governmental personnel when it is deemed necessary in the performance of his or her duties. In Board of Education v. Verisario (1986), 143 Ill. App. 3d 1000, the Illinois Appellate Court was asked to determine whether certain grand jury materials (i.e., handwriting exemplars and telephone records) could be disclosed for use in a subsequent administrative proceeding. Noting the lack of case law interpreting section 112-6 of the Code, the court found instructive the body of case law interpreting Rule 6(e) of the Federal Rules of Criminal Procedure (Fed. R. Crim. Proc. 6), upon which section 112-6 is patterned. Of particular significance to the court was the case of United States v. Sells Engineering, Inc. (1983), 463 U.S. 418, 103 S. Ct. 3133, in which the Supreme Court construed the provisions of Rule 6(e)(3)(A), which provides:

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> (3) Exceptions. (A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to-
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> (i) an attorney for the government for use in the performance of such attorney's duty; and

> (ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.
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The court in Board of Education v. Verisario stated that in interpreting the language of Rule 6(e)(3)(A), the Supreme Court:

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> * * * held that the (A)(i) exception was limited to disclosure for use in the performance of the attorney's duty to enforce the Federal criminal law. Thus, attorneys for the civil division of the justice department could not obtain automatic disclosure of grand jury materials for use in a civil action, but instead had to seek a court order for such materials.
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> In reaching this narrow interpretation of subsection (A)(i), the court found that the drafters did not intend to grant free access to grand jury materials to attorneys not working on the criminal matters to which the materials pertained. (463 U.S. 418, 428-31, 77 L. Ed. 2d 743, 755-57, 103 S. Ct. 3133, 3140-42.) Further, the court found that if automatic, disclosure to non-prosecutors for civil use would: (1) increase the risk of inadvertent or illegal release of grand jury materials to others; (2) further tempt prosecutors to manipulate the grand jury to improperly elicit evidence for use in civil cases and make detection of such abuses more difficult; and (3) threaten to subvert discovery limitations applied

> outside the grand jury context. 463 U.S. 418, 431-35, 77 L. Ed. 2d 743, 757-59, 103 S. Ct. 3133, 3142-44.
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> We find persuasive the court's reasoning in Sells Engineering. We further note that to permit a State's Attorney to disclose grand-jury matters in response to any civil or administrative subpoena would be contrary to the basic policy of grand jury secrecy behind section 112-6(b). * * *
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> * * * "
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> (Emphasis added.) Board of Education v. Verisario (1986), 143 Ill. App. 3d at 1005-1006.

It is clear that under the Federal rule, grand jury materials may be released by a government attorney in the performance of his or her duties only to other government attorneys working on criminal matters to which the materials pertain, and to other governmental personnel to the extent necessary to assist the government attorney in the performance of his or her criminal enforcement duties. Of particular concern to the Supreme Court was the potential release of those materials to nonprosecutors.

Applying the reasoning of the court to the Illinois statute, it is my opinion that subsection 112-6(c)(1)a of the Code does not authorize State's Attorneys to place grand jury transcripts in an open court file. Clearly, subsection 112-6(c)(1)a contemplates the release of transcripts only in very limited circumstances, when it is deemed necessary to assist the

State's Attorney in the performance of his or her duties as such. By placing grand jury transcripts in an open file, not only would other governmental personnel who are not working on criminal matters have access to the materials, but so also would private attorneys and other persons who may desire to review the file. Providing unlimited access to grand jury materials in this fashion would defeat the purpose traditionally cited for maintaining the secrecy of grand jury proceedings, that being to facilitate free and open disclosure by witnesses and complainants. See People v. French (1965), 61 Ill. App. 2d at 441-2.

The statute also allows for the disclosure of grand jury materials "when a law so directs". In this regard, you have cited the provisions of Supreme Court Rule 412(a)(iii) (134 Ill. 2d R. 412(a)(iii)), which provides:

> "(a) Except as is otherwise provided in these rules as to matters not subject to disclosure and protective orders, the State shall, upon written motion of defense counsel, disclose to defense counsel the following material and information within its possession or control:
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> * * *
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> (iii) a transcript of those portions of grand jury minutes containing testimony of the accused and relevant testimony of persons whom the prosecuting

> attorney intends to call as witnesses at the hearing or trial;
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> * * *

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Initially, I note that the word "law" as used in section 112-6 of the Code may be broadly or narrowly construed, depending on its context. The word "law", in its broad sense, means "* * * the body of standards, principles and rules * * * which the courts of * * * [a particular] state apply in the decision of controversies brought before them". (Restatement, Second, Conflict of Laws, § 4.) This definition of the term "law" would include "constitutions, statutes, the common law and the various rules which the courts from time to time must and do adopt to secure an orderly, definite and consistent administration of justice". (State v. Superior Court (S. Ct. Ariz. 1942), 131 P.2d 983, 986, overruled in part on other grounds, Adams v. Bolin (S. Ct. Ariz. 1952), 247 P.2d 617.) On the other hand, the term "law" is frequently used in a restricted sense to refer only to statutory enactments. A grand jury functions under the general oversight of the circuit court. (See, e.g., 725 ILCS 5/112-2 (West 1998), "The Grand Jury shall be impaneled, sworn and instructed as to its duties by the court"; 725 ILCS 5/112-3 (West 1998), "* * * [T]he Grand Jury shall be called and sit at such times and for such periods as the circuit court may order

* * *"; and 725 ILCS 5/112-5 (West 1998), "The court may appoint an investigator" to assist the grand jury.) Given the interrelationship of courts and grand juries generally, it is my conclusion that the language of section 112-6 of the Code which authorizes the disclosure of grand jury matters "when a law so directs" was intended to refer to law in the broader sense of the term, and would therefore include Supreme Court Rules as well as statutes.

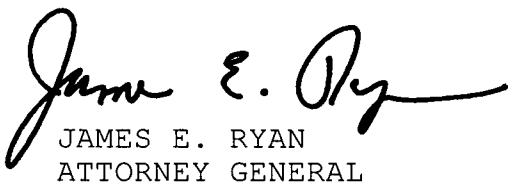
Turning to the specific provisions of Rule 412(a), it is well settled that Supreme Court Rules should be construed under the same principles of construction that apply to a statute. (P.R.S. International, Inc. v. Shred Pax Corp. (1998), 184 Ill. 2d 224, 235.) Thus, where the language of a rule is clear and unambiguous, it must be given effect as written. In re Estate of Rennick (1998), 181 Ill. 2d 395, 405.

Under the plain language of Rule 412(a), it is clear that the State must disclose "to defense counsel" the transcripts of grand jury testimony of the defendant and of any person whom the State intends to call as a witness at a hearing or during trial. Nothing in the language of Rule 412 suggests that it is intended to authorize the State to provide a copy of the transcripts of all grand jury testimony to anyone other than defense counsel or to place a copy of the grand jury transcripts in an

open court file. Moreover, no other statute or Supreme Court Rule authorizes the disclosure of grand jury transcripts generally. Consequently, it is my opinion that neither subsection 112-6(c)(3) of the Code of Criminal Procedure of 1963 nor Supreme Court Rule 412 may be relied upon to authorize the placement of grand jury transcripts in open court files.

In summary, the placement of grand jury transcripts in open court files contravenes the secrecy requirements of article 112 of the Code of Criminal Procedure of 1963. Therefore, it is my opinion that a State's Attorney should not file such transcripts in the court files unless specifically ordered to do so by a court of competent jurisdiction.

Sincerely,



JAMES E. RYAN
ATTORNEY GENERAL