Judith A. Varnau, D.O., FACOG
CORONER, BROWN COUNTY, OHIO

Deputy Coroner – Barbara J. Patridge, M.D., FACOG
Coroner's Investigator – Don Newman

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The Honorable Mike DeWine
Ohio Attorney General
c/o Opinions Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43215

December 30, 2012

Re: Request for Formal Opinion – Delivering Crime Scene Evidence to Uncertified Peace Officers

Dear Attorney General DeWine:

The mandatory duty to turn over firearms to the current sheriff of Brown County presents a legal dilemma for me where the sheriff's claim and legal credentials to hold office have been a local focus of public attention throughout his three terms in office, yet have never been specifically addressed by any court of competent jurisdiction. Several attempts have been made over the years, by individuals with standing, to challenge the sheriff's legal claim to office through protests filed with the Board of Elections and in cases brought before the courts. Every civil legal challenge to the sheriff's legitimacy has been procedurally dismissed. Every civil court clearly avoided any logical consideration of the facts involved. All failed to ever reach a decision on the merits for any challenge presented to date. A criminal court, however, found enough evidence to support falsification of election documentation, and sent the question to the jury of whether Mr. Wenninger knowingly falsified that he had satisfactory educational credentials to be a valid candidate in the 2000 sheriff race when, in fact, he did not.

All civil courts failed to reach a determination of Mr. Wenninger's legal credentials to hold public office due to insurmountable procedural hurdles in those cases. The only individuals with statutory authority to bring a case before the courts to determine the legitimacy of a person's legal credentials to hold public office are the Attorney General and County Prosecutor. The county prosecutor, however, worked diligently to prevent the unsealing of Mr. Wenninger's criminal trial record, and failed to take action on three felony infractions plus a domestic violence incident involving the sheriff. The history of concealment and complete failure to address Mr. Wenninger's legal qualifications to hold elected office is significantly suspect beyond probable cause, leaving only one individual left with the legal authority, duty, and power, to take the case before a court of competent jurisdiction for a decision on the actual facts and merits present – the Attorney General.

Code Provision:

Ohio Revised Code (ORC) §313.141, states, "If firearms are included in the valuable personal effects of a deceased person who met death in the manner described by section 313.12 of the Revised Code, ***the coroner shall deliver the firearms*** to the chief of police of the municipal corporation within which the body is found, or ***to the sheriff of the county if the body is not found within a municipal corporation***."

Question Presented:

Can a coroner with absolute knowledge of irrefutable evidence, contained in legal documentation, that a county sheriff is currently illegally holding office, legally deliver firearms, or any evidence for that matter, to the sheriff or any of his deputies, under the coroner's duty to deliver such items, as commanded in ORC §313.141, where no court of competent jurisdiction has determined the sheriff's claim to legally hold the office, considering the purview of historical circumstances presented within this request for a legal opinion?

Recorded historical facts:

January 1, 2001 – Mr. Dwayne Wenninger assumed office as sheriff of Brown County after being elected November 2000, without the proper educational credentials to qualify as a valid candidate for sheriff under ORC §311.01(B)(9)(b). ORC §311.01(B) stated that "[…] ***no person is eligible to be a candidate for sheriff, and no person shall be elected or appointed to the office of sheriff, unless that person meets all of the following requirements***:". [Section (B)(9)(a) required a candidate to have supervisory experience as a corporal or higher, which Mr. Wenninger did not possess.] Election laws are enforced under "strict compliance" unless "substantial compliance" is otherwise stated within the statute to be satisfactory.

Even though Mr. Wenninger failed to meet ALL the requirements of ORC §311.01(B)(1) through (9), he still appointed himself as Sheriff of Brown County on OPOTC Form SF400adm as of January 1, 2001, being legally ineligible to be appointed under ORC §311.01(B). He did not remove his disqualification prior to assuming the position; therefore he forfeited the seat, and had no valid appointment. Thus, under Ohio Administrative Code (OAC) §109:2-1-12(D), he started a "break in service."

January 1, 2002 – After one year of this "break in service" without a valid appointment, Mr. Wenninger's OPOTA certificate became "invalid" under OAC §109:2-1-12(D)(2), (E), and (F), where he could no longer carry a gun or perform the duties of a peace officer. Furthermore, without a "valid" peace officer certificate, he could not now satisfy the requirements of ORC §311.01(B)(8)(a) or (b).

NOTE: The OAC OPOTC requirements are strictly enforced most recently against Chief James Craig, Cincinnati, OH, and Chief Ron Twitty, Lincoln Heights, OH.

December 31, 2002 – Mr. Wenninger was indicted for falsification of his year 2000 candidate election documentation.

March 25, 2003 – Motion to dismiss falsification charge denied by Judge Robert Ringland.

October 6-8, 2003 – State makes its case in criminal trial court that Mr. Wenninger lacked the proper educational requirements necessary to qualify as a valid candidate; Judge Ringland sends case to the jury to determine if Mr. Wenninger "knowingly" falsified the documentation; jury finds "not guilty." Judge Ringland stated in court that Mr. Wenninger was "not the sheriff," according to two witnesses present at the trial.

October 9, 2003 – Judge Ringland seals Mr. Wenninger's criminal trial record from public scrutiny.

NOTE: The law concerning the sealing of criminal trial records, where the defendant is found not guilty, depends on whether or not the public's need and right to know what is in the record is greater than the privacy interests of the defendant. Here the public's constitutional right and need to know Mr. Wenninger's legal claim to office definitely outweighs any privacy interests of an elected public official. This record should never have been sealed from public view.

December 9, 2003 – Emergency legislation is enacted to change the educational requirements, under ORC §311.01(B)(9)(b), ***down to the level of Mr. Wenninger's technical school diploma*** [see **NOTE** page 5], at the request of some local political party officials, and becomes law this day when signed by Governor Taft. This legislation drafted was specifically designed, intentionally expedited, and timely signed into law, for the sole benefit of Mr. Wenninger's candidacy exclusively over ALL other candidates for Sheriff in 30 other Ohio counties having contested sheriff elections in 2004.

December 22, 2003 – Mr. Wenninger, now **"*legally*"** able to satisfy the educational requirements of ORC §311.01(B)(9)(b), submits his candidate election petitions for the 2004 election to the Board of Elections. His Ohio peace officer certificate, however, was still legally "invalid," since January 1, 2002, by having a "break in service" greater than one year, but less than four years, without a valid appointment, under OAC §109:2-1-12(D)(2).

January 1, 2005 – Mr. Wenninger's OPOTA peace officer certificate completely expires per OAC §109:2-1-12(D)(3), after four years without a valid appointment, where he is legally required to re-take the basic police officer training academy course all over from scratch to get a new certificate. Mr. Wenninger no longer legally possesses an Ohio peace officer certificate. He lost it completely by operation of law this date.

January 3, 2005 – Mr. Wenninger assumes a second-term seat as Sheriff of Brown County without an Ohio peace officer certificate in violation of OAC §109:2-1-12(E). Mr. Wenninger has not re-taken the basic peace officer training course to obtain a new certificate since January 1, 2005. As a civilian, legally speaking, Mr. Wenninger, with the concerted

effort and help of many other individuals, successfully evaded having his credentials scrutinized to prove whether he legally held the office of sheriff through his last three terms in office and whether he will legally hold office in 2013. A valid Ohio peace officer certificate is required to be an eligible candidate for sheriff under ORC §311.01(B)(8). OAC §109:2-1-12(E) requires possession of a valid certificate to legally hold the office of sheriff. Mr. Wenninger's certificate became legally "invalid" on January 1, 2002, and remained that way until he completely lost his certificate on January 1, 2005 by operation of law, ***all within his first term in office***.

It is unequivocally obvious from the historical facts, Ohio Revised Code, and Administrative Code, that Mr. Wenninger has never legally been elected or appointed to the office of sheriff. It is also suspiciously evident, from the text of emergency legislation passed and court opinions handed down, that there has been a surreptitious, organized effort to continuously hide this illegal condition from the public since at least October 9, 2003. This situation will never legally self-resolve by the passage of time only. Many elected government officials, all sworn to uphold the law, that have already been officially presented with this illegal harbinger, have overtly demonstrated their absolute refusal to tackle the question of Mr. Wenninger's legal right to hold office, the implications of which, for future legal purposes, are totally unpredictable. Every previous authority petitioned has cleverly "kicked the 'illegal' can" down the road of time to avoid having to make a decision potentially rife with political complications that pale by comparison to the potential legal liability ramifications underlying the current illegal situation as it exists.

My main concern is knowingly breaking the chain of custody on crime scene evidence by turning confidential evidence over to an unqualified "civilian" or one of his illegally-sworn deputies that are not legitimate Ohio peace officers – by law. Furthermore, a chain of custody violation could cause challenges to an investigation where the legality of the status of an officer involved is relevant, prompting a defense to be raised in an actual prosecution on the same facts and law.

It is impossible now to foresee what situation could arise in future state or federal lawsuits, by surviving family members over a death, or, a suit involving capital punishment "gone wrong," where I may find myself liable in a civil suit in some unforeseen way, after testifying that I knowingly turned over evidence to an unqualified "civilian" without ever attempting to settle the question of his legitimacy through use of the proper legal channels and authorities beforehand.

Yours sincerely,

Judith A. Varnau, D.O., FACOG
Coroner, Brown County, Ohio

Attachment: Pertinent year 2000 provisions referenced from the ORC and OAC

cc: Ohio State Coroners Association

Year 2000 Ohio Revised Code (ORC) Provisions

Ohio Revised Code §311.01. Election and qualifications of sheriff:

(B) Except as otherwise provided in this section, no person is eligible to be a candidate for sheriff, and no person shall be elected or appointed to the office of sheriff, unless that person meets all of the following requirements:

(8) The person meets at least one of the following conditions:

(a) Has obtained or held, within the four-year period ending immediately prior to the qualification date, a valid basic peace officer certificate of training issued by the Ohio peace officer training commission or has been issued a certificate of training pursuant to section 5503.05 of the Revised Code, and, within the four-year period ending immediately prior to the qualification date, has been employed as an appointee pursuant to section 5503.01 of the Revised Code or as a full-time peace officer as defined in section 109.71 of the Revised Code performing duties related to the enforcement of statutes, ordinances, or codes.

(b) Has obtained or held, within the three-year period ending immediately prior to the qualification date, a valid basic peace officer certificate of training issued by the Ohio peace officer training commission and has been employed for at least the last three years prior to the qualification date as a full-time law enforcement officer, as defined in division (A)(11) of section 2901.01 of the Revised Code, performing duties related to the enforcement of statutes, ordinances, or codes.

(9) The person meets at least one of the following conditions:

(a) Has at least two years of supervisory experience as a peace officer at the rank of corporal or above, or has been appointed pursuant to section 5503.01 of the Revised Code and served as the rank of sergeant or above, in the five-year period ending immediately prior to the qualification date.

(b) Has completed satisfactorily at least two years of post-secondary education or the equivalent in semester or quarter hours in a college or university authorized to confer degrees by the Ohio board of regents or the comparable agency of another state in which the college or university is located.

NOTE: Mr. Wenninger's technical school diploma was awarded by a school governed by ORC Chapter 3332. – State Board of Career Colleges and Schools, not ORC Chapter 1719. – Ohio Board of Regents schools. ORC §311.01(B)(9)(b) was changed by emergency legislation enacted, December 9, 2003, to read: "Has completed satisfactorily at least two years of post-secondary education or the equivalent in semester or quarter hours in a college or university authorized to confer degrees by the Ohio board of regents or the comparable agency of another state in which the college or university is located ***or in a school that holds a certificate of registration issued by the state board of career colleges and schools under Chapter 3332. of the Revised Code***."

Year 2000 Ohio Administrative Code (OAC) Provisions

Ohio Administrative Code §109:2-1-12. Certification before service and re-entry requirements:

(D) Breaks in service/requirements for update training evaluations:

(1) All persons who have previously been appointed as a peace officer and have been awarded a certificate of completion of basic training by the executive director or those peace officers described in paragraph (A)(3) of this rule who have had their appointment as a peace officer terminated for less than one year may maintain their eligibility for re-appointment as a peace officer. […].

(2) All persons who have previously been appointed as a peace officer and have been awarded a certificate of completion of basic training by the executive director or those peace officers described in paragraph (A)(3) of this rule who have not been appointed as a peace officer for one year or more but less than four years shall, within one year of the re-appointment date as a peace officer, successfully complete a refresher course prescribed by the executive director and any training as required by paragraph (D)(1) of this rule. This course and appropriate examination must be approved by the executive director and shall meet the criteria set forth in this chapter for the conduct of a basic training course. Officers required to complete the refresher course are permitted to perform the functions of a peace officer for one year from the date of the re-appointment which gave rise to the requirement.

(3) All persons who have previously been appointed as a peace officer and have been awarded a certificate of completion of basic training by the executive director or those peace officers described in paragraph (A)(3) of this rule who have not been appointed as a peace officer for more than four years shall, upon re-appointment as a peace officer, complete the basic training course prior to performing the functions of a peace officer.

(E) Any person who has been appointed as a peace officer and has been awarded a certificate of completion of basic training by the executive director and has been elected or appointed to the office of sheriff shall be considered a peace officer during the term of office for the purpose of maintaining a current and valid basic training certificate. Any training requirements required of peace officers shall also be required of sheriffs.

(F) Every person who has been re-appointed as a peace officer and who must complete training pursuant to paragraph (D)(1) or (D)(2) of this rule shall cease performing the functions of a peace officer and shall cease carrying a weapon unless the person has, within one year from the date of re-appointment, received documentation from the executive director attesting to the satisfactory completion of the above training requirements.

MIKE DEWINE
★ OHIO ATTORNEY GENERAL ★

Opinions Section
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30 East Broad Street, 15th Floor
Columbus, Ohio 43215
www.OhioAttorneyGeneral.gov

January 15, 2013

The Honorable Judith A. Varnau, D.O., FACOG
Brown County Coroner
7661 White Swan Road
Georgetown, Ohio 45121-9670

Re: Request for an opinion of the Attorney General

Dear Dr. Varnau:

Thank you for your letter of December 30, 2012, requesting an opinion of Attorney General DeWine. You ask Attorney General DeWine to advise you on the qualifications of the Brown County sheriff to hold office. Your question about the sheriff's qualifications relates to your responsibility under R.C. 313.141 to deliver firearms to the sheriff.

At the county government level Attorney General DeWine issues written opinions on questions of law to the prosecuting attorney only. R.C. 109.14. We do not provide opinions to the other elected officers of county government, for whom the prosecuting attorney is designated legal counsel. R.C. 309.09(A). Thus, we are not able to provide you the opinion you have requested.

Further, the decision of the Ohio Supreme Court in *State ex rel. Varnau v. Wenninger*, 131 Ohio St. 3d 169, 2012-Ohio-224, affirming the denial of a quo warranto writ to oust the Brown County sheriff from office, has settled the question of the sheriff's qualifications to hold office and confirms the legality of his service as county sheriff. The records of the Ohio Peace Officer Training Commission also indicate that the sheriff has not experienced a break in service. Consequently, in fulfilling your responsibilities under R.C. 313.141 to deliver firearms to the county sheriff, you will be insulated from charges of malfeasance, misfeasance, or nonfeasance. You may consult with the prosecuting attorney about your statutory responsibility in the light of this court decision.

Once again, thank you for seeking our counsel.

Very respectfully yours,

MICHAEL DEWINE
Ohio Attorney General

Kevin M. Melver
Chief-Opinions Section

KMM
Cc: The Honorable Jessica Little

Kevin\Letters\Varnau, Dr. Judith A. - Brown County coroner January 2013

Judith A. Varnau, D.O., FACOG
CORONER, BROWN COUNTY, OHIO

Deputy Coroner – Barbara J. Patridge, M.D., FACOG
Coroner's Investigator – Don Newman

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The Honorable Jessica Little
Brown County Prosecutor
510 Ohio 125
Georgetown, Ohio
45121

January 17, 2013

Re: Request for Formal Opinion – Delivering Crime Scene Evidence to Uncertified Peace Officers

Dear Prosecutor Little:

Enclosed please find a copy of a January 15, 2013, letter from the Ohio Attorney General (OAG) directing me back to you for a legal opinion on the same question presented to his office in a letter dated December 30, 2012, a copy of which I have enclosed along with this letter to you. Mr. Kevin McIver, Chief of the Opinions Section at the OAG's Office, informed me that he was not able to provide me with the legal opinion that I had requested.

Instead of re-typing the content of the December 30th letter all over again herein, please incorporate the substance of that letter as the subject of my request to you for a formal legal opinion by this letter. Mr. McIver, not being able to render a legal opinion, clearly avoided any legal analysis of the situation as it presently exists.

Having been intimately familiar with all the legal documents involved in my husband's suit, concerning Mr. Wenninger's legitimacy under the Revised and Administrative Code for more than four years, it is obvious that no authority wants to take the responsibility to provide a legal answer to the question of whether or not Mr. Wenninger is legally holding office at this time. The documentation contained in the comprehensive record unequivocally indicates that Mr. Wenninger is not legally holding office, and that his deputies, therefore, are also not legally sworn.

I am not in the position where I can consciously "pretend" that Mr. Wenninger is qualified to hold office at this time when I actually know otherwise. I cannot knowingly turn over evidence to someone that I know to be legally a "civilian," until proven otherwise by someone with the authority and power to do so. I cannot knowingly personally assume any potential future legal liability being absolutely aware of what I know to be irrefutably accurate and true.

It is obvious that Mr. McIver did not read the decision of the Supreme Court case, for even I know that the issue of qualifications to hold office was never addressed by any court. Rather the court erroneously dismissed the case by inapplicable procedural issues and not on the merits of the case.

The records of the Ohio Peace Officer Training Commission (OPOTC) would not indicate a break in service by operation of law, as the commission only knows and records what it receives in the way of appointment documentation submitted to them. It has no authority or way of determining whether an appointment is legally valid or not. An appointment may be illegally documented and submitted. The commission only records and acts on the information contained in the documentation it receives. It is not their responsibility or duty to determine the legal validity of sworn appointments submitted by appointing authorities.

I expect confidentiality in that this request not be discussed with John Schadle or Dwayne Wenninger, et al., except as needed for your investigation. I do not think this request for a legal opinion should be discussed with anyone else unless required for you to make this decision. There is already too much unnecessary and unwarranted negativity directed toward my office by the SO. This is only a simple question concerning my ability to legally turn over evidence to someone in the SO. It is my intent to eliminate any involvement in a case where evidence I turned over would be eliminated because the legal status of any SO officer collecting that evidence becomes a relevant issue during trial.

Pursuant to the Attorney General's suggestion, and pursuant to statute making you the legal advisor for all elected county officials, I am formally requesting your legal opinion on this matter. My private legal counsel, Mr. Eagle, will be forwarding to you by e-mail and/or U.S. Post, or both, a comprehensive legal explanation of why Mr. Wenninger is not legally holding office, even in light of the court decisions made in the past.

Yours sincerely,

Judith A. Varnau, D.O., FACOG
Brown County Coroner

Enclosures: AG Letter dated January 15, 2013
Coroner letter to AG dated December 30, 2012

THOMAS G. EAGLE CO., L.P.A.
LAW OFFICE

3386 N. State Rt. 123
Lebanon, Ohio 45036

Telephone: (937) 743-2545
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Also admitted in Kentucky

Re: Request for Legal Opinion from Dr. Judith Varnau, Brown County Coroner

Dear Ms. Little:

This letter is presented in support of the request for a formal legal opinion by the Brown County Coroner, regarding the legal and factual propriety of the current acting Sheriff of Brown County to hold and execute that office. I am aware that the Ohio Attorney General has rejected the same request due to a lack of statutory authority to respond to such an inquiry from a county official, and has suggested that request be submitted to you, as the County legal advisor. I am also aware that your legal ethical obligations would prohibit you from rendering a legal opinion or advice on the Coroner's question, due to it potentially being adverse to another county official (the sheriff) that you also have legal duties to. See Ohio R. Prof. Cond. 1.7(a)(1), (b), (c)(2).

I am also of the position that the Attorney General's suggestion that the Ohio Supreme Court has already ruled that the current holder of the office of Brown County Sheriff is "qualified," is clearly wrong. The Court, and no Court, has ever ruled on that question, in each case finding a reason *not* to address that issue. The most recent Supreme Court ruling in fact was based on a laches bar to that Relator being able to raise the issue. The merits have not been addressed.

Further, the suggestion that OPOTC's records do not reflect a "break in service" shows a misunderstanding of the applicable statutes, in that the break in service occurs as a matter of law, pursuant to statute, and would not be reflected in any record.

And the Attorney General's proffered "opinion" as stated, being outside of statutory authority and further contrary to the correct consideration of the prior court rulings and under a misconception of the application of the OPOTC regulations, is of no value to your current County Coroner.

Therefore there is continuing good reason for the Brown County Coroner to be concerned and justified in requiring legal justification for treating the County Sheriff as County Sheriff, although apparently failing to meet the statutory qualifications for the office. The first purpose of this letter therefore is, due to the conflict of interest, to request you to formally request an opinion on the matter from the Ohio Attorney General under your obligation under O.R.C. 309.09(A), and the Attorney General's obligation under O.R.C. 109.14. I would also ask that this letter to you, in support of rendering such an opinion, be forwarded to the Attorney General for his office's consideration along with your request.

There is also good legal support for the problem the Coroner Dr. Varnau is faced with, in that according to facts that were undisputed, Dwayne Wenninger, currently holding the office of Brown County Sheriff, never met the educational or experience qualifications to hold the office, and by operation of law thereafter lost his mandatory certification as a peace officer. Although the facts supporting that conclusion are on record in the case of *State ex rel. Varnau v. Wenninger*, 131 Ohio St.3d 169, 2012-Ohio-224, 962 N.E.2d 790 (although not fully recited in the opinion), the Courts assigned to that case never addressed the claims on the merits, avoiding the issue of Wenninger's failure to meet the minimum statutory qualifications for the office each time by a procedural bar of dubious application. The most recent was the application of "laches" to bar that Relator's claim, due to the failure of Relator to file the claim before he had standing to do so; and the resulting principle that holding the office illegally long enough will secure the illegal hold on the office. The State and the County though are not so barred.

The second purpose of this letter is to summarize for your Office, and for the Attorney General's Office, the legal authorities, and factual proof, substantiating Dr. Varnau's concern.

Summary of Prior Proceedings

Dennis Varnau ran as an independent candidate for Brown County Sheriff in 2008, after the incumbent Wenninger was indicted for knowingly falsifying his qualifications for the office (although found not guilty, after going to jury verdict, see *State v. Wenninger*, 125 Ohio Misc.2d 55, 2003-Ohio-5521, 798 N.E.2d 68 (C.P.)). Dennis Varnau first sought the determination that Wenninger was not qualified for the office (as did the Grand Jury that indicted him) by way of protest through the Brown County Board of Elections. That Board of Elections found his protest could not be heard on the merits, due to what *they called* an "unconstitutional" provision in the election laws barring an independent candidate from protesting a partisan candidate.

Varnau then tried to obtain a writ of *mandamus* in the Brown County Common Pleas Court, to compel the Board of Elections to hear the protest. The Brown County Court of Common Pleas denied that writ, due to the availability of a specific stated alternative remedy -- *quo warranto* -- if Varnau did not win the election. The Court of Appeals for Brown County (Twelfth District) affirmed that determination, on the same ground, specifically stating *mandamus* was not available because *quo warranto* was.

After not prevailing against the allegedly unqualified incumbent in the election, Varnau then, and for the first time, had standing to and therefore filed for the writ of *quo warranto*, in an original action in the Twelfth District Court of Appeals for Brown County. That Court first denied the writ on summary judgment motions, for the stated reason that the Board of Elections' action of merely placing the otherwise unopposed incumbent on the ballot was a *res judicata* bar to Varnau's challenge. The Ohio Supreme Court, on direct appeal, *unanimously reversed* and remanded for a ruling on the merits of the challenge. *State ex rel. Varnau v. Wenninger*, 128 Ohio St.3d 361, 2011-Ohio-759, 944 N.E.2d 663.

On remand, the Twelfth District Court again, relying on authorities and arguments not made or addressed by any party, found (at least by implication) that even if Wenninger was unqualified for the office of Sheriff when he first took it (but not making a finding that he was so qualified),

holding the office for the terms he did before Varnau's challenge rendered his original lack of qualification -- although a prerequisite for *continuing* to be qualified -- moot. On direct appeal the Supreme Court affirmed the denial of the writ, on similar procedural grounds. *State ex rel. Varnau v. Wenninger*, 131 Ohio St.3d 169, 2012-Ohio-224, 962 N.E.2d 790.

No court or official body of any kind has ever determined that Wenninger is qualified to hold the office.

Supporting Facts

The evidence supporting the following facts are on record in the court actions cited, and can also be supplied from my files on request. Wenninger was a candidate for Brown County Sheriff in 2000, won the election, assumed the position January 1, 2001, and registered his appointment as Sheriff with the Ohio Peace Officers Training Commission (OPOTC) as of that date. Relator's Exhibits in Support of Motion for Summary Judgment, filed August 10, 2009, Ex. 2A, pp. 2-3 (Wenninger's SF400adm Sheriff Appointment with OPOTC, January 1, 2001). Wenninger could not be a valid candidate for Sheriff unless he met *all* the requirements under R.C. § 311.01(B), specifically (9)(a) and (b), in effect at the time. R.C. § 311.01. Wenninger was not, prior to that, a corporal or higher with an approved agency, therefore not in compliance with that portion of R.C. § 311.01(B)(9)(a). Relator's Ex. 6B, August 10, 2009, Ex. 6B (Wenninger's Answer to Int. No. 15).

Wenninger also did not satisfy § 311.01(B)(9)(b), because the only post-secondary education he had was from "Technichron Technical Institute" (TTI). Depo. of D Wenninger, p. 7, 9; see also, Relator's Ex. 8A, August 10, 2009 (Wenninger's Diploma, 1987). TTI was *not* an institution registered and approved by the Ohio Board of Regents (OBR), but a different type of institution operating under R.C. Chapter 3332. R.C. § 311.01(B)(9)(b) (2000); Depo. of D. Wenninger, p. 35; Relator's Ex. 8B, August 10, 2009 (TTI's 1988-90 Certificate of Registration under R.C. Chapter 3332); Relator's Ex. 8C (State Board of Career Colleges and Schools (SBCCS) documents, showing that TTI operated under it, not the OBR, from 1978-1990); Ex. 8 (TTI "Catalog," verifying no OBR accreditation); and also Spievack Affidavit, par. 4 (TTI registered with State Board of School and College Registration). Because of the kind of institution TTI was, it was not and could not have been authorized by OBR to confer degrees.

Thus, Wenninger's diploma from TTI did not and could not satisfy the statute for the type of institution his post-secondary education had to come from. See Relator's Ex. 9A, August 10, 2009 (documents from OBR); Relator's Ex. 9C (R.C. 1713, April 14, 1985); R.C. 3332, October 31, 1979; R.C. 3332, Nov. 1, 1985. Wenninger also did not secure any other educational credentials prior to or immediately after taking office on January 1, 2001. (Relator's Ex. 10A, August 10, 2009 (Wenninger's Answer to First Doc. Req. No. 13).

Wenninger also only attended TTI for 14 months, and therefore, regardless of the nature of the institution, did not have "two years" of post-secondary education, anywhere, as the Statute required. D.Wenninger p. 4, 7; Relator's Ex. 10A, August 10, 2009 (Wenninger's answer to First Doc. Req. No. 13).

These facts were at least a partial basis for the felony indictment of Wenninger as reported at *State v. Wenninger, supra*.

Due to the lack of educational qualifications for the office, Wenninger had no *lawful* appointment to a peace officer position, as of then, and therefore started a four-year "break-in-service" which went from January 1, 2001, to at least January 1, 2005, by not removing his disqualification by not meeting the educational requirements. By statute he lost OPOTA certification two days before he assumed his second-term seat, January 3, 2005. (Relator's Ex. 2A, August 10, 2009 (Wenninger's OPOTC Sheriff Appointment January 1, 2001); O.A.C. § 109:2-1-12-(D)(3) and (E) (2001-05). Since by statute Wenninger lost peace officer certification after the four-year break-in-service, *in 2005, prior to* the 2008 and for that matter the 2012 election, he was still not a qualified candidate to run for (or hold) the office of Sheriff (not having a valid peace officer certificate), regardless of educational credentials. R.C. § 311.01; O.A.C. 109:2-1-12. This is why the legality of his current term is dependent upon the legality of his prior terms, and regardless of who has a right to challenge it.

Following the same protocol as a partisan candidate for filing a protest, Dennis Varnau sought the BCBE to accept his protest of Wenninger's candidacy. Ohio election laws however only allow protests *of independents* by *partisan candidates*, and deny protest *of a partisan's candidacy* by *an independent*. Thus Varnau's protest filed with the BCBE, on April 11, 2008, was summarily dismissed by the BCBE, because the election law did not "allow non-party affiliated persons to challenge the qualifications of a party candidate and essentially disenfranchises independent voters from challenging the qualifications of a party candidate". Respondent's Brief and Response to Relator's Motion for Summary Judgment, August 20, 2009, Appendix A. The Board did not address Wenninger's qualifications for the office.

Varnau then petitioned the Brown County Common Pleas Court for a Writ of *Mandamus* to force the BCBE to accept the protest of Wenninger's candidacy, on constitutional grounds of being denied due process and equal protection of the law under both the Ohio and U.S. Constitutions. That case was dismissed on procedural grounds, the Brown County Common Pleas Court finding "that the extraordinary remedy of *mandamus* is not appropriate in that there is a legal remedy at law through a *quo warranto* action." Judgment Entry, Sept. 9, 2008 (attached to Relator's Reply to Respondent's Memorandum in Opposition to Relator's Supplemental Authority, June 28, 2010, p. 2). The merits of Wenninger's qualifications were again not addressed.

Varnau appealed to the Twelfth District Court of Appeals for Brown County, which upheld the lower Court ruling on those same grounds ("Should Wenninger be elected and take office, appellant has other legal remedies."). *State ex rel. Varnau v. Wenninger*, 12th Dist. No. CA2008-09-006, ¶ 3-4, attached to Relator's Reply, June 28, 2010. Wenninger's qualifications to be a valid legal candidate for Sheriff in the 2008 election (or ever) were never adjudicated by any agency.

Once the general election results were certified by the BCBE on November 25, 2008, Varnau, having standing then to challenge Wenninger's claim to the office of Sheriff, filed an original action in *quo warranto* in the Twelfth District Court of Appeals on February 27, 2009. On cross-motions for summary judgment, the Twelfth District granted Wenninger's Motion and denied

Varnau's, dismissing the petition, on the ground that the BCBE act of placing Wenninger on a ballot was dispositive of his qualifications for the office. *State ex rel. Varnau v. Wenninger*, 2010-Ohio-3813. The Supreme Court unanimously reversed that Judgment. *State ex rel. Varnau v. Wenninger*, 128 Ohio St.3d 361, 2011-Ohio-759.

The matter was remanded to the Twelfth District for a determination on the merits: Was Wenninger *legally or factually* unqualified for the office, requiring the Writ of *Quo Warranto* to issue? On remand, the Court also decided that the questions as to Wenninger's qualifications for the office when he first took office, or up to the subsequent elections, *didn't matter*. Since he had held the office since then the prior elections can't be contested, therefore his lack of educational credentials or anything resulting in a disqualifying break-in-service related event couldn't be challenged by Relator. *State ex rel. Varnau v. Wenninger*, 2011-Ohio-3904. On appeal, the Supreme Court affirmed, finding that laches barred the petition – because Dennis didn't file the challenge to Wenninger in Wenninger's first term – although Dennis had absolutely no right to do so then.

During this course, whether Wenninger was ever qualified for the office, then or now, was never addressed.

Is Wenninger validly holding the office of Sherriff, such that the County Coroner would not be violating Statutes by treating him as such?

Wenninger failed to meet all requirements of R.C. § 311.01 to be a valid candidate in the 2000, 2004, 2008, and 2012 elections. R.C. § 311.01(B) provides that an unqualified person "shall not be elected or appointed unless they meet *all* the following requirements." (Emphasis added). See also, *State ex rel. Wolfe v. Delaware Cty. Bd. of Elections*, 88 Ohio St.3d 182, 724 N.E.2d 771 (2000). After one year with no valid appointment, a break-in-service results, and the peace officer certificate becomes "invalid." O.A.C. 109:2-1-12(D)(1), (F). This "invalidity" occurred for Wenninger as early as January 1, 2002. Wenninger never legally held the office of Sheriff, beginning in 2001 due to the lack of educational credentials.[1] Wenninger forfeited the office on January 1, 2001, after failing to remove his disqualification "immediately upon assuming the office" as to his lack of education required at that time under R.C. 311.01(B)(9)(b). *Id.*

Wenninger did not lawfully take office. He merely took it without a challenger, until 2008.

a. Wenninger's deficient educational qualifications -- no OBR accreditation.

Wenninger's educational credentials did not include a diploma from a school accredited under the Ohio Board of Regents (OBR) as required at that time under R.C. 311.01(B)(9)(b). Wenninger's diploma was from Technichron Technical Institute (TTI). Ohio Board of Regents and Ohio Secretary of State documents, and Wenninger's own material, proved that neither TTI nor its successor (Phoenix Educational Systems) ever received accreditation from the OBR.

[1] The lack of educational credentials, prior to 2001, is why Wenninger's lack of supervisory experience prior to that is relevant, too, contrary to the Court of Appeals' Decision at ¶ 38 saying it was "irrelevant"; to demonstrate that he had to have the educational qualifications, required by R.C. 311.01(B)(9)(b), because he didn't have sufficient alternative supervisory experience.

TTI's own material does not claim OBR accreditation. Nothing Wenninger presented proved he went to an OBR accredited school, as the law required.

In addition, regardless of that evidence, TTI legally *could not* have been OBR accredited, according to the undisputed evidence. The Statute requiring OBR accreditation does not provide for any exceptions or alternative; there is no "umbrella" or "auspices" for other unstated agencies under other unstated Revised Code chapters, nor for institutions that don't otherwise meet statutory definitions. Wenninger's *only argument* was that non-OBR accreditation didn't matter, because some other "umbrella" or "auspices" or other state agency is "close enough."

The only support for that "argument" was the affidavits of his friends to argue points of law contrary to the written words of a statute. Although the affidavits and documents were inadmissible and objection was timely made, they certainly cannot change the written words of the law, and served merely to whitewash an unqualified candidate. If the General Assembly meant to include other boards or schools it could have done so, but did not. It specified only the Board of Regents.[2] Even Wenninger's material clearly stated that TTI does "*not* fall within the jurisdiction of the Ohio Board of Regents." (see the October 4, 2002 letter from DeGarmo, emphasis added). As your Office is aware: "Courts have a duty to give effect to the words used in a statute and not to delete words used or insert words not used." *State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355, 360, 2004-Ohio-4960, 815 N.E.2d 1107, ¶ 30.

The evidence is factually and legally undisputed that Wenninger's educational credentials did not equate to two years in a school accredited by the Ohio Board of Regents as required at that time by R.C. 311.01(B)(9)(b). It is clear from the 1985-89 Revised Code that TTI was not associated with OBR in any way and *could not legally have been.* R.C. Chapter 3332 *did not apply* to the following categories of courses, schools, or colleges "(B) Institutions with certificates of authorization issued *pursuant to section 1713.02 of the Revised Code*; (C) Schools, colleges, technical colleges, or universities established by law or chartered by the Ohio board of regents." R.C. 3332.02 (emphasis added).

Any way it is examined, and by any evidence, Wenninger never met the statutory educational requirements to be a sheriff in Ohio, particularly when he first took office in 2001.

b. Wenninger's deficient educational qualifications -- too few hours/years.

R.C. § 311.01(B) provides that an unqualified person "shall not be elected or appointed unless they meet *all* the following requirements." (Emphasis added). Wenninger's protestations of an "umbrella" of authority for TTI under the OBR, and regardless of what year he ran for the office, ignores that he was still required, wherever it was, to get *two-years of post-secondary* education. R.C. 311.01(B)(9)(b) is not confusing. To be a *legal* candidate for Sheriff in 2000 (as relevant to

[2]*Expressio unius est exclusio alterius* means that the expression of one or more persons or things implies the exclusion of those not expressed. *Bank One, N.A. v. PIC Photo Finish, Inc*., 2d Dist. No. 1665, 2006-Ohio-5308, ¶23. This maxim is applied where there is a listing of items in an associated group or series, which "justif[ies] the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co*., 537 U.S. 149, 168 (2003).

this issue), he had to have "completed satisfactorily at least *two years of post-secondary education or the equivalent in semester or quarter hours* in a college or university *authorized to confer degrees by the Ohio board of regents* or the comparable agency of another state in which the college or university is located." *Id.* (emphasis added).

First, two years of post-secondary education was *impossible*, since Wenninger's own materials reflect he graduated from high school in 1986 and got his TTI diploma in 1987. By his own admission he did not *start* any post-secondary education until *August 1986*, and got his one and only degree of any kind 14 months later, October 1987. D.Wenninger p. 4, 7. That reduces the total time from start to finish to absolutely no more than a total of 14 months of schooling. Even then, Wenninger testified that he attended school for *half a day* minimum, so his actual hours attended could be *even less*. D.Wenninger, p. 7. Fourteen months could only be four and a partial fifth quarter (a "quarter" being a 3-month term), times a full-time credit schedule of 15 credit hours per quarter; equals 60 *maximum quarter credit hours* -- or 69 if given time credit for the partial quarter.[3]

Wenninger's claim to office is dependent upon him having completed two-years of post-secondary education, authorized under R.C. § 3332. O.A.C. 3332-1-16(C)(2) dictates that such diploma issued to him had less than 90 quarter credits or 60 semester credits. A two-year degree under the OBR, O.A.C. 3333-1-04(C)(6), dictates a *minimum* of 90 quarter hours or 60 semester hours are required for a two-year degree.

Wenninger can't have it both ways, and didn't have it the way the law requires, in substance or letter. The Ohio Board of Regents standards for two-year degrees are in O.A.C. 3333-1-04(C) (General standards for the approval of associate degree programs), and states:

> (6) For approval by the Ohio board of regents, associate degree programs must contain a *minimum of ninety quarter credits or sixty semester credits* and should not exceed a maximum of one hundred ten quarter credits or seventy-three semester credits . . . .
>
> (Emphasis added).

But the standards under the State Board of Career Colleges and Schools (TTI's applicable standards) for diploma programs are in O.A.C. 3332-1-16 and state:

> (C) All certificate and diploma programs approved by the board shall meet the following minimum standards:
>
> * * *
>
> (2) "Diploma program" means a program of instruction offering technical and basic coursework. General courses may be included. The program shall generally range in length from more than six hundred but less than fifteen hundred clock hours; or more

[3]See O.A.C. 3333-1-08 as to the methods of calculating class hours; and O.A.C. 3333-1-02(B)(1) defines a "full-time" student as one carrying a minimum of 15 hours/quarter.

than forty but *less than ninety quarter credit hours;* or more than twenty-seven but *less than sixty semester hours*.

(Emphasis added).

Wenninger could not have physically or legally accumulated between those two dates, the minimum 90 credit hours required by the OBR and the O.A.C. for a required two-year associate program. Nor does a calendar allow for two-years of school, regardless of degree or diploma requirements, in 14 months. Not only does he have to have the statutory requirement of "Board of Regents" not to mean "Board of Regents," but "two years" also to mean "14 months." Because Ohio election statutes are mandatory and require strict compliance, *State ex rel. Steele v. Morrissey*, *supra*, and this Brief, *supra*, these Statutes do not allow the variance Wenninger requires to hold the office, or the *made up* interpretation of the Statutes that Wenninger requires.

A sheriff candidate cannot legally be on a ballot, even if having garnered 99.99% of the votes cast, and claim to legally hold the office when by law no valid appointment or election of such candidate is possible, unless that candidate's disqualification is immediately removed upon assuming office. Just because he kept the office long enough before anyone with a right to do so formally challenged it does not render void or moot the legal requirements to first assume the office.

The Supreme Court recently decided *State ex rel. Knowlton v. Noble County Board of Elections*, 125 Ohio St.3d 82, 2010-Ohio-1115 (*Knowlton I*). The challenged sheriff candidate argued his OPOTA training, which he received college credit for (along with other "life experience" credits), met both the OPOTA requirements *and* the educational requirements at the same time. The Board of Elections agreed and denied a protest. The Supreme Court denied *mandamus* (for procedural reasons) but *granted* the writ of prohibition (against the BOE), essentially saying the candidate can't count the same classes to meet two separate requirements, *strictly enforcing* the statutory words and requirements, and not implying exceptions that do not appear in the legislation. The dissent -- a position obviously rejected by the majority -- argued that by the time of the election, he would have been actual Sheriff for more than two years anyway, and that should count toward his "supervisory" experience, an argument similar to what Wenninger made.

Knowlton I implicitly (if not explicitly) rejected Wenninger's claim that he did meet the legal qualifications for the office, that the requirements can be "fudged," or "close enough is good enough," and rejects the additional argument that being in office, even if not *legally*, counts for "service." *Knowlton I* denies "work experience as Sheriff" to be used to make that candidate, or Wenninger here, qualified under (9)(a) (corporal or higher requirement). There, as here, even if the candidate (or office holder) could be considered as satisfying (9)(a), he was originally not qualified under (9)(a) or (b), and therefore not "the sheriff." He could not, legally, appoint himself with OPOTA as Sheriff and four years later under the O.A.C. his certificate expired completely, whether or not he qualified for the 2004 election. See also, *State ex rel. Grounds v. Hocking Cty. Bd. of Elections*, 117 Ohio St.3d 116, 119, 2008-Ohio-566, 881 N.E.2d 1252, ¶ 13-17 (discussing the requirement of being employed as a peace officer during the preceding three years to satisfy (B)(8)).

Wenninger had no legally valid supervisory experience as corporal or higher to satisfy R.C. 311.01(B)(9)(a) either. Relator's Ex. 6B, August 10, 2009 (Wenninger's Answer to Int. No. 15). He was in all ways ineligible for the office. *Wellington v. Mahoning Cty. Bd. of Elections*, 117 Ohio St.3d 143, 2008-Ohio-554, 882 N.E.2d 420.

Wenninger's same defense of his hold on the office was rejected in his criminal case:

> Beginning with Count I, *R.C. 3599.36*, election falsification, defendant argues that he substantially met the educational requirements to become Brown County's Sheriff. However, to the Court's knowledge, there is nothing in *R.C. 311.01* that permits substantial compliance, and defendant has not presented any supporting statutory or case law to indicate otherwise.

State v. Wenninger, 125 Ohio Misc.2d 55, 58, 2003-Ohio-5521, ¶ 5. That Judge was correct: there is no such law. Ohio election statutes are mandatory and require *strict compliance* unless a statute specifically permits substantial compliance. *State ex rel. Steele v. Morrissey*, 103 Ohio St.3d at 360, 2004-Ohio-4960, ¶ 33 (citations and quotations omitted); *State ex rel. Thurn v. Cuyahoga Cty. Bd. of Elections*, 72 Ohio St.3d 289, 294, 649 N.E.2d 1205 (1995). In *Morrissey*, the relator on a *mandamus* petition argued that the referendum laws should be "liberally" construed to allow for errors and inconsistencies. This Court rejected that proposition: "R.C. 731.32 does not expressly permit substantial compliance, so it requires strict compliance." *Id.* at 360-361, ¶ 33.

There is no room for the *made up* interpretation of the Statutes here that Wenninger required, if the merits of his claim to the office were ever addressed. The evidence was undisputed that Wenninger's educational credentials did not equate to two years in a school accredited by the Ohio Board of Regents as required at that time by R.C. 311.01(B)(9)(b).

c. Because of the lack of qualifications on assuming the office, not cured upon taking the office, Wenninger's peace officer certification, also required for the office, lapsed, therefore disqualifying him for future terms.

Wenninger also never legally held the office of Sheriff *after* the 2004 election. Wenninger, upon legally forfeiting the office on January 1, 2001, for lack of educational/supervisory credentials, started an administrative break-in-service on his Ohio Peace Officer Training Academy (OPOTA) police certificate that same day. Even if TTI qualified under a new version of the law unconstitutionally enacted specifically for him, or under the "corporal or higher section," to be a valid candidate for the 2004 *election*, he still could not take the seat without a valid peace officer certificate on *January 3, 2005*. His certificate though expired on January 1, 2005, and whether he was qualified or not under the supervisory or educational provisions at that time, he cannot sit as a sheriff without a current, valid peace officer certificate. Any qualifications acquired under "supervisory experience" could not take effect, or have any affect, until after he started his January 3, 2005, term.

He was then still in his first (illegal) term in office that he forfeited on January 1, 2001, by not removing his disqualification under the 2000 election laws and R.C. 311.01(B). Even if

Wenninger were qualified to run in 2004 as a valid candidate, his OPOTA certificate expired before he could assume the seat from that 2004 election, and therefore in 2008 and 2012. Wenninger, not legally holding office as Sheriff from January 1, 2001 through January 1, 2005, could not appoint himself as Sheriff with the Ohio Peace Officer Training Commission (OPOTC). Therefore four years later, January 1, 2005, Wenninger's OPOTA certificate completely expired to the point where Wenninger would have to re-take the entire OPOTA police academy course from scratch to obtain a new police certificate.

O.A.C. § 109:2-1-12(A)(2), and (D)(3) ("Breaks in service.") provides:

> (A)(2) No person shall, after January 1, 1989, be permitted to perform the functions of a peace officer or to carry a weapon in connection with peace officer duties unless such person has successfully completed the basic course and has been awarded a certificate of completion by the executive director.
>
> * * *
>
> (D) Breaks in service/requirements for update training evaluations**:**
>
> (3) All persons who have previously been appointed as a peace officer and have been awarded a certificate of completion of basic training by the executive director or those peace officers described in paragraph (A)(3) of this rule *who have not been appointed as a peace officer for more than four years shall, upon re-appointment as a peace officer, complete the basic training course prior to performing the functions of a peace officer***.**
>
> (Emphasis added).

Because Wenninger's only "service" in that four years preceding the 2004 election was an illegal assumption of the office of sheriff, being unqualified, it can't be service at all. His break-in-service is not saved by his appointment with the Ripley Police Department after January 1, 2001. Per Ohio Atty. Gen. Op. 1996-017, a peace officer cannot be employed by a Sheriff's Office *and* a municipal police department at the same time, because that would be a direct legal conflict of interest. When Wenninger filed the SF400adm form with OPOTC, appointing himself as Sheriff January 1, 2001, his appointment with Ripley P.D. would have had to terminate that same date to prevent any legal conflicts. Any other conclusion allows the use of an illegal appointment to legitimize another illegal appointment.[4]

Wenninger has not held a valid OPOTA peace officer certificate, issued by the OPOTC, since January 2, 2005, because his commission expired completely, per O.A.C., on January 1, 2005. Wenninger assumed the same legal status as that of a civilian on January 2, 2005, one day before usurping a second term as Sheriff on January 3, 2005. Wenninger had not held a valid peace officer certificate for over nine years.

[4] Wenninger also swore in his Certification (Relator's Ex. 2A, p. 4-5) that the information on his termination of his prior peace officer employment was correct, but now says it wasn't. (D. Wenninger p. 43-47, claiming the chief of police of his subsequent peace officer appointment falsely notarized his official oath of office, without which he could not be a valid peace officer.).

Wenninger's argument that a change in the law (after he allegedly met his "qualifications"), or even his years of illegal service cures his deficiency is itself moot, since his break-in-service exacerbates the same deficiency, by creating a new one: no valid peace officer certificate. Even if subsequent changes in the law applied to retroactively validate his *education*, which would be the unconstitutional retroactive application of a new law,[5] Wenninger still could not take the seat without a valid peace officer certificate on January 3, 2005, the day he took that term, or the first day of the 2009 term.

The Court of Appeals acknowledged that the required certificate must have "legal force." The Court said:

> Ohio Adm.Code Chapter 109:2-1 governs peace officer basic training programs and provides that individuals are awarded a peace officer certificate of training after they have completed a basic training course. See Ohio Adm.Code 109:2-1-07(A). A peace officer training certificate remains valid so long as it has '*legal force*.'

State ex rel. Varnau v. Wenninger, 2011-Ohio-3904, ¶ 42 (emphasis added). But in fact, his peace officer certificate was *invalid* at the time of his qualification as a candidate for Sheriff in 2004, because of the break-in-service that most likely started for Wenninger's certificate on January 1, 2001, based on the difference between R.C. 311.01(B)(8)(a) and/or (b) and the O.A.C. relating to the status of peace officer certificates – *the legal definition* of what constitutes a "valid certificate."[6] Unless a court retroactively ratifies a voided certificate, by illegal service in an office he took while unqualified for it.

Wenninger "had" a paper certificate between January 1, 2001, and January 1, 2005, but it was deficient for all of the above reasons, not just the absence of OBR authorization to TTI, which is the only thing the new law changed.

The after-the-fact change in R.C. 311.01(B)(9)(b) in December 2003 is a moot issue in light of his OPOTA certificate completely expiring as a matter of law. Assuming as Wenninger argued that he was a legitimate candidate (education-wise) in 2004 under that amendment and winning the election, he still could not assume the position of Sheriff without having that valid OPOTA peace officer certificate. O.A.C. 109:2-1-12(E). He was not initially qualified by not meeting the requirements of either R.C. 311.01(B)(9)(a) or (b) *in 2000*, and thus started the break-in-service on January 1, 2001. Then his OPOTA certificate completely expired four years later, under the relevant O.A.C. provisions, on January 1, 2005, two days before he assumed his second-term seat. Following that same reasoning he would also not qualify to be a valid candidate in 2008 or 2012, failing to satisfy (8)(a) and/or (b), plus O.A.C. 109:2-1-12(E), without that OPOTA certificate he lost on January 1, 2005. Contrary to the Attorney General's suggestion, this is not a deficiency that would appear in OPATC records.

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[5] Ohio Const. Art. II, § 28; U.S. Const., Art. I, § 1, 9.

[6] In *State ex rel. Hayburn v. Kiefer*, 68 Ohio St.3d 132, 133, 624 N.E.2d 699 (1993), "valid" was not defined for the purpose of R.C. 311.01. The Court employed the ordinary meaning of the term, which is "having legal force." Wenninger's certificate had none because it was based on illegal service.

Nonetheless, to the extent he wants to allege his time with Ripley P.D. counts toward any service, there is no evidence Wenninger ever worked a day or hour during his entire appointment with the Ripley P.D. A mere allegation that he has been acting and performing as Sheriff of Brown County, albeit illegally, does not comply with any legal requirement. There is no known authority under R.C. 311.01(B)(9)(a) or otherwise that illegal service qualifies one to continue the illegality, or cures it; much less why a person should be able to profit or benefit from conduct that is not in accordance with the law. The alleged cure of his education deficiency has no bearing on the actual legal expiration of Wenninger's OPOTA police certificate, January 1, 2005. According to Wenninger's deposition, the notary and other signatures for his certification were dated wrong, and he said he joined Ripley P.D. the same day he left the sheriff's office. His actual break-in-service therefore could have *started* December 19, 1999 (the Ripley appointment not legally executed), and his certificate expired four years later, a couple of days before he turned in his election petition for the 2004 election. Dep. of D.Wenninger p. 43-47. The filing deadline for sheriff candidates in the 2008 election was January 4, 2008. Respondent did not hold a valid certificate for more than four years prior to that filing deadline. As opposed to having "no expiration" as he argues, the certificates are rendered invalid *as a matter of law* after the four-year break-in-service.

The break-in-service was not because of a "lack of continuous employment" but the lack of a *valid appointment*, without which the break-in-service started. That indisputable *fact also* ended his claim to the office. If the General Assembly had meant for employment and appointment and election to all mean one and the same, it was entirely redundant in using the terms in different places and to meet different requirements to be a sheriff. Wenninger did not "lawfully" take office, he just took it unchallenged.

At most, he could never have been a *de jure* sheriff since January 1, 2001, so his time as "sheriff" cannot count to satisfy (B)(9)(a), without judicial ratification of illegally holding office for over eight years.

In *State ex rel. Huron Cty. Prosecutor v. Westerhold*, 72 Ohio St.3d 392, 650 N.E.2d 463 (1995), the Court rejected the argument that holding the office before someone challenges it, means anything:

> While a *de facto* officer is treated as a *de jure* officer, the *de facto* officer's actions are valid *only until* a proper challenge in a *quo warranto* proceeding removes him from office**.** [Citations omitted]. The court of appeals in *State ex rel. Williams [v. Zaleski*, Lorain App. No. 3364, unreported, *aff'd sub nom State ex rel Williams v. Zaleski* (1984), 12 Ohio St.3d 109] also acknowledged the propriety of *quo warranto* to challenge the validity of the appointment of an officer, *despite the presumed validity of* a judicial appointment *under a statute*. Here, Westerhold is at best a *de facto* officer whose appointment was properly challenged in *quo warranto*, *regardless of any presumed validity of his appointment*.

Id. at 396 (emphasis added). Therefore, how the person got in office, or how long they've been there, is irrelevant to whether *quo warranto* can get them out of office, especially if they are not legally qualified to hold it.

Another reason prior service, although while unqualified, is not "moot," is written in the law. O.A.C. 109:2-1-12(F) provides:

> Every person who has been re-appointed as a peace officer and who must complete training pursuant to paragraph (D)(1) or (D)(2) of this rule *shall cease performing the functions of a peace officer and shall cease carrying a weapon* unless the person has within one year from the date of re-appointment, received documentation from the executive director that *certifies that person's compliance with the above training requirements*.

(Emphasis added). The law already contemplates someone getting an office or appointment, without the valid certificate, and directs them to "cease" acting as a peace officer. Wenninger also violated this provision, and the Court of Appeals rewards him for it.

The fallacy of allowing illegal prerequisites to justify later actions was also demonstrated in *State ex rel. Montgomery v. Hawthorn*, 9th Dist. No. 20391, 2001-Ohio-1404. In that *quo warranto* case to challenge appointment of trustees of a charitable corporation, due to lack of proper quorum at a meeting which was a prerequisite to appointing them, the Court issued the Writ, for the obvious reason, that the original illegality (lack of a quorum) "voided" all actions taken after that:

> Therefore, a quorum was not present and the meeting was invalid. Because the meeting was invalid, any and *all actions taken at that meeting are void*. Thus, Respondents' positions as members, trustees, and Board members of the Mission *are void as a matter of law*. Accordingly, *any actions of the Board taken or purportedly taken subsequent to December 11, 2000, that are or were dependent upon the presence and or vote of Richard Smith, Abraham Wright, Mae Dobbins, or Ferris Brown, are accordingly void*."

Id. at *3 (emphasis added). It seems similarly obvious that if Wenninger was not originally qualified for the office, appointing himself is void, and he can't appoint himself and use that void appointment as further qualifications for the same office.

O.A.C. § 109:2-1-12(E) states that:

> Any person who has been appointed as a peace officer and has been awarded a certificate of completion of basic training by the executive director and has been elected or appointed to the office of sheriff shall be considered a peace officer during the term of office *for the purpose of maintaining a current and valid basic training certificate. Any training requirements required of peace officers shall also be required of sheriffs*.

(Emphasis added). But Wenninger was never validly “elected or appointed” regardless of "employment."

State ex rel. Delph v. Barr, 44 Ohio St.3d 77, 541 N.E.2d 59 (1989), makes this even clearer. In that case the serving chief of police was removed from office due to his appointment being made in violation of the Sunshine Act by the appointing body. *Id.* at 80-81. The fact of the chief not being culpable in the invalid appointment was not relevant. What was also not relevant was that the chief had served for two years, which by statute would have made him a permanent employee subject to removal only through the civil service system. *Id.* at 79, 80. He was removed anyway. The dissent in fact argues that, that the years of service, although illegally appointed, protected the chief from removal.

Similarly, Wenninger's years of unqualified service cannot be used to justify continuing his peace officer certificate and therefore his continuation in office. He is not entitled to have the office, initially, or afterwards, and shouldn't be able to keep it, no matter how long he held it. In *Williams v. Ohio Dept. of Job & Family Serv.*, 129 Ohio St.3d 332, 2011-Ohio-2897, 951 N.E.2d 1031, although in a dissimilar factual and legal context, this Court upheld the same principle. An employee was hired for a job, but told in advance she had to get a certain certification (LISW) as a condition for the job, and she was given 15 months to get it. She tried, but failed the test, and never got it, so they let her go. She filed for unemployment, saying it wasn't a discharge with just cause, because (essentially) she shouldn't have to have that certification, because others didn't have to, and for other reasons. The Court of Appeals agreed with her, that the requirement wasn't fair because other people didn't have to have it.

The Supreme Court reversed, essentially saying that she knew the expectations, she had time to fix it, she didn't, and so she forfeited her right to the job. It is not the same facts, and different law applies. But, if it's important enough for a social worker to meet and keep the *agreed* requirements to hold a position, shouldn't it be even more important for a sheriff, to meet the *legal* requirements? At least one Ohio Attorney General thought so:

> We note first, that a person *is not eligible to be a candidate for elective office if he will not be qualified to assume that office if elected*. See *State ex rel. Flynn v. Board of Elections*, 164 Ohio St. 193, 200, 129 N.E.2d 623, 628 (1955), overruled in part on other grounds by *State ex rel. Schenck v. Shattuck*, 1 Ohio St. 3d 272, 439 N.E.2d 891 (1982) ("'*one who would be ineligible to hold a public office has no right to be a candidate for election thereto*'" [citation omitted], and "the board of elections has statutory authority to determine whether the relator, if elected, could successfully assume the office he seeks"). See also, *e.g.*, *Cicchino v. Luse*, No. C-2-99-1174, 2000 U.S. Dist. LEXIS 10314, at *27 (S.D. Ohio 2000) (the State may require candidates for the office of sheriff to obtain a certificate of training prior to being placed on the ballot rather than at the time of election pursuant to R.C. 311.01, since "*Ohio has an important interest in policing its ballot and minimizing frivolous candidacies*"); *State ex rel. Keefe v. Eyrich*, 22 Ohio St. 3d 164, 489 N.E.2d 259 (1986). R.C. 313.02(A) requires a person to have been "licensed to practice as a physician in this state for a period of at least two years immediately preceding election," as well as be "in good standing" in his profession, in order to be eligible to hold the office of coroner. [footnote omitted]. In this instance, the former coroner fails to meet these qualifications for two reasons, and is thus ineligible to be a candidate for the office of coroner in the November 2002 election.

Ohio A.G. Op. 2002-015 (emphasis added).

d. Lapse of time does not render the former or present lack of qualifications "moot."

In each case where the "mootness" of a prior term was raised, it was as a defense to *quo warranto*, which is not this Office's posture; but it was also because the challenged office holder was no longer holding the office, or the defect was in the selection (election or appointment) process, superseded by a new, valid appointment. See *State ex rel. Paluf v. Feneli*, 100 Ohio App.3d 461, 464-465, 654 N.E.2d 360 (1995). In *State ex rel. Zeigler v. Zumbar*, 129 Ohio St.3d 240, 2011-Ohio-2939, 951 N.E.2d 405, there had been three other office holders between the relator and the respondent, and still the Supreme Court granted the writ removing the current office holder, due to improper usurpation of the office, rejecting the mootness argument, upholding instead the integrity of the process for obtaining the office. *Id.* at 248-249, ¶ 44. The integrity of an election is not upheld by allowing an unqualified office holder to keep the office, merely because of a calendar.

"Mootness" has never justified holding an office illegally where a prior term, alleged to have been *taken unlawfully*, was used as it was here to justify *continuing* to hold the office by the same person unlawfully. Even where a *quo warranto* remedy as to a prior term is moot the continuing qualifications to hold that office *are not* and can still be enforced. In fact it appears this Court long ago rejected such a notion, although in a slightly different context (the challenge being the unconstitutionality of a law creating the particular office).

Summary

The timeline is unimpeachable. For the 2000 election, Wenninger was not eligible because he was unable to satisfy R.C. 311.01(B)(9)(a) or (b). He admitted he was not a corporal or higher ((9)(a)), and he had insufficient educational credentials, since TTI was not for two years and was not OBR authorized ((9)(b)). The Statute provides that one "shall not be elected or appointed" without those credentials. With no legal appointment, his break-in-service started January 1, 2001. This conclusion is mandated by the required strict compliance with the election laws. After one year with no appointment, the break-in-service made his peace officer certificate "invalid" under O.A.C. 109:2-1-12(D)(1) and (F) on January 1, 2002. As he admitted, he had no new training or education, and did not get a new valid appointment after a *de facto* first year (so (D)(2) and (F) don't apply). After four years with no appointment, the break-in-service cancelled his peace officer certificate completely as a matter of law under O.A.C. 109:2-1-12(D)(3) on January 1, 2005. Although still within his first term he then would have to go back to OPOTA to take basic training over again for a new certificate.

Then, for the 2004 election, Wenninger was still not an eligible candidate, now unable to satisfy R.C. 311.01(B)(8)(a) or (b). With no valid re-appointment, the same break-in-service with no appointment invalidated his certificate. Not having a valid peace officer certificate since January 1, 2002, he cannot be valid candidate in 2004. Again, without a "valid" peace officer certificate, and the Statute providing that that one "shall not be elected or appointed" without those credentials, he still had no legal appointment, so his break-in-service continued from January 1,

2001. He cannot satisfy (B)(8)(a) or (b) without a valid certificate. He therefore cannot take office January 3, 2005, or thereafter, as sheriff without the peace officer certificate, per O.A.C. 109:2-1-12(E), and not having retaken the entire OPOTA basic training course to get new certificate.

Even if argued that Wenninger did hold a valid certificate between January 1, 2001 and January 1, 2002, which would be within four years of the qualification date for the 2004 election, his Ripley PD appointment could have started his break-in-service back on December 19, 1999. That scenario would put any valid certificate he held outside of the four-year period ending immediately prior to the qualification date for the 2004 election. This requirement gives leeway to a person who has not completely lost his certificate under O.A.C. Section (D)(3), so that he/she could approach the executive director of OPOTC to get an approved course to bring his/her certificate back into a valid status so he/she could assume the office under O.A.C. Section (F), if elected.

But even if the Ripley PD appointment did not start Wenninger's break in service earlier, then Wenninger's only claim to hold a valid certificate inside of the four-year requirement prior to the qualification date for the 2004 election was the legislation lowering the requirements after he had already attempted to assume the office under the old standards, an amendment passed for and only benefitting him, and arguably therefore unconstitutional if applied retroactively. Even then, if that amendment for him was not unconstitutional, he still did not have the requisite hours/time in any degree, regardless of the institution he attended

And even then, Wenninger could not assume *the second term* seat without a valid peace officer certificate, since he lost it *within his* first term in office, and became a civilian right before the last day of his first term by operation of law. So, at the time of the 2008 and 2012 election, he was still an ineligible candidate, due to being unable to satisfy R.C. 311.01(B)(8)(a) or (b) again, or still. With no new valid appointment, now for more than four years, and no new certificate since January 1, 2002, in 2008 or 2012 he cannot be a valid candidate, since he lost his certificate completely. His appointment to the office, having no certificate at all since January 1, 2005, he could not legally take office January 5, 2009, or thereafter, as a sheriff without a peace officer certificate, lost per O.A.C. 109:2-1-12(E). He couldn't legally be appointed in 2001 due to lack of educational credentials; and in 2005 or 2009, or 2013, due to that, and due to the expired/cancelled certificate.

Please take these arguments and authorities into consideration in addressing Dr. Varnau's request for an opinion.

Sincerely,

THOMAS G. EAGLE CO., L.P.A.

Thomas G. Eagle

TGE/dms

cc: Dr. Varnau, Brown County Coroner

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January 18, 2013

The Honorable Judith A. Varnau, D.O.
Brown County Coroner
7661 White Swan Road
Georgetown, OH 45121

Re: Request for Formal Opinion – Delivering Crime Scene Evidence to the Brown County Sheriff

Dear Dr. Varnau,

I am in receipt of your request for a formal opinion concerning delivering evidence to the Brown County Sheriff. The Ohio Supreme Court has addressed your concern that the Sheriff is not qualified and is holding office illegally:

> Varnau asserts that Wenninger is not entitled to the office of sheriff, because when he was elected in 2000 and took office for his first four-year term in January 2001, Wenninger did not meet the supervisory-experience requirement or the postsecondary-education requirement of R.C. 311.01(B)(9), and this deficiency resulted in Wenninger's having a break in service that invalidated his peace-officer certificate of training and led to Wenninger's not meeting the qualifications for sheriff **793 under R.C. 311.01(B)(8) starting in January 2005.
> 2 {¶ 14} We disagree. As the court of appeals correctly concluded, "any challenge to Wenninger's qualifications to run for or hold the office of sheriff for the 2000 and 2004 election terms has been rendered moot as those office terms have already expired," and "Varnau cannot seek to invalidate Wenninger's present term of office based on an alleged prior disqualification from an expired term of office." *State ex rel. Varnau v. Wenninger*, Brown App. No. CA 2009–02–010, 2011-Ohio-3904, 2011 WL 3433024, at ¶ 38, 44. Wenninger raised defenses of mootness and laches in his motion for summary judgment.

State ex. rel. Varnau v. Wenninger, 131 Ohio St.3d 169, 171 (2012-Ohio-224). This direct quote by the Supreme Court of Ohio squarely addresses your concern that you "cannot knowingly turn over evidence to someone that I know to be legally a 'civilian,' until proven otherwise by someone with authority and power to do so." As a lay person in the legal field, your interpretation and legal conclusions of the holding in *State ex. rel. Varnau v. Wenninger* are erroneous and misguided.

Based on the binding authority of the Supreme Court of Ohio in *State ex. rel. Varnau v. Wenninger*, and the records of the Ohio Peace Officer Training Commission, it is my formal opinion to you that Sheriff Wenninger legally holds the office of Sheriff of Brown County, that his deputies are lawfully sworn, and you may deliver firearms to the said persons without concern that you are committing malfeasance, misfeasance, or nonfeasance.

Please advise if I may be of further assistance to you.

Yours Very Truly,

Jessica A. Little
Brown County Prosecuting Attorney