IN THE COURT OF COMMON PLEAS
GENERAL DIVISION
MAHONING COUNTY, OHIO

THE STATE OF OHIO	**JUDGE** William H. Wolff, Jr.
vs.	
ANTHONY M. CAFARO, SR.	**CASE NOS.** 2010 CR 00800
and	
THE CAFARO COMPANY	2010 CR 00800 A
and	
OHIO VALLEY MALL COMPANY	2010 CR 00800 B
and	
THE MARION PLAZA, INC	2010 CR 00800 C
and	
FLORA CAFARO	2010 CR 00800 I

STATE OF OHIO'S MEMORANDUM IN RESPONSE TO CAFARO DEFENDANTS' JOINT MOTION TO DISMISS THE INDICTMENT, TO ENFORCE AN AGREEMENT AND REQUEST FOR AN ORDER RELEASING GRAND JURY TRANSCRIPTS

INTRODUCTION

The Cafaro defendants' motion—specifically their memorandum in support—is a garrulous, 108 page tome that plays fast and loose with reality, ignoring all of the inconvenient but very relevant facts that were successfully censored from public view while they attempt to rewrite history with their briefs and motions. The State and the Cafaro defendants, however, do concur on one statement in the memorandum: they compare their own melodramatic summary of the case to the fictional prose of a John Grisham novel. The facts in this case, however, are even more compelling that the fictional account that the Cafaro group seeks to sell to the Mahoning County public.

Simply stated, the facts in this case illustrate the dangers inherent in a lack of transparency in government. The provision of free, paid legal services through a Cafaro group defendant to certain county officials for the purpose of manufacturing opposition (and much civil litigation) to circumvent a legitimate change sought by other county officials--when its done while lining one's own pockets with fat rent checks for an aging, decrepit building—is even more insidious than placing a bag of money on the table in exchange for a vote because the cloud of secrecy and duplicity gave a false air of legitimacy to the ruse. The Cafaro defendants and their public official-minions orchestrated the scheme then sought to hide the Cafaro involvement as the county rent checks kept rolling in to the Cafaro enterprise while the civil litigation to block relocation to Oakhill dragged-on. The Cafaro defendants even went so far as to arrange six figure contributions to a candidate to oppose the current Mahoning County prosecutor in his successful reelection bid, ostensibly to avoid any further outside scrutiny of their actions.

Those were the facts that resulted in the indictments by the Mahoning County Grand Jury after consideration of relevant evidence. A duly-appointed grand jury, acted under the guidance of special prosecutors, did what Article 1, Section 10 of the Ohio Constitution empowers and requires: that "...no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury...". The indictments in this case were a product of a review and inquiry that uncovered the fruits of that conspiracy.

RELEVANT, NON-VINDICTIVE FACTS

The interests and goals of the scheme were all focused upon the unsuccessful attempt of Anthony Cafaro Sr. and the Cafaro-related entities, including Ohio Valley Mall

Company, The Marion Plaza, Inc. and The Cafaro Company, to keep the Mahoning County Department of Job and Family Services physically located at the Garland site owned by a Cafaro-controlled entity and to keep that the scheme from becoming public. The attempt included a lawsuit, State of Ohio *ex rel* Ohio Valley Mall Company v. Mahoning County Commissioners, et al. (Mahoning County Case No. 06CV3032). The mission was to allow the Cafaro-controlled entity to continue to collect rent as it had for more than a decade under a month-to-month lease arrangement following the expiration of the term of a written lease dated March 19, 1987, reaping hundreds of thousands of dollars a year in rent from Mahoning County. Those efforts went beyond that of permissible political speech or social discourse or legitimate taxpayer interests when participants in the scheme began to commit acts ultimately constituting the criminal offenses charged in the indictment and set forth with particularity in bills of particulars pursuant to Ohio Criminal Rule 7, "The Indictment & the Information", at subdivision (E) therein.

Anthony Cafaro concealed his efforts to thwart the Mahoning County Commission's decision to move the Department of Jobs and Family Services from the Cafaro building. On Wednesday, June 6, 2007, Defendant Anthony M. Cafaro, Sr. testified as a witness in a deposition with respect to a suit captioned (State of Ohio *ex rel* Ohio Valley Mall Company v. Mahoning County Commissioners, et al.), 2006CV3032. The civil action was filed by an entity controlled by or at the direction of Anthony M. Cafaro Sr. The suit was a scheme, engineered to stop the purchase of Oakhill by Mahoning County and to prevent the move from the Garland site owned by Ohio Valley Mall Company. Anthony Cafaro, Sr. knowingly made false statements under oath about items material to that lawsuit. He denied his involvement in attempting to arrange a Chase Bank credit facility

with respect to Oakhill. The false statement was made to conceal the existence of the defendant's co-ordination of efforts to block the Mahoning County effort in acquiring the Oakhill property and the move of the Mahoning County Department of Job & Family Services from the Cafaro-controlled Garland Avenue property to Oakhill. A representative of JPMorgan Chase Bank acknowledged that the underwriting department of the bank recommended against lending $100,000 to the bankruptcy trustee of the Oak Hill property and that the line of credit would not have been made on its own merits, if not for the relationship between The Cafaro Company and the bank.

An e-mail from the bankruptcy trustee to a Senior Vice President of the bank informed the banking official on May 23, 2006 that he would proceed to seek abandonment of the property. Abandonment of the Oak Hill property by the bankruptcy trustee would have cleared the way for Mahoning County to obtain the Oak Hill building on a fast track. In a hand written note, in hand writing consistent with that known to be from Anthony Cafaro Sr., read: "we/ Jim Pitzer – I need loan comm. NOW!". One hour and 32 minutes after the Bankruptcy Trustee wrote of his intentions to abandon the property, an attorney on behalf of the Trustee wrote an e-mail on May 23, 2006 to a Cafaro Company lawyer that read: "Mr. Dobran, we met with Jim Pitzer and received a commitment from Chase about 30 minutes ago.

On the exact same day, May 23, 2006, that JPMorgan Chase Bank committed to a line of credit to the bankruptcy Trustee, Anthony Cafaro withdrew $100,000 payable to himself out of an account that bears the captioned letterhead of "The Cafaro Company". That $100,000 check cleared through a personal account of Anthony Cafaro at National City Bank. Three (3) days later, on May 26, 2006, Anthony Cafaro Sr. wrote a check

payable to himself from the National City Bank account for $100,000 and deposited that $100,000 with JPMorgan Chase Bank to open a new savings just one day after the bank formally signed the line of credit agreement with the Bankruptcy trustee.

The denial by Defendant Anthony M. Cafaro, Sr. of his efforts to guaranty the credit facility was done to conceal the degree to which the plaintiff and defendants in State of Ohio *ex rel* Ohio Valley Mall Company v. Mahoning County Commissioners, et al., the taxpayer lawsuit, and other members involved in the scheme, sought to block the move from Garland to Oakhill, allowing a Cafaro-controlled entity to continue to collect hundreds of thousands of dollars a year, in rent, from Mahoning County for the Garland Avenue property.

Anthony Cafaro, Sr. made two additional false statements under oath in the civil case deposition referenced above. There was an exchange wherein Defendant Cafaro testified that he knew little of the efforts concerning the taxpayer suit and, at one point represented that he knew little about so-called 'treasury notes'. However, Defendant Cafaro did know about treasury notes; he used that knowledge in his efforts to block the move of Mahoning County to Oakhill; and he took an active role in the lawsuit. The false statements were made to conceal the existence of his efforts to block the Mahoning County effort to acquire the Oakhill property. Detailed law firm billing records for services to The Cafaro Company in 2006 indicate the law firm was engaged to answer "Tony's three questions". Internal Accounts Payable invoice explanation and contracted service reports from The Cafaro Company provided details that the three questions were: the county Treasurer's right to refuse to invest in internal debt; the county Treasurer's right to refuse to sign checks; and the county Auditor's right to refuse to sign bonds issued by County.

The internal debt is another way to describe the treasury notes which Cafaro denied knowing anything about in his deposition despite having paid a law firm to provide research and memoranda on the topic. In an e-mail dated August 16, 2006 from one Cafaro entity-employed law firm attorney to two (2) others from that same firm, the author wrote that he had a telephone call the previous afternoon with Mahoning County Treasurer John Reardon and Reardon's Chief Deputy Lisa Antonini and that Reardon had "a number of questions related to his investment in the County's own debt obligations and our observation of practices in this area by other counties ... Mr. Reardon confirmed with us that he was calling at the urging of Anthony Cafaro Sr." On the exact same day a law firm attorney e-mailed Anthony Cafaro, Sr., and Cafaro Company attorneys with a subject line of: "Attorney communication with Reardon and Antonini".

Further evidence of Mr. Cafaro's knowledge of the internal debt/treasury notes issues is seen by his memorandum on August 8, 2006 to Defendants Reardon, Sciortino, and McNally attaching the County "Moody ratings" that Cafaro received from Squire, Sanders & Dempsey, writing: "Hopefully this information will be helpful to you in your discussions with the media regarding the financial condition of Mahoning County". Denials by Defendant Cafaro of his knowledge of the treasury notes and his efforts in engineering the taxpayer lawsuit were done to conceal the degree to which the plaintiff and defendants in State of Ohio *ex rel* Ohio Valley Mall Company v. Mahoning County Commissioners, et al., in the scheme sought to block the move from Garland to Oakhill.

Yet another false statement in that same deposition testimony concerned a question directed at whether Mr. Cafaro had ever suggested to any third party that they should initiate litigation against Mahoning County relative to the Oakhill acquisition. He

denied it but the evidence shows otherwise. Defendant Cafaro sought to have third parties intervene to block the move by Mahoning County from the Cafaro-controlled Garland site. In a letter dated October 17, 2006, Anthony Cafaro, Sr. wrote a letter on letterhead of The Cafaro Company identifying himself as the president of The Cafaro Company to the Ohio Attorney General and attached two (2) memorandums that Cafaro directed his attorneys to deliver to the Charitable Law Section of the Ohio Attorney General's office. The Cafaro letter also represents that Cafaro personally delivered a copy of the second memorandum to a State of Ohio official. Both of the attached memorandums, dated October 8, 2006, were from an attorney at a law firm to an in-house Cafaro Company lawyer. Both memorandums that suggested litigation be initiated by third parties. Recommendations to thwart the County's move to Oakhill included: filing a motion with the Bankruptcy Court; intervention in the appeal that was pending in Federal Court filed by McNally, Reardon, and Sciortino; intervene in the taxpayer's suit filed by Ohio Valley Mall; and foreclosure on the property.

Additionally, on August 1, 2006, just days before the taxpayer lawsuit was filed by Ohio Valley Mall, Anthony Cafaro Sr. went to the personal residence of a person identified in the bill of particulars and asked him to file a taxpayer lawsuit against Mahoning County on Cafaro's behalf. Cafaro offered to pay the costs of the attorneys for the lawsuit if the individual was willing to put his name on the lawsuit. Cafaro named an attorney that he would compensate along with attorneys from Cleveland that Cafaro did not name. That individual, ultimately, did not file a taxpayer lawsuit.

On November 2, 2006, another taxpayer lawsuit against Mahoning County was filed which mirrored the Ohio Valley Mall complaint. The attorney representing that 'taxpayer' was the same attorney Cafaro had suggested to the other person.

Yet another attempt to spur litigation was made by Anthony Cafaro, Sr. on August 3, 2006. On that date, he wrote a letter to the treasurer of the Youngstown Board of Education on letterhead of The Cafaro Company, again identifying himself as the president of that enterprise, enclosing information relating to the Mahoning County Commissioner's proposal for the State of Ohio to waive the delinquent taxes on the Oak Hill Renaissance building. Cafaro wrote that he believes: "it clearly is incumbent upon the Board to do its best by fighting this proposal."

Finally, Mahoning County Grand Jury returned an indictment for multiple count of bribery against Mr. Cafaro and the Cafaro-controlled entities and the public officials, as is more fully set forth in the sealed bills of particulars, relative to hundreds of thousands of dollars of legal fees paid by or at the direction of the Cafaro defendants for the benefit of the county officials engaged in the civil litigation efforts orchestrated by the Cafaro defendants to block the legitimate move of the county from Garland to Oakhill. [1]

In summary, the move to seek special prosecutors, based upon the facts uncovered in the investigation, shows that the Mahoning County Prosecutor's office did what it was charged to do under the law.

LAW & ARGUMENT

A. The Alleged Non-Prosecution Agreement "contained" in the Oakhill Civil Settlement Agreement Does Not Apply to the Current Criminal Matter.

[1] These Bribery counts are among those that are the predicate acts and the driving force behind the conspiracy and RICO counts contained in Defendants criminal indictments.

Defendants contend that the non-prosecution agreement contained within the Oakhill civil lawsuit settlement agreement allows them to avoid prosecution in the current criminal matters originated by the return of multiple indictments by the duly impaneled Mahoning County Grand Jury. This argument is meritless.

A non-prosecution agreement is defined as an agreement between the State and a suspect, an accused, or a criminal defendant. City of Marion v. Hoffman, 3rd Dist. No. 9-10-23, 2010 Ohio 4821. The status of the individual entering into such agreement depends on what stage of the criminal matter the agreement is entered in by the parties. [2] Id. These agreements codify an understanding between the State and an individual as to the individual being subject to agreed charges, lesser charges, or no charges whatsoever. State v. Moore, 7th Dist. No. 06-MA-15, 2008 Ohio 1190. It appears, here, Defendants contend that a non-prosecution agreement was entered into between themselves and the State of Ohio during the settlement of the Oakhill civil matter and is contained in the civil settlement agreement itself. [3]

Due to the nature of any non-prosecution agreement, it is clear that the State of Ohio must have knowledge that the individual has been involved in some criminal activity. [4] Otherwise, a non-prosecution agreement would be meaningless and of no benefit to the State of Ohio. Any agreement negotiated under such circumstances

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[2] At the time of the civil settlement agreement, no Defendant was a suspect, accused, or criminal defendant.

[3] This settlement agreement, assuming this Court finds a clause in a civil settlement agreement to be a non-prosecution agreement, would only apply to Defendants Cafaro and McNally. The State does not agree that a clause in a civil settlement agreement is a non-prosecution agreement; especially when at the time the settlement agreement was negotiated there had been no discovery of Defendants criminal actions.

[4] Pre-indictment agreements not to prosecute are bargained-for in the same way as Crim.R. 11 plea bargains, and are subject to review under the same contract law principles. State v. Stanley, 7th Dist. No. 99-CA-55, 2002 Ohio 3007, citing United States v. Wood (C.A. 11, 1986), 780 F.2d 929.

would likewise be unenforceable as there would have been no meeting of the minds in reaching such agreement.

As discussed in footnote one (1), members of the Mahoning County Prosecutor's Office had no knowledge at the time of the settlement agreement that all Defendants had engaged in any type of criminal activity in connection with the acquisition of the Oakhill Building. Thus, it is an impossibility for a non-prosecution agreement to be contained in the Oakhill civil settlement agreement when representatives of the State of Ohio had no knowledge of all Defendants criminal activities at the time the civil settlement agreement was executed.

Also, it is implicit that the State of Ohio must be a party to a non-prosecution agreement. The prosecutor, as a member of the executive branch, has the sole discretion as to the institution of a criminal prosecution. See generally State v. Stanley, 7th Dist. No. 99-CA-55, 2002 Ohio 3007, citing Mootispaw v.Eckstein, 76 Ohio St. 3d 383,385, 1996 Ohio 389. Here, the State of Ohio was not a party to the Oakhill civil settlement agreement. Defendant's Exhibit Thirty (30) in Volume I of accompanying exhibits plainly reveals that the parties to the settlement agreement were Ohio Valley Mall Company, the Board of Mahoning County Commissioners, and the Mahoning County Building Commission. [5]

Moreover, the "non-prosecution agreement" Defendants refer to is nothing more than an agreement and/or covenant not to sue. Covenants not to sue consist of a waiver of a parties right to seek further legal action in connection with a particular

[5] Mahoning County Prosecutor Paul Gains signed the settlement agreement in his capacity as counsel for the Mahoning County Board of Commissioners. Gains is required by state law to act as counsel to the Board of County Commissioners. Gains did not sign on behalf of the State of Ohio or in a personal capacity.

matter. [6] Diamond v. Davis Bakery, Inc. (1966), 8 Ohio St. 2d 38. Covenants not to sue are binding only upon the parties to the civil matter. Bacik v. Weaver (1962), 173 Ohio St. 214. As discussed, the State of Ohio was not a party to the Oakhill civil settlement agreement. Defendant's Exhibit Thirty (30) plainly reveals that the parties to the settlement agreement were Ohio Valley Mall Company, the Board of Mahoning County Commissioners, and the Mahoning County Building Commission. Any agreement and/or covenant not to sue is not enforceable against the State of Ohio, a non-party to the Oakhill civil action and/or the settlement of such action.

Finally, the cases Defendants cite as pertinent examples regarding non-prosecution agreements are obviously distinguishable, and to allow the Defendants desired extension of the non-prosecution agreement would be directly against public policy. It is unconscionable to permit a defendant to enter into a non-prosecution agreement on the basis of the settlement of a civil action, after knowingly committing criminal acts related to the civil action, and to subsequently prevent the State from prosecuting those unknown, undiscovered criminal acts. [7] Allowing such blatantly deceptive behavior on the part of the defendant is a direct attack on public policy and our criminal justice system. Defendants must answer for the crimes alleged and not hide behind the shield of an inapplicable non-prosecution provision buried within a civil settlement agreement.

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[6] A covenant not to sue is nothing more or less than a contract and should be so construed. This covenant is consistent with sound public policy. It tends to encourage the settlement of controversies and litigation. Diamond v. Davis Bakery, Inc. (1966), 8 Ohio St. 2d 38.

[7] Such interpretation would likewise have a chilling effect on parties reaching settlement agreements in civil matters. Parties, specifically the State, would be reluctant to settle civil matters for fear the settlement agreement would somehow be utilized as a non-prosecution agreement despite an obvious lack of meeting of the minds necessary for such an agreement to be formed.

Therefore, this Court should deny dismissal of the indictment on the basis Defendants first claim for dismissal as such claim is without merit.

B. The Mahoning County Prosecutor's Office and the Special Prosecutors did not Engage in Prosecutorial Misconduct to Support Dismissal of the Indictment

Defendants claim that the Mahoning County Prosecutor's Office, hereinafter ("MCPO"), along with the Special Prosecutors, engaged in prejudicial prosecutorial misconduct, which warrants dismissal of the indictment. The basis of this claim is three-fold: (1) the MCPO and the Special Prosecutors violated the grand jury secrecy; (2) the involvement of the MCPO in the grand jury investigation was improper, an abuse of power, and unlawfully subverted the grand jury's independence and impartiality; and, (3) the Special Prosecutors violated legal and ethical obligations by attempting to intimidate the Mahoning County Court of Common Pleas. These arguments are without merit.

In a pre-trial motion to dismiss, a defendant may address "the institution of the prosecution," but any objection must "be capable of determination without the trial of the general issue." Crim. R. 12(C). On a claim of prosecutorial misconduct, "[t]he standard of review...requires a determination of whether the prosecutor's misconduct may have been so egregious that the defendant was denied the fundamental right to a fair trial." State v. Koval, 12th Dist. No. CA2005-06-083, 2006 Ohio 5377, ¶ 46, citing State v. Iocona, 93 Ohio St. 3d 83, 104. "[T]o find a violation of the right to a fair trial, the defendant must demonstrate prejudice resulted from the prosecution's interference." In re Jeremiah R., 6th Dist. No. H-08-002, 2008 Ohio 6171, ¶ 23. See also State v. Lott (1990), 51 Ohio St. 3d 160, 165; State v. Duncan

(1998), 130 Ohio App. 3d 77, 86. "[P]rejudice is 'a reasonable probability of a different result.'" In re Jeremiah R., supra, at ¶ 23.

In the instant case, Defendants rely upon baseless accusations to claim that both sets of prosecutors have incurably tainted the entire grand jury proceedings, thus warranting dismissal of the indictments. The prosecutors' actions have not precluded Defendants from the possibility of a fair trial, nor have they prejudiced Defendants. As such, this Court should deny Defendants' motion to dismiss on these grounds.

1. The Mahoning County Prosecutor's Office and the Special Prosecutors have Violated the Rules of Grand Jury Secrecy

Defendants argue that MCPO violated grand jury secrecy rules by providing grand jury materials to the Ohio Ethics Commission, hereinafter "OEC", which were then inappropriately given to the yet-to-be-appointed Special Prosecutors in Lorain County. Additionally, Defendants maintain that Prosecutor Gains' abuse of grand jury secrecy tainted the OEC investigation and Paul Nick's appointment as a Special Prosecutor. As there is no evidence to support these claims, these arguments are without merit.

Crim. R. 6(E) provides, in pertinent part:

> Disclosure of other matters occurring before the grand jury may be made to the prosecuting attorney for use in the performance of his duties. A grand juror, prosecuting attorney [...] may disclose matters occurring before the grand jury, other than the deliberations of a grand jury or the vote of a grand juror, but may disclose such matters only when so directed by the court preliminary to or in connection with a judicial proceeding, or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss

> the indictment because of matters occurring before the grand jury.

Defendants take issue with Mahoning County Grand Jury subpoenas issued to "Squire, Sanders & Dempsey L.L.P." and "Ulmer & Berne, L.L.P." seeking specified documents. See Defendant's Exhibit Thirty Six (36), Vol. I. The documents were to be provided to Detective Gary Snyder of the Mahoning County Sheriff's Office in lieu of appearance before the Mahoning County Grand Jury. The release of the information Detective Snyder received to the OEC, in furtherance of its joint investigation of Mahoning County public officials, allegedly violated the sanctity and secrecy of the Mahoning County Grand Jury.

However, Defendants contend that it was Prosecutor Gains that breached the sanctity and secrecy of the Mahoning County Grand Jury. Yet, Prosecutor Gains did not breach grand jury secrecy, as Detective Gary Snyder, of the Mahoning County Sheriff's Office, provided the materials received in response to the grand jury subpoenas to the OEC. Defendants clearly recognize such on page sixty one (61) of their memorandum.

The Ohio Supreme Court has determined that Rule 6(E) further provides, "[n]o obligation of secrecy may be imposed upon any person except in accordance with this rule." State *ex rel.* Gannett Satellite Network v. Petro, 80 Ohio St. 3d 261, 266 1997 Ohio 319.

In Petro, the Court determined that "Crim.R. 6(E) d[id] not exempt disclosure by Petro of the requested records, which he obtained from the special prosecutor, who had in turn received them in response to grand jury subpoenas," because his position as state auditor was not one of the parties prohibited from disclosure

pursuant to Rule 6(E). Id. at 266. [8] Similarly, since Gary Snyder's position as detective is not a party named within Crim.R. 6(E), he was not precluded from disclosing responsive materials elicited from the grand jury subpoenas at issue. Furthermore, the parties had ample opportunity to object to providing the grand jury materials is response to the subpoenas to a party not prohibited from disclosure, but failed to do so.

Moreover, OEC's then chief investigative attorney Paul Nick, was permitted to view the grand jury materials, including the original subpoena and responsive materials. First, the Notes on Federal Rule 6(e) provide, "[i]t is absolutely necessary in grand jury investigations involving analysis of books and records, for the government attorneys to rely upon investigative personnel (from the government agencies) for assistance." Fed. Rule 6(e) Notes of Advisory Committee on 1977 amendments, quoting In re Grand Jury Investigation of William H. Pflaumer & Sons, Inc., 53 F.R.D. 464 (E.D. Pa. 1971). Second, Defendants, in their memorandum in support, cite Waters, at 325, "The Ohio Supreme Court has held that for guidance in interpreting Rule 6(E), Ohio courts may look to federal court decisions regarding Fed. R. Crim. P. 6(e)." Consequently, in United States v. Sells Engineering, Inc. (1983), 463 U.S. 418, which Defendants also rely upon, the U.S. Supreme Court stated, "under subparagraph 6(e)(3)(a)(i), disclosure may be made without a court order to 'an attorney for the government for use in the performance of such attorney's duty.'" Id. at 426.

[8] Then State Auditor Petro was challenging his ability to release the records received in response to a grand jury subpoenas in response to a request from the Cincinnati Enquirer.

Thus, Prosecutor Gains could legitimately disclose grand jury materials, including the original subpoenas, to Paul Nick, the prosecuting attorney for the OEC, in the performance of his duties. Furthermore, it would not be mandated that he receive a court order prior to doing so. Therefore, Prosecutor Gains and his office rightfully provided these materials to Paul Nick without receiving court permission.

Furthermore, there is no evidence to suggest that Director and/or Special Prosecutor Nick sent the Lorain County Prosecutor's Office any of the responsive materials from the grand jury subpoenas before their appointment as Special Prosecutors. Therefore, since the materials from the MCPO were appropriately provided to the OEC pursuant to Crim.R. 6(E), the special prosecutors' subsequent use of the materials after appointment is appropriate.

Also, Defendant's contention regarding the impropriety of the OEC investigation is equally meritless, as previously discussed, Prosecutor Gains did not abuse grand jury secrecy and the OEC's investigation was properly conducted. In a case specifically cited by Defendants to show the large investigatory scope available to the grand jury, In re Grand Jury Proceedings (10th Cir. 2010), 616 F.3d 1186, the court stated, "[A] grand jury's investigatory powers are 'not unlimited,' and a grand jury is 'not licensed to engage in *arbitrary* fishing expeditions.'" Id. at 1201 (emphasis added). Comparably, an OEC investigatory subpoena, which was initiated in the present case, is limited to "relevant" items. R.C. § 102.06(D). The distinction Defendants would have this Court adopt does not logically parse out the difference between precluding an arbitrary investigation and allowing a relevant investigation.

Moreover, the OEC may initiate an investigation, receive information related to such investigation, and the information received through the investigation is generally "confidential," except that it may be discretionarily be disclosed to the prosecuting attorney and other law enforcement officers. R.C. § 102.06(A), (B); see also State v. Morrison, 9th Dist. No. 24965, 2010 Ohio 6309.

In the present case, now Special Prosecutor Paul Nick appropriately investigated an issue presented to the OEC by Prosecutor Gains. In initiating the investigation, Nick was able to receive relevant items in response to the grand jury subpoenas.

Finally, as set forth in the State's Memo Contra Motion for Early Return filed with this Court (which is incorporated as if fully restated herein), the Cafaro defendants and their counsel were fully aware at the time of the facts that they now assert to somehow constitute an abuse of power and violation of the grand jury process. If they believed that they had a legitimate basis to challenge the production of documents in the manner specified, they could have and should have raised it with the Mahoning County Common Pleas judge presiding over the grand jury at the time.

2. The Involvement of the Mahoning County Prosecutor's Office in the Grand Jury Proceedings was not Improper, an Abuse of Power or Unlawful Subversion of Grand Jury Independence and Impartiality

Defendants allege that the involvement, through Assistant Mahoning County Prosecutor Stratford and secretarial support, of the MCPO in the grand jury proceedings was improper and amounted to unlawful subversion of grand jury independence and impartiality. Since any support from the MCPO was under the independent direction of the Special Prosecutors, this argument is meritless.

As discussed, *supra*, Prosecutor Gains was not involved in any of the Grand Jury investigations or proceedings, other than testifying as a witness pursuant to Mahoning County grand jury subpoena. [9] The previous contentious civil litigation between Prosecutor Gains and Defendants, as well as the likelihood of members of the MCPO being called as witnesses, necessitated the appointment of independent special prosecutors. The special prosecutors in this case were validly appointed. "A special prosecutor may be appointed by... inherent power of the court." State v. Wantz, 11th Dist. No. 2002-G-2482, 2003 Ohio 7203, *6. See also State, ex. rel. Williams v. Zaleski, 12 Ohio St. 3d 109, 111, citing State ex. rel. Thomas v. Henderson, 123 Ohio St. 474, 478. "The purpose of this inherent power is to relieve prosecutors of their prosecutorial duties when certain circumstances preclude them from effectively representing the state." Wantz, at *6.

"A special prosecutor stands in the place of the elected prosecutor, but only for the particular matter to which he or she is appointed." Supreme Court of Ohio, Board of Commissioners on Grievances and Discipline, Opinion 2003-7, 2003 Ohio Griev. Discip. LEXIS 7 (Dec. 5, 2003). Furthermore, these individuals retain "the same powers as a prosecutor to access a grand jury for the purpose of presenting criminal charges." Wantz, at *8. See also R.C. § 2939.10.

In response to Defendants complaint regarding the MCPO testimony at grand jury, "[t]he Ohio Supreme Court has held that a prosecutor should avoid testifying in a criminal proceeding unless there are extraordinary and compelling reasons." State

[9] In fact, in the attached affidavit from Michael Hehar, the Mahoning Grand Jury Foreman that returned criminal charges in the current criminal indictments, he specifically states that it was made very clear to the Grand Jury that APA Stratford and Prosecutor Gains were not before the Grand Jury in any other capacity than as a witness. Said affidavit is attached hereto as Exhibit B and incorporated by reference herein.

v. Doles (March 31, 1993), 4th Dist. No. 92 CA 1864, *9, citing State v. Coleman (1989), 45 Ohio St. 3d 298, 301-02. However, Ohio courts have permitted it when prosecutors are necessary as witnesses in a case at bar. State v. Breeding (Jan. 26, 2001), 2nd Dist. No. 00CA0008, *10-11; Doles, at *9-10. In State v. Wantz, supra, the 11th Dist. court determined that, since the original prosecutors could be called as witnesses, it was appropriate for a special prosecutor to be appointed to litigate in their stead. Wantz, *7. Even more telling were the actions of the Fourth District Court of Appeals in Doles, where the court did not find error when the lower court permitted an assistant prosecutor to call the elected prosecutor, his boss, as a witness on remand.

In the present case, Prosecutor Gains was not required to ethically screen himself pursuant to Professional Conduct Rule 1.10 since the Special Prosecutors and Prosecutor Gains are not part of the same firm. Even still, however, Prosecutor Gains has definitively avoided involvement in this case, other than acting as a witness pursuant to subpoena. Furthermore, the Special Prosecutors required Prosecutor Gains and other members of the MCPO to testify in front of the grand jury to discuss the factual background of the civil case, as well as the initiation of the OEC and grand jury investigations. Since none of the Special Prosecutors were privy to that information, there were extraordinary and compelling reasons to call members of the MCPO as witnesses. Such reasons still exist to call such witnesses during trial.

Moreover, the MCPO's continued involvement as witnesses critical to the prosecution of the criminal cases did not nullify Gains' recusal. While the MCPO was involved in the preparation and proceedings of the grand jury as witnesses, they have

acted independently of Prosecutor Gains and acted at the direction and discretion of the Special Prosecutors. Due to the link between the MCPO and the litigation concerning Mahoning County's acquisition of the Oakhill Building, and MCPO involvement with the OEC investigation into Mahoning County public officials, unlike the Lorain County special prosecutors, their knowledge and expertise in this particular case are necessary both in the preparation of and factual presentation to the grand jury as witnesses. [10]

3. The Special Prosecutors Did Not Violate Legal and Ethical Obligations in Attempting to Intimidate the Mahoning County Court of Common Pleas from Oversight of the Grand Jury

Defendants claim that the special prosecutors acted in violation of legal and ethical obligations by way of intimidation aimed at the Mahoning County Court of Common Pleas. This is a spurious misrepresentation of the actual events, in which no intimidation was involved. As such, this argument is without merit.

In approaching the Mahoning County Court of Common Pleas, the Special Prosecutors appropriately requested the judges to recuse themselves from these criminal cases before filing an affidavit of disqualification, pursuant to R.C. § 2701.03. According to the Code of Judicial Conduct, Rule 2.11, a judge is required to "disqualify himself or herself in any proceedings in which the judge's *impartiality* might reasonable be questioned," which includes circumstances when a judge has

[10] As previously addressed, the Special Prosecutors act in the stead of the elected county prosecutor in all matters relating to the prosecution of Defendants. In this capacity, the Special Prosecutors are permitted to conduct the matter as they see fit within the bounds of the law. This control over the case extends to determining who to call as witnesses and who to work with in preparing the case for trial. State v. Wantz, 11th Dist. No. 2002-G-2482, 2003 Ohio 7203, *6.

"personal *knowledge* of facts that are in dispute" or if the judge is "a material witness concerning the matter." Ohio Jud. Rule 2.11(A), (A)(1), (A)(7)(c).

In the present case, at the time the judges were approached because they were potential witnesses, and some judges were subsequently actual witnesses before the grand jury, which made them ripe for disqualification according to Rule 2.11(A)(7)(c) of the Code of Judicial Conduct. Prior to filing an affidavit of disqualification, the Special Prosecutors acted with professional courtesy, not intimidation, to address the conflict issues with the judges as it related to the present cases. The Special Prosecutors hoped to avoid additional unnecessary litigation in these cases and allow the judges to recuse themselves voluntarily, as the same judges have done in the past. See State v. Ross, 105 Ohio St. 3d 1223, 1227, 2004 Ohio 7352.

Furthermore, the fact that several Mahoning County public officials are defendants in the present matter weighed in favor of disqualification, not just of the judges who would be called as witnesses, but for all of the Mahoning County Common Pleas judges. See State v. Holin, 117 Ohio St. 3d 1242, 1243, 2006 Ohio 7230; In re Disqualification of Corrigan, 110 Ohio St. 3d 1217, 2005 Ohio 7153; In re Disqualification of Celebrezze, 105 Ohio St. 3d 1241, 2004 Ohio 7360. Therefore, the attention to the matter provided to the Mahoning County Common Pleas Court judges was a matter of professional courtesy, in light of the fact that disqualification could have been imminent under the circumstances.

Most importantly, Judge Sweeney, one of the conflicted judges who testified, explicitly stated in a recent article, "I never felt intimidated." Oakhill prosecutors tried to intimidate judges, Cafaro interests allege in filing, Peter H. Milliken,

Vindy.com (June 7, 2011). Said article is hereby attached as Exhibit A and incorporated by reference herein. Judge Evans, who oversaw the grand jury, also stated in the article, "I know of no intimidation," and had not heard of any judges reporting attempted intimidation. These statements, alone, prove the inappropriateness and invalidity of Defendants' claim. [11]

Finally, there was nothing improper in allowing the judges to testify in front of the grand jury. [12] The Ohio Supreme Court has permitted two (2) trial judges to testify as witnesses in front of the grand jury when the testimony did not involve the probability guilt or innocence of the defendants, but instead focused on non-substantive issues, and was not otherwise prejudicial. [13] State v. Freeman (1985), 20 Ohio St. 3d 55, 57. See also State v. Roth (Oct. 5, 1984), 11th Dist. No. 1326, *6-7. As none of the judges who testified before the grand jury in the present case discussed the probability of the guilt or innocence of the Defendants, but instead discussed other non-substantive matters, their testimony was both permissible and not prejudicial.

Based upon the foregoing discussion, it is obvious that Prosecutor Gains, the MCPO, Paul Nick, the OEC, and the Special Prosecutors acted properly regarding the

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[11] "I'm surprised that there's any indication of what they [Judges Krichbaum and Sweeney] testified to because that should have been kept secret," Judge Evans said. ". Oakhill prosecutors tried to intimidate judges, Cafaro interests allege in filing, Peter H. Milliken, Vindy.com (June 7, 2011).

[12] In the attached affidavit of Michael Heher, it was the Mahoning County Grad Jury that specifically instructed the Special Prosecutors to issue subpoenas for Judges Sweeney and Krichbaum after Heher discovered that the Grand Jury could subpoena individuals to testify

[13] Heher's affidavit indicates that the information sought from Judges Sweeney and Krichbaum involved separate issues and in one case had nothing to do with the grand jury extension or anything pertaining to the grand jury.

entire grand jury investigation and proceedings. [14] As there has been no prosecutorial misconduct and no prejudice to the Defendants, the motion to dismiss the indictment should be denied.

C. The Indictment Is Not a Product of Prosecutorial Vindictiveness or Selective Prosecution

Defendants argue that the current criminal indictments were sought and returned out of prosecutorial vindictiveness on the part of Prosecutor Gains, and, thereby, the Special Prosecutors allegedly acting purely in the interest of Gains. [15] These arguments are meritless.

1. Neither the Elected Nor the Special Prosecutors Engaged in Prosecutorial Vindictiveness Against Defendants

"The United States Supreme Court has stated that 'to punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort[.]'" State v. Viscomi (Sep. 20, 1995), 9th Dist. No. 2400-M, *18, quoting United States v. Goodwin (1982), 457 U.S. 368, 372. When a prosecution is initiated that is solely based upon a legal right, a defendant may properly claim prosecutorial vindictiveness. "[I]n certain cases in which action detrimental to the defendant has been taken after the exercise of a legal right, the Court has found it necessary to 'presume' an improper vindictive motive." Goodwin, at 373.

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[14] In fact, evidence from the Mahoning County Court of Common Pleas Judges themselves belies Defendants contentions. For example, Judge Sweeney noted "the Cafaro attorneys were not present in our judges' meetings, so they really don't know what went on in there". Oakhill prosecutors tried to intimidate judges, Cafaro interests allege in filing, Peter H. Milliken, Vindy.com (June 7, 2011). Moreover, Judge Evans stated "There were no improprieties that I was made aware of or became aware of," with regard to the functioning of the Oakhill grand jury. "I know of no intimidation," Judge Evans said, adding that he never heard any of the judges report any attempt at intimidation.

[15] While Defendants couch their arguments as "prosecutorial vindictiveness", it appears their claims relate to a selective prosecution argument. The State submits this is a distinction without difference.

However, in Ohio "this presumption only arises in cases where a 'reasonable likelihood' of vindictiveness exists; in other cases, specifically those involving pretrial indictments, *such a presumption will not be invoked.*" Viscomi, at *18 (emphasis added). See also State v. Wilson (1988), 47 Ohio App. 3d 136, 140-41 ("This myriad of possible motive present in the pretrial setting set forth in Goodwin makes it unrealistic to apply the presumption of vindictiveness..."); State v. Nash (May 7, 2001), 5th Dist. No. 2000CA00309, *15, citing Goodwin ("The Supreme Court has specifically refrained the extending the presumption of vindictiveness to the pretrial context."). Similarly to Wilson and Goodwin, "the only evidence defendant 'is able to marshal in support of his allegation of vindictiveness if that the additional charge was brought at a point in time after his exercise of a protected legal right." Wilson, at 140, quoting Goodwin, at 382, note 15.

Since Defendants raise the issue of vindictiveness in a pre-trial motion to dismiss, no presumption of vindictiveness by the elected or special prosecutor exists. [16] Furthermore, since no presumption attaches and all Defendants can show is that they were charged after exercising what they incorrectly deem to be merely their First Amendment rights, Defendants must "objectively prove" that the prosecutor has acted vindictively (Viscomi, at *18), which they are unable to do.

This is even more glaringly apparent since the Special Prosecutors filed the charges and have no reason to be vindictive against any one of the Defendants. In Bragan v. Poindexter (6th Cir. 2001), 249 F.3d 476, 482, the court found the fact that two (2) different sets of prosecutors were involved in the case relevant to the

[16] Heher's affidavit indicates that the presentation of information to the Grand Jury concerning the acquisition of the Oakhill Building was fair and unbiased enabling the jury to reach a decision based on the facts.

determination of vindictiveness. Under those circumstances, the court held that the second prosecutor had no reason to act vindictively against the defendant for the exercise of his First Amendment rights. Id. at 484. Here, the Special Prosecutors were brought in to ensure, as Prosecutor Gains stated in his application for appointment, "that any decisions concerning the prosecution or lack of prosecution are truly independent. ... And a special prosecutor acting independently cannot be accused of engaging in a vengeful prosecution, or, conversely, of favorable treatment." Since the Special Prosecutors were never involved in any previous encounters with Defendants, they have no reason to engage in vindictiveness against them. As the Special Prosecutors are the parties pursuing the case, and not Gains and the MCPO, a claim of vindictiveness is inappropriate.

Moreover, "[i]n a pretrial setting, a prosecutor is free to seek indictment on whatever the evidence can support, and no presumption of vindictiveness will attach if the defendant was clearly subject to those charges at the outset." Nash, at *16, citing State v. Semenchuk (1997), 122 Ohio App. 3d 30, 38. Based upon the evidence and a grand jury determination, the Special Prosecutors charged Defendants with crimes that are sufficiently supported to produce multiple indictments. As Defendants were appropriately charged from the commencement of this litigation, it is clear that Special Prosecutors did not act vindictively.

Finally, even if this allegation were properly raised in the pre-trial setting and proof of vindictiveness could be shown, the acts of Defendants transcend the First Amendment speech they allege. Often verbal acts, alone, are enough to constitute a crime. In State v. Kitts, 8th Dist. No. 83634, 2004 Ohio 5208, ¶ 33, a defendant

claimed that his conviction for intimidation was in violation of his free speech right. However, the court found that the defendant was not convicted simply for using inappropriate language, but was convicted because his words manifested intimidation, and it upheld his conviction. Id. at ¶ 34-35. In United States v. Blaszak (6th Cir. 2003), 349 F.3d 881, 885, the Court found that the bribery statute, under which the defendant was convicted, did not implicate the First Amendment because "it does not discriminate based on the content of speech but, instead, prohibits the conduct of seeking or accepting monetary compensation, beyond reimbursement of reasonable expenses, in exchange for testimony." Additionally, while freedom of association is generally protected, "no individual or group of individuals has a right to gather for an illegal activity." State v. Rushton, 151 Ohio App. 3d 654, 660, 2003 Ohio 692, citing Akron v. Holley (1989), 53 Ohio Misc.2d 4, 9.

Here, the evidence demonstrates that Defendants did not simply utilize their First Amendment rights, but, in actuality, used those rights to mask their illegal conduct. Defendant Cafaro, *et al.* attempted to block a move from Garland Avenue building by using public officials to secretly act on his behalf and not for the public good. It is abundantly clear that Defendants actions are illegal and not appropriately disguised as a proper use of First Amendment rights.

Therefore, since there is no pre-trial presumption of vindictiveness, there is no proof of vindictiveness on the part of the Special Prosecutors and because Defendants actions go illegally beyond their First Amendment rights, this Court should deny Defendants motion to dismiss on these grounds.

2. Neither the Elected Nor the Special Prosecutors Engaged in Selective Prosecution Against Defendants

While the decision to prosecute is in the hands of the prosecutor, it "is subject to constitutional equal-protection principles, which prohibit prosecutors from selectively prosecuting individuals based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" State v. LaMar, 95 Ohio St. 3d 181, 192, 2002 Ohio 2128, quoting United States v. Armstrong (1996), 517 U.S. 456, 464. The Ohio Supreme Court in LaMar further provided:

> To support a claim of selective prosecution, 'a defendant bears the heavy burden of establishing, at least *prima facie*, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the bases of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.'

Id., quoting State v. Flynt (1980), 63 Ohio St. 2d 132, 134. See also State v. Lawson (1992), 64 Ohio St. 3d 336, 346; State v. Michel, 181 Ohio App. 3d 124, 128, 2009 Ohio 450.

"The test is set out in the conjunctive, so that [the defendant] bears the burden of presenting evidence on both prongs." Michel, at 131. "[T]he prosecutor enjoys a presumption that his actions were non-discriminatory in nature. 'In order to dispel [this] presumption..., a criminal defendant must present clear evidence to the contrary.'" State v. Hill (March 1, 2000), 7th Dist. Nos. 98 CA 15, 98 CA 233, citing and quoting State v. Keene (1998), 81 Ohio St. 3d 646, 693 (internal quotations omitted). "Moreover, the mere existence of a potential discriminatory purpose does not, by itself, show that such purpose motivated a particular defendant's

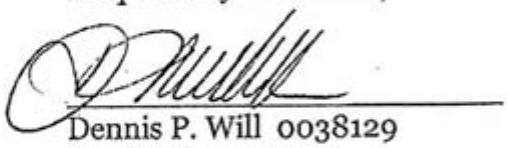
prosecution." State v. Powell, 4th Dist. No. 05CA3024, 2006 Ohio 5031, ¶ 22, citing State v. Freeman (1985), 20 Ohio St. 3d 55, 58.

In the present case, the Defendants bear the "heavy burden" to provide evidence showing that the Special Prosecutors selectively prosecuted them. However, as discussed supra, Defendants fall short. There is no evidence to suggest that others have not been prosecuted, either by the MCPO or the special prosecutors, for similar crimes. Defendants also lack evidence to show the prosecutors selected these Defendants because of their First Amendment exercise. Moreover, even if Defendants could show a discriminatory purpose on the part of Prosecutor Gains, it is not enough to assume that motivated the current prosecution by the Special Prosecutors.

Additionally, the 4th District Court in Powell found that the appointment of a special prosecutor was relevant to a selective prosecution claim. The court stated, "the evidence [did] not raise a reasonable doubt as to the prosecutor's motive and purpose. In fact, to avoid any appearance of invidious motive, a special prosecutor was appointed." Id. at ¶ 24. Here, and as discussed in response to the vindictiveness contention, the evidence does not raise a question as to the motives and purpose of the Special Prosecutors. To avoid any appearance of impropriety by Prosecutor Gains, the Court appointed the special prosecutors. Therefore, the fact that there are Special Prosecutors involved should raise a question as to the validity of this selective prosecution claim.

As Defendants have failed to provide evidence clearly supporting their claim of selective prosecution, the motion to dismiss must be denied. [17]

Respectfully submitted,



Dennis P. Will 0038129
Paul Nick 0046516
Anthony Cillo 0062497
David P. Muhek 0024395

Special Prosecutors
Mahoning County, Ohio

[17] Defendants mention in passing in their conclusion, a request for grand jury transcripts. This request is inconsistent with the motion to dismiss. Clearly, Defendants have adequately addressed in their one hundred seventeen (117) page filing in addition to two (2) volumes of exhibits their bases for dismissal. Moreover, while they may be other reasons for *in camera* court inspection of grand jury transcripts, defendants have failed to make a showing of a particularized need necessary for the release of such transcripts. A criminal defendant is not entitled to inspect grand jury minutes before trial for the purpose of preparation or for purposes of discovery in general. State v. Laskey (1970), 21 Ohio St.2d 187; see also, State v. McClutchen, 8th Dist. No. 81821, 2003-Ohio-4802 at ¶22.

CASES

STATUTES

OTHER AUTHORITIES

RULES

CERTIFICATE OF SERVICE

A true copy of the forgoing Memorandum has been served via electronic mail this **1st day of July, 2011** upon the common Defendants in care of their respective attorneys identified on the attached distribution list and shall also be filed with the court, all via electronic mail to their respective email addresses appearing on said distribution list.

Special Prosecutor

State of Ohio vs Anthony Cafaro, Sr., et al.
Case No. 10 CR 0800, et seq.

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Oakhill prosecutors tried to intimidate judges, Cafaro interests allege in filing

By Peter H. Milliken

Tuesday, June 7, 2011

By Peter H. Milliken

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YOUNGSTOWN

Special prosecutors in the Oakhill Renaissance Place criminal conspiracy case tried to intimidate Mahoning County Common Pleas Court judges by calling two of the them as grand jury witnesses, according to a recent court filing by lawyers for the Cafaro interests.

The prosecutors' decision to subpoena Judges R. Scott Krichbaum and Maureen A. Sweeney to testify before the grand jury hearing the Oakhill case "was a deliberate act of intimidation — against not just those judges, but the rest of the bench as well and a gross violation of the judicial privilege," the Cafaro lawyers wrote.

That charge was made in a Friday motion by the Cafaro lawyers to dismiss the Oakhill indictment due to alleged prosecutorial misconduct. A hearing on that motion will be at 9 a.m. July 11 before visiting Judge William H. Wolff Jr. in Mahoning Common Pleas Court.

In response to the Cafaro motion, Special Prosecutor Paul Nick, Ohio Ethics Commission director, said, "We deny the allegations, and we'll respond in a court filing as the court has directed." June 17 is the special prosecutors' deadline to respond.

"I never felt intimidated," Judge Sweeney said Monday. "I don't know what their purpose was," she said, referring to the prosecutors' decision to question her at the grand jury. "I can't read their minds."

Judge Sweeney said she was declining to comment further because the Oakhill case is pending before Judge Wolff and she didn't believe it is proper for one judge to comment publicly on a matter before another judge.

"It's a matter of pending litigation, and it would be inappropriate for me to make a comment about a pending case," Judge Krichbaum said.

In the Oakhill case, three companies, including the Cafaro Co., and five people, including two current and two former county officials, are charged with conspiring to impede the move of the county's

Department of Job and Family Services from Cafaro Co.-owned rented quarters to the county-owned Oakhill.

The county bought Oakhill in 2006, and JFS moved there in 2007.

Oakhill is the former Forum Health Southside Medical Center.

The Cafaro motion says Judges Krichbaum and Sweeney were questioned under oath before the grand jury exclusively about their confidential discussions with the other judges concerning the initial extension of the grand jury's term of service.

That questioning was "a willful breach" of the constitutionally required separation of powers between the executive and judicial branches of government, the Cafaro lawyers wrote.

"The targeting of these two judges inappropriately suggested judicial impropriety" to the grand jury, the Cafaro lawyers added.

The Cafaro motion does not cite any sources for its information concerning secret grand-jury proceedings.

Cafaro lawyers complained to Judge Wolff last fall about breaches of secrecy by Oakhill grand jurors, who communicated their views about the case through The Vindicator and vindy.com. In response, Judge Wolff called the grand jurors into court to remind them of their secrecy oaths.

One of the Cafaro lawyers, Ralph Cascarilla of Cleveland, declined to comment beyond Friday's filing, saying he was adhering to Judge Wolff's wishes by not commenting.

The grand jury that heard the Oakhill case initially was scheduled for a four-month session from January through April 2010.

At the request of the special prosecutors, who sought an extension to allow for continuity of evidence presentation before the same grand jury, Judge James C. Evans, the judge overseeing the grand jury, extended the grand jury's term indefinitely April 21.

"The other judges were alarmed Judge Evans unilaterally granted this extension without their knowledge

or consent and that he failed to set an end date for the grand-jury term," the Cafaro lawyers wrote without attributing this information to anyone.

"The Cafaro attorneys were not present in our judges' meetings, so they really don't know what went on in there," Judge Sweeney observed.

Shortly after Judge Evans granted the extension, all eight county common pleas judges amended Judge Evans' order by setting a June 3, 2010, termination date for the grand jury, with no further extensions allowed.

After that, Judges Krichbaum and Sweeney, who had questioned the reasons for the extension, were subpoenaed to testify before the grand jury at the end of May 2010, the Cafaro lawyers said.

Special Prosecutor Dennis Will then requested a second extension of 60 to 90 days, and the judges granted an extension through July 30. The grand jury issued the 73-count Oakhill indictment on July 29, 2010, and adjourned.

The alleged attempt to intimidate the judges "incurably tainted and abused the grand jury process," the Cafaro lawyers alleged.

"There were no improprieties that I was made aware of or became aware of," with regard to the functioning of the Oakhill grand jury, Judge Evans said. "I know of no intimidation," Judge Evans said, adding that he never heard any of the judges report any attempt at intimidation.

Extending the grand jury term was necessitated by the complexity of the Oakhill case and the apparent need to present the entire case to the same grand jury to preserve continuity, he said.

Judge Evans recalled he asked the grand jurors if they could stay for an extension, and the grand jurors said they could stay and favored the extension.

"I presumed that the grand-jury judge at that time had the authority to extend it," Judge Evans said. As a courtesy, however, after the other common pleas judges asked him about the extension, he agreed to all common pleas judges making the extension decision, he recalled.

"I'm surprised that there's any indication of what they [Judges Krichbaum and Sweeney] testified to because that should have been kept secret," Judge Evans said.

I was the Foreman of the Grand Jury that served from January 2010 to July 2010 in Mahoning County. I was asked to serve as the foreman of this jury by Judge James Evans. The other eight members of the jury and five alternates were randomly selected. One juror was excused after the first case was brought before us. One other juror was excused several months into the session for illness.

No one on the jury, including the alternates, had any idea that the "Oak Hill" case would be brought to us during our tenure. We first meet Dennis Will and Paul Nick sometime during the second month of our session. Both of these men introduced themselves and ask us to keep an open mind and review all information presented to us. They reviewed the function of a Grand Jury. Mr. Nick, Mr. Will and Mr. Dave Muhek from Lorain County presented the evidence before us. There were no other prosecutors or presenters other than these three gentlemen during the several months of the session. The Prosecutors made it very clear that the issue before us was not whether or not the move to Oak hill or the purchase of Oak Hill was good or bad what we were to do is to decide if there was any improper conduct during the process. I believe that the presentation of the information was fair and unbiased enabling the jury to reach a decision based on the facts.

Ms. Lynette Stafford and Mr. Paul Gains of the Mahoning County Prosecutor's Office testified as witnesses before the Grand Jury and were never present in any other capacity. Both Mr. Will and Mr. Nick spent a great deal of time to explain to the jury that these two people were there only as witnesses.

After several months of listening to testimony the jury felt that we needed to hear from several individuals that had not come before us. I looked up the rules of a Grand Jury in Ohio and found that we in fact could subpoena individuals to testify. We gave Mr. Will and Mr. Nick a list of several individuals that we wanted to talk to concerning the matter before us and they then sought out those individuals for us to talk to. I believe that we gave them a list of five or six people and they were able to have four of those on the list testify before us. Two of those individuals were Judge Krichbaum and Judge Sweeney. The jury wanted to talk to these two judges for two entirely separate issues and in one case had nothing to do with the jury extension or anything pertaining to the Grand Jury.

The second extension of the Grand Jury to July 28, 2010 was at the request of the Grand Jury ourselves because we believe we needed more time to digest the massive amount of information that was presented to us.

I believe this information to be true and correct.

Michael T. Heher

SUBSCRIBED TO AND SWORN BEFORE ME THIS 24TH DAY OF JUNE, 2011

NOTARY PUBLIC STATE OF OHIO

SANDRA WEIGLE
Notary Public
In and for the State of Ohio
My Commission Expires
May 23, 2012

STATE'S EXHIBIT B 1/1