IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO

Plaintiff,

vs.

JOHN MCNALLY, et al.

Defendants.

Case No. CR-585428

Judge Janet Burnside

STATE'S CONSOLIDATED BRIEF IN OPPOSITION TO DEFENDANTS' MOTIONS TO REVIEW COUNSEL ONLY DESIGNATION

EVIDENTIARY HEARING REQUESTED IN COMPLIANCE WITH CRIM.R. 16(F)

Now comes the State of Ohio, by and through Cuyahoga County Prosecutor Timothy J. McGinty and his undersigned assistant, and respectfully submits the *State's Consolidated Brief in Opposition to Defendants' Motions to Review "Counsel Only" Designation.* For the following reasons, this Court should reject Defendants' attack on the constitutionality of Crim.R. 16 and follow the plain language of the rule as written. The State further asks this Court to schedule a hearing on Defendants' motions according to the timing requirements of Crim.R. 16(F), seven days prior to trial.

1. **Introduction: John McNally, Michael Sciortino, and Martin Yavorcik have asked this Court to disregard Crim.R. 16 and fashion a new, special discovery procedure for them in this case.**

Crim.R. 16(C) permits a prosecutor to designate any discovery material as "counsel only." Any discovery matter bearing a "counsel only" stamp "may not be shown to the defendant or any other person, but may be disclosed only to defense counsel, or the agents

or employees of defense counsel, and may not otherwise be reproduced, copied, or disseminated in any way." Under this rule, the State has designated the discovery it has provided to the defense in this case as "counsel only."

At a pretrial in chambers on September 15, 2014, defense counsel for John McNally raised the issue of "counsel-only" designations. This Court also inquired as to why the State had designated discovery materials as "counsel-only." The State provided two reasons: (1) the informants in this case were concerned about their safety, and (2) that the recordings provided in discovery contained unfounded allegations regarding several public officials in Mahoning County. The State acknowledged that its concern was not that the defendants themselves (McNally, Sciortino, and Yavorcik) see the evidence, but that they not copy it or distribute it to others. To accommodate Defendants' concerns, the State agreed to allow them more than what Crim.R. 16(C) provided by amending the "counsel-only" designation to permit defense counsel to share the materials with their clients.

Defendants were not satisfied with this. On January 29, counsel for Martin Yavorcik filed a *Motion to Review Counsel Only Designation*, asking this Court to conduct an in camera review of the State's designation of certain discovery materials as "counsel only" pursuant to Crim.R. 16(F) for an abuse of discretion. McNally and Sciortino filed similar motions on February 1. In essence, Defendants claimed that their inability to share the discovery with unidentified third parties unfairly inhibited their ability to properly investigate the case.

In a good-faith attempt to address Defendants' concerns, the State - again doing more for these Defendants than Crim.R. 16 allowed – emailed counsel for both McNally and Sciortino, offering to lift the "counsel only" designation on a case-by-case basis if Defendants would provide a list of names for whom they wanted to play the recordings. Counsel for both

McNally and Sciortino refused the State's offer of compromise. The result is that Defendants have forced this Court into an all-or-nothing choice: according to them, this Court should remove the "counsel-only" designation altogether, allowing them unlimited ability to share the discovery in this case with whoever they want. Defendants also refused to identify these third parties to provide either the State or this Court with any means by which to determine whether they have a legitimate need for doing so.

Crim.R. 16 is written to provide for challenges to the State's designation of materials as "counsel only." Under Crim.R. 16(F), upon motion of the defendant, this Court shall review the prosecutor's designation of any materials as "counsel only" for an abuse of discretion "during an *in camera* hearing conducted seven days prior to trial, with counsel participating." Under the plain language of the rule, Defendants are thus entitled to a hearing that must be held seven days prior to trial. But even this exception is not good enough. Defendants have not only demanded a hearing, but have insisted this Court should ignore the timing requirement of Crim.R. 16(F) and hold this hearing more than seven days before trial to give them an adequate opportunity to prepare.

2. This Court should follow the requirements of Crim.R. 16 and hold a hearing on the State's "counsel only" designations seven days prior to trial.

Crim.R. 16 provides this Court with all the guidance it needs to resolving Defendants' motions. "Upon motion of the defendant, the trial court shall review the prosecuting attorney's * * * designation of 'counsel only' material for abuse of discretion during an *in camera* hearing conducted seven days prior to trial, with counsel participating." Crim.R. 16(F). The rule's use of the word "shall," a mandatory term, "creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998).

This Court is therefore required to hold a hearing on this issue, and that hearing is required to occur no earlier or later than seven days before trial. The Staff Notes to the 2010 Amendments to Crim.R. 16 explain and defend the necessity of the seven-day limitation:

> "The *in camera* review is set seven days prior to trial so that it is, in essence, the end of the trial preparation stage. There was substantial debate regarding the time for this review. Seven days provides adequate opportunity for the defense to prepare for trial and respond to the content of any nondisclosed material. The protective purpose of this process would be destroyed if courts routinely granted continuances of a trial date after conducting the seven-day nondisclosure review. The Commission anticipated that continuances of trial dates would occur only in limited circumstances."

The State simply asks this Court to follow the rule. It is Defendants who are asking this Court to disregard the rule and to make up its own discovery process, specifically for this case, as it goes along. Defendants do so by trying to create constitutional rights both to (1) discovery itself, and (2) to share discovery with others. There are no such rights.

3. Crim.R. 16 is constitutional as written because Defendants have no constitutional right to discovery.

"There is no general constitutional right to discovery in a criminal case[.]" *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977). "In fact, the only way that due process is implicated in the discovery context is in a criminal prosecution when the prosecution withholds exculpatory evidence." *Nozik v. Mentor Lagoons*, 11th Dist. No. 97-L-004, 1998 WL 553170, at *7. Absent a *Brady* claim, the legislature and state courts are generally free to create their own discovery rules.

Defendants' motions do not contend that the State has withheld any exculpatory evidence from them. Instead, Defendants challenge the propriety of the State's discovery procedures, and then attempt to raise this to a constitutional issue. It is not. Crim.R. 16(F) already provides Defendants with a means by which to challenge a "counsel only"

designation. Defendants are entitled to a hearing under that rule, but they are not entitled to select the timing of that hearing in contravention of the mandatory language of the rule. Defendants' argument is not so much that Crim.R. 16 does not allow the State to do what it did, but that it *should not* allow it, and this Court should not follow that rule as a result of this unfairness. Defendants are unsatisfied with the procedures established in Crim.R. 16, but they have no right to discovery at all, and certainly no right to demand discovery be provided to them outside the boundaries of Crim.R. 16 for the sake of their own convenience.

"Furthermore, separate and apart from Crim.R. 16, criminal courts have inherent authority to enter orders to preserve the integrity of their proceedings, including closure orders and orders restricting the litigants and their counsel from disclosing certain information relative to the litigation." *State ex rel. Cincinnati Enquirer v. Sage*, CA2012-06-122, 2013-Ohio-2270, at ¶ 40. Crim.R. 16(C) simply embodies this principle by allowing the State to limit discovery materials to defense counsel's eyes only as a necessary means by which to protect witness safety.

4. This Court should deny Defendants' attempt to remove the "counsel only" designation where a State's witness has been threatened because of his/her cooperation with law enforcement in this case.

On May 7, 2014, one week before this case was indicted, Confidential Human Source 1 ("CHS1") was at the Southern Park Mall in Boardman, Ohio. An unknown male approached CHS1 and began walking with him. The unknown male, on his own, brought up Anthony Cafaro and the Oakhill investigation, and stated that, "The worst thing in the world is a snitch. I can stand almost anything in this world but a snitch." The unknown male then said, "I'll see you again" and walked away. CHS1 was concerned about his safety after this incident. Law enforcement relocated CHS1 out of the Youngstown area for several days after this incident.

Upon returning to his residence, CHS1 discovered a plastic rat placed in his doorway. The State has attached to this brief the May 8, 2014 Investigative Report of BCI Special Agent Edward Carlini documenting this incident as State's Exhibit 1.

In their motions, Defendants – before knowing any of the facts – declare that a threat to the life of a State's witness is no justification for following Crim.R. 16 at all. Defendants make the following argument:

> "Apparently the government has claimed that there have been threats. Counsel learned of the government's claim from a media report as this filing was not served upon counsel for McNally or Sciortino. This government pleading too was reported in local media before it appeared on the public docket. This was not the reason given by the prosecutor at the September, 2014 pretrial for why the material had been designated 'counsel only.'"

There are a number of inaccuracies here. First, Defendants' attempt to portray witness safety as a post hoc rationalization by the State is false. The State did inform both defense counsel and this Court at the September 15, 2014 pretrial that the safety of its informants was one of the two reasons it had designated the discovery in this case as "counsel only." The undersigned prosecutor's notes of that pretrial show Assistant Attorney General Kasaris saying, "the informants are concerned about their safety." Defendants have thus been aware of this issue since September.

The State is also confused by Defendants' reference to a "media report" of a "filing [that] was not served upon counsel" in which the State allegedly referenced a threat made to a witness. Presumably, Defendants are referring to an article that appeared on the Youngstown Vindicator's website on January 30, 2015, "*Oakhill defendant wants to share evidence; AG objects, cites threats.*" The article stated:

> "The attorney for Martin Yavorcik, one of the three defendants in the Oakhill Renaissance criminal corruption case, filed a motion asking a judge to permit

him to share all evidence turned over by prosecutors with whomever he wants.

"But the Ohio Attorney General's Office, which is prosecuting this case along with the Cuyahoga County Prosecutor's Office, is objecting because 'threats have been made to at least one witness in this case,' said Dan Tierney, an AG spokesman." [1]

The article does not reference any "filing" by the State that "was not served upon counsel for McNally or Sciortino." There was no such filing. The State has served all of its pleadings in this case to defense counsel by email the same day that it filed each pleading with the clerk of courts. The article simply quotes a spokesperson for the Ohio Attorney General's Office responding to Defendants' allegations. The brief that this Court is reading now is the first pleading filed by the State to discuss threats made to any State's witness. The only prior reference to witness safety occurred in chambers and off-the-record between the parties at the September 15, 2014 pretrial.

5. **This Court cannot weigh the protection of witnesses against Defendants' purported need to share the discovery without knowing the targets of Defendants' open-ended request.**

In an attempt to minimize the State's need to protect witness safety, Defendants emphasize that they are not, themselves, dangerous men. "Defendants are both lawyers and elected public officials. They have neither a penchant for, nor a record of, thuggery." (Sciortino's Motion, at p. 10). This is a strange argument that misses the point. The State has already agreed to amend the "counsel only" designation to allow defense counsel to share the discovery material with their clients, whom the State agrees are not guilty of the crime of "thuggery." But Defendants' latest request asks this Court to go further than that and lift

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[1] See Skolnick, *Oakhill defendant wants to share evidence; AG objects, cites threats,* Youngstown Vindicator (January 30, 2015), http://www.vindy.com/news/2015/jan/30/lawyer-seeks-ok-to-disclose-evidence-fro/ (accessed February 8, 2015).

the "counsel only" designation altogether, allowing them to share the discovery material *with other people*, whom Defendants refuse to name.

For Defendants to demand the right to share all discovery material with anyone they want, in addition to their clients, and to then defend this request by arguing that their clients are not dangerous misses the point that Defendants themselves have raised. Neither the State nor this Court can determine whether the sharing of discovery with persons unknown would create a risk to any witness' safety unless the State and this Court know who those persons are. It also makes it impossible for this Court to determine whether Defendants have any need at all to share the discovery. And Defendants refuse to provide that information.

The State is not necessarily going to oppose Defendants' request – it simply has to know what that request actually is before deciding. The only reason for Defendants to withhold the information, considering that Defendants have to submit a witness list prior to trial anyway, is gamesmanship. The State is also concerned that Defendants wish to share the information with yet-unindicted parties for reasons unrelated to trial preparation. If that is in fact Defendants' true motive, this would not be a legitimate reason to lift the "counsel only" designation. Neither the State nor this Court have any way of knowing. The best way to simplify any hearing held pursuant to Crim.R. 16(F) would be for Defendants to provide this Court and the State with a list of people with whom they wish to share the discovery in this case.

6. The State committed no improprieties by providing public records to a media outlet on request.

Finally, Defendants' argument that the State somehow has "unclean hands" in this regard because some of the pleadings filed on the public docket have been reported in the media is a distortion aimed at creating a distraction. Initially, this is irrelevant to Defendants'

request. Crim.R. 16(F) entitles them to a hearing, at which this Court will review the State's designation of the discovery as "counsel only" for an abuse of discretion. The fact that this is a case with media attention in which public documents have been released to the public simply has no bearing on anything under the rule.

Moreover, Defendants' allegations in this area are wrong. The State has not, as Defendants imply, released any documents to the media that were not a public record. The explanation is less conspiratorial than Defendants would have this Court believe. Numerous media outlets in Mahoning County, including the Youngstown Vindicator, have requested copies of all publicly-filed pleadings in this case after they are filed. On January 30, 2015, the State filed its *Response to Defendant's Request for Discovery.* The Clerk of Courts time-stamped the pleading as filed at 9:08 a.m. The State provided a courtesy copy to this Court through its bailiff outside of chambers. The State then scanned a filed copy of the pleading in and served it to defense counsel by email at 9:46 a.m. Only after the motion had been filed and served did the State then provide a copy of the discovery response to the Youngstown Vindicator through Dan Tierney, a spokesperson with the Ohio Attorney General's Office.[2] The Vindicator then published a story about the filing on its website at 10:55 p.m., more than 13 hours later.

Once the State filed the *Response to Defendant's Request for Discovery*, that pleading became a public record. "The term 'public record,' as defined in R.C. 149.43(A)(1), thus includes pleadings filed with a court." *State ex rel. Miami Valley Broad. Corp. v. Davis*, 158

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[2] This is the same procedure by which the State provided the Vindicator with a copy of the January 8 *Notice of Intent to Use Evidence Pursuant to Crim.R. 12*, the only difference being that the copy in that case was an unsigned version. Nevertheless, the State only did so after filing the motion with the clerk of courts and serving it to defense counsel.

Ohio App. 3d 98, 102, 2004-Ohio-3860, 814 N.E.2d 88 (2d Dist.). See also *Davis v. Cincinnati Enquirer*, 164 Ohio App. 3d 36, 41, 2005-Ohio-5719, 840 N.E.2d 1150 (1st Dist.) ("Documents used by a court to render a decision are public records"); *In re Providence Journal Co.*, 293 F.3d 1, 11 (1st Cir.2002) (noting "the constitutional presumption of public access to documents submitted in conjunction with criminal proceedings"). All of the pleadings in this case were therefore a public record as soon as they were filed and the State did nothing improper by providing a public record to the media on request.

Nor is the lawful provision of public records to the media in any way inconsistent with the State's designation of the discovery materials as "counsel only." The pleadings filed on the public docket are not discovery materials; they are summaries of what the State has provided the Defendants in discovery. The discovery itself has not been, and will not be, released to the media. The unknown third parties with whom Defendants wish to share the discovery are welcome to read the pleadings on the public docket if they choose, just as any other member of the public is. But the pleadings are not discovery. Most importantly, they do not identify the witnesses who have placed their lives in jeopardy by cooperating with law enforcement in this case. That is the difference. The release of public documents to the public has nothing to do with the confidential nature of discovery materials, and Defendants' attempt to conflate the two issues is both misguided and irrelevant.

7. Conclusion.

For the foregoing reasons, the State submits that Defendants have not established any factual or legal basis for finding that the State abused its discretion in designating any of the materials in this case as "counsel only." Defendants' open-ended and limitless request, and their refusal to identify the persons with whom they wish to share the discovery, renders

this Court's decision a guessing game as to a need that Defendants will not define or even explain. This Court should not rewrite Crim.R. 16 simply because these Defendants are unsatisfied with it. The State therefore respectfully asks this Court to hold a hearing under Crim.R. 16(F), and after that hearing, to deny Defendants' motions.

Respectfully submitted,
TIMOTHY J. MCGINTY
CUYAHOGA COUNTY PROSECUTOR

CHRISTOPHER SCHROEDER (0089855)
Assistant Prosecuting Attorney
Cuyahoga County Prosecutor's Office
The Justice Center, Courts Tower
1200 Ontario St., Eighth Floor
Cleveland, Ohio 44113
(216) 443-7733
cschroeder@prosecutor.cuyahogacounty.us

CERTIFICATE OF SERVICE

A copy of the foregoing State's Consolidated Brief in Opposition to Defendants' Motions to Review "Counsel Only" Designation has been emailed this 10th day of February, 2015 to Lynn Maro (Schoejlka@aol.com), counsel for John McNally, John Juhasz (Jbjjurisdoc@yahoo.com), counsel for Michael Sciortino, and Mark Lavelle (lavellelaw@aol.com), counsel for Defendant Martin Yavorcik.

Chris Schroeder

Christopher Schroeder
Assistant Prosecuting Attorney

Ohio Attorney General's Office
Bureau of Criminal Investigation

INVESTIGATIVE REPORT

STATE'S EXHIBIT

DATE: 5/8/2014

TITLE: SURVEILLANCE / ATTEMPT TO IDENTIFY

SUMMARY:
On May 08, 2014, Ohio BCI Special Agent Ed Carlini participated in a surveillance conducted at the Southern Park Mall (Boardman, Ohio). Carlini was advised that an unknown subject had previously approached a Federal Bureau of Investigation Confidential Human Source at this location, and made unsolicited comments regarding an investigation that he / she was assisting with.

DETAILS:
On May 08, 2014 at approximately 0840 hours, Ohio BCI Special Agent Ed Carlini arrived at the Southern Park Mall (7401 Market Street in Boardman, Ohio), to assist the Federal Bureau of Investigation with the physical surveillance of a Confidential Human Source (CHS) that has been assisting law enforcement in the Oak Hill Renaissance Place investigation.

Federal Bureau of Investigation Special Agent Wallace Sines advised Carlini that on May 07, 2014, the CHS (named as "CHS1" in all documentation related to the Oak Hill Renaissance Place / 2008 Election investigation and in subsequent supporting FBI 302 reports) was approached by an unknown subject while walking at the mall. Sines indicated that the subject engaged CHS1 in a general conversation and then made threatening comments regarding "informants" before departing.

Carlini performed a visual surveillance on CHS1 as he / she walked the interior perimeter of the mall, observing no individuals that engaged him / her. The surveillance was terminated at approximately 0945 hours after CHS1 completed walking and exited the area.

Carlini later met with Sines and CHS1 (hereafter referred to with a male pronoun whether actually male or female) and was provided further details of the May 07, 2014 incident.

CHS1 indicated that on May 07, 2014 at approximately 0845 hours; he arrived at the Southern Park Mall and began his walking routine. After walking for a period of time, CHS1 Advised that

File Number: SI-50-14-14-0143	**File Title**: Oak Hill Renaissance / 2008 Election
Authoring Agent: S/A Ed Carlini #130	**Case Agent**: S/A Carlini #130
Report Date: 5/8/2014	**Exhibit Number**: Exhibit Number
Investigative Activity: Surveillance / Attempt to Identify	**Supervisor Approval**: SAS James Ciotti #23

he was approached by an unknown male white subject that began walking with him. CHS1 described the individual as approximately 5'11" tall, 65-68 years old and having dark-colored (thinning) hair. He further advised the subject was wearing dress pants, a shirt / tie and dress shoes. Although verbally stating that he too was a "walker", CHS1 recalled thinking that the subject's attire was unusual for exercising.

CHS1 stated that the subject made general conversation about walking and offered some personal information about his children, people that he knew, and what he did for a living. CHS1 indicated that he did the same and more general conversation ensued.

CHS1 indicated that the subject ultimately changed the conversation by mentioning Anthony (Tony) CAFARO and what a "good guy he is". CHS1 advised that the subject continued by saying that "Tony Cafaro is a good family man and the Cafaro Family does a lot of good things for the community". The subject continued to say "You know, the first Oak Hill investigation didn't work out for some people".

CHS1 advised that the subject then started talking to him about "informants" including local organized crime figure Lenine "Lenny" STROLLO; who cooperated with the Federal Bureau of Investigation and provided testimony on several Youngstown-area murders and related crimes of violence. Strollo was a high-ranking, organized crime 'boss' and in fact himself ordered the murders of several individuals. His cooperation included testimony and the providing of evidence against those who carried out his orders (as well as assistance with other crimes including gambling and other Mahoning Valley murders).

According to CHS1, the suspect stated, "Look how bad Strollo's life was after he snitched, he will be looking over his shoulder forever". CHS1 advised that suspect then said "Who knows what still may happen to him (Strollo)?"

CHS1 advised that the subject ended the conversation by stating, "The worst thing in the world is a snitch. I can stand almost anything in this world but a snitch. Well, I have to go to a meeting. It was nice talking to you, I'll see you again." and exited the mall via the northeast exit (outside of JC Penny's).

CHS1 was purposefully relocated from the Youngstown area for several days after this incident, due to the upcoming May 13, 2014 indictment of John MCNALLY, Michael SCIORTINO and Marty YAVORCIK. Upon returning to his residence on the following week, CHS1 advised that he discovered a large plastic (novelty) rat had been placed between the storm door and front door of his residence.

CHS1 relayed that the encounter with the subject at the mall and the accompanying incident at his residence has caused him concern for his wellbeing, in that those responsible obviously know his identity and where he resides.

SI-50-14-14-0143
SURVEILLANCE / ATTEMPT TO IDENTIFY

SUBJECT INFORMATION:

NAME:	Unknown						
ADDRESS:	Click here to enter subject's address.						
PHONE:	Click here to enter subject's phone number.						
EMPLOYMENT:	Click here to enter subject's employment.						
DOB:	65-68 YOA	**SSN:**	Enter SSN	**SEX:**	Male	**RACE:**	White
HEIGHT:	5'11"	**WEIGHT:**	Heavy	**HAIR:**	Black	**EYES:**	Choose an item.
S/V/W:	Suspect						
CCH:	Click here to enter CCH.						
OTHER:	Wore shirt / tie and dress clothes and appeared familiar with CHS1						