FILED UNDER SEAL

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., *et al.*	**CASE NO.** 2010 CR 00800 to 0800I

MOTION IN LIMINE OF THE STATE OF OHIO WITH RESPECT TO THE JOINT MOTIONS OF DEFENDANTS MICHAEL SCIORTINO AND JOHN MCNALLY, IV AND OTHER DEFENDANTS

Now comes the State of Ohio, by and through the Special Prosecutors for Mahoning County, and moves this Honorable Court for an order precluding any defendant from putting on witness testimony or submitting evidence relating to their allegations of "governmental misconduct" raised in their recent filing, for the reason that such evidence is of no relevance to any motion hearing set for December 6, 2010 with which to determine whether a record should be sealed in a case or otherwise.

STATEMENT OF THE CASE

On July 29, 2010, the Mahoning County Grand Jury returned a seventy-three (73) count indictment charging, the defendants with various offenses in violation of the Ohio Revised Code. In addition to numerous previous filings and motions, a third party newspaper, The Youngstown Vindicator and its sister station, WFMJ-TV, recently moved the Court to reconsider its earlier order sealing records and limiting access.

Rather than responding with a brief in opposition to the motion of the media to unseal the proceedings, the Defendants Sciortino and McNally responded with an unusual motion captioned: *"Joint Motion of Defendants Michael V. Sciortino to Insure Public Access to Filings after insuring that Filings are in Accordance with the Established Rules of Pleading"*. The 'motion' states, in essence that the defendants recant their earlier objections to the Court's method of handling the filings in the case and then veers into trial territory by making unsupported allegations of government misconduct and serving subpoenas upon the elected Mahoning County Prosecuting Attorney and an assistant, ostensibly for the purposes of addressing those allegations.

LAW AND ARGUMENT

I. THERE IS A LIMITED RIGHT OF ACCESS TO COURT DOCUMENTS IN A CRMINAL PROCEEDING.

The law is well-settled with respect to media and public right of access to criminal proceecdings. The First Amendment to the United States Constitution provides a limited right of access to criminal proceedings. *State ex rel. Cincinnati Enquirer v. Winkler* (2004), 101 Ohio St. 3d 382, 383-84, 2004 Ohio 1581, at ¶ 8, citing *Press Enterprise Co. v. Superior Court of Cal., Riverside Cty.* (19860, 478 U.S. 1, 7-8l; *see also Richmond Newspapers, Inc. v. Virginia* (1980), 448 U.S. 555. Likewise, Section 16, Article I of the Ohio Constitution guarantees the public's right to open courts. *Winkler*, 101 Ohio St. 3d at 383-84. The right of access includes both access to the courtroom itself along with records and the transcripts which document the proceedings. *Id.*, citing *State ex rel. Scripps Howard Broadcasting Co. v. Cuyahoga Cty. Court of Common Pleas* (1995), 73 Ohio St. 3d 19, 21, 652 N.E.2d 179.

As the *Winkler* Court noted, the right of access serves two important policy goals. First, a crime is a public wrong and the community has a compelling interest in observing the administration of justice. *Id.* at ¶ 9, citing Jack B. Harrison, Comment, *How Open is Open? The Development of the Public Access Doctrine Under State Open Court Provisions*, 60 U. CIN. L. REV. 1307, 1322. Second, the right of access promotes respect for and understanding of the legal system and thus enables the public to engage in an informed discussion of the governmental process. *Id.*, citing Anne-Therese Bechamps, *Sealed Out-of-Court Settlements: When Does the Public Have a Right to Know?*, 66 NOTRE DAME L. REV. 117, 127. Moreover, the Sixth Circuit opined in *Detroit Free Press v. Ashworth* (6th Cir. 2002), 303 F.3d 681, 703-04, citing *Richmond Newspapers*, 448 U.S. at 569, that public access acts as a check against the actions of the executive by assuring us that proceedings are conducted fairly and properly. The Sixth Circuit explained that openness: 1) ensures that the government does its job properly and does not make mistakes; 2) has a cathartic effect, 3) enhances the perception of integrity and fairness; and 4) contributes to the proper functioning of the republican system of self-government by protecting free discussion of government affairs. *Id.* at 704. As the district court in *Ashworth v. Bagley* (S.D. Ohio 2005), 351 F. Supp. 2d 786, 791, noted, "[t]he public has as much interest in the process as in the result, and contemporaneous, rather than after-the-fact, access to the process seems to promise more benefits than detriments."

Regarding constitutionally-based access to court documents, the Sixth Circuit Court of Appeals is split whether the right to inspect is founded in the constitutional right or the common law right. *Compare United States v. Beckham* (6th Cir. 1986), 789 F.2d 401, 406-09 (holding members of the media have no constitutional right of access

to tapes), *with Application of Nat'l Broadcasting Co. v. Presser* (6th Cir. 1987), 828 F.2d 340, 345 (holding there is a qualified First Amendment right of access to proceedings and documents).

Beyond the constitutional analysis, there exists a common law right of access to judicial proceedings and documents. *Bagley*, 351 F. Supp. 2d at 788-89, citing *Nixon v. Warner Commc'ns, Inc.* (1978), 435 U.S. 589, 597-99. The trial court's discretion with regard to the common law right of access is not unfettered and usually involves a fact-intensive and context-specific balancing of the competing interests of those who seek access and those who would seek to deny it. *Id.*, citing *Nixon*, 435 U.S. at 598-99. The interests to be weighed are: 1) the Court's supervisory authority over its own documents; 2) the benefit to the public from the incremental gain in knowledge which would result from access to the materials in question; 3) the degree of danger to the petitioner or other persons mentioned in the materials; 4) the possibility of improper motives on the part of the media; and 5) any other special circumstance in the case. *Id.*, citing *Beckham*, 789 F.2d at 409.

There is a strong presumption in favor of access. *Id.*, citing *Nixon*, 435 U.S. at 602; *Brown & Williamson Tobacco Corp. v. Federal Trade Comm.* (6th Cir. 1983), 710 F.2d 1165, 1179. Any balancing of interests begins from the starting point in favor of access. *Id.* Additionally, instead of merely indicating rational interests in favor of restricting access, a court must set forth "substantial reasons" for denying access. *Id.*, citing *Beckham*, 789 F.2d at 413. Therefore, the decision to restrict media access to documents must survive a more searching form of "intermediate scrutiny." *Compare id.* ("substantial reason"), with *United States v. Virginia* (1996), 518 U.S. 515, 524

("exceedingly persuasive justification" of "important governmental interests" which is "substantially related" to achievement of those objectives).

It is the proper role of the legislature to balance the competing interests between public and private rights. *Winkler*, 101 Ohio St. 3d 382, 2004 Ohio 1581, at ¶ 9, citing *State ex rel. Toledo Blade Co. v. Univ. of Toledo Found.* (1992), 65 Ohio St. 3d 258, 266, 602 N.E.2d 1159. The General Assembly did so in R.C. 2953.02. In that section, the General Assembly provided that a court, following a finding of not guilty or dismissal or no-bill indictment, may seal a record. The section does not mention sealing ongoing criminal actions. In fact, the section specifically prohibits sealing of a case where the defendant has a pending criminal action. R.C. 2953.52(B)(2)(b).

Moreover, the Ohio Public Records Act, R.C. 149.43 *et seq.* codifies the rule in Ohio that "public records are the people's records." *Dayton Newspapers, Inc. v. Dayton* (1976) 45 Ohio St. 2d 107, 109, 341 N.E.2d 576, 577. Anyone may inspect records at any time, subject only to the limitation that such inspection does not endanger the safety of the record or unreasonably interfere with the discharge of the duties of the officer having custody of the record. *Id.* at 109, 341 N.E.2d at 577-78, quoting *State ex rel. Patterson v. Ayers* (1960), 171 Ohio St. 369, 371 (quotations omitted). Doubt should be resolved in favor of disclosure. *Id.* at 110. Records should be available to the public unless the custodian can show a legal prohibition to disclosure. *Id.*, citing R.C. 121.22(A).

As the Supreme Court of the United States recently reaffirmed in *Presley v. Georgia* (2010), 130 S. Ct. 721, 723, citing *Press-Enterprise I*, 464 U.S. 501, the public trial right extends beyond the accused and can be invoked under the First Amendment. This right is binding on the States. *Id.* To overcome the presumption of openness based

on findings that closing or sealing the proceeding is essential to preserve the higher value of a fair trial under the Sixth Amendment, the court must find a compelling governmental interest which is narrowly tailored to serve that interest- strict scrutiny applies. *Press Enterprise I*, 464 U.S. at 510; *Waller v. Georgia* (1984), 467 U.S. 39, 44-45; *Globe Newspaper Co. v. Superior Court for the Cty. of Norfolk* (1982), 457 U.S. 596, 606; *Brown v. Hartlage* (1982), 456 U.S. 45, 53-54.

Additionally, because the court's order preventing access to the newspapers could be construed as a form of prior restraint, a note about prior restraints is appropriate. The term "prior restraint" is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur. *Alexander v. United States* (1993) 509 U.S. 544, 550; *see also New York Times Co. v. United States* (1971), 403 U.S. 713, 714 (per curiam). Unlike cases involving subsequent punishment for speech, prior restraints bar a person or entity from speech in the future. *Alexander*, 509 U.S. at 553. Some may argue that the court's order could be construed as a prior restraint because a 'sealing' if otherwise subject to disclosure controls the flow of information and effectively prohibits the press from writing about the ongoing criminal case. *See Grosjean v. Am. Press Co.* (1936), 297 U.S. 233, 246.

II. TESTIMONY AT THE PRE-TRIAL HEARING ABOUT ALLEGED GOVERNMENT MISCONDUCT WOULD BE IRRELEVANT TO DISPOSITION OF THE PENDING MOTION REGARDING SEALING OF CASE DOCUMENTS.

In their missives, defendants indicate desires to call witnesses to testify to what the State can only surmise are defendants' allegations of governmental misconduct. The upcoming hearing, however, is focused on arguments relating to i) certain of the

defendants' motion to dismiss the indictment relative to their argument and ii) the Press' motion.

The extant motions are ostensibly labeled as motions relative to records and sealing while the subpoenas issued to Mahoning County prosecutors relate to what the State can only surmise is defendants' intention to elicit testimony or present evidence relating to allegations of governmental misconduct. Introduction of any evidence either through tangible items or testimony would be absolutely irrelevant to disposition of the pending motions concerning whether and to what extent records may be 'sealed'. *See* Evid. R. 401 and 403.

While purported allegations of governmental misconduct may have some relevance from a defense perspective to a defendant's trial strategy or tactics, such testimony have absolutely no place in the present proceedings and--from the State's perspective--would appear to be nothing more than an outrageous effort by certain defense counsel to make their own manipulative headlines during a hearing which will likely be heavily covered by the media.

Moreover, such a hearing relative to those allegations, should it occur for some proper motion-driven purpose, is premature, given conflict issues that must be addressed.

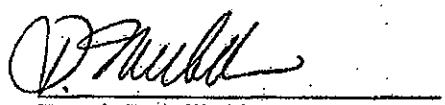
In State v. Spahr (1976), 47 Ohio App.2d 221, the court summarized the intent of a motion in Limine at paragraph one of the syllabus:

> "As related to trial, a motion in limine is a precautionary request, directed to the inherent discretion of the trial judge, to limit the examination of witnesses by opposing counsel in a specified area until its admissibility is determined by the court outside the presence of the jury." The power to grant the motion is not conferred by rule or statute, but instead lies within the inherent power and discretion of a trial court to control its proceedings. Id. at 224. Riverside Methodist Hosp. Assn. v. Guthrie, supra, at 310. See, also, Evid. R. 103(A) and 611(A)."

CONCLUSION

The State submits that putative evidence relating to allegations of misconduct is irrelevant to the issues relating to the sealing of court records, or, for that matter, any other pending motion for the December 6, 2010 hearing date and respectfully requests that the court exclude any such evidence that may be offered by any defendant. Accordingly, the State respectfully requests that this honorable Court grant its Motion in limine and issue an order barring the introduction of any such evidence during any hearing occurring on that date.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A true copy of the forgoing motion has been served this 1st day of December, 2010 upon Defendants John McNally, IV and Michael Sciortino in care of their counsel at their addresses appearing on the attached distribution list and served upon counsel for defendants charged by way of the same common indictment and shall be filed with the court, all via their respective email addresses appearing on said distribution list and through the same method of delivery.

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