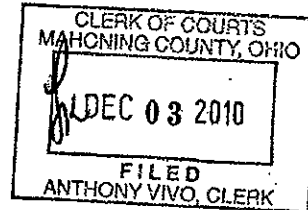


FILED UNDER SEAL

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO



STATE OF OHIO,

Plaintiffs

v.

ANTHONY M. CAFARO, SR., et al.,

Defendants.

Case No. 2010 CR 00800

Judge William H. Wolff, Jr.

**JOINT MOTION OF ANTHONY CAFARO, SR., THE CAFARO COMPANY,
OHIO VALLEY MALL COMPANY, THE MARION PLAZA, INC.,
AND FLORA CAFARO TO ENLARGE THE JANUARY 3, 2011 PRETRIAL MOTION
FILING DEADLINE**

Now come Defendants Anthony Cafaro, Sr., The Cafaro Company, Ohio Valley Mall Company, The Marion Plaza, Inc., and Flora Cafaro (collectively "Defendants"), by and through the undersigned counsel, and respectfully seek the entry of an order enlarging the January 3, 2011 pretrial motion filing deadline that was established in this Court's Orders of September 9 and 14, 2010.

An enlargement of the January 3, 2011 pretrial motion deadline is necessary because of the State's failure promptly to furnish bills of particulars for Anthony Cafaro, Sr., The Cafaro Company, Ohio Valley Mall Company, and The Marion Plaza, Inc. that the State promised in September were imminently forthcoming when the Court initially established that deadline. The State has further disregarded its open-file discovery obligations by refusing to furnish complete



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discovery responses and failing to respond to several written communications sent to the Special Prosecutors outlining specific deficiencies in the responses that have been provided to date. A memorandum in support of this motion is attached.

**MEMORANDUM IN SUPPORT OF MOTION FOR
ENLARGEMENT OF PRETRIAL MOTION FILING DEADLINE**

I. THE STATE HAS FAILED TO PROVIDE DEFENDANTS WITH ALL OF THE REQUESTED BILLS OF PARTICULARS AND IS REFUSING TO RECTIFY DEFICIENCIES IN ITS DISCOVERY RESPONSES.

Within weeks following issuance of a 73-count Indictment, each Defendant timely made separate written requests to the Special Prosecutors for the production of discovery materials pursuant to Criminal Rule 16. Defendants also timely filed a joint motion for bills of particulars pursuant to Criminal Rule 7.

On September 9, 2010, this Court held the initial pretrial conference with counsel for all the parties. At that conference, the Special Prosecutors advised this Court that Defendants' requests for bills of particulars would be furnished within two weeks of the September 9th conference. To date, however, only Flora Cafaro, Martin Yavorcik, John Zachariah, John Reardon, and Michael Sciortino have received what the State has labeled its response to these defendants' request for particulars. Further, only the Flora Cafaro and Martin Yavorcik responses could be characterized as having been timely provided. While the State originally furnished a response to Zachariah's request for particulars on November 3, 2010, it then amended and restated that response on November 22, 2010. On that same day, the State furnished its response to Reardon's request for particulars. Most recently, the State furnished its response to Sciortino's request for particulars on December 1, 2010 – substantially more than the "two weeks" from September 9th that it and the other responses had been promised. Finally, despite repeated requests from Defendants' counsel, the Special Prosecutors are unable, or

perhaps unwilling, to advise when the remaining responses to bills of particulars will be furnished.

Since the September 9th pretrial, Defendants received over 56,000 pages of documents. The manner in which the documents were furnished constituted, literally, an electronic document dump. Despite concerns raised by Defendants' counsel during the September 9th pretrial conference about the potential for a wholesale document dump given the potential amount of information, the State nevertheless proceeded to produce electronic images of more than 56,000 documents with no identification of the type, category, subject matter, or file name for even a single documents. It has taken Defendants considerable time and expense to organize the State's discovery production before any meaningful review could begin. In contrast, the Special Prosecutors have had two years in which to review, organize, and digest these same materials.¹

Defendants' initial review of the State's discovery production has revealed gaping deficiencies in the material and information the State is required to produce. Specific deficiencies have been repeatedly communicated to the Special Prosecutors, both in writing and orally, as early as October 14, 2010. The Special Prosecutors have utterly failed to respond to Defendants' attempts to resolve discovery issues informally and without resorting to the involvement of this Court. These unresolved discovery deficiencies involve some of the following categories of material and information:

- **FBI forms FD-302 produced thus far do not comply with Crim. R. 16 as they were heavily redacted.² In an attempt to resolve**

¹ The investigation of this case commenced in 2007. A grand jury investigation was activated in early 2008. Special Prosecutors were assigned to assume the grand jury investigation in November 2008, with the grand jury ultimately returning a 73-count Indictment on July 29, 2010.

² An FBI FD-302 is the name given to the federal document ("FD") containing the report of an investigative activity.

this issue, defense counsel sent the Special Prosecutors a letter dated October 21, 2010 requesting unredacted copies of all FBI forms FD-302. See letter from Stamboulidis and Weinberg to Will, Cillo, Muhek and Nick dated October 21, 2010, Exhibit 1. Instead of receiving a response to that letter from Special Prosecutors, defense counsel received a letter from FBI SSRA John Stoll ("Stoll"). See letter from Stoll to Stamboulidis dated October 28, 2010, Exhibit 2. Stoll's letter was a refusal to comply with the open discovery requirements of Crim. R. 16. Following receipt of Stoll's letter, defense counsel re-requested these documents from Special Prosecutors in letters dated November 2, 2010, (Exhibit 3) November 12, 2010 (Exhibit 4) and November 29, 2010 (Exhibit 5). Thus, despite receiving four separate letters on this issue, the Special Prosecutors have remained silent and failed to remedy this patent deficiency.

- **Notes taken contemporaneously by investigating agents during the course of witness interviews have not been produced.** These notes are necessary to determine if discrepancies or contradictions exist between the notes of agent interviews and the FD-302s linked to those notes. As many FD-302s relate to events extending over a substantial period of time, and witness statements – ultimately reflected in a single FD-302 – are collected over the course of a series of separate interviews, the risk of discrepancies or contradictions is significant. These documents have also been repeatedly requested by defense counsel in numerous letters. Even if there had been any ambiguity, a November 2, 2010 letter from defense counsel was clear: "please produce all handwritten notes of interviews." See Exhibits 1, 3, 4, and 5. Again, no response from the Special Prosecutors.
- **Photocopies of the 1A envelopes in the FBI's possession have also been withheld.**³ A specific request referencing 1A envelopes was made by letter dated October 21, 2010. See Exhibit 1. Once again, the Special Prosecutors did not respond to defense counsels' request, but rather allowed Stoll to respond in their stead. Stoll represented that all 1A envelopes were provided to the Special Prosecutors. At this time defense counsel are uncertain as to the accuracy of Stoll's statement, as Special Prosecutors have failed to respond to defense counsels' requests personally, despite follow-up letters sent on November 2 and 12, and most recently on November 29, 2010. However, if Stoll's statement is accurate,

³ A "1A" envelope is the federal document identifying chain of custody information for evidence in the government's possession.

Special Prosecutors have failed to produce those documents to defense counsel. *See Exhibits 3, 4, and 5.*

- **Correspondence and drafts of correspondence, email communications, text messages, proffer letters have not been provided. In addition investigative inserts, memoranda, and other such reports are not within the State's "open file" discovery production.** These communications are "substantive" and discoverable under Crim. R. 16 in that they include factual reports about investigative activity, factual discussion of the relative merit of evidence, factual information obtained during interviews or interactions with witnesses, and factual issues relating to the assessment of witness credibility. However, despite defense counsels' repeated requests for these documents, the Special Prosecutors have refused to engage in discussion regarding the issue. *See Exhibits 1, 3, 4, and 5.*

The foregoing list does not identify all of the issues Defendants have with the State's discovery responses, but is merely representative of some of the glaring omissions that must be rectified before Defendants should be required to file any further motions challenging the Indictment.

(The attached letters identify several other deficiencies and are thereby incorporated by reference.)

II. THE STATE'S DELAY IN FURNISHING DEFENDANTS THE REQUESTED BILLS OF PARTICULARS AND COMPLIANCE WITH ITS CLEAR, UNEQUIVOCAL DISCOVERY OBLIGATIONS HAS PREJUDICED DEFENDANTS' ABILITY TO COMPLY WITH THE COURT'S SCHEDULED PRETRIAL MOTION FILING DEADLINE.

Rule 16 of the Ohio Rules of Criminal Procedure was amended effective July 1, 2010 to provide for "open discovery." On April 28, 2010, when the Supreme Court of Ohio filed with the General Assembly the final amendments to the annual update for the Rules of Practice and Procedure, it issued a statement titled: "Supreme Court Submits 'Open Discovery,' Other Amendments to Rules of Practice and Procedure." That statement noted that "the amendments to Criminal Rule 16 call for a more open discovery process" that "would allow defense counsel

access to materials that, under the current rule, prosecutors did not have to divulge.” See “Supreme Court Submits ‘Open Discovery,’ Other Amendments to Rules of Practice and Procedure,” April 28, 2010, available at http://www.supremecourt.ohio.gov/PIO/news/2010/ruleAmend_042810.asp. Furthermore, Justice Pfeifer explained that the amendment to Crim. R. 16 provided “important and necessary changes to the discovery process” *Id.*

The Supreme Court of Ohio’s statement regarding the purpose and effect of the amendments to Rule 16 is supported by the accompanying official Staff Notes, which explain: “The purpose of the revisions to *Criminal Rule 16* is to provide for just determination of criminal proceedings and to secure the fair, impartial, and speedy administration of justice through *the expanded scope of materials* to be exchanged by the parties.” Crim. R. 16, Staff Notes, 7-1-10 Amendment (emphasis added). In furtherance of the goal of “open discovery,” Rule 16 (B) now provides:

Upon receipt of a written demand for discovery by the defendant. . . the prosecuting attorney shall provide copies or photographs, or permit counsel for the defendant to copy or photograph, the following items related to the particular case indictment, information, or complaint, and which are material to the preparation of a defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant, within the possession of, or reasonably available to the state, subject to the provisions of this rule:

(1) Any written or recorded statement by the defendant or a co-defendant, including police summaries of such statements, and including grand jury testimony by either the defendant or co-defendant;

* * *

(5) Any evidence favorable to the defendant and material to guilt or punishment;

(6) All reports from peace officers, the Ohio State Highway Patrol, and federal law enforcement agents, provided however,

that a document prepared by a person other than the witness testifying will not be considered to be the witness's prior statement for purposes of the cross examination of that particular witness under the Rules of Evidence unless explicitly adopted by the witness;

(7) Any written or recorded statement by a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal.

Crim. R. 16(B) (emphasis added). Importantly, the Staff Notes explain that Rule 16(B) "expands the *State's duty* to disclose materials and information beyond what was required under the prior rule." *Id.* (emphasis added). The Staff Notes make note that "[t]he limitations on disclosure permitted under this rule are believed to apply to the minority of criminal cases" and that "nondisclosure [of discoverable material] must be for one of the reasons enumerated in the rule, and must be certified in writing to the court." *Id.*

Should the prosecutor elect not to disclose materials that are designated as discoverable, he must follow a specified procedure:

If the prosecuting attorney does not disclose materials or portions of materials under this rule, the prosecuting attorney shall certify to the court that the prosecuting attorney is not disclosing material or portions of material otherwise subject to disclosure under this rule for one or more of the following reasons:

- (1) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will compromise the safety of a witness, victim, or third party, or subject them to intimidation or coercion;
- (2) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will subject a witness, victim, or third party to a substantial risk of serious economic harm;
- (3) Disclosure will compromise an ongoing criminal investigation or a confidential law enforcement technique or investigation regardless of whether that investigation involves the pending case or the defendant;

(4) The statement is of a child victim of sexually oriented offense under the age of thirteen;

(5) The interests of justice require non-disclosure. Reasonable, articulable grounds may include, but are not limited to, the nature of the case, the specific course of conduct of one or more parties, threats or prior instances of witness tampering or intimidation, whether or not those instances resulted in criminal charges, whether the defendant is pro se, and any other relevant information.

The prosecuting attorney's certification shall identify the nondisclosed material.

Crim. R. 16(D).

In this case, as outlined above, the State has purposefully withheld discoverable material and information from the Defendants. It has also failed to offer any justification for its conduct or respond to Defendants' repeated requests to furnish the material and information, including bills of particulars, to which they are entitled. The State's refusal to respond completely to requests for bills of particulars and to provide full and complete discovery disclosures has prejudiced Defendants' ability to adhere to the Court's pretrial motion filing deadline.

CONCLUSION

For the foregoing reasons, Defendants respectfully request an enlargement of the pretrial motion filing deadline to a date 90 days after the State provides written notice that it has fully complied with its Criminal Rule 16 obligations and that it has furnished complete responses to the Defendants' requests for bills of particulars.

Respectfully submitted,

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Counsel for Flora Cafaro

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Casaro Defendants' Enlarge the January 3, 2011 Pretrial Motion Filing Deadline* has been served via electronic mail this 3rd day of December, 2010 upon:

Dennis P. Will, Esq.
Lorain County Prosecuting Attorney
225 Court Street, 3rd Floor
Elyria, OH 44035

Special Prosecutor for Mahoning County

John B. Juhasz, Esq.
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Youngstown, OH 44512

Counsel for Mike Sciortino

Lou DiFabio, Esq.
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Youngstown, OH 44512

Counsel for John Reardon

Lynn Maro, Esq.
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Youngstown, OH 44512

Counsel for John McNally

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7330 Market Street
Youngstown, OH 44512

Counsel for Martin Yavorcik


Counsel for Ohio Valley Mall and
The Marion Plaza, Inc.

Baker Hostetler

October 21, 2010

Baker & Hostetler LLP

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Paul M. Nick
Special Prosecutor for Mahoning County
c/o Ohio Ethics Commission
William Green Building
30 West Spring Street, L3
Columbus, OH 43215-2256

Re: *State of Ohio v. Anthony M. Cafaro, Sr., et al.*, Case No. 2010-CR-00800
Mahoning County Court of Common Pleas


Dear Counsel:

We write on behalf of our client Anthony M. Cafaro, Sr. So that we may prepare our defense to the charges levied against our client, please produce to us unredacted copies of all FBI forms FD-302 related to his case. This includes forms related to FBI case numbers 194B-CV-68254, 194B-CV-72723, and any other cases related to Mr. Cafaro. Please produce to us also copies of any documents related to such forms and to the interviews or other investigative activity they memorialize, including 1As, envelopes, notes taken during, after, or in preparation for the investigative activity (handwritten or otherwise) and all logs referencing these documents. If there exist other FBI materials related to any interview or other investigative activity in a case involving Mr. Cafaro, please produce them as well, as they may be material to our defense of this case.

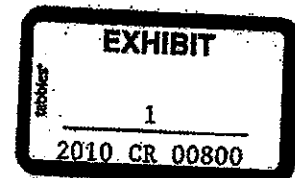
In addition to producing copies of the documents requested, please ensure that all original documents are preserved.

Very truly yours,


George A. Stamboulidis


Martin G. Weinberg
Martin G. Weinberg, P.C.

Chicago Cincinnati Cleveland Columbus Costa Mesa
Denver Houston Los Angeles New York Orlando Washington, DC



BakerHostetler

November 2, 2010

VIA EMAIL AND FEDERAL EXPRESS

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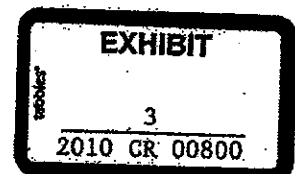
Re: *State of Ohio v. Anthony M. Cafaro, Sr., et al.*, Case No. 2010-CR-00800
Mahoning County Court of Common Pleas.

Dear Counsel:

We write on behalf of Anthony M. Cafaro, Sr., The Cafaro Company, Ohio Valley Mall Company, The Marlon Plaza, Inc., and Flora Cafaro. In order to be able to examine witnesses adequately and otherwise prepare our defense, please produce to us, pursuant to Crim. R. Rule 16(B)(1), (6) and (7) and other applicable law, copies of all emails, reports, and other correspondence or statements by police officers, FBI agents, other investigators, or any other witnesses, relating to this case. Further to our request dated October 21, 2010, which the undersigned join, please produce all handwritten notes of interviews.

Whether or not you assent to the production request detailed above, we additionally request that the originals of any and all emails, handwritten notes, and reports authored by any state or federal law enforcement agent involved in the investigation or prosecution of this case be preserved to the extent they are at all related to the broad

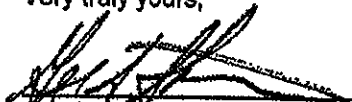
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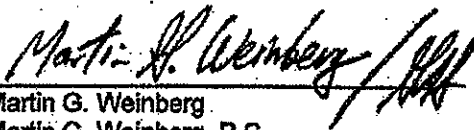


Dennis P. Will, Esq.
Anthony D. Cillo
David P. Muhek
Paul M. Nick
November 2, 2010
Page 2

subject matter of your prosecution so that they may be available for judicial review or
counsel's inspection at some later time.

Very truly yours,


George A. Stamboulidis
Counsel for Anthony M. Cafaro, Sr.


Martin G. Weinberg
Martin G. Weinberg, P.C.
Counsel for Anthony M. Cafaro, Sr.


John F. McCaffrey
McLaughlin & McCaffrey
Counsel for Ohio Valley Mall Company &
The Marion Plaza, Inc.


Ralph E. Cascarilla
Walter & Haverfield, LLP
Counsel for The Cafaro Company


J. Alan Johnson
Johnson & Eddy
Counsel for Flora Cafaro

November 12, 2010

VIA EMAIL AND FEDERAL EXPRESS

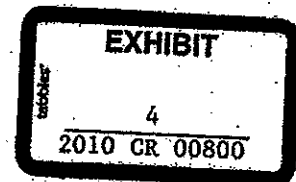
Dennis P. Will
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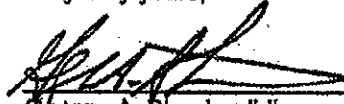
We write on behalf of Anthony M. Cafaro, Sr., The Cafaro Company, Ohio Valley Mall Company, The Marion Plaza, Inc., and Flora Cafaro. In order to prepare for our defense to the charges levied against our clients and to examine witnesses adequately, pursuant to Crim. P. Rule 16(B), *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. U.S.*, 405 U.S. 150 (1972), and other applicable law, please produce to us copies of all documents including but not limited to any interviews or investigative activity that have been memorialized; handwritten notes of any interviews, logs referencing these documents, correspondence and drafts of correspondence, emails, reports, and other correspondence or statements by police officers, FBI agents, investigators, or any other witnesses, relating to this case and/or the above-referenced defendants that are within the possession of the Mahoning County Prosecutor's Office, including those of Paul Gains, who has been identified by the State as a witness, and any other representative of that office associated with this case and/or the above-referenced defendants.



Dennis P. Will, Esq.
November 12, 2010
Page 2

In addition to producing copies of the foregoing documents, please ensure that all originals are preserved.

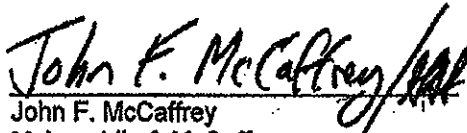
Very truly yours,



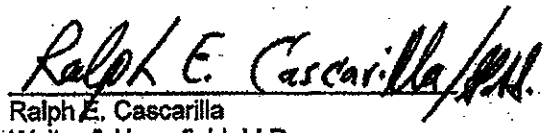
George A. Stamboulidis
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Ralph E. Cascarilla
Walter & Haverfield, LLP
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J. Alan Johnson
Johnson & Eddy
Counsel for Flora Cafaro

cc: Paul J. Gains, Department Head, Mahoning County Prosecutor's Office