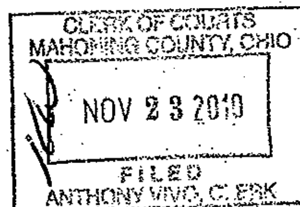

FILED UNDER SEAL

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

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

STATE OF OHIO'S BRIEF IN OPPOSITION TO JOINT MOTION OF ANTHONY M. CAFARO SR., FLORA CAFARO, THE CAFARO COMPANY, OHIO VALLEY MALL COMPANY, AND THE MARION PLAZA, INC. TO TEMPORARILY SEAL ALL BILLS OF PARTICULARS AND NOTICES OF INTENT TO INTRODUCE RULE 404(B) EVIDENCE UNTIL AFTER TRIAL

Now comes the State of Ohio, by and through the Special Prosecutor for Mahoning County, and responds in opposition to Defendants' Joint Motion to Temporarily Seal all Bills of Particulars and Notices of Intent to Introduce Rule 404(B) Evidence Until After Trial.

Statement of the Case

On November 9, 2010, five (5) of the ten (10) named Defendants filed a motion with this Court, seeking to drastically alter the Court's Order and Supplemental Order filed on September 9 and September 14, 2010, respectively, concerning the protocol for counsel

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to initially file all substantive motions under seal. See Exhibits A and B. Opposing counsel would then have fourteen (14) days to file objections. As set forth in the Court's September 14, 2010 Order, at ¶ 3: "If the court concluded that any material should not be made a part of the public record prior to trial, it will order that material to be redacted from that filing and the balance of the filing will, as redacted, be unsealed." See Exhibit B.

Some of the Defendants have now requested that this Court set aside this protocol and instead seal, **in their entirety,** the content of every discovery filing by the State, until after the completion of the trial. For the reasons set forth below, the State respectfully requests that this Motion be DENIED.

LAW AND ARGUMENT

The Ohio Supreme Court has consistently held that R.C 149.43 et seq., the Public Records Act, applies to court records. State ex rel. Cincinnati Enquirer v. Winkler, 101 Ohio St. 3d 382, 383 (2004). Further, once documents are filed with the court, such as any pretrial discovery material, those documents become a public record once they become a part of the court record. State ex rel. Cincinnati Enquirer v. Dinkelacker, 144 Ohio App. 3d 725, 730 (1st Dist. 2001).

The Ohio Supreme Court has also recognized that in some circumstances, the release of certain court records would prejudice the rights of the parties in an ongoing civil or criminal proceeding. In those limited circumstances, the court has recognized a "narrow exception" to public access to such documents. State ex rel. Vindicator Printing Co. v. Watkins, 66 Ohio St. 3d 129 (1993).

However, the parties affected by this Court's decision to seal records are not limited to the State of Ohio through the Special Prosecutors or the named Defendants through their respective counsel. The Ohio Supreme Court, through its Rules Governing the Courts of Ohio, has explicitly stated that, in Ohio, "Court records are presumed open to public access." Sup. R. 45(A). The Court also has set forth the procedure for restricting public access to an otherwise public document:

> **Rule 45(E) Restricting public access to a case document**
>
> (1) Any party to a judicial action or proceeding or other person who is the subject of information in a case document may, by written motion to the court, request that the court restrict public access to the information or, if necessary, the entire document.....
>
> (2) A court shall restrict public access to information in a case document or, if necessary, the entire document, if it finds by **clear and convincing evidence that the presumption of allowing public access is outweighed by a higher interest** after considering each of the following:
>
> (a) Whether public policy is served by restricting public access;
>
> (b) Whether any state, federal, or common law exempts the document or information from public access;
>
> (c) Whether factors that support restriction of public access exist, including risk of injury to persons, individual privacy rights and interests, proprietary business information, public safety, and fairness of the adjudicatory process. [Emphasis added].

Thus, the starting presumption is that any document filed with the court is subject to public disclosure, unless by "clear and convincing evidence" the opponent to disclosure establishes that this presumption is overcome by other more compelling interests. Defense counsel's motion to seal a yet unwritten document whose contents have not even been

committed to paper is premature. No conclusion of clear and convincing evidence could possibly be reached about future filings prior to a document having been written or filed.

However, the analysis does not end there. Even if a party, through clear and convincing evidence, can overcome the presumption that the record is open to public access, the court must then find and use the "**least restrictive means available.**" Sup. R. 45(E)(3). [Emphasis added]. The Supreme Court provides the following non-exclusive examples as guidance to courts:

> **Rule 45(E)(3):** When restricting public access to a case document or information in a case document pursuant to this division, the court shall use the least restrictive means available, including but not limited to the following:
>
> (a) Redacting the information rather than limiting public access to the entire document;
>
> (b) Restricting remote access to either the document or the information while maintaining its direct access;
>
> (c) Restricting public access to either the document or the information for a specific period of time;
>
> (d) Using a generic title or description for the document or the information in a case management system or register of actions;
>
> (e) Using initials or other identifier for the parties' proper names.

Clearly, the prophylactic relief sought by Defendants of total redaction of all filings until the trial is complete is contrary to the spirit and the language of Sup. R. 45.

Further, recently, the Twelfth District Court of Appeals reviewed two public record decisions by a Common Pleas Court in Warren County related to a pending murder trial. First, the trial court had denied a request by a local newspaper to attend an anticipated petit jury view of a murder crime scene where the defendant was accused of drowning his wife

in the bathtub. Second, the trial court had also issued a "gag" order to all parties, prohibiting "the parties, their counsel, employees, and witnesses, as well as employees of the court and the clerk of courts, from discussing or disseminating personnel files, records, or related documents pertaining to Detective Braley [the investigating detective] or any other witness in the case." As a result of this court order, the same paper was unable to access a copy of Detective Braley's personnel file. State ex rel. The Cincinnati Enquirer v. Honorable Neal B. Bronson, et al., 2010-Ohio-5315 (12th Dist. 2010), ¶ 6 (Attached as Exhibit C).

The paper filed a mandamus action, seeking a writ of prohibition restraining the trial judge from prohibiting press access to the jury view and from barring production of Detective Braley's personnel records. The paper also filed a writ of mandamus requiring production of these records. Bronson, at ¶ 7.

The Court of Appeals noted that the right of the general public to attend and have access to criminal proceedings is a "fundamental right guaranteed by the First Amendment to the United States Constitution." Bronson, at ¶ 11 (citing to Richmond Newspapers v. Virginia (1980), 448 U.S. 555, 579-80). This right to access "promotes both the fair administration of justice and the public's confidence in the judicial system." Id. (Citing to Press-Enterprise Co. v. Superior Ct. (1986), 478 U.S. 1, 7 and State ex rel. Dayton Newspapers, Inc. v. Phillips (1976), 46 Ohio St.2d. 457, 467).

In granting the writs, the Court held that as to both requests by the media, the trial court "must conduct a hearing, make appropriate findings, and enter its decision on the record." Bronson at ¶¶ 14, 20. (Citing to State ex rel. Natl. Broadcasting Co., Inc. v. Court