FILED UNDER SEAL

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

THE STATE OF OHIO *vs.* **ANTHONY M. CAFARO, SR.** *and* **THE CAFARO COMPANY** *and* **OHIO VALLEY MALL COMPANY** *and* **THE MARION PLAZA, INC** *and* **JOHN A. McNALLY, IV** *and* **JOHN REARDON** *and* **MICHAEL V. SCIORTINO** *and* **JOHN ZACHARIAH** *and* **MARTIN YAVORCIK** *and* **FLORA CAFARO**	**JUDGE** William H. Wolff, Jr. **CASE NOS.** 2010 CR 00800 2010 CR 00800 A 2010 CR 00800 B 2010 CR 00800 C 2010 CR 00800 D 2010 CR 00800 E 2010 CR 00800 F 2010 CR 00800 G 2010 CR 00800 H 2010 CR 00800 I **SUPPLEMENT TO BRIEF IN RESPONSE TO JOINT MOTION OF CERTAIN DEFENDANTS REGARDING GRAND JURY SECRECY AND REQUEST FOR HEARING**

I. The Court Lacks Authority to Appoint a "Special Investigator" to Investigate Allegations of a Grand Juror Violating His Oath under Crim. R. 6(E).

In their Joint Motions, Defendants Anthony M. Cafaro, Sr., Flora Cafaro, The Cafaro Company, Ohio Valley Mall Company, and The Marion Plaza, Inc. (hereinafter "Defendants") move The Court to appoint a disinterested member of the bar pursuant to R.C. 2733.07 to conduct an independent investigation. In effect, Defendants move

for The Court to appoint a special prosecutor. For the following reasons the Court lacks that authority.

The Court sits on this case as a visiting judge pursuant to the Guidelines for Assignment of Judges, Guideline 10(A). Although fully possessed of responsibility to oversee this case to its conclusion, The Court is not a "judge" within the meaning of R.C. 2941.63, which vests in the court of common pleas discretion to appoint prosecutorial counsel in criminal matters. That section states that "the court of common pleas . . . may appoint an attorney to assist the prosecuting attorney in the trial of a case pending in such court." Id.; *see also* State ex rel. Williams v. Zaleski (1984), 12 Ohio St. 3d 109, 112, 465 N.E.2d 861. There are then two related arguments which operate together to produce the result that the Court cannot appoint a special prosecutor.

As a visiting judge, the Court's authority extends only to the confined limits of Case No. 2010 CR 00800. *See* Guidelines for Assignment of Judges, Guideline 10(A) and 11(A). Because appointment of a special prosecutor to investigate allegations that a grand juror violated their oath of secrecy[1] would necessarily entail creation of a new investigation into a new subject (the grand juror(s) supposedly responsible), the matter exceeds the limits of the Court's specific grant of authority. *See* Guidelines for Assignment of Judges, Guidelines 10(A) and 11(A); *see also* Sup. R. 17.

Moreover, R.C. 2941.63 says that a court of common pleas may appoint an attorney to assist in prosecuting a case "*pending in such court.*" R.C. 2941.63 (emphasis added). The investigation of a grand juror or jurors who allegedly violated

[1] A matter more properly the subject of a contempt proceeding in the court of the judge who supervised that term of the grand jury.

their oath of secrecy under Crim. R. 6(E) is not a matter currently pending before this Court. Not only is the case not one of those included in the assignment of the Court, but the matter is not a case before any court in the State of Ohio. At this point, even the regular judges of the Mahoning County Court of Common Pleas would lack authority to appoint assistants to aid in prosecuting the matter.

Additionally, Defendants' motion urging the Court to appoint a special prosecutor under R.C. 2733.07 must fail because Defendants do not indicate on what basis they believe the office of the Mahoning County Prosecutor to be vacant, or the Mahoning County Prosecutor absent, interested in the action in quo warranto or disabled. R.C. 2733.07; State ex rel. Thomas v. Kane (1989), 43 Ohio St. 3d 164, 539 N.E.2d 1122. Defendants similarly fail to establish a special need for the Court to appoint a special prosecutor.

The Office of the Mahoning County Prosecutor is not conflicted in investigating the individual or individuals in question in the same manner as they felt conflicted to request a special prosecutor to prosecute Defendants. Because there is no apparent conflict between the supposed grand juror and the Mahoning County Prosecutor's Office, it would be inappropriate for the Court to appoint a special prosecutor and thereby usurp the authority and discretion of the Mahoning County Prosecutor. State v. Ross (*In re* Disqualification of Cirigliano) (2004), 105 Ohio St. 3d 1223, 2004 Ohio 7352, at ¶ 16 (citing State v. Bunyan (3rd Dist. 1988), 51 Ohio App. 3d 190, 192, 555 N.E.2d 980 (where the duly elected prosecutor felt unable to carry out his prosecutorial duties against the defendant, the court of common pleas possessed authority to appoint a special prosecutor)). For these reasons, Defendants' motion must be denied.

II. The Comments of the Alleged Grand Juror(s) Do Not Concern a 'Matter Occurring Before the Grand Jury'.

Defendants claim in their Joint Motion that one or more grand jurors violated their oath of secrecy under Crim. R. 6(E) in mailing an anonymous letter and posting comments to news articles on the newspaper's website. Even though the comments were made, none rose to the level of prohibited disclosures of matters "occurring before the grand jury." Crim. R. 6(E).

Ohio Rule of Criminal Procedure 6(E) sets forth the obligations of grand jurors with respect to secrecy and provides that:

> Deliberations of the grand jury and the vote of any grand juror shall not be disclosed. 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, interpreter, stenographer, operator of a recording device, or typist who transcribes recorded testimony, 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. No grand juror, officer of the court, or other person shall disclose that an indictment has been found against a person before such indictment is filed and the case docketed. The court may directed that an indictment shall be kept secret until the defendant is in custody or has been released pursuant to Rule 46. In that event the clerk shall seal the indictment, the indictment shall not be docketed by name until after the apprehension of the accused, and no person shall disclose the finding of the indictment except when necessary for the issuance of a warrant or summons. No obligation of secrecy may be imposed upon any person except in accordance with this rule.

Federal law has long recognized that the need for secrecy is relaxed post-indictment. *See* Schmidt v. United States, 115 F.2d 394 (6th Cir. 1940). The oath of secrecy grand jurors take is recognized for the following purposes:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt. The basis of all but the last of these reasons for secrecy is the protection of the grand jury itself, as the direct independent representative of the public as a whole, rather than those brought before the grand jury.

Id. (citing United States v. Amazon Indus. Chem. Corp., 55 F.2d 254 (D. Md. 1931); *see also* United States v. John Doe, Inc. I, 481 U.S. 102, 110 (1987).

Defendants point to seven (7) comments they believe are authored by an individual or individuals who was/were a grand juror in this case which disclose evidence or documents presented to the grand jury, the contents of the deliberations or the vote of the grand jury. They are:

1) an anonymous letter claiming to be from "a juror" in response to an article in the *Vindicator*. The letter supposedly received by the *Vindicator* appeared in an editorial entitled "Did special prosecutors go too far?" on September 19, 2010.
2) a comment on the *Vindicator* website from "ytownredux" arguing with previous commentators on September 20, 2010.

3) a comment on the *Vindicator* website from "ytownredux" arguing with previous commentators on August 25, 2010.

4) a comment on the *Vindicator* website from "ytownredux" arguing with previous commentators on August 25, 2010.

5) a comment on the *Vindicator* website from "ytownredux" remarking on the article on August 24, 2010.

6) a comment on the *Vindicator* website from "ytownredux" remarking on the article on August 22, 2010.

7) a comment on the *Vindicator* website from "ytownredux" arguing with previous commentators on July 31, 2010.

Examining each comment in turn, the Defendants' assertions that the statements evince that a grand juror or jurors violated his or her/their oath(s) of secrecy fall short of violation.

Anonymous Grand Juror Letter

Defendants undertake painstaking effort to cull through the letter of the alleged grand juror to show that it is, and could only be written by, a member of the grand jury which indicted Defendants. Even though the letter opens with the author claiming to be a member of the grand jury and how it pains him to not be able to say anything, the letter goes on to say nothing of substance about the underlying merits of the case. The letter merely avers that the grand jury did not indict a ham sandwich and that the author is concerned that the case will not go anywhere and get lost in the politics of the Valley.

Contrary to Defendants' suggestion, this letter does not relate to matters occurring before the grand jury. A grand juror's oath of secrecy does not prohibit

them from identifying themselves as a member of the grand jury. Crim R. 6(E). Instead, the rule merely prohibits grand jurors duly sworn from disclosing the contents of the grand jury's deliberations and the vote[2] and "other matters occurring before the grand jury." Crim R. 6(E).

Unlike Defendants' characterization of this letter as vouching for the accuracy of the article to which it responds, the letter does not allude to any specific evidence presented to the grand jury and refers nowhere to the deliberations of the grand jury. In fact, contrary to Defendants' claim that the letter verifies the presentation of "other acts evidence," the letter is silent on the question. The line that "[the author is] exactly right in [his] analysis" is vague whether it refers, as the Defendants suggest, to whether the State presented other acts evidence to the grand jury or whether it refers to the comments de Souza made in the editorial about political issues and observations. In view of the other comments related to political considerations not properly before the Court in the instant case ("Please keep hitting this hard. I am so afraid that what we did will end up going no where [sic] and get lost in 'politics as usual' in the Mahoning Valley."), it is equally likely that the comment does not refer to matters before the grand jury.

Setting aside Defendants' claim that it is somehow an impermissible purpose for a commentator to support what Defendants characterize as a deeply-biased author of a newspaper editorial, it strains credulity to argue that the mere utterance of the phrase "politics as usual" provides a sufficient basis to believe that the letter refers to specific grand jury testimony. On the contrary, the phrase has become

[2] In light of The Court's release of the fact that the grand jury unanimously (9-0) voted to indict the Defendants in this case, that fact is no longer being secret. When discussing public information, it cannot be said that a grand juror who discloses public information violates an oath of secrecy.

common parlance in the vernacular not only of the Mahoning Valley area but of the country as a whole. Defendants' argument that the phrase refers to an impermissible disclosure of specific grand jury testimony is belied by the phrase's common usage. Simply put, nothing in the anonymous letter discloses the contents of the grand jury's deliberations or specific matters occurring before the grand jury. Even assuming the author of the letter was in fact a grand juror, that grand juror did not violate the specific command of Crim. R. 6(E). Because no other obligation of secrecy may be imposed inconsistent with that Rule, *id.*, any action against the grand juror would amount to an unconstitutional infringement of their First Amendment right to freedom of speech.

Internet Postings of "ytownredux"

As an initial matter, "ytownredux" has been contacted and interviewed by an investigator holding multiple law enforcement credentials, including that of a deputy sheriff of the Mahoning County Sheriff's department. That was done following the initial joint motion filed by several of the defendants and is one of the nine members of the grand jury which indicted the Defendants. Defendants make conclusory assertions that, based on the nature of the comments and the views expressed therein, the poster must be one of the grand jurors. Their averments layer implication and supposition upon their own speculation that because evidence must have been presented to the grand jury, the statements a person makes on a website must confirm what evidence that must have been. Contrary to Defendants' assertions otherwise, the statements made in the online posts, while not laudable, nevertheless fails to surmount the requirement that the disclosures be about 'matters occurring before the grand jury'.

2) Post of September 19, 2010

Defendants aver that comment #4 to the editorial, "Did special prosecutors go too far?," appearing online is not only from a grand juror but impermissibly discloses matters occurring before the grand jury. Each of the different parts of the online post fails to disclose the substance of any matter occurring before the grand jury. "Ytownredux" does not admit to seeing the letter at any point or being its author. Instead, the comment merely states that although not impossible, it would be seriously misguided to think that the reporter made up the letter.

Next, Defendants claim that the statement "I would really appreciate it if he would stop until the facts come out" somehow demonstrates that the poster is different from the other commentators. Rather than independently assert facts — which could be construed as disclosing matters occurring before the grand jury — "ytownredux" merely asks another commentator to withhold their conclusory judgment about a pending case. Even if this statement could somehow be read to suggest that "ytownredux" were positively aware of the facts of the case, Defendants attempt to prove the affirmative from a qualified negative statement. It were as though the rules of logic somehow necessitated the conclusion that because some animals are not human and Aristotle is an animal that Aristotle is therefore an elephant. That conclusion is not supported by the logical inferences reasonably drawn from the statement.

The Defendants also claim that this comment's statement that the prosecution presented "overwhelming amounts of evidence" which was taken into consideration demonstrates that this person is a grand juror because only the grand jurors know of the supposed overwhelming evidence presented. This argument also misses the fact

that the statement does not identify any of that supposed overwhelming amount of evidence. Nowhere does this comment refer to specific testimony of witnesses or disclose the deliberations of the grand jury. It is no secret that the grand jury was held over from it's initial term and investigated the charges against Defendants for many months. Given the length of the grand jury's consideration of charges, it would be reasonable for even a public observer to conclude that the prosecution had presented voluminous evidence. What else would have occupied the time of the grand jury for so long?

Finally, Defendants argue that allusions to the civil deposition transcripts from the OakHill litigation somehow demonstrate that "ytownredux" read *all* of the transcripts (an incorrect donclusion). Because Defendants aver that not all of the depositions were filed with the clerk of court's office or otherwise made public, they conclude that the commentator must have been a grand juror and that the State must have offered testimony for the grand jury's consideration. This argument too relies on layering belief and inference and supposition on a thin layer of speculation.

3) Post of August 25, 2010

Defendants claim that the assertion by "ytownredux" that he or she visited the Oak Hill site and saw pictures of Garland proves that he or she was a grand juror. Even so, it seems patently clear from the newspaper reports and from the postings of other commentators that the fact that the grand jury toured the OakHill site and saw pictures of Garland was public knowledge.

Additionally, Defendants point to the statement that "going from the evidence that I have seen . . . leads me to believe that Anthony [Cafaro] is about shoulder deep in this . . . ." as identifying the poster as a juror. Even so, there is no basis upon

which to believe that it implicates a matter occurring before the grand jury. Specifically, the quote does not impermissibly reveal any particular evidence "ytownredux" may or may not have considered. It is not, however, an instance of a grand juror disclosing matters occurring before the grand jury in violation of the secrecy oath under Crim. R. 6(E).

4) Second Posting of August 25, 2010.

Defendants claim that the statement "the special prosecutors were very fair and balanced with the Grand Jury" demonstrates that the commentator was a grand jury. Even granting that the natural tendency of this statement is to believe that the person was in fact a grand juror, it nevertheless does not disclose a matter occurring before the grand jury because it does not discuss deliberations or the presentation of actual evidence before the grand jury. It merely notes the manner or style of presentation. Crim. R. 6(E); Schmidt, 115 F.2d 394.

5) Posting of August 24, 2010.

Defendants aver that because there was a chronological description of events prepared for the taxpayer trial that this evidence was presented to the grand jury and therefore the only basis on which one could write about it would be if the author was a grand juror. Again, even so, the disclosure does not rise to the levfel of a matter occurring before the grand jury. Moreover, Defendants' own argument concedes that the evidence was already public. It was offered in the taxpayer lawsuit by Mahoning County officials supporting the OakHill property. Any number of people had access to this document before it was, if ever, presented to the grand jury. Because this was not purely a matter occurring before the grand jury, even if "ytwonredux" is a grand

juror they did not violate the oath of secrecy under Crim. R. 6(E). The information was public knowledge.

6) Post on August 22, 2010.

Defendants claim that the post asking how many people get to lobby in person in their own office dozens of time discloses that the author was exposed to information about the number and specific location of meetings. On the contrary, the post is rather vague. The post does not mention any defendant by name, does not provide anything close to a specific number of meetings and asks an interesting question. Even viewing it in a light most favorable to the Defendants, this post does not disclose a matter a occurring before the grand jury. It does not identify specific testimony or documents the grand jury reviewed, does not disclose the contents of deliberations or the vote of the grand jury, and refers to facts in the public record ascertainable from the chronology prepared by Mahoning County officials which is the subject of communication #5, the post of August 24, 2010. The posting did not disclose matters occurring before the grand jury. Therefore, there was no violation of the secrecy obligation under Crim. R. 6(E).

7) Post of July 31, 2010.

Defendants argue that the comment that the grand jury considered all the evidence, took their time and thought (unanimously) that what they heard was criminal and should be brought to trial. This specific post doesn't reveal anything occurring before the grand jury. It says the only thing an outside observer would say. The grand jury considered the evidence presented; the grand jury took its time and listened to all the evidence that was presented; the grand jury thought that what they heard was criminal and should be brought to trial. Of course they did all of those

things: that's the very definition of what an indictment by a grand jury represents. The grand jurors found probable cause to believe that the Defendants committed the proscribed offenses and that a trial should be held. What is it about this post which avers knowledge of inside information?

The post does not disclose anything occurring before the grand jury. As described above, the post is generic and does not reveal specific evidence or deliberations. It is a post-indictment opinion. The only aspect of this communication which could be a disclosure is the fact that the grand jury voted unanimously to indict, a fact which has long been public knowledge. Nothing "ytownredux" uttered in his or her posts was a "matter occurring before the grand jury." There was no Crim. R. 6(E) violation. The appropriate remedy is a limited one. *See* discussion *infra* Part III.

III. Defendants' Requested Remedy is overly broad. The Appropriate Remedy is a Cautionary Instruction to All of the Grand Jurors and an Admonishment not to comment on the case. Failure to Adhere to the Admonishment Would Result in a Finding of Contempt by the Offending Grand Juror.

In their Joint Motion, Defendants assert that the court should appoint a special investigator/prosecutor/member of the bar to investigation their allegations that a grand juror or grand jurors violated his or her/their oath(s) of secrecy. For the reasons set forth above at Part II, the specific comments made do not disclose a matter occurring before the grand jury. The disclosure is thus not prohibited by the oath of secrecy. *See* Crim R. 6(E).

Defendants stretch to argue that these disclosures prejudice them in that if the petit jurors were to learn that the grand jury was convinced not just that the indictment was supported by probable cause but that they were convinced by enough

evidence to convict, the petit jurors might unduly rely on that information. This argument belies the realities of a trial. Jurors are routinely instructed that the indictment is not evidence, that an indictment does not support an inference towards a conclusion that the defendants are guilty. The argument also misses completely the fact that the jurors would have to be aware of that specific information in order to rely on it. The only possibility that a petit juror would know such information would be if they read the comments on the *Vindicator* website and remember it. That possibility can be solved simply through voir dire and/or a cautionary instruction not to consider anything jurors may have heard before the case about the evidence or the opinions of others prior to trial.

Defendants state at the end of their Law and Argument section that the letter to the *Vindicator* editorialist represents the most dangerous of the disclosures. They argue that it reveals the sentiment of the jurors during deliberations. As argued in Part II, *supra*, however, the letter claiming to be from a grand juror does not disclose either evidence before the grand jury or the content of their deliberations. To the extent that the letter discloses sentiment, the "appalled at what undue influence cost the citizens" line fails to rise to a level of prejudicial effect.

In effect, ordering an investigation into "ytownredux"'s comments on the *Vindicator* website will have the effect of seeking to punish an individual for his speech. The right to free speech is certainly not absolute, but it is a vigorous right guaranteed by Amendment. The investigation will not just implicate the right of "ytownredux" but also the *Vindicator*'s decisions to publish information, create a forum for discussion on its website as well as other commentators who are fearful

that the full weight of a prosecutor will be brought to bear against them creating a chilling effect on free speech.

Unless the rights of a grand juror to express his opinions about public information relevant to a public case are to be subordinated, *contra* Crim. R. 6(E) ("No obligation of secrecy may be imposed upon any person except in accordance with this rule."), the proposed remedy of Defendants violates an individual's right to freedom of speech because a prohibition on future speech is a form of prior restraint, *see* Seven Hills v. Aryan Nations (1996), 76 Ohio St. 3d 304, 307, 1996 Ohio 394 ("prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights"); Tory v. Cochran (2005), 544 U.S. 734, 738 ("Prior restraints are simply repugnant to the basic values of an open society" in that they "tend to encourage indiscriminate censorship in a way that subsequent punishments do not."). The Ohio Supreme Court recognized earlier this year that Defendants' claim that their right to a fair trial may be implicated by continued publicity is not an absolute claim. In State ex rel. Toledo Blade v. Henry County Court of Common Pleas (2010), 125 Ohio St. 3d 149, 157, 2010 Ohio 1533, at ¶ 37 (emphasis added), the Court quoted precedent holding that "When there is a conflict between the First and Sixth Amendment rights . . .the trial court is required to act to resolve that conflict by protecting *both* the First and the Sixth Amendment rights when . . . that can be done in a reasonable and lawful way."

Even if the author of the letter is in fact one of the grand jurors, restricting his or her right to speak freely about matters not prohibited by the oath of secrecy would unconstitutionally restrict his or her First Amendment right to freedom of speech. Similarly, an order to the *Vindicator* to disclose what it knows is not only shielded by

the Ohio source shield law, R.C. 2739.12, but would encroach on its First Amendment right to freedom of the press, *see* Nebraska Press Ass'n v. Stuart (1976), 427 U.S. 539, 561. It would serve as a dramatic chilling effect on free speech and press were Defendants to prevail on what amounts to a gag order for the public. *Cf.* FCC v. Fox TV Stations, Inc. (2010), ____ U.S. ____, 129 S. Ct. 1800, 1837 (quoting Dombrowski v. Pfister (1965), 380 U.S. 479, 494) ("So long as the statute remains available to the State the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression."); *see also* Ashcroft v. Free Speech Coalition (2002), 535 U.S. 234, 244; Gibson v. Florida Legis. Investigative. Comm'n. (1963), 372 U.S. 539, 556-57; Wieman v. Updegraff (1952), 344 U.S. 183, 195 (Frankfurter, J., concurring).

IV. **Conclusion**

For the foregoing reasons, the State respectfully requests that The Court deny the Defendants' Joint Motion for the appointment of a special prosecutor and other relief requested.

Respectfully submitted,

Dennis P. Will
Special Prosecuting Attorney

and

Paul Nick
Special Prosecuting Attorney

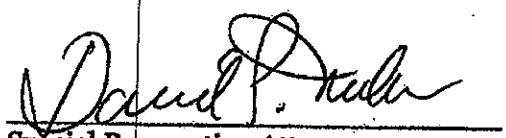
and **Anthony D. Cillo** 0062497
Special Prosecuting Attorney

and by:

David P. Muhek 0024395
Special Prosecuting Attorney

CERTIFICATE OF SERVICE

A true copy of the forgoing brief has been served via electronic mail this 13th day of October, 2010, upon the persons named in the attached distribution list incorporated herein by reference as counsel of record for each defendant and as their names appear therein.



Special Prosecuting Attorney