ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE, *ex rel.* THE CINCINNATI ENQUIRER, a Division of Gannett Satellite Information Network, Inc. **312 Elm Street** **Cincinnati, Ohio 45202** Petitioner, vs. **HONORABLE NADINE ALLEN,** **Hamilton County** **Court of Common Pleas** **1000 Main Street, Room 495** **Cincinnati, Ohio 45202** Respondent.	:	**Case No.** 11-1643

MEMORANDUM IN SUPPORT OF COMPLAINT FOR WRIT OF MANDAMUS

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The Cincinnati Enquirer, a division of Gannett Satellite Information Network, Inc. ("The Enquirer"), submits this as its Memorandum in Support of its Complaint for Writ of Prohibition and/or Mandamus.

I. STATEMENT OF FACTS

On or about Tuesday, September 20, The Enquirer's counsel learned that Martin Morris, the plaintiff in the case of *State of Ohio v. Martin Morris*, Case No. B1001826, Hamilton County Court of Common Pleas, may have pled guilty to aggravated theft and telecommunications fraud.[1] Those were two counts of a fourteen-count complaint. Apparently, the remaining twelve counts were dismissed.

On the Hamilton County Common Pleas Clerk's electronic docket, there is no listing for Case No. B1001826. According to John Williams, the acting Clerk, that this is so because Judge Allen, the judge in the Morris case, had issued an order sealing all records in the case ("the Order").

As a result of the Order, the public cannot see the motion for sealing, or any other case documents. The public cannot see the case docket of any schedule of events. Nor is there any way to determine the grounds for the Order.

On the morning of September 21, counsel for The Enquirer delivered a letter to Judge Allen expressing my client's concerns. A true and correct copy of the letter is attached as Exhibit B to the affidavit of John C. Greiner.

Later on September 21, The Enquirer learned that Judge Allen would conduct a hearing on the matter on September 22 at 1:00 p.m.

At 1:00, Judge Allen called the prosecutor, Andy Berghausen, and the defense counsel, Amy Higgins into her chambers. The three of them were in there for about 20 minutes. They

[1] See Affidavit of John C. Greiner (all factual references set forth in this section are set out in that affidavit).

emerged from chambers, and Judge Allen sat at the bench and announced that she reviewed her original Order in light of the applicable Rules of Superintendence. She said that she was satisfied there was a risk of injury if the case were not sealed, and that therefore, public policy favored sealing the records. She did not specify the injury, or who would suffer the injury. She announced she would maintain the Order in place.

II. ARGUMENT

"Court records are presumed open to public access."[2] Under Sup. R. 44(B), "court records," includes "case documents," which are defined as follows:

> a document and information in a document submitted to a court or filed with a clerk of court in a judicial action or proceeding, including exhibits, pleadings, motions, orders and judgments, and any documentation prepared by the court or clerk in the judicial action or proceeding, such as journals, dockets, and indices * * *.[3]

Under Ohio Rule of Superintendence 45, 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 . . . (a) [w]hether public policy is served by restricting public access; (b) whether any state, federal or common law exempts the document or information from public access; *and* (c) whether factors that support restriction of public access exist, including risk of injury to persons...."[4]

Moreover, if a court decides to restrict access to a case document, under Sup. R. 45(E)(3), it must do so in the least restrictive means possible:

> (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:

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[2] Sup. R. 45(A).
[3] Sup. R. 44(C)(1).
[4] Sup. R. 45 (emphasis added).

(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 * * *.[5]

In addition to the Rules of Superintendence, the First Amendment to the United States Constitution guarantees the public and press a coextensive right of access to criminal proceedings.[6] This right of access can only be overcome if the court makes specific findings, on the record, demonstrating that closure if necessary to preserve higher values and that the closure order if narrowly tailored to achieve that interest.[7]

Judge Allen ignored the Rules of Superintendence and the Constitution by sealing this case in its entirety. Her ruling is improper for a host of reasons.

First, the Rules of Superintendence by their very terms, do not permit a blanket order sealing all records in a case. Rule 45(E)(2), which sets out the process for restricting access to information in a case document, provides clearly that the court must consider the issue on a document by document basis. The pertinent text of Rule 45(E)(2) provides: "A court shall restrict public access to information <u>in a case document</u> or, if necessary, the entire document..." (emphasis added) The rule is drafted in the singular, not the plural. A court can only restrict access to a case document by considering the specific document. A blanket order - which by its very nature restricts access to current and yet to be filed case documents - violates Rule 45(E)(2).

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[5] Sup. R. 44(C)(1) (emphasis added).

[6] *State ex rel. Beacon Journal Publishing Co. v.* Bond, 98 Ohio St.3d 146, 2002-Ohio-7117, 781 N.E.2d 180, ¶15.

[7] Id. at ¶17

Second, Rule 45(E)(3) requires that the Court use the least restrictive means when entering an order restricting access to a case document. The rule sets out five methods the court may use to minimize the impact on the public's right of access, including redacting specific information.

Judge Allen gave no consideration to any less restrictive methods here. The order seals every word of every case document. It is hard to imagine how a court could be more oblivious to the Superintendence Rules.

Finally, Judge Allen failed to comply with the dictates of the United States Constitution in issuing the orders. Judge Allen did not conduct an evidentiary hearing, not did she make on the record findings identifying any higher value that compelled the entry of the order. She made no inquiry nor any finding that the blanket sealing order constituted the least restrictive means for achieving the protection of any higher value.

The Ohio Rule of Superintendence 47 provides for an action in mandamus to remedy a court's failure to abide by those rules:

> (B) Denial of public access - remedy
>
> A person aggrieved by the failure to a court or clerk of court to comply with the requirements of Sup. R. 44 through 47 may pursue an action in mandamus pursuant to Chapter 2731 of the Revised Code.

Sup. R. 47 expressly provides an aggrieved party with a right to pursue a mandamus action. The Enquirer is an aggrieved party because the court did not protect its interests and it is left with no opportunity to change the status quo, and therefore, has no adequate remedy at law.

Moreover, when a court fails to abide by the Constitution in restricting public access to criminal proceedings, mandamus in the appropriate remedy.[8]

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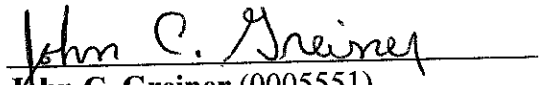
[8] *State ex rel. Cincinnati Enquirer v. Heath*, 183 Ohio App.3d 274, 916 N.E.2d 1090, 2009-Ohio-3415, ¶11.

III. CONCLUSION

This Court should award The Enquirer a Writ of Mandamus ordering Judge allen to vacate the Order.

Respectfully submitted,



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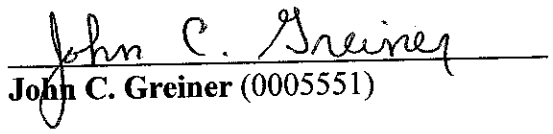
PRAECIPE FOR SERVICE

TO THE CLERK:

Please issue a copy of this *MEMORANDUM IN SUPPORT OF COMPLAINT FOR WRIT OF MANDAMUS AND/OR PROHIBITION* along with the Summons and Complaint to the Respondents identified in the caption on page one via Certified Mail, return receipt requested.



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