

IN THE SUPREME COURT OF OHIO

**STATE, *ex rel.* THE CINCINNATI
ENQUIRER, a Division of Gannett
Satellite Information Network, Inc.**

Case No. 2011-1643

Petitioner,

vs.

**HONORABLE NADINE ALLEN, Judge
Hamilton County Court of Common Pleas**

Respondent.

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

John C. Greiner (0005551) *Counsel of Record*
GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
Phone: (513) 629-2734
Fax: (513) 651-3836
E-mail: jgreiner@graydon.com

COUNSEL FOR THE CINCINNATI ENQUIRER

Joseph T. Deters
Prosecuting Attorney
Christian J. Schaefer (0015494) *Counsel of Record*
Assistant Prosecuting Attorney
230 East Ninth Street, Suite 4000
Cincinnati, OH 45202-2174
Phone: (513) 946-3041
Fax: (513) 946-3018
E-mail: chris.schaefer@hcpros.org

COUNSEL FOR HONORABLE NADINE ALLEN

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Memorandum in Opposition to Motion to Dismiss

Respondent Judge Nadine Allen (“Allen”) on August 25, 2011 issued a blanket order sealing all records in the case of *State of Ohio v. Morris*, Case No. B1001826, Hamilton County Court of Common Pleas. Allen issued the order without following the dictates of the Ohio Rules of Superintendence or the United States Constitution. Indeed, Allen issued the order simply because defense counsel requested it.¹ Allen conducted no hearing and heard no evidence in support of her extraordinary order.²

On September 30, 2011, in an apparent attempt to correct the utterly ineffectual August 25 “hearing,” Allen conducted another proceeding. At the September 30 “hearing” Allen stated that she’d conducted a hearing on August 25 and at the hearing “the attorney for the victim, that would be Ms. Ferguson, and the defense’s attorney expressed concern that public disclosure of certain documents would cause a risk of injury to the victim.”³

There are two problems with Allen’s statement. First, it is not true. As the August 25 transcript attests, neither the victim’s attorney nor defense counsel expressed any such concern.

Second, even if someone had actually expressed such a concern, the court could not issue a blanket sealing order on that basis.

In the face of Allen’s disregard and/or contempt for the law, her counsel understandably seeks to avoid a discussion of the substance of this case, and asks this court to dismiss based on wholly unfounded procedural grounds. The basis for Allen’s motion to dismiss is that “[t]he Cincinnati Enquire[sic] failed to file a motion as required by Sup.R. 45(f)(1) and thereby is not

¹ See Transcript of Proceedings, August 25, 2011, pp. 2-3, attached as Exhibit 1.

² *Id.*

³ Transcript of Proceedings, September 30, 2011, p. 4, attached as Exhibit 2.

an[sic] person aggrieved with standing to file a mandamus action as provided in Sup.R. 47(B).”

The motion has no legal basis and this court should dismiss it.

1. THE ENQUIRER IS ENTITLED TO RELIEF PURSUANT TO THE UNITED STATES CONSTITUTION, AND MANDAMUS IS THE APPROPRIATE RELIEF.

The Enquirer makes plain in its Petition for Mandamus that it seeks relief not only pursuant to the Rules of Superintendence, but also pursuant to the United States Constitution.⁴ This court has held that mandamus is the proper remedy when a right of access is predicated on a constitutional challenge.⁵

2. THE RULES OF CRIMINAL PROCEDURE DO NOT PERMIT INTERVENTION, SO THE ENQUIRER COURT NOT FILE A MOTION.

Because the underlying matter is a criminal proceeding, there is no mechanism for a non-party to intervene. The Rules of Criminal Procedure do not have a rule equivalent to Civil Rule 24. Accordingly, in any access matter, mandamus is the proper remedy.⁶

3. OHIO RULE OF SUPERINTENDENCE 45(F) DOES NOT APPLY TO THE FACTS PRESENTED HERE.

Rule 45(F) provides:

(1) Any person, by written motion to the court, may request access to a case document or information in a case document that has been granted restricted public access pursuant to division (E) of this rule. The court shall give notice of the motion to all parties in the case and, where possible, to the non-party person who requested that public access be restricted. The court may schedule a hearing on the motion.

(2) A court may permit public access to a case document or information in a case document if it finds by clear and convincing evidence that the presumption of allowing public access is no longer outweighed by a higher interest. When making this determination, the court shall consider whether the original reason

⁴ See Petition at par. 11.

⁵ *State ex rel. Beacon Journal Publishing Company v. Bond*, 98 Ohio St.3d 146, 781 N.E.2d 180, 2002–Ohio–7117, ¶ 49, citing, *State ex rel. Scripps Howard Broadcasting Co. v. Cuyahoga Cty. Court of Common Pleas*, Juv. Div. (1995), 73 Ohio St.3d 19, 652 N.E.2d 179.

⁶ *State ex rel. Beacon Journal*, 2002–Ohio–7117 at ¶ 48.

for the restriction of public access to the case document or information in the case document pursuant to division (E) of this rule no longer exists or is no longer applicable and whether any new circumstances, as set forth in that division, have arisen which would require the restriction of public access.

In short, where a court follows the procedure set forth in Rule 45(E), and restricts access to a particular case document, Rule 45(F) sets forth a procedure for challenging that restriction.

But here, Allen did not restrict access pursuant to Rule 45(E). She completely ignored that provision. Moreover, Allen issued her order on a blanket basis, rather than on a case document by case document basis. Thus, Allen never triggered Rule 45(F) because she never applied Rule 45(E).

A full reading of Rule 45(F) makes it very clear that the facts here do not permit a Rule 45(F) motion. Rule 45(F)(2) provides in pertinent part:

“A court may permit public access to a case document or information in a case document if it finds by clear and convincing evidence that the presumption of allowing access is no longer outweighed by a higher interest.”

Thus, Rule 45(F) contemplates a scenario where the court properly applied Rule 45(E) originally, but changed circumstances dictate relief from the original order. Here, the court never made an evidentiary finding that a higher interest outweighed the presumption of access. This is not a situation where a “changed circumstances” motion is warranted. Thus, mandamus is the appropriate relief.

4. THE ENQUIRER SUBSTANTIALLY COMPLIED WITH RULE 45(F).

Even if Rule 45(F) applied to these facts, there has been substantial compliance here. The Enquirer alerted Allen to her non-compliance with the Rules of Superintendence, and copied counsel for the parties.⁷ Thereafter, Allen held a “hearing” where she announced her intent to

⁷ See Affidavit of John C. Greiner, attached as Exhibit 3.

require redactions to all case documents and to continue the blanket sealing order in place for all case documents filed on or after August 25, 2011. This case is ripe for adjudication, and The Enquirer has standing to pursue it.

5. *RHODES V. NEW PHILADELPHIA*⁸ DOES NOT APPLY HERE.

Allen cites *Rhodes* to bolster her argument that The Enquirer is not “aggrieved.” But *Rhodes* has no application here. *Rhodes* was decided under the Public Records Act – R.C. 149.43. This matter obviously does not concern the Public Records Act. And that obvious fact is significant.

Under the Public Records Act, a public body has no duty to produce records until a party makes a good faith request for those records. Thus a person cannot be “aggrieved” under the Public Records Act unless that person makes a good faith request that the public body denies. In *Rhodes*, the request was not made in good faith, and therefore, the requester was not aggrieved.

By contrast, a court is obligated to ensure that case documents are publicly accessible whether or not anyone requests it to. A court owes a duty to the public to restrict access only after it makes the requisite evidentiary findings permitting it to do so. If the court completely disregards that duty, the public is aggrieved. The Enquirer thus has standing to bring this action.

6. THE STATEMENTS REGARDING THE DEFENDANT’S WIFE ARE UTTERLY IRRELEVANT.

The issue before this court in this motion is whether The Enquirer has standing to proceed with a mandamus action to address Allen’s utter disregard for the Ohio Rules of Superintendence, the United States Constitution and the public’s right to know. The current marital situation of the defendant and his wife have nothing whatsoever to do with the issue before the court.

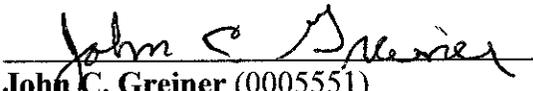
⁸ (2011), 129 Ohio St.3d 305.

The fact that Allen has brought the defendant's wife into this matter demonstrates her desperation and is beneath contempt. This court should disregard this material because to do otherwise would diminish the dignity of this court.

Respectfully submitted,

Of Counsel:

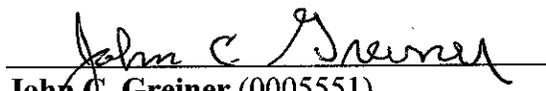
GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
Phone: (513) 621-6464
Fax: (513) 651-3836


John C. Greiner (0005551)
Counsel for The Cincinnati Enquirer
GRAYDON HEAD & RITCHEY LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, OH 45202-3157
Phone: (513) 629-2734
Fax: (513) 651-3836
E-mail: jgreiner@graydon.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing *MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS* was served by regular U.S. Mail, postage prepaid, this 12th day of October, 2011, upon the following:

Christian J. Schaefer, Esq.
Assistant Prosecuting Attorney
230 East Ninth Street, Suite 4000
Cincinnati, OH 45202-2174


John C. Greiner (0005551)

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COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

- - -

THE STATE OF OHIO, :
Plaintiff. :
vs. :Case Number B1001826
MARTIN MORRIS, :
Defendant. :

- - -

TRANSCRIPT OF PROCEEDINGS

- - -

APPEARANCES:
Andrew Berghausen, Esq.
On behalf of the State of Ohio.
Amy Higgins, Esq.
On behalf of the Martin Morris.
Also present: Amy Schott-Ferguson, Esq.
On behalf of the victim, (name redacted).

BE IT REMEMBERED that upon the hearing
of this cause, on August 25, 2011, before the
Honorable Nadine L. Allen, a judge of the said
court, the following proceedings were had, to
wit:

1 PROCEEDINGS, August 25, 2011

2 THE COURT: I would like to start
3 with State vs. Martin Morris. This is on
4 B1001826. Counsel, state your name.

5 MS. HIGGINS: Amy Higgins for
6 Martin Morris.

7 THE COURT: Uh-huh.

8 MR. BERGHAUSEN: Andrew Berghausen
9 on behalf of the prosecutor's office.

10 THE COURT: And you want to put
11 your name on the record?

12 MS. SCHOTT-FERGUSON: Sure. Amy
13 Ferguson on behalf of (name redacted).

14 THE COURT: Okay. And so, sir, you
15 want to start with the restraining order?

16 MS. HIGGINS: No. Restricting
17 order. Your Honor, restricting public
18 access to the docket in this case for up
19 to 180 days pursuant to the Rules of
20 Superintendence 45 for good cause.

21 THE COURT: Yes. Very good. And,
22 Scott, we need to make a copy of that,
23 because you got the order and found out
24 the particulars for 180 days.

25 MS. HIGGINS: Well, Your Honor, the

1 rule actually gives you a lot more
2 flexibility than just 180 days. It
3 really doesn't put a time limit on it at
4 all, but per our discussion on Monday --

5 THE COURT: That's your agreement.

6 MS. HIGGINS: -- I think 180 days
7 should do the trick. If there is cause
8 to request a continued restriction at the
9 end of that time period, we can come back
10 in and talk to you about it again.

11 THE COURT: Yes, you can. Okay.
12 Counsel, about did you want to say
13 regarding the plea in this matter?

14 MS. HIGGINS: Your Honor, I do have
15 a signed plea agreement here between the
16 State and Martin Morris, wherein he does
17 agree to plead to two of the indicted
18 counts.

19 THE COURT: Okay. So, sir, at this
20 time you have signed off. Now, did he
21 sign this agreement?

22 MS. HIGGINS: Yes, ma'am.

23 THE COURT: Okay. Let me get the
24 last page here.

25 MS. HIGGINS: You want these two?

1 THE COURT: Which you have agreed
2 to plead guilty today -- to withdraw your
3 plea of not guilty to all the charges,
4 first of all. You're withdrawing the
5 plea of not guilty and you're entering
6 pleas of guilty to Count 1, aggravated
7 theft, a felony of the third degree; and
8 Count 5, telecommunica tions fraud, a
9 felony of the third degree.

10 what you're facing on each of those
11 is a potential sentence of one or two or
12 three -- count to five, one to five years
13 on each. There is a possible fine of
14 \$10,000 on each, so the maximum that you
15 could possibly get from this Court is ten
16 years and a \$20,000 fine as a possible
17 worst case scenario.

18 So, is this your signature giving
19 up your right to have a not guilty plea
20 and enter pleas of guilty on those two
21 counts?

22 THE DEFENDANT: Yes, it is.

23 THE COURT: And this is your
24 signature giving up your right to have a
25 trial by jury?

1 THE DEFENDANT: Yes, it is.

2 THE COURT: And also there is a
3 plea agreement that the parties entered
4 into, and I'm sure there will be more
5 stated about this. That you have agreed
6 to this plea agreement, and you are --
7 this is your signature to the plea
8 agreement you signed?

9 THE DEFENDANT: Yes, it is.

10 THE COURT: And who else -- affirm
11 your signature?

12 MS. HIGGINS: That is my signature,
13 Your Honor. Amy Higgins, counsel for
14 defendant.

15 MR. BERGHAUSEN: It is my
16 signature, Your Honor, Andrew Berghausen
17 on behalf of the State.

18 THE COURT: well, there is one
19 thing I'll mention about it, is that the
20 State is going to dismiss Counts 2, 3, 4,
21 6, 7, 8, 9, 10, 11, 12, 13 and 14 of the
22 indictment. You know, at this point
23 we're going to be getting into the facts,
24 I'm going to explain to you what guilty
25 means. It does mean that you're

1 admitting that the facts are true on the
2 two counts you're pleading guilty on, and
3 there is nothing to dispute. There is no
4 reason to have a trial and that you'll be
5 found guilty based on your plea.

6 But there is two reasons that it
7 won't happen. One is you don't
8 understand. If you don't understand what
9 post-release control means, and I have to
10 explain that to you, or if you hear your
11 seven constitutional rights, you have to
12 waive every one of them individually and
13 you could withdraw your plea. You're not
14 stuck with the guilty plea. I haven't
15 found you guilty yet, so you can withdraw
16 your plea. But you would then be facing
17 all the charges if this plea unravels,
18 that's what you do need to know.

19 Let's hear the facts. Are the
20 facts going to be what's in here or are
21 you going to read something specific?

22 MR. BERGHAUSEN: Your Honor, the
23 facts are not in the plea agreement. I
24 will provide the Court with a statement

25 --

1 THE COURT: Okay.

2 MR. BERGHAUSEN: -- of the charges
3 and the facts to which Mr. Morris will be
4 entering a plea of guilty today.

5 THE COURT: Read the facts on the
6 charges he's pleading to.

7 MR. BERGHAUSEN: Count 1 of the
8 indictment charges that Martin Morris
9 from the 1st day of December 2003 to the
10 25th day of May, 2005, in Hamilton
11 County, in the State of Ohio, with
12 purpose to deprive the owner of certain
13 property or services worth \$100,000 or
14 more, to wit: United States currency
15 and/or securities belonging to (name
16 redacted), knowingly obtained or exerted
17 control over the property or services
18 without consent of the owner or person
19 authorized to give consent, in violation
20 of section 2913.02(A)(1) of the Ohio
21 Revised Code, charging aggravated theft,
22 a felony offense of the third degree.

23 Count 5 of the indictment charges
24 that Martin Morris from the 1st day of
25 December, 2003 to the 25th day of May,

1 2005, in Hamilton County, in the State of
2 Ohio, having devised a scheme to defraud,
3 knowingly disseminated, transmitted or
4 caused to be disseminated or transmitted
5 by means of a wire, radio, satellite,
6 telecommunication, telecommunication
7 device or telecommunication service any
8 writing, data, sign, signal, picture,
9 sound or image, to wit: Scott Trade
10 Distribution request forms with the
11 purpose to execute or otherwise further
12 the scheme to defraud, and the value of
13 the benefit obtained by the said
14 defendant or to the detriment to the
15 victim of the fraud, in this case which
16 would be (name redacted), is \$100,000 or
17 more, in violation of section 2913.05 of
18 the Ohio Revised Code, charging
19 telecommunications fraud, a felony
20 offense of the third degree.

21 The short version of the facts are,
22 Your Honor, that Mr. Morris began a
23 relationship with a woman named (name
24 redacted). The basis of that -- one of
25 the bases of that relationship was that

1 she entrusted him to invest money for her
2 and manage her investments. In the
3 course of doing so, Mr. Morris stole from
4 her, subject to Count 1, an amount that
5 we have fixed for purposes of the plea
6 agreement at \$400,000.

7 And, secondly, the
8 telecommunication charge is based on the
9 fact that in the course of his
10 relationship with her, he made, he faxed
11 or e-mailed or transmitted by phone
12 request forms to take money out of her
13 accounts with Scott Trade, money that he
14 was stealing, in the process he used the
15 telecommunication systems to do that, and
16 that would be the basis of the
17 telecommunication fraud charge.

18 Waive further reading of the facts?

19 THE COURT: Counsel, do you agree
20 with those facts?

21 MS. HIGGINS: Yes, agree with those
22 facts and waive further reading, please.

23 THE COURT: So I need to tell you a
24 couple things. One is that, first of
25 all, if you're found guilty today, you do

1 have to submit to a DNA test, which is --
2 you know what a DNA sample would be? And
3 if you refuse to do that, it's grounds
4 for arrest and punishment separately.

5 Also, I'm going to explain now what
6 post-release control means. Any prison
7 sentence you get, if you should get one,
8 you might get community control here, I
9 know we discussed a lot of things, is
10 that included in this plea agreement?

11 MR. BERGHAUSEN: It is, Your Honor.

12 THE COURT: Okay then. So there is
13 a possibility of community control. Even
14 if you do get that and violate it, then
15 you still are facing that possible prison
16 term. So any prison sentence that you do
17 get, it will be served without any
18 good-time reduction whatsoever; do you
19 understand that, sir?

20 THE DEFENDANT: I do.

21 THE COURT: And then after you are
22 released, the Parole Board might decide
23 to keep you on what used to be called
24 parole but now it's called something --
25 much more long-winded, post-release

1 control, we call that PRC. And if they
2 do that, it's either for no period of
3 time at all or for three years, so it's
4 zero or three years.

5 During that three-year period, if
6 you violate their terms, the Parole Board
7 has the power to send you back to prison
8 after you have served your entire
9 sentence that a Judge gives you and they
10 have the power to act like a Judge. You
11 won't have a jury, a trial, a lawyer or a
12 judge present. It's you and the Parole
13 Board. So they can send you back to
14 prison for nine months for each violation
15 up to half of your prison term if it's
16 repeated violations.

17 And if you commit a new felony
18 while you are on this three-year period
19 of post-release control, the Parole Board
20 can send you back to prison for either
21 twelve months or whatever years are left
22 on that PRC time, and it must be served
23 consecutively to the new felony time. So
24 what questions do you have on that?

25 THE DEFENDANT: I don't have any

1 questions.

2 THE COURT: I want to explain your
3 seven constitutional rights. Did you go
4 over these with your lawyer? Of course
5 you did, right? And I forgot to ask you
6 something I must ask everyone. Can you
7 read and write?

8 THE DEFENDANT: I can.

9 THE COURT: And are you a US
10 citizen?

11 THE DEFENDANT: Yes, I am.

12 THE COURT: And are you satisfied
13 with your lawyer's representation?

14 THE DEFENDANT: Absolutely.

15 THE COURT: Okay. Now, I'm gonna
16 explain your seven constitutional rights.
17 You have the right to a speedy trial and
18 to have your lawyer represent you
19 throughout that trial. Your right to a
20 trial by jury that you signed off on
21 means that 12 people all have to agree
22 unanimously that you're guilty of each
23 count; do you understand that?

24 THE DEFENDANT: Yes.

25 THE COURT: You're giving up your

1 right to a bench trial without a jury and
2 to have a judge decide whether you're
3 guilty or not. You're giving up your
4 right to confront all your accusers on
5 all these charges, and they are subject
6 to cross-examination by your lawyer.
7 Your right to compel people to come
8 forward and testify for you by way of a
9 subpoena. The right to make the State
10 prove their case against you by proof
11 beyond a reasonable doubt. And, lastly,
12 your right to remain silent throughout
13 the trial. No one can comment on your
14 silence and it cannot be used against
15 you.

16 what questions do you have about
17 your seven constitutional rights?

18 THE DEFENDANT: No questions.

19 THE COURT: So knowing all that, do
20 you still want to go forward with your
21 plea of guilty?

22 THE DEFENDANT: Yes.

23 THE COURT: Counsel, is your client
24 proceeding today knowingly, intelligently
25 and voluntarily?

1 MS. HIGGINS: Yes, he is, Your
2 Honor.

3 THE COURT: Based upon that then
4 the findings are guilty to Counts 1 and
5 5. Did you want a presentence
6 investigation?

7 MS. HIGGINS: I believe there will
8 be a pre-sentence investigation, Your
9 Honor. I would also ask that the terms
10 of his bond be extended pending sentence.

11 THE COURT: Same bond.

12 MS. HIGGINS: Same bond, same
13 terms?

14 THE COURT: Yes. You have a date?

15 MS. HIGGINS: I do not have a date.

16 THE COURT: Get a date then today?

17 MS. HIGGINS: Yes.

18 THE COURT: And that is the end of
19 that phase of it. See you next time for
20 presentence investigation or after
21 presentence investigation.

22 MS. HIGGINS: Can we talk to the
23 probation department, how they're going
24 to proceed with that? Because if they're
25 gonna need to go interview then,

1 obviously, this is going to cause a bump
2 in the road.

3 MR. BERGHAUSEN: We can talk --

4 THE COURT: There is also --

5 MR. BERGHAUSEN: -- with them. I
6 don't --

7 THE COURT: What they do is they
8 just --

9 MR. BERGHAUSEN: I don't believe
10 based on my -- I'm sorry, Judge, I didn't
11 mean to interrupt you. Go ahead

12 THE COURT: You go ahead. You're
13 probably going to say something similar.

14 MR. BERGHAUSEN: What I was gonna
15 say, I don't believe they would. I mean
16 based on the way my knowledge of how they
17 process this --

18 MS. HIGGINS: Okay.

19 MR. BERGHAUSEN: -- basically all
20 they're gonna do is they're gonna talk to
21 (name redacted).

22 MS. HIGGINS: Uh-huh.

23 MR. BERGHAUSEN: Talk to the
24 police.

25 THE COURT: Yes.

1 MR. BERGHAUSEN: Detectives.
2 MS. HIGGINS: Uh-huh.
3 THE COURT: Yes.
4 MR. BERGHAUSEN: Who were involved
5 in the case.
6 MS. HIGGINS: Uh-huh.
7 MR. BERGHAUSEN: They're going to
8 talk -- they probably will talk to you.
9 MS. HIGGINS: Uh-huh.
10 MR. BERGHAUSEN: Or you.
11 THE COURT: Yes.
12 MR. BERGHAUSEN: And talk to me.
13 MS. HIGGINS: Okay.
14 THE COURT: They only talk to
15 prosecuting witnesses --
16 MR. BERGHAUSEN: Not going to be
17 talking to --
18 THE COURT: -- ex-wives, children.
19 MS. HIGGINS: The PSIs that I was
20 involved with have all been in federal
21 court, in that case they do home visits
22 and go talk to spouses. Now I don't know
23 what a soon-to-be ex-spouse may or may
24 not --
25 THE COURT: No.

1 MS. HIGGINS: But, again, that's in
2 the federal system where I've practiced
3 mostly.

4 THE COURT: Normally we don't. It
5 would be unusual if that happened. Okay.

6 MS. HIGGINS: Okay. Very good.
7 Thank you.

8 THE COURT: We'll see you on that
9 date. Thank you all.

10 THE DEFENDANT: Thank you.

11 MS. HIGGINS: Thank you.

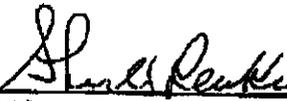
12 (Proceedings concluded.)
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CERTIFICATE

I, SHERI D. RENKEN, RMR, the undersigned, an Official Court Reporter for the Hamilton County Court of Common Pleas, do hereby certify that at the same time and place stated herein, I recorded in stenotype and thereafter transcribed the within 17, and that the foregoing Transcript of Proceedings is a true, complete, and accurate transcript of my said stenotype notes.

IN WITNESS WHEREOF, I hereunto set my hand this 5th day of October, 2011.


SHERI D. RENKEN, RMR
Official Court Reporter
Court of Common Pleas
Hamilton County, Ohio

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COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

- - -

THE STATE OF OHIO, :
Plaintiff. :

vs. :Case Number B1001826

MARTIN MORRIS, :
Defendant. :

- - -

TRANSCRIPT OF PROCEEDINGS

- - -

APPEARANCES:

Andrew Berghausen, Esq.
On behalf of the State of Ohio.

Amy Higgins, Esq.
On behalf of the Martin Morris.

Also present: Amy Schott-Ferguson, Esq.
On behalf of the victim, (name redacted.)

BE IT REMEMBERED that upon the hearing
of this cause, on September 30, 2011, before the
Honorable Nadine L. Allen, a judge of the said
court, the following proceedings were had, to
wit:

1 PROCEEDINGS, September 30, 2011

2 THE COURT: Are we ready to proceed
3 now on the matter of State vs. Martin
4 Morris? It's on B1001826. This matter
5 is proceeding on the Court's motion to
6 review its own August 25, 2011 order
7 sealing the entire case documents from
8 public access for a period of 180 days.
9 Appearing today is Assistant Prosecuting
10 Attorney Andy Berghausen.

11 MR. BERGHAUSEN: Yes, Your Honor.

12 THE COURT: And the attorney pro
13 bono, stressing the pro bono for the
14 victim, Mrs. Amy Schott-Ferguson.

15 MS. SCHOTT-FERGUSON: Yes, Your
16 Honor.

17 THE COURT: Amy Higgins is here for
18 the defendant, Martin Morris, by
19 teleconference. Can she hear us?

20 MS. HIGGINS: Yes.

21 THE COURT: Thank you. And she's
22 here by teleconferenc e. Also note in
23 attendance attorney for The Enquirer
24 newspaper. Is he here? Jack Greiner?

25 MR. GREINER: I'm here, Your Honor.

1 THE COURT: And also the Hamilton
2 County Clerk's Office, I think there is a
3 representative here from there, is there?

4 MR. BRENNER: I don't think so.

5 THE COURT: well, that's regarding
6 the continued or whatever we do with the
7 sealing of this record. I'm going to
8 give counsel an opportunity to speak
9 after I make a statement that, one, the
10 public access to court records is of
11 grave importance to this Court, and Ohio
12 law favors public access to court
13 records.

14 Rule 45 of the Ohio Supreme Court
15 Rules of Superintendence establish when a
16 judge may restrict public access to
17 information or the entire document, and
18 the court may hold a hearing on that
19 motion. A court shall, under the rule --
20 I'm going to say in pertinent part what
21 it says -- a court shall restrict public
22 access to the entire case if it finds
23 that allowing public access is outweighed
24 by higher interests when factors
25 supporting restriction exist such as the

1 risk of injury to persons.

2 Now, let me correct this. Was the
3 hearing held on August 25th or 22nd?

4 MR. BRENNER: I believe it was the
5 25th. All the parties who are present
6 here were there.

7 THE COURT: Anyway, at the
8 August 25th hearing, the attorney for the
9 victim, that would be Ms. Ferguson, and
10 the defense's attorney expressed concern
11 that public disclosure of certain
12 documents would cause a risk of injury to
13 the victim. So at this time did you want
14 to speak and say anything about that?
15 Any of the parties? Ms. Ferguson?

16 MS. SCHOTT-FERGUSON: Yes, Your
17 Honor. As the attorney for the victim
18 for the past year and watching what she's
19 been through, knowing very well her
20 circumstances, I can absolutely state
21 that that decision was in the best
22 interest of protecting the victim. We
23 fully support -- in fact, we encourage
24 that decision and we are pleased that you
25 weighed the circumstances and reached the

1 conclusion that the potential harm and
2 consequence to my client outweighed the
3 public's right to view every pleading in
4 this case.

5 THE COURT: Okay. Any other
6 statements? Okay. Having considered all
7 that, this Court ordered a temporary
8 sealing of the record. I determined,
9 with the agreement of the defense
10 attorney and the attorney for the victim,
11 that the right to public access is
12 outweighed by the risk of injury to the
13 elderly victim. None of the factors
14 regarding the defendant's public
15 embarrassment or any other factor about
16 the defendant were raised or even
17 considered at that time.

18 I'm aware that this was not
19 disclosed until now, but that's why we
20 are doing so at this time. And no one
21 cares more about victims of crime than
22 this Court. So today I am going to amend
23 my order, however, so that information
24 which does not pose a risk of injury to
25 the victim shall be accessible to the

1 public. This order pertains to documents
2 issued prior to August the 22nd or 25th,
3 in that range. The victim's name shall
4 be redacted from these documents.
5 Ms. Ferguson, that is at your request; is
6 that correct?

7 MS. SCHOTT-FERGUSON: Yes, that's
8 correct, Your Honor.

9 THE COURT: Okay. Did you want to
10 say anything else about why her name
11 should be restricted?

12 MS. SCHOTT-FERGUSON: Your Honor,
13 you know, I believe it goes hand-in-hand
14 with the decision you've already reached,
15 and that is that it's for her protection,
16 and that is my job to protect my client.

17 THE COURT: And she is an elderly
18 person?

19 MS. SCHOTT-FERGUSON: That is
20 correct.

21 THE COURT: These are documents --
22 actually the other documents that will be
23 released to anyone who wants them --
24 these are documents which were already
25 made available to the public, most of

1 them. So this Court will continue to
2 review this restriction, and if it's
3 determined in the future that the
4 original reason for this restriction no
5 longer exists then I will be releasing
6 additional records at that time, and much
7 of it would depend on what you have to
8 say, Ms. Ferguson, about the injury to
9 the victim.

10 So that being said, that is -- it
11 is so ordered. That's what we're going
12 to be doing. Yes, prosecution?

13 MR. BERGHAUSEN: Your Honor.

14 THE COURT: Mr. Berghausen?

15 MR. BERGHAUSEN: I may have -- I
16 may have missed it, but in terms of the
17 documents after that date, what would be
18 the Court's position?

19 THE COURT: Those remain sealed.

20 MR. BERGHAUSEN: Okay.

21 THE COURT: Just records prior to
22 that time shall be accessible to the
23 public. As of today, we have to get them
24 to the clerk's office and redact the name
25 of the victim as best as we can from any

1 existing documents. Okay. It is so
2 ordered. Thank you.

3 MS. SCHOTT-FERGUSON: Thank you.

4 MR. BERGHAUSEN: Thank you, Your
5 Honor.

6 MS. HIGGINS: Thank you, Your
7 Honor.

8 THE COURT: Thank you. Thank you,
9 Ms. Higgins.

10 MS. HIGGINS: Thank you for
11 allowing me to be on cell phone.

12 THE COURT: And happy birthday to
13 your mother.

14 MS. HIGGINS: I'll tell her you
15 said so.

16 THE COURT: We know that's why
17 you're not here. Okay.

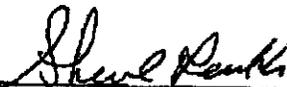
18 (Proceedings concluded.)
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CERTIFICATE

I, SHERI D. RENKEN, RMR, the undersigned, an Official Court Reporter for the Hamilton County Court of Common Pleas, do hereby certify that at the same time and place stated herein, I recorded in stenotype and thereafter transcribed the within 8, and that the foregoing Transcript of Proceedings is a true, complete, and accurate transcript of my said stenotype notes.

IN WITNESS WHEREOF, I hereunto set my hand this 5th day of October, 2011.



SHERI D. RENKEN, RMR
Official Court Reporter
Court of Common Pleas
Hamilton County, Ohio

IN THE SUPREME COURT OF OHIO

11 - 1643

STATE, *ex rel.* THE CINCINNATI ENQUIRER, a Division of Gannett Satellite Information Network, Inc. 312 Elm Street Cincinnati, Ohio 45202

Case No.

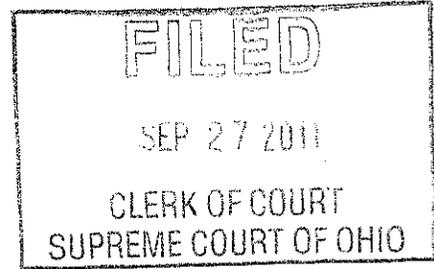
Petitioner,

AFFIDAVIT OF JOHN C. GREINER

vs.

HONORABLE NADINE ALLEN, Hamilton County Court of Common Pleas 1000 Main Street, Room 495 Cincinnati, Ohio 45202

Respondent.



Affiant, after being duly cautioned and sworn, states as follows:

1. I am an attorney admitted to practice in the State of Ohio. I represent The Cincinnati Enquirer ("the Enquirer") in this matter.
2. On or about Tuesday, September 20, I 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. Those were two counts of a fourteen-count complaint. See copy of Indictment attached hereto as Exhibit A. Apparently, the remaining twelve counts were dismissed.
3. On the Hamilton County Common Pleas Clerk's electronic docket, there is no listing for Case No. B1001826. I was informed by John Williams, the acting Clerk, that this is so because Judge Allen had issued an order sealing all records in the case ("the Order").

4. 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.

5. On the morning of September 21, I delivered a letter to Judge Allen expressing my client's concerns. A true and correct copy of the letter is attached hereto as Exhibit B.

6. Later on September 21, I was told that Judge Allen would conduct a hearing on the matter on September 22 at 1:00 p.m.

7. I attended the hearing. 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 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.

Further Affiant sayeth naught.

John C. Greiner
John C. Greiner

STATE OF OHIO)
) ss:
COUNTY OF HAMILTON)

Sworn and subscribed personally before me by John C. Greiner this 26th day of September, 2011.

Kimberly A. Lubbers
Notary Public



KIMBERLY A. LUBBERS
Notary Public - State of Ohio
My Commission Expires
8-10-15

THE STATE OF OHIO, HAMILTON COUNTY

COURT OF COMMON PLEAS

STATE OF OHIO

Plaintiff

Case No. B 1001826

-vs-

MARTIN MORRIS

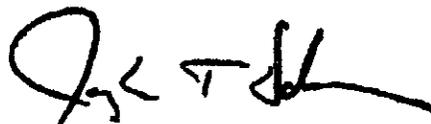
Defendant

PROSECUTING ATTORNEY'S REQUEST
FOR ISSUANCE OF WARRANT
UPON INDICTMENT

TO THE CLERK OF THE COURT OF COMMON PLEAS:

MARTIN MORRIS has been named a defendant in an indictment returned by the Grand Jury.

Pursuant to Rule 9, Ohio Rules of Criminal Procedure, the undersigned requests that you or a Deputy Clerk forthwith issue a warrant to an appropriate officer and direct him to execute it upon the above-named defendant at the following address: Hamilton County Justice Center, or at any place within this State.

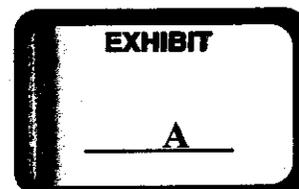


Joseph T. Deters
Prosecuting Attorney
Hamilton County, Ohio



D87677889

By: 
Assistant Prosecuting Attorney



THE STATE OF OHIO, HAMILTON COUNTY

COURT OF COMMON PLEAS

THE STATE OF OHIO

Case No. B 1001826

HAMILTON COUNTY, ss:

INDICTMENT FOR:

- CT1: AggravatedTheft 2913.02(A)(1)[F3]
- CT2: AggravatedTheft 2913.02(A)(2)[F3]
- CT3: AggravatedTheft 2913.02(A)(3)[F3]
- CT4: Unauthorized Use of Property
2913.04(A)[F3]
- CT5: Telecommunications Fraud 2913.05[F3]
- CT6: Forgery 2913.31(A)(3)[F3]
- CT7: Theft From Elderly Person or Disabled
Adult 2913.02(A)(1)[F1]
- CT8: Theft From Elderly Person or Disabled
Adult 2913.02(A)(2)[F1]
- CT9: Theft From Elderly Person or Disabled
Adult 2913.02(A)(3)[F1]
- CT10: Unauthorized Use of Property
2913.04(A)[F2]
- CT11: Telecommunications Fraud 2913.05[F3]
- CT12: Forgery 2913.31(A)(3)[F2]
- CT13: Forgery 2913.31(A)(3)[F3]
- CT14: Forgery 2913.31(A)(3)[F2]

In the Court of Common Pleas, Hamilton County, Ohio, of the Grand Jury Term Two Thousand and Ten.

FIRST COUNT

The Grand Jurors of the County of Hamilton, in the name and by authority of the State of Ohio, upon their oaths do find and present that **MARTIN MORRIS, from the 1ST day of December, Two Thousand and Three to the 25TH day of May, Two Thousand and Five** at the County of Hamilton and State of Ohio aforesaid, with purpose to deprive the owner of certain property or services worth \$100,000 or more, to wit: **UNITED STATES CURRENCY AND/OR SECURITIES** belonging to **DONNA COLLINS,**

knowingly obtained or exerted control over such property or services without the consent of the owner or person authorized to give consent, in violation of Section 2913.02(A)(1) of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

SECOND COUNT

The Grand Jurors of the County of Hamilton, in the name and by authority of the State of Ohio, upon their oaths do find and present that **MARTIN MORRIS, from the 1ST day of December, Two Thousand and Three to the 25TH day of May, Two Thousand and Five** at the County of Hamilton and State of Ohio aforesaid, with purpose to deprive the owner of certain property or services worth \$100,000 or more, to wit: **UNITED STATES CURRENCY AND/OR SECURITIES belonging to DONNA COLLINS, knowingly obtained or exerted control over such property or services beyond the scope of the express or implied consent of the owner or person authorized to give consent, in violation of Section 2913.02(A)(2) of the Ohio Revised Code and against the peace and dignity of the State of Ohio.**

THIRD COUNT

The Grand Jurors of the County of Hamilton, in the name and by authority of the State of Ohio, upon their oaths do find and present that **MARTIN MORRIS, from the 1ST day of December, Two Thousand and Three to the 25TH day of May, Two Thousand and Five** at the County of Hamilton and State of Ohio aforesaid, with purpose to deprive the owner of certain property or services worth \$100,000 or more, to wit: **UNITED STATES CURRENCY AND/OR SECURITIES belonging to DONNA COLLINS, knowingly obtained or exerted control over such property or services by deception, in violation of Section 2913.02(A)(3) of the Ohio Revised Code and against the peace and dignity of the State of Ohio.**

FOURTH COUNT

The Grand Jurors of the County of Hamilton, in the name and by authority of the State of Ohio, upon their oaths do find and present that **MARTIN MORRIS**, from the 1ST day of December, Two Thousand and Three to the 25TH day of May, Two Thousand and Five at the County of Hamilton and State of Ohio aforesaid, knowingly used or operated property, to wit: **UNITED STATES CURRENCY AND/OR SECURITIES**, of **DONNA COLLINS**, without the consent of the owner or person authorized to give consent, and the offense was committed for the purpose of devising a scheme to defraud or to obtain property or services and the value of the property or services or the loss to the victim was \$100,000 or more, in violation of Section 2913.04(A) of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

FIFTH COUNT

The Grand Jurors of the County of Hamilton, in the name and by authority of the State of Ohio, upon their oaths do find and present that **MARTIN MORRIS**, from the 1ST day of December, Two Thousand and Three to the 25TH day of May, Two Thousand and Five at the County of Hamilton and State of Ohio aforesaid, having devised a scheme to defraud, knowingly disseminated, transmitted, or caused to be disseminated or transmitted by means of a wire, radio, satellite, telecommunication, telecommunications device, or telecommunications service, any writing, data, sign, signal, picture, sound, or image, to wit: **SCOTTRADE DISTRIBUTION REQUEST FORMS**, with purpose to execute or otherwise further the scheme to defraud and the value of the benefit obtained by the said defendant or of the detriment to the victim of the fraud is one hundred thousand dollars or more, in violation of Section 2913.05 of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

SIXTH COUNT

The Grand Jurors of the County of Hamilton, in the name and by authority of the State of Ohio, upon their oaths do find and present that **MARTIN MORRIS**, from the 1ST day of December, Two Thousand and Three to the 25TH day of May, Two Thousand and Five at the County of Hamilton and State of Ohio aforesaid, with purpose to defraud or knowing that he was facilitating a fraud, uttered or possessed with purpose to utter a writing, to wit: **SCOTTRADE DISTRIBUTION REQUEST FORMS**, that he knew to have been forged, and the value of the property or services or loss to the victim was \$100,000 or more, in violation of Section 2913.31(A)(3) of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

SEVENTH COUNT

The Grand Jurors of the County of Hamilton, in the name and by authority of the State of Ohio, upon their oaths do find and present that **MARTIN MORRIS**, from the 26TH day of May, Two Thousand and Five to the 31ST day of October, Two Thousand and Eight at the County of Hamilton and State of Ohio aforesaid, with purpose to deprive the owner of certain property or services worth \$100,000 or more, to wit: **UNITED STATES CURRENCY AND/OR SECURITIES** belonging to **DONNA COLLINS**, knowingly obtained or exerted control over such property or services without the consent of the owner or person authorized to give consent, and at the time, the said victim of the offense was an elderly person or disabled adult, in violation of Section 2913.02(A)(1) of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

EIGHTH COUNT

The Grand Jurors of the County of Hamilton, in the name and by authority of the State of Ohio, upon their oaths do find and present that **MARTIN MORRIS**, from the 26TH day of May, Two Thousand and Five to the 31ST day of October, Two Thousand and Eight at the County of Hamilton and State of Ohio aforesaid, with purpose to deprive the owner of certain property or services worth \$100,000 or more, to wit: **UNITED STATES CURRENCY AND/OR SECURITIES** belonging to **DONNA COLLINS**, knowingly obtained or exerted control over such property or services beyond the scope of the express or implied consent of the owner or person authorized to give consent, and at the time, the said victim of the offense was an elderly person or disabled adult, in violation of Section 2913.02(A)(2) of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

NINTH COUNT

The Grand Jurors of the County of Hamilton, in the name and by authority of the State of Ohio, upon their oaths do find and present that **MARTIN MORRIS**, from the 26TH day of May, Two Thousand and Five to the 31ST day of October, Two Thousand and Eight at the County of Hamilton and State of Ohio aforesaid, with purpose to deprive the owner of certain property or services worth \$100,000 or more, to wit: **UNITED STATES CURRENCY AND/OR SECURITIES** belonging to **DONNA COLLINS**, knowingly obtained or exerted control over such property or services by deception, and at the time, the said victim of the offense was an elderly person or disabled adult, in violation of Section 2913.02(A)(3) of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

TENTH COUNT

The Grand Jurors of the County of Hamilton, in the name and by authority of the State of Ohio, upon their oaths do find and present that **MARTIN MORRIS**, from the 26TH day of May, Two Thousand and Five to the 31ST day of October, Two Thousand and Eight at the County of Hamilton and State of Ohio aforesaid, knowingly used or operated property, to wit: **UNITED STATES CURRENCY AND/OR SECURITIES**, of **DONNA COLLINS**, without the consent of the owner or person authorized to give consent, and the said victim of the offense was an elderly person or a disabled adult and the value of the property or services or less to the said victim was \$25,000 or more, in violation of Section 2913.04(A) of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

ELEVENTH COUNT

The Grand Jurors of the County of Hamilton, in the name and by authority of the State of Ohio, upon their oaths do find and present that **MARTIN MORRIS**, from the 26TH day of May, Two Thousand and Five to the 31ST day of October, Two Thousand and Eight at the County of Hamilton and State of Ohio aforesaid, having devised a scheme to defraud, knowingly disseminated, transmitted, or caused to be disseminated or transmitted by means of a wire, radio, satellite, telecommunication, telecommunications device, or telecommunications service, any writing, data, sign, signal, picture, sound, or image, to wit: **SCOTTRADE DISTRIBUTION REQUEST FORMS**, with purpose to execute or otherwise further the scheme to defraud and the value of the benefit obtained by the said defendant or of the detriment to the victim of the fraud is one hundred thousand dollars or more, in violation of Section 2913.05 of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

TWELFTH COUNT

The Grand Jurors of the County of Hamilton, in the name and by authority of the State of Ohio, upon their oaths do find and present that **MARTIN MORRIS**, from the 26TH day of May, Two Thousand and Five to the 31ST day of October, Two Thousand and Eight at the County of Hamilton and State of Ohio aforesaid, with purpose to defraud or knowing that he was facilitating a fraud, uttered or possessed with purpose to utter a writing, to wit: **SCOTTRADE DISTRIBUTION REQUEST FORMS**, that he knew to have been forged, and **DONNA COLLINS** was an elderly person or disabled adult, and the value of the property or services or loss to the victim was \$25,000 or more, in violation of Section 2913.31(A)(3) of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

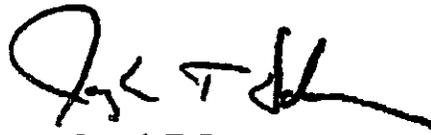
THIRTEENTH COUNT

The Grand Jurors of the County of Hamilton, in the name and by authority of the State of Ohio, upon their oaths do find and present that **MARTIN MORRIS**, from the 1ST day of December, Two Thousand and Three to the 25TH day of May, Two Thousand and Five at the County of Hamilton and State of Ohio aforesaid, with purpose to defraud or knowing that he was facilitating a fraud, uttered or possessed with purpose to utter a writing, to wit: **CHECKS FROM SCOTTRADE PAYABLE TO DONNA COLLINS**, that he knew to have been forged, and the value of the property or services or loss to the victim was \$100,000 or more, in violation of Section 2913.31(A)(3) of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

FOURTEENTH COUNT

The Grand Jurors of the County of Hamilton, in the name and by authority of the State of Ohio, upon their oaths do find and present that **MARTIN MORRIS**, from the 25TH day of May, Two Thousand and Five to the 31ST day of October, Two Thousand and Eight at the County of Hamilton and State of Ohio aforesaid, with purpose to defraud or knowing that he was facilitating a fraud, uttered or possessed

with purpose to utter a writing, to wit: CHECKS FROM SCOTTRADE PAYABLE TO DONNA COLLINS, that he knew to have been forged, and DONNA COLLINS was an elderly person or disabled adult, and the value of the property or services or loss to the victim was \$25,000 or more, in violation of Section 2913.31(A)(3) of the Ohio Revised Code and against the peace and dignity of the State of Ohio.



Joseph T. Deters
Prosecuting Attorney
Hamilton County, Ohio

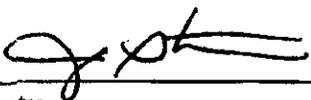
Reported and filed this

31 Day of 03, A.D. 10

By: 
Assistant Prosecuting Attorney

By: **Patricia M. Clancy**
Clerk of Hamilton County
Common Pleas

A TRUE BILL

By: 
Deputy

By: 
Foreperson, Grand Jury

GRAYDON HEAD

LEGAL COUNSEL | SINCE 1871

John C. Greiner
Direct: 513.629.2734
jgreiner@graydon.com

COPY

September 21, 2011

VIA HAND DELIVERY

Honorable Nadine L. Allen
HAMILTON COUNTY MUNICIPAL COURT
1000 Main Street, Room 240
Cincinnati, OH 45202

Re: *The Cincinnati Enquirer*

Dear Judge Allen:

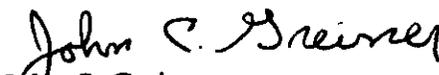
This firm represents The Cincinnati Enquirer ("The Enquirer"). It has come to our attention that you have sealed all records in the case of *State of Ohio v. Martin Morris*, Case No. B 1001826. It is our understanding that the case was sealed based on the request of defense counsel to "avoid embarrassment" for Mr. Morris. As you know, Ohio Rules of Superintendence 44-47 address the public's right of access to court records. The rules provide that public access is presumed, and that access may be denied only upon specific findings that a compelling need to restrict access to outweighs the public right of access. Moreover, the public has a First Amendment right of access to criminal trials that can only be denied for compelling circumstances. Even when access to certain information is properly limited, the Superintendence Rules require redaction, not a blanket restriction of access. A defendant's desire to avoid embarrassment is not a compelling interest.

It appears that in sealing this case, you did not apply the Rules of Superintendence, much less abide by them. The remedy for this violation is a mandamus action. I am writing this letter, and copying counsel, in hopes that you will lift the sealing order. If you don't we will be proceeding with a mandamus action in the Ohio Supreme Court.

I would appreciate a response by the end of this week.

Very Truly Yours,

GRAYDON HEAD & RITCHEY LLP


John C. Greiner

JCG|pl
c. *Andrew A. Berghausen, Esq.*
Amy L. Higgins, Esq.

3329516.1

Cincinnati at Fountain Square Northern Kentucky at the Chamber Center Butler/Warren at University Pointe

Graydon Head & Ritchey LLP | 1900 Fifth Third Center | 511 Walnut Street | Cincinnati, OH 45202
513.621.6464 Phone | 513.651.3836 Fax | www.graydonhead.com

