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 ROBERT H. LYONS,** **Butler County** **Area I Court** **118 High St.** **Oxford, Ohio 45056** Respondent.	:	Case No. 12-1924

MEMORANDUM IN SUPPORT OF COMPLAINT FOR WRIT OF MANDAMUS

FILED
NOV 14 2012
CLERK OF COURT
SUPREME COURT OF OHIO

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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 Mandamus.

I. STATEMENT OF FACTS

On or about November 9, 2012, counsel for the Enquirer obtained from Butler County Prosecuting Attorney Michael Gmoser a copy of a redacted Order ("the Order") issued by the Respondent, Judge Robert H. Lyons of the Butler County Area I Court. The Order seals the record of conviction of a defendant whose identity was redacted in the Order (hereinafter "John Doe Defendant").[1]

According to the Order, counsel for the John Doe Defendant applied for the Order, and the Butler County Prosecuting Attorney made no objection to its issuance. The Order provides that "all official records of the charge . . . are hereby sealed and all Index references deleted, as provided by Ohio Revised Code Section 2953.52." The "charge" referenced in the Order reads as "Guilty plea – Disorderly Conduct."

Judge Lyons' Order makes no reference to a hearing on the matter, nor does it state that he considered the Ohio Rules of Superintendence in rendering his decision. As a result of the Order, the public cannot see the motion for sealing, the John Doe Defendant's name, the case number, or any other case documents. The only grounds for the Order provided are that there were no criminal charges pending against the John Doe Defendant at the time of the Order, and "[t]hat the interest of the [John Doe] Defendant outweighs the legitimate needs of the Government to maintain any record pertaining to th[e] case."

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[1] See Affidavit of John C. Greiner (all factual references set forth in this section are set out in that affidavit and Judge Lyons' Order attached thereto).

II. ARGUMENT

A. Ohio Rev. Code § 2953.52, cited by Judge Lyons in support of his Order, does not apply in cases where a defendant is convicted of a crime.

Ohio Rev. Code § 2953.52 is titled "Sealing of official records *after not guilty finding, dismissal of proceedings or no bill.*" (Emphasis added.) The statute permits those criminal defendants who are accused of a crime, but never found guilty, to apply for an application sealing the official records in the case. Section 2953.52, on its face, does not apply to defendants who were actually convicted of a crime.

Judge Lyons' Order expressly states an entry of conviction for the disorderly conduct charge was filed on the same day as the Order sealing the case. Since the Court's Order makes clear that the John Doe Defendant was found guilty of the charge, § 2953.52 could not provide a basis for the Court's Order sealing the record of conviction.

B. Judge Lyons failed to comply with Ohio Rule of Superintendence 45 in sealing the record of conviction of the John Doe Defendant.

Since § 2953.52 could not (and does not) provide a basis for Judge Lyon's Order sealing the record of conviction, Judge Lyons was required to comply with the Rules of Superintendence, "which provide for public access to court records."[2] Rule 45(A) specifically provides that "Court records are presumed open to public access." Under Superintendence Rule 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]

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[2] *State ex rel. Vindicator Printing Co. v. Wolff*, 132 Ohio St. 3d 481, 2012-Ohio-3328, 974 N.E.2d 89, ¶ 23.

[3] Sup. R. 44(C)(1).

Under Superintendence Rule 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 Superintendence Rule 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:
>
> (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]

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[4] Sup. R. 45 (emphasis added).

[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

Because Judge Lyons erroneously sealed the record of conviction pursuant to § 2953.52, which does not apply to the case at bar, his Order did not comply with the requirements of the Rules of Superintendence or the Constitution. His ruling is thus 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).

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 Lyons' Order has the effect of expunging the record of conviction, leaving no evidence of it ever having existed. Indeed, even the initials of the John Doe Defendant are not available to the public.

As noted, because Judge Lyons did not consider the requirements of Rule 45(E), he did not consider any less restrictive means of limiting public access to the record. Indeed, even the statute permitting a court to expunge certain criminal records of certain eligible offenders

contemplates public access to the record of conviction for a period of time.[8] Here, the public has been denied total and complete access to the record.

Finally, Judge Lyons failed to comply with the dictates of the United States Constitution in issuing the orders. Judge Lyons did not conduct an evidentiary hearing, nor did he make an on the record finding identifying any higher value that compelled the entry of the order. Instead, his Order recites a threadbare conclusion that "[t]he interest of the Defendant outweighs the legitimate needs of the Government to maintain any record pertaining to this case." The Order makes no reference to the public's interest in access to the record.

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.

Superintendence Rule 47 expressly provides an aggrieved party with a right to pursue a mandamus action.[9] The Enquirer is an aggrieved party because the court did not protect its interests; the Enquirer is left with no opportunity to change the status quo; and therefore, the Enquirer 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.[10]

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[8] *See* Ohio Rev. Code § 2953.32 (providing that a criminal defendant may apply to have a conviction record sealed "at the expiration of three years after the offender's final discharge if convicted of a felony, or at the expiration of one year after the offender's discharge if convicted of a misdemeanor").

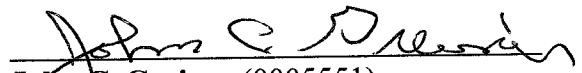
[9] *See State ex rel. Vindicator Printing Co.*, 132 Ohio St. 3d 481, 2012-Ohio-3328, 974 N.E.2d 89, at ¶ 23.

[10] *State ex rel. Cincinnati Enquirer v. Heath*, 183 Ohio App.3d 274, 916 N.E.2d 1090, 2009-Ohio-3415, ¶11 (12th Dist.).

III. CONCLUSION

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

Respectfully submitted,



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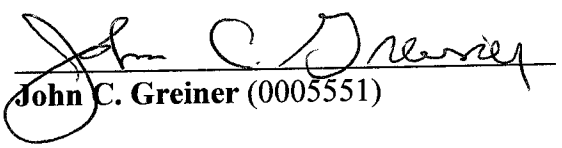
PRAECIPE FOR SERVICE

TO THE CLERK:

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



John C. Greiner (0005551)

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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 ROBERT H. LYONS,** **Butler County** **Area I Court** **118 High St.** **Oxford, Ohio 45056** Respondent.	:	Case No. **AFFIDAVIT OF JOHN C. GREINER**

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 November 9, 2012, Butler County Prosecutor Michael Gmoser delivered a redacted copy of an Order sealing the record of a criminal conviction issued by Respondent Robert H. Lyons of the Butler County, Ohio Area I Court ("the Order"). See copy of Order attached hereto as Exhibit A.

3. The name of the criminal defendant is redacted on the face of the Order, as is the case number.

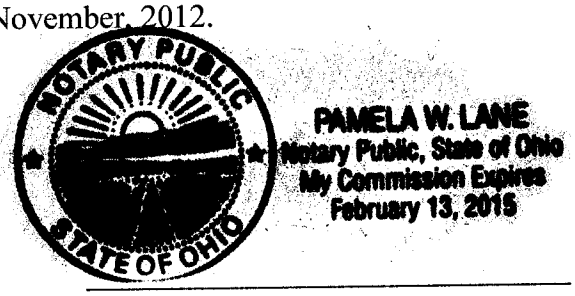
4. According to the terms of the Order, all records relating to the record of conviction are to be sealed pursuant to Ohio Rev. Code §§ 2953.52 and 2953.53, which would forever prevent public access to the case record.

FURTHER AFFIANT SAYETH NAUGHT.

John C. Greiner

STATE OF OHIO)
) ss.
COUNTY OF HAMILTON)

Sworn and subscribed personally before me by **John C. Greiner** this 13th day of November, 2012.



Notary Public

My Commission Expires

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IN THE BUTLER COUNTY AREA I COURT
OXFORD, OHIO

Butler County
Area I Court
NOV 07 2012
Filed

State of Ohio
Plaintiff

-vs-

[redacted]
Defendant

Case No. CRB [redacted]

ENTRY FOR SEALING OF RECORD OF MINOR MISDEMEANOR CONVICTION

This matter having come before the Court upon the Application of the above named Defendant to seal the official records herein the Court finds:

1. That an Entry of Conviction of Minor Misdemeanor on the charge(s) against the above named defendant was/were filed by this Court on 11/7/12.
2. That the Prosecuting Attorney was notified of the filing of said Application, has waived notice of a hearing on said Application and has filed no objection to the granting of said Application.
3. That there are no criminal charges pending against the above named Defendant, and
4. That the interest of the Defendant outweighs the legitimate needs of the Government to maintain any record pertaining to this case.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that all official records of the charge(s) noted below are hereby sealed and all index references deleted, as provided by Ohio Revised Code Section 2953.52 and the clerk is ordered to send a copy of this Entry to any public office or agency that has a record of the case which is the subject of this order, as provided by Ohio Revised Code Section 2953.53.

Notified:
Butler County Prosecuting Attorney
by Jessica Poly

JUDGE

ADDRESS: [redacted]
(Complete address with zip)

PHONE NUMBER: [redacted]

DOB: [redacted] SSN: [redacted]

DATE OF ARREST: 11/7/12 ARREST BOOKING NO.:

ARREST CHARGE: Disorderly Conduct

BCI NO.: FBI NO.:

FINAL CHARGE AND DISPOSITION: Guilty plea - Disorderly Conduct

I certify this within to be a true copy of the original filed
11-7 20 12
D. Bolser
Butler County Area I Court
By Debby Caldwell Deputy
11-7-12

Prepared by Haughey & Deters, LLC. Attorney:

EXHIBIT A