

STATE OF OHIO  
STATE PERSONNEL BOARD OF REVIEW

Martin Desmond,  <i>Appellant,</i>  v.  Mahoning County Prosecutor's Office,  <i>Appellee.</i>	Case No. 2020-RMD-04-0037  Administrative Law Judge Raymond M. Geis
<b>APPELLANT MARTIN DESMOND'S COMBINED MOTION TO LIFT THE STAY, CANCEL ANY PROPOSED BRIEFING SCHEDULE, AND FOR SANCTIONS AND DISQUALIFICATION OF APPELLEE'S COUNSEL AS THE APPROPRIATE REMEDY FOR LYING TO THE ALJ</b>	

Appellant Martin Desmond respectfully moves that the ALJ lift the stay of the proceedings and cancel the (proposed) briefing schedule over the purported federal orders. Contrary to Appellee's representations, Judge Inderlied in the *Desmond v. Gains, et al.* civil case (Mahoning County Court of Common Pleas Case No. 2018 CV 771) already ruled on March 19, 2019 that Desmond may elicit information about the misconduct that Appellee Mahoning County Prosecutor's Office seeks to keep hidden. That on-point ruling from the very court to which any ruling here would be appealed binds in this case.

Desmond also moves for sanctions because, as irrefutably proved below, the Prosecutor's Office's counsel—and by extension the Prosecutor's Office—simply lied to the ALJ at the hearing regarding Judge Inderlied's decision. Desmond seeks sanctions including payment of Appellant's attorneys' fees and expenses, as well as disqualification of Attorneys Todd Raskin, Patricia Rubright, and Gina DeGenova Zawrotuk.

A memorandum in support follows.

## MEMORANDUM IN SUPPORT

### I. ISSUES PRESENTED

- A. The ALJ entered a stay for further briefing based upon counsel for Appellee's representation that the Mahoning County Common Pleas Court had "not accepted" Desmond's argument that he should be permitted to ask questions about the misconduct Appellee is trying to hide from scrutiny. But as the transcript of proceedings proves, counsel's representation was false. The judge—of the court to which any ruling on this issue would be appealed—actually ruled in Desmond's *favor*. Should the ALJ lift the stay premised on this lie, cancel any proposed briefing, and follow Judge Inderlied's order?
- B. Sanctions and disqualifications are appropriate where a lawyer knowingly makes a false statement of fact or law to a tribunal, or fails to correct a false statement of material fact or law the lawyer previously made. Appellee's counsel made false statements of material fact and law to the ALJ, namely, that the Judge Inderlied in the civil case had not accepted Desmond's same arguments made here on the same issue. Co-counsel, and Appellee representatives Gains and Stratford, nodded their agreement to these false statements despite having been in the same hearing in which Judge Inderlied ruled the opposite. The ALJ relied upon that lie. Should the ALJ sanction Appellee and disqualify all of Appellee's counsel?

### II. FACTS

- A. During the SPBR hearing, Appellee's counsel falsely represented to the ALJ that Mahoning County Court of Common Pleas Visiting Judge Inderlied had "not accepted" "the same argument" Desmond made in the civil case about inquiry into Prosecutor's Office misconduct.**

On October 27, 2021, the ALJ began the whistleblower hearing. During the hearing, for the first time in 4 1/2 years, Appellee claimed a basis for Desmond's termination was his report of misconduct and a criminal conspiracy to Assistant Attorney General Dan Kasaris. During Kasaris's testimony—Appellee's own witness—Kasaris began testifying about Desmond's report to him, during which Desmond laid out the criminal conspiracy and prepared a diagram detailing the participants, criminal activity, and evidence. The criminal conspiracy involved assistant prosecutors and local attorneys. Appellee's counsel Todd Raskin abruptly interrupted Kasaris' testimony when Kasaris mentioned Assistant Prosecutor Jack Ausnehmer's name.

Raskin claimed to the ALJ that there was a federal order preventing the disclosure of this information. The ALJ then heard argument on the matter and, apparently relying on Raskin's representation, issued a stay of the proceedings for the matter to be researched, briefed, and decided.

During the argument, Attorney Raskin initially claimed, "The court has prohibited any comment at all about him." (Audio Recording of *Desmond* SPBR Hearing, day 2, 11:49:15 (the recording is in the SPBR's possession).) Raskin was presumably referring to the federal court. The ALJ heard arguments from both parties, including arguments like those made to Judge Inderlied in the related civil case.

In response to Desmond's argument, Attorney Raskin claimed that Judge Inderlied had not accepted Desmond's arguments on the issue:

Raskin: And let me just say, this is exactly the same argument they made to Judge Inderlied in the civil case and he didn't accept it.

ALJ Geis: Ok.

Raskin: And there have been—

ALJ Geis: Well, let me read it.

Desmond: That is not accurate.

Raskin: It is.

*Id.* at 11:59:40. The ALJ will recall that as Raskin represented this to the ALJ, his co-counsel (Patricia Rubright and Gina DeGenova-Zwortuk and client representatives (Paul Gains and Lynette Stratford—both also lawyers), all nodded to reinforce the message.

But as shown immediately below, Attorney Raskin's statement to the ALJ that Judge Inderlied "didn't accept" Desmond's argument as to the admissibility of the information is *false*. So were the amen nods of everyone on that side of the table.

**B. During the civil-case hearing, Judge Inderlied rejected Appellee's same arguments and accepted Desmond's—*permitting* inquiry into Prosecutor's Office misconduct related to the Ausnehmer matter.**

On March 19, 2019, Judge Inderlied held a status hearing in the *Desmond v. Gains, et al*, civil case. Attorney Raskin, Attorney Rubright, and Attorney DeGenova Zawrotuk were present on behalf of defendants, as were Paul Gains and Linette Stratford. (Transcript of Proceedings dated Mar. 19, 2019 at 1–3 (opening pages and relevant discussion attached as Ex. 1.)) They raised with Judge Inderlied the exact issue currently before the ALJ about whether Desmond could elicit and present information concerning potential criminal conduct by Assistant Prosecutor Jack Ausnehmer. (*Id.* at 23:19–74:13.) They waived around presumably the same purported federal court orders and submitted them *ex parte*, just as they did here.

Appellee offered Judge Inderlied the same arguments and excuses it raised before the ALJ. Although *Desmond* himself has never had a full and fair opportunity to completely litigate his position—because Appellee refuses to provide the purported documents it hands off *ex parte*—Appellee Mahoning County Prosecutor's Office had a full and complete opportunity to litigate its claims in that forum. And the issue was decided to Appellee's detriment.

Following *ex parte* review of the purported orders and listening to extended arguments back and forth, Judge Inderlied ruled against the Prosecutor's Office:

THE COURT: I don't dispute, Mr. Chandra, that the proceedings before me at the present time are unusual. I would, however, clarify for the record that what's actually occurred is that back in May of 2016, and pursuant to an application of the U.S. Attorney's Office, there was issued an order by a Federal District Court in conjunction with various Grand Jury proceedings. The Federal District Court in that case being Judge Solomon [Oliver], as well as this case. And that date is May 11, 2016. As a consequence of proceedings that have occurred in this case, an additional application was filed under seal and *ex parte* with Judge Solomon -- with Judge

Oliver. I said Solomon. Solomon Oliver, Jr., U.S. District Judge for the United States District Court for the Northern District of Ohio Eastern Division, on May 15 of 2019, and was followed by an ex parte order under seal by Judge Oliver, only to the effect that the defendants in this case were authorized to share with this Court the May 11, 2016 order and application therefore, which was a, essentially, secrecy order under Federal Rule 6(e), and its various subparts. **And that what's now before me is whether the questions by Ms. Gupta of certain witnesses in this case are technically in violation of the secrecy order of Judge Solomon [Oliver] from May 11 of 2016, and based not upon any event occurring in this case, but rather upon Grand Jury secrecy items from prior to the May 11, 2016 order.**

To that extent, I have reviewed the submitted documentation. I consider myself not at liberty to divulge the contents of those various documents. Instead, it is my responsibility as administrator of this particular case, that is the civil case before me, so-called 18 CV 00771, as opposed to any orders of confidentiality or made under seal in Case Number 16-08-01-MFC by Judge Oliver on May 11, 2016. **And the Court's conclusion in that regard is that the inquiries made by -- via deposition based upon the representations contained at this time are not subject to any violation of Judge Solomon [Oliver]'s orders and that they are, in fact, appropriate inquiries so long as they do not specifically inquire of any individual the content of Grand Jury testimony given by that individual or any other individual in the conduct of federal investigation in the order just indicated.**

The order currently issued by Judge Solomon [Oliver] is under U.S. DJ Number 16-08-02-MFC. Why the difference in case number between the March 15, 2019 order to which I just referred and the May 11 -- I'm sorry, March 15, 2019 order and the May 11, 2016 order, I do not know. **However, the Court's ruling is that those depositions may proceed, that the answers to those depositions are appropriate, that if in point of fact at some later time they become subject to a protective order upon application of any of the parties to this action, so be it. But I am not formally acting on any order of Judge Solomon [Oliver] in connection with these proceedings.**

To the extent that it is asserted that there is a violation of some federal court order, I suggest that whoever is concerned about it take it up with the federal judge, not with me. **Any questions, Mr. Chandra?**

**MR. CHANDRA: No, Your Honor.**

**THE COURT: Ms. Rubright, Mr. Raskin?**

**MS. RUBRIGHT: No, Your Honor.**

Id. at 69:4–72:14 (emphasis added).

Simply put, Judge Inderlied agreed with Desmond's arguments and permitted questioning and answering on the issue Appellee is again now desperately trying to keep secret. And Appellee's counsel—all present—*had no questions about that ruling*.

Yet on October 28, 2021, Appellee's counsel Todd Raskin, with his co-counsel, and Paul Gains and Lynette Stratford in full concurrence, lied about it to the ALJ's face, causing the ALJ to rely upon that lie in stopping the proceedings.

### **III. ARGUMENT**

#### **A. The information sought has already been ruled appropriate for inquiry and there is no need to relitigate the issue.**

Given that the issue before the ALJ has already been argued before and ruled upon by Judge Inderlied, there is no need for this ALJ to stay these proceedings and require briefing on the topic. And given that the Mahoning County Court of Common Pleas would be the court to which this issue would be appealed (and Judge Inderlied, as before in this case, likely the visiting judge assigned), a stay and briefing is even less appropriate. *See, e.g.*, R.C. 119.12(B); O.A.C. 124-15-06. Judge Inderlied has already reviewed the purported federal orders and ruled that questions on this topic are appropriate and, thus, permissible.

Appellee has also had 2 1/2 years to “take it up with the federal judge,” per Judge Inderlied's instructions, but has chosen not to do so. Appellee also could have filed a motion *in limine* on the issue with the ALJ before the hearing started—knowing Appellee was going to newly introduce what the ALJ aptly called the “tin-foil-hat” theory about Desmond's reports about criminal misconduct in the office.

But rather than taking either of those routes, Appellee chose to sandbag Desmond by eliciting the testimony *it* wanted, and then seeking to prevent Desmond's crushing cross-examination on the topic. Appellee then attempted to bully the ALJ into accepting its position by waiving the secret-and-not-yet-disclosed-federal-orders around the hearing room, and compounding

that farce by submitting those orders *ex parte* to the ALJ and Chief ALJ, without Desmond having any chance to review their verbiage, scope, and application. Appellee takes this approach to keep the facts of the criminal conduct in the prosecutor's office, which Desmond blew the whistle on, from becoming public. After all, Appellee kept hidden for over 4 1/2 years the fact that Desmond was terminated at least in part because he reported the criminal conduct to the Ohio Attorney General.

The ALJ should not reward Appellee's bad behavior and blatant lies to the SPBR about Judge Inderlied's decision by giving it a second bite at the apple. Appellee should not be afforded yet another chance to re-argue an issue that has already been argued and ruled upon. Appellee should be given no further opportunity to mislead, misrepresent, and lie to another tribunal just to stop relevant and damaging evidence from coming to light.

**B. Appellee's egregious behavior must be sanctioned by disqualification of its counsel and more, or it and they will surely continue to contaminate these proceedings and the civil case.**

**1. Counsel and Appellee's lies to the ALJ about Judge Inderlied's order violated Prof.Cond.R. 3.3.**

Prof.Cond.R. 3.3 [Candor Toward the Tribunal] provides, in relevant part:

- (a) A lawyer shall not knowingly do any of the following:
  - (1) **make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.**
  - (2) **fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client** and not disclosed by opposing counsel;
  - (3) **offer evidence that the lawyer knows to be false.** If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable measures to remedy the situation, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

Attorney Raskin's statement to the ALJ, "And let me just say, this is exactly the same argument they made to Judge Inderlied in the civil case and he didn't accept it" is a false statement to the tribunal. Even when Desmond responded, "That is not accurate," Raskin doubled down on his lie and insisted "It is." It was also a failure to disclose controlling authority—indeed, a lie about controlling authority. Attorney Rubright and Attorney DeGenova Zawrotuk, who were both present for the hearing before Judge Inderlied and the hearing before the ALJ, nodded in agreement and let Raskin's false statements go uncorrected. And Gains and Stratford—both lawyer-leaders who were present in the March 19, 2019 Judge Inderlied hearing, nodded gamely at Raskin's fraud on the tribunal. These are not hapless non-lawyer victims to their lawyers' misconduct. They are the Mahoning County Prosecuting Attorney and Chief Assistant Prosecuting Attorney—lawyer-instigators who hired and control Raskin, Rubright, and DeGenova Zawrotuk and who know Prof.Cond.R. 3.3's solemn mandates. Indeed, they are DeGenova's supervisors and did nothing as *she* nodded her assent at Raskin's lies.

The ALJ relied on Raskin's false statement in staying the hearing and establishing a briefing schedule. It was inherently material and Raskin understood that when he uttered the lies. Indeed, it is why he uttered the lies.

Appellee cannot be rewarded for its deceitful actions over the last 4 1/2 years. At some point, Appellee (and its counsel) must be held accountable. Appellee's behavior goes beyond defending itself. Appellee has employed a truth-be-damned, win-at-all-cost mentality. And to do so, Appellee is desperately trying to keep the evidence concerning criminal activity and misconduct at the hands of the prosecutor's office and its assistants hidden—after all, by Prosecutor Paul Gains's own admission, that's a reason why Desmond was terminated—to keep that information hidden.

Consider Appellee's first motion *in limine* in which it sought to keep hidden from the ALJ and the public's views evidence concerning 15 years of misconduct. Consider that Gains had

multiple opportunities to admit that his termination of Desmond was motivated by Desmond's report to Kasaris. Gains could have said so in the predisciplinary letter, but he didn't. Gains could have said so in the termination letter, but he didn't. Gains could have said so during the press conference, but he didn't. Gains could have said so in his affidavit before the SPBR, but he didn't. Gains could have said so in his discovery responses, but he didn't. Gains could have said so during his deposition, but he didn't.

Instead, Gains waited 4 1/2 years to admit that Desmond's termination was motivated, at least in part, by Desmond's report to Kasaris about criminal misconduct.

**2. The seriousness of the misconduct—lying to the ALJ about controlling authority and causing a suspension of the hearing—warrants disqualification.**

Disqualification of counsel is the appropriate primary sanction here.

A party does not "have an absolute right to be represented by a particular lawyer or law firm." *Carnegie Cos., Inc. v. Summit Properties, Inc.*, 2009 -Ohio- 4655, at ¶ 56, 183 Ohio App.3d 770 (2009). The "importance of maintaining the public confidence in the propriety of the conduct of those associated with the administration of justice outweighs a party's interest in choosing its own lawyer." *Id.* (internal quotations and citations omitted). "The extreme sanction of disqualification should only be utilized when there is a reasonable possibility that some specifically identifiable impropriety actually occurred, and where the public interest in requiring professional conduct by an attorney outweighs the competing interest of allowing a party to retain counsel of his choice." *Id.*

Consider the case of *State v. Lavontae Knight*, Mahoning County Common Pleas Case No. 2019-CR-00109A, which was prosecuted by Appellee Mahoning County Prosecutor's Office (specifically Assistant Prosecuting Attorney Dawn Cantalamessa). This case should be fresh in Appellee's minds as it was just decided this past summer. In *Knight*, the defendant filed a motion to disqualify Cantalamessa from prosecuting the case. Following a hearing on the matter, the trial court found Cantalamessa

- (1) violated the Rules of Professional Conduct;
- (2) made multiple false statements to the Court;
- (3) failed to turn over evidence to the defendant; and
- (4) failed to properly review her file, which led to her failure to turn over exculpatory evidence to the defendant.

The court described Cantalamessa's behavior as "**a careless indifference to ascertaining the truth**" and ultimately disqualified Cantalamessa from prosecuting the case. *See* 2019-CR-00109A *Lavontae Knight*—entry disqualifying prosecutor (attached as **Ex. 2**). Appellee never appealed Cantalamessa's disqualification, thus signaling its own belief that disqualification is an appropriate sanction for lying to the court. Apparently, making false statements to the court and withholding evidence is Appellee's way of doing business and warrants disqualification.

Consider Appellee's attempted admission of Kasaris's memo during the hearing. (Appellee's Hearing Ex. 50, attached as the last exhibit.) Appellee, *on its own*, redacted the portion concerning the information it desperately seeks to keep hidden. Appellee redacted the memo despite Judge Inderlied's ruling that questions and answers on the information were appropriate and permissible. There was no legitimate, legal reason for Appellee to make such a redaction.

And sure enough, neither Kasaris nor the Ohio Attorney General's Office recognized the information as confidential. In response to a subpoena issued in the *Desmond v. Gains, et al*, civil case, Kasaris and the Ohio Attorney General's Office readily provided the *unredacted* version of his memo to Desmond. (Ohio Attorney General's Office letter and Kasaris memo, attached as **Ex. 3**.) There *is* no issue other than one being manufactured by Appellee in secret, *ex parte* federal proceedings that it then seeks to improperly and misleadingly leverage in state fora without due process, and other than one manufactured by out-and-out lies to the ALJ here about what happened before Judge Inderlied.

The ends of justice require sanctions be imposed on Appellee and its counsel. Monetary sanctions including attorneys' fees and expenses are necessary to address past behavior. The prejudice includes the added time, fees, and costs for Desmond associated with the suspension of the trial hearing that Appellee and their counsel necessitated with their lies—including the time required to re-prepare for a newly scheduled hearing.

And disqualification is necessary to remedy the prejudice and prevent future, and inevitable, unwarranted behavior. Here, per the *Carnegie* case cited above, specifically identifiable impropriety actually occurred (lies to the ALJ, on which the ALJ relied and that remain uncorrected), and the public interest in requiring professional conduct by an attorney outweighs the competing interest of allowing a party to retain counsel of his choice. *Carnegie* at ¶ 56. Especially where the party was a prosecuting attorney who was complicit in and reinforced the lies by nodding assent, and permitting the lies to go uncorrected.

With Appellee client representatives and counsel having changed their stories so many times during the course of this and the related civil litigation, it is intriguing to see how Appellee and counsel will now try to justify lying to the ALJ. Somehow—among the five of these seasoned lawyers—they just forgot or misunderstood what Judge Inderlied had actually ruled? Even though counsel said they had no questions of Judge Inderlied? If they remembered it later, why did they not correct the misstatement as required by Prof.Cond.R. 3.3(a)(1) in the weeks following the hearing? Will they just gaslight the ALJ and Desmond and claim that Judge Inderlied's plain words mean the opposite of what they say? Will they claim their misrepresentation to the ALJ was immaterial? Or will they all just accept responsibility for knowingly trying to mislead the ALJ and apologize?

There is no conceivable explanation or excuse for lying to the tribunal under these circumstances, and the ALJ and SPBR as an institution should send a strong message to lawyers and

litigants alike that they cannot get away with misrepresenting controlling authority to the SPBR.  
How can anything these counsel say or do anything else with the SPBR and be trusted?

#### **IV. CONCLUSION**

Appellant Martin Desmond thus asks the ALJ and SPBR to lift the stay and cancel the (proposed) briefing schedule; to follow Judge Inderlied's controlling ruling; and to issue sanctions against Appellee, including payment of Appellant's expenses, fees, attorneys' fees, and, above all, disqualification of Attorneys Raskin, Rubright, and DeGenova Zawrotuk.

If Paul Gains and other witnesses continue to refuse to answer questions on the subject matter relying on purported federal-court orders or otherwise, the ALJ may enter safely enter further sanctions and make the appropriate adverse inferences. Because Gains and counsel should have zero credibility

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on November 17, 2021, my office served the above document by email on the following:

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\_\_\_\_\_  
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STATE OF OHIO ) IN THE COURT OF COMMON PLEAS  
 ) ss.  
COUNTY OF MAHONING ) **CASE NO. 2018 CV 771**

**MARTIN P. DESMOND** )  
 )  
**Plaintiff** )

-vs-

**PAUL GAINS, ET AL.** )  
 )  
**Defendants** )

**TRANSCRIPT OF PROCEEDINGS**

**STATUS HEARING**

APPEARANCES: **Atty. Sandhya Gupta**  
**Atty. Subodh Chandra**  
On behalf of the Plaintiff

**Atty. Patricia A. Rubright**  
**Atty. Todd M. Raskin**  
**Atty. Gina Zawrotuk**  
On behalf of the Defendants

**BE IT REMEMBERED** that at the hearing of the above-entitled cause, in the Court of Common Pleas, Mahoning County, Ohio, beginning on the **19th** day of **March, 2019**, and continuing thereafter, as hereinafter noted, before **the Honorable H. F. Inderlied**, the above appearances having been made, the following proceedings were had:

1           **THE COURT:** Once again, for the record,  
2 my apologies for not doing this at 9:00, as  
3 scheduled. I assume the extra two hours I  
4 inadvertently gave you resulted in you  
5 resolving whatever conflicts you might have  
6 so that we can just put it on the record?

7           Okay, that was a lame effort at levity.

8           So the record should reflect the case  
9 before the Court to be Number 18 CV 00771,  
10 Martin Desmond vs. Mahoning County, Paul  
11 Gains and Linette Stratford.

12           The record should reflect that the  
13 parties are present and represented by  
14 counsel. Mr. Desmond by Mr. Chandra and  
15 Ms. Gupta; Mahoning County, Paul Gains and  
16 Linette Stratford by Mr. Raskin and  
17 Ms. Rubright.

18           And I've got one name that I don't  
19 recognize because I think you're a new  
20 attachment here. It's pronounced how?

21           **MS. ZAWROTUK:** Zawrotuk.

22           Z-A-W-R-O-T-U-K.

23           **THE COURT:** That's good. I would have

1 missed it completely.

2 **MS. ZAWROTUK:** That's okay. Most people  
3 do, Your Honor.

4 **THE COURT:** So your capacity here is as  
5 additional counsel for the county --

6 **MS. ZAWROTUK:** For the parties, correct.

7 **THE COURT:** -- and Mr. Gains and  
8 Ms. Stratford?

9 **MS. ZAWROTUK:** Correct.

10 **THE COURT:** And I'm sorry, Ms. Zawrotuk,  
11 your first name is?

12 **MS. ZAWROTUK:** Gina, G-I-N-A.

13 **MS. RUBRIGHT:** And probably spell it  
14 again for the court reporter.

15 **THE COURT:** I'm sorry, say again?

16 **MS. ZAWROTUK:** G-I-N-A.

17 **THE COURT:** That, I got.

18 **MS. ZAWROTUK:** Do you need my last name  
19 again? No? Okay.

20 **THE COURT:** She got it.

21 Okay. So the purpose of today's  
22 hearing, which is an unusual approach for me  
23 in terms of actual scheduling is a

1 With the understanding that I have no  
2 intention of competing with Webster's  
3 definition of brief. You folks don't  
4 actually understand the definition of brief  
5 anyway, because I haven't seen a brief yet  
6 out of you folks that wasn't way longer than  
7 I thought necessary. So that is apparently  
8 not going to change. So let's see if we can  
9 find a way to shortcut that process somewhat.

10 So we'll begin, Ms. Gupta, with your  
11 approach. And if it's easier for all of you  
12 folks to sit down, I am not -- I have no need  
13 for the formality of your standing while  
14 you're trying to work out these problems. I  
15 don't intend to stand while you do it myself.  
16 So, there you go.

17 Ms. Gupta, pick an issue and tell me  
18 about it, please.

19 **MS. GUPTA:** Thank you, Your Honor.  
20 There is one issue that has arisen during the  
21 depositions that we have had so far. I have  
22 tried to ask certain witnesses about a line  
23 of questioning and when I've done so, defense

1           counsel has immediately put a stop to that  
2           questioning, citing an order of some kind,  
3           sort of vaguely, that that testimony is not  
4           to be permitted. I have not -- supposedly  
5           there is a concern with regard to this  
6           testimony about whether it involves some  
7           FBI-related matter. But we have a  
8           communication, a written communication, from  
9           the U.S. Attorney's Office, saying that  
10          unless it's an FBI-related -- unless it's an  
11          FBI agent or someone working on behalf of the  
12          FBI, it's okay to ask other deponents about  
13          this particular line of questioning. And yet  
14          defense counsel has continued to put a stop  
15          to those questions. So that is one area that  
16          we -- that has arisen that I think needs to  
17          be resolved.

18                 **MR. RASKIN:** Are you done?

19                 **THE COURT:** So I don't understand the  
20                 issue you're raising at this point in time.

21                 **MS. GUPTA:** And I can give some context  
22                 and background.

23                 **MR. RASKIN:** I don't think that -- with

1 all due respect, Your Honor, I don't think  
2 that Ms. Gupta should do that. I have an  
3 order from the federal court which I have  
4 been authorized to share with you and you  
5 alone.

6 **THE COURT:** I'm listening.

7 **MR. RASKIN:** No, I can't put it on the  
8 record. This is confidential. If so, I  
9 would have to ask for a recess so that I can  
10 have an ex parte communication with the Court  
11 for the purposes of alerting you to the  
12 subject matter of Ms. Gupta's commentary and  
13 the order of the judge, Judge Oliver, with  
14 respect to that area of inquiry. Otherwise,  
15 I can't disclose it. The order -- as you  
16 will see, when you read it, the order is  
17 quite explicit.

18 **MS. GUPTA:** And --

19 **THE COURT:** Let's -- let's visit the  
20 issue of some -- you're talking about a  
21 Federal District Court order?

22 **MR. RASKIN:** I am, yes.

23 **THE COURT:** A Federal District Court

1 order, which is ex parte in nature or in  
2 which both sides to this case have had an  
3 opportunity to participate?

4 **MR. RASKIN:** Neither side has had an  
5 opportunity to participate. The order was --

6 **THE COURT:** Well, if neither side has  
7 had an opportunity to participate, should I  
8 assume that you haven't seen the content of  
9 the order either?

10 **MR. RASKIN:** No, I have. The order  
11 was -- the order was as a result of a motion  
12 filed by the United States of America.

13 **THE COURT:** Filed by whom?

14 **MR. RASKIN:** The Attorney General's  
15 Office, the United States of America.

16 **THE COURT:** Okay.

17 **MR. RASKIN:** Seeking permission from  
18 Judge Oliver for the limited release of  
19 information which was previously the subject  
20 of his order sealing that information. So  
21 what the U.S. Attorney's Office did was ask  
22 the Court for permission to provide limited  
23 information to you, as the presiding judge in

1 this case, because of the existence of this  
2 case and because of the attempts by  
3 Mr. Desmond's counsel to inquire into matters  
4 which are sealed and ordered confidential by  
5 the Federal District Court. So -- and so  
6 once that motion was filed with Judge Oliver,  
7 Judge Oliver subsequently issued an order  
8 allowing for you to see that order and some  
9 of the information pertaining to it. But --

10 **THE COURT:** The content of which you  
11 have also seen, but the other side has not?

12 **MR. RASKIN:** Correct.

13 **THE COURT:** And why wouldn't I share  
14 that with the other side, the same thing that  
15 you've got?

16 **MR. RASKIN:** Well, because I don't think  
17 that the order allows for that.

18 **THE COURT:** Well, why does it allow for  
19 you to see it if it doesn't allow for them to  
20 see it?

21 **MR. RASKIN:** The information was  
22 provided to my client, to the Prosecutor's  
23 Office. So the issue is -- but the

1           Prosecutor's Office was also subject to the  
2           order precluding the dissemination of that  
3           information. And so the question was could  
4           this information be provided to you, as the  
5           presiding judge in this case. And Judge  
6           Oliver's order, as you will see, if you  
7           choose to read it, is quite explicit in that  
8           regard.

9           **MS. GUPTA:** Your Honor, if I may.

10          **THE COURT:** Go ahead.

11          **MS. GUPTA:** First of all, we would  
12          object to not having seen the order and not  
13          understanding the basis. I'm not even --  
14          based on the fact that we have been stopped  
15          from asking our questions, the defendants  
16          don't even know what it is we are asking. So  
17          how can we -- we don't even -- I don't know  
18          that there's any basis yet to say that  
19          whatever has been sealed or whatever  
20          information is not being permitted is  
21          actually the information that we are asking  
22          about.

23          **MR. RASKIN:** Well, based on the

1 questions that you did ask, it was our good  
2 faith belief, and continues to be our good  
3 faith belief, that the answers to those  
4 questions would be in violation of the  
5 Federal District Court's order. And so  
6 that's why we requested that the U.S.  
7 Attorney's Office, who sought the  
8 confidentiality to begin with, seek  
9 permission of Judge Oliver, who granted that  
10 confidentiality request, to disclose it to  
11 you, because of what was happening in this  
12 case.

13 **THE COURT:** Is there a pending federal  
14 litigation that generated this motion or is  
15 this a stand-alone confidentiality order  
16 issued by a federal district judge in  
17 response to a U.S. Attorney's motion?

18 **MS. STRATFORD:** Can we talk to him?

19 **MS. RUBRIGHT:** Can we take a brief  
20 recess, Your Honor? Or just a break for a  
21 second?

22 **(WHEREUPON, a brief recess was had,**  
23 **after which the proceedings continued as**

1           **follows:)**

2           **MR. RASKIN:** I'm sorry, Judge, your  
3 question to me was is there a pending case?

4           **THE COURT:** Correct.

5           **MR. RASKIN:** There is no pending case.  
6 The issue in this case is that --

7           **THE COURT:** There must be a pending  
8 something, otherwise a federal district judge  
9 wouldn't have any authority to take any  
10 action.

11           **MR. RASKIN:** I can respond. The issue  
12 in this case is that Mr. Desmond, as an  
13 Assistant County Prosecutor, gained Rule 6  
14 Grand Jury confidential information, which he  
15 is now, we believe, attempting to share with  
16 his counsel and use in this civil case. That  
17 information is the subject of the District  
18 Court's confidentiality -- or order sealing  
19 the information. It was an investigation,  
20 which did not result, as I understand it, in  
21 an indictment.

22           **THE COURT:** A federal investigation?

23           **MR. RASKIN:** Yes.

1                   **MS. GUPTA:** Your Honor --

2                   **THE COURT:** Yes, Ms. Gupta.

3                   **MS. GUPTA:** -- as far as I understand,  
4 we are not seeking Grand Jury information.

5                   **MR. RASKIN:** If you ask questions that  
6 was the subject -- whether you're aware of it  
7 or not, I'm not suggesting you're aware of  
8 it. I don't know what Mr. Desmond told you  
9 and it isn't appropriate for me to know that,  
10 I understand, because of the privilege. But  
11 if you're asking questions which invades the  
12 Grand Jury, that would be in violation of the  
13 order of the United States District Court  
14 sealing that record.

15                   **THE COURT:** Sealing what record?

16                   **MR. RASKIN:** The investigation in the  
17 Grand Jury proceedings. And you'll see that  
18 if you --

19                   **THE COURT:** I hear you. I guess I'm  
20 mindful of the fact that we have a pending  
21 case under the label 17 CV 99999 that was  
22 aimed at obtaining unsealing of Grand Jury  
23 records and the production of those

1 transcripts, which I ruled against, and which  
2 is now on appeal, one part of which involves  
3 additional disclosure of heretofore sealed  
4 hearing information from a date I now don't  
5 recall. But the point is, that's on appeal.  
6 There's been no objection to appointed  
7 counsel Matthew Meyer, to the transcription  
8 of that in camera conference, although that  
9 does not relate to the content of the Grand  
10 Jury transcripts and the order that I would  
11 issue, given Mr. Meyer's response to  
12 Mr. Desmond's motion to transcribe the  
13 content of the in camera portion of that  
14 Grand Jury transcript hearing, it still won't  
15 be subject to disclosure.

16 **MS. GUPTA:** Correct. Your Honor, that  
17 issue is completely separate. And if I may  
18 provide a little context here, it may allow  
19 us to further the conversation. There is an  
20 individual who was employed or is employed by  
21 the County Prosecutor's Office. That  
22 individual is -- as far as I understand, that  
23 individual engaged in certain conduct. We

1 wanted to ask questions about that because it  
2 would show -- it's relevant to Mr. Desmond's  
3 claims because our point is that -- if our  
4 point is that the reasons given for  
5 Mr. Desmond's termination were pretextual,  
6 then the existence of other comparators  
7 within the office are relevant. And so the  
8 conduct of that individual becomes relevant  
9 to Mr. Desmond's claims. So we are asking  
10 questions about that individual's conduct and  
11 what the defendants knew about that  
12 individual's conduct.

13 Now, the depositions that we have had so  
14 far that -- where these questions have  
15 arisen, have not been of defendants, they  
16 have been of third-party witnesses who are  
17 not subject to any order from the U.S.  
18 Attorney's Office, because we have a written  
19 communication from the U.S. Attorney's Office  
20 saying as much. They have been, for example,  
21 Lieutenant Jeff Solic, who is an  
22 Austintown -- I believe Austintown Police --  
23 within the Austintown Police Department, who

1 is part of Mahoning Valley Task Force. And  
2 there was another individual, an attorney,  
3 who had some -- you know, of whom -- a  
4 private defense attorney, of whom we also  
5 were asking questions on the subject. So  
6 those -- so they are not defendants that we  
7 have been asking -- so far, you know, a  
8 private attorney and an Austintown Police  
9 Department individual who is the former  
10 commander of the Mahoning Valley Task Force.  
11 I specifically asked the U.S. Attorney's  
12 Office whether there was a basis to stop that  
13 questioning and she wrote me back and  
14 specifically said --

15 **MR. CHANDRA:** Name and date.

16 **MS. GUPTA:** I can tell you the name and  
17 date of the e-mail. It's from Lynn Buck of  
18 the U.S. Attorney's Office. The e-mail is  
19 dated March 1, 2019.

20 She writes: Sandhya and Patty, as  
21 previously indicated, Jeff Solic is not a  
22 federal officer or federal task force  
23 officer. As such, we have no advice or

1 comment concerning any issues regarding his  
2 testimony or that of any non-federal officer.

3 **MR. CHANDRA:** May I --

4 **THE COURT:** Testimony in what context?

5 **MS. GUPTA:** And this was in response to  
6 my e-mail to her on which I cc'd  
7 Ms. Rubright, saying: During Jeff Solic's  
8 deposition today in Desmond vs. Gains, I  
9 attempted to have the witness review an  
10 exhibit referring to Jack Ausnehmer. That's  
11 A-U-S-N-E-H-M-E-R. Defense counsel Patty  
12 Rubright interrupted this presentation --

13 **(WHEREUPON, the reporter interrupted the**  
14 **proceedings, after which the proceedings**  
15 **continued as follows:)**

16 **MS. GUPTA:** Defense counsel Patty  
17 Rubright interrupted this presentation,  
18 representing that there was an order in place  
19 preventing even questions about something in  
20 the exhibit. She did not say Mr. Ausnehmer's  
21 name on the record, but we talked privately  
22 and she explained that Paul Gains had  
23 received a communication from you on this

1 issue. I was unaware of any order. As far  
2 as I understood from you, Jeff Solic was not  
3 someone the FBI had any control over. Patty  
4 said I should call you to verify.

5 So Ms. Buck is responding to this. Then  
6 I go on to say: Please clarify whether there  
7 is an issue with plaintiff's counsel  
8 questioning Jeff Solic or any other non-FBI  
9 witness about Jack Ausnehmer, even mentioning  
10 Jack's name.

11 And it was in response to this e-mail  
12 that Ms. Buck wrote back and indicated that  
13 she has no advice or comment concerning any  
14 issues regarding Mr. Solic's testimony or  
15 that of any non-federal officer.

16 **MR. CHANDRA:** Your Honor, may I add  
17 something?

18 **THE COURT:** Go ahead.

19 **MR. CHANDRA:** So, Your Honor, I'm trying  
20 to absorb all of this because this is news to  
21 us that there's supposedly some order from  
22 Judge Oliver that the defense now wants to  
23 present to the Court ex parte.

1           Beyond our general objection to that in  
2 terms of due process, this very unusual  
3 desire to give an ex parte order, we are not  
4 parties to any such order, we didn't  
5 participate in any such order, we have no  
6 idea what the scope of any such order is.  
7 And if you think about it contextually,  
8 that's a big deal. Because Federal Rule of  
9 Criminal Procedure 6(e), which relates to the  
10 secrecy of Grand Jury proceedings, is a  
11 narrow rule. It doesn't say, never talk  
12 about anything that there had been an  
13 investigation. It is limited in its scope to  
14 those who are bound by it, which is Assistant  
15 U.S. Attorneys investigating agents who sign  
16 off on a 6(e) letter that they are being  
17 given Grand Jury material. It applies only  
18 to the information that's been obtained by  
19 the Federal Grand Jury that is under seal as  
20 Grand Jury material. But if that material  
21 had a separate preexisting existence, say  
22 that there were documents in the County  
23 Prosecutor's Office that were their records,

1 that are also now 6(e) material because they  
2 were produced in connection with the  
3 litigation, the separate existence, we still  
4 get to have that information. It doesn't  
5 magically get cloaked by Rule 6(e) as  
6 something we can never obtain. What it is --

7 **THE COURT:** Are you talking about  
8 Federal Rule 6(e)?

9 **MS. GUPTA:** Federal Rule 6(e). Federal  
10 Rule 6(e), to begin with, is very narrow in  
11 its scope. And that's what Lynn Buck is  
12 saying in her response. She is, I believe,  
13 in charge of the civil division at the U.S.  
14 Attorney's Office and would be the person to  
15 reach out to about their civil interests. If  
16 they had an interest in this proceeding --  
17 and that's the only person with standing, the  
18 only entity really with standing to voice the  
19 interests of the United States of America in  
20 this proceeding. If they had any interest in  
21 this proceeding, and it sure sounds like the  
22 defense has tried to get them interested in  
23 this proceeding, then they could move to

1           intervene here, they could get involved on  
2           particular issues. The Court might say,  
3           okay, you have an interest, what's your  
4           interest, and we could hash it out. But  
5           that's not what's happening here. What's  
6           happening is an effort to try to go through  
7           some sort of backdoor process to get some  
8           sort of vague, unspecified order that we have  
9           had no voice in, we have no idea what its  
10          scope is, we have no idea what the context  
11          is, give it to the Court ex parte and get a  
12          decision. And that's -- in addition to just  
13          not even being fundamentally fair, it goes  
14          beyond any sense of logic or reason about the  
15          scope of 6(e).

16                 If we are putting people who are not  
17                 involved in a federal investigation, federal  
18                 criminal investigation that was subject to  
19                 6(e), and we are not seeking the Grand Jury  
20                 material that was subpoenaed by a Grand Jury  
21                 or the testimony before a Federal Grand Jury,  
22                 then there is no way that this order could  
23                 apply to anything that we're doing, putting

1 private parties, third parties, defense  
2 lawyers, and asking them about things they  
3 know. Because they are not subject to  
4 Federal Rule of Criminal Procedure 6(e).

5 And so I'm sort of amazed that we are  
6 even having this conversation. Besides the  
7 due process issues of us being cut out of any  
8 voice in whether or not we are able to get  
9 material, the effort to try to leverage some  
10 unspecified order from Judge Oliver in this  
11 proceeding is not for the defendants, with  
12 all due respect, it is for the United States  
13 of America, which controls the Federal Grand  
14 Jury proceedings. They are the ones, if they  
15 have an interest, could get involved here,  
16 could be heard. Typically when that has --  
17 on the rare occasion that that has happened  
18 and when I was an AUSA, from time to time we  
19 would have to be involved in such  
20 conversations where there were third parties  
21 in civil litigation trying to get Grand Jury  
22 material. Typically the way it will happen  
23 is the U.S. Attorney's Office will send a

1 representative down to court and the defense  
2 attorneys, or the party that's seeking the  
3 material, will have an opportunity in camera,  
4 in chambers, as an officer of the court, to  
5 have a conversation with the Court, to have  
6 at least some due process about what's  
7 happening. Maybe that transcript goes under  
8 seal, if it really is discussion of Grand  
9 Jury information. All of the lawyers and  
10 participants in that discussion do so,  
11 subject to a protective order of the Court,  
12 that we are not to disclose those  
13 proceedings. But at least there's a record  
14 of it, even if it's under seal, for further  
15 consideration by appellate courts. Here, no  
16 law is being cited, other than a vague  
17 reference to 6(e). No procedure is being  
18 cited by which this Court can consider  
19 things.

20 And I want to ask the Court to consider  
21 one last thing, which is the conduct of these  
22 depositions. The idea -- you know very well  
23 from your considerable experience that

1           there's really only one proper objection in a  
2           deposition, and that is as to form. As long  
3           as nobody's abusing a witness, we are  
4           permitted to inquire in depositions. And  
5           instead what is happening here is  
6           instructions from our opponents in civil  
7           litigation, you can't ask about that, we're  
8           not going to let you ask about that,  
9           including Ms. Rubright physically leaving a  
10          deposition, cutting short a deposition when  
11          it came our time to question a deponent. All  
12          of a sudden, you can't ask about that, and  
13          leaving. I have -- I mean, in my career, I  
14          thought I had seen everything in depositions.  
15          I had never seen that. And there's no legal  
16          basis for it. Instead what it's doing is  
17          adding to the expense, adding to the  
18          peculiarities of this litigation.

19                 So I would ask the Court, number one,  
20                 not to consider any ex parte document or  
21                 vague references to an order. There's no  
22                 legal authority by which Mr. Raskin is  
23                 offering that or for the Court to consider

1           that. And if there is some sort of  
2           third-party interest here, the third party  
3           can be heard. And we can all hash out  
4           whether the third party should be heard  
5           first, before the third party is heard.  
6           That's the proper procedure. And, otherwise,  
7           would ask the Court to direct the parties to  
8           conduct depositions as they are supposed to  
9           be conducted, which is if they have an  
10          objection, a permitted objection in a  
11          deposition, which is as to form, they should  
12          state it or it's waived; otherwise, they  
13          should permit our inquiries.

14                 Now, if we have a protective order in  
15          this case, which we have been trying to work  
16          out, and the material that's being discussed  
17          is fairly subject to it the protective order,  
18          then they can designate that and we can  
19          challenge that designation. That would be  
20          the normal way to proceed, not with people  
21          leaving depositions, stopping the plaintiff  
22          from asking questions important to the  
23          prosecution of this case. Thank you.

1           **THE COURT:** Mr. Raskin.

2           **MR. RASKIN:** Thank you. First of all,  
3 pretext is not an issue in this case because  
4 this isn't a wrongful termination case.  
5 That's number one. Number two, the only  
6 reason that the plaintiff's counsel knows  
7 about this topic at all is because their  
8 client has disclosed confidential information  
9 to them, which he learned when he was an  
10 Assistant County Prosecutor. Number three,  
11 the sealed order doesn't only -- is not only  
12 limited to Grand Jury proceedings, the sealed  
13 order relates to all documents and  
14 information and prohibits their disclosure.

15           And so, again, I would ask you to just  
16 look at the documents that we have from the  
17 federal court and then you can make whatever  
18 decision you make. But I think making any  
19 decision without looking at these documents  
20 is a decision that's made in a vacuum. And  
21 the Court's order mandated that the county --  
22 that the Mahoning County Prosecutor abide by  
23 it, such that none of the documents, none of

1 the records, none of the investigation be  
2 disclosed. That's why Ms. Rubright walked  
3 out of the room. Because had she stayed in  
4 the room and allowed for those questions to  
5 be asked, by asking the questions and by  
6 gaining the answers, that would have violated  
7 Judge Oliver's order.

8 **THE COURT:** At the risk of getting a  
9 repetitious response, Mr. Raskin, how is it  
10 that Mr. Desmond's counsel were not in any  
11 way permitted to participate in the process  
12 by which Judge Oliver issued this order that  
13 you want me to consider?

14 **MR. RASKIN:** For the same reason that we  
15 weren't either. We contacted the Court and  
16 asked for guidance. Actually my client,  
17 Prosecutor Gains, asked for guidance. And  
18 the instructions from Judge Oliver were that  
19 the U.S. Attorney who had sought the order to  
20 begin with was the entity who had standing to  
21 seek relief from that order. And so we  
22 didn't participate, the plaintiff didn't  
23 participate, the U.S. -- I have a copy of the

1 motion to share with you that the U.S.  
2 Attorney filed with Judge Oliver and a copy  
3 of his order addressing that motion.

4 **MR. CHANDRA:** Your Honor, may I ask  
5 when?

6 **MR. RASKIN:** What we know -- I'm sorry.  
7 Excuse me, I didn't mean to interrupt. All  
8 we know -- what we knew was that we were --  
9 "we" being Mahoning County and the  
10 Prosecutor's Office -- was subject to Judge  
11 Oliver's prior order sealing the record and  
12 requiring confidentiality. So we believed  
13 that by the inquiry, which plaintiff's  
14 counsel could only have learned about from  
15 their client, and he could only have learned  
16 about it in his role as an Assistant County  
17 Prosecutor and member of the -- former member  
18 of the -- assigned to the multi-county task  
19 force. And so we couldn't allow for that to  
20 occur without -- knowing that it would  
21 violate Judge Oliver's order. So --

22 **THE COURT:** What's the date of the  
23 order?

1           **MR. RASKIN:** The original order or the  
2 orders that were newly filed?

3           The original order was filed May 11,  
4 2016. The U.S. Attorney filed a motion with  
5 Judge Oliver on March 15, 2019. And Judge  
6 Oliver issued an order on the same date,  
7 March 15, 2019. It was an ex parte motion  
8 and the order was entered on the same date.

9           **MR. CHANDRA:** Your Honor, may I ask  
10 which AUSA?

11           **THE COURT:** Beg your pardon?

12           **MR. CHANDRA:** May I ask which Assistant  
13 U.S. Attorney was a signatory to that motion?

14           **THE COURT:** Go ahead.

15           **MR. RASKIN:** Sure.

16           **THE COURT:** Answer the question.

17           **MR. RASKIN:** Robert W. Kern.

18           **MR. CHANDRA:** Okay. I know Bob.

19           **THE COURT:** Spell the last name, please.

20           **MR. RASKIN:** K-E-R-N. Robert W.

21           **MS. GUPTA:** Your Honor, I would --

22           **THE COURT:** Ms. Gupta.

23           **MS. GUPTA:** Thank you, Your Honor. I

1 would like to clarify and correct one item  
2 that Mr. Raskin has raised, because he's  
3 consistently said that Mr. Desmond only  
4 learned of this as confidential information.  
5 My understanding is that it was not  
6 confidential information. He learned it as a  
7 witness in that investigation. So, meaning  
8 that whatever information he had would have  
9 been learned as a witness in the  
10 investigation and not by virtue of being  
11 privy to some confidential information. But  
12 separately, we have been asking questions of  
13 witnesses who are, again, not federal agents  
14 and not members of the Mahoning County  
15 Prosecutor's Office. At least so far.

16 And, again, just to point out again that  
17 we have this e-mail from Lynn Buck who has  
18 said those -- it's fine to ask questions of  
19 those individuals, if the U.S. Attorney had  
20 an interest, it would know how to protect its  
21 interests and would come here to speak for  
22 itself.

23 **THE COURT:** I don't think that's what

1 she said based on what you read.

2 **MS. RUBRIGHT:** Thank you.

3 **THE COURT:** What she said is that her  
4 office wasn't going to take any interest.

5 **MS. GUPTA:** No advice or comment  
6 concerning any issues regarding Mr. Solic's  
7 testimony or that of any non-federal officer.  
8 I take that to mean that she doesn't have a  
9 position as to whether we are asking  
10 questions of that witness. Which means that  
11 they are fine with it. If they weren't fine  
12 with it, she would certainly have said so.

13 **MR. CHANDRA:** They are not covered by  
14 Rule 6(e), that's why.

15 **THE COURT:** Mr. Raskin.

16 **MR. RASKIN:** Seems like at this point we  
17 are beating a dead horse. Mr. Desmond  
18 learned that information when he was an  
19 Assistant County Prosecutor. The order was  
20 issued to the Mahoning County Prosecutor's  
21 Office. He was obviously subject to and  
22 required to comply with that information.

23 I listened to Ms. Gupta's reading of

1 Ms. Buck's e-mail. I came away with the same  
2 impression that you came away with, she  
3 wasn't giving instructions one way or  
4 another.

5 And the only other thing I might add is  
6 I don't know the date of that e-mail, but I  
7 do know that the date of that e-mail predates  
8 the motion filed by the U.S. Attorney's  
9 Office and Judge Oliver's order. So whatever  
10 Ms. Buck's opinion was, she didn't know  
11 anything about the U.S. Attorney's motion or  
12 Judge Oliver's order.

13 **THE COURT:** For the record, what was the  
14 date of that e-mail?

15 **MS. GUPTA:** The date of this e-mail is  
16 March 1, 2019. And the depositions occurred  
17 before March 1, 2019. So the depositions  
18 obviously also occurred before this order.

19 **MR. RASKIN:** I don't deny that. My  
20 point simply is that the --

21 **THE COURT:** That the order of the Court  
22 was March 15?

23 **MR. RASKIN:** Correct. And the motion

1 was filed the same date. So it was obviously  
2 before.

3 **THE COURT:** We'll take a recess. I'll  
4 take a look at what we are talking about.  
5 And my first concern is that I'm not -- well,  
6 strike that.

7 Just for the record, does that order  
8 specifically reference me or this case?

9 **MR. RASKIN:** Yes.

10 **MR. CHANDRA:** Your Honor, we object.

11 **THE COURT:** I know you object. Of  
12 course you do.

13 **MS. GUPTA:** Your Honor, we have asked --  
14 in our discovery requests, we have asked for  
15 communications between the Prosecutor's  
16 Office and law enforcement agencies that have  
17 to do with Mr. Desmond. These -- whatever  
18 communication that Mr. Gains got regarding  
19 this, if it has to do with this case, then  
20 it's responsive to our document request and  
21 we have not received those documents.

22 **MR. RASKIN:** Can I be sure I gave you a  
23 copy of everything you should have?

1           **THE COURT:** All right. We are briefly  
2 in recess.

3           **(WHEREUPON, a brief recess was had,**  
4 **after which the proceedings continued as**  
5 **follows:)**

6           **MR. RASKIN:** Your Honor, can I just be  
7 heard for a moment?

8           **THE COURT:** I beg your pardon?

9           **MR. RASKIN:** May I be heard for just a  
10 moment, please?

11          **THE COURT:** Go ahead.

12          **MR. RASKIN:** I would orally move for any  
13 arguments that were made to you on this  
14 subject, as well as any decision that you  
15 make on this subject, be the subject of an  
16 order sealing the record, only for the  
17 purpose -- only available for the purposes of  
18 appeal. That's what we think needs to happen  
19 in order to comply with the federal Court's  
20 order.

21          **MR. CHANDRA:** And we would object to  
22 that, Your Honor, because this is going --

23          **THE COURT:** What's the basis of your

1 objection?

2 **MR. CHANDRA:** Well, the objection is  
3 that Federal Rule of Criminal Procedure 6(e)  
4 doesn't apply to anything we are talking  
5 about. Mr. Desmond has just clarified for us  
6 that the information he became aware of that  
7 is the genesis of the questioning we are  
8 engaged in of these non-federal official  
9 witnesses is information that came to his  
10 attention as a witness. He was approached by  
11 the FBI asking him questions. That's how he  
12 became aware. He was a witness. He didn't  
13 learn of it --

14 **THE COURT:** You don't dispute that  
15 occurred during the period of time that he  
16 was an Assistant County Prosecutor in  
17 Mahoning County?

18 **MR. CHANDRA:** We do not. But what we  
19 are also trying to say is the idea of the  
20 defendants taking a back door to the U.S.  
21 Attorney's Office, apparently, to a different  
22 Assistant U.S. Attorney, and going and  
23 getting a federal order that apparently we

1 just learned before you went into chambers  
2 actually specifically mentions this  
3 proceeding, without us being a party to it,  
4 without us having any voice in it, means that  
5 it's relying on information that was  
6 presented strictly by the defendants for  
7 their own purposes and we know that  
8 information to be false because we know that  
9 Mr. Desmond became aware of this information  
10 not as a signatory to any 6(e) letter, not as  
11 confidential Grand Jury information. And the  
12 reason that the Court should not place any of  
13 this under seal is because we are not seeking  
14 Grand Jury information. So I don't even know  
15 what the order says, because I'm not -- you  
16 know, we are not parties to that federal  
17 order that was procured through this strange,  
18 you know, lack of due process method. But as  
19 somebody who doesn't know what it says and  
20 can only guess at what it says, I can't  
21 imagine that it could say, legitimately or  
22 otherwise, that 6(e), Rule 6(e), the Grand  
23 Jury secrecy rule, now suddenly applies to

1 non-federal witnesses, to people who might be  
2 put in for a deposition, who weren't even  
3 federal officers at the time, that doesn't  
4 make any sense at all. So the idea that we  
5 would place under seal a discussion about  
6 what even the scope of that order could be,  
7 what it would apply to, what it might not  
8 apply to, seems very unfair and it's contrary  
9 to the Rules of Superintendence on the  
10 openness of proceedings. There's just no  
11 legitimate basis for hiding that information  
12 from the public.

13 **THE COURT:** How is it unfair,  
14 Mr. Chandra? It's not unfair. Everybody  
15 that's part and parcel of this particular  
16 discussion is here. It's not like there's a  
17 secret among a bunch of you.

18 **MR. CHANDRA:** Right.

19 **THE COURT:** The only reason for putting  
20 it under seal under these circumstances would  
21 be to avoid a news media or other disclosure  
22 in some premature -- potentially premature  
23 fashion. So what's the harm?

1                   **MR. CHANDRA:** So that the harm is very  
2 serious, Your Honor. Because of the openness  
3 of court proceedings, because of the  
4 abundance of case law and the Rules of  
5 Superintendence, the First Amendment, access  
6 to the courts, the right to access court  
7 information. We don't live in a totalitarian  
8 state where you get to hide court  
9 proceedings. We have to have these narrow,  
10 specific reasons that we put things under  
11 seal, that we hide information from public  
12 scrutiny. And we are then being put in a  
13 position, if this is put under seal, and then  
14 presumably we're ordered not to talk about  
15 it, where we can't even then go out and make  
16 inquiries and try to understand and unravel  
17 what has happened here because this is so  
18 procedurally unusual, Judge. The idea that  
19 the defendants get to go through a back door  
20 and request a federal order based on whatever  
21 one-sided information they have presented,  
22 rightly or wrongly, and that that order then  
23 applies to us as litigants in this proceeding

1 or is even -- that we are even entertaining a  
2 discussion about that is -- without the party  
3 in interest, the United States of America,  
4 coming here and having to appear in court and  
5 justify its position and us then having due  
6 process to respond to that, that is a matter  
7 of intense public concern, Your Honor.

8 And so what I would say is please don't  
9 place it under seal, because there may be  
10 third parties that are now very interested in  
11 this proceeding and want to know why is there  
12 a conversation even being had about keeping  
13 information secret.

14 Now, you know, I've been a party to  
15 federal proceedings as a federal prosecutor  
16 where then, yes, we ask that information be  
17 placed under seal. But we have a rule that  
18 we point to, we say it's Rule 6(e). And we  
19 are talking about the narrow scope of 6(e),  
20 the matters that were obtained by testimony  
21 in front of a Federal Grand Jury. We are in  
22 a position here we don't even know what we  
23 are talking about. We don't even know what

1 the subject matter of that order is, what  
2 information was presented. And so to take a  
3 situation that is this uncertain, and to put  
4 everybody in a position where we can't talk  
5 about it, when we are the most handicapped in  
6 our ability to argue any of this, I think  
7 really does prejudice to the idea of the  
8 openness of court proceedings. That's the  
9 harm, Your Honor.

10 **THE COURT:** What's the easy way to fix  
11 your problem, Mr. Chandra?

12 **MR. CHANDRA:** I think the easy way to  
13 fix -- the easiest way to fix the problem,  
14 and I don't know if this is where the Court  
15 is going, is to simply deny the request  
16 that's been made by the defense, without  
17 prejudice to any third party, within a  
18 reasonable period of time, say two weeks,  
19 that has standing on that particular issue,  
20 namely the United States of America, seeking  
21 relief from this Court, that we then get due  
22 process and an opportunity to discuss.

23 Here's my concern. And I know Assistant

1 U.S. Attorney Bob Kern. I served with him.  
2 I think he's a great federal prosecutor and  
3 honorable guy. But I can't imagine, given my  
4 knowledge of how that process works, that if  
5 he went and got an ex parte order from Judge  
6 Oliver that is directed, as we have learned  
7 now specifically at this proceeding, that  
8 that would not have been based upon a  
9 misimpression about what was actually  
10 happening in those depositions. All that  
11 was -- and talk about the left hand not  
12 knowing what the right hand is doing, Lynn  
13 Buck's reaction to a question generated by  
14 Ms. Gupta was generated because Patty  
15 Rubright, our esteemed opposing counsel,  
16 said, you can ask U.S. Attorney's Office, ask  
17 Lynn Buck why we say you shouldn't be able to  
18 get into these matters. And when Sandhya  
19 explains the facts and says we are deposing  
20 this non-federal officer, Ms. Buck's  
21 reaction, once she is fully informed, is we  
22 don't have any interest in that, we don't  
23 have any comment on that. Right?

1           So now we have a situation where,  
2           apparently dissatisfied with that result and  
3           never communicating in that e-mail chain,  
4           without informing us, they go off to a  
5           different Assistant U.S. Attorney, Bob Kern,  
6           in the criminal division, tell him God knows  
7           what, that then results in this order. We  
8           haven't even seen the motion. I don't know  
9           if the motion was presented to the Court  
10          along with the order. But we don't know what  
11          facts were represented to Judge Oliver that  
12          may be false facts, false allegations about  
13          what we are actually seeking.

14                 **THE COURT:** So why can't you go to Judge  
15          Oliver and ask for that answer?

16                 **MR. CHANDRA:** Because I don't even have  
17          a case number. And because Judge Oliver's  
18          position may be --

19                 **THE COURT:** You will have a case number.

20                 **MR. CHANDRA:** Okay. You mean, there's a  
21          case number on the order?

22                 **THE COURT:** There certainly is.

23                 **MR. CHANDRA:** Okay. Yeah, what I don't

1 know is -- well, that's a great question,  
2 Your Honor. Let me process that for a  
3 moment. It seems to me that the decision to  
4 be made is a decision by this Court about the  
5 propriety of questions occurring in  
6 depositions under this Court's jurisdiction  
7 and whether they are relevant to and proper  
8 for consideration in this matter. Right?  
9 That's the threshold question. That's your  
10 decision.

11 The two bases by which federal  
12 jurisdiction could be asserted over this  
13 proceeding would be under the Federal All  
14 Writs Act, which is very rarely exercised to  
15 interfere with state court proceedings.  
16 Judge Oliver doesn't even have jurisdiction  
17 over us. He doesn't -- his order can't apply  
18 to us because we are not parties to any such  
19 order. And so for Judge Oliver to kind of  
20 issue an order into the blue, I don't even  
21 know who he's ordering to do what, but how  
22 could it possibly apply to us? And you have  
23 your own authority and jurisdiction and so

1           how can he be issuing an order to you?  
2           Federal jurisdiction doesn't work like that.  
3           We have a Constitution that narrowly  
4           subscribes federal jurisdiction.

5           So the only way there could be an order  
6           that applies to us is if we are parties to  
7           that order or if that order comes from this  
8           Court exercising its jurisdiction with  
9           whatever third party that's interested coming  
10          before this Court. That's the proper  
11          procedure. I have literally never heard of  
12          any procedure where an AUSA tries to go to  
13          the federal court ex parte, backdoor, without  
14          the people that they are trying to order to  
15          apparently not do something being at the  
16          table or being involved in that process. It  
17          is an overreach of federal jurisdiction. And  
18          the only way it can occur is based upon  
19          misinformation being presented to the federal  
20          court via the defense, via the U.S.  
21          Attorney's Office, and miscomprehension of  
22          what's actually occurring here.

23                 So what I am saying in remedy, Your

1 Honor, is not for us to have to go intervene  
2 in some federal proceeding that we never  
3 wanted any part of, it's for anybody who  
4 wants you to undertake an order to come here.  
5 And if they don't, that speaks volumes. If  
6 they don't come here and represent what they  
7 think is going on, so that we can then  
8 correct any misimpressions, that speaks  
9 volumes. But the Court shouldn't act based  
10 upon some backdoor-obtained federal order,  
11 especially when we are representing to the  
12 Court, as officers of the court, we are not  
13 asking for 6(e) information under the federal  
14 rules. We are just not asking for that. And  
15 you dealt with the Ohio Rule 6 issues in a  
16 separate proceeding and we understand and  
17 respect the Court's order. This has nothing  
18 to do with that. This is about whether we  
19 can ask questions.

20 And I can clarify one issue for you, if  
21 this wasn't clear earlier. We used the word  
22 pretext earlier as a kind of shorthand for  
23 credibility and also the elements of some of

1 our other claims. What Mr. Desmond's  
2 position is, that he went to defendant Paul  
3 Gains with information that he obtained as  
4 part of being asked questions as a witness  
5 about potential misconduct in the office. He  
6 went to Paul Gains in an episode similar to  
7 the one at issue in this case, and Paul Gains  
8 never responded to him, never got back to him  
9 on it. So we are trying to use that episode  
10 to show, number one, there's an  
11 intentionality and a recklessness on these  
12 defamation claims, that they know that  
13 Marty -- that these defendants know that  
14 Marty Desmond is a conscientious prosecutor  
15 who brings potential misconduct issues to the  
16 attention of the prosecutor, that their  
17 explanations are not credible, that they are  
18 pretextual. They are shifting explanations  
19 for why they did what they did. The excuses  
20 they have offered don't have any weight.  
21 That's why it's important for discovery  
22 purposes. And yet we are not saying to  
23 anybody, tell us something that is within the

1           ambit of Federal Rule of Civil Procedure  
2           6(e). It's a very narrow ambit. We are not  
3           saying, tell us what somebody said to a Grand  
4           Jury. We are not saying, give us a document  
5           that has been subpoenaed before a Federal  
6           Grand Jury that exists for purposes of that  
7           Grand Jury proceeding only and doesn't have  
8           an independent existence. That's not what we  
9           are asking for. And if the federal court is  
10          under that impression, then it is under that  
11          impression because of misleading arguments  
12          made by the defense and the Court shouldn't  
13          entertain it for a moment. The Court should  
14          follow the proper procedure, saying, third  
15          parties, if you're interested, this is the  
16          place to come. Don't go try to assert  
17          jurisdiction over this proceeding through an  
18          ex parte process where there's no due process  
19          for the plaintiff.

20                 So that's why we would say this  
21                 shouldn't be under seal, the fact that the  
22                 efforts here should be very transparent to  
23                 the public.

1           **THE COURT:** Mr. Raskin.

2           **MR. RASKIN:** Judge, I made all the  
3 arguments that I think are required to be  
4 made.

5           **THE COURT:** The bottom line here is,  
6 irrespective of the content of the  
7 documentation you've presented to me, there's  
8 no order to me on this.

9           **MR. RASKIN:** There's an order --

10          **THE COURT:** I don't have a federal judge  
11 telling me what to do here.

12          **MR. RASKIN:** Correct. There's an order  
13 allowing us to share with you information  
14 which was previously ordered to be  
15 confidential so that you are able to rule on  
16 the propriety of that examination.  
17 Otherwise, we couldn't have shared that with  
18 you.

19                 And I guess the only other thing that I  
20 would add is, I've heard "backdoor" about 15  
21 times. And we had no one from my office, not  
22 Ms. Rubright, nor I, had any communication  
23 with the U.S. Attorney's Office. We simply

1           contacted Judge Oliver's chambers for the  
2           purpose of saying what do we do, and the  
3           response was the U.S. Attorney's Office asked  
4           for the order, the U.S. Attorney's Office has  
5           standing to request relief from that order.

6           **MR. CHANDRA:** Your Honor, if I may.

7           **THE COURT:** One last time.

8           **MR. CHANDRA:** Sure. Well, then the  
9           backdoor was to Judge Oliver. The  
10          appropriate -- if one were trying to be fair  
11          in this proceeding --

12          **MR. RASKIN:** That is absurd.

13          **MR. CHANDRA:** -- as counsel, one would  
14          say we have an issue here, we think we have  
15          an issue here. In good faith, why don't we  
16          call Judge Oliver together and discuss this.  
17          But the call to Judge Oliver and whatever  
18          information was communicated there about what  
19          was happening here, which was apparently  
20          one- -- well, obviously one-sided, because we  
21          weren't parties to it, then resulted in some  
22          sort of a U.S. Attorney's Office effort to  
23          get an order authorizing release of a prior

1 order to you. Okay. Now, if it's that prior  
2 order we are talking about, we are not  
3 parties to that order. Nor are you. It  
4 orders us to do nothing.

5 So what is happening here? Let's go  
6 back to basics. It's just we are asking  
7 questions in a deposition, what does a  
8 witness know. And then suddenly it's a  
9 big -- no pun intended -- federal case. Oh,  
10 no, you can't do that, you can't ask that.  
11 There is no provision under Ohio law, or even  
12 federal law for that matter, that permits  
13 that to happen in a deposition. If there was  
14 an issue with the questioning, the questions  
15 happen, they are out there, and then you get  
16 to rule on evidentiary objections later.  
17 That's how it works. We all know that. We  
18 are all experienced lawyers in this  
19 courtroom. So to now create this whole new  
20 procedure where one party calls a federal  
21 judge, somehow that engineers an order being  
22 issued that now this Court is being asked to  
23 take seriously, with us having no information

1 about any of that, that's just really not  
2 fair. And so this kind of unusual proceeding  
3 should never be under seal.

4 **THE COURT:** I don't dispute,  
5 Mr. Chandra, that the proceedings before me  
6 at the present time are unusual. I would,  
7 however, clarify for the record that what's  
8 actually occurred is that back in May of  
9 2016, and pursuant to an application of the  
10 U.S. Attorney's Office, there was issued an  
11 order by a Federal District Court in  
12 conjunction with various Grand Jury  
13 proceedings. The Federal District Court in  
14 that case being Judge Solomon, as well as  
15 this case. And that date is May 11, 2016.  
16 As a consequence of proceedings that have  
17 occurred in this case, an additional  
18 application was filed under seal and ex parte  
19 with Judge Solomon -- with Judge Oliver. I  
20 said Solomon. Solomon Oliver, Jr., U.S.  
21 District Judge for the United States District  
22 Court for the Northern District of Ohio  
23 Eastern Division, on May 15 of 2019, and was

1 followed by an ex parte order under seal by  
2 Judge Oliver, only to the effect that the  
3 defendants in this case were authorized to  
4 share with this Court the May 11, 2016 order  
5 and application therefore, which was a,  
6 essentially, secrecy order under Federal Rule  
7 6(e), and its various subparts. And that  
8 what's now before me is whether the questions  
9 by Ms. Gupta of certain witnesses in this  
10 case are technically in violation of the  
11 secrecy order of Judge Solomon from May 11 of  
12 2016, and based not upon any event occurring  
13 in this case, but rather upon Grand Jury  
14 secrecy items from prior to the May 11, 2016  
15 order.

16 To that extent, I have reviewed the  
17 submitted documentation. I consider myself  
18 not at liberty to divulge the contents of  
19 those various documents. Instead, it is my  
20 responsibility as administrator of this  
21 particular case, that is the civil case  
22 before me, so-called 18 CV 00771, as opposed  
23 to any orders of confidentiality or made

1 under seal in Case Number 16-08-01-MFC by  
2 Judge Oliver on May 11, 2016. And the  
3 Court's conclusion in that regard is that the  
4 inquiries made by -- via deposition based  
5 upon the representations contained at this  
6 time are not subject to any violation of  
7 Judge Solomon's orders and that they are, in  
8 fact, appropriate inquiries so long as they  
9 do not specifically inquire of any individual  
10 the content of Grand Jury testimony given by  
11 that individual or any other individual in  
12 the conduct of federal investigation in the  
13 order just indicated.

14 The order currently issued by Judge  
15 Solomon is under U.S. DJ Number 16-08-02-MFC.  
16 Why the difference in case number between the  
17 March 15, 2019 order to which I just referred  
18 and the May 11 -- I'm sorry, March 15, 2019  
19 order and the May 11, 2016 order, I do not  
20 know. However, the Court's ruling is that  
21 those depositions may proceed, that the  
22 answers to those depositions are appropriate,  
23 that if in point of fact at some later time

1 they become subject to a protective order  
2 upon application of any of the parties to  
3 this action, so be it. But I am not formally  
4 acting on any order of Judge Solomon in  
5 connection with these proceedings.

6 To the extent that it is asserted that  
7 there is a violation of some federal court  
8 order, I suggest that whoever is concerned  
9 about it take it up with the federal judge,  
10 not with me.

11 Any questions, Mr. Chandra?

12 **MR. CHANDRA:** No, Your Honor.

13 **THE COURT:** Ms. Rubright, Mr. Raskin?

14 **MS. RUBRIGHT:** No, Your Honor.

15 **THE COURT:** Thank you.

16 Now, let's return to the other issue.  
17 Well, one final thing. While I have no need  
18 to keep this record under seal and I do not  
19 intend to place this record under seal, I do,  
20 in fact, believe that the in camera  
21 consideration of the documents provided by  
22 Mr. Raskin's office should at this time be  
23 returned to that office and the Court takes

1 no further position with respect to the  
2 content of those documents.

3 **MR. RASKIN:** Thank you.

4 **THE COURT:** Thank you, Mr. Raskin. Let  
5 us now return then to the specific --

6 **MR. CHANDRA:** Your Honor, if I may.

7 **THE COURT:** I'm sorry.

8 **MR. CHANDRA:** I'm sorry. Just out of an  
9 abundance of caution, and we understand the  
10 Court has made that decision, but we want to  
11 just respectfully lodge our objection and  
12 request that the documents that were provided  
13 to the Court ex parte be made a part of the  
14 record in this case. And we understand if  
15 the Court wants to place those under seal,  
16 but we would object to that as well. We just  
17 want to make sure the record in this case is  
18 preserved, certainly in case this issue winds  
19 up becoming an issue later.

20 **THE COURT:** Mr. Raskin, bring them back.  
21 For the sake of simplification, I'll simply  
22 grant that request. Those documents having  
23 been referred to by the Court will be placed

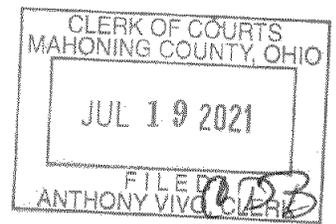
1 under seal and maintained as such by the  
2 court reporter. To the extent that, again,  
3 anyone wishes to challenge the content of  
4 those documents or suggest that those  
5 documents have some impact in this case will  
6 have to do so in the appropriate forum; or,  
7 in the event that it's asserted that the  
8 inquiries being made by the plaintiff in  
9 conjunction with any witness called to  
10 testify on deposition or later at trial are  
11 in violation of some federal order, it will  
12 be necessary to take it up with the federal  
13 court, not with this one.

14 Let's return, if we may, to the issues  
15 that I thought we were here to begin with.

16 Ms. Gupta.

17 **MS. GUPTA:** Yes, Your Honor. Thank you.  
18 The second issue that I have on my list is  
19 that plaintiff has issued subpoenas duces  
20 tecum to employees of the Prosecutor's  
21 Office, line employees, Assistant County  
22 Prosecutors, a handful of them, from whom we  
23 are seeking records on their personal devices





IN THE COURT OF COMMON PLEAS  
MAHONING COUNTY, OHIO

STATE OF OHIO	)	<b><u>CASE NO. 19-CR-109(A)</u></b>
	)	
PLAINTIFF	)	JUDGE JOHN M. DURKIN
	)	
VS.	)	
	)	<b><u>JUDGMENT ENTRY</u></b>
LAVONTAE KNIGHT	)	
	)	
DEFENDANT	)	

This matter came on for hearing on June 18, 2021, on Defendant Lavontae Knight's Motion to Dismiss and Motion to Disqualify Counsel and the State's Motion to Strike, Opposition to Defendant's Motion to Dismiss and Motion to Disqualify. The Defendant seeks this relief alleging *Brady* violations, and asserting that Attorney Dawn Cantalamessa, the assistant prosecutor assigned to this case, violated Prof. Cond. R. 3.7(a), and that she is biased. That hearing continued on July 16, 2021, where this Court also considered Defendant Lavontae Knight's Motion for Transcription of Grand Jury Proceedings, his Motion to Reconsider Court's Denial of Motion to Disqualify Counsel and Motion to Reconsider Past Conduct of Counsel pursuant to *Brady* violations.

The Defendant withdrew the Subpoenas Duces Tecum. The Court overruled the Motions to Reconsider and overruled the Defendant's Motion to provide a transcript of the Grand Jury proceeding from April 4, 2019. Finally, after reviewing Detective Lambert's personnel file, which was also subject to a subpoena duces tecum, this Court determined that there was no *Brady* or *Giglio* material that would require disclosure to the defense. (See Record from July 16, 2021 hearing).



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Turning to the facts of this case, Joshua Donatelli was shot and killed on October 25, 2018, in Youngstown, Ohio. An eyewitness account of the murder indicated that there were two individuals who arrived at a house for a drug transaction. During the transaction, one of the individuals pulled out a gun and shot Donatelli to death. Through its investigation, Youngstown Police identified George Gutierrez as one of the suspects involved in the murder. He was subsequently indicted by the Mahoning County Grand Jury on February 8, 2019, on one count of involuntary manslaughter, one count of attempted possession of cocaine, and one count of possessing criminal tools.

On April 2, 2019, Gutierrez provided a proffer to the State of Ohio naming the defendant, Lavontae Knight, as the shooter. The Mahoning County Grand Jury returned a superseding indictment on April 4, 2019, charging Gutierrez with the same three counts, and charging Lavontae Knight with two counts of aggravated murder, one count of murder, one count of aggravated robbery with firearm specifications attached to each count, one count of attempted possession of cocaine, and one count of having weapons while under a disability.

This case has been scheduled for trial on multiple occasions but has been continued for various reasons, including the COVID-19 pandemic, the Defendant's Request for an Eyewitness Identification Expert, and continuances that were caused by the prosecutors' failure to provide the co-defendant's statement and failure to provide exculpatory evidence in a timely fashion.

The state concedes that the proffer of the co-defendant, Gutierrez, should have been timely provided to the defense. However, the state asserts that this late disclosure

did not violate *Brady* or the defendant's due process rights, as the defendant cannot point to any prejudice or harm that he suffered. Once the proffer of Gutierrez was provided to the defense, this Court granted the Defendant's Motion to Continue the Jury Trial from August 26, 2019, to October 15, 2019, and, as a result, the late disclosure did not affect the outcome of the trial.

The remaining two bases for the defendant's motion involve the claim that Attorney Cantalamessa (hereinafter referred to as Cantalamessa) is an essential witness, and that she has demonstrated bias against the defendant, both of which require her removal as the prosecutor in this case.

Initially, this Court finds that Cantalamessa cannot be called as a witness during trial, and that she is not an essential witness. Evidence Rule 410(A) (5) expressly states that any statements made during Crim. R. 11 plea negotiations are inadmissible at trial. As a result, the defendant's attempt to subpoena Cantalamessa to testify regarding the offer that she extended to the co-defendant is impermissible. Additionally, defense counsel was able to fully cross-examine Gutierrez in a deposition taken on October 21, 2020, in the event he is unavailable for Knight's trial, so Cantalamessa is not the only individual who possesses the necessary information the defense would attempt to introduce at trial.

The defense also asserts that Cantalamessa is an essential witness regarding the facts surrounding Amanda Johnson's identification of Lavontae Knight and the subsequent investigation conducted by Detective Lambert. At the July 16, 2021 hearing, the State of Ohio represented to this Court that although they intend to call Amanda Johnson to testify that she was present at the time of the shooting, they would not use her

as an identification witness against Lavontae Knight. As a result, Cantalamessa is not an essential witness, and the defendant's motion to disqualify Cantalamessa on that basis is overruled.

The state and the defense have addressed the issue of Cantalamessa's potential violations of disciplinary rules. The state asserts that any potential violation of a disciplinary rule is a matter for the Board of Professional Conduct to ultimately consider. However, there are rules of professional conduct that are relevant to this Court's determination as to whether Cantalamessa's conduct resulted in actual prejudice to the defendant, or otherwise impacted the integrity of this specific case.

So what is prejudice or actual harm? It is well settled under *Brady* and its progeny that prejudice is measured by asking whether the conduct or violation will affect, or already has affected, the outcome. In *United States v. Bagley*, the Court held that the test for prejudice in the *Brady* context is "a reasonable probability that, had the favorable evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. 667, 682 (1985). Additionally, the defendant bears the burden of establishing actual prejudice.

This outcome-based approach to prejudice is typically applied via appellate review or through habeas relief. It is often difficult for a trial court to make a finding of actual prejudice as the outcome of the trial is not yet known. As a result, trial judges are limited in any remedial action they can take to prevent or sanction conduct that otherwise violates procedures established by case law or rule.

However, a constitutional analysis is not the only source or means that regulate the conduct of trial counsel. In the area of criminal procedure and discovery, the Ohio

Rules of Criminal Procedure and local rules of court impose disclosure obligations on the parties, and the Ohio Rules of Professional Conduct also impose obligations on trial counsel, and those obligations are sometimes more demanding than the constitutional floor set by the *Brady* doctrine.

Specifically, Rule 16 of the Ohio Rules of Criminal Procedure requires the prosecuting attorney, upon receipt of a written demand for discovery by the defendant, to provide copies of any written or recorded statement of a co-defendant. Rule 9 of the Mahoning County Rules of Criminal Procedure require the prosecutor to give to defense counsel all witness statements and all statements of co-defendants. Finally, Rule 3.8 of the Ohio Rules of Professional Conduct governs the special responsibilities of a prosecutor.

The Supreme Court of Ohio's Commission on Professionalism has addressed the conduct of prosecutors and defense attorneys stating that "the integrity of our criminal justice system depends, in large part, upon the professionalism of the lawyers who prosecute criminal matters on behalf of the state and the defense attorneys who defend the accused. In a criminal matter, the rights of the victim, the protection of the public, and the liberty of the defendant are at stake. Considering the importance of these interests, perhaps nowhere in the practice of law is it more important for attorneys to act with professionalism and to serve our system of justice honorably." The Supreme Court of Ohio's Commission on Professionalism.

Although advisory in nature, Ohio's Commission on Professionalism provides valuable insight and guidance on the responsibilities and duties of a prosecutor:

- "Prosecutors should remember that their job is not to win, but to help administer justice;

- that the power of the state is not personal to an individual prosecutor and that they should always use prosecutorial power judiciously, and with humility;
- that prosecutors should remain in control of their case and remember that they, not the police, not the investigator, and not the victim, are the person in charge; that their client is the government, and that their ultimate goal is the furtherance of justice;
- that prosecutors should periodically and regularly review their case from the point of view of the defense. This practice will help provide exculpatory evidence in a timely fashion.” The Supreme Court of Ohio, Conduct of Prosecutors and Defense attorneys; The Commission on Professionalism.

Turning to the instant case, the defendant filed a Motion to Sever Lavontae Knight from the co-defendant, George Gutierrez. The State of Ohio opposed that motion. The memorandum in opposition, which was filed by Cantalamessa, states that “the statement of Co-defendant Gutierrez are not incriminating to Defendant Knight. He simply says he did not commit a murder or a robbery. He does not implicate Defendant Knight in any of these statements.”

At the hearing on the Defendant’s Motion to Sever held on December 3, 2019, Cantalamessa stated, “Your Honor, just like I said in my motion, he (Gutierrez) doesn’t say his guy did it (meaning Knight). He said I was there. I didn’t shoot. The other witness who was at the scene says there is two guys. That’s all he says. *He never says it’s Lavontae Knight* (emphasis added). He only says I didn’t do the shooting. So it’s not prejudicial joinder.” (December 3, 2019 hearing).

This Court previously noted that Gutierrez gave a proffer on April 2, 2019. His counsel, Attorney Doug Taylor, was present along with Cantalamessa and Assistant Prosecutor Michael Rich. In response to questions from Attorney Rich, Gutierrez stated that Lavontae Knight pulled a gun out and shot Donatelli.

The state in their Motion to Strike/Opposition to Motion to Disqualify states that “the defense takes Cantalamessa’s statements at that hearing out of context.” This specific issue was addressed at the July 16, 2021 hearing. The evidence before this Court is that Guitierrez’s initial statements to Detective Lambert did not mention Lavontae Knight as the shooter. However, Guitierrez’s last statement (proffer) to Cantalamessa and Attorney Rich leaves no doubt as to who the shooter was. The state has conceded that the proffer should have been timely disclosed to the defense, but still maintains that Cantalamessa’s representation to the Court was not a false statement of fact, because she was only arguing the Motion to Sever the defendants’ trial, and that the proffer could not be introduced in evidence because Defendant Guitierrez had not accepted the Criminal Rule 11 Agreement and had not plead guilty.

Candidly, this Court finds that position untenable. Cantalamessa knew that there was a statement of a co-defendant that named Lavontae Knight as the shooter. Her obligation under Criminal Rule 16 was to disclose that statement. The issue of the admissibility of that statement is a separate and distinct matter. If Cantalamessa had a duty to disclose that statement, then she also had a duty under the Code of Professional Conduct to advise the Court and Defendant Knight that Guitierrez had made a statement naming Knight as the shooter. Cantalamessa’s statement that “he never says it’s Lavontae Knight” was a false statement of fact, in violation of Rule 3.3 of the Ohio Rules of Professional Conduct.

Turning next to Amanda Johnson, the eyewitness of the shooting, Detective Lambert conducted an interview of Amanda Johnson on January 9, 2019, and showed her a photo array that included Defendant Knight. Amanda Johnson was unable to pick

Knight out during that photo array. On December 3, 2019, at the same hearing that the Court considered the Motion to Sever, defense counsel raised concerns about the lack of evidence regarding Amanda Johnson and her identification of Lavontae Knight. Attorney Betras stated that there is nothing “tying my client to this crime except an eyewitness who sees my client on TV. Now there is no police report saying this. They don’t do a photo lineup. There’s nothing done by law enforcement. There is only Attorney Cantalamessa’s representation that Amanda Johnson called Cantalamessa and said she saw the defendant, Lavontae Knight, on television regarding another homicide, and identified him as the person who shot Donatelli.” (December 3, 2019 hearing, beginning on p. 10).

Throughout the course of these proceedings the defense continuously requested additional evidence from the state regarding this eyewitness. Cantalamessa repeatedly advised the defense and this Court that there was no additional evidence to disclose. Finally, on May 4, 2021, the defense was advised that there had, in fact, been a photo array shown to Amanda Johnson and that she could not identify Defendant Knight as the shooter.

The state has asserted that Cantalamessa was unaware of that photo array until she spoke with Detective Lambert immediately prior to the May 4<sup>th</sup> hearing. Lambert was called by the state as a witness at the July 16, 2021 hearing, and he confirmed the conversation he had with Cantalamessa in May. However Lambert also testified that he had personally delivered the photo array and interview of Amanda Johnson to the Mahoning County Prosecutor’s office in January of 2019.

The state asserts that no *Brady* violation occurred. Although the outcome of this

trial is not yet known, Cantalamessa's conduct has impacted these proceedings. She made a false statement of a material fact to this Court. She failed to timely provide the co-defendant's proffer to Defendant Knight. She failed to periodically and regularly review her case file. This failure, especially given the defendant's repeated requests for additional evidence concerning the eyewitness, can best be characterized as a careless indifference to ascertaining the truth. Had Cantalamessa called Detective Lambert earlier, she would not have been surprised to discover, on the eve of the latest trial, that a photo array had been shown to Amanda Johnson and that Detective Lambert had delivered that exculpatory evidence to the prosecutor's office over two years earlier. Additionally, although this issue is not before this Court, this exculpatory evidence should have been provided to the co-defendant prior to his entering a plea of guilt.

To leave this conduct unchecked would undermine the integrity of our system of justice. Achieving fair outcomes is perhaps the single most important function of criminal proceedings, and the key ingredients of a fair process should extend to the innocent and the guilty alike.

Although counsel for the defense requests the disqualification of Cantalamessa due to *Brady* violations, *Brady* is not the only remedy available to a court, especially where the integrity of the proceedings have been impacted. In fact, a trial court has power to disqualify a lawyer from participating in a case for ethical violations, as part of the Court's inherent power to regulate conduct before it. *State Emp. Relations Bd. v. Cleveland*, 106 Ohio App. 3d 128, 665 N.E.2d 693 (8<sup>th</sup> Dist. Cuyahoga County 1995).

The Defendant's Motion to Disqualify Attorney Cantalamessa from prosecuting this case is sustained.

The Defendant's Motion to Dismiss the Indictment is overruled.

7/19/21

DATE:



JUDGE JOHN M. DURKIN



**DAVE YOST**  
OHIO ATTORNEY GENERAL

Constitutional Offices Section  
Office: 614-466-2872  
Fax: 614-728-7592

May 24, 2019

*Via email to Sandhya.gupta@chandralaw.com*

Sandhya Gupta  
Chandra Law Firm, LLC  
1265 W. 6th Street, Suite 400  
Cleveland, Ohio 44113

Re: Daniel Kasaris Subpoena

Dear Ms. Gupta,

Our office is in receipt of the subpoena issued to Senior Assistant Attorney General Daniel Kasaris on May 17, 2019, in the matter of *Desmond v. Gains*, Mahoning Cty C.P. No. 18-cv-771. The subpoena is for the production of documents and requests production by May 31, 2019. This letter, along with the attached documents, constitutes Assistant Attorney General Kasaris's response to the subpoena.

Document Request 1 seeks “[a]ll records . . . from January 1, 2016 to the present, regarding Martin Desmond, Paul Gains, Linette Stratford, Nicolas Modarelli, Dawn Cantalamessa, Shawn Burns, and other Mahoning County assistant prosecutor, Attorney James Wise, Scott Cochran, and/or Lynn Maro, or otherwise regarding the claims in *Desmond v. Gains, et al.*, 18-cv-771 (Mahoning C.C.P.)” This request is either vague, overbroad, or both.

To the extent this request seeks documents relating to *Desmond v. Gains*, the request is vague. Assistant Attorney General Kasaris is not a party to that lawsuit, is not a witness, and has no knowledge of the claims being made by the parties. Accordingly, he is unable to review his records to determine if they relate to the case. Furthermore, expecting Assistant Attorney General Kasaris to review the pleadings to discover the claims and defenses in the case and then to attempt to discern whether any of his documents would relate to those claims and defenses is inappropriate and creates an undue burden.

To the extent this request seeks any document that relates in any way to the listed individuals, regardless of subject matter, the request is overbroad and would implicate privilege issues. Assistant Attorney General Kasaris is an attorney in the Office's special prosecutions section. Therefore, he prosecutes criminal cases throughout the State, which requires him to communicate with county prosecutor's offices, including the Mahoning County Prosecuting Attorney's Office. These communications regarding criminal cases seem unlikely to be relevant or even likely to lead to relevant information in a civil matter between Mr. Desmond and

Mr. Gains. Furthermore, requiring Assistant Attorney General Kasaris to review all of his cases over a two-and-half-year period, redact any privileged information, and then produce those documents within a two week period also is unreasonable and creates an undue burden.

If you could provide more detailed document requests that would enable Assistant Attorney General Kasaris to more readily ascertain the responsive documents, we would be able to run searches for those documents and produce them. However, at this time, the request is too vague and overbroad to allow for an effective search.

Assistant Attorney General Kasaris was able to search for communications “with defense counsel in *Desmond v. Gains*” and for documents responsive to Request 2. The documents responsive to these requests are attached with this communication.

Please feel free to contact me if you would like to discuss this matter further.

Very respectfully yours,

*Tiffany L. Carwile*

Tiffany L. Carwile  
Senior Assistant Attorney General

**From:** Daniel Kasaris  
**To:** ["Stratford, Linette"](#)  
**Cc:** [Patricia A. Rubright](#)  
**Subject:** RE: Contact Rubright  
**Date:** Wednesday, April 03, 2019 11:30:00 AM  
**Attachments:** [Desmond Memo.doc](#)

---

Here you go  
Thx  
dan

-----Original Message-----

From: Stratford, Linette [<mailto:LStratford@mahoningcountyoh.gov>]  
Sent: Monday, March 11, 2019 10:59 AM  
To: Daniel Kasaris  
Cc: Patricia A. Rubright  
Subject: Contact Rubright

Sent from my iPhone

MEMO: TO FILE

FROM: DAN KASARIS

DATE: FEBRUARY 14 2019

Matt Donahue and Steve Schumacher my former bosses authorized me to write this memo and to forward it to Mahoning County Prosecutor Paul Gains.

On or about August of 2017 I received a call from my Section Chief Matt Donahue asking me if I would handle a matter involving Attorney Scott Cochran in Mahoning County. I do not know Scott Cochran; I have never met Scott Cochran. I did know of Scott Cochran and was aware that he had been indicted by the Federal Government, went to trial which ended in a mistrial. I knew of Scott Cochran through FBI Agent Deanne Hassman who was the case agent on Cochran's Federal mistried case as well as a case of mine, State v. McNalley at al. I agreed to look at the matter. I understood that the matter I was being asked to look at involved Attorney Cochran being involved with a prostitution ring, representing a prostitution ring and possibly trading sex for legal representation.

I met Marty Desmond at the Mahoning County Drug Task Force in August or September of 2016 with Assistant Ohio Attorney General Chris Stickan to learn about the case. Desmond laid out a large conspiracy involving Prosecutor Paul Gains, staff members and defense attorneys to both myself and Chris Stickan. The conspiracies were not related to the issue of whether or not Cochran was involved with prostitution of involved in the prostitution criminal enterprise, rather it offered a theory as to why Paul Gains would not prosecute Scott Cochran for alleged criminal conduct.

On a piece of paper Marty Desmond drew circles with each circle representing a conspiracy. The conspiracy was:

1. Nick Modarelli a Senior Assistant Mahoning County Prosecutor and friend of Prosecutor Paul Gains was shaking down Defense attorneys at the Austintown County Court for Political Donations in 2012 and that Scott Cochran was aware of the conduct.
2. The 2012 Primary Prosecutor election according to Desmond was the most corrupt in Mahoning County History. (I am a native of Youngstown and am well aware of Youngstown, Ohio's history and found that statement hard to believe and I told Desmond that) Desmond laid out that Cochran was involved in assisting Gains to get reelected and did release information damaging to Gains' opponent shortly before the Primary Election and that information played a huge role in Gains winning the primary. I was aware of the subject matter Desmond was discussing and did agree that the release of that information may have substantially helped Paul Gains win the primary election. Desmond also stated that Modarelli wrote a character letter to Cochran's federal sentencing judge in the matter mentioned above on county letterhead asking the Judge not to send Cochran to federal prison. I was aware of such letter and of Modarelli's conduct. I agreed with Desmond that it was a mistake and not appropriate for Modarelli to write the letter and to do it on County Prosecutor letterhead. Desmond asserted that Gains was going to wash

the Cochran case away as a favor to Cochran from Cochran assisting Gains to win his re-election. I assured Desmond that that would not happen.

3. Attorney Lynn Maro and Attorney John Juhasz represented Cochran in the Prostitution matter. Desmond alleged that there was a case pending in front of Judge Jack Durkin in the Mahoning County Common pleas court that he was involved in and that the witness list in the matter was marked "counsel only" by him and that Attorney Maro had shared the witness list with her client in the case in Judge Durkin's courtroom and that as a result her client had a witness killed in another State and that Gains was protecting Lynn Maro from being prosecuted for the witness being killed because she was Scott Cochran's attorney. Criminal Rule 16 permits prosecutors to designate a discovery document "Counsel Only" so that only the attorney for the defendant may view the document. Once "Counsel Only" is affixed to a document, an attorney is prohibited from showing the document to any person. Based upon my own personal knowledge having interacted with Paul Gains and Lynn Maro since November of 2013 I know that Paul Gains and Lynn Maro do not like each other, are not friends and may not even be on speaking terms. I later learned that the witness list was not mark "counsel only" as Desmond had asserted but that the witness listed was sealed by Judge Durkin. There is a huge difference between a document being placed under seal and being marked "counsel only". Since the witness list was not marked "Counsel Only" it could be shared with other persons by an attorney. Attorney Maro could provide the witness list to her client. Since the witness list was not marked "Counsel Only" by Marty Desmond as he had asserted I found nothing wrong with the fact that Paul Gains was not asking Judge Durkin to take action against Lynn Maro. It would be for Judge Durkin to take any action he sought fit.
4. Jack Ausnehmer was or still may be an Assistant Mahoning County Prosecutor assigned to a county court. Desmond alleged that Ausnehmer took money from either a criminal defendant or the defendant's family to secure her release from jail and that Paul Gains had received \$1,000.00 cash from the family through Ausnehmer.

Desmond alleged that Ausenhmer, drafted documents to present to a Mahoning County Court Judge to secure the release from County Jail of a private client of his, and had another attorney sign the pleading. It was further alleged that Ausenhmer spoke ex-parte to the County Court Judge and secured the client's release. It was further alleged that money take from this client was paid to Paul Gains in the form of \$1,000.00 cash. Desmond alleged that Ausnehmer was being represented by John Juhasz because a criminal investigation was being conducted into Ausnehmer's conduct. I was made aware by FBI Agent Todd Wurth that the FBI had investigated these allegations and that the U.S. Attorney's office declined to prosecute the matter referring the matter back to Paul Gains because the case lacked sufficient evidence to charge anyone with a crime. Desmond stated that because John Juhasz was representing Ausnehmer in that case and Cochran in his case in Federal Court and the aforementioned prostitution case, Gains had agreed or would not prosecute Cochran and that Juhasz would have information about this. I have personal knowledge acquired since November of 2013 that Gains and Juhasz do not talk and that Gains does not like Juhasz.

Ken Cardinal an Assistant Mahoning County Prosecutor was supposed to attend the meeting I had with Marty Desmond. He did not for a reason which I do not recall. Desmond disclosed that he was annoyed that Cardinal had disclosed the Cochran investigation to Gains because he said Gains would kill the investigation. Desmond was annoyed with Cardinal. I spoke to Ken Cardinal at a later date. He told me that as an assistant county prosecutor he has a duty to inform the county prosecutor that Desmond was seeking to indict an attorney who practices law in Mahoning County and that he met with Gains and disclosed such. Cardinal was not impressed with Desmond being annoyed at or with him.

It was clear from the meeting that we had that Desmond had no respect for Chief Mahoning Count Assistant Prosecutor Linette Stratford. He did not think she should hold the position she currently holds.

In October of 2016 I was formally appointed a Special Assistant Mahoning County Prosecutor to investigate and or prosecute Scott Cochran by Paul Gains. Any and all decisions in the Cochran matter were made without Gains' input or knowledge. I talked to my section chief Matt Donahue only about the Cochran matter.

**From:** [Daniel Kasaris](#)  
**To:** [P. Nicholas Sebastiano](#)  
**Cc:** [Cara L. Yoder \(CLYoder@ohioauditor.gov\)](#); [carudy@ohioauditor.gov](#); [Kevin P. Monnolly \(KPMonnolly@ohioauditor.gov\)](#); [Leigh Bayer](#); "[Martin Desmond](#)"  
**Subject:** RE: 25k to bull dog LLC  
**Date:** Thursday, May 25, 2017 11:10:00 AM

---

Nick  
Thank you  
Please provide that paperwork  
thx  
Dan

-----Original Message-----

From: P. Nicholas Sebastiano [<mailto:p.nicholas@sebastianolaw.com>]  
Sent: Thursday, May 25, 2017 11:03 AM  
To: Daniel Kasaris  
Cc: Cara L. Yoder (CLYoder@ohioauditor.gov); carudy@ohioauditor.gov; Kevin P. Monnolly (KPMonnolly@ohioauditor.gov); Leigh Bayer; 'Martin Desmond'  
Subject: Re: 25k to bull dog LLC

Dan,

The check attached to your prior email was paid without invoice or check request. It was assigned to "permit/fees". This check was paid on a taco bell job (job no. 0843). Said job was between B & B and Ricksim, Inc. and was completed in Toledo, Ohio.

As of the date of this email, B & B has retained Atty. Marty Desmond to serve as co-counsel on the civil suit. Marty is cc'ed hereto. Over the past week or so, Marty and I have been digging pretty deeply into these taco bells jobs. We've uncovered a great deal of suspicious activities on these. Thus, if you can expand on your inquiry I'm confident we can help each other quite a bit.

Very truly yours,

- Nick

--

P. Nicholas Sebastiano  
SEBASTIANO LAW LTD.  
918 Trailwood Drive, Suite 2  
Boardman, Ohio 44512  
(330) 953-3667  
(330) 953-3668 Fax  
[p.nicholas@sebastianolaw.com](mailto:p.nicholas@sebastianolaw.com)

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IRS Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS in Circular 230, I inform you that, unless I expressly state otherwise in this communication (including

Kasaris\_\_005

attachments), any tax advice contained in this communication is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or other matter addressed herein.

Thank you.

**From:** [P. Nicholas Sebastiano](#)  
**To:** [Daniel Kasaris](#)  
**Cc:** [Cara L. Yoder \(CLYoder@ohioauditor.gov\)](#); [carudy@ohioauditor.gov](#); [Kevin P. Monnolly \(KPMonnolly@ohioauditor.gov\)](#); [Leigh Bayer](#); "[Martin Desmond](#)"  
**Subject:** Re: 25k to bull dog LLC  
**Date:** Thursday, May 25, 2017 11:03:30 AM

---

Dan,

The check attached to your prior email was paid without invoice or check request. It was assigned to "permit/fees". This check was paid on a taco bell job (job no. 0843). Said job was between B & B and RickSim, Inc. and was completed in Toledo, Ohio.

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Very truly yours,

- Nick

--

P. Nicholas Sebastiano  
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918 Trailwood Drive, Suite 2  
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(330) 953-3668 Fax  
[p.nicholas@sebastianolaw.com](mailto:p.nicholas@sebastianolaw.com)

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communication is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or other matter addressed herein.

Thank you.

**From:** [P. Nicholas Sebastiano](#)  
**To:** [Daniel Kasaris](#)  
**Cc:** [LSTRATFORD@MAHONINGCOUNTYOH.GOV](mailto:LSTRATFORD@MAHONINGCOUNTYOH.GOV); [Leigh Bayer](#); [RFSmith@ohioauditor.gov](mailto:RFSmith@ohioauditor.gov); "[Martin Desmond](#)"  
**Subject:** B & B Contractors and Developers, Inc. - Garea Waiver  
**Date:** Monday, September 25, 2017 2:06:47 PM  
**Attachments:** [B & B - Garea - Limited Attorney-Client Waiver 9-25-17.docx](#)

---

Dan,

Marty and I made some edits to the above-described document, previously provided by you. Please review the attached document and advise regarding the same. Once you've had a chance to review the document, please let us know and we will forward the same to B & B for execution.

Very truly yours,

- Nick

--

P. Nicholas Sebastiano  
SEBASTIANO LAW LTD.  
918 Trailwood Drive, Suite 2  
Boardman, Ohio 44512  
(330) 953-3667  
(330) 953-3668 Fax  
[p.nicholas@sebastianolaw.com](mailto:p.nicholas@sebastianolaw.com)

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IRS Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS in Circular 230, I inform you that, unless I expressly state otherwise in this communication (including attachments), any tax advice contained in this communication is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or other

matter addressed herein.

Thank you.

## LIMITED WAIVER OF ATTORNEY-CLIENT PRIVILEGE

This Limited Waiver of Attorney-Client Privilege (hereafter the “Waiver”) has been executed on September \_\_\_\_, 2017 by **B & B Contractors and Developers, Inc.**, 4531 Belmont Avenue, # A, Youngstown, Ohio 44505, including without limitation its officers, agents and employees (hereafter collectively referred to as the “Company”) for the express purpose of waiving attorney-client privilege by and between the Company and **Attorney Stephen R. Garea**, 3722 Starrs Centre Drive, Canfield, Ohio 44406 (hereafter “Garea”), as more fully described herein.

**WHEREAS**, for many years Garea provided legal services and representation to the Company; serving as outside legal counsel.

**WHEREAS**, during the course of representing the Company, and from approximately 2009 through 2016, Garea represented, communicated, and counselled the Company in matters relating to the following construction projects in the City of Youngstown:

That certain project for construction of a residential housing facility known as the Flats at Wick, located at 139, Madison Avenue, Youngstown, Ohio 44502 (hereafter the “Flats at Wick”).

That certain project for construction of a housing facility known as the Erie Terminal, located at 112 W. Commerce Street, Youngstown, Ohio 44503 (hereafter the “Erie Terminal”)

That certain project for construction of a housing facility known as the Wick Tower Apartments, located at 34 W. Federal Street, Youngstown, Ohio 44503 (hereafter the “Wick Tower”).

That certain project for construction of a hotel located at the Stambaugh Building, 44 E. Federal Street, Youngstown, Ohio 44503 (hereafter the “Stambaugh Building”).

**WHEREAS**, the Flats at Wick, Erie Terminal, Wick Tower and Stambaugh Building, projects shall hereafter be collectively be referred to as the “Projects”.

**WHEREAS**, Garea’s representation regarding the Projects included participating in communications, negotiations, drafting legal documents, advising and counseling the Company, and prior controller and Treasurer Samuel DeCaria and prior president and director Philip M. Beshara, in matters relating to contracting with, billing, paying and otherwise exchanging funds from various parties including: James G. Grantz; Komar Plumbing Co., Inc.; and additional entities associated with James G. Grantz; Dominic J. Marchionda; U.S. Campus Suites, LLC; Erie Terminal Place, LLC; Wick Properties, LLC; Flats at Wick, LLC; Youngstown Stambaugh Holdings, LLC; Youngstown Acquisition Holdings, LLC; Youngstown Stambaugh Hotel, LLC; NYO Property Group, LLC; Rubino

Construction, Inc.; and additional entities associated with Dominic J. Marchionda (hereafter the “Scope of Representation”).

**WHEREAS**, the Company affirmatively acknowledges that under most circumstances Garea would be prohibited from revealing information relating to Garea’s representation of the Company, including information protected by attorney-client privilege under applicable law and the Ohio Rules of Professional Conduct, unless the Company provides its informed consent to waiving such protections.

**WHEREAS**, the Company has reason to believe that Garea may possess knowledge or information regarding criminal and/or unlawful behavior stemming from or relating to the Projects and arising from the Scope of Representation; the disclosure of which would immeasurably benefit that certain investigation and litigation into these matters being conducted by and/or on behalf of the State of Ohio, by: agents with the Public Integrity Unity of the Ohio Auditor’s Office; members of the Mahoning County Sheriff’s Department, including Major Jeff Allen; and members of the Mahoning County Prosecutor’s Office, including Special Assistant Prosecutors/Assistant Ohio Attorney Generals, Dan Kasaris, Leigh Bayer and/or Matt Donahue (hereafter the “Investigation”).

**WHEREAS**, in exchange for repeated assurances by the State of Ohio, that the Company is not being investigated and/or treated as the target or subject of the above-described investigation, and is in fact being treated as a witness, the Company now wishes to waive attorney-client privilege with Garea regarding the Scope of Representation, as defined herein, for the purpose of aiding the State of Ohio in the above-described Investigation.

**NOW THEREFORE**, and in consideration for aforementioned assurances, the Company as a prior client of Garea, hereby expressly, knowingly and voluntarily provides its informed consent to the immediate and revocable waiver of attorney-client privilege and confidentiality, protecting information, communications, and materials with, by and between the Company and Garea arising from the Scope of Representation and/or the Projects; the disclosure of which would benefit the Investigation and subject to the following. That certain waiver described in the preceding sentence, shall be limited to the Projects, Scope of Representation and shall only allow disclosures made to the State of Ohio and its agents in furtherance of the Investigation.

The undersigned, on behalf of the Company, hereby expressly acknowledge having had opportunity to discuss this Waiver with counsel for the Company and are knowingly, intelligently, and voluntarily authorizing Garea to discuss the above-described matters with the above-described agents of the State of Ohio so that he may fully cooperate with law enforcement in the Investigation.

**-REMAINDER OF PAGE INTENTIONALLY LEFT BLANK-**

IN WITNESS WHEREOF,

B & B Contractors and Developers, Inc.

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
Geno D. Leshnack, *President*

STATE OF OHIO )  
 ) SS  
COUNTY OF \_\_\_\_\_ )

BE IT REMEMBERED that I certify on the \_\_\_\_\_ day of September, 2017, as a Notary Public in and for the State of Ohio, that **Geno D. Leshnack as President of B & B Contractors and Developers, Inc.**, appeared before me, that his identity is either well-known to me or that he presented satisfactory evidence to me of his identity, that the above instrument was signed by him in my presence and was acknowledged that he did sign the foregoing instrument and that the same was his free act and deed.

So sworn,

\_\_\_\_\_  
Notary Public

[Notary Seal]

**From:** [Martin Desmond](#)  
**To:** [Daniel Kasaris](#)  
**Subject:** Re: 25k to bull dog LLC second check  
**Date:** Friday, May 26, 2017 10:55:28 AM  
**Attachments:** [image001.png](#)

---

Dan,  
Nick is on his way to NYC for the weekend. If you want, call me and I can explain in detail these checks. There is a lot on these Taco Bell jobs. My cell is (330)559-4505.  
Marty

Sent from my iPhone

On May 26, 2017, at 10:51 AM, Daniel Kasaris  
<[Daniel.Kasaris@ohioattorneygeneral.gov](mailto:Daniel.Kasaris@ohioattorneygeneral.gov)> wrote:

Please provide what info you can with respect to this 25k check to bulldog dated 11/10/10 check number 40035  
<image001.png>

Thx  
dan

-----Original Message-----

From: P. Nicholas Sebastiano [<mailto:p.nicholas@sebastianolaw.com>]  
Sent: Thursday, May 25, 2017 11:03 AM  
To: Daniel Kasaris  
Cc: Cara L. Yoder ([CLYoder@ohioauditor.gov](mailto:CLYoder@ohioauditor.gov)); [carudy@ohioauditor.gov](mailto:carudy@ohioauditor.gov); Kevin P. Monnolly ([KPMonnolly@ohioauditor.gov](mailto:KPMonnolly@ohioauditor.gov)); Leigh Bayer; 'Martin Desmond'  
Subject: Re: 25k to bull dog LLC

Dan,

The check attached to your prior email was paid without invoice or check request. It was assigned to "permit/fees". This check was paid on a taco bell job (job no. 0843). Said job was between B & B and RickSim, Inc. and was completed in Toledo, Ohio.

As of the date of this email, B & B has retained Atty. Marty Desmond to serve as co-counsel on the civil suit. Marty is cc'ed hereto. Over the past week or so, Marty and I have been digging pretty deeply into these taco bells jobs. We've uncovered a great deal of suspicious activities on these. Thus, if you can expand on your inquiry I'm confident we can help each other quite a bit.

Very truly yours,

- Nick

Kasaris\_\_014

--

P. Nicholas Sebastiano  
SEBASTIANO LAW LTD.  
918 Trailwood Drive, Suite 2  
Boardman, Ohio 44512  
(330) 953-3667  
(330) 953-3668 Fax  
[p.nicholas@sebastianolaw.com](mailto:p.nicholas@sebastianolaw.com)

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IRS Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS in Circular 230, I inform you that, unless I expressly state otherwise in this communication (including attachments), any tax advice contained in this communication is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or other matter addressed herein.

Thank you.

**From:** [Daniel Kasaris](#)  
**To:** [P. Nicholas Sebastiano](#)  
**Cc:** [Cara L. Yoder \(CLYoder@ohioauditor.gov\)](#); [carudy@ohioauditor.gov](#); [Kevin P. Monnolly \(KPMonnolly@ohioauditor.gov\)](#); [Leigh Bayer](#); ["Martin Desmond"](#)  
**Subject:** RE: 25k to bull dog LLC  
**Date:** Friday, May 26, 2017 10:43:00 AM

---

Nick

What proof does B and B have, if any that this money was actually used to pay fees/permits?

Thx

dan

-----Original Message-----

From: P. Nicholas Sebastiano [<mailto:p.nicholas@sebastianolaw.com>]

Sent: Thursday, May 25, 2017 11:03 AM

To: Daniel Kasaris

Cc: Cara L. Yoder (CLYoder@ohioauditor.gov); carudy@ohioauditor.gov; Kevin P. Monnolly (KPMonnolly@ohioauditor.gov); Leigh Bayer; 'Martin Desmond'

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Kasaris\_\_016

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Kasaris\_\_018

promoting, marketing or recommending to another party any transaction or other matter addressed herein.

Thank you.

**From:** [Daniel Kasaris](#)  
**To:** [Gains, Paul](#); [Angela R. Canepa](#)  
**Cc:** [Linnette Stratford](#)  
**Subject:** Fw: Subpoena - Martin Desmond v. Paul Gains et al.  
**Date:** Wednesday, May 22, 2019 9:56:03 AM  
**Attachments:** [05\\_22\\_2019\\_2491\\_001.pdf](#)

---

Please see attached  
Dan

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

---

**From:** Myrna Underwood <[myrna.underwood@ohioattorneygeneral.gov](mailto:myrna.underwood@ohioattorneygeneral.gov)>  
**Sent:** Wednesday, May 22, 2019 9:10 AM  
**To:** Daniel Kasaris  
**Subject:** Subpoena - Martin Desmond v. Paul Gains et al.

---

**From:** [Gains, Paul](#)  
**To:** [Daniel Kasaris](#); [Angela R. Canepa](#); "[traskin@mrrlaw.com](#)"; [Rubright, Patricia A.](#); [Zawrotuk, Gina](#)  
**Cc:** [Stratford, Linette](#)  
**Subject:** Re: Subpoena - Martin Desmond v. Paul Gains et al.  
**Date:** Wednesday, May 22, 2019 12:55:41 PM

---

Dan:

I have forwarded your e-mail and subpoena to Attorneys Raskin and Rubright. I believe this is a subpoena duces tecum which does not require your presence. They merely want the documents you have in your possession. I believe it is best if you contact attorneys Rubright and/or Raskin directly, and have asked the same of them.

P J Gains

---

**From:** Daniel Kasaris <[Daniel.Kasaris@ohioattorneygeneral.gov](mailto:Daniel.Kasaris@ohioattorneygeneral.gov)>  
**Sent:** Wednesday, May 22, 2019 9:58 AM  
**To:** Gains, Paul; Angela R. Canepa  
**Cc:** Stratford, Linette  
**Subject:** Re: Subpoena - Martin Desmond v. Paul Gains et al.

I am in court this day on marchionda  
And am not available  
Thc  
Dan

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

---

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**Cc:** [Stratford, Linette](#)  
**Subject:** Re: Subpoena - Martin Desmond v. Paul Gains et al.  
**Date:** Wednesday, May 22, 2019 3:39:45 PM

---

Thx

I forwarded the sub to con law

My guess is we will quash it

Dan

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

---

**From:** Gains, Paul  
**Sent:** Wednesday, May 22, 2019 12:55 PM  
**To:** Daniel Kasaris; Angela R. Canepa; 'traskin@mrllaw.com'; Rubright, Patricia A.; Zawrotuk, Gina  
**Cc:** Stratford, Linette  
**Subject:** Re: Subpoena - Martin Desmond v. Paul Gains et al.

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**Sent:** Wednesday, May 22, 2019 9:10 AM

**To:** Daniel Kasaris

**Subject:** Subpoena - Martin Desmond v. Paul Gains et al.

---

MEMO: TO FILE

FROM: DAN KASARIS

DATE: FEBRUARY 14 2019

Matt Donahue and Steve Schumacher my former bosses authorized me to write this memo and to forward it to Mahoning County Prosecutor Paul Gains.

On or about August of 2017 I received a call from my Section Chief Matt Donahue asking me if I would handle a matter involving Attorney Scott Cochran in Mahoning County. I do not know Scott Cochran; I have never met Scott Cochran. I did know of Scott Cochran and was aware that he had been indicted by the Federal Government, went to trial which ended in a mistrial. I knew of Scott Cochran through FBI Agent Deanne Hassman who was the case agent on Cochran's Federal mistried case as well as a case of mine, State v. McNalley at al. I agreed to look at the matter. I understood that the matter I was being asked to look at involved Attorney Cochran being involved with a prostitution ring, representing a prostitution ring and possibly trading sex for legal representation.

I met Marty Desmond at the Mahoning County Drug Task Force in August or September of 2016 with Assistant Ohio Attorney General Chris Stickan to learn about the case. Desmond laid out a large conspiracy involving Prosecutor Paul Gains, staff members and defense attorneys to both myself and Chris Stickan. The conspiracies were not related to the issue of whether or not Cochran was involved with prostitution or involved in the prostitution criminal enterprise, rather it offered a theory as to why Paul Gains would not prosecute Scott Cochran for alleged criminal conduct.

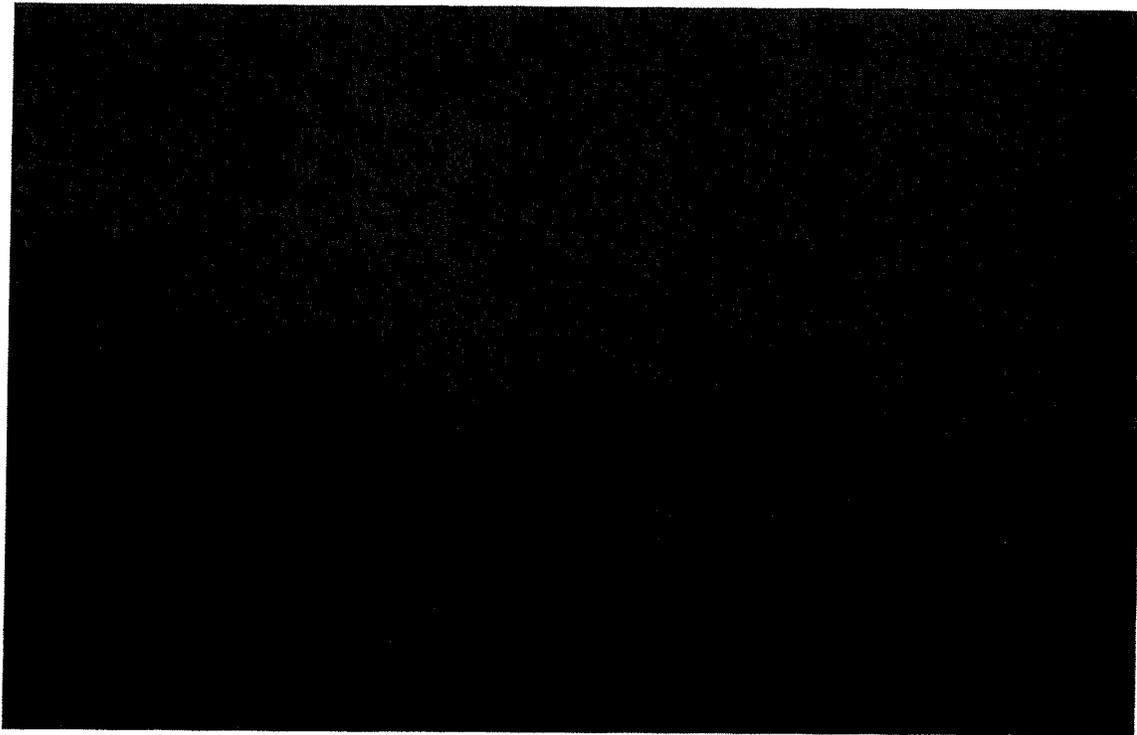
On a piece of paper Marty Desmond drew circles with each circle representing a conspiracy. The conspiracy was:

1. Nick Modarelli a Senior Assistant Mahoning County Prosecutor and friend of Prosecutor Paul Gains was shaking down Defense attorneys at the Austintown County Court for Political Donations in 2012 and that Scott Cochran was aware of the conduct.
2. The 2012 Primary Prosecutor election according to Desmond was the most corrupt in Mahoning County History. (I am a native of Youngstown and am well aware of Youngstown, Ohio's history and found that statement hard to believe and I told Desmond that) Desmond laid out that Cochran was involved in assisting Gains to get reelected and did release information damaging to Gains' opponent shortly before the Primary Election and that information played a huge role in Gains winning the primary. I was aware of the subject matter Desmond was discussing and did agree that the release of that information may have substantially helped Paul Gains win the primary election. Desmond also stated that Modarelli wrote a character letter to Cochran's federal sentencing judge in the matter mentioned above on county letterhead asking the Judge not to send Cochran to federal prison. I was aware of such letter and of Modarelli's conduct. I agreed with Desmond that it was a mistake and not appropriate for Modarelli to write the letter and to do it on County Prosecutor letterhead. Desmond asserted that Gains was going to wash



the Cochran case away as a favor to Cochran from Cochran assisting Gains to win his re-election. I assured Desmond that that would not happen.

3. Attorney Lynn Maro and Attorney John Juhasz represented Cochran in the Prostitution matter. Desmond alleged that there was a case pending in front of Judge Jack Durkin in the Mahoning County Common Pleas court that he was involved in and that the witness list in the matter was marked "counsel only" by him and that Attorney Maro had shared the witness list with her client in the case in Judge Durkin's courtroom and that as a result her client had a witness killed in another State and that Gains was protecting Lynn Maro from being prosecuted for the witness being killed because she was Scott Cochran's attorney. Criminal Rule 16 permits prosecutors to designate a discovery document "Counsel Only" so that only the attorney for the defendant may view the document. Once "Counsel Only" is affixed to a document, an attorney is prohibited from showing the document to any person. Based upon my own personal knowledge having interacted with Paul Gains and Lynn Maro since November of 2013 I know that Paul Gains and Lynn Maro do not like each other, are not friends and may not even be on speaking terms. I later learned that the witness list was not marked "counsel only" as Desmond had asserted but that the witness list was sealed by Judge Durkin. There is a huge difference between a document being placed under seal and being marked "counsel only". Since the witness list was not marked "Counsel Only" it could be shared with other persons by an attorney. Attorney Maro could provide the witness list to her client. Since the witness list was not marked "Counsel Only" by Marty Desmond as he had asserted I found nothing wrong with the fact that Paul Gains was not asking Judge Durkin to take action against Lynn Maro. It would be for Judge Durkin to take any action he sought fit.



Ken Cardinal an Assistant Mahoning County Prosecutor was supposed to attend the meeting I had with Marty Desmond. He did not for a reason which I do not recall. Desmond disclosed that he was annoyed that Cardinal had disclosed the Cochran investigation to Gains because he said Gains would kill the investigation. Desmond was annoyed with Cardinal. I spoke to Ken Cardinal at a later date. He told me that as an assistant county prosecutor he has a duty to inform the county prosecutor that Desmond was seeking to indict an attorney who practices law in Mahoning County and that he met with Gains and disclosed such. Cardinal was not impressed with Desmond being annoyed at or with him.

It was clear from the meeting that we had that Desmond had no respect for Chief Mahoning Count Assistant Prosecutor Linette Stratford. He did not think she should hold the position she currently holds.

In October of 2016 I was formally appointed a Special Assistant Mahoning County Prosecutor to investigate and or prosecute Scott Cochran by Paul Gains. Any and all decisions in the Cochran matter were made without Gains' input or knowledge. I talked to my section chief Matt Donahue only about the Cochran matter.

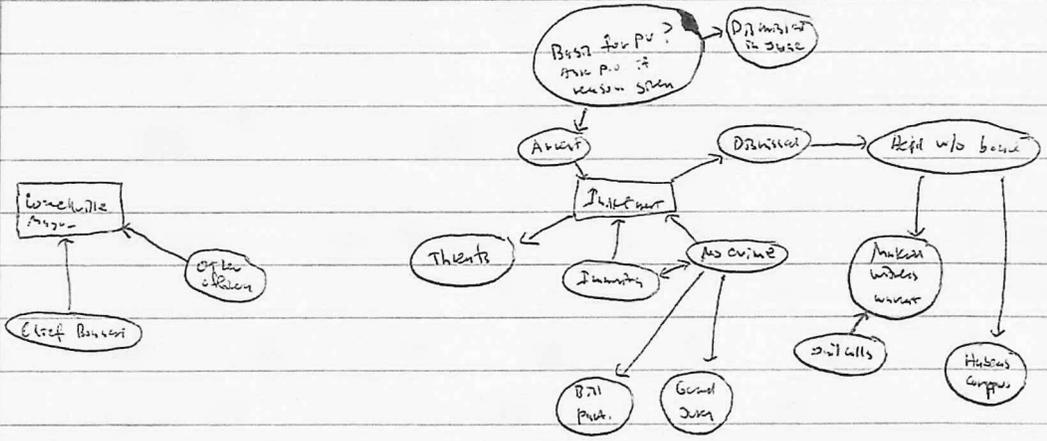
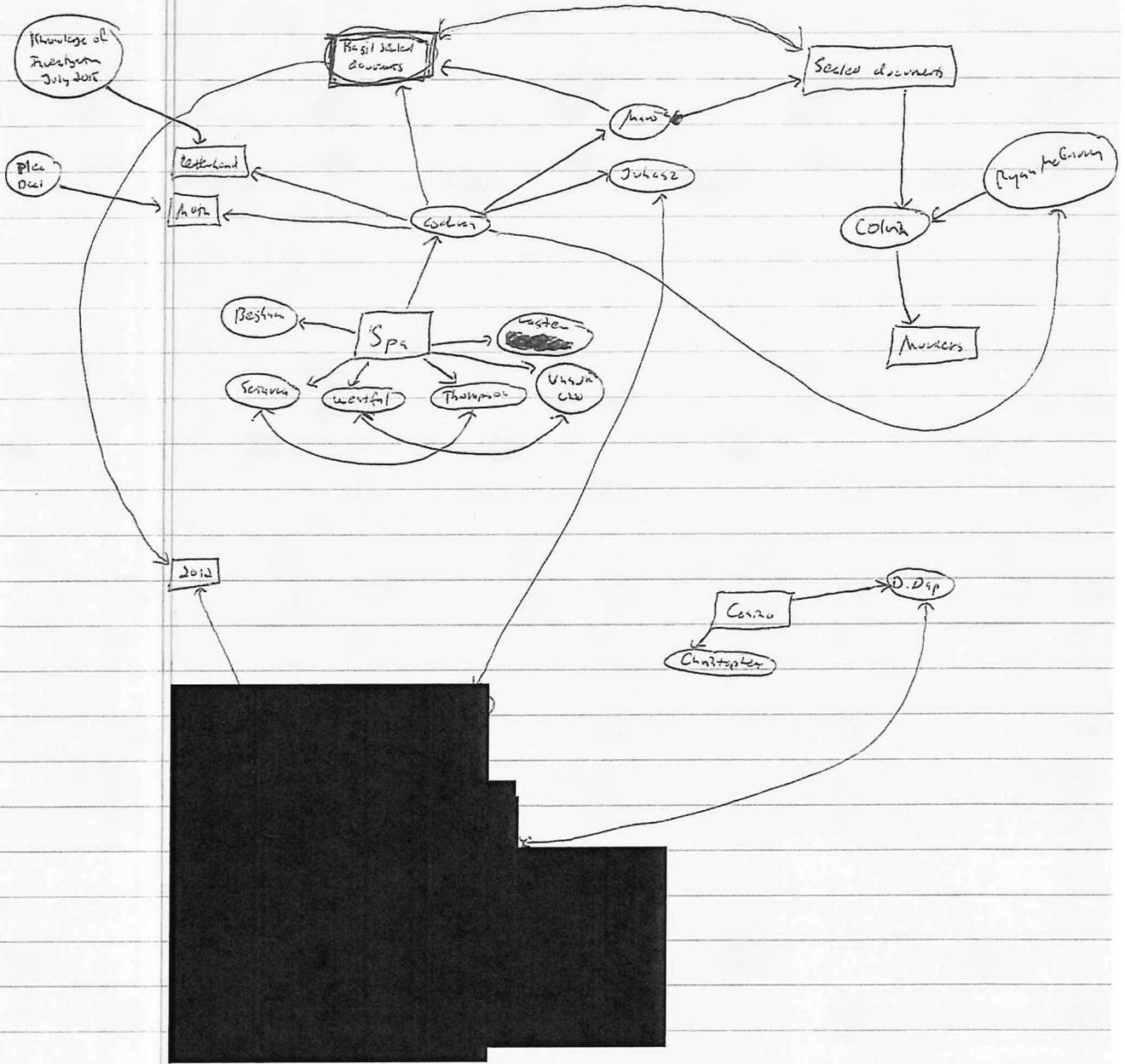


EXHIBIT  
tabbles  
**41A**