**HAMILTON COUNTY COURT OF COMMON PLEAS**
**CINCINNATI, OHIO**

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| **STATE OF OHIO,** | : | |
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| **Plaintiff,** | : | **Case No.: B-1503961** |
| | : | **JUDGE MEGAN E. SHANAHAN** |
| **vs.** | : | |
| | : | |
| **RAYMOND TENSING,** | : | |
| | : | |
| **Defendant,** | : | |

**ENTRY**

This Court has learned that at least one local news media outlet has requested copies of the full questionnaires completed by the empaneled jury and alternates in the above-captioned case, which continues to be in trial. For the reasons that follow below, this Court rules that the completed questionnaires from the empaneled jurors and alternates in this case shall be made available to the public and the news media for copying and inspection by the Clerk of Courts; however, any personal identifying information of jurors (including but not limited to the name, address, date of birth, social security number) shall be redacted by the Court Administrator prior to being made available.

## Legal Standard

The Supreme Court has made clear that "[t]he process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) [*Press-Enterprise I*]. Historically, an open selection process has given "assurance to those not attending trials that others were able to observe the proceedings and enhanced public confidence." *Id.* at 507. There is a "presumption of openness" of the jury selection process, just as there is a presumption of openness for a criminal trial generally. *See Id.* at 510; *See also State ex rel. Beacon Journal Publishing Co. v. Bond*, 98 Ohio St.3d 146, 781 N.E.2d 180, 2002-Ohio-7117 at ¶¶ 15-16).

The right of access, however, is not absolute. The First Amendment qualifies the right by creating a presumption of openness that may be overcome "by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure was properly entered. *Press-Enterprise I*, 464 U.S. at 509-10; *Bond*, at ¶ 17.

## Discussion

The Court finds it appropriate to begin by discussing the extent to which the trial in general—including oral voir dire—has been open to the public. The Court has reserved eight seats for members of the press each day during the trial. (See Entry dated October 19, 2016 permitting one individual from WLWT 5, WCPO 9, WKRC 12, FOX 19, WVXU, the Cincinnati Enquirer, the Associated Press and one additional media member a seat in the courtroom each day during the trial). The proceedings are broadcast live to members of the public through the

use of a media pool video camera. (*Id.* at ¶ 4). Transcripts of the trial, including the oral portion of voir dire, are available as they are in any criminal trial. Additionally, the Court has permitted the quiet use (by the media) of electronic devices for electronic transmission of email and social media updates. (*Id.* at ¶ 2). Thus, the criminal trial, is being conducted in public to the extent that all criminal trials are conducted in public with certain accommodations made for the large attendance and media presence. The press and the public can attend, listen and report on the proceedings.

The Court has authority to restrict public access to the information in the case document or, if necessary, the entire document upon its own order. Sup. R. 45(E). The question presented is whether the public, the press and internet users across the globe should have access to the names and personal identifying information of the empaneled jurors and alternates as reflected on the completed jury questionnaires. As the Seventh Circuit has explained, "The right question is not *whether* the names may be kept secret, or disclosure deferred, but *what justifies* such a decision." *United States v. Blagojevich*, 612 F.3d 558, 561 97th Cir. 2010) (emphasis in original). "[A] judge must find some unusual risk to justify keeping jurors' names confidential; it is not enough to point to possibilities that are present in every criminal prosecution." *Id.* at 565.

Sup. R. 45(E) provides guidance to the Court on the issue presented and instructs a court to restrict public access to information in a case document if the court finds by clear and convincing evidence that "the presumption of allowing public access is outweighed by a higher interest after considering each of the following: ... (c) whether factors that support restriction of public access exist, including risk of injury to persons, individual privacy rights and interests, proprietary business information, public safety, and fairness of the adjudicatory process." Similarly, the Ohio Supreme Court qualifies the right of access by "creating a presumption of

openness that may be overcome 'by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *State ex rel. Beacon Journal Publ'g Co. v. Bond*, 2002-Ohio-7117, ¶ 17, 98 Ohio St. 3d 146, 151, 781 N.E.2d 180, 188.

Here, the Court is faced with two compelling governmental interests that militate in favor of non-disclosure of the names and identifying information of empaneled jurors: juror privacy and the parties' right to a fair trial.

The Court notes first that this is an unusually high profile case. This matter has repeatedly made national news. (See e.g. http://www.cnn.com/2016/11/01/us/ray-tensing-trial/; http://abcnews.go.com/US/jurors-cop-ray-tensings-murder-visit-scene-fatal/story?id=43213659; http://www.nbcnews.com/news/us-news/ray-tensing-trial-what-know-case-against-cincinnati-cop-n672426). Indeed, multiple news organizations have requested press credentials to be in court for the trial.

The Court is concerned about the possibility that any members of the public, press or non-press, will interact with jurors during the trial in ways that might invade the privacy of the jurors and ultimately negatively impact the fairness of the proceedings. As with any high profile case, there is a risk that jurors will themselves receive attention during the trial, which is likely to distract them from the case. The jurors could be approached or even harassed or offered money to provide information about themselves or the case. The jurors could see their names or photographs in print, on the internet or in social media. Even if they are completely successful in sequestering themselves from media coverage, people they know may inform them about it. The jurors have been instructed to not read or watch press coverage of the case, which is already a difficult task. Disclosing their names will make that task more difficult still.

The Ohio Supreme Court in *Bond, supra*, 2002-Ohio-7117, ¶ 25, noted that portions of juror questionnaires containing personal identifying information – such as Social Security number, telephone number, and driver's license number – are not properly part of the voir dire process and should be redacted prior to disclosure. "[S]uch information does nothing to further the objectives underlying the presumption of openness – namely, the enhancement and appearance of basic fairness in the criminal trial. *Id.*

In addition to the privacy concerns of the jurors, the Defendant has a compelling interest in being tried by an impartial jury based on the evidence and testimony presented at trial. The United States Supreme Court has observed that "[n]o right ranks higher than the [Sixth Amendment] right of the accused to a fair trial." *Bond, supra*, 2002-Ohio-7117, ¶ 28 citing *Press–Enterprise I*, 464 U.S. at 508, 104 S.Ct. 819, 78 L.Ed.2d 629. "Actions which have a significant potential of intimidating jurors or disturbing their tranquility to the point that they lose the ability to rationally consider the evidence or follow instructions are . . . to be discouraged. *United States v. Blagojevich*, 743 F.Supp.2d 794, 801 (N.D. Ill. 2010). Additionally, "jurors summoned from the community to serve as participants in our democratic system of justice are entitled to safety, privacy and protection against harassment." *In re Globe Newspaper*, 920 F.2d 88, 95 (1st Cir. 1990); *see also, Id.* ("As the Supreme Court has recognized, protecting jurors' privacy interests also implicates the integrity and reputation of the judicial process" (citing *Press-Enterprise I,* 464 U.S. at 515 (Blackmun, J., concurring). The potential transformation of "jurors' personal lives into public news . . . could unnecessarily interfere with the jurors' ability or willingness to perform their sworn duties." *United States v. Black*, 483 F.Supp.2d 618, 630 (N.D. Ill. 2007). Such a distraction interferes with the ability of the jury to give its full attention to the facts of this important case and, by extension, interferes with

Defendant's right to a fair trial. *See e.g. United States v. Koubriti*, 252 F.Supp.2d 418, 424 (E.D. Mich. 2003) ("...an anonymous jury actually may aid in ensuring Defendants a fair trial because jurors who have the protection of anonymity can more confidently render a verdict without fear of reprisal or negative repercussions if the verdict rendered is an unpopular one.") (collecting cases).

The Ohio Supreme Court directs that in the context of juror questionnaires, therefore, trial courts must (1) make specific findings, on the record, demonstrating that there is a substantial probability that the defendant would be deprived of a fair trial by the disclosure of the questionnaires and (2) consider whether alternatives to total suppression of the questionnaires would have protected the interest of the accused. *Bond, supra*, 2002-Ohio-7117, ¶ 30. The Court finds that there is a substantial probability that the defendant would be deprived a fair trial by the disclosure of the completed juror questionnaires. Jurors would be unable or unwilling to perform their sworn duties if their personal lives become public news. In consideration of alternatives to the total suppression of the completed juror questionnaires, the Court finds that the completed questionnaires shall be redacted of any personal identifying information by the Court Administrator prior to inspection.

The Court has carefully reviewed, and made available with this order, a sworn affidavit from the Court's Bailiff, Timothy Noel. This sworn affidavit details significant and serious concerns raised by several of the jurors. The consistent thread that runs through these reports is that these jurors fear for their well-being if they become known. The concerns appear to be distracting to these jurors, as was exemplified in their reported reactions during the jury view. The very purpose of a jury view is for jurors to be able to focus intently on the surroundings, gauge the distances, examine the nearby objects, and otherwise discern how the physical setting

may help them view the facts of the case. Yet, during the jury view in this matter, other concerns became part of the picture. The Court has an obligation to address this. Jurors who are focused on the fear of their identities being made public in such a high profile matter may not be able to provide their full attention to the evidence and arguments presented.

In *Bond*, the court held that although juror names, addresses, and questionnaire responses are not "public records" as contemplated by R.C. 149.43, there was in that case a qualified right of access creating a presumption of openness that may be overcome. The Bond case was decided prior to the Ohio Supreme Court's promulgation of Superintendence Rules 44-47, effective July 1, 2009. As a result, a trial court's analysis of a request to review juror questionnaires requires a different process than that which was undertaken in *Bond.*

Under *Bond,* even if the completed juror questionnaires are not "court documents" as defined in Sup. R. 44(C)(1), there may be a qualified right of access. As such, the Court will treat the questionnaires in this case as if they were "court documents" as defined in Sup. R. 44(C)(1) for purposes of analysis under Sup. R. 45 (E). Court documents must be publicly available unless they are subject to Sup. R. 45 (E). The Court applied the three main factors found in Sup. R. 45 (E)(1) to this case as follows:

*Whether public policy is served by restricting public access.*

While public policy supports openness and transparency in the availability of public records in government, there are numerous exceptions to this role found both in statute and case law. *State ex rel. Cincinnati Enquirer v. Lyons*, 2014-Ohio-2354, ¶ 14, 140 Ohio St. 3d 7, 11, 14 N.E.3d 989, 993; *See also*, Sup. R. 44 and 45.

In statute, and by way of example, the General Assembly has given privacy rights to court-employed bailiffs (such as the one whose affidavit accompanies this order) by shielding all

of their residential and familial information from public view. R.C. 149.43 (A)(1)(p). These court employees also have additional privacy protection in R.C. 149.45. Despite the fact that these men and women are public employees paid by and accountable to the citizenry and that the statute requires no showing of potential harm or danger to accomplish the restriction, it offers protection from those who may be angry or agitated by the work bailiffs do in the court system.

With respect to common law, for example, the Ohio Supreme Court in *TBC Westlake, Inc. v. Hamilton Cty. Bd. of Revision* (1998), 81 Ohio St.3d 58, 64, recognized a common law "judicial mental process privilege" as a public records exception. All records that show how a trial court judge makes decisions are shielded from public view. Presumably, this allows judges – all of whom are public employees paid by and accountable to the citizenry – privacy to review and consider matters without scrutiny from those who may be angry or agitated by the work judges do in the court system.

These broad privacy protections apply in all cases – those involving minor and uncontroversial matters as well as high profile and controversial litigation. The above captioned litigation undoubtedly falls into the latter category. As detailed above, Hamilton County has not had a more prominent or potentially divisive criminal case in a long time.

The Court need not list or detail certain incidents seen in America over the last few years but it takes judicial notice that certain interactions between police officers and African American citizens wherein deadly force was used or death otherwise resulted have found their way into criminal courtrooms and some judicial outcomes have led to massive public outcry and even serious violence against persons.

In a legal system where bailiffs and judges are given some protection from public scrutiny in the work they do in courtrooms, only the most unreasonable among us would

embrace a viewpoint that offers no concomitant protection to jurors, a group of citizens tasked with making a difficult decision under the harshest of spotlights.

Given the above-referenced examples of statutory and common law protections, the Court finds that public policy favors some measure of public access restriction to beleaguered and worried jurors in high profile criminal cases who may well be distracted from their important duties if their complete jury questionnaires are released for public and internet distribution.

*(b) Whether any state, federal, or common law exempts the document or information from public access;*

Beyond statutory and common law policy considerations, government in federal and state courts specifically have a constitutional obligation to consider and protect life, liberty, and property interests as recognized in the Fourteenth Amendment due process clause. *Ingraham v. Wright*, 430 U.S. 651, 672, 97 S. Ct. 1401, 1413, 51 L. Ed. 2d 711 (1977). Among the historic liberties long cherished at common law was the right to be free from "unjustified intrusions on personal security." *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1062 (6th Cir. 1998).

In at least three cases arising from Ohio law enforcement matters, courts have found that even compliance with laws requiring public access can violate such rights and that constitutional protections must supersede other obligations. The Sixth Circuit held in *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998) that sometimes an officer's constitutional right to privacy shields the release of records such as internal affairs and disciplinary reports. 136 F.3d at 1069. In *Kallstrom*, the Sixth Circuit decided that the right to privacy of law enforcement officers barred the release of police records containing law enforcement officers' highly personal information, including addresses, phone numbers, driver's licenses, as well as the personal information of their family members. *Id.* The facts showed that releasing such information would put the officers and their families at substantial risk of serious harm. *Id.*

In *State ex rel. Keller v. Cox*, 85 Ohio St.3d 279, 282, 707 N.E.2d 931, 934 (1999), the Ohio Supreme Court relied on *Kallstrom* and exempted essentially identical information from disclosure. In *Keller*, the Court held that personnel and internal affairs records of law enforcement officers, who may be potential witnesses, are exempt from public disclosure because such records are protected by the constitutional right of privacy. *Id.* The Court noted that if such information was released, then the information may be used by a defendant "to achieve nefarious ends." *Id.*

Similarly, in *State ex rel. Cincinnati Enquirer v. Craig*, 2012-Ohio-1999, ¶ 2, 132 Ohio St. 3d 68, 68, 969 N.E.2d 243, 245, the Ohio Supreme Court denied disclosure of requested information relating to police officers wounded in shootout with a motorcycle gang. The Court noted that the evidence established that the release of the wounded police officers' names would place them at risk of serious bodily harm and possibly even death from a perceived likely threat and that the disclosure of their identities was not narrowly tailored to achieve the public purpose of examining the performance of the police. *Id.* at ¶ 22, 132 Ohio St. 3d at 73.

With these contemplations in mind, the Court finds that constitutional considerations as reflected in the common law stated mediate in favor of restricting public access.

*(c) Whether factors that support restriction of public access exist, including risk of injury to persons, individual privacy rights and interests, proprietary business information, public safety, and fairness of the adjudicatory process*

Ohio law presumes that access to government records is hinged on the need for the public to scrutinize and oversee the work of their public employees. *See, State ex rel. Data Trace Info. Servs., L.L.C. v. Cuyahoga Cty. Fiscal Officer*, 2012-Ohio-753, 131 Ohio St. 3d 255, 963 N.E.2d 1288; See also, *State ex rel. Strothers v. Wertheim*, 80 Ohio St.3d 155, 158, 684 N.E.2d 1239, 1242 (1997). When the personal information of non-public employees intersects with the work of

a public office, a different and less rigorous need to know exists. The United States Supreme Court held that "as a categorical matter * * * a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy * * *." *State ex rel. McCleary v. Roberts*, 2000-Ohio-345, 88 Ohio St. 3d 365, 368, 725 N.E.2d 1144, 1147 citing *United States Dept. of Justice v. Reporters Commt. for Freedom of the Press*, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989).

The Ohio Supreme Court recognized a clear distinction "between public employees and their public employment personnel files and files on private citizens created by government." *McCleary*, 2000-Ohio-345, 88 Ohio St. 3d at 369. The Court considered in *McCleary* a request for public disclosure of the photo identification program database used by the city's recreational facilities. In denying the release of such information, the Court explained that even though there "is nothing in the record before this court, or otherwise, that indicates that appellee intends any harm to these children," disclosure of such personal information "increases the risk that the information will fall into the wrong hands." *Id.* at 371.

Thus, the individual privacy rights of the empaneled jurors and alternates are of greater weight than those of government employees. Given that these citizens are potentially at the most risk of danger from those who may be angered by their verdict, restricting access to their completed jury questionnaires, at least in this instance, is the appropriate decision to make.

**Conclusion and Order**

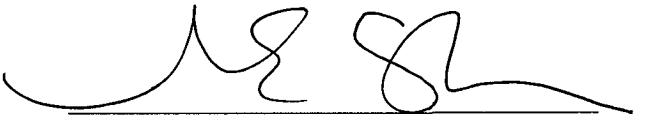
Sup. R. 45 (E)(3) requires the Court to apply the "least restrictive means" to achieve the purposes of the analyses detailed above. Indeed, Sup. R. 45 (E)(3)(a) provides perhaps the best example of such limitation: "[r]edacting the information rather than limiting public access to the entire document[.]" Therefore, rather than withhold all parts of the juror questionnaires at issue,

and in accordance with Sup. R. 45 (E)(3)(a), the Court finds it necessary and appropriate to withhold from the public the names and personal identifying information of empaneled jurors and alternates during the pendency of the trial. This restriction is intended to lessen the risk that jurors will be improperly approached during the trial, either for the purpose of obtaining information from the jurors or for the purpose of influencing the verdict.

Pursuant to Sup. R. 45 (E)(4), a redacted version of the jury questionnaires at issue shall be filed in the case file along with a copy of the Court's order. The Court hereby directs the Court Administrator to redact any personal identifying information of jurors (e.g. name, address, date of birth, social security number, and identifiable details) from completed juror questionnaires prior to being made available.

While Sup. R. 45 (E)(4) expressly does not require that the Court convene a hearing prior to entering this Order, any of the counsel copied on this order may file with the Clerk of Courts objections to, and a request for a hearing to reconsider, this Order by 4:00pm November 7, 2016. The Court will not otherwise entertain objections or argument on this matter.

**IT IS SO ORDERED.**



**JUDGE MEGAN E. SHANAHAN**

cc: Counsel for the State of Ohio
Counsel for the Defendant
John Greiner, Esq. for local news media entities

**COURT OF COMMON PLEAS**
**HAMILTON COUNTY, OHIO**

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| STATE OF OHIO, | : | Case No. B1503961 |
| Plaintiff, | : | JUDGE MEGAN E. SHANAHAN |
| v. | : | **AFFIDAVIT OF TIMOTHY NOEL** |
| RAYMOND TENSING, | : | |
| Defendant. | : | |

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

1. I am the Bailiff for the Honorable Judge Megan E. Shanahan, judge of the Hamilton County Court of Common Pleas, General Division. I make this affidavit based on my personal knowledge.

2. In the course of my duties as a Bailiff, I manage jury operations in cases over which Judge Shanahan presides.

3. While performing my duties as a Bailiff in escorting jurors in the above-captioned case, several jurors raised concerns while in the presence of all the other jurors about the potential that they might be photographed or recorded on video. Specifically the following concerns were raised:

    a. At least seven to eight jurors expressed to me that they were afraid that the pool video camera may have filmed them when the camera operator attempted to focus on attorneys in the case.

    b. At the juror view of the scene, several jurors expressed concern about walking at the scene because they might be photographed or recorded on video.

    c. At the view of the scene, one juror expressed concern that they might be photographed or recorded on video while in the transport van and pointed out to me that a media camera was pointed at the front window of the van which was not tinted.

    d. While walking at the view of the scene, one juror expressed concern and pointed out to me that a media representative was on the front porch of a nearby home holding up a cell phone in a manner that suggested she might be taking a video recording or photographs of the jurors.

e. After the conclusion of the trial proceedings for the day, one juror expressed concern that there were media representatives sitting next to the jury box with a lap top computer. The juror indicated concern that the lap top could be used to photograph the jurors.

f. On November 2, 2016, a juror asked whether I was monitoring the live stream to ensure that no jurors were being filmed.

4. While performing my duties as a Bailiff in escorting jurors in the above-captioned case, several jurors raised concerns while in the presence of all the other jurors about the potential that their names might be released. Specifically, one juror asked whether the checks issued to each juror for their juror pay were public records that could be released. The same juror asked whether work statements provided by the Jury Commissioner's Officer were public records that could be released.

5. While performing my duties as a Bailiff in escorting jurors in the above-captioned case, one juror asked, in the presence of all the other jurors, whether their completed juror questionnaires would be released. The juror expressed concerns that there was personal information that they did not want released.

FURTHER AFFIANT SAYETH NAUGHT.

Timothy Noel

Sworn to and subscribed before me this 2d of November 2016.

MARK LANDES