

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

BILLY M. SMITH,

Plaintiff,

:

Case No. 3:10-cv-448

-vs-

District Judge Thomas M. Rose
Magistrate Judge Michael R. Merz

:

MONTGOMERY COUNTY
SHERIFF'S OFFICE, et al.,

Defendants.

DECISION AND ORDER

This case is before the Court on Motion of the Plaintiff Opposing Representation of Defendants Montgomery County Sheriff's Office, Paul Henson, and Montgomery County, Ohio, by the Assistant County Prosecuting Attorneys John Cumming and Victoria Watson (Doc. No. 40).

As grounds for removal of these attorneys, Plaintiff says he intends to call Mathias Heck, Jr., the Montgomery County Prosecuting Attorney, as a witness in his case and may call other unknown assistant prosecutors. He believes that Mr. Heck and any assistants called as witnesses would be "immune from disclosure of discoverable evidence, if said legal counsel represented the defendants." The Court is unaware of any such legal doctrine. Discovery in this civil case will be governed by the Federal Rules of Civil Procedure and not either the Ohio Public Records Act or the Ohio Rules of Criminal Procedure. In any event, if any party claims an immunity from disclosure of discoverable documents, they must make that claim openly to the Court and allow the Court to rule on it.

Plaintiff expresses his concern in ¶ 5 of his Motion that his case may be prejudiced if these Assistant Prosecuting Attorneys at trial vouch for the credibility of any witness who is also an attorney from Mr. Heck's office. Such vouching is prohibited by law. Plaintiff is also concerned that his criminal conviction may "overwhelm the actual Complaint's allegations..." The criminal conviction can only be mentioned if it is relevant, but if that is the case, it is likely to be mentioned

regardless of who the attorneys are for the defense.

Part of the statutory duties of a county prosecutor under Ohio law involve defending cases of this sort. If Plaintiff can show some genuine conflict of interest as regards any particular attorney, the Court will consider removing him or her. But in the absence of such a showing, the Motion is denied.

July 8, 2011.

s/ **Michael R. Merz**
United States Magistrate Judge