VIRGINIA: IN THE CIRCUIT COURT FOR ARLINGTON COUNTY

COMMONWEALTH OF VIRGINIA	}	
	}	
v.	}	Case No. CR11000771, 772, 773
	}	
MICHAEL ARMIN GARDNER	}	

BRIEF IN SUPPORT OF MOTION TO INTERVENE

TO GAIN ACCESS TO CERTAIN SEALED JUDICIAL RECORDS

SUMMARY OF ARGUMENT

This Motion petitions the Court for access to three documents. First, there is a copy of the transcript of a public court hearing in a criminal matter. Second, there is a Motion to Dismiss the charges against this Defendant based on exculpatory evidence introduced to the Court in open court and fully argued in open court. Third, there is the Commonwealth's Motion to Seal and any transcript, it if exists, of argument to the Court. All documents have been sealed in the face of constitutional rights and common law rights to the contrary without notice or opportunity to the press or public to be heard on the issue and without written, reviewable decisions citing the reasons why sealing is warranted. This is plain error.

Because these rights are presumed and are difficult to overcome, the case law in Virginia and the Fourth Circuit requires an adversarial hearing with the press and/or public's representatives *before* sealing or closure takes place. The burden of proof is on the party

moving for closure and the burden is on the court to provide a written evaluation of all factors, including the alternatives to closure, and if closure is ordered, an explanation about why only closure will be effective and the alternatives to closure will not be. If this "due process" for the public has not been provided, the sealing orders in this case have been granted improvidently.

Therefore, an expedited hearing must follow this motion, to be scheduled at the earliest feasible possibility for the Court, the Parties and this Petitioner.

STATEMENT OF FACTS

The Petitioner is the Falls Church News Press, a weekly newspaper published on Thursdays with a circulation of 17,000 readers in Bailey's Crossroads, Sleepy Hollow, Pimmit Hills, Lake Barcroft, and the City of Falls Church regions. Washington, D.C. and Arlington are also areas of distribution. Nicholas F. Benton is the founder, owner, publisher and a frequent reporter in its news columns. Mr. Benton started up the Falls Church News Press in 1991 to provide these communities with solid news coverage of events of local importance. The newspaper qualified as a "newspaper of general circulation" in 1992 and so is recognized by the Commonwealth to publish legal notice advertising. It is a full voting member of the Virginia Press Association. The Falls Church City Council has twice named this newspaper as the Business of the Year.

The Falls Church News Press has covered the story of these criminal charges in print and on the web at fcnp.com

This criminal case involves charges against the husband of a public official in the City of Falls Church. The Defendant, Michael Gardner, is charged in connection with alleged sexual activity involving three girls reportedly under the age of thirteen.

The Defendant was arrested in June of 2011. In July, a preliminary hearing was held in

the Juvenile and Domestic Relations District Court at Falls Church City Hall. That hearing that was held open by the presiding judge, Judge Esther Wiggins. The Defendant was then indicted by a Grand Jury. In October, 2011, the results of DNA testing first were reported incorrectly, then corrected by an uncontradicted press release from defense counsel. On Tuesday, December 20th, the defense moved to dismiss the charges against the Defendant. Arlington County Circuit Court Judge Joanne F. Alper, after a hearing in open court, denied the motion and sealed the contents of the defense Motion to Dismiss. This Petitioner requested a copy of the transcript of that open hearing from the M.A.R. Reporting Service. On February 10th, the Commonwealth's Attorney filed a motion for an order to seal the transcript of the December 20th hearing and an Emergency Order was signed that day by Chief Judge William T. Newman, then delivered to the Reporting Service. On information and belief, the Commonwealth's Motion for a Sealing Order was filed *ex parte* and did not or has not appeared in the file for this case.

On information and belief, the girls were named in the courtroom during the hearing on the Motion to Dismiss. This Petitioner has not published the names, nor will it, as a matter of policy. This policy is customary among news reporting agencies in Falls Church and through-out the area and will be followed, even though the alleged victims' names are known to a number of people who are not directly involved in the case.

In short, the ability to confirm important facts about proceedings in this case has been mooted by the Court, even after discussion of facts and names has taken place in open court.

ARGUMENT

I. STANDING TO INTERVENE DEPENDS UPON A DISTINCT BODY OF CONSTITUTIONAL LAW

In 1980, in the U.S. Supreme Court held that there is a presumed First Amendment right of public access to a criminal trial that is properly exercised when courts treat "the press" as a surrogate for the public. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980). ("Richmond I") A second court access case followed quickly. In 1982, the U.S. Supreme Court reiterated that the right of access can be outweighed only by a "compelling government interest" and if closure is to take place, it must be as narrow and as short as possible. (Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-607 (1982). The high court next ruled in favor of access to the transcript of a closed voir dire in Press Enterprise v. Superior Court, 464 U.S. 501 (1984) ("PE I"). The same publisher came back to the Supreme Court in 1986 to obtain a holding that access to a preliminary hearing was on the same footing as the criminal trial itself in Press Enterprise v. Superior Court, 478 U.S. 1 (1986) ("PE II").[1]

In Richmond I, the Virginia trial court's order to for closure was reversed.[2] Undeterred, some courts continued to close proceedings. In three criminal cases in Virginia, suppression hearings were closed, giving the Virginia Supreme Court the opportunity to think about its earlier

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[1]In the meantime, the U.S. Supreme Court had ruled against a New York newspaper seeking access to a preliminary hearing. Gannett Co. v. DePasquale, 443 U.S. 368 (1979). Acknowledging a "common law right" of access to trials, the decision held that the Sixth Amendment does not create a right for the press and public to attend a criminal trial and left the First Amendment unresolved. Court observers might conclude that the decisions mentioned above were a reaction against that outcome. According to a LEXIS report, Gannett has never been explicitly over-ruled, but it has been severely limited by these subsequent rulings that the First Amendment is not only a consideration, but is out-come determinative.

[2]In this particular case, the Virginia Supreme Court had declined to accept the petition of the Richmond Newspapers, Inc. 1979 Va. LEXIS 307; 5 Media L. Rep. 1545 (Va. Sp. Ct. 1979).

position again. Richmond Newspapers v. Commonwealth, 222 Va. 574 (1981), ("Richmond II"). The state Supreme Court not only followed the federal Supreme Court's ruling, but took the opportunity to spell out what foundations must be laid before a trial court may issue a closure order. "Before closing a pretrial hearing, the trial court should consider whether there are alternatives available which would eliminate the likelihood of prejudice to the accused. While there are fewer alternatives available at pretrial than at trial, (citations omitted) they should be explored before closure is employed." Id. at 589- 590.

Thus the constitutional law recited here creates the standing of the press to intervene in this criminal case. "Intervention is necessary to give substance to the qualified right of access discussed herein. Gannett, *supra*, 443 U.S. at 401 (Powell, J. concurring)." Richmond II at 590. "[W]e recognized in Richmond Newspapers the right of a newspaper to intervene in a criminal proceeding for the sole purpose of challenging a circuit court's ruling which closed criminal proceedings. ["Richmond II"] at 590." Hertz v. Times-World Corp., 259 Va. 599, 609 (Va. 2000).

> We have adopted and applied the principles and standards articulated in Richmond Newspapers I (sic). Eschewing a First Amendment analysis in [Richmond I], we declared orders closing preliminary hearings in three criminal cases unconstitutional under Article I, Section 12, of the Virginia Constitution, and we held that 'intervention [by the public] is necessary to give substance to the qualified right of access' (Footnote omitted.)

Shenandoah Pub. House, Inc. v. Fanning, 235 Va. 253, 257 (Va. 1988).

II. PROCEDURES TO FOLLOW PRIOR TO CLOSURE OR SEALING

Before closing a procedure, or as it logically follows, before sealing a transcript to an open event in a criminal trial or motions filed with the court, the trial court is required by Virginia and Fourth Circuit case law to take steps that do not include secret motions and *ex parte*

orders. What is required is public notice, an opportunity for an adversarial hearing, reasoning stated in a written decision, consideration of narrower remedies and if applicable, stated reasons for rejecting alternatives to closure.

> For intervention to take place, the public must have notice of the closure motion. [contra, Gannett v. Depasquale 443 U.S. 668, 401 (1979) (suggesting that notice be limited to those in the courtroom at the time of the closure motion)]. For this reason, motions to close a hearing should be made in writing and filed with the court before the day of the hearing involved, and the public must be given reasonable notice that a closure hearing will be conducted. (Footnote omitted).
>
> At the hearing on closure, the burden will be on the moving party to show that an open hearing would jeopardize the defendant's right to a fair trial. Id. The interveners, however, shall have the burden of showing that reasonable alternatives to closure are available. Id. Upon entering a closure order, the trial judge shall articulate on the record his findings that the evidence supports the moving party's contention that an open hearing would jeopardize the defendant's fair-trial rights, that alternatives will not protect these rights, and that closure will be effective in protecting them. (Citation omitted).

Richmond II at 589-591

The Fourth Circuit requires similar standards as a matter of constitutional law. When there is a motion for closure or a consideration of whether to close, first, the trial court must give the public adequate notice that the sealing of documents may be ordered. Second, the trial court must provide interested persons a hearing before the court makes its decision. Third, if the trial court decides to close a hearing or seal documents, it must state its reasons on the record, supported by specific findings. Finally, the court must state its reasons for rejecting alternatives to closure. In re Knight Publishing Co., 743 F.2d 231, 234-235 (1984). The court reviewing or considering sealing or closing a document or a hearing, must make separate findings on each closure and should treat the sealing of documents in the same way.

> If the district judge decides that any documents should remain sealed, he must make ‘sufficiently specific’ findings on a document-by-document basis to show that the three substantive prerequisites to closure have been satisfied -- that there

> is a substantial probability (1) that public proceedings would result in irreparable damage to defendant's right to a fair trial, (2) that no alternative to closure would adequately protect this right, and (3) that closure would effectively protect it.

Associated Press v. United States Dist. Court for Cent. Dist., 705 F.2d 1143, 1147 (9th Cir. Cal. 1983).

III. THE BENEFITS OF PUBLIC ACCESS

The reason for these strict requirements is simply that the right of access to criminal trials weighs so heavily. It is based on long English and American traditions of openness and the function of public oversight of the courts. Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982). Open criminal trials and all attendant proceedings help the public understand that a crime will be vindicated and that the prosecution, defense and the court are handling their duties properly. This value was acknowledged even by the Gannett court.

> There can be no blinking the fact that there is a strong societal interest in public trials. Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously, and generally give the public an opportunity to observe the judicial system.

Gannett Co. v. DePasquale, *supra at* 383.

The fact that preliminary, suppression and other hearings end most criminal trials is a significant consideration. "If members of the public are to be able to evaluate the work of trial judges, prosecutors, and public defenders in the criminal justice system, there must be access to pretrial proceedings which are the only proceedings had in the great mass of criminal causes." Buzbee v. Journal Newspapers, Inc., 297 Md. 68, 80 (Md. 1983)

Most important in a case like this one, the community's emotional reaction to the crime is expected and *respected* by open proceedings.

> This openness has what is sometimes described as a "community therapeutic value." [Richmond I] at 570. Criminal acts, especially violent crimes, often provoke public concern, even outrage and hostility; this in turn generates a community urge to retaliate and desire to have justice done. (Citation omitted.) Whether this is viewed as retribution or otherwise is irrelevant. When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions. Proceedings held in secret would deny this outlet and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected. (Citations omitted.) "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[Richmond I] at 572. Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness. (Citation omitted.)

Press-Enterprise v. Superior Court of California, 464 U.S. 50l, 509 (1983) ("PE I").

On information and belief, a critical Motion to Dismiss was filed in a presumably open case file, discussed in open court, then sealed. On information and belief, the transcript of the hearing itself was sealed, "until the motion can be heard on its merits." Exhibit 1. The Commonwealth's motion was also sealed, so neither the Commonwealth's reasons nor the court's reasoning are available to the public or to a reviewing court. ". . . to allow the public to view the trial without any knowledge of what has taken place previously would make the right of access granted in Richmond Newspapers [Richmond I) a hollow one." Richmond II, at 588.

IV. SPECULATIONS ON THE REASONS FOR CLOSURE AND ALTERNATIVES TO CLOSURE

And so, the public and this Petitioner, who are concerned about this case, have been left to

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speculate. It is clearly not the burden of this Petitioner to prove the argument for an open procedure. But the posture of this case at the moment requires speculation so that possible reasons for closure can be considered.

Frequently the criminal defendant moves for closure, especially during preliminary and suppression hearings, arguing that public hearings would threaten the Sixth Amendment right to a fair trial. But here the Defense is not the party requesting closure. Since these sealed documents concern arguments in the Defendant's favor, it is logical that most of the information in the transcript and the sealed motions would raise inferences in his favor. After false broadcast reports, the defense was able to issue an uncontradicted press release that refuted the error. (Exhibit 2 "Attorney Says DNA Test Shows Sperm Is Not Michael Gardner's" fcnp.com, Wednesday, October 12, 2012.) Even if these closures were the result of a defense motion, the reviewing court would have to find a genuine threat to a fair trial, explain why alternatives to closure would not be effective against that threat and explain why closure would be effective. If the thought is to delay release of these documents until a jury is seated, or to delay until after the Motion to Dismiss is decided, the delay itself impedes on the First Amendment right, thus any delay must be justified on the same grounds.

> . . . we perceive in the magistrate's assessment a basic misapprehension and undervaluation of the core first amendment value at stake. This is most directly reflected in his perception that public disclosure, immediately after a jury is selected, of the basis for his earlier change of venue ruling and of the proceedings

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> themselves necessarily would protect the right of access asserted by representatives of the press and public. In the magistrate's expressed view, the only effect of his closure order, as so shaped, was a "minimal delay" in access to the materials upon which a judicial decision was made and to the judicial reasoning behind the decision. *This unduly minimizes, if it does not entirely overlook, the value of "openness" itself, a value which is threatened whenever immediate access to ongoing proceedings is denied, whatever provision is made for later public disclosure.*

In re Charlotte Observer, 882 F.2d 850, 856 (4th Cir. 1989) (Emphasis supplied.)

Always there is the apprehension that it will be difficult to find an "untainted" jury, because there has been news coverage of this case. This argument has not been not viewed favorably. "We have noted earlier that pre-trial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial." Neb. Press Ass'n v. Stuart, 427 U.S. 539, 565 (U.S. 1976). The rule is that neither the venire nor the ultimate jury is required to be entirely ignorant of information about this crime, the arrest and the criminal proceedings. For example,

> . . . a community newspaper published an article court days before the defendant's trial reporting that the defendant's wife had been convicted of our first degree murders as his accomplice. [Buchanan v. Commonwealth] 238 Va. 389, 384 (1989). The fact that some seated jurors were aware of this evidence was held not to deny the defendant an impartial jury. . . It is quite simple to have those potential jurors who have heard of the case approach the bench and some more specific questions in private.

In the matter of the Application and Affidavit for a Search Warrant, 923 F.2d 324 (4th Cir. 1190).

Even before the trial starts, "[t]hrough voir dire. . . a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict. . . The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of that right. And any limitation must be 'narrowly tailored to serve that

interest.' Press-Enterprise I, supra, at 510." Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 14 (U.S. 1986). Jury instructions are regarded as a major tool for trial courts.

By way of illustration, after virtually all pre-trial events in another criminal trial were held in the judge's chambers in Patrick County Circuit Court, the Virginia Court of Appeals held that the judge then conducted the trial in a way that dealt with any influence from the coverage of the trial. The Court detailed with approval the trial judge's regular instructions to a jury. But because the trial court had closed the multiple pre-trial events, the Court of Appeals' approval ended.

> We hold in the present case that the trial court erred in conducting closed proceedings without sufficient "overriding interest" articulated in the record, without first conducting a hearing on the matter, and without narrowly tailoring its closure order. Accordingly, the order of the trial court closing the proceedings to the press is reversed . . . .

In re Times-World Corporation, *supra* at 330. [the mandamus part of the ruling was overturned in Hertz v. Times-World Corporation, 259 Va. 599 (2000)].

"Unless the record shows to the contrary, it is to be presumed that the jury followed an explicit cautionary instruction. . . ." Alber v. Commonwealth, 2 Va. App. 734, 741, 347 S.E.2d 534, 538 (1986) (quoting LeVasseur v. Commonwealth, 225 Va. 564, 589, 304 S.E.2d 644, 657 (1983))."

Id. at 329.

After a five year old girl was kidnaped from a community Christmas party, the investigation and eventually the charges against Caleb Hughes received wide attention from news media in the Northern Virginia and Washington, D.C. region. When the district court gave local news publishers access to the affidavits underlying a search warrant for the defendant's car, the

defendant appealed to the Fourth Circuit. Writing about preserving an untainted jury, the federal court appeals held that instructed jurors can be trusted, barring plausible evidence to the contrary.

> The judicial system is entitled to respect the critical faculties of those citizens who give of their time as jurors. *It verges upon insult to depict all potential jurors as nothing more than malleable and mindless creations of pre-trial publicity*. Jurors can be skeptical about the sort of information contained in the paragraph at issue here and are not necessarily naive to the fallibility of various police investigative techniques. They are also quite capable of concentrating upon the evidence presented before them in open court, especially when admonished by appropriate instructions of their sober responsibility to do so.

In re Application & Affidavit for a Search Warrant, 923 F.2d 324, 330 (4th Cir. Va. 1991).

The third consideration - the most important - is whether the alleged victims can be protected from letting "everyone" know who they are. On information and belief, the names of these children were used in the hearing on the Motion to Dismiss. If that report is true, everyone in the courtroom that day knows who these children are. Nothing except their own personal sense of compassion prevents non-party observers from repeating the names. Even assuming that news publishers will not follow a common policy to keep the names secret, each of the documents being sought here can be redacted to remove the names of these little girls. In this case, the Petitioner has promised in writing that it will not repeat the children's names. (Exhibit 3 "Gardner Case Judge Seals Transcript of Open Hearing" FCNP.com, Wednesday, February 15, 2012.) If the court chooses not to trust this and similar policies, redaction is available. *Redaction as a remedy is narrow, effective and well short of a sealing order.*

However, aside from the fact that there is nothing on the record showing the reasons for these sealing orders, the burden is not on this Petitioner to prove that openness is warranted. Openness is presumed. The burden rests entirely on the moving party or on this Court, if the

documents were sealed *sua sponte*. The burden, after an adversarial hearing, is for the Court to discuss the reasons for closure or sealing that outweigh the important constitutional principles at stake, to explain with reference to specific facts and to explain why narrower solutions will not address the articulated problems.

V. COMMON LAW RIGHT OF ACCESS

Virginia statutory law regarding access to court files is based on the common law of the Commonwealth.

> Except as otherwise provided by law, any records and papers of every circuit court that are maintained by the clerk of the circuit court shall be open to inspection by any person and the clerk shall, when requested, furnish copies thereof, except in cases in which it is otherwise specially provided.

Va. Code Ann. § 17.1-208[3]

In Shenandoah Publishing v. Fanning, 235 Va. 253 (1988), the Virginia Supreme Court notes that the origin of this concept "extends back to the Code of 1849 that references Acts of the Assembly "1820-21, p. 104, ch. 74, § 1." Construing the language of the statute as it has endured for more than a century, we conclude that the General Assembly intended to recognize the generally accepted common-law rule of openness and to declare its power to make statutory exceptions to the rule." Shenandoah Pub. House, Inc. v. Fanning, 235 Va. 253, 258 (1988). The common law right of access applies to *judicial records*. These were defined in a subsequent Virginia Court of Appeals decision.

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[3] An potential anamoly appears in Virginia Code §18.2-370, providing that preliminary hearings in sex offenses cases can be closed by the Court or on motion by the parties, without reference to any of the law discussed here. However, Hertz v. Times-World Corporation, 259 Va. 599 (2000), makes it clear that when the cause is to gain access to a preliminary hearing, newspapers and the public have an appropriate remedy by intervening, rather than asking for a writ of

> Included in the category "judicial records" were "the pleadings and any exhibits or motions filed by the parties and all orders entered by the trial court in the judicial proceedings leading to the judgment under review." Id. at 257, 368 S.E.2d at 255. The category of materials referred to as "pretrial documents" consisted of "all data assembled by the parties in the discovery process." Id. at 256-57, 368 S.E.2d at 255. Relying on Seattle Times Co., the Court held that the "pretrial documents" were not subject to the common law right of access. Id. at 261, 368 S.E.2d at 257.

In re Worrell Enterprises, Inc., 14 Va. App. 671, 681 (Va. Ct. App. 1992), reversed on other grounds by Hertz, *supra*, 259 Va. at 610.

This Motion seeks only judicial records.

The test for access under the common law is nearly indistinguishable to the constitutional test because the common law test requires consideration of the constitutional background. The common law right of access depends upon the "sound discretion of the trial court," but

> [t]his discretion, however, is not open-ended. Rather, access may be denied only if the district court, after considering "the relevant facts and circumstances of the particular case", (footnote omitted et al.) and after "weighing the interests advanced by the parties in light of the public interest and the duty of the courts", concludes that "justice so requires". The court's discretion must "clearly be informed by this country's strong tradition of access to judicial proceedings". In balancing the competing interests, the court must also give appropriate weight and consideration to the "presumption however gauged in favor of public access to judicial records." Any denial or infringement of this "precious" and "fundamental" common law right remains subject to appellate review for abuse.

In re Application of National Broadcasting Co., 653 F.2d 609, 613 (D.C. Cir. 1981).

The application of the tests on common law grounds will have the same result as those applied on constitutional grounds.

CONCLUSION

The arguments above are based on clear and unambiguous holdings, "black letter law" as it were, from the highest federal and state courts and intermediate appeals court. The multiple

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mandamus. Id. at 609.

public interests in a criminal proceeding are the fundamental reason behind doctrines of public access. In this case, those doctrines are in even greater force because the proceedings themselves were held in open court. Nothing is available to explain why the documents recording what was said and what transpired were closed; no reason was offered to keep the Motion to Dismiss a secret. If the hearing was open, it follows that the transcripts and judicial records (i.e. motions) should be unsealed. As the perfectly natural and right result of the nature of the crime and the people involved, there is intense public interest in the way this trial is handled. Shutting down documents after the fact not only is futile, it flies in the face of established law in Virginia and the Fourth Circuit that respects and protects this public interest.

Respectfully submitted,

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