Argument: Commonwealth v. Gardner
March 22, 2012
Arlington County Circuit Court

When this story left off, it was last December. In an open hearing, the defense had asked the court to dismiss the case against his client. Everything about that hearing has been sealed, even tho the hearing was held in an open courtroom.

We don't know what the Commonwealth argued to this court when Ms. Wittmann asked for a sealing order on the motion itself and then - two months later - on the transcript of the hearing. The FCNP asked for that transcript but when it was about to be delivered, we saw this emergency order instead.

The act of sealing off this information throws everyone back on rumor, speculation, inference, which is not good in a case where the public interest is so high and there seems to be a political overtone.

On the one hand, observers can infer the case was set for trial before the prosecution had tested all of its evidence, so another DNA test had to be done. On the other hand, the Commonwealth's brief argues that the concern is for the alleged victims. We don't really know the reason proposed by Ms. Wittmann to the court, nor do we know what persuaded the court to grant her motion. That puts this newspaper and the public at a huge disadvantage.

However, the law is in our favor.

The Commonwealth says that everyone in the small community knows who the alleged victims are and what they've said about the defendant. In fact, their names were available at the preliminary hearing, and at the hearing on the motion to dismiss and the names are on the DNA Forensic Report, a public document that is still public.

What *incremental danger* is there now - beyond what the young witnesses have already endured?

The Commonwealth's burden here is to show that the *incremental danger* amounts to a compelling government interest - and it must weigh more heavily that the importance of making sure that this case is prosecuted in the open.

Then the Commonwealth has to show that the sealing order would, prospectively, eliminate that danger.

The Commonwealth is also required to show that no alternatives will work. . . . including this really simple remedy of court-ordered redaction.

All the Commonwealth has offered is argument and speculation as to what might happen if the hearing on the motion to dismiss and the motion itself become public. We have no *evidence.* The Commonwealth has offered no proof of anything, including evidence of what these children and their parents want.

We've relied on two cases in particular that discuss how to treat personal embarrassment. Neither authority suggests closing down the entire event. In Press Enterprise II, which unsealed the transcript of a voir dire, the court points out that some of the jurors did have legitimate claims to privacy. The Supreme Court's suggestion was to make it clear that jurors with this kind of issue could ask to speak with the judge in chambers, during an open voir dire. In other words, the remedy was as short and narrow as possible.

In Globe v. Superior Court, Massachusetts law required that every hearing involving a minor sex crime victim had to be closed. The Supreme Court said no, not without considering every case individually. Among the considerations, the court should look at the impact on each

minor witness. As it developed, the witnesses in the Globe case didn't care if reporters were present, they just didn't want their pictures taken and they didn't want to be interviewed. In *this* case, the court should be looking only at the incremental impact and we don't have any argument or information on that.

We are not blind to the possible impact on the young witnesses, but neither can this court be blind to the certain negative impact on the public's interest in this case. There is a fourth entity present in every trial: public observation. Its function cannot be tossed aside easily, without considerations and difficult balancing. The Commonwealth has already persuaded the court to toss that interest aside.

What are the values of public observation?

Watching the performance of the prosecution, defense, court
watching events in the prosecution unfold, in progression
likewise with the defense
Keeping testimony honest
seeing that these charges are resolved rightly and plausibly
and seeing that justice has been satisfied.

Is the public's interest in this case intense? That is not a good reason to shut down all systems and hide the matter for a couple of months. Everything should be open and aboveboard.

This is a function of openness. It is fundamental to the way our courts are supposed to operate. The functions of open courts are lost by making information secret, forcing trial observers to rely on rumor, inferences and leaks.

Why not delay the report to the public about what was done?

The report loses immediacy and loses its context.

The sequence of events become unclear
The public loses interest in the matter and/or fails to understand
All the benefits of openness are lost

Most important, the First Amendment right has take a back seat to whatever mysterious concerns caused this record to be sealed in the first place. **A constitutional right delayed is still a constitutional right denied**.

The Falls Church News Press is asking for three things, unsealed transcripts, the motion to dismiss, and the transcripts of the ex parte arguments to the court.

We also suggest that from now forward, this court's procedure should require notice of closure motions, first to the court, then to the public.