

**IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CRIMINAL DIVISION**

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff,)	
)	No. 17 CR 09700-01
vs.)	No. 17 CR 09700-02
)	No. 17 CR 09700-03
DAVID MARCH, JOSEPH WALSH, and)	
THOMAS GAFFNEY)	
)	Hon. Domenica A. Stephenson
Defendants.)	

**INTERVENORS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THEIR
EMERGENCY MOTION FOR ACCESS TO JUDICIAL RECORDS**

Intervenors¹ respectfully file this Supplemental Memorandum of Law in Support of their Emergency Motion for Access to Judicial Records. Intervenors seek to supplement their December 6 Emergency Motion to ensure that it also requests disclosure of sidebar and in-chambers conference transcripts, which we understand have been filed with the court. Intervenors are informed that on December 4, 2018, the Court stated that because of an objection by one of the parties, sidebar transcripts will not be provided to members of the media. Now that the parties have delivered closing arguments in the trial and any perceived need for wholesale secrecy has expired, Intervenors urge the Court to make these transcripts part of the public record. To the extent there is a compelling need to continue shielding sensitive information, the Court must make specific, on-the-record findings justifying such sealing and release the transcripts with only those specific portions redacted.

¹ The Intervenors joining this motion are Chicago Public Media, Inc.; WGN Continental Broadcasting Company, LLC; the Associated Press; Chicago Tribune Company, LLC; and the Reporters Committee for Freedom of the Press.

ARGUMENT

I. Sidebar Transcripts Are Judicial Records Presumptively Open to the Public Under the Constitutional and Common-Law Rights of Access.

As set forth in Intervenor's December 6 Emergency Motion, the public has a right of access to judicial documents and proceedings under the First Amendment and common law. Illinois courts have long held that documents filed with the court have historically been open to the public and are thus subject to the presumption of public access. *See Skolnick v. Alzheimer & Gray*, 191 Ill. 2d 214, 232 (2000); *In re Marriage of Johnson*, 232 Ill. App. 3d 1068, 1074 (4th Dist. 1992); *People v. Zimmerman*, 2018 IL 122261, ¶¶ 27-28.

Court transcripts are precisely the type of court filings that are historically open to the public. In *In re Marriage of Johnson*, the court held that the right of access extends to documents filed with the court, because "they lose their private nature and become part of the court file and public component[s] of the judicial proceeding." 232 Ill. App. at 1074 (internal quotation marks and citations omitted). Furthermore, this right of access also "applies to transcripts of hearings as they are records of trial court proceedings." *Id.* This right of access has been extended to sidebar transcripts as well. *See People v. Reynolds*, 274 Ill. App. 3d 696, 698 (1995) (implicitly recognizing right of access to sidebar transcripts and focusing on "when access . . . should be allowed," ultimately concluding that court lacked jurisdiction to hear interlocutory appeal where trial court only "temporarily limit[ed] access to sidebar transcripts" until end of trial); *United States v. Smith*, 787 F.2d 111, 115 (3d Cir. 1986) (recognizing common law right of access to transcripts of sidebar conferences during criminal trials at which evidentiary or other substantive rulings were made).

Where—like here—there "has been no contemporaneous observation, the public interest in observation and comment *must* be effectuated in the next best possible manner"—by the

subsequent release of the sidebar transcripts. *Smith*, 787 F.2d at 114–15 (emphasis added). “By inspection of such transcripts, the public, usually through the press, can monitor, observe, and comment upon the activities of the judge and of the judicial process.” *Id.* at 115. This presumption in favor of access is a strong one and requires that a party opposing disclosure demonstrate that the factors favoring access have been overcome. *Id.*

II. A Court Must Make Specific Findings on the Record to Support Denial of Access to Sidebar and In-Chambers Conference Transcripts Filed with the Court.

Since the First Amendment and common law presumptions of access apply, a trial court may not deny access to sidebar transcripts unless the court makes specific findings demonstrating that the denial of access is “essential to preserve higher values and . . . narrowly tailored to serve that interest.” *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 510 (1984); accord *Skolnick*, 191 Ill. 2d at 232; *Zimmerman*, 2018 IL 122261, ¶ 30.

Intervenors are not aware of any findings made in support of denying access to these sidebar transcripts. In the audio recording of trial proceedings from December 4, the Court noted that one of the parties objected to release of these transcripts, but the Court did not appear to make any findings justifying continued sealing of them. A court may not deny access to publicly filed court documents without providing notice to the public and making specific, particularized findings on the record justifying such secrecy. *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 13–14, (1986). Respectfully, the Court may not abdicate its responsibility to determine whether court records should be made available to the public, merely because one party objects to disclosure. *Citizens First Nat’l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) (“The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it).”).

Additionally, this is a bench trial. The commonly made argument that sealing is necessary in order to keep certain information from tainting jurors is therefore inapplicable. Indeed, sidebar conferences are largely meant to conduct proceedings outside the presence of a jury. Not only would disclosure here create no risk to a jury, but it would also increase visibility into the Court's rulings, which is particularly important given the Court's role as finder of fact. For the same reasons, Intervenor's request also includes in-chamber conferences, to the extent that there are transcripts of any such conferences, as we are not aware of particularized findings to support the denial of access now that the trial has concluded.

If the Court considers entering any findings in support of closure, Intervenor respectfully request the opportunity to participate in that process, to review any proposed findings and, if necessary, to challenge them. In this case—a high-profile criminal trial involving alleged police misconduct—the public's constitutional right of access is particularly powerful. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1035 (1991) (plurality) (recognizing that “public awareness and criticism have even greater importance” when they concern allegations of police corruption and prosecutorial misconduct). Moreover, “what goes on in court is the business of the people. Courts function best and most effectively when they are open to the public view. When courts are open, their work is observed and understood, and understanding leads to respect.” *In re Marriage of Johnson*, 232 Ill. App. 3d at 1074.

CONCLUSION

For the foregoing reasons, Intervenor respectfully request that the Court promptly grant Intervenor's Emergency Motion for access to judicial records, including access to all sidebar and in-chambers conference transcripts.

Dated: December 10, 2018

Respectfully submitted,

CHICAGO PUBLIC MEDIA, INC.
WGN CONTINENTAL BROADCASTING
COMPANY, LLC
THE ASSOCIATED PRESS
CHICAGO TRIBUNE COMPANY, LLC
REPORTERS COMMITTEE FOR FREEDOM OF
THE PRESS

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The People of the State of Illinois

Plaintiff

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DAVID MARCH, JOSEPH WALSH, and THOMAS
GAFFNEY

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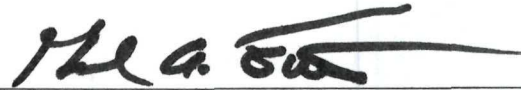
17 CR 09700-02

17 CR 09700-03

APPEARANCE

The undersigned, as attorney, enters the appearance of
Chicago Public Media, Inc

Intervenors in the above entitled cause.



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