Filed Under Seal Over Intervenors' Objection to Sealing

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

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	No. 17 CR 0428601
	)	
vs.	)	Hon. Vincent M. Gaughan
	)	
JASON VAN DYKE,	)	
	)	
Defendant.	)	

INTERVENORS' OPPOSITION TO STATE'S
MOTION TO CLOSE MAY 4, 2018 COURT HEARINGS

The State's motion to bar the public from the court hearings scheduled for May 4, 2018, is unsupported in law and devoid of the necessary justifications strictly mandated by the First Amendment, for the Court to take the extraordinary step of closing the courtroom for pretrial hearings in a criminal case. Intervenors respectfully request that the Court deny the motion and hold the May 4 hearings in public.

FACTUAL BACKGROUND

Intervenors, which are seven news organizations and the Reporters Committee for Freedom of the Press, have intervened to assert their right of access to these public proceedings in which a Chicago police officer is accused of murder in the death of a teenager named Laquan McDonald, who was shot 16 times in an incident recorded by a police video camera. Although the Court repeatedly has held what it terms "informal case management conferences" in chambers to discuss with the State and the Defendant (the "Parties") various matters out of public view, the State's "Motion to Close the Public Hearings Scheduled to Be Litigated May 4, 2018" (herein, "Motion to Close Hearings" filed April 28, 2018), represents the first time either of the Parties has moved the Court to close a public hearing on motions seeking specific judicial relief in this matter. The

Motion to Close Hearings seeks to bar the public from the scheduled May 4 hearings at which the Court is expected to take up two motions: (1) a defense motion under *People v. Lynch*, 104 Ill. 2d 194 (1984), to admit evidence of McDonald's alleged past violent acts in support of the Defendant's assertion that he acted in self-defense (the "*Lynch* Motion"); and (2) a State motion to bar testimony from a defense expert about the psychology of police-involved shootings and the expert's examination of the Defendant (the "Expert Motion"). Motion to Close Hearings at 1-2; People's Motion in Limine (filed March 8, 2018) at 2. The Motion to Close Hearings further asks the Court to seal the transcripts of the May 4 hearings until after the trial or sentencing in this matter. Motion to Close Hearings at 2.

At a hearing on April 28, 2018, the Court considered the State's Motion to Close Hearings and allowed Intervenors leave to file this written opposition to that Motion. The Court did not permit Intervenors to present oral argument on the matter on April 28 but stated that "we are going to seal [the May 4 hearing];" and later described these findings as "preliminary." 4/28/18 Tr. at 7-8, 11.

A. The *Lynch* Hearing

In *Lynch*, the Illinois Supreme Court held that evidence of a shooting victim's propensity for violence is admissible in a self-defense case involving conflicting accounts of what happened, even if the defendant did not know of the victim's violent propensity at the time of the incident. *Lynch*, 104 Ill. 2d at 200. "[W]hen the theory of self-defense is raised, the victim's aggressive and violent character is relevant to show who was the aggressor, and the defendant may show it by appropriate evidence, regardless of when he learned of it." *Id.* The factual matter surrounding the *Lynch* Motion was already given an extensive public airing at a public hearing on January 18, 2018. At the January 18 hearing, the public heard a proffer from the Defendant's attorney as to 25

separate witness accounts of incidents the defense sought to introduce under *Lynch*, and the Court preliminarily ruled that six of these incidents (as recounted by nine of the 25 witnesses) would be admitted, pending a further ruling or "issues conference" regarding the precise testimony to be admitted. 1/18/Tr. at 11-58. At the hearing, and in public, Defendant's attorney described the provisionally admitted allegations as follows, without disclosing witness names:

- **Witness Nos. 6, 7:** that on August 26, 2013, in an incident in a courthouse lockup area at the Cook County Juvenile Court, McDonald attempted to strike a Cook County Sheriff's deputy who had sought to restrain him and then threw a pair of handcuffs at the deputy. *Id.* at 21-22. It was not clear whether Witness No. 7 could offer a firsthand account of this event, and the Court reserved ruling on the extent of that witness's testimony. *Id.* at 26, 28.

- **Witness Nos. 8 and 9:** that on an unspecified date at the Juvenile Temporary Detention Center ("JTDC"), McDonald became angry, threatened staff, incited other detainees against staff, and eventually "aggressively resisted restraints by swinging his torso and kicking his legs and at one point wrapping his arms around a female staff member," whereupon he continued to resist by kicking his legs and "jumped to his feet and attempted to spit at staff members." *Id.* at 31-32.

- **Witness Nos. 14, 15:** that on February 16, 2014, at the JTDC, McDonald verbally threatened a staff member, "refused to obey directives," and "ripped a phone . . . off the console and pulled out all of the cords" before resisting staff members' efforts to restrain him and further threatening a staff member. *Id.* at 40-42.

- **Witness No. 16:** that on January 20, 2014, at the JTDC, McDonald "became very aggressive, angry and attempted to break a television set," and when confronted by staff, McDonald swore, "continued to be belligerent," and punched a staff member in the chest with a closed fist. *Id.* at 44-45.

- **Witness No. 17:** that on January 19, 2014, at the JTDC, McDonald became involved in a fight in a television area of the facility and then punched another detainee multiple times after staff told him to sit down. *Id.* at 46-47.

- **Witness No. 23:** that on February 20, 2014, at Juvenile Court, McDonald was found to have violated his probation after a positive drug test, and while being escorted out of the courtroom, he "left in an aggressive manner and ended up spitting on a sheriff," threatening another detainee, and telling a staff member that "he should kill her." *Id.* at 54-55.

The May 4 *Lynch* hearing presumably is the "issues conference" the Court wishes to hold to determine what specific testimony from the above nine witnesses may be admissible. At a hearing on April 26, 2018, the Court stated that it wanted those witnesses to be present to testify, and that the Court planned to seal the hearing to avoid disclosure of witness names, and to prevent disclosure of evidence that may be inadmissible at trial. 4/26/18 Tr. at 74-76. The State's two-page Motion to Close Hearings echoed the argument that the hearing should be closed because the public must not be allowed to hear "unreliable or inadmissible evidence," and it made conclusory statements that the *Lynch* hearing (as well as the expert hearing) are not subject to the First Amendment presumption of public access. Motion to Close Hearings at 1-2. The State also argued in court on April 28 that holding the *Lynch* hearing publicly "could have the potential, and would likely have the potential, to interfere with the [D]efendant's right to a fair trial." 4/28/18 Tr. at 3.

B. The Expert Hearing

The Expert Motion is a motion *in limine* to exclude the opinions of a defense expert on the physiological and neurological effects that officer-involved shootings have on police officers. In that motion, a redacted version of which was released to the public on April 26, 2018, the State described this witness's proffered area of expertise as "the physiological reactions experienced by police officers during and following an officer involved shooting" and represented that the defense seeks to have the witness testify to the following:

- "the neurophysiological response mechanisms including but not limited to the alterations in perceptions, thinking, behavior, and memory";
- "sensory and perceptual adaptations, alterations of memory, and post-shooting officer reactions"; and
- statements made by Defendant to the witness during a 2016 psychological examination, on topics including Defendant's "state of mind" at the time of the McDonald shooting, his explanation for his conduct including why he shot McDonald, his actions after the

> shooting, his return to work, and how his involvement in the shooting has affected his life.

Expert Motion at 2.

The May 4 hearing on the Expert Motion presumably will include more detailed discussion and argument about this expert's opinions and their admissibility at trial. The State seeks to bar the public from the hearing on the ground that Defendant is seeking to introduce inadmissible evidence that, if disclosed (apparently to some greater extent than it already has been), "poses a significant risk of unduly prejudicing the jury pool." Motion to Close Hearings at 2; *see also* 4/28/18 Tr. at 11 (State asserts that hearing the Expert Motion in public "could interfere with the [D]efendant's right to a fair trial."). The State offered no further arguments, orally or in its Motion to Close Hearings, to justify closure. Nor did the State assert that closure *is essential* to protect Defendant's fair trial right, that holding the Expert Motion hearing in public would create a substantial probability of prejudicing that right, or that reasonable alternatives to closure would not adequately protect the right.

ARGUMENT

The First Amendment presumption of public access is rigorously applied to criminal court proceedings. *See Press-Enter. Co. v. Super. Ct of Calif. for Riverside Cty.*, 478 U.S. 1, 13 (1986) ("*Press-Enterprise II*"). "Closed proceedings, although not absolutely precluded, must be rare." *Press-Enter. Co. v. Super. Ct. of Calif.*, 464 U.S. 501, 509 (1984) ("*Press-Enterprise I*"); *see also Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 236 (2000). The public's right of access to court proceedings is firmly rooted in the common law and the First Amendment. *Skolnick*, 191 Ill. 2d at 230-32. Access to proceedings is "essential to the public's right to monitor the functioning of

our courts, thereby insuring quality, honesty and respect for our legal system." *Id.* at 230[1] (citations and internal quotations omitted). That is why the United States Supreme Court has long recognized a First Amendment presumption of public and press access to criminal court proceedings – *including, specifically, hearings regarding the suppression of inadmissible evidence. See, e.g., Waller v. Georgia*, 467 U.S. 39, 47-48 (1984). *People v. Kelly*, 397 Ill. App. 3d 232 (2009), does not support the sweeping and unsupported closure order the State seeks. It *could not*, consistent with settled U.S. and Illinois Supreme Court jurisprudence. Under that binding law, the fact that inadmissible evidence might reach potential jurors' ears is patently insufficient to justify closing the courtroom – especially when *voir dire* and jury instructions can address any hypothesized harm to Defendant's fair trial rights.

Furthermore, even if this Court could find overriding interests compelling closure are genuinely present, the public's right of access may be limited only to the extent necessary to vindicate those interests. *See Press-Enterprise I*, 464 U.S. at 510. The State does not even attempt to show that there is no reasonable alternative to total closure of the May 4 proceeding. Plainly, there are alternatives to a blanket closure order. Justice does not mean doing what is most convenient. Rather, adherence to the constitutional balance and least restrictive means analysis

---

[1]The Court previously appeared to suggest that the Illinois Supreme Court's decision in *Skolnick* somehow carries less weight as to the presumption of public access here, on the ground that *Skolnick* was a civil case. *See* 4/28/18 Tr. at 98. But the cases make clear that the presumption, and the rationale behind its application, have their origin in criminal cases and apply with equal if not greater force to criminal cases. *See, e.g., United States v. Peters*, 754 F.2d 753, 763 (7th Cir. 1985) (recognizing First Amendment right of access to judicial records in criminal case). "Most of the cases recognizing the presumption of access relate to the right of the public (and press) to attend *criminal* proceedings and to obtain documents used in *criminal* cases. However . . . the policy reasons for granting public access to criminal proceedings apply to civil cases as well. These policies relate to the public's right to monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system." *In re Continental Illinois Secs. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984) (italics in original; internal citations omitted). "Though its original inception was in the realm of criminal proceedings, the right of access has since been extended to civil proceedings because the contribution of publicity is just as important there." *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (citing *Smith v. U.S. Dist. Court*, 956 F.2d 647, 650 (7th Cir. 1992)).

requires this Court to consider alternative options in depth and with the vigor the American justice system deserves. But such less restrictive measures as alternatives to closure should only be considered if the Court makes the proper findings (for which no basis has been presented) that any restriction at all on access is *essential* to protect Defendant's fair trial right, and unless such findings are narrowly tailored in a manner that specifically considers alternatives to closure, which cannot happen in any event without a finding that closure is the only alternative available to protect the right.

I. THE FIRST AMENDMENT AFFORDS A PRESUMPTIVE RIGHT OF ACCESS TO THE MAY 4 HEARINGS.

As the U.S. Supreme Court held in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980), "it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Richmond Newspapers* is part of a long line of Supreme Court decisions that recognize a presumptive right of public access to the criminal justice system – *including* pretrial proceedings such as the May 4 hearing. *See e.g., Press-Enterprise II,* 478 U.S. 1 (right of access to preliminary hearing); *Press-Enterprise I*, 464 U.S. 501 (*voir dire* proceedings); *Waller,* 467 U.S. 39 (suppression hearing).

In forcefully upholding this right of access, the Supreme Court has observed:

> [T]he right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process.

Globe Newspaper Co. v. Super. Court for County of Norfolk, 457 U.S. 596, 606 (1982).

In contrast, closed proceedings inhibit the "crucial prophylactic aspects of the administration of justice" and lead to distrust of the judicial system if, for example, the outcome

is unexpected and the reasons for it are hidden from public view. *Richmond Newsp.*, 448 U.S. at 571.

In determining whether the access right attaches, the courts apply the test of "experience and logic," *i.e.,* they consider "whether the place and process have historically been open to the press and general public," and "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II,* 478 U.S. at 8 (citing *Globe Newsp.,* 457 U.S. at 605-06). Under that test, "[o]pen preliminary hearings . . . have been accorded 'the favorable judgment of experience,'" and hence are subject to the presumption against closure. *Id.* at 11; *see also El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 150-51 (1993) (recognizing "established and widespread tradition of open preliminary hearings among the States").

The State's assertion that "[l]ike the pretrial proceedings in *Kelly*, the subject matter of the May 4, 2018 proceedings are not ones that have been historically open to the public or which have a purpose and function that would be furthered by disclosure" (Motion to Close Hearings at 2) is simply incorrect. The "aims and interests" that animate the presumption in favor of public trials and preliminary hearings "are no less pressing" in the context of a pretrial hearing to suppress inadmissible evidence. *Waller*, 467 U.S. at 46; *see also People v. LaGrone*, 361 Ill. App. 3d 532, 536-37 (4th Dist. 2005) ("the standard set forth in *Press–Enterprise II* is the standard we will apply in reviewing the trial court's decision to close the proceedings on defendant's motions *in limine*"; reversing closure order despite the trial court's concern that inadmissible evidence would be made public).

The "experience and logic" test does not look to the particular "subject matter" of the preliminary hearing or the "particular practice of any one jurisdiction, but instead 'to the

experience in that *type* or *kind* of hearing throughout the United States . . . .'" *El Vocero de Puerto Rico*, 508 U.S. at 150 (quoting *Rivera–Puig v. Garcia–Rosario,* 983 F.2d 311, 323 (1st Cir. 1992)) (italics in original). And again, the Supreme Court has held that this *type* of pretrial hearing is presumptively open – *even if* the subject matter includes potentially inadmissible evidence. *See Press-Enterprise II*, 478 U.S. at 13-15. Indeed, if, as *Waller* held, there is a right of access to Fourth Amendment suppression hearings – which involve evidence that typically incriminates the defendant – there is *a fortiori* a right of access to this hearing where the defendant proposes admission of evidence that will *help* his case. Thus no Sixth Amendment rights, which are the stated basis of the State's effort to close the May 4 hearings, are implicated.

Accordingly, the *Lynch* hearing and the Expert Motion hearing scheduled for May 4 are unquestionably of the same "type" as the suppression hearing in *Waller*: they will involve "testimony by witnesses, arguments by counsel, and determinations by the trial court." *Kelly*, 397 Ill. App. 3d at 258 (citing *Waller*, 467 U.S. at 47); *see* Motion to Close Hearings at 1 ("In order to litigate the motion in *limine*, the parties will need to present the contested evidence in open court for review"). Just as written submissions to the court on a motion *in limine* (that form the basis for the court's decision) are part of the court file and presumed open to the public, argument and testimony on the hearing of such a motion are also presumptively public. Thus, to the extent *Kelly* is read to suggest that motions *in limine* and their related hearings have traditionally not been accessible to the public, that suggestion is contrary not only to *Press-Enterprise II* and *Waller*, but to the Illinois Supreme Court's decision in *Skolnick*, and should be rejected.

And indeed, *Kelly* itself acknowledged that "the presumption [of access] applied" to the admissibility hearing in *Waller*. 397 Ill. App. 3d at 258. However, as Intervenors have noted and the Court is well aware, *Kelly* was a highly unusual case, and the hearings at issue there involved

allegations of unlawful sex with an underage female. *Kelly* specifically distinguished cases like *Waller*, and this one, where "the public has 'a strong interest in exposing substantial allegations of police conduct to the salutary effects of public scrutiny,'" noting that "in the case at bar, the hearings did not concern" such allegations, "which carry a 'particularly strong' need for public scrutiny." *Kelly*, 397 Ill. App. 3d at 258-59 (quoting *Waller*, 467 U.S. at 39). The First Amendment presumption of public access applies to both May 4 hearings.

II. THE STATE CANNOT JUSTIFY THE EXTRAORDINARY STEP OF BARRING THE PUBLIC FROM THE MAY 4 HEARINGS.

The public's First Amendment-based presumption of access to court proceedings, including hearings on admissibility motions, can be overcome only by showing that closure "is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise I*, 464 U.S. at 510. To justify a closure order, a trial court must:

1. Identify a compelling, overriding interest requiring courtroom closure;
2. Narrowly tailor the closure order to protect that interest (and, in doing so, specifically consider alternatives to closure); and
3. Make specific findings adequate to support the decision that closure is the only alternative that can serve that interest.

Id.; *see also Globe Newsp.*, 457 U.S. at 606-607; *Waller*, 467 U.S. at 48; *Skolnick*, 191 Ill. 2d at 232 (constitutional presumption of access can be rebutted by demonstrating that "suppression is 'essential to preserve higher values and is narrowly tailored to serve that interest'") (quoting *Grove Fresh,* 24 F.3d at 897).

"Overcoming the presumption [of access] . . . is a formidable task. The court must be 'firmly convinced that disclosure is inappropriate before arriving at a decision limiting access.'" *Associated Press*, 162 F.3d at 506 (quoting *Press-Enterprise I*, 464 U.S. at 510). In *Waller*, the

Supreme Court made clear that "[s]uch circumstances will be *rare*" and "the balance of interests must be struck with special care." *Waller*, 467 U.S. at 45 (emphasis added).

A. No Showing Has Been Or Could Be Made That Closure Is Necessary To Serve An Overriding Public Interest.

Intervenors' constitutional access right – including the right to bear public witness to the hearing in this case – cannot be set aside except in the face of express findings by this Court that compelling interests require otherwise. No such compelling interests have been articulated, much less supported with evidentiary submissions, by the State – only the conclusory assertion that "[g]iven the significant public scrutiny of this case, releasing to the public, the potentially inadmissible evidence which will be presented to the court at the May 4, 2018 hearings, poses a significant risk of unduly prejudicing the jury pool," Motion to Close Hearings at 2, and that holding these hearings in public "could interfere" with Defendant's fair trial right. 4/28/18 Tr. at 11.

Respectfully, no showing has been made by anyone that news coverage of the *Lynch* hearing or the hearing on the Expert Motion will generate publicity that could, let alone will, create the "substantial probability" of prejudicing fair trial rights that is required to justify closure. *Press-Enterprise II*, 478 U.S. at 13-15. A bald representation that making a hearing public "could" affect fair trial rights or has the "potential" to do so is insufficient to meet the First Amendment's high bar for closure.[2] If the law were otherwise, a party to a criminal case could block the public from

[2] The State's reliance on language from *Kelly* that public access to an admissibility hearing poses "special risks of unfairness," Motion to Close Hearing at 2, is misplaced and of no avail. *Kelly* was quoting *Press-Enterprise II.* The State fails to mention that immediately after its comment about "special risks of unfairness," the Supreme Court in *Press-Enterprise II* emphasized that a "risk of prejudice does not automatically justify refusing public access to hearings on every motion to suppress," and "[t]he First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of" a fair trial. *Id.* at 15. Instead, as *Press-Enterprise II* recognized, *voir dire* and instructions to jurors protect fair trial rights such that wholesale denial of access is rarely justified. *Id.* Accordingly, the quoted language from *Kelly*, when read in its proper, appropriate, and accurate context, supports

access to most or even all pre-trial proceedings concerning evidence to be offered at trial, all based on speculation that the news coverage might affect that party's petit jury in some unspecified or unsupported manner. Here, the public already has the gist of the *Lynch* evidence because it was aired fully in public at the January 18 hearing. Although there is no basis for concluding that any of it rises to the level of a "substantial probability" of prejudicing any party's rights here, there is a substantial public interest in observing how this Court applies *Lynch* and what evidence of McDonald's prior acts will or will not be allowed to reach the jury in support of Defendant's self-defense arguments. As for the Expert Motion, there is no argument that the Defendant will be harmed by the public hearing more about this proposed testimony than the already substantial description of it in the State's motion, as this information is *helpful* to the defense.

In addition, the record already includes substantial testimony from a different defense expert, Bryan Edelman, who told the Court that the mere existence of substantial press coverage of a case does not translate automatically into a substantial probability of prejudicing the Defendant's fair trial right. As Dr. Edelman, a social psychologist called by the defense in support of its motion for change of venue, testified:

> [T]here can be inflammatory coverage; but it doesn't mean that it has really impacted the community. I've had cases where there's been hundreds of articles; and then you do the survey, less than half of the – the jury pool is familiar with the case. It just doesn't capture their attention.

4/18/18 Tr. at 60.

Finally, while the State purports to advance the Defendant's fair trial rights in seeking to close the May 4 hearings, *id.* at 3, 11, the State has not argued that the Court could even make the necessary findings that reasonable alternatives to closure cannot adequately protect those rights.

Intervenors' point that closure is rare and must be supported by the required specific findings, and not the conclusory assertions of the kind offered in the Motion to Close Hearing.

Press-Enterprise II, 478 U.S. at 13-15; *see also LaGrone*, 361 Ill. App. 3d at 536-37 (trial court's finding that "inadmissible evidence in the hands of the media would 'tend' to create 'more than a potential problem' selecting a jury is not a fact-specific finding showing a substantial probability that an impartial jury could not be chosen"; speculative "concern that the press will misuse inadmissible information is not sufficient to support a finding that a substantial probability exists that the defendant's fair-trial rights will be impinged."). The record here contains ample evidence, again from Dr. Edelman, that even where pre-trial publicity *has* been absorbed by the broader jury pool, reasonable alternatives are available to the Court to avoid an adverse impact on fair trial rights. Although the Parties and the Court have scarcely mentioned the availability of tools such as *voir dire*, jury questionnaires, and jury instructions while urging limitations on the public's right of access, Dr. Edelman's testimony served as a reminder that these tools are viable alternatives to closure:

> [A]ssuming that . . . there's high recognition, or appears to be significant pre-judgment, I would recommend different remedial measures. It would be – sometimes they're minor; and it's just maybe an individual sequestered *voir dire*, or extended jury questionnaire, or excluding jurors who on the questionnaire say they're familiar with the case; and it stops there.

4/18/18 Tr. at 60-61. *See also LaGrone*, 361 Ill. App. 3d at 537 ("*voir dire* is the preferred method for guarding against the effects of pretrial publicity"); *People v. Taylor*, 166 Ill. 2d 414, 438-39 (1995) (holding that jurors are presumed to follow their instructions, even when exposed to extraneous material). As the U.S. Supreme Court has stated:

> Our decisions have rightly set a high bar for allegations of juror prejudice due to pretrial publicity. News coverage of civil and criminal trials of public interest conveys to society at large how our justice system operates. And it is a premise of that system that jurors will set aside their preconceptions when they enter the courtroom and decide cases based on the evidence presented.

Skilling v. United States, 561 U.S. 358, 399 n.34 (2010) (internal citations omitted).

On this record, the Court has simply no basis to find that closure of the May 4 hearings is essential to protect Defendant's fair trial rights or any other interest, that holding the hearings in public would create a substantial probability of prejudice to Defendant's fair trial right, or that reasonable alternatives to closing the hearings would not adequately protect that interest, to the extent it is even in play.

B. Even If An Overriding Interest Could Be Proven, Less Restrictive Alternatives To Total Closure Must Be Employed.

Even if there were a basis for closing the courtroom – and there is not – the Court cannot take that extraordinary step before considering the availability of more limited, less restrictive alternatives to closure. These measures include *voir dire* and proper jury instructions. In the case of the *Lynch* witnesses (about whom the Court has expressed security concerns if they appear as expected on May 4), the State has not proposed, and the Court has not considered, less restrictive means to protect their anonymity while not denying access. If and only if some form of restricted access is found by the Court to be essential to protect witness security, the required narrowly tailored findings must address and consider the availability of less restrictive measures short of closure, because the First Amendment presumption of public access means that the Court should consider closure as a last resort, not a first resort.

Additionally, to the extent that a sufficient basis could be found to close the hearing in whole or part, at a minimum, the transcripts of proceedings should be made available *promptly*, after allowing a very brief period of time for redaction of only those limited portions required to protect the specific overriding interests at issue. "To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression." *Grove Fresh*, 24 F.3d at 897; *see also* Intervenors' Consolidated Response to Parties' Objections to Public Disclosure of Court File Documents at 21-22 (citing cases for controlling law that public access

must be contemporaneous). Accordingly, if used as a viable alternative, transcripts must be made available immediately *i.e.*, within a day.

CONCLUSION

In sum, the First Amendment analysis is an exacting one and requires not only that closure be essential to protect some higher interest, but also that any restriction on public access to a pretrial proceeding like the May 4 hearings here be as limited as possible – even if it means taking additional measures to allow for some public access. The Constitution demands this process. Here, the State has identified no legitimate – much less compelling and overriding – interest that would justify closing the May 4 hearings to the press and public. Nor has the State shown that total closure is necessary to serve that unsubstantiated interest. The Motion to Close Hearings must be denied.

Filed Under Seal Over Intervenors' Objection to Sealing

Dated: May 2, 2018

Respectfully submitted,

CHICAGO PUBLIC MEDIA, INC.

By: _____
One of Its Attorneys

THE ASSOCIATED PRESS
WLS TELEVISION, INC.
WGN CONTINENTAL BROADCASTING CO., LLC
WFLD FOX 32 CHICAGO
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

By: _____
One of Their Attorneys

Jeffrey D. Colman
Gabriel A. Fuentes
Patrick E. Cordova
Jenner & Block LLP
353 N. Clark St.
Chicago, IL 60654
(312) 222-9350
jcolman@jenner.com
gfuentes@jenner.com
pcordova@jenner.com
Counsel for Chicago Public Media, Inc.

Brendan J. Healey
Mandell Menkes LLC
1 N. Franklin St, Ste. 3600
Chicago, IL 60606
(312) 251-1000
bhealey@mandellmenkes.com
Counsel for Reporters Committee for Freedom of the Press, WGN Continental Broadcasting Co., LLC, WFLD Fox 32 Chicago, The Associated Press, and WLS Television, Inc.

Natalie J. Spears
Dentons US, LLP
233 S. Wacker Drive
Chicago, IL 60606
312-876-2556
natalie.spears@dentons.com
Counsel for Chicago Tribune Company, LLC

Damon E. Dunn
Funkhouser Vegosen Liebman & Dunn, Ltd.
55 West Monroe Street
Suite 2410
Chicago, IL 60603
(312) 701-6800
ddunn@fvldlaw.com
Counsel for Sun-Times Media, LLC