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

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	17 CR 04286-01
Plaintiff,	)	
	)	
v.	)	
	)	
JASON VAN DYKE,	)	
	)	Hon. Vincent M. Gaughan
Defendant.	)	Judge Presiding

Order Closing May 4, 2018 Proceedings

The Court granted leave to seven news organizations (Intervenors) to intervene in this action regarding access to records and proceedings. Two matters, a hearing regarding admissibility of material under *People v. Lynch*, 104 Ill. 2d 194 (1984), and a hearing on the admissibility of a certain expert's testimony offered by the Defense or limits thereon, are scheduled to be heard on May 4, 2018. The State moved for closure of these proceedings and the Defense agreed. On April 28, 2018, the Court indicated, preliminarily, it would close the May 4 proceedings. Intervenors object to closure and the Court allowed Intervenors to file a brief on their position. The Court has reviewed that brief, pleadings of the parties, and relevant authority. Accordingly, the May 4 proceedings will be closed to the media and general public.

Legal Standard

The public has parallel rights of access to court records and proceedings rooted in the federal and state constitutions, common law, and state statute. *People v. Kelly*, 397

Ill. App. 3d 232, 242 (2009). As the Court commented on April 28, "the first amendment...enables all the other articles and amendments in our Constitution to be strong."[1] Indeed, openness is a keystone to the integrity of the administration of criminal justice. See *Richmond Newspapers v. Virginia,* 448 U.S. 555, 564-73 (1980) (discussing historical tradition of open criminal trials and the benefits of public access). But, both the United States and Illinois Supreme Courts recognize the right of public access is not absolute. *Press-Enterprise Co. v. Superior Court of California for the County of Riverside,* 478 U.S. 1, 9 (1986) (*Press-Enterprise II*); *Skolnick v. Altheimer & Gray,* 191 Ill. 2d 214, 231 (2000). Rather, the first amendment gives rise to a qualified right of access when the tests of experience and logic render the record or proceedings presumptively open. *Kelly,* 397 Ill. App. 3d at 260 (citing *Press-Enterprise II,* 478 U.S. at 9). The experience test examines whether "there has been a tradition of accessibility;" and the logic test inquires 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.

"If the presumption applies to a certain type of proceeding or record, the trial court cannot close this type of proceeding or record, unless the court makes specific findings demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve those values." *Kelly,* 397 Ill. App. 3d. at 261 (citing *Press-Enterprise II,* 478 U.S. at 13-14; *Press-Enterprise Co. v. Superior Court of California, Riverside County,* 464 U.S. 501, 510 (1984) (*Press-Enterprise I*). "If the value asserted is the defendant's right to a fair trial, then the trial court's findings must demonstrate, first,

[1] Report of Proceedings, April 28, 2018, p. 9.

that there is a substantial probability that defendant's trial will be prejudiced by publicity that closure will prevent; and second, that reasonable alternatives cannot adequately protect the defendant's fair trial rights. *Id.* (citing *Press-Enterprise II*, 478 U.S. at 13-14).

In a criminal proceeding, "[n]o right ranks higher than the right of the accused to a fair trial." *Press-Enterprise I*, 464 U.S. at 508 (*Press-Enterprise I*). Thus, the interests of the public's right of access and a defendant's right to a fair trial may be in competition. *People v. LaGrone*, 361 Ill. App. 3d 532, 535 (2005). So, in determining the extent of access, a court has to "craft a careful and delicate balance." *Kelly*, 397 Ill. App. 3d at 256. The trial court should "take in to consideration all facts and circumstances unique to that case and decide the appropriate parameters of closure"—what is restricted and for how long. *Id.* (internal quotes omitted).

Analysis

A presumption of access can attach to certain pretrial criminal proceedings. See, e.g., *Waller v. Georgia*, 467 U.S. 39 (1984) (presumption applied to a hearing on a motion to suppress wiretap evidence). However, the presumption is most acute when the pretrial proceeding itself resembles a trial and has a likelihood of resulting in a final adjudication of the case. *Press Enterprise II*, 478 U.S. at 12 ("California preliminary hearings are sufficiently like a trial to justify [public access].***Because of its extensive scope, the preliminary hearing is often the final and most important step in the criminal proceeding"); *Kelly*, 397 Ill. App. 3d at 258 (describing *Waller* decision noting "a suppression hearing will be, in effect, the only trial if the defendant subsequently pleads

guilty" and "a suppression hearing often resembles a bench trial"). In those instances, the presumption of access that applies to criminal trials through the experience and logic tests extends to pretrial hearings.

In *Kelly*, the appellate court found the presumption of access did not attach to four pretrial hearings concerning evidence of other crimes and questionnaires for potential jurors. *Id.* at 259. The court noted those proceedings bore no resemblance to the suppression hearing in *Waller*, the subject matter of the proceedings was not historically open to the public, and their purpose and function would not be furthered by disclosure. *Id.* The other crimes evidence did not pass the experience test because "potential evidence does not carry a presumption of access until its use in court." *Id.* at 260 (interpreting *People v. Pelo*, 384 Ill. App. 3d 776, 782-83 (2008)); nor the logic test because "publicity could undermine the whole purpose of the hearing, which is to screen out unreliable or illegally obtained evidence." *Id.* quoting *Press-Enterprise II*, 478 U.S. at 14-15 (internal quotes omitted).

The *Kelly* court further noted that even if the presumption of access applied to the proceedings the balancing of competing interests along with appropriate parameters warranted closure. *Id.* The defendant's right to a public trial was not at issue. *Id.* at 262. Intense coverage of the case was an undisputed fact. *Id.* at 263. And privacy interests of sex crime victims and minors were at stake. *Id.*

The proceedings at issue and surrounding circumstances here bear strong similarity to *Kelly* in a number of regards. First, the subject matter of the May 4 proceedings is unlike those that have been historically open to the public. Both concern

potential evidence that may not be admissible at trial. They are functionally the same as pretrial depositions, with the only difference being that the Judge will be present. *Cf. Pelo*, 384 Ill. App. 3d 776 (presumption did not apply to pretrial deposition not yet entered into evidence). Thus, these do not seem to pass the experience test.

Likewise, public access would not further the purpose and function of these hearings. The proceedings concern admissibility of evidence and disclosure could result in potential jurors learning of information that is inadmissible or otherwise prejudicial to the Defendant.

Moreover, these pretrial hearings bear no resemblance to a trial or have any likelihood of producing a final adjudication. The proceedings will not function like a "full-scale trial." *Press-Enterprise II*, 478 U.S. at 7. And it is not reasonably conceivable the outcome of the hearings will induce a plea bargain. Thus, they are unlike the preliminary hearing discussed in *Press Enterprise II* or the suppression hearing in *Waller*. The Supreme Court commented that the need for a public hearing is particularly strong when the pretrial hearing concerns allegations of police misconduct "since the public has a strong interest in exposing substantial allegations of police conduct to the salutary effects of public scrutiny." *Kelly* 397 Ill. App. 3d at 258 (quoting *Waller*, 467 U.S at 47) (internal quotation marks omitted). The subject matter at issue here do not involve ancillary matters of improper police action like those raised in a suppression hearing that would not otherwise be exposed to the "salutary effects of public scrutiny." Rather, the offense itself is an allegation of improper police conduct so the "particularly strong" need for public scrutiny will be satisfied by the public trial.

Next, even if the presumption of access were to apply to these proceedings, the Court's balancing of competing interests results in a conclusion that closure is warranted. From the outset, it has been manifestly clear that this case is the subject of intensive public interest and media coverage. As the Intervenors stated in their motion to intervene, "[t]he media and the public have a significant interest in this important criminal matter in which a Chicago police officer allegedly murdered a teenager by shooting him 16 times in an incident recorded by a police video camera." And "the incident has become part of the national discussion about urban policing in America." Intervenors also note "[r]eporters have attended every court hearing since Officer Van Dyke was charged *** in November 2015."

Likewise, A LEXIS search of major news publications using the names Jason Van Dyke and Laquan McDonald yields 8,164[2] articles since November 2015. An internet search using Google returned over 1,120,000 "hits." (A court can take judicial notice of media coverage to assess "the probable extent of publicity." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976)). Further underscoring the level of interest, an expert on the effect of pretrial publicity, Dr. Bryan Edelman, testified this case is in the top four he has worked on in his career in terms of extent of media coverage.[3] (He noted his experience includes trials stemming from the 2013 Boston Marathon bombing, the 2012 theater mass shooting in Aurora, Colorado, the prosecution of a priest for murdering a young woman decades earlier in Hidalgo County, Texas, and the prosecution of

[2] As of April 24, 2018

[3] Report of Proceedings, Apr. 8, 2018, at 89-90.

Timothy McVeigh for the 1995 Oklahoma City bombing). Accordingly, that there is widespread and intense publicity concerning this case is more than speculative: it is indisputable. *Cf. Kelly*, 397 Ill. App. 3d at 240, 263.

This Court has stated this case, which has been pending for over two years since the initial indictment and over three years since the occurrence of the charged offense, will go to trial this summer. With the trial nearing, "adverse publicity can endanger the ability of a defendant to receive a fair trial." *Gannett Co. v. DePasquale*, 443 U.S. 368, 378, (1979) (internal citations omitted). And "[t]o safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity." *Id.*

Intervenors contend the Defendant's fair trial interests are diminished because the proceedings concern potentially exculpatory evidence the Defendant wants to be admitted at trial. Thus, in the Intervenors' argument, the subject matter is distinguishable from other crimes evidence like that at issue in *Kelly*. The Court is not persuaded that distinction requires a different result. *Lynch* evidence is much like other crimes evidence—both are allegations of a person's bad conduct and character. In fact, the very same conduct has the potential to be either depending on how it might come before a court. However it presents, such material is not yet in evidence before trial and may not be admissible. So, ultimately, the purpose and function of a pretrial hearing on *Lynch* evidence is similar to one regarding other crimes and disclosure would similarly undermine that purpose.

Within the same argument, Intervenors posit that since a suppression hearing would involve incriminating evidence, the presumption of access must, by force of logic, attach to hearings involving potentially exculpatory evidence. The Court is not persuaded. The public interest supporting the openness of suppression hearings does not derive from whether the evidence at issue is harmful or helpful to the defendant: it derives from the "particularly strong" need for public scrutiny of allegations of police misconduct. As explained earlier, the trial on this charge will meet that interest.

Further, the proceeding on *Lynch* material will concern a minor. The privacy interests generally afforded a minor were noted in *Kelly* and are applicable here, even though this case does not involve a sex crime. Intervenors argue *Kelly* was "a highly unusual case" because the hearings at issue "involved allegations of unlawful sex with an underage female." In so arguing, Intervenors seem to contend that fact alone distinguished it from *Waller*. The Court disagrees. The *Kelly* court noted consideration of several reasons made closure proper.

In addition, this case presents serious safety concerns. The Constitution compels courts not only to vindicate individual rights after a deprivation, but also in applicable circumstances, to take actions to ensure the protection of those rights, of which, life and liberty are paramount. During the pendency of this case, the Defense has reported several threats toward the Defendant. The Court received a copy of a flier distributed in front of the Leighton Building that, in part, called for violence against the Defendant. While the flier is an example that appears to come from a certain point of view, other material reported by the Defense and available on the internet is no less intense or

inflammatory. The Court is greatly concerned that the witnesses summoned to appear at the May 4 hearings could be exposed to harm. Aside from the effect these circumstances may have on the truth-seeking function of the case, the Court has a duty to the witnesses for their basic safety.

Based on these considerations, the Court finds there is a substantial probability that Defendant's trial will be prejudiced and the safety of witnesses will be at risk if the May 4 proceedings are open. Only closure will prevent that harm.

Intervenors do not suggest alternatives to closure other than to state "*voir dire* and instructions can and should be an adequate alternative." And "'[i]t is presumed that juries will obey the Court's instructions to limit themselves to the facts in evidence." While *voir dire* can normally "identify those jurors whose prior knowledge of a case would disable them from rendering an impartial verdict," courts recognize there are "circumstances where *voir dire* cannot remove the taint" of pretrial publicity. *Kelly*, 397 Ill App. 3d at 264. *Voir dire* and instructions are measures a court can employ *post hoc* to address the effects of pretrial publicity. The Court cannot assume, ahead of time, that *voir dire* or instructions will cure any prejudice when it has the ability to prevent it. This Court has a duty to prevent this from becoming a "rare case" where such measures cannot protect the right to a fair trial. *Id.* Accordingly, the Court finds reasonable alternatives to closure cannot adequately protect the Defendant's fair trial rights.

In sum, these proceedings do not give rise to a presumption of access. Closure is essential to preserve competing interests. And reasonable alternatives are not available.

Despite closure of the in-court hearings, transcripts will be available as they have been for all proceedings in this case.

Conclusion

Based on the foregoing, the proceedings regarding the Defense's motions to admit *Lynch* evidence and expert testimony on May 4, 2018, or any date to which these specific matters may continue, shall be closed to the public and media.

Entered:

Vincent M. Gaughan

Judge Vincent M. Gaughan
Cook County Circuit Court
Criminal Division 1553

Date: May 4, 2018

ENTERED
JUDGE VINCENT GAUGHAN-1553
MAY 04 2018
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK