VIRGINIA: IN THE CIRCUIT COURT FOR ARLINGTON COUNTY

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

PETITIONER'S BRIEF IN RESPONSE TO THE COMMONWEALTH

SUMMARY

The Commonwealth's Response Brief has dismissed a massively important holding in American constitutional law as a "recent trend in favor of access."[1] The presumption of public access to criminal proceedings is the law in the Commonwealth of Virginia and federal courts. The public has constitutional and common law rights of access to criminal proceedings and the underlying judicial records. These rights may be set aside or limited only after an adversarial public hearing at which the party moving for closure has succeeded in proving that a compelling state interest exists *and* that it outweighs these rights of access (such as the Sixth Amendment right).[2] The party moving for closure is required to offer proof that this state interest will be

[1] Page 3, COMMONWEALTH'S RESPONSE TO PETITIONER'S MOTION TO UNSEAL JUDICIAL RECORDS AND DOCUMENTS RELATED TO GARDNER CRIMINAL PROSECUTION ("Commonwealth's Response Brief"). Petitioner asks the Court to notice that the Commonwealth has renamed the Petitioner's Motion, which is actually titled "MOTION TO INTERVENE TO GAIN ACCESS TO CERTAIN SEALED JUDICIAL RECORDS." As will be discussed below, there is significance in the difference between "judicial records" and "documents."

[2] Defendant not only has not raised Sixth Amendment issues, but has filed a brief in support of access.

compromised by proceedings in the open and that no other shorter, less confining remedy can resolve the threat. None of that has happened in this case. Instead, on information and belief, this Court signed off on an *ex parte* order that was not filed in with the Criminal Clerk and, based on information and belief, was sent by the Commonwealth to the Defendant's Counsel by e-mail.

The fact that this Court has not yet ruled on the defense Motion to Dismiss in no way sets up this Petitioner's Motion to Intervene as "premature." (Commonwealth's Response Brief at page 5). To the contrary, this hearing is taking place long after it should. Had things operated as required by the case law, had Petitioner had immediate access to all the information later developed, Petitioner would have been given the opportunity to file this Motion to Intervene last December and a hearing would have been promptly scheduled at that time.

Finally, the Commonwealth's grounds for closure is the impact on its witnesses, specifically the alleged victims. If the Court is able to make the required findings, the remedy is redaction of the judicial records.

In this brief, Petitioner continues its earlier practice of referring to the U.S. Supreme Court's decision in Richmond Newspapers v. Commonwealth, 448 U.S. 555 (1980) as "Richmond I" and to the Virginia Supreme Court's subsequent holding in Richmond Newspapers v. Commonwealth, 222 Va. 574 (1981) as "Richmond II." Petitioner will also continue refer to In Press Enterprise v. Superior Court, 464 U.S. 501 (1984) as "PE I" and to Press Enterprise v. Superior Court, 478 U.S. 1 (1986) as "PE II".

ARGUMENT

THE TRADITION OF COURT ACCESS LONG PRECEDES RICHMOND I

"A trial is a public event. What transpires in the court room is public property. . . . . Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it." Craig v. Harney, 331 U.S. 367, 374 (1947).

The Commonwealth has characterized public rights of access to criminal proceedings and judicial records in a way that bears correction. The Commonwealth has dismissed the steady drumbeat of open criminal trials in English and American history as "recent trends in favor of access." This a not a recent trend. This is fundamental and ancient. "As we have shown, and as was shown in both the Court's opinion and the dissent in Gannett, 443 U.S., at 384, 386, n.15, 418-425, the historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open. This is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial." Richmond I, at 569. In fact, the Richmond I Court uses a specific example of laws in *colonial* Virginia that assumed the open nature of all trials. Id. at 567.

The Commonwealth's Response Brief (page 3) states that "it is not at all clear that the public's interest provides open access as a matter of right." At a minimum, Petitioner offers Richmond I and Richmond II flatly to the contrary. Precedent for access in this particular case is found in the two Press Enterprise cases from the U.S. Supreme Court where the issue of access to pre-trial events and the transcript thereof were held to be of constitutional stature.

In Press Enterprise v. Superior Court, 464 U.S. 501 (1984) ("PE I") the Court held "[a]bsent consideration of alternatives to closure, the trial court could not constitutionally close the *voir dire*." Id. at 511. In Press Enterprise v. Superior Court, 478 U.S. 1 (1986) ("PE II"), the Court held that access to a preliminary hearing was a constitutional issue.

Even in the face of this precedent, the Commonwealth argues that the motion to dismiss represents a distinct "sub-set" of criminal proceedings and asserts that Petitioner's constitutional and common law arguments "unnecessarily broaden the scope of the issues at hand. . ." (Commonwealth's Response Brief at page 2) To the contrary, "[t]here is no reason to distinguish between pretrial proceedings and the documents filed in regard to them." Associated Press v. U.S. Dist. Court for Cent. Dist., 705 F.2d 1143, 1145 (9th Cir. 1983). Because Petitioner's initial brief has already discussed these issues, in the interest of brevity, a simple review of the cases listed in two footnotes in PE II provides access to the broad body of law holding that the constitutional right of public access to criminal trials extends also to supporting proceedings.

> n3 The vast majority of States considering the issue have concluded that the same tradition of accessibility that applies to criminal trials applies to preliminary proceedings. (Omitting multiple citations). Other courts have noted that some pretrial proceedings have no historical counterpart, but, given the importance of the pretrial proceeding to the criminal trial, the traditional right of access should still apply. (Omitting multiple citations.)
>
> n4 (Omitting citations.) Although Arizona, Iowa, Montana, North Dakota, Pennsylvania, and Utah have closure statutes based on the Field Code, see Gannett, 443 U.S., at 391, in each of these States the Supreme Court has found either a common-law or state constitutional right of the public to attend pretrial proceedings. (Omitting citations.)

PE II, 11, at n.3 and n.4. (1986)

This precedent has not stopped. Two days before the sealing order was signed in this case, the federal trial court in District of Columbia held that "[t]he right of access is not limited to the criminal trial itself, but extends to many pre- and post-trial documents and proceedings." (Multiple citations omitted.) In re Special Proceedings, 2012 U.S. Dist. LEXIS 15656, 16-17 (D.D.C. Feb. 8, 2012).

THERE IS NO PENALTY BOX FOR NOT COVERING A PROCEEDING

The Commonwealth's Response Brief suggests four times that had Petitioner just been more on the ball, it would have had a reporter in the courtroom. (Commonwealth's Response Brief at pages 2, 8, 9 and 11.) In other words, the Petitioner had the chance to see the brief, hear the arguments, even to get the alleged victims' names and if they missed that chance, so the Commonwealth argues, Petitioner should not be "assisted in its fact-finding investigation" by unsealing court records. (Commonwealth's Response Brief at 9.) To the contrary, if a news reporter is not in the courtroom, he or she and the news entity itself always have the right to argue against closure of courts or sealing of judicial records.

> This concept of 'now or never,' 'speak now or forever hold your peace' is a strict, harsh one, narrowly confining First Amendment interests in what might be a large problem of governance to a temporally immediate, discrete episode. It seems to us to contradict the insight, expressed in Richmond Newspapers, 448 U.S. at 572-73 . . .If the press is to fulfill its function of surrogate, it surely cannot be restricted to report on only those judicial proceedings that it has sufficient personnel to cover contemporaneously.

Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 504 (1st Cir. Mass. 1989).

The right of public access is like the judge's bench. It is there whether or not anyone draws attention to it. No form of media is required to have a presence in every single

proceeding to which there is a constitutional right of access in order to acquire the right to intervene and argue in favor of access. It would be an impossible requirement. If this were the law, adversarial hearings on closure orders would depend on happenstance.

THE PETITIONER SEEKS ACCESS TO *JUDICIAL RECORDS*

The Commonwealth has directed the court's attention to two cases that ought to be distinguished from this case. Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) was a defamation action brought against the Seattle Times, a civil case, not a criminal case. The newspaper defendant, a party in the case, wanted access to the names of donors to the religious organization organized by the libel plaintiff. The right to donate anonymously is of course a fully protected First Amendment right. In light of the right to speech anonymity and in light of liberal civil discovery rules that do not apply in a criminal case, the U.S. Supreme Court upheld the protective order. "The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders." Id. at 36. It was also important to the Court that the libel defendant not be allowed to use the discovery process to dig up stories it could not otherwise find. "In sum, judicial limitations on a party's ability to disseminate information discovered in advance of trial implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in a different context." Id. at 34.

Warner Communications was not permitted to get tape recordings made by President Nixon after the tapes were played in the trials of third parties. During these trials, as the Commonwealth failed to mention, transcripts of the tapes were made available to the public. (Commonwealth's Response Brief, page 9). But Warner wanted the recordings themselves for commercial distribution. On review by the U.S. Supreme Court, the claim of access was denied because the Presidential Recordings Act set up an administrative procedure for releasing the tapes to the public. Nixon v. Warner Communications, 435 U.S. 539, 603 (1978).

By referring to these particular civil cases, the Commonwealth's Response Brief (page 4) suggests that scurrilous motives drive the Petitioner, effectively reducing all news reporting on trials to the most base level. This line of reasoning would result in secret procedures for all criminal adjudication because most criminal trials and their proceedings require airing ugly facts.

If there are analogies between Seattle Times and Nixon and this case, the analogies rest entirely on the nature of the documents sought. The Virginia Court of Appeals ruled against public access to *discovery* in a criminal case when the discovery sought access to medical, psychological and psychiatric records in response to an insanity plea. In re Worrell, 14 Va. App. 671 (1992). The Virginia Court of Appeals accepted the Seattle Times, *supra*, as authority on the issue of access to discovery materials even in a criminal trial. Id. at 678. But Worrell is not the same as this case. In Worrell, the newspaper sought access to documents that (1) were not yet admitted in the trial or any pre-trial proceeding, (2) concerned medical and psychiatric evidence to support an insanity plea, (3) might be ruled inadmissible or irrelevant and finally (4) were not received in court, but in "private" exchanges between the parties for the purpose of trial preparation. Id. at 679-680. Those grounds for denial of access don't exist in this case. The

Worrell court ruled against the newspaper's petition for access for all of these reasons. Because the documents had not been submitted in evidence, "they are not 'judicial records,' as that term has been defined by the Virginia Supreme Court." Id at 682. While discussing the arguments presented by the newspaper, the Worrell court distinguished no fewer than five cases holding that "a first amendment (sic) right of access extends to documents filed in a criminal proceeding." Id. at 677. Furthermore, according to the Virginia Supreme Court, the material sought here is not discovery. In Shenandoah, another basis for the decision in Worrell, two classes of documents were defined:

> . . . [W]e will call the first class "pretrial documents". This class includes all data assembled by the parties in the discovery process authorized by Part Four of the Rules of Court, Rules 4:0 through 4:14. *We will refer to the second class as "judicial records". The documents in this class include 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*." (Emphasis supplied.)

Shenandoah Pub. House, Inc. v. Fanning, 235 Va. 253, 256-257 (Va. 1988).

This Petitioner is not seeking discovery documents; the Petitioner is seeking *judicial records*.

THE COMMONWEALTH HAS NOT MET ITS BURDEN OF PROOF

The Commonwealth's chief concern appears to be that its witnesses, the alleged victims, will change their testimony. (Commonwealth's Response, p. 5, 6, 7). Under these circumstances, it is a legitimate consideration. No doubt, these are difficult charges to bring. This role cannot be easy for the prosecuting witness in any criminal case and Petitioner does not trivialize these concerns. But witness discomfort does not readily justify sacrificing the larger community values of open criminal proceedings by sealing judicial records or closing

courtrooms. Here the Commonwealth only has offered conclusory statements, conjecture, generalizations and anticipatory fears. This is not enough. Analogies to rules affecting juvenile proceedings are not enough, unless the Virginia Supreme Court writes new rules or the General Assembly passes new legislation. That has not happened. Ths Court is not empowered to do either.

The Commonwealth acknowledges that everyone in the immediate community knows who these alleged victims are. "Most members of the community know who the victims are, whether their names are printed in the newspaper or not." (Commonwealth's Response Brief at page 7). On information and belief, Petitioner believes there were nearly 60 people in the courtroom during the hearing on the Motion to Dismiss. Whatever the headcount, there is no dispute that the courtroom was open to the public. The Commonwealth implies a fear that the Defendant's Motion to Dismiss discredits the alleged witnesses and would disseminate inaccurate information. (Commonwealth's Response Brief at page 7.) But there was no evidence that the Court or the Commonwealth were concerned about difficulties the Commonwealth now suggests. It was an afterthought, two months after the fact, that prompted the Commonwealth to ask this Court to seal the judicial records being sought,[3] specifically because the Petitioner had asked for a transcript of the hearing. (Commonwealth's Response Brief at page 5). This last minute motion suggests that the impact of widespread knowledge on alleged victims did not concern the Commonwealth at the time of the hearing. It is the Commonwealth's burden to show what *incremental* harm will impact the alleged victims if the information is now made available to the press. "It is important to note that in the context of [a

[3]Contrary to the Commonwealth's statement, Petitioner does not know whether other reporters were in the courtroom at the time.

mandatory closure law], the measure of the State's interest lies not in the extent to which minor victims are injured by testifying, but rather in the incremental injury suffered by testifying in the presence of the press and the general public." Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 609, n.19 (1982). The Commonwealth has not addressed the question of incremental impact but assumes it without discussion or proof. This is not enough.

The Globe case, *supra*, tested a statute that required courts to close when a minor sex crime victim would be testifying. The mandatory aspect of the law was struck down because the high court believed that closure would not be necessary in many cases. Trial courts should consider the circumstances of each case and the characteristics of the alleged victims. "Among the factors to be weighed are the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives." Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 608 (1982). The Commonwealth offers none of that information.

This initial fear that seems to concern the Commonwealth, the possibility of witnesses changing or recanting testimony, is precisely the reason that trials and hearing are held in open court. The function of public overview is to help guarantee the truthfulness of witnesses, who may feel less pressure behind closed doors, outside of the scrutiny of others who may know something about their allegations.

> Publicizing trial proceedings aids accurate factfinding. 'Public trials come to the attention of key witnesses unknown to the parties.' In re Oliver, [333 U.S. 257, 271, n. 24;] see Tanksley v. United States, 145 F.2d 58, 59 (CA9 1944); 6 J. Wigmore, Evidence § 1834 (J. Chadbourn rev. 1976). Shrewd legal observers have averred that "open examination of witnesses viva voce, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination . . . where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal." 3 Blackstone Commentaries, *supra*, at 373.

Richmond Newspapers v. Va., 448 U.S. 555, 596-597 (U.S. 1980).

The very stress that the Commonwealth wants to guard against is one of the functions of open proceedings, and here, it is the function of allowing access to the judicial records sought.

> 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. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process -- an essential component in our structure of self-government. In sum, the institutional value of the open criminal trial is recognized in both logic and experience.

Globe Newspaper Co. *supra,* at 606.

These proceedings are about sensitive, embarrassing and intimate facts. Contrary to the Commonwealth's representation at page 7, the Petitioner does not suggest relying on its own policy or the policy of any other news media. The Commonwealth must know that the Petitioner requests Court ordered redaction of the judicial records to block out the alleged victims' names. If the Commonwealth could show a danger that outweighs the considerable traditional and constitutional value of open proceedings, redaction will narrowly address problems that might be created by further dissemination of the alleged victims' identity.

> Therefore, prior to issuing a closure order, a trial court should be obliged to show that the order in question constitutes the least restrictive means available for protecting compelling state interests. In those cases where a closure order is imposed, the *constitutionally preferable method* for reconciling the First Amendment interests of the public and the press with the legitimate privacy interests of jurors and the interests of defendants in fair trials *is to redact transcripts* in such a way as to preserve the anonymity of jurors while disclosing the substance of their responses.

PE I, at 520. J. Marshall *concurring*. (Emphasis supplied.).

If there were a finding of incremental and unreasonable danger of unwarranted injury to the alleged victims, in addition to what has already taken place, and if that danger were to weigh more heavily that the significant constitutional benefits of open proceedings, the Court may fashion an order that directly addresses that problem and resolves it in the narrowest possible way. Petitioner respectfully suggests that court-ordered redaction is the most viable solution.

Respectfully submitted,

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