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September 28, 2012

VIA HAND-DELIVERY

Diane Hill, Clerk
York County Superior Court
45 Kennebunk Road
P.O. Box 160
Alfred, ME 04002-0160

Re: *State of Maine v. Mark Strong*
Docket No. YORSC-CR-12-1666

Dear Ms. Hill:

I am writing on behalf of the *Portland Press Herald* and the *York County Coast Star* to register my clients' objections to the State's motion for protective order dated September 24, 2012. Please bring this letter to the attention of the presiding justice before the court acts on the State's motion for protective order.

Access to proceedings and records in criminal cases implicates the highest public interest. The Supreme Court has said, "Openness . . . enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system[.]" *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 508-509 (U.S. 1984). Justice Blackmun summarized the importance of a public criminal justice system:

> [T]he requirement that a trial of a criminal case be public embodies our belief that secret judicial proceedings would be a menace to liberty. The public trial is rooted in the 'principle that justice cannot survive behind walls of silence,' and in the 'traditional Anglo-American distrust for secret trials[.]' This Nation's accepted practice of providing open trials in both federal and state courts "has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.

Gannett Co. v. DePasquale, 443 U.S. 368, 412 (U.S. 1979) (Blackumn, J., concurring in part and dissenting in part) (citations omitted). The right to public access to criminal proceedings and records is secured by the First Amendment and the common law. Criminal defendants also have a Sixth Amendment right to a public trial.

The standard for a protective order is "good cause." *Bailey v. Sears, Roebuck & Co.*, 651 A.2d 840, 843-44 (Me.1994) (referring to "good cause" with respect to protective order);

M.R.Crim.P. 16(b)(6). Referring to a protective order, the First Circuit wrote: " if the good cause standard is met, and the order is restricted to the discovery context and does not prohibit dissemination of information gained from other sources, then it does not offend the First Amendment." *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 7 (1st Cir. 1986). However, the First Amendment remains "a relevant consideration in reviewing protective orders[.]" *Id.* at 7. The First Circuit quoted with approval the following language from a Second Circuit decision:

> A plain reading of the language of Rule 26(c) demonstrates that the party seeking a protective order has the burden of showing that good cause exists for issuance of that order. It is equally apparent that the obverse also is true, i.e., if good cause is not shown, the discovery materials in question should not receive judicial protection and therefore would be open to the public for inspection. . . . Any other conclusion effectively would negate the good cause requirement of rule 26(c): Unless the public has a presumptive right of access to discovery materials, the party seeking to protect the materials would have no need for a judicial order since the public would not be allowed to examine the materials in any event.

Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 789 (1st Cir. 1988), *quoting In re "Agent Orange" Product Liability Litig.*, 821 F.2d 139, 145-46 (2d Cir.1987), cert. denied, 484 U.S. 953 (1987). This precedent is useful guidance in that the same "good cause" standard for protective orders applies in both civil or criminal cases.

A far higher standard applies before a record may be impounded by the court. The Law Court wrote, "Although under appropriate circumstances a court may impound records when publication would impede the administration of justice, the power of impoundment should be exercised with extreme care and only upon the clearest showing of necessity." *Maine Auto Dealers Assn. v. Tierney*, 425 A.2d 187, 189 n.3 (Me.1981) (citation omitted).

My clients have several concerns with the State's motion for protective order:

First, the State has not shown "good cause" for confidentiality. The State points to 16 M.R.S. §614 as a basis for confidentiality. That statute only applies to requests for records under the Freedom of Access Act. The Law Court distinguished between confidentiality for purposes of the Freedom of Access Act and protection from discovery for purposes of litigation. *Me. Health Care Ass'n Workers' Comp. Fund v. Superintendent of Ins.*, 2009 ME 5, ¶ 10, 962 A.2d 968. Further, the statute does not apply to dissemination of information to an accused person or that person's attorney pursuant to a discovery order. 16 M.R.S. § 614(3)(C). The statute is inapposite.

The State references in passing concerns for a fair trial and privacy. The State has not explained why the alternatives to closure, including jury selection, jury instructions, sequestration, and (if necessary) change of venue are inadequate to ensure a fair trial. In addition, the defendant opposes confidentiality. The State has not explained what particular

information raises privacy concerns or how such concerns outweigh the public interest in open criminal proceedings.

Second, any protective order should be strictly and carefully limited in scope to ensure that confidentiality is no greater than necessary. The scope of the proposed order is exceedingly broad. It applies to all discovery materials – as well as "investigative or trial preparation files in the possession or control of either party, the progress of this case, strategy or similar information." The order does not just apply to discovery material provided by the state – or even to the identities of persons on a "client list," referenced in the State's motion. There are no meaningful limits on the scope of the order. If the Court finds that any order is warranted, the scope of the order should be crafted to apply only to particular information turned over by the State as part of discovery upon an adequate showing of good cause and upon written findings of good cause as to particular information.

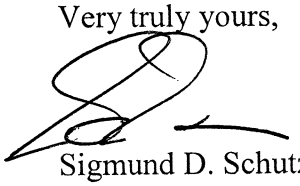
Third, the proposed order also has no limits in terms of duration. By its terms it is not limited solely to the pre-trial phase of the case. The motion for entry of the order says that the order "will continue in effect until this matter is concluded" – which suggests that the order is meant to apply even through the trial of the case. The State's motion does not come close to making the showing necessary to permit secret court filings or the introduction of evidence under seal. If any protective order is justified, it should apply only to the extent documents are *not* filed with the court in connection with pre-trial proceedings and, in any circumstance, should *not* apply to the introduction of evidence at trial.

CONCLUSION

I am filing this letter to bring my clients' concerns before the court without delay. If the court requests a more formal filing, please contact me.

Thank you for considering our First Amendment and public access concerns.

Very truly yours,



Sigmund D. Schutz

cc: Justina A. McGettigan, Esq. – Deputy District Attorney
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Sarah A. Churchill, Esq.