**VIRGINIA:**

**IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS**

**Commonwealth of Virginia**

**v.** **Case No.:**

**Antwain Donta Steward**

**PETITION FOR LEAVE TO INTERVENE**

The Daily Press, LLC, publisher of *The Daily Pre*ss, by counsel, petitions for leave to intervene in this proceeding involving Antwain Steward, for the limited purpose of seeking the vacation of an order from the Juvenile and Domestic Relations District Court issued in open court on October 2, 2013, and entered on October 3, 2013, barring media publication of information identifying certain witnesses who gave testimony in open court on October 2, 2013. The grounds for this petition are set forth fully in the accompanying memorandum.

Dated: October 4, 2013.

Respectfully Submitted,

THE DAILY PRESS, LLC
Publisher of *The Daily Press*

By Counsel

Craig T. Merritt (VSB No. 20281)
David B. Lacy (VSB No. 71177)
CHRISTIAN & BARTON, L.L.P.
909 East Main Street, Suite 1200
Richmond, Virginia 23219-3095
Tel.: (804) 697-4100
Fax: (804) 697-4112
cmerritt@cblaw.com
dlacy@cblaw.com

*Counsel for The Daily Press, LLC*

**CERTIFICATE OF SERVICE**

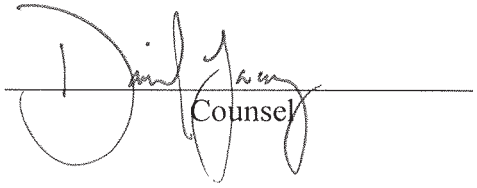
I hereby certify that a true copy of the foregoing was served by electronic and overnight delivery this 4th day of October, 2013, on:

Robin L. Farkas, Esquire
Assistant Commonwealth's Attorney
for the City of Newport News
2501 Washington Avenue, 6th Floor
Newport News, Virginia 23607
rfarkas@nngov.com

*Attorney for the Commonwealth*

James S. Ellenson, Esquire
2600 Washington Avenue, #1007
Newport News, VA 23607-4333
jimmy@jamesellenson.com

*Counsel for the Defendant*



Counsel

#1492144

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS**

**Commonwealth of Virginia**

**v.** **Case No.:**

**Antwain Donta Steward**

**MEMORANDUM IN SUPPORT OF PETITION**
**FOR LEAVE TO INTERVENE**

The Daily Press, LLC, publisher of *The Daily Pre*ss (the "Newspaper"), by counsel, petitions this Court for leave to intervene in the proceeding involving Antwain Steward.

The Commonwealth has charged Steward with, *inter alia*, two counts of murder. On October 3, 2013, following a preliminary hearing on October 2, 2013, in the Juvenile and Domestic Relations ("JDR") District Court to determine whether to certify the defendant to be tried as an adult, the JDR Court entered an Order prohibiting the media from publishing the names of the civilian (*i.e.*, non-law enforcement) witnesses who had already testified in open court. The public, including news reporting entities such as Petitioner, has standing to intervene and challenge any prior restraint on the exercise of free speech. *Cf. Richmond Newspapers, Inc. v. Commonwealth*, 222 Va. 574, 590, 281 S.E.2d 915, 923 (1981) ("Intervention is necessary to give substance to the qualified right of access discussed herein."). In this case, the Order was directed specifically to petitioner and other media entities, and has a direct and immediate effect on the exercise of their constitutionally-guaranteed rights, conferring upon them standing to intervene for the purpose of protecting those rights.

For the reasons stated, Petitioner respectfully requests that its petition for leave to intervene be granted and that it be afforded an opportunity to object to the October 3, 2013, Order prohibiting the release or publication of the names of the lay witnesses who testified in open court during the preliminary hearing on October 2, 2013.

Dated: October 4, 2013.

Respectfully submitted,

THE DAILY PRESS, LLC,
Publisher of *The Daily Press*

By Counsel

Craig T. Merritt (VSB No. 20281)
David B. Lacy (VSB No. 71177)
CHRISTIAN & BARTON, L.L.P.
909 East Main Street, Suite 1200
Richmond, Virginia 23219-3095
Tel.: (804) 697-4100
Fax: (804) 697-4112
cmerritt@cblaw.com
dlacy@cblaw.com

*Counsel for The Daily Press, LLC*

## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served by electronic and overnight delivery this 4th day of October, 2013, on:

Robin L. Farkas, Esquire
Assistant Commonwealth's Attorney
for the City of Newport News
2501 Washington Avenue, 6th Floor
Newport News, Virginia 23607
rfarkas@nngov.com

*Attorney for the Commonwealth*

James S. Ellenson, Esquire
2600 Washington Avenue, #1007
Newport News, VA 23607-4333
jimmy@jamesellenson.com

*Counsel for the Defendant*

Counsel

#1492148

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS**

**Commonwealth of Virginia**

**v.** **Case No.:**

**Antwain Donta Steward**

**MOTION TO VACATE ORDER IMPOSING PRIOR RESTRAINT**

The Daily Press, LLC, publisher of *The Daily Press* (the "Newspaper"), by counsel, respectfully moves the Court for entry of an order vacating an Order entered October 3, 2013, by the Juvenile and Domestic Relations ("JDR") District Court (the "Order") prohibiting the news media from publishing the names of certain witnesses who appeared and gave testimony in open court during a preliminary hearing held on October 2, 2013. For the reasons stated below, the JDR Court's prohibition on the publication of information lawfully obtained in open court is in conflict with the core purpose of the First Amendment to the Constitution of the United States, and violates Article I, Section 12 of the Constitution of Virginia.

**Facts**

On October 2, 2013, the JDR Court conducted a preliminary hearing in this case, the purpose of which was to take evidence and to determine whether to certify the defendant to be tried as an adult. The hearing was open to the public, in accordance with controlling law. *See* Va. Code § 16.1-302. Neither the Commonwealth nor the defendant sought to close the hearing, or any part thereof, nor did the JDR Court seek to do so *sua sponte*.

The Commonwealth, by its attorney, presented witnesses who were sworn and gave testimony in open court on various issues material to the case. The witnesses included both law enforcement personnel and other citizens, including the defendant's mother, a prison inmate, and

a witness to the alleged crime. The JDR Court ordered at the close of the hearing that the case be certified to the grand jury.

After the JDR Court's ruling on the merits, the attorney for the Commonwealth made an oral motion for the issuance of an order prohibiting the news media from publishing the identities of persons, other than law enforcement personnel, who had testified at the hearing. The Commonwealth had given no prior notice of its motion, had submitted no moving papers or other authority in support of its motion, and offered in justification only a generalized assertion that the restraint on publication it was seeking was necessary to protect the safety of lay witnesses:

> You Honor, we are asking the Court to order the names of the witnesses because of security reasons and the safety issues not be published by media.

(Ex. A, 10/02/2013 Transcript.) This single sentence represents the entirety of the Commonwealth's justification for its oral motion.

The JDR Court queried the attorney for the Commonwealth concerning the lack of any notice or formal motion by the Commonwealth in support of its request for a restraint on publication. However, the JDR Court ruled that the media would be, and is, prohibited from publishing the names of civilian witnesses (*i.e.*, non-law enforcement personnel) who testified at the October 2, 2013 preliminary hearing. (*See Id.*) The JDR Court also imposed restrictions on the manner the court reporter would be permitted to refer to those witnesses in the transcript of the proceedings. (*See Id.*)

The following day, October 3, the Commonwealth submitted a "Motion and Order to Seal Lay Witness Names." The JDR Court endorsed the Motion and Order that same day. The Newspaper has been unable to obtain a copy of the Motion and Order as filed or entered, but the

text was provided to the Newspaper's counsel. (*See* Ex. B, text of the Motion and Order.) The Motion portion repeats the concerns for witness safety proffered by the Commonwealth at the preliminary hearing:

> This day came the Commonwealth for the City of Newport News and represented unto the Court that the Commonwealth has received information from multiple unrelated sources which, if true, shows the lay-witnesses in this case to be in physical danger of death or serious injury for testifying. Further, the persons involved in the incident (the basis of this case) belong/belonged to ongoing rival criminal street gangs.

(*See* Ex. B.) The Motion concludes that, based on this non-specific proffer, there exists "a clear and present danger to testifying witnesses," and that pursuant to the Supreme Court of the United States' opinion *Bridges v. California*, 314 U.S. 252 (1941), the identities of the lay witnesses must not be released or published. (*Id.*)

## Arguments and Authorities

### I. The Order is presumptively unconstitutional.

An order enjoining the publication of information is known as a "prior restraint." *See Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 556 (1976). It is foundational under our federal and state constitutions that an effort by the government to prohibit the free exercise of speech in this fashion is anathema. The Constitution of Virginia states:

> That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances.

Va. Const. Art. I, § 12. The First Amendment, applicable to the States through the Fourteenth Amendment, states:

Congress shall make no law … abridging the freedom of speech, or of the press[.]

U.S. Const. amend. I.

Given our profound commitment to the free exercise of speech, the Supreme Court of the United States long ago established the principle that prior restraints are the "most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n*, 427 U.S. at 559. Accordingly, there is a "heavy presumption" that a prior restraint is unconstitutional. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (citation omitted). This heavy presumption against prior restraints is "almost insurmountable," *Richmond Newspapers v. Va.*, 448 U.S. 555, 586-587 (1980) (citations omitted), justifiable, if at all, only in the rarest circumstances, such as to prevent the dissemination of information about troop movements during wartime, *Near v. Minnesota*, 283 U.S. 697, 716 (1931), or to "suppress[] information that would set in motion a nuclear holocaust." *New York Times v. United States*, 403 U.S. 713, 726 (1971) (Brennan, J., concurring). "In fact, the Supreme Court has never upheld a prior restraint on pure speech." *News Herald v. Ruyle*, 949 F. Supp. 519, 522 (N.D. Ohio 1996) (citation omitted). Indeed, in *Bridges v. California*, 314 U.S. 252 (1941), the case cited in the Commonwealth's Motion, the Supreme Court found the prior restraint at issue to be unconstitutional.

## II. The Commonwealth has not satisfied its heavy burden to justify a prior restraint.

The "witness safety" rationale offered by the Commonwealth in this case does not override the heavy presumption against prior restraints. Procedurally, the Commonwealth offered its rationale without notice, without articulated and specific facts and evidence, and without any legal authority. "It is difficult to conceive how such a restrictive order [imposing a prior restraint] could ever validly be entered without a prior evidentiary hearing in which the

parties and representatives of the press have a right to present evidence and be heard." *Des Moines Register & Tribune Co. v. Osmundson*, 248 N.W.2d 493, 500 (Iowa 1976) (citing *United States v. Schiavo*, 504 F.2d 1 (3 Cir. 1974)).

Substantively, assuming *arguendo* that the Commonwealth had articulated specific facts and adduced supporting evidence, the Commonwealth's Motion was ill-timed. When, as in this case, the information has already been disclosed, a prior restraint may not be used to unring the bell:

> 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). *See also Neb. Press Ass'n*, *supra*, 427 U.S. at 568 ("To the extent that this order prohibited the reporting of evidence adduced at the open preliminary hearing, it plainly violated settled principles: There is nothing that proscribes the press from reporting events that transpire in the courtroom.") (citation omitted); *News Herald v. Ruyle*, 949 F. Supp. 519 (N.D. Ohio 1996) (holding that juvenile court's order prohibiting the media from publishing information disclosed during a public preliminary certification hearing is an unconstitutional prior restraint).[1] Indeed, in a case reversing the Supreme Court of Virginia, a concurring justice of the United States Supreme Court observed that the "government cannot take it upon itself to decide what a newspaper may and may not publish," and even where the government may deny access to information, "government may not prohibit or punish the publication of that information once it falls into the hands of the press, unless the need for

---

[1] A copy of *News Herald v. Ruyle* is attached hereto as Exhibit C.

secrecy is manifestly overwhelming." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 849 (Stewart, J., concurring).

The constitutionally permissible remedy is, instead, to address disclosure concerns before the information becomes public:

> We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public. At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records. If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information ... Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it. In this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast.

*Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975). *See also Neb. Press Ass'n*, *supra*, 427 U.S. at 568 ("The County Court could not know that closure of the preliminary hearing was an alternative open to it until the Nebraska Supreme Court so construed state law; but once a public hearing had been held, what transpired there could not be subject to prior restraint.").

Simply stated, once the identities of witnesses are revealed in open court, subsequent concern about their safety is not sufficient to justify a prior restraint on the press. As one court observed:

> Nor can the order be sustained on the second prong: the intimidation theory. In the first place, the witnesses' identities were no secret; if they were eyewitnesses to the crime of which the defendants stood accused – as claimed by the prosecutor – then Hale and Mendrin had presumably been aware of their identities since the stabbing; secondly, their names were made known to the defense in the course of pretrial discovery; defense counsel candidly informed the court that they had discussed the case – and inferentially the identities of the prosecution's witnesses

> – with the defendants and the inmate-witnesses they intended to call; and finally, the subject witnesses obviously had to take the stand during the prosecution's case (and identify themselves) in the presence of the defendants – the very men, or their confederates, from whom retribution, if any, would be expected.

*Sun Co. of San Bernardino v. Superior Court*, 29 Cal. App. 3d 815, 830 (Cal. App. 4th Dist. 1973).

**Conclusion**

The Order entered by the JDR Court is without support in the law. It is in direct violation of the First Amendment and the Constitution of Virginia. It should be vacated promptly.

Dated: October 4, 2013.

Respectfully Submitted,

THE DAILY PRESS, LLC,
Publisher of *The Daily Press*

By Counsel

Craig T. Merritt (VSB No. 20281)
David B. Lacy (VSB No. 71177)
CHRISTIAN & BARTON, L.L.P.
909 East Main Street, Suite 1200
Richmond, Virginia 23219-3095
Tel.: (804) 697-4100
Fax: (804) 697-4112
cmerritt@cblaw.com
dlacy@cblaw.com

*Counsel for The Daily Press, LLC*

## CERTIFICATE OF SERVICE

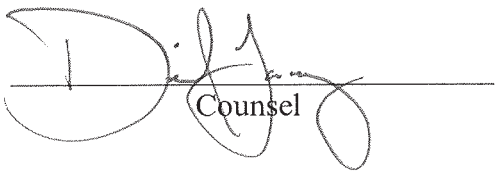
I hereby certify that a true copy of the foregoing was served by electronic and overnight delivery this 4th day of October, 2013, on:

Robin L. Farkas, Esquire
Assistant Commonwealth's Attorney
for the City of Newport News
2501 Washington Avenue, 6th Floor
Newport News, Virginia 23607
rfarkas@nngov.com

*Attorney for the Commonwealth*

James S. Ellenson, Esquire
2600 Washington Avenue, #1007
Newport News, VA 23607-4333
jimmy@jamesellenson.com

*Counsel for the Defendant*



Counsel

#1492149

V I R G I N I A:

IN THE JUVENILE AND DOMESTIC RELATIONS COURT FOR THE CITY OF NEWPORT NEWS

| | |
|---|---|
| COMMONWEALTH OF VIRGINIA, Plaintiff, vs. ANTWAIN DONTE STEWARD, Defendant. | NO. JA092055-03 |

EXCERPT TRANSCRIPT OF PROCEEDINGS

Newport News, Virginia

October 2, 2013

Before: THE HONORABLE THOMAS W. CARPENTER



EXHIBIT

A

Appearances:

OFFICE OF THE COMMONWEALTH ATTORNEY
2501 Washington Avenue
6th Floor
Newport News, Virginia 23607
(757)926-7443
By: ROBIN L. FARKAS, ESQUIRE
TRAVIS S. WHITE, ESQUIRE
Counsel for the Plaintiff

JAMES S. ELLENSON LAW FIRM
2600 Washington Avenue
Suite 1007
Newport News, Virginia 23607
(757)244-4445
jseatty@aol.com
By: JAMES S. ELLENSON, ESQUIRE
Counsel for the Defendant

EXCERPT TRANSCRIPT OF PROCEEDINGS

* * *

THE COURT: Get Mr. Steward back quickly, please. Mr. Steward, if you will resume your seat next to Mr. Ellenson. Apparently the Commonwealth had one other thing they wanted to bring to the Court's attention.

MS. FARKAS: You Honor, we are asking the Court to order the names of the witnesses because of security reasons and the safety issues not be published by media.

AUDIENCE MEMBER: They didn't feel like that about me and my kids.

THE SHERIFF: No talking.

THE COURT: A motion has been made by the Commonwealth to have this Court seal the names of civilian, that is, non-Commonwealth witnesses associated with this case.

Frankly, Ms. Farkas, the Court would expect to see such a motion given the amount of interest that this case has generated in the media, I would expect to see such a motion in writing in advance rather than asking the Court to rule off the cuff at the end of a preliminary hearing. I am going to grant your motion. Names of the witnesses are sealed. Do not make that

request under these circumstances in that fashion again.

MS. FARKAS: Yes, Your Honor. I apologize.

THE COURT: Is there any clarification needed on the part of the media as to what the Court's ruling is on the civilian witnesses?

MS. MALONE: No, sir.

THE COURT: The Court has had very real concerns and I know law enforcement has had concerns during the pendency of this case, and the Court would order that the civilian witnesses names not be published.

MS. FARKAS: Thank you, Judge.

THE COURT: Thank you.

MR. ELLENSON: Judge, what do we do with the transcript?

THE COURT: Very good question, Mr. Ellenson.

MS. FARKAS: Your Honor, may I ask the transcript be prepared with just first and last initials or even just letters and then an accompanying schedule sealed giving the names because it is part of the court's record so it has to be in the court's record but just the names can be sealed and the transcriptionist can use --

THE COURT: Madam Court Reporter, do you have

any questions as to the names of any of the witnesses that we've heard from today?

THE COURT REPORTER: No.

THE COURT: Court would ask that you utilize initials only for civilian or incarcerated witnesses, that is, nonpolice officer witnesses and have a key attached -- have a key under seal in the files that identify the initialed witnesses.

THE COURT REPORTER: Yes, sir.

MS. FARKAS: Thank you.

THE COURT: All right, Mr. Steward, at this time you may go back with the deputy. All right, proceedings in the matter of Commonwealth against Antwain Steward are concluded.

MS. FARKAS: Thank you, Judge.

THE COURT: I would ask the defendant's family members might leave, then we'll have the family member of the victim leave separately later.

* * *

(Thereupon, the excerpt proceedings were concluded.)

CERTIFICATE OF REPORTER

I, Lois B. Boyle, do hereby certify that I reported verbatim the proceedings in the Juvenile & Domestic Relations Court of the City of Newport News, in the matter of Commonwealth of Virginia v Antwain Donte Steward, heard by The Honorable Thomas W. Carpenter, Judge of said Court.

I further certify that the foregoing is a true, accurate and complete transcript of said proceedings.

Given under my hand this 4th day of October, 2013 at Newport News, Virginia.

Lois B. Boyle, RMR
Notary Registration No. 203748

VIRGINIA: IN THE JUVENILE AND DOMESTIC RELATIONS DISCTRICT COURT FOR THE CITY OF NEWPORT NEWS

COMMONWEALTH OF VIRGINIA,
Complainant,

v.

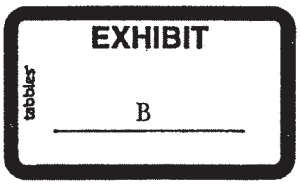
Preliminary Hearing – JDR# 4
October 2, 2013 at 10:30 am

**ANTWAIN DONTA STEWARD,**
Defendant.

**MOTION AND O R D E R to SEAL LAY WITNESS NAMES**

This day came the Commonwealth for the City of Newport News and represented unto the Court that the Commonwealth has received information from multiple unrelated sources which, if true, shows the lay-witnesses in this case to be in physical danger of death or serious injury for testifying. Further, the persons involved in the incident (the basis of this case) belong/belonged to ongoing rival criminal street gangs. Pursuant to *Bridges v. California*, 314 U.S. 252 (1941) and the line of cases following,[i] and because of this clear and present danger to testifying witnesses, the Commonwealth MOVES this Honorable Court to SEAL and ORDER that the names of the lay witnesses in this case NOT BE RELEASED





or PUBLISHED, as doing so will place those persons in threat of death or serious injury, and will obstruct justice in this case, and so

It is so-ORDERED, and it is further ORDERED that the transcript of the preliminary hearing be prepared using only initials of testifying lay witnesses, and that a key to those initials be prepared and that key will be kept under seal until released by a court of competent jurisdiction.

ENTERED:

This ___ day of _____, 2013.

_____
JUDGE

I ASK FOR THIS:

_____
Robin L. Farkas, Sr. Asst.
Attorney for the Commonwealth

[1] *Bridges* defined the scope of the "clear and present danger" standard. There, the Court stated: "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment . . . does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." 314 U.S. at 263.

**NEWS HERALD, a Division of Gannett Satellite Information Network, Inc., et al., Plaintiffs, -vs- THE HONORABLE STEPHEN RUYLE, Defendant.**

**Case No. 3:96 CV 7497**

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION**

*949 F. Supp. 519; 1996 U.S. Dist. LEXIS 19088; 24 Media L. Rep. 2436*

**August 8, 1996, ISSUED**

**DISPOSITION:** [**1] Plaintiffs' motion granted.

**COUNSEL:** For NEWS HERALD, Division of Gannett Satellite Information Network, Inc., plaintiff: Michael Kevin Farrell, Esq., David L. Marburger, Esq., Baker & Hostetler, Cleveland, OH. For FREEMONT MESSENGER CO., THE, Division of Gannett Satllite Information Network, Inc., plaintiff: Michael Kevin Farrell, Esq., (See above). David L. Marburger, Esq., (See above). For SANDUSKY NEWSPAPERS, INC. dba The Sandusky Register, dba, plaintiff: Michael Kevin Farrell, Esq., (See above). David L. Marburger, Esq., (See above). For PLAIN DEALER PUBLISHING COMPANY dba The Plain Dealer, dba, plaintiff: Michael Kevin Farrell, Esq., (See above). David L. Marburger, Esq., (See above). For TOLEDO BLADE COMPANY, THE dba dba, plaintiff: Fritz Byers, Esq., Toledo, OH.

For STEPHEN RUYLE, Judge, Defiance County Juvenile Court, defendant: Kevin E. Joyce, Esq., William M. Connelly, Esq., Sarah Steele Riordan, Esq., Connelly, Soutar & Jackson, Toledo, OH.

**JUDGES:** DAVID A. KATZ, UNITED STATES DISTRICT JUDGE

**OPINION BY:** DAVID A. KATZ

**OPINION**

[*520] MEMORANDUM OPINION

KATZ, J.

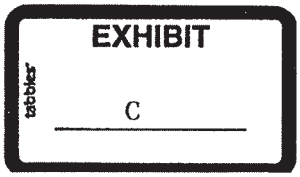
This matter is before the Court on Plaintiffs' motion for a temporary restraining order. The Plaintiffs, publishers of several [**2] daily newspapers, have brought suit to enjoin the Honorable Stephen Ruyle of the Common Pleas Court of Defiance County, Ohio, sitting by designation in the Juvenile Court Division, from enforcing an order prohibiting Plaintiffs from reporting the proceedings in a juvenile delinquency action over which Judge Ruyle is presiding. The Court heard oral argument from both sides on August 8, 1996. For the following reasons, Plaintiffs' motion will be granted.

## I. BACKGROUND

Judge Ruyle is presiding over a matter captioned *In the Matter of Kevin Fabian*. The *Fabian* case arises from the 1994 drive-by shooting of an Ottawa County deputy sheriff's home in which Fabian, who was then age sixteen, is alleged to have participated. Fabian is now eighteen years old.

Judge Ruyle scheduled a hearing to begin on June 28, 1996, to determine whether to certify Fabian to be tried as an adult defendant. On June 12, 1996, Plaintiff News Herald moved to open the proceedings in the *Fabian* case to the public.

Judge Ruyle conducted a hearing on Plaintiff's motion on June 24, 1996. At that hearing, [*521] neither the prosecution nor the defense introduced any evidence that an open hearing would [**3] be adverse to Fabian's best interests. Since Ohio law requires a Juvenile Court to make specific findings to justify closing a courtroom before proceedings can be closed to the public, *In re T.R., 52 Ohio St. 3d 6, 17-21, 556 N.E.2d 439, cert. denied, 498 U.S. 958, 111 S. Ct. 386, 112 L. Ed. 2d 396*



*(1990)*, Judge Ruyle was compelled to open the proceedings to the press and public. However, he issued a contemporaneous order, *sua sponte*, prohibiting the news reporters present from (1) informing anyone that the hearing is open to the public, and (2) informing anyone what transpired during the hearing. The order reads, in pertinent part:

> It is ORDERED, ADJUDGED AND DECREED that the Port Clinton News Herald or other media may attend the probable cause hearing in the above case; however, further IT IS ORDERED that no media representative shall publicly report on or personally discuss the case until the final decree on certification is entered by the Court. At that time the above restrictions are lifted and free reporting is allowed.

At the conclusion of the June 25 hearing, Judge Ruyle continued the matter until August 9, 1996. He extended his injunctive order through August [**4] 9, 1996, and until entry of the final decree on certification.

The Plaintiffs claim that the restraint violates their rights of freedom of speech and of the press. They have filed suit to enjoin enforcement of Judge Ruyle's order.

## II. DISCUSSION

*A. Younger Abstention Issue*

As a preliminary matter, the Court addresses the issue of whether it should abstain from the exercise of federal jurisdiction in this case under the doctrine of *Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)*. That doctrine holds that, lacking extraordinary circumstances, a Federal Court cannot enjoin a currently pending state criminal proceeding. Defendant has argued that this Court should abstain from exercising jurisdiction in the instant action because (1) there is a pending state criminal proceeding; (2) there is an important state interest in retaining the confidentiality of the proceedings, and (3) Plaintiffs are afforded an adequate opportunity to raise their claims in a state proceeding.

The Court disagrees. First, and most importantly, binding precedent in the Sixth Circuit holds that *Younger* abstention is inappropriate where a news reporter challenges [**5] the validity of a suppression order barring disclosure of information produced in open court. *WXYZ, Inc. v. Hand, 658 F.2d 420, 422-425 (6th Cir. 1981)*. Second, even if this Court's determination were not governed by binding precedent, common sense dictates that abstention is inappropriate in the instant action. Issuance of a temporary restraining order or preliminary injunction in this action will have no effect on the pending state proceedings, since the order affects only the use the news media make of those proceedings and not the proceedings themselves. The fact that Judge Ruyle held that he was bound to open the proceedings to the public obviates Defendant's argument that there is an important state interest in retaining the confidentiality of the proceedings. And, as nonparties to the proceedings, Plaintiffs are afforded no opportunity to challenge Judge Ruyle's order on direct appeal or by an extraordinary writ.

Accordingly, the Court finds that Younger abstention is inappropriate in this case, and proceeds to the merits of Plaintiffs' motion.

*B. Issuance of the Temporary Restraining Order*

If there is notice to the other side and a hearing, the Court applies [**6] the same standards governing issuance of a preliminary injunction in determining whether to issue a temporary restraining order. The Sixth Circuit has set forth four standards for the District Court to use in making this determination: (1) whether the plaintiff has shown a strong or substantial likelihood or probability of success on the merits; (2) whether the plaintiff has shown that irreparable injury will result if the preliminary injunction is not granted; (3) whether the issuance of a preliminary injunction would [*522] cause substantial harm to others; and (4) whether issuing a preliminary injunction would serve the public interest. *Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558, 564 (6th Cir. 1982)*. In determining whether a temporary restraining order should issue in this case, therefore, the Court addresses these four factors.

1. Probability of Success on the Merits

Plaintiffs have shown a high probability of success on the merits. Prior restraints on media publication come to this Court hearing a heavy presumption against constitutional validity. *New York Times Co. v. United States, 403 U.S. 713, 714, 29 L. Ed. 2d 822, 91 S. Ct. 2140 (1971)*. In fact, the Supreme Court has never upheld a prior [**7] restraint on pure speech. *In re Providence Journal Co., 820 F.2d 1342, 1348 (1st Cir. 1986), cert. granted, 484 U.S. 814, 108 S. Ct. 65, 98 L. Ed. 2d 28 (1987), cert. dismissed, 485 U.S. 693, 108 S. Ct. 1502, 99 L. Ed. 2d 785 (1988)*. The Supreme Court has repeatedly held that:

> A trial is a public event. What transpires in a courtroom 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, 67 S. Ct. 1249, 1254, 91 L. Ed. 1546 (1947). See also Oklahoma Publishing Co. v. District Court, 430 U.S. 308, 97 S. Ct. 1045, 51 L. Ed. 2d 355 (1977); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975).*

The suppression order issued by Judge Ruyle was a classic prior restraint. It barred publication of information legally obtained by Plaintiffs, in advance of [**8] publication, with the threat of criminal contempt if the order were breached. As such, the order is presumptively unconstitutional.

2. Irreparable Injury

Plaintiffs have shown that they will suffer irreparable injury if an injunction does not issue. The violation of the right to free speech always constitutes irreparable harm, which justifies the Court in invoking its equitable powers and issuing an injunction. *See Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 2689, 49 L. Ed. 2d 547 (1976).*

3. Substantial Harm to Others

No showing has been made that issuance of a temporary restraining order will cause substantial harm to others. The Court is mindful of Kevin Fabian's right to a fair trial, and, had a showing been made that public disclosure of the certification proceedings would prejudice that right, such showing would weigh against issuance of the injunction.

No such showing has been made, however. Even assuming that Fabian is certified to stand trial as an adult, the very terms of the suppression order permit public disclosure of the proceedings once a final determination as to certification is made, so the public will have access to the information [**9] before a trial occurs.

4. Public Interest

The public's interest will be served by issuance of a temporary restraining order in that the public is served when constitutional rights, especially the right to free speech, are vindicated. *See Christy v. Ann Arbor, 824 F.2d 489 (6th Cir. 1987). cert. denied, 484 U.S. 1059, 108 S. Ct. 1013, 98 L. Ed. 2d 978 (1988).*

## III. CONCLUSION

Plaintiffs have shown that they have a substantial likelihood of prevailing on the merits; that they will be irreparably harmed if an injunction does not issue; that issuance of a temporary restraining order will not cause substantial harm to others; and that issuance of a preliminary injunction will serve the public interest. Accordingly, the Court will issue a temporary restraining order enjoining enforcement of the portions of Judge Ruyle's June 24, 1996 order prohibiting [*523] Plaintiffs from publishing or discussing the proceedings in the *Fabian* case.

## ORDER

For the above reasons, it is ORDERED that the Defendant's order of June 24, 1996 that "no media representative shall publicly report on or personally discuss the [*Fabian*] case until the final decree on certification [**10] is entered by the Court" is STAYED. Defendant is hereby enjoined from enforcing any provision of that order pertaining to publication of events occurring in open court while this or any subsequent order of this Court is in effect. This order pertains to the proceedings previously held on June 24 and 25, 1996, the proceedings scheduled for August 9, 1996, and to any other open proceedings that may be held in the *Fabian* case.

This temporary restraining order is effective immediately. No bond is required, due to the fact that no damage to the person or property of the Defendant is threatened

A preliminary injunction hearing is set for August 14, 1996 at 4:00 p.m.

IT IS SO ORDERED.

DAVID A. KATZ

UNITED STATES DISTRICT JUDGE

JUDGMENT ENTRY

KATZ, J.

For the reasons stated in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that Defendant's order of June 24, 1996 that "no media representative shall publicly report on or personally discuss [the case styled *In re Kevin Fabian*] until the final decree on certification is entered by the Court" is STAYED.

Defendant is hereby enjoined from enforcing any [**11] provision of that order pertaining to publication of events occurring in open court while this or any subsequent order of this Court is in effect. This order pertains to the proceedings previously held on June 24 and 25, 1996, the proceedings scheduled for August 9, 1996,

and to any other open proceedings that may be held in the *Fabian* case.

This temporary restraining order is effective immediately. No bond is required, due to the fact that no damage to the person or property of the Defendant is threatened

A preliminary injunction hearing is set for August 14, 1996 at 4:00 p.m.

IT IS SO ORDERED.

DAVID A. KATZ

UNITED STATES DISTRICT JUDGE