

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

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff,)
)
vs.)
)
DAVID MARCH, JOSEPH WALSH, and)
THOMAS GAFFNEY)
)
Defendants.)

No. 17 CR 09700-01
No. 17 CR 09700-02
No. 17 CR 09700-03

Hon. Domenica A. Stephenson

2018 DEC -6 PM 4: 11

FILED

**MEMORANDUM IN SUPPORT OF INTERVENORS'
EMERGENCY MOTION FOR ACCESS TO JUDICIAL RECORDS**

Chicago Tribune Company, LLC; Sun-Times Media, LLC; the Associated Press; WGN Continental Broadcasting Company, LLC; Chicago Public Media, Inc.; and the Reporters Committee for Freedom of the Press (collectively, "Intervenors") are, respectively, news organizations that have covered this important matter, up to and including its trial, and a nonprofit that advocates for press freedoms. In seeking to assert the right of public access to court proceedings and judicial records, Intervenors act as "surrogates for the public," *Richmond Newsp., Inc. v. Virginia*, 448 U.S. 555, 573 (1980), and "must be given an opportunity to be heard." *Globe Newsp. Co. v. Super. Ct.*, 457 U.S. 596, 609 n.25 (1982) (quoting *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 401 (1979) (Powell, J., concurring)). The media and public have an obvious and significant interest in this case, in which three Chicago police officers allegedly conspired to obstruct justice in the investigation of a fellow officer involved in the murder of teenager Laquan McDonald in an incident recorded by a police video camera. News coverage of this case provides the public with a window into the workings of its criminal justice system and helps assure the public that justice is being properly served.

Intervenors are informed that on December 4, 2018, the Court reiterated its prior ruling that it will not allow a monitor to display any exhibits to the media or to the public during trial.

Moreover, Intervenors are informed that the Court has further ruled that the exhibits admitted at trial will not be tendered to the media. The reasons for these decisions were apparently given in a private meeting in chambers, not in open court.

It is not clear to Intervenors whether the Court intended to deny access to the admitted evidence only while the trial is ongoing, or whether the Court intended to deny access to the evidence even after the trial has concluded. Either way, the Court's ruling violates the First Amendment and common law right of access. The press and the public have been deprived of viewing the admitted evidence during trial, or even having access to the exhibits at the end of each trial day—despite the fact that this is a bench trial and there are no jury-tainting concerns with releasing trial exhibits to the public. Further, to Intervenors' knowledge, the Court has not made the specific findings necessary under the law to justify, on a document-by-document, redaction-by-redaction basis, withholding judicial documents to protect a higher interest or value in this matter. *See Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 13 (1986) (“*Press-Enterprise II*”); *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 505-13 (1984) (“*Press-Enterprise I*”); *People v. LaGrone*, 361 Ill. App. 3d 532, 533 (4th Dist. 2005). To the extent the rationale for the Court's decision to restrict access is that some (but by no means all) of the exhibits that have been shown included personal information of the officers or witnesses, there are less restrictive measures than wholesale denial of access to the admitted exhibits, such as redacting such information before it appears on the monitor or before the exhibits are made available to the public. *See Press-Enterprise I*, 464 U.S. at 510 (measures restricting access must be “essential to preserve higher values and . . . narrowly tailored to serve that interest”).

Depriving the public and the press of contemporaneous (or at least nearly contemporaneous) access to admitted evidence at trial without justification is, in itself, a violation of well-established law. And, to the extent the Court intends to continue to restrict

access to the admitted evidence *even after the trial is concluded*, such action is an even more egregious violation of the public's and Intervenors' right of access because there is no justification for shielding the evidence in these circumstances. After trial, any personal information contained in the exhibits can be promptly and appropriately redacted before releasing them to the public. Nor are there any future jury-tainting concerns that could possibly arise from releasing the exhibits at the conclusion of this trial. Absent any conceivable basis for shielding the trial evidence from public view and scrutiny, the Court's action contravenes well-established law under the First Amendment, the Illinois Constitution, and common law. Intervenors respectfully urge the Court to release the admitted evidence immediately.

ARGUMENT

I. Trial Exhibits Are Judicial Records Presumptively Open to the Public Under the Constitutional and Common-Law Rights of Access.

Intervenors, as members and representatives of the public, have a presumptive federal constitutional right of access to judicial documents and proceedings under the First Amendment. *Press-Enterprise II*, 478 U.S. at 11-12; *Press-Enterprise I*, 464 U.S. at 508-10; *Skolnick v. Alzheimer & Gray*, 191 Ill. 2d 214, 232 (2000). Illinois courts also recognize a right of access grounded in the Illinois Constitution, which provides that “[a]ll persons may speak, write, and publish freely.” Ill. Const. art. I, § 4 (1970). This constitutional, presumptive right of access applies to court records or proceedings of the kind that have been historically open to the public. *Skolnick*, 191 Ill. 2d at 232; *People v. Zimmerman*, 2018 IL 122261, ¶¶ 27-28.

In addition to Intervenors' constitutional right of access, Illinois and federal courts also recognize a common-law right of access to documents filed in court cases. *See Skolnick*, 191 Ill. 2d at 230 (citing *Nixon v. Warner Commc 'ns, Inc.*, 435 U.S. 589, 597 (1978)); *Zimmerman*, 2018 IL 122261, ¶¶ 40-41. This “common law right of the public to inspect and copy judicial records is well-established,” *United States v. Guzzino*, 766 F.2d 302, 304 (7th Cir. 1985); there is a

“strong presumption in support of the common law right to inspect and copy judicial records.” *United States v. Edwards*, 672 F.2d 1289, 1294 (7th Cir. 1982); *In re Cont. Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984) (“long-recognized” presumption of public access to judicial records “has been characterized as fundamental to a democratic state”).

An Illinois statute, the Clerks of Courts Act, has also long recognized the publicly accessible nature of court documents:

All records, dockets and books required by law to be kept by such clerks shall be deemed public records, and shall at all times be open to inspection without fee or reward, and all persons shall have free access for inspection and examination to such records, docket and books, and also to all papers on file in the different clerks' offices and shall have the right to take memoranda and abstracts thereto.

705 ILCS 105/16(6).

Behind all these constitutional, common law and statutory mandates is the basic principle that court documents are not the litigants' property, but rather, they belong to the public, which underwrites the judicial system that produces them. *See A.P. v. M.E.E.*, 354 Ill. App. 3d 989, 997 (1st Dist. 2004) (citing *Pepsico, Inc. v. Redmond*, 46 F.3d 29, 31 (7th Cir. 1995)); *Smith v. U.S. Dist. Court*, 956 F.2d 647, 649–650 (7th Cir. 1992) (“what transpires in the courtroom is public property”).

Trial exhibits are the paradigm of court documents subject to the presumption of access. Documents that are made part of the trial record have historically been open to the public and are thus subject to the constitutional presumption of public access. *Zimmerman*, 2018 IL 122261, ¶¶ 27 (“this court specifically found a public right of access to court records embodied in the first amendment”) (citing *Skolnick*, 191 Ill. 2d at 231-32). Recently, in *Zimmerman*, the Illinois Supreme Court specifically contrasted trial evidence with “discovery material *not yet admitted at*

trial,” holding that because such material “*will not be admitted at trial,* it is not subject to a tradition of access.” *Id.* at ¶¶ 33-34 (emphasis added).

Evidentiary material introduced at trial is also subject to the common law right of access—including “the right of the media to copy audio or video tapes which have been admitted into evidence in a criminal trial.” *Guzzino*, 766 F.2d at 304 (citing *United States v. Edwards*, 672 F.2d at 1293-94; *United States v. Criden*, 648 F.2d 814, 821-23 (3d Cir. 1981)). Material shown at trial must be released absent “extraordinary circumstances”:

Once the evidence has become known to the members of the public, including representatives of the press, through their attendance at a public session of court, it would take the most extraordinary circumstance to justify restrictions on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence, when it is in a form that readily permits sight and sound reproduction.

In re Continental Ill. Sec. Litig., 732 F.2d at 1313 (citation omitted).

Indeed, the common law access right applies not only to items in evidence, but more generally to “materials on which a court relied in determining the litigants’ substantive rights,” which may include “transcripts of proceedings [and] everything in the record, *including items not admitted into evidence.*” *Smith*, 956 F.2d at 650 (emphasis added) (citing *United States v. Martin*, 746 F.2d 964, 968 (3d Cir. 1984) (“The common law right of access is not limited to evidence, but rather encompasses all ‘judicial records and documents’”)).

In effect, the common law right functions to extend the right of the public to attend court proceedings to include the inspection of evidence presented at those proceedings. Thus, . . . the definition of a “judicial document” would extend to any material presented in a public session of court “relevant to the performance of the judicial function and useful in the judicial process” whether or not it was formally admitted.

United States v. Graham, 257 F.3d 143, 153 (2d Cir. 2001) (citations omitted).

Access here will further the interests of the judicial system in this important and widely followed criminal matter. “Public scrutiny over the court system promotes community respect for the rule of law, provides a check on the activities of judges and litigants, and fosters more accurate fact finding.” *A.P.*, 354 Ill. App. 3d at 999 (citing *Grove Fresh Distrib., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994)). “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 Newsp.*, 448 U.S. at 575. This is particularly true where, as here, police misconduct allegations are involved, and public interest in observing and understanding these proceedings and the evidence presented in them is particularly keen. *People v. Kelly*, 397 Ill. App. 3d 232, 259 (1st Dist. 2009) (subject matter of official misconduct carries “a ‘particularly strong’ need for public scrutiny”) (quoting *Waller v. Georgia*, 467 U.S. 39 (1984)).

II. This Court Has Not Made, and in These Circumstances *Could Not Make*, the Findings Necessary to Support Denial of Access.

Once the First Amendment presumption of access applies, a trial court may not deny access to a document unless the court makes specific findings demonstrating that the denial of access is “essential to preserve higher values and . . . narrowly tailored to serve that interest.” *Press-Enterprise I*, 464 U.S. at 510; accord *Skolnick*, 191 Ill. 2d at 232; *Zimmerman*, 2018 IL 122261, ¶ 30.

Intervenors are not aware of any findings made in support of denying access to the trial exhibits. The audio of trial proceedings does not indicate that any findings were made to warrant suppressing the exhibits. The Court may not deny access to publicly filed court documents without providing notice to the public and making specific, particularized findings on the record justifying such secrecy. *Press-Enterprise II*, 478 U.S. at 13-14.

Denials of public access are permitted only after a court makes specific, narrowly tailored findings to support such secrecy on a document-by-document basis. *See A.P.*, 354 Ill. App. 3d at 1001 (“[T]he court should limit sealing orders to particular documents or portions thereof which are directly relevant to the legitimate interest in confidentiality.”). In addition, because this is a bench trial, the commonly made argument—that sealing is necessary in order to keep certain information from potential jurors—is inapplicable. *Compare Zimmerman*, 2018 IL 122261, at ¶ 37 (“disclosure of the discovery evidence in this case could . . . expos[e] the public and potential jurors to irrelevant information that will not be used to support a conviction and could taint the jury pool”); ¶ 46 (trial court “recognized the common-law right of access to court records, as well as defendant’s right to a fair trial, which might be undermined by publicity of discovery material *that will not be admitted at trial*”) (emphasis added). Nor are there any upcoming jury trials where the same evidence may be at issue.

If the Court considers entering any such findings, Intervenors respectfully request the opportunity to participate in that process, to review any proposed findings and, if necessary, to challenge them. In this case—a significant criminal proceeding involving substantial public interest where the defendants have opted to have a bench trial—the Court must protect the public’s constitutional right of access and need not weigh that interest against concerns that disclosure might prejudice the defendant’s fair trial rights by tainting a jury pool. The Court—which is the trier of fact in this case—has suppressed the exhibits, and there simply is no reason why Intervenors and the public should be deprived of access to them.

III. Access Delayed Is Access Denied.

Courts have long recognized that when the right of access applies, as it does here, access must be “immediate and contemporaneous.” *In re Associated Press*, 162 F.3d 503, 506–07 (7th Cir. 1998) (quoting *Grove Fresh*, 24 F.3d at 897); *see also Associated Press v. Dist. Court*, 705

F.2d 1143, 1147 (9th Cir. 1983) (48-hour delay in unsealing judicial records is improper, because the effect of the delay acts as a “total restraint on the public’s first amendment right of access” during that time). As the First District has recognized, “even a temporary denial of access to court proceedings . . . raises important first amendment concerns.” *Kelly*, 397 Ill. App. 3d at 247. Courts must therefore act “expeditiously” in adjudicating motions to unseal. *Lugosch v. Pyramid Co.*, 435 F.3d 110, 120–21 (2d Cir. 2006) (finding that district court erred in delaying ruling on motion to intervene and unseal court records). A loss of First Amendment rights, “for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Indeed, “each passing day may constitute a separate and cognizable infringement of the First Amendment.” *Neb. Press Ass’n v. Stuart*, 423 U.S. 1327, 1329 (1975) (Blackmun, Circuit Justice).

Delayed access to court records forever deprives the public of its ability to monitor cases as they proceed and assess whether justice is being served. *Grove Fresh*, 24 F.3d at 897 (“To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression”). This is particularly true in this high-profile criminal prosecution that has garnered not only the close attention of Chicago residents but also a national spotlight. Barring access to evidence in this case undermines the historic purpose of “open trials,” to serve as “bulwarks of our free and democratic government.” *Richmond Newsp.*, 448 U.S. at 592 (Brennan, J., concurring).

Contemporaneous access to court records ensures that the public learns about cases while they are newsworthy. Prompt access also promotes accuracy in reporting and leads to more informed, meaningful public debate and discussion about case proceedings. Delay has consequences. If the press cannot report on the exhibits introduced into evidence at trial at the time, the public may never learn what those filings said, particularly if they are no longer

newsworthy when they finally become available. *See Grove Fresh*, 24 F.3d at 897 (“The newsworthiness of a particular story is often fleeting.”). Delaying access to the evidence introduced at trial thus stifles the flow of information to the public and chills public debate at the moment the trial evidence is most newsworthy.

CONCLUSION


Intervenors respectfully request that the Court grant the motion for access to judicial records and contemporaneously release all exhibits introduced at trial as required by law.

Dated: December 6, 2018

Respectfully submitted,

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SUN-TIMES MEDIA, LLC
WGN CONTINENTAL BROADCASTING COMPANY,
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CERTIFICATE OF SERVICE

Kristen C. Rodriguez, an attorney, certifies that she caused a copy of the foregoing **MEMORANDUM IN SUPPORT OF INTERVENORS' EMERGENCY MOTION FOR ACCESS TO JUDICIAL RECORDS** to be served upon:

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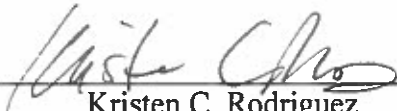
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