SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – FIRST DEPARTMENT

Application of	:	
DAILY NEWS, L.P., THE ASSOCIATED PRESS, CNN, NEWSDAY, THE NEW YORK LAW JOURNAL, THE NEW YORK TIMES, and THE WALL STREET JOURNAL,	:	Index No. 15/15
Petitioners,	:	
For a Judgment Pursuant to Article 78 of the CPLR	:	
-against-	:	
HON. MAXWELL WILEY, As Justice of the Supreme Court, County of New York, CYRUS R. VANCE, JR., As District Attorney of New York County, and PEDRO HERNANDEZ,	:	
Respondents.	:	

REPLY MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' APPLICATION PURSUANT TO ARTICLE 78

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PRELIMINARY STATEMENT

Respondents' opposition only confirms that the public's constitutional right of access to the underlying criminal prosecution has been abridged, and that Respondent, Hon. Maxwell Wiley (hereafter "Respondent"[1]), has acted contrary to law. While the multiple opposition papers seek to portray the denials of access as reasonable under the circumstances, none disputes either the existence of the public's access right or the procedures that must be followed before that right is properly limited. And, tellingly, the opposition nowhere suggests that the required procedures were followed in this case, where the trial court closed proceedings and sealed records *sua sponte,* usually without advance notice, without providing an explanation of the reasons for secrecy, and without allowing Petitioners to be heard in opposition.

It is an inversion of the constitutionally-required process that Petitioners are learning for the first time in this proceeding certain information and explanations that were required to be given before the public access right was abridged. Moreover, while Respondents' *post hoc* explanations do not cure the procedural failures, they do confirm that the governing legal standards were not applied in the multiple denials of access that have occurred. The limitations on access imposed by Respondent to protect defendant's fair trial right were unnecessary under the circumstances, overlooked available and sufficient alternative steps to ensure a fair trial, and were plainly overbroad. Steps taken to protect jury privacy were similarly overbroad and violated clear precedent mandating the procedures to be used to mediate the conflict between legitimate juror privacy and public access in high profile prosecutions. Had Petitioners been heard on these closures, this Article 78 proceeding might well have been avoided.

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[1] Consistent with their initial submissions, Petitioners refer to Justice Wiley individually as "Respondent," and refer to the additional nominal respondents as the "District Attorney" and the "Defendant," respectively. *See* Verified Petition (hereafter "Pet.") at 2 fn.1. Collectively, they are "Respondents."

Petitioners do not deny that a defendant's fair trial right and juror privacy are both important interests that warrant close attention by a trial judge. Nor do Petitioners deny that the public access right is a qualified right. The issue presented is not whether a judge has discretion to close a proceeding or seal a record in a proper situation; rather, it is whether Respondent "failed to perform a duty" imposed upon him by law, and whether he made determinations "in violation of lawful procedure" that were "affected by an error of law." CPLR § 7803(1) & (3).

The record before this Court establishes that Respondent has violated the public access right and that his overbroad sealing orders continue to do so. As recognized in decades of New York case law—including this Court's seminal decision in *Associated Press v. Bell*— these issues are properly raised by a petition under Article 78, and relief in the nature of mandamus and prohibition is both appropriate and necessary to vindicate the public's constitutional access right.

Numerous records in this case remain improperly under seal, in violation of a right that requires contemporaneous access; they should promptly be unsealed. Respondent has stated that he will continue to close hearings without proper process; he should be prohibited from doing so. Only by imposing these concededly strong, but plainly authorized and fully warranted remedies, can further irreparable damage to the public's constitutional right of access be avoided.

ARGUMENT

I.

THE OPPOSITION CONCEDES THE LEGAL STANDARDS GOVERNING THE PUBLIC ACCESS RIGHT

Respondents concede, as they must, the existence of the constitutional access right and, with one exception, do not dispute its application to the various proceedings and records at issue

here.[2] Respondents also accept that the constitutional access right imposes procedural obligations on those who seek to limit or deny public access. All parties thus recognize that the public must be given notice and an opportunity to be heard in advance of any restriction on access, and that findings must be entered on the record explaining the reasons secrecy is being ordered. *See* State Respondent's Answer and Affirmation ("AG Answer"), ¶¶ 23-24; Memorandum of Law of District Attorney Cyrus R. Vance, Jr. ("DA Mem."), at 9-11; Affirmation of Steven N. Feinman ("Def. Aff."), at ¶ 5.

The opposition papers are also largely in agreement as to the substantive standards that govern any decision to limit the public access right. Petitioners demonstrated that access may properly be limited only where (a) there is a "substantial probability" of harm to a compelling interest, (b) no alternative to a restriction of access can adequately protect that interest, and any limitation imposed on access is (c) narrow and (d) effective. Petitioners' Memorandum of Law (hereafter "Pet. Mem.") at 12. The Attorney General agrees that a limitation on access is proper only where there would be prejudice to "an important interest," the limitation on access is "necessary," and it is "done in as narrow a manner as possible." AG Answer, ¶ 23, 26.

The only material difference in the governing standard urged by the Attorney General is the claim that a "strong likelihood" of prejudice is sufficient to abridge the access right. *Id.* ¶ 23. It is not. The Attorney General cites *Westchester Rockland Newspapers v. Leggett*, 48 N.Y.2d 430 (1979), for this proposition, but that case was decided by the Court of Appeals a year before the U.S. Supreme Court first articulated the First Amendment access right in *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980). Applying the First Amendment right in 1986, the U.S. Supreme Court specifically rejected a "reasonable likelihood" of harm standard as

[2] The District Attorney mistakenly contends that only a common law right applies to court records as distinct from court proceedings. *See, infra,* p. 5.

insufficiently protective of the access right, and held to the contrary that the First Amendment requires a finding of a "substantial probability" of harm before public access may be denied. *Press Enter. Co. v. Super. Ct.*, 478 U.S. 1, 14-15 (1986) ("*Press-Enterprise II*"). This is the controlling standard, as the Court of Appeals itself later recognized in *Associated Press v. Bell*, 70 N.Y.2d 32, 39 (1987) (to limit the qualified right to access there must be specific findings demonstrating "a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent"); *see also United States v. Antar*, 38 F.3d 1348, 1359-60 (3d Cir. 1994) (requiring "substantial probability" of harm to seal *voir dire* transcript).

The District Attorney does not dispute these standards governing the First Amendment access right, and indeed confirms that the New York State Constitution imposes comparable standards. DA Mem. at 10. The District Attorney argues, however, that only a common law right and not a constitutional one applies to requests to inspect and copy judicial records. *Id.* at 10-11. This is incorrect. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), the case on which the District Attorney relies, predates *Richmond Newspapers* recognition of a qualified right of access to criminal proceedings grounded in the First Amendment itself. Since *Richmond Newspapers*, courts have widely recognized that its reasoning also conveys a qualified First Amendment right to evidence submitted in connection with a criminal proceeding.

For example, the First Circuit in *Globe Newspaper Co. v. Pokaski* described *Warner Communications* as an "idiosyncratic" decision involving presidential privacy and a special statute governing unique and limited circumstances, and cautioned that it must be read "[i]n light of *Richmond Newspapers,* decided two years later." 868 F.2d 497, 504 (1st Cir. 1989). *Pokaski* rejected the argument advanced here by the District Attorney that *Warner Communications* "la[id] down a general rule for all criminal cases that once the substance of testimony and

evidence has been exposed to public view," there is no right to the "inspection of exhibits, audiotapes, videotapes, and any papers to which the public had no 'physical access.'" *Id.* at 504. *See also, e.g.*, *In re N.Y. Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) ("our analysis clearly indicated that the First Amendment right of access applicable to a suppression hearing extends to the exhibits at the hearing")[3]; *Pokaski*, 868 F.2d at 505 ("a blanket prohibition on the disclosure of records of closed criminal cases of the types at issue here implicates the First Amendment"); *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986) ("the First Amendment right of access applies to documents filed in connection with plea hearings and sentencing hearings in criminal cases, as well as to the hearings themselves"); *Doe v. Pub. Citizen*, 749 F.3d 246, 267 (4th Cir. 2014) (public access right public access applies to court pleadings, motions, and exhibits as "a necessary corollary of the capacity to attend the relevant proceedings.") (internal quotation marks and citation omitted).

The District Attorney also relies on a 1987 Monroe County court decision that interpreted *Warner Communications* to mean a First Amendment right of access applies to documents submitted in a criminal proceeding but that no First Amendment right exists to copy them. DA Mem. at 12 (citing *People v. Glogowski*, 135 Misc. 2d 950, 951 (N.Y. Sup. Ct. 1987)). This holding is contrary to the substantial weight of state and federal authority and is plainly incorrect. As Petitioners demonstrated, by authority to which the District Attorney has no reply, Pet. Mem. at 10 fn.2, the First Amendment access right applies to the videotape confession and no proper ground exists for its continued sealing.

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[3] While not expressly basing its decision on the First Amendment right of access, the court in *New York v. Chambers*, 14 Media L. Rep. (BNA) 2244 (N.Y. Sup. Ct. 1988) (attached hereto), acknowledged case law in support thereof when it ordered the videotaped statement of the criminal defendant to be released to the media. *Id.* at 2245 n.2 (noting the Second Circuit's recent admonition that "the public and the media . . . have a constitutional right of access to documents filed in connection with a suppression hearing" (citing *In re N.Y. Times Co.*, 828 F.2d at 114)).

II.

THE OPPOSITION CONFIRMS THAT THE PUBLIC ACCESS RIGHT HAS BEEN VIOLATED

A. Required Procedures Were Not Followed

The opposition does not contend that proper procedures were followed, but attempts to excuse as unnecessary the failure of the trial court to provide notice and an opportunity to be heard, or to make findings to justify most of the access denials now being challenged. *See, e.g.*, AG Answer, ¶ 12 (it was "unnecessary to announce that the proceeding would be closed"); DA Mem. at 7 (proceeding was "closed at the request of defense counsel"); Def. Aff. ¶ 13 ("the trial court did not at all times comply with the above stated procedure."). As demonstrated in Petitioners' opening papers, however, the mandated procedures are not optional—they are required in order to ensure the access right is adequately protected. Pet. Mem. at 11. Had Petitioners been afforded an opportunity to be heard, the trial court would have been apprised in advance of the governing standards, and Petitioners would have identified various alternatives for the court's consideration. Because proper procedures were not followed, this did not happen.

Nor is it any justification for the procedural failings that the parties all agreed upon the need for secrecy. The access right is a public right, and interested members of the public have the right to be heard when a limitation on access is proposed. *See* Pet. Mem. at 11 (citing cases). Respondents simply fail to acknowledge the significance of the procedural errors that have been made, and the District Attorney even submits the most recent statement by Respondent Wiley that he intends to continue proceeding as he has. Affirmation of Joan Illuzi-Orbon ("DA Aff.") Ex. C at 883:18-22. Plainly, declaratory and injunctive relief is appropriate to protect Petitioners' constitutional rights.

B. The Stated Concerns For Defendant's Fair Trial Rights Do Not Justify Continued Sealing of Court Records

Respondents fail to provide any constitutionally adequate showings to justify continued sealing of records to protect defendant's fair trial rights. They must be released.

1. Respondents establish no proper basis for continued sealing of the records of the motions *in limine*.

Petitioners demonstrated that hearings on evidentiary motions have been improperly closed and their records improperly sealed. Pet. Mem. 21-23. Respondents do not provide any showings that particular information in any of the papers, evidence, or argument given at the secret hearings satisfies constitutional standards for closure and sealing. The opposition provides little additional detail about the conduct of those hearings and reveals the existence of two more closed proceedings of which Petitioners were previously unaware, but fails to explain how the constitutional standards are met.[4] DA Aff. ¶ 11 (motion for protective order); DA Mem. at 21-22 (sealed argument on *Molineux* application was held on December 16, 2015; protective order was heard *in camera* on January 9, 2015); DA Mem. 18-20 (describing sealed hearings on motions *in limine* held on January 20, 23, 29, and February 9, 2015). To the contrary, the opposition papers demonstrate that sealing and closure consistently have been procedurally improper and substantively unjustified.

Respondents also accept that the requisite procedures were not followed, but the Attorney General seeks to excuse the failure to give notice that a January 20 hearing would be closed. He claims that it was unnecessary to follow the mandatory constitutional process in that instance

[4] The only argument in the opposition papers that advances a recognized basis for closure is the District Attorney's explanation of its *ex parte* application for a protective order concerning "the name or location of the informant or any identifying details" of a confidential informant. DA Mem. at 22 (describing ruling in sealed protective order). However, the District Attorney does not contend that this argument applies to any of the other closed proceedings at issue here.

because only the parties were present in the courtroom at the time. AG Answer, ¶ 12. But a court must always provide some form of docket notice because it is "entirely inadequate to leave the vindication of a First Amendment right to the fortuitous presence in the courtroom of a public spirited citizen willing to complain about closure." *In re Herald Co.*, 734 F.2d 93, 102 (2d Cir. 1984).

Rather than providing the missing justification for continued sealing, Respondents simply assert that the trial court "appropriately balanced" the competing First and Sixth Amendment rights at issue, without illuminating what must be withheld or why. *E.g.,* DA Mem. at 18 (January 20 motion sought preclusion of "certain portions" of videotape and release of "additional information" regarding a witness); *id.* at 19 (January 23 hearing addressed "portions" of video "plus one additional section"); *id.* (January 29 hearings addressed "the same portions of the video" and "discussed the specific conduct/acts" addressed. The Attorney General says that the trial court issued a "finding that the particular and discrete subject of the *in limine* motion" required sealing because of the sensitive and potentially inflammatory information at issue. AG Answer, ¶ 37. That "finding," however, simply characterizes unspecified information withheld as being "sensitive and potentially inflammatory" such that "public disclosure" would be "unfairly prejudicial to the defendant." *Id.*, Ex. 3 at 871:11-16. This fails to provide a sufficient factual basis upon which to find the sealing order proper and that disclosure would create a "substantial probability" of harm to defendant's fair trial rights. *Press-Enterprise II*, 478 U.S.at 14-15.

The closures and sealings were constitutionally deficient, and there is no basis for continued withholding of the sealed records and transcripts. They must be released. Troublingly, Respondent has indicated on the record that he will continue to seal hearings, transcripts, and motions in this same fashion, as he sees fit. Affirmation of Patrick Kabat, Ex. G, at 2:10-17.

2. Respondents establish no proper basis for continued sealing of the videotape confession.

No proper basis existed to withhold the videotape evidence from the public at the time it was aired in court at the *Huntley* hearing, and though a redacted portion of one of the confession videotapes has now been released, and Respondent has stated that redacted portions of others will also be released after they are played at trial, this neither excuses the months-long denial of access, nor justifies withholding the redacted portions that remain under seal.[5]

Petitioners demonstrated that the fact that a case is closely followed by the public is not, alone, a sufficient ground for denying public access to motions concerning the admissibility of evidence. Pet. Mem. at 17-20. In response, the Attorney General and the District Attorney suggest without elaboration that the trial court employed an appropriate balancing test. AG Answer, ¶ 27; DA Mem. at 12-13. Defendant offers little more, arguing that the "highly publicized" nature of the case justified sealing the records of the suppression hearing. Def. Aff. at 2. But parties to a proceeding generally overestimate the impact of press coverage, *e.g., In re NBC,* 635 F.2d 945, 953 (2d Cir. 1980); *In re NBC., Inc.*, 653 F.2d 609, 613-619 (D.C. Cir. 1981), and judges, in any event, "have at their disposal a broad spectrum of devices for ensuring that fundament fairness is accorded the accused." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 572-73 (1976) (Brennan, J., concurring).

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[5] The Attorney General suggests that because "one of the three video recordings has now been admitted into evidence (subject to the limited redactions that were the subject of Defendant's in limine motion," the withholding of the videotapes is partially moot. AG Answer ¶ 28. This misses the point. Not only have no showings been made to justify sealing the redacted portions, and however limited they may be, the redactions are themselves critically important from the perspective of the public's access right. *In re Washington Post Co.*, 923 F.2d 324, 330 (4th Cir. 1991) ("if all pre-trial publicity involved only admissible evidence, the tension between the First and Sixth Amendment values would rarely arise.") The public's understanding about what evidence has been withheld from the jury is essential to its constitutionally protected interest in understanding how a court shapes evidence for trial, and satisfying itself that the process is fair and effective. *Richmond Newspapers*, 448 U.S. at 556.

In defense of the sealing order, the opposition points primarily to the fact that small portions of the video tape confession have been ruled inadmissible. AG Answer, ¶ 28; DA Mem. at 20. That argument gets them nowhere. A court's findings that certain evidence would unfairly prejudice a *jury* permits it to disallow introduction of the evidence at trial. To justify keeping the information from the public, however, requires a separate finding of a substantial probability that public access would deprive defendant of his fair trial right. This finding cannot generally be made in a metropolitan area like New York City with 8.4 million potential jurors. As explained in *CBS v. District Court*, 729 F.2d 1174, 1181 (9th Cir. 1984), "in a populous metropolitan area, the pool of potential jurors is so large that even in cases attracting extensive and inflammatory publicity, it is usually possible to find an adequate number of untainted jurors." *See also*, *United States v. Griffin*, 1996 WL 140073, at *1 (S.D.N.Y. Mar. 27, 1996) (same); *In re CBS,* 570 F. Supp. 578, 582-83 (E.D. La. 1983) (same).

In any event, the concern about the potential impact on the jury pool cannot reasonably support continued sealing now that the jurors have been selected and are subject to control by the court. "If information could never be disclosed simply because it might be inadmissible at trial, much about the world of crime and the operation of the criminal justice system would be withdrawn from public view." *In re Washington Post Co.*, 923 F.2d 324, 330 (4th Cir. 1991).

The District Attorney cites *United States v. McVeigh* as supporting a *per se* rule against public access to suppressed evidence, but *McVeigh* is premised on an analysis that the First Amendment access right does not even attach to any suppressed evidence. 119 F.3d 806 (10th Cir. 1997). The Court of Appeals rejected that proposition in *Bell*, 70 N.Y.2d at 36, and it is plainly at odds with the requirements of *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607-08 (1982), which forbids categorical closures, and *Press Enterprise II*, which requires a

showing that specific information to be kept from the public will create a substantial probability of harm. 478 U.S. at 13-14. *McVeigh* is also at odds with many opinions recognizing that the public's interest is *particularly strong* with respect to understanding what information is kept from the decision-makers and why. *E.g.*, *Lugosch v. Pyramid Co. of Onondaga,* 435 F.3d 110, 123 (2d Cir. 2006); *United States v. Kemp*, 365 F. Supp. 2d 618, 632 (E.D. Pa. 2005).

Indeed, a core purpose of the access right is to allow the public to understand the manner in which a court shapes evidence for trial and satisfy itself that the process is fair. *Richmond Newspapers,* 448 U.S. at 556. Public access plays a key role in promoting confidence in the judicial system, and that confidence is severely undermined when decisions are made by judges in closed proceedings and on sealed records. As Justice Brennan explained in *Nebraska Press Association v. Stuart*:

> [A] responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. . . . The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. . . . Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.

427 U.S. at 586-87 (internal quotation marks and citations omitted).

Given the importance of public access, information about a criminal prosecution—admissible or inadmissible—cannot be kept secret unless it is specifically shown to pose a threat to the defendant's fair trial rights, and no alternatives are available. But ample alternatives are available here. *See* Pet. Mem. at 18-20. Respondents do not dispute that curative instructions, for example, can adequately protect the fairness of this trial. To the contrary, they concede that

jurors will be "presumed to have followed" a curative instruction that "there will be Press coverage about this recording, and they are not to watch it, in any form, in any manner, or to listen to it, and that if they see it anywhere, to turn off the device that is playing it, or turn their heads and ignore it." AG Answer, Ex. 3 at 876-77.

Aside from the existence of pretrial publicity, and a conclusory reference to the "sensitive and prejudicial nature" of the redacted information, Respondents make no showing that the redacted information in the videotapes may properly be withheld from the public. Ultimately, Respondents are forced to argue that, because the videotape was played in open court during the suppression hearing, the public has had enough access. AG Answer, ¶ 27; DA Mem. at 12. This gets it precisely backwards: the fact that the videotape was played in open court, and has been widely reported on renders sealing ineffective and doubly inappropriate. *E.g. In re N.Y. Times Co.*, 828 F.2d at 116 (information that "has already been publicized" cannot properly be sealed).

C. The Concerns For Juror Privacy Do Not Justify The Jury Selection Procedures Followed Or The Continued Sealing Of Juror Questionnaires

1. The completed questionnaires are improperly sealed.

Petitioners do not dispute that records may be redacted to withhold information for which sealing is justified, but sealing completed jury questionnaires in their entirety is unjustified, particularly as to those jurors who have been chosen to decide this case. *See* Pet. Mem. at 15-16. Respondents depict the jury questionnaires as dealing primarily with sensitive medical and emotional issues, DA Mem. at 3, 6, 16; AG Answer, ¶ 8, but this elides that many questions solicit information that is typically disclosed in open *voir dire* and for which there is no proper basis for sealing. *E.g.* Affidavit of Shayna Jacobs, Ex. A ("Do you watch any television news programs regularly?" "Do you like to read books?" "Do you have a Facebook account?").

Respondents argue that the public has no right to the jury questionnaires, despite unbroken judicial precedent to the contrary. Pet. Mem. at 15-16. In support, they cite a statute that exempts from the Freedom of Information Law the *qualification questionnaires* circulated by the county commissioner of jurors to determine whether residents qualify for inclusion in the roster of prospective jurors—ministerial questionnaires that seek extremely limited and narrowly constrained personal information. Jud. L. § 509(a). The effort is unavailing. It conflates two entirely different types of questionnaires used for different purposes—one is part of the *voir dire* process and one is not.

Qualifying questionnaires are the type of judicial administrative documents to which the constitutional right of access does not apply. *See Newsday, Inc., v. Sise*, 71 N.Y.2d 146 (1987). The questionnaires at issue here, however, are part of jury selection for a specific case and are subject to the public's right of access under *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505 (1984) ("*Press-Enterprise I*") . These questionnaires may only be sealed or redacted to exclude "deeply personal and private information" in accordance with constitutional procedures and standards. *In re The Washington Post*, 1992 WL 233354, at *4 (D.D.C. July 23, 1992); *see also, Newsday, Inc. v. Goodman*, 159 A.D.2d 667, 669 (2d Dep't 1990) (questionnaires completed by petit jurors are integral to *voir dire* and subject to the access right). Respondents' effort to place the questionnaires beyond the reach of the access right has repeatedly been rejected by other courts:

> We can think of no principled reason to distinguish written questions from oral questions for purposes of the First Amendment right of public access. Jury questionnaires merely facilitate and streamline *voir dire*; their use does not constitute a separate process. Every court that has decided the issue has treated jury questionnaires as part of the *voir dire* process and thus subject to the presumption of public access.

In re Jury Questionnaires, 37 A.3d 879, 885-86 (D.C. 2012) (reviewing nine cases holding that the access right applies to jury questionnaires). As these decisions recognize, permitting questions that would routinely be asked in *voir dire* to be kept from the public merely by posing them by written questionnaire would swallow the public's right of access to jury selection.

Though it appears from the blank questionnaire that a limited number of questions in this case solicited information that could properly be redacted, the Respondents make no effort to bear their burden to identify them and narrow the abridgement of the access right. Indeed, the only generalized basis for objection referred to by Respondents is the presence of medically-related information; by their own standards, the sealing order is overbroad.

Although Respondent represented that the questionnaires would be kept strictly secret, making this promise exceeded his discretion, at least without findings of fact to justify sealing and a dramatic narrowing of the questions posed. *United States v. Bruno*, 700 F. Supp. 2d 175, 185 (N.D.N.Y. 2010) (court's assurances of confidentiality are "not determinative or controlling"). The representation may not properly be used as a boot-strap to justify the absence of findings establishing a need for secrecy, or a narrowing of the sealing.

Nor are Respondents correct that a desire for "juror candor" justifies the use of confidential questionnaires. Respondents' authority for this proposition, *United States v. King*, 140 F.3d 76 (2d Cir. 1998), was expressly limited by the court that issued it to a very narrow set of concerns, like racism, which are so socially disfavored that a potential juror might not answer in public with candor. As the Second Circuit explained in *ABC v. Stewart*, this concern does not justify sealing where, as here, there are no particularly "controversial issue[s] to be probed in *voir dire* that might have impaired the candor of prospective jurors." 360 F.3d 90, 101 (2d Cir. 2004).

2. The secret juror interviews were improper.

Respondents argue that the challenge to the secret questioning of jurors is moot now that the transcripts have been ordered unsealed, and generally suggest that the secret interviews were also necessary to ensure juror candor. But a violation of the access right does not become moot simply because a transcript is later released. The U.S. Supreme Court repeatedly has ruled that the mootness doctrine does not apply to access violations because they are capable of repetition and evading review. *Globe Newspaper Co. v. Super Ct.*, 457 U.S. at 603; *Press-Enterprise II*, 478 U.S. at 6. Courts have consistently held that the availability of a transcript is no substitute for presence at a proceeding, and the release of a transcript does not cure a violation of the First Amendment access right. *E.g.*, *Stewart*, 360 F.3d at 99-100; *Antar*, 38 F.3d at 1360 n.13.

Other than conclusory suggestions that "sensitive topics" arose "at times," over the course of the secret interviews,[6] DA Mem. at 6, the only substantive justification for the back-room proceeding is the speculative assertion that juror candor would have been diminished. AG Answer, ¶ 34. As noted above, this concern is inadequate to justify closure.

There can be no serious dispute that Respondent's actions violated the public access right. *See Doe v. Pub. Citizen*, 749 F.3d at 272; *United States v. Wecht*, 537 F.3d 222, 229 (3d Cir. 2008); *In re Associated Press*, 162 F.3d 503, 506-07 (7th Cir. 1998). Respondents' reference to certain concerns raised by jurors during the closed interviews process actually underscores the impropriety of the procedure followed. *E.g.* DA Aff. ¶¶ 10, 17-18. Closure of

[6] Despite CPLR 7804(e), Respondents have not provided this Court with the transcripts of jury interviews that the Court might "independently review" them to test Respondents' unsubstantiated claim that wholesale sealing did not violate the public's right of access. *Stewart*, 360 F.3d at 102; *Glens Falls Newspapers v. Berke*, 206 A.D.2d 668, 668 (3d Dep't 1994) (reviewing transcripts, annulling order closing hearings). Petitioners respectfully submit that review of those transcripts will reveal substantial colloquy that does not disclose highly personal and sensitive information, or probe socially polarizing issues like racism or gender bias. Indeed, Respondents concede as much. DA Mem. at 6.

questioning should only have been considered when these specific concerns were raised by a juror. *See* Pet. Mem. at 14 (citing cases).

III.
DECLARATORY AND INJUNCTIVE RELIEF ARE PROPER AND NECESSARY TO PREVENT FURTHER IRREPARABLE DAMAGE TO THE PUBLIC ACCESS RIGHT

Unable to refute the errors of law that have been committed, Respondents object that Article 78 does not afford the relief Petitioners seek, because applying the constitutional standards involves the exercise of discretion. This objection is meritless.

A. Respondent's First Amendment Duties Are Clear

The Constitution does not afford any court discretion to abdicate its duty to provide the public notice and opportunity to be heard in advance of any closure or sealing, or its duty to make factually specific findings justifying any restriction on the access right. The Court of Appeals has explicitly instructed that "no hearing should be closed before affected members of the news media are given an opportunity to be heard 'in a preliminary proceeding adequate to determine the magnitude of any genuine public interest' in the matter." *Herald Co. v. Weisenberg*, 59 N.Y.2d 378, 383 (1983) (quoting *Gannett Co. v. De Pasquale*, 43 N.Y.2d 370, 381 (1977)). As the District Attorney acknowledges, courts "must adhere" to these requirements. *Associated Press v. Owens*, 160 A.D.2d 902, 902-03 (2d Dep't 1990). Respondents also acknowledge that the failure to permit counsel for Petitioners to be heard in opposition to closure violated Respondent's clear constitutional duty. *Johnson Newspaper Corp. v. Parker*, 101 A.D.2d 708, 709 (4th Dep't 1984); *In re Herald Co.*, 734 F.2d at 102.

There can be no dispute that a court lacks discretion to refuse to provide these procedural safeguards. There similarly can be no dispute that a court is required to apply the governing law in deciding whether the qualified access right may be abridged. *See* Pet. Mem. at 11-12. These

standards are well settled, and in ruling on a motion to close or seal a trial court may not act contrary to law or make arbitrary and capricious finding of facts.

B. Article 78 Authorizes The Relief Petitioners Seek

Article 78 expressly authorizes relief where a "body or officer failed to perform a duty enjoined upon it by law," or where "a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." CPLR. 7803(1) & (3). New York courts routinely have held that Article 78 is the proper vehicle for review of the denial of the public's access right, and that vacating sealing orders and providing declaratory relief are appropriate remedies. *See, e.g., Associated Press v. Bell*, 70 N.Y.2d at 36-37; *N.Y. Times Co. v. Bell*, 135 A.D.2d 182, 184-85 (1st Dep't 1998); *Herald Co. v. Burke*, 261 A.D.2d 92 (4th Dep't 1999); (reviewing sealed transcripts and ordering disclosure); *Glens Falls Newspapers*, 206 A.D.2d at 668 (reviewing transcripts, annulling order closing hearings, and ordering unsealing of minutes and motion papers).

Respondents rely on *Crain Communications* for the proposition that the relief afforded by all of these courts was in error, but *Crain Communications* arose from a civil case, in which alternative procedural remedies were available for appellate review. As was made clear by this Court in *New York Times Co. v. Bell*, Article 78 is the appropriate vehicle for challenging denials of access in criminal cases, 135 A.D.2d at 185, because the Criminal Procedure Law provides no similar vehicle for appellate review by a nonparty of an order affecting its rights. *Compare* Article 450, Criminal Procedure Law, *with* CPLR § 5511.

Respondents also attempt to overturn decades of jurisprudence by arguing that future actions in violation of the access right cannot be remedied under Article 78. The effort is entirely off base. *See, e.g., Associated Press v. Bell*, 70 N.Y.2d at 36-38 (affirming this Court's grant of Article 78 petition to enjoin trial court from proceeding with a closed suppression

hearing); *N.Y. Times Co. v. Demakos*, 137 A.D.2d 247, 254 (1988) (Article 78 petition is proper vehicle to obtain order prohibiting trial court from conducting further closed plea proceedings); *Milonas v. Schwalb*, 65 Misc. 2d 1042, 1043-44 (Sup. Ct. N.Y Cnty. 1971) (Article 78 relief in the nature of prohibition is available to restrain court from taking action violative of First Amendment rights).

1. Declaratory Relief Is Appropriate.

Under Article 78, this Court has authority to determine whether Respondent's repeated denials of public access to criminal proceedings and associated court records were "affected by an error of law or was arbitrary and capricious or an abuse of discretion." CPLR § 7803 (3). Likewise, under Article 78, this Court has authority to determine whether Respondent failed to comply with the procedural and substantive duties enjoined upon Respondent by the First Amendment. CPLR § 7803 (1). *See Associated Press v. Bell*, 128 A.D.2d at 62 (declaring violation of "the rights guaranteed to the petitioners and the public by the First and Fifth Amendments to the Constitution of the United States and article I, section 8 of the New York State Constitution.").

2. Injunctive Relief Is Necessary

Where a proceeding "was brought to review a determination," Article 78 provides that "the judgment may annul or confirm the determination in whole or in part, or modify it, and may direct or prohibit specified action by the respondent." CPLR § 7806. Forward-looking review is appropriate where, as here, "the respondent refused [the press] an opportunity to be heard on the issue of closure." *Demakos*, 137 A.D.2d at 248, 252 (ordering prohibition and unsealing); *Associated Press v. Bell*, 128 A.D.2d at 62 (ordering hearing open); *Burke*, 261 A.D.2d at 92 (ordering prohibition and unsealing). Prohibition is particularly warranted in this case: Respondent has stated that proceedings will continue to be closed "as I see fit," and without

affording the press notice or opportunity to be heard in opposition. AG Answer, Ex. 4, at 3:3-5, DA Aff. Ex. C, at 883. Indeed, when counsel for the Petitioners was physically present in the courtroom to address an impending closure, Respondent flatly refused counsel's oral request to be heard. Kabat Aff. Ex. G. at 3:15-17.

3. Remand Is Unwarranted

The District Attorney suggests that this Court should remand for constitutionally adequate findings. Coming, as it does, the context of a submission that fails to provide a single particularized justification for sealing a single document, this suggestion is entirely unwarranted. *See Associated Press v. Bell*, 70 N.Y.2d at 38-39 (declining to remand for findings); *Glens Falls Newspapers*, 206 A.D.2d at 668 (reviewing transcripts). It also fails completely to grasp that the public's right of access is a right of *contemporaneous* access. This right is further eclipsed with the passage of each trial day. This Article 78 proceeding afforded Respondents the opportunity and responsibility to bear the burdens to justify the ongoing denials of the public's access right. They failed to do so.

CONCLUSION

For each and all of the foregoing reasons, and those set forth in Petitioner's initial papers, Petitioners respectfully request this Court to declare that their rights have been violated, direct Respondent to release or redact unlawfully sealed documents and transcripts (as it did in four days in *Associated Press v. Bell*), and direct Respondent to carry out his non-discretionary procedural duties during the remainder of the criminal trial of Pedro Hernandez. The Petition should be granted in all respects, and such other and further relief entered as this Court deems just and proper.

Dated: February 17, 2015
New York, New York

Respectfully submitted,

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14 Med.L.Rptr. 2244
New York v. Chambers
New York Supreme Court, New York County
No. 6394-86
February 5, 1988

THE PEOPLE OF THE STATE OF NEW YORK v. ROBERT CHAMBERS

Headnotes

NEWSGATHERING

Access to records—Judicial (▶38.15)

News media has right to copy defendant's videotaped statement that has been introduced into evidence at trial, since such access will not impinge upon defendant's fair trial right, and since any commercialization of statement which may result is outweighed by significant presumption in favor of access, by prior publicity already given to information contained in statement, and by safeguards imposed to protect defendant's rights.

Case History and Disposition

News media files motion seeking access to videotaped statement of defendant.

Motion granted.

Attorneys

Ellen Rosen and Devereux Chatillon, of Cahill Gordon & Reindel, New York, N.Y., for news media.

Jack Litman for defendant.

Linda Fairstein for prosecution.

Opinion Text

Opinion By:

Bell, J.:

Full Text of Opinion

Petitioners, National Broadcasting Co., WABC Television Inc., and CBS, Inc. (collectively the "Petitioners") have applied for an order of this court granting

them permission to copy the videotaped statement of Robert E. Chambers ("videotaped statement") which has been introduced into evidence at the trial. [1] The Petitioners assert that they have a First Amendment and a common law right to copy the videotaped statement. Defendant opposes the application on the ground that the broadcasting of the videotaped statement, or any part thereof, would impair his ability to receive a fair trial. The People also opposed the motion, adopting many of the defendant's arguments and noting that they believe that the videotaped statement will be commercialized.

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[1] As a matter of convenience and customary courthouse practice, this court has not taken custody of the trial exhibits. The parties have been allowed to be responsible for their own exhibits. This practice, however, does not prevent the court from ordering the production of the trial exhibits which are constructively in the possession of the parties.

The public and the media, as a representative of the public, have a qualified First Amendment right to attend and observe trials and/or hearings (*See Richmond Newspapers v. Virginia*, 448 U.S. 555; *Press Enterprise Co. v. Superior Court*, 106 Sup. Ct. 2735; *Matter of Associated Press v. Bell*, 70 NY 2d 32). [2] The public and media also have a common law right to copy and inspect judicial records (*See Nixon v. Warner Communications, Inc.*, 435 U.S. 589). [3] "[T]he non-documentary nature of the evidence sought to be copied does not remove the common law right" (*In re Application of NBC,* 635 F.2d 945, 950; *see also United States v. Mitchell*, 551 F.2d 1252, 1258 n. 21, *rev'd on other grounds sub nom. Nixon v. Warner Communications Inc.*, 435 U.S. 589; *People v. Glogowski*, 135 Misc. 2d 950). The common law right is not, however, absolute but is subject to the discretion of the presiding trial judge (*Nixon v. Warner Communications, Inc.*, *supra; United States v. Beckham*, 789 F.2d 401). In *Nixon v. Warner Communications, Inc.*, the United States Supreme Court also noted the supervisory power courts have over their records and files (*See also WNYT-TV v. Moynihan*, 97 A.D.2d 555).

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[2] The media's right of access is equal to and not greater than that of the public.

[3] Recently, the United States Court of Appeals for the Second Circuit, in *In re New York Times,* 828 F.2d 110, held that the public and the media, as the public's representative, have a constitutional right of access to documents filed in connection with a suppression hearing. The court, *id.* at 114, stated that "access to written documents filed in connection with pretrial motions is particularly important in the situation... where no hearing is held and the court's ruling is based on motion papers." (*But see Nixon v. Warner Communications, Inc.*, *supra*).

In considering Petitioners' application, the court has carefully reviewed all pertinent factors. It has, among other things, weighed the considerations set forth by the United States Supreme Court in *Nixon v. Warner Communications, Inc.* (*See also United States v. Beckham*, *supra*). The court has reviewed the interests advanced by the parties in light of the public interest and the duty of the court.

Having weighed the relevant factors, the court grants Petitioners' motion. Defendant's assertions that jurors may disregard the court's admonitions or be overwhelmed by the publicity generated by the broadcast of the videotaped statement are unfounded. The court has no reason to believe that this particular jury, having been selected after the voir dire of 486 persons, would disregard the court's admonition. The jury has been repeatedly admonished not to read any newspaper or magazine articles, listen to any radio broadcasts or observe any television programs concerning this case. [4] Defendant's right to a fair trial will not be impinged upon by producing the videotaped statement, which has been previously viewed by the jury, to the media. Any future trial right of defendant can be protected by similar

measures.

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[4] The court is aware that there may be occasions when an admonition to a jury is insufficient, (*See United States v. Beckham*, 789 F.2d 401, 410 n. 2) and that publicity can rise to a level which deprives defendant of a fair trial (id. at n3). However, this court finds that because of the precautions which have been taken, any potential danger to defendant's right to a fair trial has been removed. Indeed, on December 21, 1987, this court denied an application to conduct audio-visual coverage of this prosecution to, at least in part, protect the defendant's right to a fair trial. Additionally, the court has withheld the names and addresses of jurors and directed jurors to report to the court any improper contact to which they may be exposed.

The parties' contention that the court may be facilitating the commercialization of the videotaped statement by allowing it to be copied does give the court strong reason for concern, particularly given the past focus of the media. However, given the significant presumption in favor of

access to judicial records, [5] the fact that the information contained in the videotaped statement has already been widely publicized, and the safeguards imposed in order to protect defendant's rights, the court has struck the balance in favor of access. [6]

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[5] *In re Application of CBS,* 828 F.2d 958 and *In re Application of NBC, supra,* the United States Court of Appeals for the Second Circuit held that the presumption in favor of public access to inspect and copy is so strong that only the most extraordinary or compelling circumstances justify restricting the right.

[6] There has been no claim by the parties that technical difficulties would prevent or complicate the copying of the videotaped statement. Rather, the Petitioners have indicated that they could reproduce it without disturbing the integrity of the evidence or disrupting the courtroom.

Accordingly, the court grants the motion and directs the People to make the videotaped statement available to Petitioners for reproduction.

- End of Case -