IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BECKLEY DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

Criminal Action No.: 5:14-cr-00244
(Hon. Irene Berger, District Judge)

DONALD L. BLANKENSHIP,

Defendant.

THE CHARLESTON GAZETTE-MAIL AND WEST VIRGINIA PUBLIC BROADCASTING, INC.'S MOTION TO INTERVENE FOR THE PURPOSE OF RESPONDING IN OPPOSITION TO DEFENDANT'S REQUEST FOR *IN CAMERA* VOIR DIRE QUESTIONING OF POTENTIAL JURORS AND MOTION FOR CONTEMPORANEOUS PUBLIC ACCESS TO ALL EXHIBITS ADMITTED AT TRIAL AND FULLY PUBLISHED TO THE JURY

Charleston Newspapers d/b/a *The Charleston Gazette-Mail* and West Virginia Public Broadcasting, Inc. (collectively "the News Media Interveners") pursuant to the First Amendment to the *United States Constitution*, the common law and other well-recognized legal grounds, respond in opposition to Defendant's request for *in camera voir dire* of prospective jurors made in his September 8, 2015 Proposed Voir Dire Procedures and Questions. The News Media Intervenors further request that the Court direct the Clerk to make available to the public a copy of all trial exhibits within twenty four hours after they have been admitted and fully published to the jury.

As the Court is aware, these News Media Interveners and others previously moved to intervene in this matter [Doc. 30], asserting their First Amendment rights of access. After this

Court allowed the intervention,[1] and, *inter alia*, granted in part and denied in part the News Media Interveners' request for access to sealed court documents [Doc. 63], the News Media Interveners sought a Writ of Prohibition from the Court of Appeals again asserting their First Amendment rights of access to all filings in this case.

On March 5, 2015 the Court of Appeals issued the requested writ. [Docs. 162]. In a *per curiam* Order setting forth its reasoning for issuing the writ, the Court of Appeals affirmed the News Media Interveners' First Amendment rights of access to filings in criminal cases:

> "The public enjoys a qualified right of access to criminal trials, see *Richmond Newspapers v. Virginia*, 448 U.S. 555, 580 (1980); pretrial proceedings, see *Press–Enter. Co. v. Super. Ct.*, 478 U.S. 1, 14 (1986) ("*Press–Enterprise II*"); and "documents submitted in the course of a trial," including documents filed in connection with a motion to dismiss an indictment and other pretrial filings. *In re Time Inc.*, 182 F.3d 270, 271 (4th Cir.1999); see also *In re Charlotte Observer*, 882 F.2d at 852. Where the right of an accused to a fair trial is at stake, the public will not be denied access absent "specific findings ... demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights." *Press–Enterprise II*, 478 U.S. at 14.
>
> Having carefully reviewed the record, although we commend the district court's sincere and forthright proactive effort to ensure to the maximum extent possible that Blankenship's right to a fair trial before an impartial jury will be protected, we are constrained to conclude that the order entered here cannot be sustained. See id. See also *In re Morrissey*, 168 F.3d 134, 139–40 (4th Cir.1999); *In re Russell*, 726

---

[1]The Court granted the News Media Interveners' Motion to Intervene at the December 17, 2014 hearing, and memorialized that ruling in its January 7, 2015 Order. [Doc. 63 at 4]. The intervention was granted "for the limited purpose of entertaining the Movants' substantive argument(s)." *Id.* While The News Media Interveners believe the scope of the Court's previous permission to intervene may encompass the instant response, if the Court determines it does not, for the same reasons stated in the original Motion to Intervene and supporting Memorandum, incorporated herein by reference, the News Media Interveners seek leave again to intervene for the limited purpose of opposing Defendant request for *in camera* voir dire questioning of potential jurors, and for contemporaneous access to all exhibits within twenty four hours after they are both admitted and fully published to the jury at trial.

F.2d 1007, 1010 (4th Cir.1984); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976)."

In re The Wall St. Journal, No. 15 1179, 2015 WL 925475, at 1-2 (4th Cir. Mar. 5, 2015).

ARGUMENT

Defendant asks this Court to conduct *in camera* and conceal from public view all voir dire questioning of potential jurors. Acceding to Defendant's request would infringe on the News Media and the Public's important constitutional and common law rights of open access to criminal trial proceedings and secret this important part of the criminal trial process from public view.[2] The News Media Intervenors oppose Defendant's request to hide such important court proceedings from the public.

Similarly, the News Media Intervenors request contemporaneous access to trial exhibits once they have been admitted into evidence at trial and fully published to the jury. The News Media Intervenors have made this request to the Clerk's office and understand that is the Clerk's office typically does not release trial exhibits for public view until the conclusion of a trial. The issue of contemporaneous media access to criminal trial exhibits was addressed and decided in favor of such access by the Court of Appeals for the Fourth Circuit in *In re Associated Press*, 172 F. App'x 1, 5 (4th Cir. 2006) ("As for documentary exhibits that have been admitted into evidence and fully published to the jury, we conclude that the district court abused its discretion

---

[2] "The process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system. . . . the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown." *Press Enter. Co. v. Superior Court of California, Riverside Cnty.*, 464 U.S. 501, 505, 104 S. Ct. 819, 821, 78 L. Ed. 2d 629 (1984).

in denying access. 'Once ... evidence has become known to the members of the public ... through their attendance at a public session of court, it would take the most extraordinary circumstances 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.' *United States v. Myers (In re Nat'l Broad. Co.)*, 635 F.2d 945, 952 (2d Cir.1980).").[3]

A THE FIRST AMENDMENT PROVIDES THE PUBLIC WITH A RIGHT OF ACCESS TO THE CRIMINAL TRIAL, INCLUDING TO ATTEND THE VOIR DIRE QUESTIONING OF THE POTENTIAL JURORS THAT DEFENDANT REQUESTS OCCUR IN SECRET

As explained by the Court of Appeals, the First Amendment provides an affirmative right of public access to virtually all judicial proceedings and documents involved in a criminal prosecution. "'The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.' *Richmond Newspapers, Inc. v. Virginia*, 448 U.S., at 569-571, 100 S.Ct., at 2823-2824." *Press Enter. Co. v. Superior Court of California, Riverside Cnty.*, 464 U.S. 501, 508, 104 S. Ct. 819, 823, 78 L. Ed. 2d 629 (1984).[4]

---

[3]The constitutional access right extends to "documents submitted in the course of a trial," *In re Time Inc.*, 182 F.3d at 271.

[4]"When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions. Proceedings held in secret would deny this outlet and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly

The concealing of voir dire questioning Defendant seeks is inconsistent with this constitutional right of access. See, e.g., *Richmond Newspapers v. Virginia,* 448 U.S. 555, 580-581 (1980) (recognizing a constitutional right of access to criminal trials); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13 (1986) (recognizing constitutional right of access to pretrial proceedings) ("Press-Enterprise II").

In criminal proceedings, "openness enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("*Press-Enterprise I*"). This is so because "[p]ublic confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view." *Gannett Co. v. DePasquale*, 443 U.S. 368, 429 (1979) (Blackmun, J., dissenting in part); see also *Nebraska Press Ass'n v. Stuart*, 427 U.S. at 587 (1976) (Brennan, J., concurring) ("[s]ecrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges").

The Supreme Court also has stressed that other "crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.'" *Richmond Newspapers*, 448 U.S. at 571. These

---

selected. See *United States v. Hasting*, --- U.S. ----, ----, 103 S.Ct. 1974, 1979, 76 L.Ed.2d 96 (1983); Morris v. Slappy, --- U.S. ----, ----, 103 S.Ct. 1610, 1617, 75 L.Ed.2d 610 (1983)."

Press Enter. Co. v. Superior Court of California, Riverside Cnty., 464 U.S. 501, 509, 104 S. Ct. 819, 823, 78 L. Ed. 2d 629 (1984).

goals can not be achieved without public access to the records used by judges in performing their Article III functions.

"[T]he circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one. Where ... the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982). "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Press Enter. Co. v. Superior Court of California, Riverside Cnty.*, 464 U.S. 501, 509 10, 104 S. Ct. 819, 823 24, 78 L. Ed. 2d 629 (1984). "Even with findings adequate to support closure, the trial court's orders denying access to *voir dire* testimony failed to consider whether alternatives were available to protect the interests of the prospective jurors that the trial court's orders sought to guard. Absent consideration of alternatives to closure, the trial court could not constitutionally close the *voir dire*." *Id.*, 464 U.S. 501 at 511.

More recently, in *Presley v. Georgia*, 558 U.S. 209, 213 14, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010), the United States Supreme Court reiterated the Public's right to access to criminal trials, including voir dire, and the standard that applies to consideration of closing the courtroom:

> "[T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Waller*, 467 U.S., at 45, 104 S.Ct. 2210. "Such circumstances will be rare, however, and the balance of interests must be struck with special care." *Ibid. Waller* provided standards for courts to apply before excluding the public from any stage of a criminal trial:
>
> > "T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Id.*, at 48, 104 S.Ct. 2210.

The Supreme Court was abundantly clear that trial courts must make every effort to accommodate public attendance at criminal trials: "Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials." *Id.*, 558 U.S. at 215.

In the case at bar, Defendant's rationale for *in camera* questioning during voir dire focuses almost entirely on his speculation that potential jurors may respond to voir dire questioning in a way that it should, "occur outside the earshot and presence of other jurors [or in a way that] "insulates the jurors from one another's prejudicial comments." [Doc. __ at 2].[5] The

---

[5]The Defendant appears to suggest that the jury questionnaires are "confidential," and therefore any "follow-up" questioning should be confidential. Courts employ written jury questionnaires, or "voir dire questionnaires," as a substitute for oral voir dire, every court that has confronted the issue has ruled that the presumptive First Amendment right of access extends to jury questionnaires. *See In re Access to Jury Questionnaires*, 37 A.3d 879, 886 (D.C. 2012) ("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.") (citing *In re South Carolina Press Ass'n*, 946, F.2d 1037, 1041 (4th Cir. 1991), and collecting other cases). The U.S. Supreme Court has held that this "presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise I*, 464 U.S. at 510. Before ordering closure or sealing, a court must articulate "findings specific enough that a reviewing court can determine whether the closure order was properly entered," and consider alternatives that would be sufficient to protect against the harm closure or seal would avoid. *Id.* at 510–11. Because no such findings have been made here, and no alternatives considered, and no record made, the juror questionnaires can not be confidential or concealed from public view.

only other basis Defendant offers as a rationale to defeat the Public's constitutional right of open access to the courtroom during this criminal trial is that he believes *in camera* questioning would be more "efficient." [Doc. ___ at 2-3].

As for Defendant's assertion that *in camera* voir dire is necessary in the event "some members of the venire will express strong opinions about Mr. Blankenship and this case," this is speculative and limited, and does not justify the wholesale closure of voir dire from public access. However, even if this concern was shown to be valid, it still would not justify *in camera* voir dire because it does not consider alternatives to closure. For example, if individualized voir dire is deemed necessary, it still can be done in open court, in public, as the rest of the venire could be in a different room in the courthouse – certainly there are other ways that questioning can occur in open court while out of the earshot and presence of other potential jurors. In other words, there clearly are less restrictive alternatives to closing the courtroom or conducting voir dire *in camera* that can be used that would allow voir dire to be conducted in public and out of the earshot and presence of other potential jurors.

As to Defendant's secondary assertion that it would be more "efficient" to conduct voir dire in camera, that is not necessarily true and certainly hasn't been proved to a level anywhere near that required to overcome the Public's right of access to criminal trials. Therefore, that purported rationale is insufficient to justify *in camera* voir dire questioning of jurors.

B THE FIRST AMENDMENT INCLUDES A RIGHT OF ACCESS TO THE JUDICIAL RECORDS FILED IN CONNECTION WITH A CRIMINAL PROCEEDING, INCLUDING TRIAL EXHIBITS THAT HAVE BEEN ADMITTED INTO EVIDENCE AND PUBLISHED TO THE JURY

As noted above, Pursuant to the First Amendment, The News Media Intervenors request contemporaneous access to all trial exhibits that are (1) admitted into evidence, and (2) fully published to the jury. It is Movants' understanding that the Clerk's office in this District typically withholds trial exhibits from public access until a trial ends. However, because the First Amendment right of access to judicial records is a right of contemporaneous access, the Court should instruct the Clerk to make available to the Public a copy of all trial exhibits within twenty four hours after they have been admitted into evidence and fully published to the jury.

The Constitution's public access right is a right of *contemporaneous* access. See, *e.g.*, *Pub. Citizen*, 749 F.3d at 272 (underscoring the right of contemporaneous access); *In re Charlotte Observer*, 882 F.2d at 853 (recognizing a right to immediate access to ongoing proceedings). Even a "minimal delay" harms "the value of 'openness' itself, . . . whatever provision is made for later public disclosure." *Id.*, 882 F.2d at 856. It is a "misapprehension and undervaluation of the core first amendment value at stake" to postpone even briefly public access to judicial records. *Id.* The Court of Appeals has thus regularly "rejected pleas by litigants" to seal documents until the trial is over. *Pub. Citizen*, 749 F.3d at 272; see also *In re Application and Affidavit for a Search Warrant*, 923 F.2d 324, 331 (4th Cir. 1991) (rejecting request to seal record until after trial).

"The right of public access springs from the First Amendment and the common-law tradition that court proceedings are presumptively open to public scrutiny." *Va. Dep't of State*

Police v. Wash. Post, 386 F.3d 567, 575 (4th Cir.2004). Under the First Amendment, "access may be restricted only if closure is "necessitated by a compelling government interest" and the denial of access is "narrowly tailored to serve that interest,"" *Doe v. Pub. Citizen*, 749 F.3d 246, 266 (4th Cir. 2014). "The common-law presumptive right of access extends to all judicial documents and records, and the presumption can be rebutted only by showing that "countervailing interests heavily outweigh the public interests in access."" *Id.*, 749 F.3d at 265-66.

The issue of the contemporaneous access to trial exhibits admitted and published to a jury was addressed by the Court of Appeals in the *In re Associated Press*, 172 F. App'x 1, 5 (4th Cir. 2006). In that case news media organizations sought a writ of mandamus after the trial court in the criminal trial of accused September 11 bombing participant Zacharias Moussaoui ordered that no trial exhibit would be made available for public review until the trial was complete. *Id.* The news media companies had moved to intervene before the trial court, which motion was granted. *Id.* at 3. Following the trial court's order refusing contemporaneous access to trial exhibits, the Court of Appeals granted the writ of mandamus as follows:

> "As for documentary exhibits that have been admitted into evidence and fully published to the jury, we conclude that the district court abused its discretion in denying access. 'Once ... evidence has become known to the members of the public ... through their attendance at a public session of court, it would take the most extraordinary circumstances 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.' *United States v. Myers (In re Nat'l Broad. Co.)*, 635 F.2d 945, 952 (2d Cir.1980)."

The Court of Appeals directed that the district court make such trial exhibits available for public review by 10:00 a.m. the day after the exhibit is published to the jury, directing that:

> "all documentary exhibits that have been admitted into evidence and fully published to the jury. With respect to such exhibits, therefore, we grant the petition for a writ of mandamus and direct the district court to adopt a mechanism that will provide the media with one copy of each documentary exhibit that has been admitted into evidence and fully published to the jury. This copy should be made available as soon as is practically possible, but in no event later than 10:00 a.m. on the day after the exhibit is published to the jury, or, in the case of an exhibit that is published to the jury in parts, after all parts of the exhibit have been published."

In re Associated Press, 172 F. App'x 1, 6 (4th Cir. 2006). The News Media Intervenors request the same procedure directed by the Court of Appeals in the foregoing case be adopted here.[6]

[6]It is The News Media Intervenors understanding that the Clerk's office in the Eastern District of Virginia in the Moussaoui criminal case instead created an internet wed site where all admitted published exhibits, including electronic exhibits such as video and audio files were posted for public view by 10:00a.m. the day after they were admitted and fully published to the jury. Certainly that procedure would meet the standards of the First Amendment and be most appreciated.

CONCLUSION

The News Media Intervenors request the Court allow them to intervene for the limited purposes of responding in opposition to the Defendant's request that voir dire questioning of the jury venire be conducted *in camera*, and so that they may request contemporaneous access to all exhibits that have been admitted into evidence and published to the jury. For all the reasons stated above, the Court should deny Defenant's request to conduct voir dire questioning of the jury venire *in camera*, and direct the Clerk to provide to the media contemporaneous access to all exhibits that have been admitted into evidence and published to the jury.

THE CHARLESTON GAZETTE-MAIL, and **WEST VIRGINIA PUBLIC BROADCASTING INC.**, Interveners,
By Counsel

Sean P. McGinley (WV Bar No. 5837)
DiTRAPANO, BARRETT DiPIERO McGINLEY & SIMMONS, PLLC
604 Virginia St., E.
Charleston, WV 25301
(304) 342-0133 Telephone
304) 342-4605 (fax)
http://www.dbdlawfirm.com

CERTIFICATE OF SERVICE

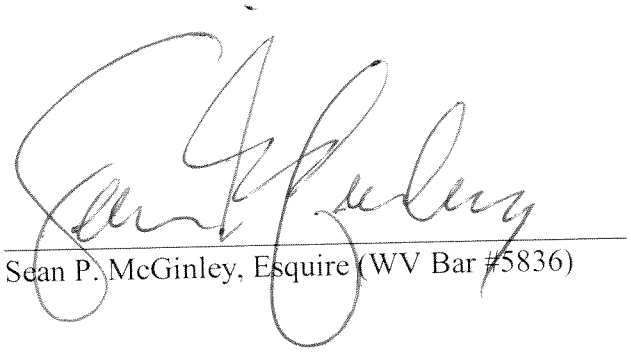
I, Sean P. McGinley, hereby certify that on this 30th day of September, 2015, I served this **THE CHARLESTON GAZETTE-MAIL AND WEST VIRGINIA PUBLIC BROADCASTING, INC.'S MOTION TO INTERVENE FOR THE PURPOSE OF RESPONDING IN OPPOSITION TO DEFENDANT'S REQUEST FOR *IN CAMERA* VOIR DIRE QUESTIONING OF POTENTIAL JURORS AND MOTION FOR CONTEMPORANEOUS PUBLIC ACCESS TO ALL EXHIBITS ADMITTED AT TRIAL AND FULLY PUBLISHED TO THE JURY** by facsimile on the following counsel of record:

R. Booth Goodwin, II, Esq.
Steve R. Ruby, Esq.
United States Attorney
P.O. Box 1713
Charleston, WV 25301
Fax: 304-347-5104

William W. Taylor, III, Esq.
Miles Clark, Esq.
Eric R. Delinsky, Esq.
Steven Herman, Esq.
Zuckerman Spaeder, LLP
1800 M Street, N.W., Suite 1000
Washington, DC 20036-5807
Fax: 202-822-8106

Alexander Macia, Esq.
Spilman Thomas & Battle, PLLC
P.O. Box 273
Charleston, WV 25321
Fax: 304-340-3801

James A. Walls, Esq.
Spilman Thomas & Battle, PLLC
48 Donley Street, Suite 800
P.O. Box 615
Morgantown, WV 26501
Fax: 304-291-7979



Sean P. McGinley, Esquire (WV Bar #5836)