VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

COMMONWEALTH OF VIRGINIA

v. Case No. 11-102

GEORGE HUGUELY,

Defendant.

MEMORANDUM IN SUPPORT OF MOTION FOR INDIVIDUAL SEQUESTERED VOIR DIRE

The defendant, George Huguely ("Mr. Huguely"), by counsel, submits the following Memorandum in Support of his Motion for Individual Sequestered Voir Dire:

Mr. Huguely has documented the quantity and extent of the pre-trial publicity generated in his case.

In light of that publicity, and also the controversial nature of the subjects inevitably involved, Mr. Huguely has filed a motion requesting, among other things, that he be allowed to employ a juror questionnaire and conduct individual, sequestered voir dire.

I. The United States Supreme Court, Virginia Court of Appeals, and Fourth Circuit Allow Closure of Voir Dire, Under Certain Circumstances and Under Certain Procedures.

The United States Supreme Court has held that "since the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown." Press-Enterprise Co. v. Superior Court (Press-Enterprise I), 464 U.S. 501, 510 (1984).

The Court explained, "No right ranks higher than the right of the accused to a fair trial. But the primacy of the accused's right is difficult to separate from the right of everyone in the community to attend the voir dire which promotes fairness." Press-Enterprise I, 464 U.S. at 508.

Nevertheless, "in some limited circumstances, closure may be warranted. Thus, a trial judge may, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial. [T]he question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge ... the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." Id. at 511 n.10 (quotation and citations omitted).

Therefore, in order to deny public access to voir dire, "[t]he 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." Id. at 510. This test was affirmed two years later, in Press-Enterprise Co. v. Superior Court (Press-Enterprise II), 478 U.S. 1 (1986).

In In re Times-World Corp., the Court of Appeals of Virginia summarized the applicable test for closure of voir dire proceedings. 7 Va. App. 317 (1988). The Court reasoned that the Virginia case of Richmond Newspapers, Inc. v. Commonwealth, 222 Va. 574 (1981), though decided before Press-Enterprise I, provides "guidance [that] is still applicable to closure hearings generally." In re Times-World Corp., 7 Va. App. at 326.

Before a trial court may order closure of voir dire, it must comply with certain requirements. In re Times-World Corp., 7 Va. App. at 326. First, the public must receive adequate notice of any motion to close voir dire. That is, the moving party must formally move to close voir dire through a motion "in writing and filed with the court before the day of the hearing." Id. (quoting Richmond Newspapers, 222 Va. at 590).

At that closure hearing, "the burden is on the moving party to show that an open hearing would jeopardize the defendant's right to a fair trial." Id. Meanwhile, the opponents of closure "shall have the burden of showing that reasonable alternatives to closure are available." Id. (quoting Richmond Newspapers, 222 Va. at 590).

If the trial court finds that closure is appropriate, then "the trial judge shall articulate on the record his findings that the evidence supports the moving party's contention that an open hearing would jeopardize the defendant's fair-trial rights, that alternatives will not protect these rights, and that closure will be effective in protecting them." Id. (quoting Richmond Newspapers, 222 Va. at 590).

In Press-Enterprise I, the Court provided one example of "alternatives ... available to protect the interests of the prospective jurors that the trial court's orders sought to guard." 464 U.S. at 511. The Court proposed that voir dire should be held in open court, but that "when interrogation [of a juror] touches on deeply personal matters," that juror should inform the Court, which could then conduct closed voir dire on that limited subject. Id. at 512. The Court further proposed that the public's interests in those closed

proceedings could be vindicated by releasing the transcript of the voir dire after a reasonable time. Press-Enterprise I, 464 U.S. at 512.

The Fourth Circuit has endorsed in camera voir dire, and its reasoning is instructive in this case.

In In re the South Carolina Press Association, former members of the South Carolina General Assembly were prosecuted for extortion and other offenses, in what the U.S. Attorney dubbed "Operation Lost Trust." 946 F.2d 1037 (1991).

The trial court first ordered that the jurors be screened through a juror questionnaire, the results of which would be kept confidential.

The trial court then ordered the jurors be further screened through an individual voir dire in the judge's chambers. The trial court found that "frank and forthright responses from potential jurors, which are essential to voir dire, would be chilled if they felt that their remarks would be published in the press." Id. at 1039. Moreover, the trial court specifically rejected the alternative proposed by the Supreme Court in Press-Enterprise I. Id. In ordering closed voir dire, the court articulated its findings clearly. First, the court found an overriding interest in holding closed voir dire:

> After viewing the statements of these potential jurors, there is no doubt in the mind of the court that their responses would not have been as candid had they believed that the press would report the contents of the proceedings.... If the voir dire is to serve its function as the safeguard of the defendant's sixth amendment rights, then clearly candor must be the hallmark of such a proceeding. Therefore, this court feels that the presence of the press and others creates a substantial probability that the candor of the venire would be impaired and would infringe on the sixth amendment rights of the defendant.

In re the South Carolina Press Ass'n, 946 F.2d at 1042.

Second, the court rejected the alternatives proposed by the media. The media had proposed that voir dire be held in public, but that individual concerns of a juror be addressed privately, or, in the alternative, that the jurors be assigned a number to protect their identities. Id. But the court found both proposals wanting:

> It would be difficult, if not impossible, for this court to anticipate what questions the potential juror might feel justifies a side bar. Thus, the juror would have to request the side bar after the question has already been posed, which arguably chills the witness' response. Alternatively, even if the juror is assigned a number, they are aware of the presence of the press in the courtroom....
>
> Using a side bar in these situations would only have attracted more attention to a situation in which these veniremen clearly did not feel comfortable dissenting. Further, assigning a number to a juror instead of referring to them by name would not appear to lessen the juror's concern over confidentiality.

Id.

The Fourth Circuit went on to note the judge's comments from the bench. The judge stated that some members of the venire had told him privately that they were unable to serve because they could not face their coworkers after the trial. Id. The judge commented, "I have never had a juror stand up in open court and say [that]." Id.

The Fourth Circuit concluded that the judge "made the necessary findings to support his closure in his written order," which were bolstered by his comments from the bench, and that therefore closure was proper. Id. at 1043.

II. In This Case, Closure of Voir Dire Is Appropriate.

In the instant case, the factors of a closed voir dire have similarly all been satisfied.

First, a hearing is to be held on November 7, 2011 to determine this issue; that motion has already been filed by counsel for Mr. Hugucly, in writing, and the public and media have had notice of that motion. See In re Times-World Corp., 7 Va. App. at 326.

Second, Mr. Hugucly has demonstrated, and will further demonstrate at the hearing, that there is an overriding interest in closed voir dire. It will be impossible to question jurors about their knowledge of the case without infecting the venire. This case implicates a number of sensitive and personal issues for members of this community, including, but not limited to, the impact of apparent privilege on the justice system; domestic abuse; alcohol use; racism and classism; and, finally, what then-President Casteen referred to as a "threat" to the very culture of the University of Virginia. Voir dire must be structured in a way that encourages jurors to be open and frank about any and all of these sensitive issues.

Third, no opponent has demonstrated, or can demonstrate, a viable alternative to full closure of the voir dire process. The Supreme Court in Press-Enterprise I noted the possibility of "limited" closure. But in In re the South Carolina Press Association, the trial court and the Fourth Circuit noted the unworkable nature of such a process in the face of a multitude of sensitive issues. Similarly, in this case there is no evidence that

merely removing the jurors' names will encourage the same fullness and frankness as a closed voir dire—particularly in a community as small as Charlottesville.

Finally, a full closure of voir dire is limited to that which is necessary to serve the overriding interest of an impartial jury. To the extent that the confidentiality of jurors' responses is no longer of importance after the jury is seated, the judge may allow the publication of the transcript of the voir dire, without the jurors' names, once the jury is seated. As the Supreme Court noted in Press-Enterprise I, in the case of closed voir dire, the court can fashion a remedy that would serve the various interests at stake:

> [T]he constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time, if the judge determines that disclosure can be accomplished while safeguarding the juror's valid privacy interests. Even then a valid privacy right may rise to a level that part of the transcript should be sealed, or the name of a juror withheld, to protect the person from embarrassment.

464 U.S. at 512; see also In re the Greensboro News Co., 727 F.2d 1320, 1321 n.4 (1984) (stating a preference that transcripts of voir dire be released shortly after the jury is seated).

Therefore, closure of voir dire is appropriate and required to protect Mr. Huguely's constitutional right to an impartial jury.

GEORGE HUGUELY

By Counsel

ST. JOHN, BOWLING, LAWRENCE & QUAGLIANA, LLP

By: _____

Rhonda Quagliana
VSB# 39522
Francis McQ. Lawrence
VSB# 14754
416 Park Street
Charlottesville, Virginia 22902
434-296-7138 telephone
434-296-1301 facsimile
rq@stlawva.com
Counsel for George Hugucly, V

CERTIFICATE

I hereby certify that a true and exact copy of the foregoing was sent by hand delivery this 3rd day of November, 2011 to:

Warner D. Chapman
Charlottesville Commonwealth
Attorney's Office
P. O. Box 911
Charlottesville, Virginia 22902

Rhonda Quagliana