

COPY

1 VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF
2 CHARLOTTESVILLE

3
4 COMMONWEALTH OF VIRGINIA,
5 Plaintiff,

6 v.

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8 GEORGE WESLEY HUGUELY, V,
9 Defendant.

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COURT PROCEEDING

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Taken on

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April 19, 2012

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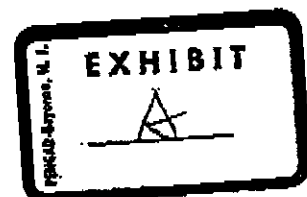
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11 BEFORE: The Honorable Edward L. Hogshire

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1 April 19, 2012

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THE COURT: So, good afternoon everyone, we're going to take up matters involving, I guess, access this afternoon. I thought I already sch---I already entered this order once. Is this the third one I would have entered?

THE CLERK: No, sir. You entered the---

MR. CHAPMAN: Judge, I put that on your desk a moment ago. That is the scheduling, it's a draft scheduling--

THE COURT: From the last time we were here.

MR. CHAPMAN: From Monday at docket call.

THE COURT: Got it, okay. And everyone's endorsed it?

MR. LAWRENCE: We have, Your Honor. We noted our objection as set forth before the Court, thank you.

THE COURT: Absolutely. Absolutely, you did. All right, thank you for doing that. All right. Now, Mr. Yates, do you want to lead off?

MR. YATES: Yes, sir. When we were last here the Court challenged us to come up with a means of---

THE COURT: I thought it was more of a request,

MR. YATES: Well, challenge, it was a request with a purpose, given the---given the set up of this courthouse and where we are procedurally in the course of the trial,

1 the number of exhibits, and the challenges that are facing
2 how we would go about if you were to allow access to the ex-
3 hibits, what to do about that. And we initially talked
4 about, perhaps coming up with a way to set it up so that
5 there was a view only system where people could go to the
6 clerk's office and take a look at some of the evidence. Mr.
7 Chapman raised some points during the argument about, well,
8 you know, there's some evidence that has the potential to be
9 perishable, such as DNA, there's some evidence that's sensi-
10 tive, which, of course, is the pictures of Ms. Love and some
11 other things. So, after I left the courthouse I spent some
12 time talking to the clerk, Ms. Dugger, and also to Mr. Chap-
13 man about how we might go about it, and the one thing, that
14 in talking to Ms. Dugger, the clerk, about how to do this
15 that really became apparent is she's got her hands full.
16 She is---she's been in the clerk's office since the begin-
17 ning of the year. Things were done a certain way, she has a
18 new way of doing them that is going to be more efficient,
19 but she's implementing all those programs, making some
20 changes, making improvements, and making the clerk's office
21 more efficient. And to impose upon her the policing of the
22 exhibits or the policing of making sure that people didn't
23 make copies of everything or distort the evidence, or to Mr.
24 Chapman's point, destroy some of the perishable evidence or
25 even mess with the chain of custody, is going to, in my

1 mind, and I think in her mind, overwhelm the clerk's office.
2 So, the initial thought that had been discussed in the hear-
3 ing last time of coming up with a system that would stand
4 down there by itself somewhere, which we have as option one
5 in our proposal, we don't believe it's feasible. It places
6 too much of a burden. I can say from my client's perspec-
7 tive and some of the other media outlets that have contacted
8 me, the number one thing that they want to see is the inter-
9 rogation tape, that's two and a half hours, and for Ms.
10 Dugger to have to provide a clerk to have to sit next to
11 somebody for two and a half hours to watch this thing, it
12 would just overwhelm the clerk's office, that's impossible.
13 Cause if you had somebody show up at 10:00 and they want to
14 watch it, it's not over till 12:30, and somebody else shows
15 up at 12:00 then she's got somebody tied up for five hours
16 for a day. This evidence---so then I begin talking to Mr.
17 Chapman, and I said now what are your concerns about this,
18 and he said well some of this stuff is just very sensitive,
19 the photographs, some of it there's chain of custody issues,
20 some of it's are originals, some of it, it's too problemat-
21 ic, for instance the quilt, which has DNA on it, we don't
22 need that to get messed up. Some of the photographs that
23 even he hadn't seen, because they're---or he had seen, but
24 to get access to, to look at, are kept in the evidence room.
25 At that point he said---it sort of clicked in my mind, well

1 maybe the best way to handle this, to accommodate every-
2 body's perspectives in this, because all of this evidence is
3 now in the public. This was all introduced as an exhibit.
4 It was discussed, it was argued about, the jury heard about
5 it, the public heard about it, the media heard about it, if
6 they were in here or if they were over in the satellite
7 room. So all of these emails have been read, all of the
8 sound from the interrogation has been broadcast, and so I
9 think we're well beyond the 6th Amendment issue on the right
10 of a fair trial, because the trial is over, and the thought
11 was if we publish this evidence what would happen if there's
12 a motion set aside that's granted, or an appeal, or even af-
13 ter all the appeal process is run a collateral attack, and I
14 think the case law says you really can't worry about that.
15 But even if you were worried about that, the community knows
16 he was found guilty, and the little pieces of evidence that
17 might be published, that aren't the sensitive evidence, is
18 not going to impact that and can be dealt with on voir dire,
19 so option two that we came up, with based upon some detailed
20 efforts by the Commonwealth attorney, Mr. Chapman, we pro-
21 vide the Court with two lists, one are photographs. And I
22 don't know, I realize today Ms. Quagliana called me, she
23 didn't get a color copy, and you need a color copy, I have
24 extra color copy.

25 THE COURT: Did you get that?

1 MS. QUAGLIANA: He emailed it to me and I have it
2 now.

3 MR. YATES: She has it now, I don't know if your
4 copy is color. I have another.

5 THE COURT: It is, I thought it was very helpful.

6 MR. YATES: It's extremely helpful.

7 THE COURT: Yeah.

8 MR. YATES: And he put in a lot of time on this,
9 because we talked about it many times over the two weeks
10 while we were putting this together. Then the clerk's of-
11 fice doesn't have a scanner capable of doing this. The
12 clerk's office doesn't have staff capable of putting all of
13 this together. The clerk's office, and I know Ms. Dugger
14 has somebody that's prepared to testify about how much it
15 would cost to have another computer. Option two would be
16 to---to divide this evidence up, based on how Mr. Chapman
17 has divided it, with some input we haven't heard from the
18 defense as to whether there's things they would move from
19 one side of the ledger to the other, and then go ahead, scan
20 it in, put it on a disk such that there are two disks. One
21 is all of the non-sensitive documentary evidence, photo-
22 graphic evidence, videotape evidence, and put those on CD's.
23 And we'll take care of that. In other words, staff from ei-
24 ther my clients or my law firm will come in, the IT people
25 with the equipment to do it, and put it all in. We will

1 then make copies of these disks, because those are cheap
2 once you put them on a CD, and give them to Ms. Dugger. If
3 somebody comes in and says, I would like the non-sensitive
4 evidence, she can hand it to them, and they can go on their
5 way. The only time involvement or interference with the op-
6 eration of the clerk's office is when the people are here
7 actually doing the scanning in and the creation of the CD's.
8 Now, I don't---as you know, I don't do criminal law, so I
9 don't know where all of the evidence is physically, it may
10 be some of it has to be done at the police station, because
11 it may be in the evidence locker. Those are things I don't
12 know, but those are things that can be worked out if we get
13 the option in place. The other disk would be the sensitive
14 evidence, and that is the pictures of Ms. Love's body. The
15 DNA evidence that's on things, no access to that at all.
16 Maybe put the pictures on a separate disk that she would
17 keep under lock and key. If you really want to see that,
18 you can't have a picture, you can't have a copy of it, but
19 that is policeable, it can---somebody can just, you know,
20 look at it on a computer while a clerk is watching them,
21 they maybe have to make an appointment or, you know, that's
22 only a ten minute interference every so often. But to get
23 the videotape out, and the other thing such as the photo-
24 graphs of---I think there's a picture of the door that was
25 kicked in, but the layout of the apartment, there's no

1 reason that shouldn't just be made available to the public
2 and be made available for publication anyway. We're past
3 the trial, there's---there's no case that says well, sorry,
4 6th Amendment trumps the right of access to public records,
5 there just isn't. And that seems to be the defense argu-
6 ment, and I understand why they're making that argument,
7 they've got a client they're trying to protect.

8 THE COURT: Well isn't there a concern, while
9 there are motions that will clearly be pending, to have all
10 of this out in the public realm at that stage---we're right
11 in---we're in the middle of the process.

12 MR. YATES: I understand.

13 THE COURT: Granted, there are four walls (sic), I
14 agree with you entirely.

15 MR. YATES: Right.

16 THE COURT: But shouldn't there be some verdaton
17 (sic) in terms of this, because let's say they do file a mo-
18 tion for a new trail.

19 MR. YATES: Right.

20 THE COURT: And let's say the Court grants that
21 motion, they haven't filed anything, as far as I know, but
22 I'm just---

23 MR. YATES: They hadn't as of Tuesday morning, I
24 know that.

25

1 THE COURT: Well, you know, I think they will, I
2 think they're planning to. But in any event, the point be-
3 ing, wouldn't that be something to release that---in other
4 words, why does the---my concern is giving greater access to
5 the evidence in the case than the jury had. The jury
6 couldn't take it home with them and study it, the jury came
7 in and viewed it, you see---

8 MR. YATES: That was---that was---

9 THE COURT: Seems to me that the public had, would
10 be in the courtroom with the jury, and this would be a way
11 of compensating, I agree with you when you brought it up
12 that it's very difficult to make and to see anything from
13 the audience in this courtroom, with everything facing to
14 the jury. But then what you're requesting, it sounds like,
15 is for the case itself, except for the sentencing part.

16 MR. YATES: Yes, sir.

17 THE COURT: And I think that's well taken, by the
18 way, to have complete access, it will be all over the news-
19 papers and television, that's what will happen to it, as we
20 know, while motions are pending in the case.

21 MR. YATES: That's exactly what we're suggesting.

22 THE COURT: Yeah.

23 MR. YATES: And that's been addressed by other ju-
24 risdictions, it was addressed---well, it's been addressed in
25 Virginia in the case, Shenandoah Valley, I can't remember

1 the exact name of it, where those were being released as the
2 trial, or as the hearings were going forward before circuit
3 addressed it in the Moussaoui sentencing, the documents had
4 to be released by ten o'clock the next day during the sen-
5 tencing, which was the---

6 THE COURT: We haven't even gotten to sentencing.

7 MR. YATES: But the documents in the Moussaoui
8 case were the documents that were being introduced in the
9 sentencing phase.

10 THE COURT: Right.

11 MR. YATES: And in other jurisdictions it's the
12 same thing, during the trial the exhibit, once it's admitted
13 into evidence it's a public record and it's supposed to be
14 available for the trial. The motions that would be going
15 forward now---

16 THE COURT: Wait a second.

17 (Court confers with clerk at this time)

18 THE COURT: This is an issue of an IT guy being
19 here about the cost of---go ahead

20 MR. YATES: The issue of what motions are going to
21 be pending now are not going to be decided by the jury,
22 they're going to be decided by Your Honor.

23 THE COURT: Yeah, that's true.

24 MR. YATES: And so the effect of releasing and
25 having it published, because that's exactly what's going to

1 happen, it's going to get published, is not going to have
2 any impact on those motions at all.

3 THE COURT: No.

4 MR. YATES: It's not going to have---and the sen-
5 tence---

6 THE COURT: Well, it will have an impact of ever
7 getting a jury if the case is---

8 MR YATES: Which has also been---well, it will and
9 it won't, because that is evidence that they likely would
10 see. And again, we argued this last time, and I don't have
11 the case names at my finger tips, but the law was you don't
12 worry about that, that's what voir dire is for, because that
13 argument would prohibit the allowing---allowing any evidence
14 out at any point, because even if the appeals process is run
15 there's always the possibility of collateral attack, we just
16 saw that up in Culpeper. So, how would you---and so you
17 deal with that in terms of voir dire, and if---and yes,
18 Charlottesville is not a community of hundreds and hundreds
19 and hundreds or millions of potential jurors, but every po-
20 tential juror that you would put in the box for the next
21 case, if it had to be retried, is likely going to know that
22 he's been convicted once. If---if the public information
23 state---if---and the standard is not, do you know anything
24 about the case, the standard for qualification of a juror is
25 have you made up your mind, do you have a bias, can you put

1 aside your preconceived notions of this case and judge it
2 fairly on the evidence that's to be presented on both sides
3 in this courtroom. They could have seen pictures of her
4 apartment, which many of them likely had, it was in the
5 news. They could have heard what---and the police officers
6 talking about it, they could have discussed it with their
7 friends, they might have even known some of the witnesses.
8 But that doesn't disqualify them as a juror, and if that's
9 the case, have do you---you would have to seal every record,
10 forever, because of the probability that a case could get
11 set aside. So, in the jurisdictions that have dealt with
12 that, they've said no, that's not the standard, that's not
13 one of the issues you should accommodate when you're making
14 a decision on how or whether to release the public documents
15 for availability to the public or the press, that's not
16 something that you should be concerned about. And, again,
17 this is the evidence that is going to be introduced again,
18 it's already been discussed once, it's already been heard by
19 the jury once, so releasing it to the public is not going to
20 cause any more of an issue than is already out there, it's
21 certainly less than the amount of media attention that the
22 verdict got, and the sentence got. We've had jurors on TV
23 talking about the evidence, and the sentence, and the pro-
24 cess. A diagram of the apartment is not going to affect the
25 process any more than it already has been, in the event that

1 there's a new trial or---and it's certainly not going to af-
2 fect Your Honor in post-trial motions, or the Supreme Court
3 on an appeal. So for that reason---

4 THE COURT: I agree with---I agree with that, I
5 agree with what you've said then. Let me ask you this, does
6 the Commonwealth---and I'll hear from Mr. Chapman, does the
7 Commonwealth, you're saying the Commonwealth participated in
8 the---the redlining of---

9 MR. YATES: The Commonwealth actually---

10 THE COURT: ---identifying the sensitive---

11 MR. YATES: Mr. Chapman is actually the one who
12 did it all, I didn't do it. He---he sent those to me, and
13 he said I tell you what, Bob, I will do this as long as you
14 file it under seal, because I don't want it to become a pub-
15 lic record, and I said that's fine.

16 THE COURT: Okay, all right. I got it out of the
17 envelope, I've got the sealed envelope.

18 MR. YATES: We'll---we'll---we'll let you put it
19 back in the envelope.

20 THE COURT: I'll put it back in the sealed enve-
21 lope.

22 MR. YATES: And so you've got---you know, I think
23 what we've got is a balancing here that really is fair. I'm
24 supposed to be more of an advocate, but this seems to work.
25 It meets the needs of the clerk's office.

1 THE COURT: Let me be sure I understand, is it---
2 you're saying that the expense of the creation of the disk
3 and the scanning process will be borne by your clients, is
4 that right?

5 MR. YATES: Well, what I would say is if Your Hon-
6 or doesn't want it to be borne by the clerk's office you
7 could order that it be borne by my clients.

8 THE COURT: Will you take it up on appeal or some-
9 thing?

10 MR. YATES: No, I'm saying, Your Honor, that that
11 would be a solution that would solve the dilemma that he
12 clerk has right now, and yes, we would do that.

13 THE COURT: All right. Now, Mr. Chapman, do you
14 want to go next, then I'm going to hear from the defense,
15 and we can go around more than once if we need to.

16 MR. CHAPMAN: One of the reasons I was a little
17 hesitant to participate in the process of trying to classify
18 the photographs and the exhibits was to avoid the impression
19 of anyone that I was agreeing that any particular thing
20 should be done, I was just going through the analytical ex-
21 ercise of classifying these things for purposes of trying to
22 think about them meaningfully. And what I would say at the
23 end of that process is if the Court found at an appropriate
24 time that the law required and the Court's discretion ena-
25 bled members of the media, if ordinary person off the street

1 or anyone else to come to the clerk's office and see the ev-
2 idence, that the proposal in option two, which would be a
3 read only monitored ability to see the bulk of the evidence
4 in the case through photographs is a responsible approach to
5 that level of access.

6 THE COURT: Well, remember his option two and my
7 copy says release copies of the non-sensitive to the media
8 for public use.

9 MR. CHAPMAN: Then I'm---then in speaking I'm re-
10 ferring to the wrong option. The option that---let me look
11 future.

12 THE COURT: On page two at the bottom, that's what
13 I've been looking at.

14 MR. CHAPMAN: The responsible option---

15 MR. YATES: He said option two, so it can't take
16 in back.

17 MR. CHAPMAN: It's option one, view only

18 THE COURT: Option one, okay.

19 MR. CHAPMAN: If Your Honor decides that that is
20 the appropriate exercise of discretion at an appropriate
21 time, and for purposes of thinking about that it seems to me
22 that the Court must think in terms of the time period be-
23 tween trial and the entry of a final order in this case.
24 The Court must think about the time period between the entry
25 of a final order and the completion of any direct appeal.

1 And then the third period of time would be the time period
2 after the completion of a direct appeal. And I say that
3 just to divide it into time periods, of course, things can
4 happen that would, or could cause a new trial in the case.
5 If the Court, in the exercise of discretion before the com-
6 pletion of direct appeal, has enabled access that would re-
7 sult in publication, then all of these materials in some
8 form or another are on the internet and are forever there on
9 the internet, and it can be retrieved by anyone at anytime,
10 through any convenient means. And that is something that
11 must be taken into consideration by the Court, and we sug-
12 gest the appropriate period of time to think in terms of as
13 being most important would be the completion of direct ap-
14 peal. That is for the Court to exercise very cautious con-
15 sideration, it is most important to focus on the time period
16 up to the completion of any direct appeal and to be im-
17 pressed by the importance of restricting access, this has
18 been a public trial. The evidence was introduced, the rec-
19 ord has not even been certified yet. The items of evidence,
20 when you break them down into the classifications, a great
21 majority of the items of real evidence are items that the
22 clerk is required to protect, because they're DNA bearing
23 substances, and the Court simply can't, the clerk simply
24 can't enable anyone to have physical access to them. So
25 those could never be accessed for viewing purposes, except

1 photographically in some way. And then you think in terms
2 of the other items of real evidence that were subjected to
3 forensic testing. They may not be DNA bearing, but they
4 could be re-tested, and so throughout the period of depend-
5 ency of any direct appeal those are items that could one day
6 easily be subjected to retesting, if properly kept. And then
7 within that class of evidence you have documents that are in
8 evidence, they can preserved in any number of ways for dis-
9 play in any number of ways, but a number of them come to us
10 from protected sources. They're records of the Department
11 of Health in the form of the autopsy, and that's an agency
12 that's subject to HIPAA, isn't it? They're records of the
13 University of Virginia Medical Center that required a sub-
14 poena before only receipt, pursuant to a subpoena, they're
15 somebody's medical record that were subject to HIPAA, just
16 because they get introduced into evidence at a criminal case
17 does that necessarily mean that, in fact, they are subject
18 to viewing in the way in which even option one proposes? I
19 don't think the cases really litigate that. They really
20 don't. In the Globe case, which was the FOIA request to the
21 clerk, the request was for DNA retesting. That didn't ad-
22 dress the issue of access, even for viewing purposes, of DNA
23 bearing evidence. In, for example, In re: (unintelligible)
24 case in Virginia Court of Appeals, the issue before the
25 Court was access to the papers relating to the competency

1 evaluation, but it came before the Court where the competen-
2 cy hearing had been closed, and so what---so the remedy of
3 giving access to the media to those papers came to the Court
4 and was adopted by the Court where media didn't have access
5 to the proceedings themselves. So isn't that case distin-
6 guishable or potentially distinguishable from where we find
7 ourselves now, in terms of had it been an open proceeding,
8 as it ought have been, and anyone, citizen or media, then
9 able to hear the proceedings with the remedy of enabling ac-
10 cess in the way which that Court allowed to competency re-
11 lated papers introducing evidence be the same? I don't
12 think it would, necessarily. At this time we would say, un-
13 der the case law, the Smith case in particular, that at the
14 earliest practicable time the clerk can and should and must
15 make available a recording of the proceedings that can be
16 listened to by interested parties until a transcript is
17 available, and then a transcript can be accessible to inter-
18 ested parties for viewing. And it might need to be supple-
19 mented, for example, by the availability of the taped state-
20 ment taken by police for purposes of listening, because it's
21 probably cost prohibitive to reduce that to a transcript at
22 this point. But the authority of the Smith case would sug-
23 gest that those things need to be available. But there's
24 nothing in that case that says those have to be available
25 for copying, in fact, Rule 1:3, to this day, suggests to the

1 Court that you must approve any transcript that's going to
2 be authorized. These things are subject to your discretion,
3 and your discretion is very unclearly defined by the case
4 law, and the issues that are important here, and many of
5 them are very important to the defense for very appropriate
6 reasons they will articulate, but from the Commonwealth
7 standpoint they're very important in a variety of different
8 ways. One, what's the standing of a HIPAA protected docu-
9 ment when introduced into evidence when you've litigated
10 whether it's appropriate to even make that a document avail-
11 able to the Court? Does it lose all protection or should
12 it? It's somebody's health record. That's a separate kind
13 of an issue that needs to be resolved, you have very little,
14 I don't know of any specific guidance on that point. Why
15 would a court system, in the exercise of discretion, make
16 available for copying, it's bad enough that it might be
17 available for inspection and description publicly, but why
18 would a court system make available autopsy photographs for
19 publication forever when it can be done differently? If
20 it's a read only basis then the interested observer can see
21 for him or herself and write about it or talk about it in
22 the media, or the citizen off the street who has curiosity
23 can satisfy him or herself, but if it's made accessible for
24 copying purposes then forever a victim family suffers the
25 wound of inadvertently running into the photograph wherever

1 they might be in any manner of publications that they might
2 observe, and that will last for that family forever in suc-
3 ceeding jurisdictions. And why would a court system make
4 that the rule? Well they might do that in Florida, or they
5 might do that somewhere else, but I'm not sure that that's
6 the way---and it starts with the judge and it starts with
7 the General Assembly; and I think the Court needs to be very
8 cautious whether it's a clear authority.

9 THE COURT: Well, I'm not hearing a request for
10 that. I hope that's not where we're going with that, I'm
11 not hearing today a request that the sensitive items be put
12 out to the general---

13 MR. CHAPMAN: For purposes of responding to the
14 option one, which is read only, I think that the most that
15 should be done in response to the request is to follow the
16 law of Smith and make available a recording of the proceed-
17 ings until a transcript is available for read only viewing,
18 and that's what the law provides. And the Court can take
19 the issue up again at the completion of any direct appeal,
20 or if Your Honor decides that the appropriate time to do so
21 is at the point at which a final order has been entered in
22 this case, we would urge the consideration of direct appeal
23 as the decisional point for purposes of---of appeal. And if
24 I'm not being clear I'd be happy to answer specific ques-
25 tions of the Court, but I think Your Honor should leave the

1 record as it is, it's inaccessible. The first thing that
2 should occur, at the earliest practical time, would be to
3 make available a recording of the proceedings, and that can
4 be either supplanted or supplemented by a transcript that
5 becomes available for viewing, and that satisfies, we think,
6 the law and the interested observer. That would be our po-
7 sition.

8 THE COURT: All right, Ms. Quagliana, let me hear
9 from you.

10 MS. QUAGLIANA: Yes, six. We were reminded this
11 week that timing is everything, and I think that's, you
12 know, probably the primary issue that I'd address with the
13 Court is that we're at this moment when the Court is being
14 asked to make a decision about this subject at a point in
15 time when the Court should exercise its discretion and has
16 authority, legal authority, to exercise its discretion to
17 not allow access. It's premature, and I understand the
18 Court wants to make---make a decision and wants to have a
19 plan in place, and I appreciate Mr. Chapman's discussion
20 about the prospect of appeals, and we wouldn't disagree with
21 that, but right now the case is really at a posture no dif-
22 ferent from where we were when we took up this issue before.
23 And the Court's decision about limiting access was sanc-
24 tioned by the Court of Appeals, nothing has changed, the
25 Court has not---the Court hasn't found Mr. Huguely guilty,

1 the Court hasn't entered a final order, the Court hasn't
2 ruled on any post trial motions. I think it's important,
3 you know, as I'm listening to the argument I think that the
4 distinction between sensitive and non-sensitive is actually
5 sort of a false distinction, it's all sensitive. And Mr.
6 Yates makes reference to, you know, does the 6th Amendment
7 trump the right of public access, and the issue for the
8 Court is how to balance these things, it's a balancing is-
9 sue. The problem---the problem is that we operate in an en-
10 vironment in which the media doesn't function the way it
11 used to. It's an explosive environment, it's a sensational-
12 istic environment, it's an environment in which you have to
13 assume that every viewing and every piece of evidence, if
14 somebody's allowed to walk out of here with a CD that con-
15 tains any piece of evidence, to try to distinguish sensitive
16 and non-sensitive, it's all sensitive. That information
17 leaves this courthouse, it goes out into the public domain,
18 it goes out on the internet, and I just---I don't think that
19 anybody who's paid any attention to the manner in which this
20 case has been treated out there on the internet by the pub-
21 lic, by the media, by that sort of huge gray area in be-
22 tween, bloggers and everything else, would suggest anything
23 but that if the Court grants access at this moment to this
24 material, that if Mr. Huguely is granted a new trial, if
25 he's ever retried, his 6th Amendment rights will be

1 absolutely violated and he will never ever be able to re-
2 ceive a fair trial anywhere in the Commonwealth. The last
3 time we were here we were talking about the difficulty of
4 seating a jury in this community, you know, communities are
5 increasingly interlinked and there's information everywhere
6 on the internet. It's just not---it's not time yet, it's
7 too early, we're only a few weeks away from the conclusion
8 of this trial and at this stage in attempting to balance the
9 interests of Mr. Huguely and the public and the media the
10 Court has to keep a very watchful eye out for this defend-
11 ant's interest, which are also the interest of the public
12 and the interest of his community, and of the Commonwealth
13 in making sure that Mr. Huguely is treated fairly. As a
14 practical matter, what's done can't be undone, that's the
15 problem. If we make a mistake in the handling of this evi-
16 dence in allowing access to this material you can't take it
17 back, and that's particularly true in today's environment
18 where the internet is vibrating all the time. I think as a
19 legal matter the Court is clearly within its discretion to
20 deny this request now, that may change, and we may be back
21 here debating these issues again, but there certainly isn't
22 any question that at this point the common law right of ac-
23 cess is not absolute and the Court may exercise its supervi-
24 sory power over material in its custody. And the Court
25 ought to do that at this stage, certainly until the Court

1 has ruled on any post trial motions, and probably, at least,
2 until the Court has imposed sentence and entered a final or-
3 der, and we also agree that, probably, until Mr. Huguely's
4 direct appeal rights have been exhausted. That can be ad-
5 dressed later. For the moment it's too early, we're not
6 there yet. And so in our thinking the distinctions made be-
7 tween plan one and plan two are helpful in some respects,
8 but there also sort of just niceties, because they brush
9 over the bigger question, which is this the appropriate time
10 for the Court to allow access to any of this material, and
11 the answer to that questions is no. And certainly it would
12 be extraordinary, I think, for the Court to allow anybody to
13 come in here and receive a copy of a disk containing any of
14 the evidence that was entered in this case. There's no rea-
15 son to do that at this time, and we think the Court
16 shouldn't, and we ask the Court to deny this motion. If we
17 need to revisit these issues following any of the demarcat-
18 ing points that Mr. Chapman has identified, including the
19 point at which Mr. Huguely is sentenced and an order is en-
20 tered, then we should come back here and do that. But we
21 should approach this carefully and thoughtfully, and you
22 can't just distinguish sensitive and not sensitive, there
23 are too many gradations to deal with, too many issues, we
24 talked at the last hearing about HIPAA and other issues that
25 might arise, and so at this point we would ask the Court to

1 deny the intervenor's request. It's not---we're not ripe
2 yet, the issue isn't right for a decision.

3 THE COURT: All right. Well, I'm going to let you
4 talk, but I'm going to turn to the---the person---that's fi-
5 ne, you can have a seat, I was going to put you on the spot,
6 but the person that's really confronted with the major bur-
7 dens here of this record is sitting to my right. And I know
8 you've done some investigation into looking at---you've met
9 with, I think, Mr. Yates, and maybe counsel, I encourage you
10 to do that, all of you talk about this, because I want to
11 make the right decision with a capitol R, and it's very dif-
12 ficult, because we have sort of a guidance, and I think
13 we're all conceding that from the appellate courts or from
14 statues, for that matter. But I think one of the things I
15 haven't looked at is that under what terms and conditions
16 could access be granted without imposing cost and major dis-
17 ruption to the operation of the clerk's office, and I think
18 that's kind of a global question, and there may be something
19 you want to think about and give us a written response---or
20 you may have already talked about, I think you've talked
21 with some of the media people at the city. Is there any-
22 thing that you can share with us this afternoon that might
23 inform me and counsel as to what type of impact on your of-
24 fice allowing the public media to access this massive record
25 that we have? Besides we have all the other---I'm just

1 talking about physically it's---I think there are two---I
2 haven't counted the exhibits---what is your reaction to what
3 you've heard?

4 THE CLERK: As to option one, when I received Mr.
5 Yates motion I looked into both options. With options one
6 we have a read only computer, which would be a stand alone
7 computer that would be placed somewhere in the clerk's of-
8 fice and photographs of the evidence then would be uploaded,
9 read only, cannot download, won't be attached to a printer,
10 won't have access to the internet, so simply people would
11 come and view it. At the very least to do that, from the
12 city IT it's a thousand dollars (\$1,000). That's not count-
13 ing licensing fees, that's not counting freeze (sic) rights,
14 which means you really can't do anything but view it, so
15 that there can be no accidently downloading something, so we
16 start off at about a thousand dollars (\$1,000) to get a com-
17 puter into my office that can be stripped down for that one
18 single purpose. That's the hardware, the people ware is the
19 problem in the clerk's office, because we have to be aware
20 that every cell phone has a camera, and so unless everyone
21 leaves their cell phones at the sheriff when they come in
22 I'd have to have someone watching that computer from 8:30 to
23 4:30, because that's probably what the access demand is go-
24 ing to be in the beginning. I'm down one person, I am in
25 the process of hiring one person, but as a lot of folks in

1 this room know, there's a lot of catch up to do in the
2 clerk's office, as well as just keeping up with all of the
3 rest of our dockets that doesn't include Mr. Huguely's case.
4 Judge has full civil docket, and full criminal docket, as
5 well. So my biggest concern, really, is people power in my
6 office, I think financially we probably could find some com-
7 promise to get the computer up there so that it's read only
8 and watch only, but when we come down to actual people
9 watching, that becomes a concern for my office and myself.
10 With regards to option two, with Mr. Yates clients opting
11 and offering to take up the expense with providing disks to
12 my office to then disseminate to anyone in the public who
13 asks for the non-sensitive evidence that they have, that's
14 simple, it really is. But I think the issue in that is
15 something the attorneys and Your Honor has to---to decide on
16 whether you want to widely decimate something on disk that
17 leaves the courthouse. The non-sensitive materials under
18 option---oh, sorry, the sensitive materials under option two
19 would basically be treated like our court file now, where it
20 would be with me, and it would, I can watch, because what
21 I've seen in the motion was sensitive---the items that have
22 been tagged sensitive, it doesn't include the two and a half
23 hour videotape, it's pictures. That's not going to talk a
24 long time for people to go through the sensitive materials.
25 I can have a staff person, I can have myself watch that if

1 that occurs, and make sure nobody copies, nobody takes a
2 picture. But, again, with option two, I think the decision
3 is the Court's, because the disks will leave the courthouse,
4 so you're going to have part of the evidence will then be,
5 we lose control over it completely, but we keep control over
6 the sensitive matters that have been tagged in the motion.

7 THE COURT: All right; would you be prepared to
8 answer questions from counsel about any of this at this
9 point?

10 MS. DUGGER: Sure.

11 THE COURT: Mr. Yates, now, do you want to come up
12 and you---

13 MR. YATES: I don't have any questions for her,
14 and I know if they have questions for her, I was just---

15 THE COURT: I think all of you had a chance to talk
16 to Ms. Dugger anyway, but I thought it ought to be on the
17 record. This first, I haven't----I haven't asked her sepa-
18 rately of cost, we've talked verbally about the request and-
19 --I want you to know that I'm sympathetic to the cause in
20 the global sense, and the frustration that's presented by
21 the way the evidence is presented in the courtroom and the
22 inability for the audience to see and hear, .

23 MR. YATES: Exactly.

24 THE COURT: And I know that, and I don't dispute
25 any of that, I tell you the thing that's causing me the

1 most concern, is the idea of having anything about this
2 case, before it is resolved, disseminated in the public's
3 fear where it's on the global---it's on the web, it's on
4 everything, and the case is not even resolved at this point,
5 And, you know, your point about eyes only where the media is
6 given, for the first time, a chance to see what the jurors
7 see, which means no copy, eyes only, let's hear what---I
8 couldn't hear before, that sort of thing, to me makes the
9 most---the most sense, at this stage of the proceeding, but
10 the idea of giving out and disseminating disks with anything
11 on the case as evidentiary that's going to be put on the
12 blogoshpere for the world to see before the case even hits,
13 wherever it hits next, whether it's the Court of Appeals or
14 wherever these things go, I have a lot of problems with,
15 particularly when the motions haven't even been filed yet.
16 But the whole motion of eyes only has more appeal. Now, the
17 other thing is how in the world do we police it, how do we
18 police someone, other than having a deputy standing next to
19 the machine, someone not having a second phone or whatever
20 technology they have, and everybody has all these fancy gis-
21 mos and they can copy and record anything they want,, and we
22 don't know about it, and the next thing we know it's all out
23 there, and we don't know who's done it, but the cats out of
24 the bag. And then the second question is the HIPAA issue,
25 and I think---I think the media's credit is not saying give

1 us the sensitive stuff to copy and to propagate and all of
2 that. I know that's going to be coming is we're entitled to
3 see all these things, the autopsy, the medical records that
4 were introduced, and all of it, in the case law somewhere,
5 or the statute somewhere maybe there's some authority for
6 that, but this HIPAA statute is a gotcha and used to prac-
7 tice, maybe still do---

8 MR. YATES: I still do.

9 THE COURT: ---in this area. And maybe you can
10 give us some guidance on that, what is the HIPAA statute, and
11 what does the case law say about that.

12 MR. YATES: The guidance is that I don't mess with
13 the HIPAA statute, so we don't want to see those documents.
14 Your concerns are the concerns that many courts have had to
15 face, and many appellate courts---well, let me start by say-
16 ing your concerns are exactly what every trial court and ev-
17 identary court has as its burden that they worry about, be-
18 cause that's what you deal with on a day to day basis. It
19 then goes up to an appellate court that says we're sorry,
20 but this common law right, once it's a public document, and
21 even our own Virginia Supreme Court in the Shenandoah Pub-
22 lishing House v. Fanning case, in a civil case, quoted in
23 its 17-43, and I don't know if it's changed since then, be-
24 cause this was 1988. The records and papers of every court
25 shall be open to inspection by any person the clerk shall,

1 when required, furnish copies thereof, except in cases which
2 it's otherwise specifically or specially provided. Now
3 there's the discretion, otherwise specially provided, but
4 then you get to a situation where you have to articulate a
5 reason, not a hypothetical reason, but an actual reason---
6 and they say you even have to do it on an exhibit by exhibit
7 basis, now that's not in Virginia, it was Valley Broadcast-
8 ing, which is in Nevada Appellate Court, said you must de-
9 cide on exhibit by exhibit basis articulable facts, not un-
10 supported hypothesis or conjecture, as to why you're not go-
11 ing to release a particular piece of evidence as a public
12 record, and they said the threat of a new trial is a hypo-
13 thetical. You can always do voir dire. And they required
14 in the National Broadcasting case, the Abscam trial in the
15 District of Columbia in 1981, the exhibits were published
16 the same day. They said in the Abscam trial, you think
17 there were a lot of exhibits in this one, imagine the number
18 of pages there were in the Abscam trial, which was all of
19 the fraud and other issues involved in that case, because
20 the evidence became a public record. And so just because
21 there are administrative burdens and there are these hypo-
22 theticals of maybe there's going to be a new trial, what I'm
23 saying is the law says that doesn't matter. The trial has
24 already happened, the cat is out of the bag, the evidence is
25 out of the bag, it's out there. And even if---and it will--

1 -it will go viral, the diagram of Ms. Love's apartment will
2 be available for anybody's computer that wants to see it.
3 Just like they should be able to come downstairs and look at
4 it. There is no difference, other than it puts a burden on
5 the clerk to do it the way Your Honor is suggesting, or not
6 suggesting, but the way option one would be, if it is pub-
7 lished it still read only for everybody, sure, they can
8 print it out, but they just get to see it, every person in
9 the city of Charlottesville could show up at the courthouse,
10 everybody in the state of Virginia could show up at the
11 courthouse, and they could look at it. This way they don't
12 have to come to the courthouse to do exactly what they could
13 do at the courthouse, which is listen to the video or the
14 audio tape, look at the pictures, they look at these, they
15 listen to these somewhere else. And the remedy for that is
16 if there's a new trial you instruct them not to do that.
17 Just like you do, don't read the newspaper, don't go on the
18 internet, don't do this, don't do that. That's the remedy
19 for the hypothetical that you're not even supposed to con-
20 sider. So all that we are saying is that if we do it the
21 route that has the least impact on the clerk's office we re-
22 ally aren't doing anything differently, we're just making
23 the place of viewing different, because everybody could come
24 look at it, because it's a public record. Why impose that
25 burden on Ms. Dugger's staff, on the limited space they have

1 down there, on the limited staff they have down there, when
2 people could just, if they're that curious, look at it in
3 their own home, watch it on TV, have the press report about
4 it in print or on TV, they can all just do it without having
5 to come to the clerk's office to do it. That's the only re-
6 al difference, in making it go viral and having this whole--
7 whole---everybody's worried about it getting out there, be-
8 cause the trials over, he's been convicted. Now there's
9 some post trial motions, now there's a sentencing, but eve-
10 rything that's going to happen from his point forward is go-
11 ing to be decided by you or the justices up the way. And
12 then if we have a new trail there are ways that the Court
13 deals with that, and every case says you don't consider the
14 hypothetical of a new trial, because it's---otherwise
15 there'd be no way to ever allow any evidence out, because
16 every case is subject to (inaudible - someone coughed).

17 THE COURT: Well, do you want address the issue,
18 in terms of---right now you're not requesting the access to
19 the HIPAA covered (sic) report?

20 MR. YATES: No, no. You know, if somebody else
21 wants to do that, that's fine, or if it becomes an issue
22 where it's worth it to drill down into that, fine, we'll do
23 that another day. What Mr. Chapman did was make a rough
24 cut, okay, and we can live with this rough cut, we don't
25 need the autopsy photos, in the photos---in some of the