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,

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.

No. _____

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

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PRELIMINARY STATEMENT

This Article 78 proceeding is brought by seven news organizations to enforce the constitutional right of public access to the ongoing murder prosecution in *People v. Pedro Hernandez*, Indictment No. 4863/12, Docket No. 2012NY040582 (the "Criminal Prosecution"), the closely followed prosecution of a man accused of kidnapping and murdering young Etan Patz more than 35 years ago. During the pretrial hearings and jury selection in the Criminal Prosecution, the right of the press and public to attend the proceedings and to inspect records repeatedly was denied by respondent, Hon. Maxwell Wiley (hereafter, "respondent"), without following proper procedures, without making the requisite findings, and without applying the strict legal standards that must be satisfied before the public's constitutional access right may be abridged.

The trial began with opening statements last Friday, January 30, 2015, and the improper denials of access resumed again this Monday, February 2, 2015. On just the second day of trial, respondent again closed a hearing and sealed the transcript without affording petitioners an opportunity to be heard—even though their counsel was present in the courtroom and sought to address the closure. And respondent apparently did so on the mistaken assumption that any argument about the admissibility of evidence must be kept secret because this is a high profile case and the evidence might not ultimately be presented to the jury. This emphatically is not the law. *E.g., Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13-14 (1978) ("*Press-Enterprise II*"); *Associated Press v. Bell*, 70 N.Y.2d 32, 38 (1987).

This petition seeks to compel respondent to perform the duties enjoined on him by law to safeguard the public access right, and seeks additional relief to remedy the ongoing violations of the access right inflicted by improper sealing orders that continue to this day. Expedited

consideration is required because the trial is ongoing and respondent has stated he will continue to close proceedings following the same improper procedures. The continued closing of proceedings and the refusal to unseal records are ongoing violations of petitioners' constitutional rights. These violations unlawfully restrict petitioners' ability to report on the Criminal Prosecution, and deprive the public of its right to understand what is transpiring, to assess whether proper procedures are being followed, and to assure that justice is done.

STATEMENT OF FACTS

This proceeding is brought to enforce the public's right of access to proceedings and records in the criminal prosecution of Pedro Hernandez, who stands charged with kidnapping and murdering Etan Patz in May 1979.

A. Overview of the Prosecution of Pedro Hernandez

On May 25, 1979, 6-year-old Etan Patz went missing in Manhattan in a case that received widespread press attention. For many years, prosecutors and others believed the perpetrator to be an individual who was subsequently convicted for the sexual abuse of another minor unrelated to Etan. In 2001, Etan's parents obtained a legal declaration of his death in order to file civil proceedings against that individual. In 2012, however, police received a tip from an informant who indicated that Hernandez had made comments to friends and relatives implicating him in Etan's disappearance. Police reopened the case and questioned Hernandez. In fact, they questioned him for more than six hours, during which time Hernandez confessed to strangling Etan. He was subsequently indicted on charges of kidnapping and murder.

Pretrial proceedings have been ongoing in Supreme Court, New York County since Hernandez was arraigned in May 2012. Respondent, Hon. Maxwell Wiley, J.S.C., has presided over the case throughout.

Petitioners are seven news organizations that have been reporting on the prosecution of Hernandez since the case was reopened in 2012.[1] The Patz murder is a matter of intense public interest. The prosecution of this defendant presents the public with fundamental issues whose illumination is very reason the constitutional access right exists: the fairness and adequacy of techniques used in a criminal investigation, the procedures by which the State pursues justice for aggrieved citizens, and the manner in which a citizen whose capacities and defenses are sharply disputed is prosecuted.

B. The Trial Court's Repeated Abridgement of the Access Right

1. Pre-trial suppression hearing.

Beginning on September 15, 2014 and extending over the course of several weeks, the trial court held a suppression hearing to determine whether the videotaped recording of Hernandez's confession would be admissible at trial. Jacobs Aff. ¶ 4. The hearing addressed whether Hernandez's putative intellectual deficiency and mental illnesses and other factors affected the voluntariness of his confession. Kabat Aff., Ex. A. The "video recording of statements made by defendant" – Hernandez's confession – "were received in evidence and played in their entirety" in open court during this hearing. *See id.,* Ex. D at 2. Many news articles about the hearing reported on the contents of the video, *see, e.g.*, *id.*, Exs. A, H & I, several of which described in detail the content of the confession and included courtroom sketches of a scene from the video in which Hernandez depicted the way in which he allegedly strangled Etan Patz, *id.*, Ex. A.

Following the hearing, petitioners sought to copy and inspect the videotaped confession and other evidence admitted at the hearing. McKinley Aff. ¶ 3; Jacobs Aff. ¶ 5. Although such

[1] Petitioners are Daily News, L.P., publisher of New York *Daily News*, Associated Press, CNN, *Newsday*, *New York Times*, *The New York Law Journal*, and *The Wall Street Journal*.

evidence from a hearing is typically available for public inspection, and there had been no public notice of any request to seal the evidence, petitioners were told it had been placed under seal by Justice Wiley. *Id.*

On September 22, 2014, counsel for some news organizations applied to Justice Wiley to unseal the videotapes, police notes, and other evidence put before the court. *See* Kabat Aff., Ex. B; *see also id.*, Ex. C (Oct. 3, 2014 letter from additional news organizations joining objections). Their letter application presented the settled legal principles under the U.S. Constitution, the New York state constitution, and the common law that establish a qualified right of public access to pre-trial proceedings and records in a criminal prosecution, and noted that no proper basis to overcome the access right had been articulated by the court. *Id.*, Ex. B.

On October 6, 2014, the trial court denied the application for unsealing. *Id.*, Ex. D. As justification for the sealing the court stated that "release of the video recordings and detective's notes for copying would prove a grave risk to defendant's ability to receive a fair trial," due to the "resurgence of press reports" and the palpable "public interest in the case." Kabat Aff., Ex. D at 3. The Court denied unsealing "at this stage," but acknowledged that the videotape recordings "can play [a critical role] in educating the public," and ruled that the press could renew their application for unsealing after trial commenced. *Id.* at 3, 5.

2. Jury selection.

Jury selection began January 5, 2015. Jacobs Aff. ¶ 6. Quickly and without advance notice, many of the public aspects of the questioning and winnowing of jurors was closed from public view. *Id.* ¶ 7; McKinley Aff. ¶ 6. On the first day, the trial court spoke to a set of 100 jurors and gave them each a 22-page questionnaire to complete. *See* Jacobs Aff. ¶ 6. The questionnaire contained 109 questions covering a wide a range of topics, including bias,

hardship, prior contacts with law enforcement and the criminal justice system, and many other relevant biographical details. *See id.*, Ex. A. The cover page of the questionnaire stated that the completed forms would be "KEPT IN CONFIDENCE" and "UNDER SEAL." *Id.* No advance notice had been given that the initial screening of jurors would be done through written questions, or that the responses would be sealed. McKinley Aff. ¶¶ 6-7.

On January 6, 2015, several reporters working for petitioners asked Justice Wiley that they be given the names of the potential jurors and access to the completed questionnaires. McKinley Aff. ¶ 5. Justice Wiley rejected this request immediately, stating that he would make public only a blank copy of the questionnaire form being used. *Id.*

On January 8, 2015, the first 100 jurors returned, and Justice Wiley told them that they would each be questioned individually and privately in the jury room. *Id.* ¶ 6. Reporters working for petitioners asked Justice Wiley to observe the questioning of jurors; that request was also denied. *Id.*; Jacobs Aff. ¶ 7. When pressed by one reporter for a reason that jury questioning was not being held in open court, Justice Wiley said that information disclosed in the questioning might be "sensitive" and that he preferred to use the jury room, rather than conferencing at bench, because it was more "comfortable" and "convenient." McKinley Aff. ¶ 7. Another reporter then cited legal precedent requiring open and public *voir dire*, but Justice Wiley again rejected the reporters' request to observe the questioning of the jurors. *Id.* ¶ 6. During the same exchange with Petitioners' journalists, Justice Wiley also rejected a request for minutes of the private questioning of jurors, stating that those minutes would be sealed. Jacobs Aff. ¶ 7.

The next day, counsel for petitioners *New York Times* and *Daily News* filed a letter objecting to the blanket closures of the ongoing juror questioning. *See* Kabat Aff., Ex. E. The letter requested that all remaining juror interviews be conducted in open court, subject to

individualized closure where a specific basis made such closure constitutionally permissible. The letter further requested the release of the completed juror questionnaires, likewise subject to particularized redactions where appropriate. *Id.* The trial court denied these requests, allowing only that petitioners could purchase transcripts of the juror questioning as they were made available at the stenographers' convenience. McKinley Aff. ¶ 11; Jacobs Aff. ¶ 9.

The court continued its private jury selection over the ensuing weeks. McKinley Aff. ¶ 12; Jacobs Aff. ¶ 11. The individual questioning of prospective jurors in private lasted between about five to fifteen minutes, and persons interviewed were afterwards seen exiting out a side door leading into the hallway, rather than through the courtroom. McKinley Aff. ¶ 12. On January 20, 2015, the court stated that it was seeking to screen about 100 more potential jurors through the same process of a written questionnaire followed by private questioning. *Id.* ¶ 13.

By January 22, 2015, the court had narrowed the pool of potential jurors to approximately 100 persons, down from 700 potential jurors. *Id.* ¶ 14. It then began calling the remaining individuals to the jury box for additional *voir dire* in open court. *Id.* On January 29, 2015, the final alternate juror was selected, and the jury was empaneled. *Id.* ¶ 16. After the jury was empaneled, petitioners applied to respondent to unseal the completed questionnaires of those jurors who had been selected for service. *Id.* ¶ 17. Justice Wiley denied the request in open court on February 2, 2015. Kabat Aff., Ex. G.

3. Ongoing motions practice.

During the jury selection process and continuing into the first days of trial, respondent repeatedly conducted closed hearings to address unidentified motions. Jacobs Aff. ¶¶ 10, 12-13, 15. These hearings were closed to the public without prior notice or any opportunity for petitioners to object. *Id.* ¶ 14.

On January 20, 2015, respondent presided over an argument held entirely at the bench that apparently related to the admissibility of evidence. *Id.* ¶ 10. When petitioners tried to obtain the minutes of that exchange, they were told the transcript was under seal. *Id.*

On January 23, 2015, respondent closed the courtroom and ordered the press and public to leave, without any explanation of the reason for doing so. *Id.* ¶ 12. After a thirty minute closed proceeding, the courtroom reopened. *Id.* Upon questioning from reporters working for petitioners, Justice Wiley would offer no explanation for what had occurred other than stating that closure had been requested by the parties. *Id.*; *see also id.*, Ex. B.

On two separate occasions on January 29, 2015, the trial court again closed the courtroom and required the public to leave. In the first closure that day, Justice Wiley cited the parties' request as the basis for the closure, adding only that he would be determining whether certain evidence was admissible and the press and public could not observe because he might decide that evidence would not be admitted. McKinley Aff. ¶ 15. He added that the transcript would remain sealed at least for the pendency of the trial. *Id.*

After the jury departed for lunch that same day, the court held another sealed proceeding, again at the request of the parties. *Id.* ¶ 16. Following the approximately 30-minute hearing, the prosecutor and defense counsel both advised petitioners that they were prohibited from discussing what had transpired. *Id.* The prosecutor would acknowledge only that a ruling had been made. *Id.* A telephone call to Justice Wiley's chambers seeking to confirm that a decision of some type had issued, and seeking details about that ruling, went unreturned. *Id.*

As with the previous occasions on which the public access right has been abridged, at no time did Justice Wiley invite, permit, or otherwise provide an opportunity for objections to the closures by members of the public, including the media present. *Id.* ¶ 18; Jacobs Aff. ¶ 14. Nor

did respondent make findings of fact to demonstrate that a compelling reason properly justified the denial of the constitutional access right, or that no alternatives other than closure would suffice.

4. Petitioners' further objections and application to be heard.

On February 2, 2015, Judge Wiley indicated before the lunch break that another closed hearing would be held at the end of the day. Jacobs Aff. ¶ 15. One reporter submitted a written objection to the judge and requested an opportunity to be heard. *See id.* Later that same day petitioners submitted to Judge Wiley via fax to chambers and in-person delivery by counsel during the lunch break, a letter application objecting to the repeated sealing of proceedings and evidence, reminding the court of the procedural and substantive standards that must be satisfied before the constitutional access right is abridged, asking again to be heard before further closed proceeding took place. *See* Kabat Aff. ¶ 10 & Ex. F.

That letter also asked the trial court to reconsider its prior sealing orders now that a jury had been empanelled and other procedures were available to protect the integrity of the jury and the fairness of the trial. *Id.*, Ex. F. Specifically, petitioners requested the trial court to:

> 1. Close no future proceedings without (a) providing public notice and an opportunity to be heard and (b) factual findings demonstrating a proper need for closure;
>
> 2. Unseal for inspection and copying the written juror questionnaires of those jurors who have been selected to hear this case;
>
> 3. Unseal for inspection and copying the video recordings and other records presented in open court during the *Huntley* suppression hearing; and
>
> 4. Unseal for inspection and copying the transcripts of all closed evidentiary hearings, together with the evidence considered by the Court in deciding evidentiary motions.

Id. at 1-2. Counsel for petitioners attended the court session throughout the afternoon to be available to oppose the closure that Justice Wiley had said would occur at the end of the day. *Id.* ¶ 12. Following dismissal of the jurors for the day, Justice Wiley instructed counsel for the

parties to approach the bench. Petitioners' counsel then stood up and began to introduce himself, but was immediately instructed by Justice Wiley to be seated. A bench conference ensued. *Id.*

Following the bench conference, Justice Wiley stated that he was denying petitioners' request to be heard on the issue of closing the next motion in limine, which involved a question of admissibility of evidence that "may not" become part of the trial record. *Id.*, Ex. G at 2:18-25. He also stated that he was in receipt of petitioners' letter application, and although he had not yet reviewed the letter in full, he understood petitioners to be requesting that he refrain from closing future evidentiary hearings and asking him to unseal the minutes and records from proceedings currently under seal. He then denied the requests, without making any factual findings of the reasons for doing so and stating only that he will continue to seal proceedings "as [he] see[s] fit." *Id.* at 2:10-17, 3:3-5.

ARGUMENT

I.
THE PUBLIC'S RIGHT OF ACCESS APPLIES THROUGHOUT A CRIMINAL PROSECUTION

The public's right of access to criminal proceedings is secured by the First and Fourteenth Amendments to the United States Constitution, and Article I, Section 8 of the New York State Constitution. The Supreme Court explained in *Richmond Newspapers Inc. v. Virginia* that the guarantees of free speech, freedom of the press and the right to petition the government enshrined in the First Amendment necessarily carry with them an implicit right of access to criminal trials because, were it otherwise, the First Amendment's structural role in protecting the informed discussion of government actions, promoting the fairness of judicial proceedings, and ensuring public confidence in the legal system, would be "'eviscerated.'" 448 U.S. 555, 569-72, 580 (1980) (citation omitted). The Court of Appeals has similarly underscored

the importance of the public access right, observing that "contemporaneous review" of judicial actions "in the forum of public opinion" serves powerful public interests—"protect[ing] the accused from 'secret inquisitional techniques' and unjust persecution," demonstrating "that there is justice for the accuser" and promoting catharsis and public trust "when justice has been done." *Westchester Rockland News v. Leggett*, 48 N.Y.2d 430, 437 (1979) (quotation marks and citations omitted).

This constitutional right of access to criminal proceedings attaches to virtually every aspect of a criminal prosecution. *See, e.g. Richmond Newspapers, Inc.*, 448 U.S. at 580-81 (access right applies to criminal trial); *Press-Enterprise II*, 478 U.S. at 13-14 (access right applies to preliminary hearings). Of particular significance here, the access right applies fully to the proceedings and records of motions to suppress or deny admission of evidence, and to the proceedings and records of jury selection. *See, e.g., Bell*, 70 N.Y.2d at 38 (access right applies to pre-trial *Huntley* suppression hearings); *In re N.Y. Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) (access right applies to records filed in support of motion to suppress); *People v. Burton*, 189 A.D.2d 532, 535 (3d Dep't 1993) (access right applies to evidentiary motions, hearings, and exhibits); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505 (1984) ("*Press-Enterprise I*") (access right applies to jury selection).[2]

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[2] In his Decision and Order sealing the videotapes and records introduced during the *Huntley* hearing, respondent asserted that the constitutional access right does not apply to the videotape evidence, only a common law right. Kabat Aff., Ex. D at 2. That is incorrect. "The fact the judicial records sought are videotapes, rather than written documents, does not affect the analysis." *Dhiab v. Obama*, 2014 WL 4954458, at *5 n.3 (D.D.C. Oct. 3, 2014) (ordering release for copying of videotape evidence of forced feedings at Guantanamo Bay under the First Amendment access right); *People v. Hyson*, 30 Media L. Rep. 2566, 2567 (Sup. Ct. Albany Cnty. June 11, 2001) (First Amendment right includes right to inspect and copy evidence) (Kabat Aff., Ex. J). In any event, as petitioners have demonstrated, Kabat Aff. Ex. B., the common law also imposes rigorous standards to justify closure, *Lugosch v. Pyramid Co.*, 435 F.3d 110, 125-26 (2d Cir. 2006), and respondent made no findings—and could make no finding—to satisfy the common law right to inspect and copy court records here. *See, e.g., In re NBC, Inc.* ("*Myers*"), 635 F.2d 945, 949 (2d Cir. 1980); *United States v. Graham*, 257 F.3d 143, 153-54 (2d Cir. 2001); *In re NBC*, 653 F.2d 609 (D.C. Cir. 1981).

The Constitution imposes procedural and substantive responsibilities on trial courts in every proceeding to which the access right attaches. Procedurally, a court must provide "some form of public 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). Where the press is in attendance, a court must provide notice and an opportunity to be heard through counsel. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982); *Capital Newspapers Div. of Hearst Corp. v. Moynihan*, 125 A.D.2d 34, 38 (3d Dep't 1987) ("affected members of the media should be given the opportunity to be heard."), *aff'd on other grounds,* 71 N.Y.2d 263 (1988). Failure reasonably to permit counsel to be heard in opposition to closure violates the access right. *Johnson Newspaper Corp. v. Parker*, 101 A.D.2d 708, 709 (4th Dep't 1984). These procedural safeguards are not advisory; they are critical to ensure that the public's access right is not bargained away or inadequately represented by disinterested parties, and courts "must adhere" to them. *Associated Press v. Owens*, 160 A.D.2d 902, 902-03 (2d Dep't 1990).

Even after providing notice and an opportunity to be heard through counsel, a court may not properly restrict public access without making findings of fact, on the record, demonstrating a compelling need for secrecy and that no alternatives exist short of denying public access. *See, e.g.*, *Press-Enterprise I*, 464 U.S. at 509-10; *Press-Enterprise II*, 478 U.S. at 13-14; *Danco Labs v. Chem. Works of Gedeon Richter*, 274 A.D.2d 1, 8 (1st Dep't 2000). Conclusory or speculative "findings" are insufficient to abridge the access right. *See, e.g.*, *Press-Enterprise II*, 478 U.S. at 15; *ABC v. Stewart*, 360 F.3d 90, 102-03 (2d Cir. 2004); *People v. Hodges*, 172 Misc. 2d 112, 117 (Sup. Ct. Kings Cnty. 1997); *People v. Arroyo*, 177 Misc. 2d 106, 109 (Schoharie Cnty Ct. 1988).

Substantively, the standards governing a request to deny public access are also strict. A restriction may be imposed on the public access right only where four factors are satisfied:

1. Compelling Interest. A substantial probability of harm to a compelling government interest must be established before the access right is limited in any respect. *See, e.g., Richmond Newspapers, Inc.*, 448 U.S. at 580-81 (plurality opinion of Burger, C.J.); *Press-Enterprise I*, 464 U.S. at 510; *Press-Enterprise II*, 478 U.S. at 13-14; *Bell*, 70 N.Y.2d at 38-39.

2. No alternative. There must be no alternative to a limitation on public access that can adequately protect the threatened interest. As the Second Circuit has explained, a "trial judge must consider alternatives and reach a reasoned conclusion that closure is a preferable course to follow to safeguard the interests at issue." *In re Herald Co.*, 734 F.2d at 100; *see also Press-Enterprise II*, 478 U.S. at 13-14; *Bell*, 70 N.Y.2d at 39; *Burton*, 189 A.D.2d at 535; *NBC v. Myers*, 635 F.2d 945, 953 (2d Cir. 1980).

3. Narrow. Any restriction on access that is ultimately imposed must be no broader than necessary to protect the threatened interest. *See, e.g., Richmond Newspapers Inc.*, 448 U.S. at 581; *Press-Enterprise II*, 478 U.S. at 14; *Burton*, 189 A.D.2d at 535. If a more narrowly tailored means of protecting the interest exists, such as producing documents in redacted form, it must be employed to limit any impact on the public's access rights. *Press-Enterprise I*, 464 U.S. at 510-11; *Burton*, 189 A.D.2d at 536-37; *Herald Co. v. Burke*, 261 A.D.2d 92, 95-96 (4th Dep't 1999).

4. Effective. Any restriction on access must be effective in protecting the threatened interest; a constitutional right may not be restricted for a futile reason. Thus, for example, there can be no proper basis to seal transcripts concerning information that is already publicly known. *See Press-Enterprise II*, 478 U.S. at 14 (defendant's rights must be prejudiced by publicity "that closure would prevent"); *Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1146 (9th Cir. 1983) ("there must be 'a substantial probability that closure will be effective in protecting against the perceived harm'") (citation omitted); *Burton,* 189 A.D.2d at 535.

Respondent repeatedly has failed to comply with his constitutional duty to implement these mandatory procedural and substantive safeguards. Respondent failed to provide notice and an opportunity to be heard in respect to closed proceedings and sealed documents, and has never made findings of fact to justify the repeated abridgments of the public's access right in this case.

II.
RESPONDENT VIOLATED THE CONSTITUTIONAL RIGHT OF PUBLIC ACCESS TO JURY SELECTION

The public's right of access to the process of jury selection extends to juror interviews. *Stewart*, 360 F.3d at 98. When written questionnaires are used for the initial screening of the jury pool, the access right likewise extends to the responses provided to those questionnaires. *Newsday, Inc. v. Goodman*, 159 A.D.2d 667, 669-70 (2d Dep't 1990); *In re Wash. Post*, 1992 WL 233354, at 4-6 (D.D.C. July 23, 1992); *see also State ex rel. Beacon Journal Publ'g Co. v. Bond*, 781 N.E.2d 180, 188-90 (Ohio 2002) ("virtually every court having occasion to address this issue has concluded that such questionnaires are part of *voir dire* and thus subject to a presumption of openness."). Respondent violated the public's right to contemporaneous access to the juror interviews, and the questionnaires remain unlawfully sealed to this day.

A. The Public's Right Of Contemporaneous, In-Person Access To Juror Interviews

Respondent conducted initial juror interviews in the jury room, without providing the public with notice or opportunity to be heard in opposition to this closure of the jury selection process, and without making findings of fact to justify this denial of access. Respondent *sua sponte* directed that all prospective jurors would be interviewed privately because those interviews might involve sensitive information, and questioned the jurors in the jury room because it would be more "convenient." Respondent denied the reporters' request to observe the questioning.

This very process was addressed and held unconstitutional in another high-profile case—the criminal prosecution of Martha Stewart. As here, the court circulated juror questionnaires, and then conducted juror interviews in a robing room "without affording members of the media notice or an opportunity to be heard." *Stewart*, 360 F.3d at 95. The court immediately released

redacted transcripts to members of the press (something which has not happened here), but the Second Circuit made clear that providing a written transcript is no substitute for the right of in-person, contemporaneous access protected by the constitution. "The ability to see and to hear a proceeding as i[t] unfolds is a vital component of the First Amendment right of access." *Id.* at 100. The closed questioning of jurors in that case was unconstitutional because the only finding made to justify the secret interviews was that publicity resulting from media coverage could undermine the defendants' right to a fair trial. *Id.* at 102-03.

Respondent's duty to the public in the Criminal Proceeding was clear. The Supreme Court has previously explained the procedure to be followed to strike the proper balance between juror privacy and public access in a high profile case:

> [A court] should inform the array of prospective jurors, once the general nature of sensitive questions is made known to them, that those individuals believing public questioning will prove damaging because of embarrassment, may properly request an opportunity to present the problem to the judge in camera but with counsel present and on the record. By requiring the prospective juror to make an affirmative request, the trial judge can ensure that there is in fact a valid basis for a belief that disclosure infringes a significant interest in privacy. This process will minimize the risk of unnecessary closure.

Press-Enterprise I, 464 U.S. at 512. Respondent improperly restricted access before ascertaining whether any proper basis existed to do so, and without providing advance notice to allow the press an opportunity to object and place before him this controlling precedent.

These violations of petitioners' access rights underscore the importance of providing an opportunity to be heard *before* a court imposes any restrictions on the public's right of access. The access right is a right of contemporaneous access. *See, e.g., Doe v. Pub. Citizen*, 749 F.3d 246, 272 (4th Cir. 2014) ("public and press generally have a contemporaneous right of access to court documents and proceedings"); *United States v. Wecht* , 537 F.3d 222, 229 (3d Cir. 2008) (the "value of the right of access" is seriously undermined if not contemporaneous*); In re*

Associated Press, 162 F.3d at 506-07 (constitutional access right is a right to "immediate and contemporaneous" access) (citations omitted); *cf., Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975) (each passing day of an improper restriction of First Amendment rights is a further violation). Nor is the availability of a trial transcript any substitute for a public presence at the proceedings themselves. *Richmond Newspapers, Inc.*, 448 U.S. at 597 n.22 (Brennan, J., concurring); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 710-11 (6th Cir. 2002) (providing transcript is no "cure" for the loss of the ability to attend proceedings "because the information contained in the appeal or transcripts will be stale, and there is no assurance that they will completely detail the proceedings"); *Soc'y of Prof'l Journalists v. Sec'y of Labor*, 616 F. Supp. 569, 578 (D. Utah 1985) ("Much of what makes good news is lost in the difference between a one-dimensional transcript and an opportunity to see and hear testimony as it unfolds.").

The improper procedures followed here undermine a core constitutional interest served by the right of public access to jury selection: public scrutiny *improves* the criminal justice system. *Press-Enterprise I*, 464 U.S. at 505. As the Court of Appeals explained in *People v. Martin*, 16 N.Y.3d 607, 613 (2011), "[t]he ability of the public to observe questioning of this sort is important, both so that the judge, the lawyers and the prospective jurors will be conscious that they are observed, and so that the public can evaluate the fairness of the jury selection process."

B. The Public's Right Of Access To Juror Questionnaires

Sealing the prospective jurors' responses to questionnaires in their entirety was equally improper. The responses to the lengthy 22-page questionnaire may only properly be redacted as to specific items disclosing personal information, and then only if the court determines that a juror's interest in keeping the particular information private overrides the public's right to observe and understand the basis of selection of the jury. *In re Wash. Post*, 1992 WL 233354, at *2 (requiring jury questionnaires to be released before the jury was impaneled, with only "deeply

personal and private information" redacted); *Bond*, 781 N.E.2d at 188-90 (juror questionnaires must be released with Social Security numbers redacted); *Lesher Commc'ns, Inc., v. Superior Court*, 224 Cal. App. 3d 774, 777-80 (1990) (requiring release of juror questionnaires).

Here, there has been no finding that any response contains any properly withheld information. The continued sealing of these responses is patently improper, and violates petitioners' right of *contemporaneous* access to the written responses. *Doe v. Pub. Citizen*, 749 F.3d at 272; *Wecht*, 537 F.3d at 229; *In re Associated Press*, 162 F.3d at 506-07; *see also Grove Fresh Distribs. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) ("[t]he newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression.").

Petitioners thus respectfully request that the responses provided by the seated jurors and alternates, at a minimum, should be unsealed at this time, while the public's interest in this proceeding and concerns over fairness are at their peak.

II.
RESPONDENT VIOLATED THE CONSTITUTIONAL RIGHT OF PUBLIC ACCESS TO SUPPRESSION HEARING EVIDENCE

As demonstrated above (supra at 10-11), the constitutional access right applies fully to pretrial suppression hearings and the records of those hearings, even in high profile cases. *See Bell,* 70 N.Y.2d at 38 (public has constitutional right to suppression hearing in high profile "preppy murder" case); *In re N.Y. Times Co.*, 828 F.2d at 114 (public has constitutional right to suppression hearing in high profile prosecution of sitting congressman). This access right continues to be violated by respondent's order sealing the videotaped confession and evidence displayed in open court at the suppression hearing in this prosecution. The hearing addressed videotapes in which the defendant confessed, as well as records memorializing statements he

made to investigating officers, all of which were displayed in open court and widely reported. They have since been ruled admissible at trial.

A. Pretrial Publicity Does Not Justify Sealing Court Records

Respondent denied petitioners' request to access the videotapes and records for inspection and copying, placing them under seal out of a concern that the amount of publicity this case has received would jeopardize the defendant's right to a fair trial, and a concern that the videotapes would be published in edited form and "subject to editing and manipulation by web-based advocates who are unburdened by journalistic ethics." Kabat Aff., Ex. D at 4. Neither concern provides a proper basis for a continuing sealing of the videotape evidence here.

Even before they were ruled admissible at trial, the presence of pre-trial publicity did not justify withholding the records of the suppression hearing from the public. "The mere fact that the suit has been the subject of intense media coverage is not . . . sufficient to justify closure." *Stewart*, 360 F.3d at 102. Pretrial publicity, "even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial." *Nebraska Press Ass'n*, 427 U.S. at 565.

Indeed, the Supreme Court has underscored that "[p]rominence does not necessarily produce prejudice, and juror *impartiality*, we have reiterated, does not require *ignorance*." *Skilling v. United States,* 561 U.S. 368, 381 (2010) (emphasis in original). Rather, it is a premise of our justice system "that jurors will set aside their preconceptions when they enter the courtroom and decide cases based on the evidence presented." *Id.* at 399 n.34. Speculation about the potential impact of extensive media coverage of a case is not a proper or sufficient basis upon which to deny access. *Hodges*, 172 Misc. 2d at 117; *Arroyo*, 177 Misc. 2d at 109; *Orange Cnty. Publ'ns v. Dallow*, 14 Media L. Rep. 1311, 1313 (Sup. Ct. Orange Cnty. June 17,

1987); *see also Press-Enterprise II*, 478 U.S. at 15 ("The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of that right.").

Indeed, if access could be restricted whenever a case receives intense public scrutiny, the public would know the least about the cases that most concern them and "the very demand for openness would paradoxically defeat its availability." *Stewart*, 360 F.3d at 102. Accepting the mistaken premise on which respondent is acting would both weaken the integrity of the judicial system and undermine public confidence in the courts.

Moreover, sealing the hearing evidence was unlawful because alternatives existed to adequately safeguard the defendant's fair trial right, such as the *voir dire* process itself. *Bell*, 70 N.Y.2d at 38 ("through careful *voir dire*, a court can identify any potential jurors whose prior knowledge of the case would deter them from rendering an impartial verdict"); *CBS v. U.S. Dist. Ct.*, 729 F.2d 1174, 1181 (9th Cir. 1984) ("even in cases attracting extensive and inflammatory publicity, it is usually possible to find an adequate number of untainted jurors" in a populous metropolitan area); *United States v. Griffin*, 1996 WL 140073, at *2 (S.D.N.Y. Mar. 27, 1996) (same). Respondent violated his obligation to consider the alternatives and make findings as to why they would not suffice before denying public access. Such analysis is particularly important when concerns about pretrial publicity are advanced, because the tendency by participants in the judicial system to overestimate the extent to which jurors are influenced by news reports is well documented. *E.g. Myers,* 635 F.2d at 948; *United States v. Pageau*, 535 F. Supp. 1031, 1033-34 (N.D.N.Y. 1982) ("there is a tendency to overestimate the public awareness of the news, and it cannot be assumed that jurors will ignore the Court's instructions to render a verdict solely upon the evidence presented in the courtroom.") (citations omitted).

Sealing was unlawful for the further reason that the sealed records had already been viewed in open court and widely reported. A courtroom sketch depicted the very moment in one of the videotapes in which the defendant mimes strangling the victim. Kabat Aff., Ex. A. Once the cat is out of the proverbial bag, the public's right to access material that conveys the same information may not be abridged absent "the most extraordinary circumstances." *Myers*, 635 F.2d at 952; *see also In re N.Y. Times Co.*, 828 F.2d at 116 (information that "has already been publicized" cannot properly be sealed).

Any possible concerns about the impact of the level of publicity on a defendant's fair trial right dissipate once a jury is actually empanelled, and no basis can properly exist for the continued sealing of the evidence. Trial has begun, and the individual jurors who will actually decide the case are subject to the supervision and control of respondent. Narrower measures are available to protect the fairness of the proceeding, such as emphatic instructions about what jurors may read or watch during the trail, and regular reminders of a juror's sworn duty to decide the issues only on the evidence presented in court. *Pageau*, 535 F. Supp. at 1034 n.4 ("Given the Court's authority to so instruct the jury, and given the further authority to sequester the jury if necessary, there seems to be no reason why videotapes introduced in evidence should not be available to the media during the course of the trial."); *United States v. Mouzin*, 559 F. Supp. 463, 467 (C.D. Cal. 1983) (ordering production for copying and dissemination of surveillance videotapes of defendant where all objections to dissemination "rest on a speculative assumption that the jury, which already has been empaneled, will not abide by this Court's admonition to avoid all publicity about this case until the completion of trial."); *see also Nebraska Press Ass'n*, 427 U.S. at 552-55, 564 (cataloging prophylactic measures available to judges to prevent unfair prejudice in a high profile case); *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966) (same).

These measures have widely been found to be adequate in legions of other high-profile cases conducted in the state and federal courts in New York City.

B. Speculation About Misreporting Does Not Justify Sealing Court Records

Respondent's concern that the videotape evidence might be shown in edited form if it were unsealed equally fails to justify a denial of the public's right to inspect and copy the hearing evidence. Courts have long rejected such arguments as a proper basis to abridge the First Amendment right of access because they would essentially "give rise to a 'heckler's veto'." *Dhiab*, 2014 WL 4954458, at *10 (unsealing videotapes for inspection and copying despite objection that the images would be used in anti-American propaganda); *Sprecher v. Sprecher*, 15 Media L. Rep. 1773, 1775 (Sup. Ct. N.Y. Cnty. June 21, 1988) ("the better and presently appropriate" resolution is "that the Courtroom remain open to the press and the public, and the responsibility for accurate non-sensational reporting [is] placed upon the journalists present."). The notion that information may be restricted because it may be distorted, misconstrued, or misrepresented by the public would swallow the First Amendment access right and render it all but meaningless. *See Stewart*, 360 F.3d at 101 (restriction on access in a high profile case not be justified where no record evidence exists "that members of the media at any point violated an order of the district court or otherwise conducted themselves improperly in covering the case"); *People v. Williams*, 29 Misc. 3d 1222(A), 2010 WL 4608687, at *4 (Sup. Ct. Nassau Cnty. Nov. 15, 2010) (that public dissemination means "more people may presumably see and hear the videotapes and transcripts, is not a sufficient basis to deny access"). Indeed, respondent's concern is precisely backwards: further and fuller dissemination of the *actual evidence*, rather than second-hand accounts, is likely to enhance the fairness and accuracy of the information available to the public.

Now that trial has commenced and the confession videotapes have been ruled admissible, no proper basis exists for their continued sealing.

III.
RESPONDENT CONTINUES TO VIOLATE THE PUBLIC'S RIGHT OF ACCESS BY CLOSING EVIDENTIARY HEARINGS AND SEALING RECORDS

Respondent has conducted a number of other evidentiary hearings in secret and has sealed their transcripts without advance notice. But as the Court of Appeals has explicitly instructed, "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)).

In several cases respondent has neither indicated the nature of the disputed evidence, such that the propriety of closure might be tested, nor issued findings that particular information satisfies constitutional standards for closure and sealing, nor considered whether reasonable alternative to complete sealing would adequately protect threatened interests. This is also improper. *Press-Enterprise II*, 478 U.S. at 12-13. Respondent has expressed in no uncertain terms that he plans to continue to close hearings in the same manner as he sees fit. By these actions, respondent has violated and continues to violate duties enjoined upon him by the Constitution.

The only justification respondent has provided for closing the hearings has been that evidence presented at the hearing may not be admitted at trial.[3] But that is no proper

[3] Many of these hearings appear to have been closed, and their transcripts sealed, *sua sponte*, but respondent has also referred to requests of the parties. Deference to parties is not a basis for sealing, *In re Herald Co.*, 734 F.2d at 102 ("Since by its nature the right of public access is shared broadly by those not parties to the litigation, vindication of that right requires some meaningful opportunity for protest by persons other than the initial litigants, some or all of whom may prefer closure.").

justification. That evidence may not be admitted or introduced does not justify restricting the public's right of access, unless specific circumstances *beyond the mere fact that evidence may not be admitted* are shown and entered on the record. *See, e.g., Press-Enterprise II*, 478 U.S. at 7; *In re N.Y. Times Co.*, 828 F.2d at 114-15, *Bell*, 70 N.Y.2d at 38; *Burton*, 189 A.D. 2d at 536 . As the Court of Appeals made plain in a case no less high-profile than this one – the sensational "preppy murder" prosecution of Robert Chambers for murdering a young woman on the lawn of the Metropolitan Museum of Art – the public access right can only properly be overcome by findings *beyond* the mere fact that the hearing addresses a dispute about the admissibility of evidence. *Bell*, 70 N.Y.S.2d at 38-39.

The public has its own, independent right to understand the manner in which a trial judge shapes the evidence for trial, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 596 ("facilitation of the trial factfinding process . . . is of concern to the public as well as to the parties") (Brennan, J., concurring), and the defendant's fair trial interests are enhanced, not hindered, by this public oversight. *Globe Newspaper Co.*, 457 U.S. at 606; *Press-Enterprise II*, 478 U.S. at 7; *In re New York Times*, 828 F.2d at 114. Public access to evidentiary motions, hearings, and associated records may therefore be restricted only upon constitutionally adequate findings that under the particular circumstances of a hearing, specific evidence presents a particularly likely threat that can only be overcome by narrowly tailored restrictions. *E.g. Press-Enterprise II*, 478 U.S. at 13-14; *In re New York Times,* 828 F.2d at 116; *Bell*, 70 N.Y.S.2d at 39; *Burton*, 189 A.D. 2d at 536. No such findings have been made here.

In the absence of such findings, the sealed transcripts and records should be unsealed, subject to limited, appropriate redactions upon prompt motion by the parties, and respondent

should be enjoined from ordering further closures without affording constitutional process to the press.

CONCLUSION

The fact that this is a high-profile and hotly attended prosecution does not justify the denial of the public's right of access, and yet, in substance, that is the only justification that respondent has provided for the extensive restraints he has unlawfully imposed. For all the foregoing reasons, this Court should grant the relief requested in the Article 78 petition in full, together with such other and further relief as the Court deems proper.

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Respectfully submitted,
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