

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

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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.
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No. _____

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SUP COURT APP. DIV.
FIRST DEPT.

**VERIFIED PETITION TO UNSEAL COURT RECORDS
AND OPEN CRIMINAL PROCEEDINGS TO THE PUBLIC**

For their Verified Petition, New York *Daily News*, The Associated Press, CNN, *Newsday*, *The New York Law Journal*, *The New York Times*, and *The Wall Street Journal*, set forth and allege:

Introduction

1. This proceeding brought pursuant to CPLR Article 78 by seven news organizations seeks to enforce the constitutional right of public access to the ongoing prosecution in *People v. Pedro Hernandez*, Indictment No. 4863/12, Docket No. 2012NY040582 (the “Criminal Prosecution”). Hernandez stands accused of the long-unsolved kidnapping and murder of young Etan Patz in 1979. Trial began with opening statements last Friday, January 30, 2015, and is expected to continue for the next three months.

2. Petitioners seek relief declaring that respondent, the Honorable Maxwell Wiley, J.S.C.,¹ violated his state and federal constitutional duties and acted contrary to law during the pretrial hearings and jury selection in the Criminal Prosecution by denying the right of the press and public to attend proceedings and to inspect records. Respondent's improper actions have included closing the initial questioning of prospective jurors and sealing transcripts of the closed interviews, sealing answers to lengthy written questionnaires used to screen the jury pool, sealing a videotape confession and other evidence introduced during a pre-trial suppression hearing, and closing a number of other motion hearings and sealing the transcripts. All of these closures occurred 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.

3. Petitioners also seek declaratory and injunctive relief to prevent continuing violations of petitioners' constitutional rights in light of Justice Wiley's on-the-record statement that he intends to continue to close the proceedings as he sees fit without giving petitioners an opportunity to be heard.

4. Expedited consideration of this petition is needed because respondent's violation of the constitutional access right is ongoing. Certain important records and transcripts from the Criminal Prosecution remain improperly sealed, and proceedings in the Criminal Prosecution continue to be closed in violation of the procedures and standards required by law. These

¹ Since petitioners are not parties to the underlying action, CPLR § 7804(i)(1), and no party to the Criminal Prosecution sought the relief at issue in the Petition, CPLR § 7804(i)(2), it is not clear whether petitioners are required to name the parties to the Criminal Prosecution as additional respondents. Petitioners have nonetheless designated and served the parties to the Criminal Prosecution as respondents solely because their interests may be affected by the relief sought herein. *See* David D. Siegel, *N.Y. Prac.* § 564 (5th ed. 2014); Vincent C. Alexander, CPLR § 7804, Practice Commentary C7804:10. Accordingly, references to "respondent," both herein and in the accompanying papers, refer only to Justice Wiley.

continuing violations improperly restrict petitioners' ability to report fully 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 being done.

PARTIES

5. Petitioners are:

a. Daily News, L.P., publisher of the New York *Daily News*, a daily newspaper that is the seventh-largest paper in the country by circulation. The Daily News' website, nydailynews.com, receives approximately 31 million unique visitors each month.

b. The Associated Press (AP), a not-for-profit mutual news cooperative, whose members include more than 1,500 newspapers and more than 5,000 television and radio stations throughout the United States. AP also serves thousands of subscribing newspapers, news networks and other publishers and distributors of news worldwide. Founded in 1848, AP is now the largest newsgathering organization in the world.

c. Cable News Network LP, LLP (CNN), a subsidiary of Turner Broadcasting System, Inc., a Time Warner Inc. company. CNN is one of the world's largest news organizations with over a dozen television and radio news networks and websites available worldwide, as well as several news programming services, which are provided to affiliates domestically and worldwide. CNN employs more than 3,000 news professionals, who gather news throughout the world.

d. Dow Jones & Company, Inc., a global provider of news and business information, is the publisher of *The Wall Street Journal*, *Barron's*, MarketWatch, Dow Jones Newswires, and other publications. Dow Jones has produced unrivaled quality

content for 125 years, and today has one of the world's largest news-gathering operations with nearly 2,000 journalists in more than 75 bureaus in more than fifty countries publishing news in several different languages. Dow Jones also provides information services, including Dow Jones Factiva, Dow Jones Risk & Compliance, and Dow Jones VentureSource. Dow Jones is a News Corporation company.

e. The New York Times Company, publisher of *The New York Times* and the *International New York Times*, formerly the *International Herald Tribune*.

f. ALM Media, LLC, a publisher of over 30 national and regional magazines and newspapers, including *The New York Law Journal*. Many of ALM's publications have long histories reporting on legal issues and serving their local legal communities. ALM's *The Recorder*, for example, has been published in Northern California since 1877. *The New York Law Journal* was begun a few years later, in 1888. ALM's publications have won numerous awards for their coverage of critical national and local legal stories, including many stories that have been later picked up by other national media.

g. Newsday LLC is the publisher of the daily newspaper, *Newsday*, and related news websites. Newsday is one of the nation's largest daily newspapers, serving Long Island through its portfolio of print and digital products.

6. Respondent, the Honorable Maxwell Wiley, J.S.C., is a Justice of the Supreme Court of New York, for the County of New York and is, in that capacity, presiding over the Criminal Prosecution. The additional respondents are parties or counsel to the parties in the Criminal Prosecution and are named solely because their interests may be affected by the relief sought herein.

ISSUE PRESENTED

7. The issue presented by this petition is whether Justice Wiley's acts and orders violate the public right of access to court records and proceedings that is protected by the First and Fourteenth Amendments to the Constitution of the United States, Article I, section 8 of the New York Constitution, and the New York Judiciary Law. The public has a qualified constitutional right to attend the proceedings and inspect the records of a criminal prosecution that may be abridged only if established procedures are followed and strict standards satisfied. Among other things, a denial of the access right may properly be imposed only where findings of fact establish that a compelling state interest requires secrecy, and no alternative to closure or sealing can adequately protect that interest. Here, respondent has repeatedly denied the access right without making such findings and where no such findings could be made.

8. Although Justice Wiley has rarely explained his actions, respondent apparently believes that any argument about the admissibility of evidence in the Criminal Prosecution must be conducted in secret and sealed from the public 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 I*"); *Associated Press v. Bell*, 70 N.Y.2d 32, 38 (1987).

9. Respondent has announced as recently as February 2, 2015 that he will continue to hold closed hearings and seal the transcripts as he sees fit.

BACKGROUND

10. On May 25, 1979, 6-year-old Etan Patz went missing in Manhattan in a case that received national 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.

11. On information and belief, in 2012 police received a tip from an informant that Pedro Hernandez had made comments to friends and relatives implicating him in Etan's disappearance. Police reopened the case and questioned Hernandez for more than six hours. During that marathon questioning, Hernandez confessed to strangling Etan.

12. Hernandez was subsequently indicted on charges of kidnapping and murder in December 2012. Pretrial proceedings have been ongoing in Supreme Court, New York County ever since.

13. Respondent has presided over the case throughout.

RESPONDENT'S REPEATED DENIALS OF PUBLIC ACCESS

The suppression hearing.

14. Beginning on September 15, 2012, a *Huntley* suppression hearing was held to address the admissibility of Hernandez's videotaped confession. The hearing extended over the course of several weeks, and during the hearing, the entire six hours of video showing Hernandez's confessions were played in open court. Other evidence relevant to the voluntariness of the confession, including evidence about Hernandez's mental acuity and health, was presented. *See* Aff. of Shayna Jacobs ("Jacobs Aff.") ¶ 4; Aff. of James C. McKinley, Jr. ("McKinley Aff.") ¶ 3.

15. Many news articles about the suppression hearing reported graphically on the contents of the video, describing in detail the substance of the confession and including courtroom sketches of a scene from a video in which Hernandez demonstrated how he allegedly strangled Etan Patz. Aff. of Patrick S. Kabat ("Kabat Aff.") ¶ 3 & Exs. A, H & I.

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

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

18. On October 6, 2014, respondent denied the application for unsealing. As justification, 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. Respondent denied unsealing “at this stage,” but acknowledged that the videotape recordings “can play [a critical role] in educating the public,” and ruled that petitioners could renew their application for unsealing after trial commenced. *Id.* at 3-5.

Jury selection.

19. Jury selection began January 5, 2015. That 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 public notice had been given that the initial screening of jurors would be done through written questions, or that the responses would be sealed. Jacobs Aff. ¶ 7; McKinley Aff. ¶¶ 5-7.

20. On January 6, 2015, several reporters working for petitioners asked respondent for access to the completed questionnaires. McKinley Aff. ¶ 5. Justice Wiley rejected their request, stating that he would make public only a blank copy of the questionnaire form being used. *Id.*

21. 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 No advance public notice had been given that initial questioning of jurors would be closed. *Id.*

22. Reporters immediately asked respondent to observe the questioning of jurors in the jury room; their request was denied. *Id.* ¶¶ 6-7; Jacobs Aff. ¶ 7.

23. When pressed by one reporter for a reason that jury questioning was not being held in open court, respondent responded that information disclosed in the questioning might be “sensitive” and that the jury room was more “comfortable” and “convenient” than bench conferences. McKinley Aff. ¶ 7. Another reporter then cited legal precedent requiring open and public *voir dire*, but respondent again rejected the reporters’ request to observe the questioning of the jurors. *Id.* ¶ 6. During the same exchange, respondent also rejected a request for minutes of the private questioning of jurors, stating that those minutes would be sealed. Jacobs Aff. ¶ 7.

24. On January 9, 2015, counsel for petitioners *New York Times* and *Daily News* filed a letter objecting to the blanket closures of the ongoing juror questioning. 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. *See Kabat Aff.*, Ex. E.

25. 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. *See Jacobs Aff.* ¶ 9.

26. The court continued its private jury selection over the ensuing weeks. *See McKinley Aff.* ¶ 12. The individual questioning of each prospective juror in private lasted between five to fifteen minutes. *Id.*

27. 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.

28. By January 22, 2015, the court had narrowed the pool of potential jurors to approximately 100 persons, down from 700 potential jurors. It then began calling the remaining individuals to the jury box for additional *voir dire* in open court. *Id.* ¶ 14.

29. 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 Justice Wiley to unseal the completed questionnaires of those jurors who had been selected for service. *Id.* ¶ 17. Respondent denied the request without issuing any findings of fact on February 2, 2015. *Kabat Aff.*, Ex. G.

Closed motion hearings.

30. Meanwhile, during jury selection, respondent conducted a number of closed hearings to address unidentified motions. These hearings were closed to the public without prior notice or any opportunity for petitioners to object. For example, on January 20, 2015, respondent presided over an argument apparently related to the admissibility of evidence that was held entirely at the bench. Jacobs Aff. ¶ 10. When petitioners attempted to obtain the minutes of that exchange, they were told the transcript was under seal. *Id.*

31. On January 23, 2015, Justice Wiley closed the court room and ordered the press and public to leave, without providing any explanation of the reason for doing so. *Id.* ¶ 12. After a thirty minute closed proceeding with counsel for the parties, the courtroom reopened. Upon questioning from reporters, petitioner 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.

32. Again, on two separate occasions on January 29, 2015, respondent closed the courtroom and required the public to leave. In the first of closure that day, respondent cited the parties' request as the basis for the closure, adding 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; Jacobs Aff. ¶ 13. He ordered that the transcript would remain sealed, at least for the pendency of the trial. McKinley Aff. ¶ 15.

33. After the jury departed for lunch on January 29, 2015, the court held another closed proceeding, again at the request of the parties. *Id.* ¶ 16. Following the approximately 30-minute hearing, the prosecutor and defense counsel 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 respondents chambers seeking to confirm that a decision of some type had issued, and seeking details about that ruling, has gone unreturned. *Id.*

34. Opening statements were held on January 30, 2015. On February 2, 2015, respondent indicated before the lunch break that another closed hearing would be held at the end of the day. One reporter submitted a written objection to the judge and requested an opportunity to be heard. Jacobs Aff. ¶ 15.

35. Later on February 2, 2015, petitioners submitted to respondent via fax to chambers and in-person delivery 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, and asking again to be heard before further closed proceeding took place Kabat Aff., ¶ 10 & Ex. F.

36. The February 2 letter application also asked respondent to reconsider his prior sealing orders, including his order sealing the confession videos, now that the jury was empanelled and other procedures were available to protect the integrity of the jury and the fairness of the trial. *Id.*, Ex. F.

37. Respondent denied petitioners' requests made in the February 2 letter from the bench that same day, and denied petitioners' counsel an opportunity to be heard on the issues raised. Kabat Aff., Ex. G. Respondent announced instead he will continue to hold closed hearings and seal the transcripts as he sees fit. *Id.* at 3:3-5.

38. At no time has respondent invited, permitted, or otherwise provided an opportunity for objections to be made by members of the press or public before a closure or sealing was ordered; nor has he made findings of fact establishing that closure is justified. *See* McKinley Aff. ¶ 18; Jacobs Aff. ¶ 14; Kabat Aff., ¶ 9 & Ex. F.

39. Before the closures described above, respondent had not made findings of fact to demonstrate that a compelling reason properly justified the denial of the constitutional access right, and that no alternatives other than closure would suffice.

BASIS FOR RELIEF

40. Petitioners bring this proceeding pursuant to CPLR 7803(2), 7803(3), and 7803(4). This proceeding is properly filed in this Court pursuant to CPLR 506(b)(1).

41. Petitioners respectfully submit that the foregoing actions and orders by respondent violate their constitutional right of public access to court proceedings and records to the extent that proceedings were closed and records sealed (a) without advance notice and an opportunity to be heard, (b) without findings of fact demonstrating both a substantial probability that openness would harm a compelling governmental interest, and that no reasonable alternative exists to adequately protect that interest, and (c) without narrowly tailoring the limitations imposed on the public access right in scope and in time.

42. Respondent has indicated that he will continue to close proceedings and seal records in the same manner throughout the Criminal Prosecution, in violation of the constitutional right of public access.

43. Sealing orders that are currently in place, which bar release of questionnaire responses by individuals selected to sit on the jury, seal all evidence introduced at the *Huntley* hearing, and seal all transcripts of closed motion hearings, constitute ongoing daily violations of the constitutional right of public access.

44. Unless and until the improper sealing orders are reversed and vacated, petitioners will continue to suffer irreparable injury to their rights.

45. Petitioners respectfully submit that the foregoing actions and orders by respondent were made in violation of lawful procedure, were effected by errors of law, and were an abuse of discretion.

46. Petitioners have no adequate remedy at law.

47. No prior request has been made for the relief requested herein.

WHEREFORE, petitioners demand judgment against respondents:

- a) Declaring that respondent, the Honorable Maxwell Wiley, violated his state and federal constitutional duties, and acted contrary to law in an arbitrary and capricious manner in (i) closing portions of jury selection in *People v. Pedro Hernandez*, Indictment No. 4863/12, (ii) sealing written questionnaires used during jury selection, (iii) sealing from public inspection the confession tapes and other evidence presented during the suppression hearing, and (iv) closing numerous hearings and sealing the transcripts from public inspection; all without providing advance public notice, without affording the press and public an opportunity to be heard, and without making factual findings demonstrating the existence of a proper basis for the denial of public access;
- b) Vacating the improperly issued sealing orders and prohibiting enforcement thereof;
- c) Enjoining respondent from imposing restrictions on the public's right of contemporaneous access to the proceedings and records in the Criminal Prosecution without first providing notice and a reasonable opportunity for any objecting members of the press or public to be heard through counsel, making the

required on-the-record factual findings to support any closure, and narrowing any closure that may be warranted in both scope and time; and

d) Granting such other and further relief as this Court may deem just and proper.

Dated: New York, New York
February 4, 2015



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Attorneys for Petitioners

VERIFICATION

STATE OF NEW YORK)
)
COUNTY OF NEW YORK) ss.:

Patrick S. Kabat, being sworn, states:

I am counsel for petitioners in the above-captioned matter. This verification is made by me because the material allegations of the Petition are within my personal knowledge. I have read the foregoing Petition and know its contents. The Petition is true to my knowledge, except as to matters alleged on information and belief, and as to those matters I believe it to be true.



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Subscribed and sworn to before me
this 4th day of February, 2015



Notary Public

SCOTT BAILEY
Notary Public, State of New York
No. 01BA6201502
Qualified in New York County
Commission Expires March 2, 2017