IN THE CIRCUIT COURT OF CRITTENDEN COUNTY, ARKANSAS
ARKANSAS CRIMINAL DIVISION

STATE OF ARKANSAS,

v.

JESSIE LLOYD MISKELLY, JR., CHARLES JASON BALDWIN and DAMIEN WAYNE ECHOLS.

Nos. CR-93-516-517-518

FILED
at_____o'clock____m
SEP 23 1993
LAVADA NORRIS, CLERK

MEMORANDUM IN OPPOSITION TO DEFENDANT CHARLES JASON BALDWIN'S MOTION FOR COURT DOCUMENTS TO BE FILED UNDER SEAL

INTRODUCTION

On or about September 14, 1993, defendant Charles Jason Baldwin filed a motion with this Court to prophylactically seal *all* court filings in this criminal case -- regardless of the nature and content of any one particular filing. In support of that motion, defendant states, in conclusory fashion, that such filings "may contain information which will reveal the essence of the Defendant's defense to the case," and that if the media publishes the documents, the problems in selecting a fair and impartial jury will be "exacerbated".

On or about September 22, 1993, Memphis Publishing Company, doing business as The Commercial Appeal, filed a Motion to Intervene in this proceeding.

ARGUMENT

The State of Arkansas vigorously protects the rights of free speech and liberty of the press through its Constitution, its legislation and its judicial decisions. The Arkansas Constitution unequivocally states:

> The liberty of the press shall forever remain inviolate. The free communication of thoughts and opinions is one of the invaluable rights of man . . .

Ark. Const. Art. 2, § 5. Recognizing that it is "vital in a democratic society that public business be performed in an open and public manner", the Arkansas legislature adopted the Freedom of Information Act allowing people "to learn and to report fully the activities of their public officials." Ark. Code Ann. § 25-19-102 (emphasis added). And the Supreme Court of Arkansas, of course equally protective of the liberty of the press, has held:

> Any restraint on the freedom of the press, even though narrow in scope and duration, is subject to the closest scrutiny and will be upheld only upon a clear showing that an exercise of this right presents a clear and imminent threat to the fair administration of justice . . . . Any prior restraint bears a heavy presumption against its constitutional validity, and the government carries a heavy burden of demonstrating justification for its imposition.

Arkansas Gazette Co. v. Lofton, 269 Ark. 109, 110-11, 598 S.W.2d 745, 746 (Ark. 1980) (emphasis added) (citing United States v. CBS, Inc., 497 F.2d 102 (5th Cir. 1974) and CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975)) (paper could not be restrained from referring to accused as "Quapaw Quaker rapist"). The drafters of the Arkansas

Constitution, the legislature, and the courts, then, have jealously guarded Arkansas citizens' rights of free speech and liberty of the press.

Consistent with its protections for the rights of free speech and liberty of the press, Arkansas has a long-standing "tradition of open judicial proceedings." Arkansas Television Co. v. Tedder, 662 S.W.2d 174, 176 (Ark. 1984). The people of Arkansas have enjoyed their right of access to the courts since 1838. Rev. Stat., Ch. 43 § 19, now codified at Ark. Stat. Ann. § 16-10-105 ("The sittings of every court shall be public, and every person may freely attend the sittings of every court.")

In order for this Court to seal any documents in this case on the ground that failing to do so would impair defendant's right to a fair trial, defendant must meet the standards articulated in Arkansas Television Co. v. Tedder, 281 Ark. 152, 662 S.W.2d 174 (Ark. 1983). Arkansas Newspaper, Inc. v. Patterson, 281 Ark. 213, 215, 662 S.W. 2d 826, 827 (Ark. 1984) ("pretrial proceedings and their record must be open to the public, including representatives of the news media, and before an exception to that general rule is made, the test set out in Arkansas Television must be met").

In Arkansas Television, the Supreme Court of Arkansas, relying on United States Supreme Court precedent, held:

> [T]he proponent of closure must demonstrate a substantial probability that (l) irreparable damage to the defendant's fair trial right will result from [not sealing the documents] and (2) alternatives to [sealing the documents] will not adequately protect the

> right to a fair trial. Additionally, the trial court's findings must be articulated and sufficiently specific to demonstrate on review that these requirements have been satisfied.

Id. at 157, 662 S.W.2d at 176. Apparently approving of petitioners' alternatives, the court the court listed the following among alternatives to closure: (1) change of venue; (2) trial continuance; (3) use of voir dire; (4) sequestration; and (5) admonition of the jury. Id. at n.3.

In the case at bar, defendant has not and cannot meet the above standard. In his motion, defendant claims that documents filed with this Court "may" contain information relating to Baldwin's "defense to the case." While that statement may be true, it does not demonstrate a substantial probability that irreparable damage will occur to defendant's right to a fair trial if the documents are not sealed, nor does it even address Baldwin's burden of demonstrating that all alternatives to sealing will not adequately protect those rights.

Federal constitutional law amply supports the conclusion that defendant is not entitled to trump the public's first amendment access rights by merely claiming that his rights to a fair trial are at stake. The first amendment protects the right of the public and the press to attend criminal trials. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (1980). The United States Supreme Court has noted that judicial documents have been

historically considered to be open for inspection by the public. Nixon v. Warner Communications, Inc., 435 U.S. 589, 597-99 (1978). See also In re Search Warrant for Secretarial Area-Gunn, 855 F.2d 569, 573 (8th Cir. 1988) (first amendment right of public access extends to documents filed in support of search warrants); Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 252-54 (4th Cir. 1988) (order to seal pleadings and accompanying exhibits violated first amendment right of access); Wilson v. American Motors Corp., 759 F.2d 1568, 1571 (11th Cir. 1985) (order to seal records in civil proceedings violates first amendment right of access); United States v. Martin, 746 F.2d 964, 968-69 (3d Cir. 1984) (denial of permission to tape and access to judicial records and documents violated common law right of access); In re Knight Pub. Co., 743 F.2d 231, 235 (4th Cir. 1984) (order to seal court documents in criminal trial violated common law right to inspect and copy judicial documents); Brown & Williamson Tobacco Co. v. Federal Trade Comm'n, 710 F.2d 1165, 1176 (6th Cir. 1983) (order to seal Federal Trade Commission documents violated first amendment right of access), cert. denied, 465 U.S. 1100 (1984); Associated Press v. United States Dist. Ct., 705 F.2d 1143, 1147 (9th Cir. 1983) (order to seal court records and files in John DeLorean case violated first amendment right of access).

Courts have also extended the first amendment right of public access to documents filed in connection with protected proceedings. See Seattle Times Co. v. United States Dist. Ct., 845 F.2d 1513, 1517 (9th Cir. 1988) (documents filed in connection with pretrial detention proceeding); United States v. Haller, 837 F.2d 84, 86-

87 (2d Cir. 1988) (plea agreement); In re New York Times Co., 828 F.2d 110, 114 (2d Cir. 1987) (documents files in connection with suppression motions), cert. denied sub nom. Esposito v. New York Times Co., 485 U.S. 977 (1988); Associated Press v. United States District Court, 705 F.2d 1143, 1145 (9th Cir. 1983) (pretrial documents in general); In re Washington Post Co., 807 F.2d 383, 390 (4th Cir. 1986) (affidavits submitted in connection with sentencing hearing).

The proponents of closure bear a heavy burden under first amendment analysis: they must overcome a presumption of openness. "'Proceedings may be closed and, by analogy, documents may be sealed if 'specific, on the record findings are made demonstrating that "closure is essential to preserve higher values and is narrowly tailored to serve that interest."'" In re Search Warrant for Secretarial Area-Gunn, 855 F.2d 569, 574 (8th Cir. 1988) (emphasis added) (quoting In re New York Times Co., 828 F.2d at 116 (citing Press-Enterprise II, 478 U.S. at 13-14 (citation omitted)).

Defendants may only overcome "[t]he presumption of openness" by showing that sealing the documents is "necessitated by a compelling government interest." Id. at 574 (citing Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984) (Press-Enterprise I)). Defendant also must show that sealing the documents is narrowly tailored to serve that interest. Press-Enterprise I, 464 U.S. at 510. If this Court decides to seal the documents, it must articulate on the record why sealing was necessary and why less restrictive alternatives were not appropriate. In re Search Warrant, 855 F.2d at 574

(citing Press-Enterprise I, 464 U.S. at 510-11). See also In re United States ex rel. Pulitzer Publishing, 635 F.2d 676, 678 (8th Cir. 1980) (trial court erred in conducting in-chambers voir dire because it failed to inquire into alternate solutions and to articulate reasons for and to balance the interests of the public in access to open court against rights of party to fair trial). The Arkansas Supreme Court likewise requires on the record findings overcoming the presumption of openness and specifically considering all alternatives to closure. Arkansas Television, 662 S.W.2d at 176.

Baldwin's mere assertion that certain unspecified and yet-to-be filed documents may contain information regarding his defense does not meet his burden of showing that sealing the documents is "necessitated by a compelling government interest." Nor has defendant shown that sealing the documents is a "narrowly tailored" alternative used to serve that interest. Press-Enterprise I, 464 U.S. at 510. Finally, no alternatives have been discussed or argued in the motion. In sum, Baldwin has wholly failed to shoulder the obligation squarely thrust on him under federal and Arkansas constitutional analysis.

CONCLUSION

The Arkansas Supreme Court has "concluded that the rights of the accused to a fair and impartial trial do not exceed the rights of the public to observe justice in progress." Shiras v. Britt, 267 Ark. 97, 101, 589 S.W.2d 18, 20 (Ark. 1979). This Court will

preserve the rights of MPC, and likewise the public, by denying defendant's motion to seal court documents in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served upon all counsel of record by mail, this 22nd day of September, 1993.

S. Russell Headrick