

IN THE CIRCUIT COURT OF MAYCOMB COUNTY, ALABAMA

STATE OF ALABAMA,

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v.

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Case No. CC-00-0000

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JOE CLIENT.

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**MOTION TO SEAL THE COURT FILE
AND CLOSE PRETRIAL PROCEEDINGS**

Joe Client respectfully moves this Court for an order sealing the file in this case and closing pretrial proceedings. In support of his motion, Mr. Client submits the following:

1. On June 7, 2016, the State indicted Mr. Client for the capital murder of Victor Victim and David Deceased. The State is seeking the death penalty.

2. In addition to Mr. Client, the State indicted two other men for this crime: Karl Kodefendant and Paul Plead. Mr. Plead pleaded guilty to the lesser crime of murder, which carries a sentence of twenty-five years to life, in exchange for his testimony against Mr. Kodefendant and Mr. Client. In January 2017, the State tried Mr. Kodefendant in Maycomb County. A jury convicted him of capital murder and this Court sentenced him to death.

3. As detailed in Mr. Client's motions for change of venue and to prohibit trial participants from commenting about the case to the media, the proceedings in this case have received widespread publicity, much of which has been inaccurate, false, speculative, and inflammatory.

4. The Constitution guarantees criminal defendants a fair trial by a panel of impartial and indifferent jurors. The Supreme Court has held that "[c]losure of pretrial proceedings is often one of the most effective methods that a trial judge can employ to attempt to ensure that the fairness of a trial will not be jeopardized by the dissemination of such information throughout the community before the trial itself has even begun." Gannett Co. v. DePasquale, 443 U.S. 368, 379 (1979); see also Sheppard v. Maxwell, 384 U.S. 333, 362 (1966); Estes v. Texas, 381 U.S. 532, 540-41 (1965).

5. While closure of criminal proceedings implicates the public's First Amendment right of access to criminal proceedings, the Supreme Court has held that the public's right of access is a qualified right that may be outweighed by competing interests, Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 11-13 (1986) (Press-Enterprise II), such

as a criminal defendant's right to a fair trial. Gentile v. State Bar of Nev., 501 U.S. 1030, 1075 (1991) ("Few, if any, interests under the Federal Constitution are more fundamental than the right to a fair trial by impartial jurors, and an outcome affected by extrajudicial statements would violate that fundamental right.").

6. Where the public's right of access to criminal proceedings conflicts with the Sixth Amendment right to a fair trial, a criminal defendant's right to a fair trial takes precedence. See Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508 (1984) (Press Enterprise I) ("No right ranks higher than the right of the accused to a fair trial."); see also Press-Enterprise II, 478 U.S. at 11-13 (closure is warranted when substantial probability exists that defendant's fair trial rights will be prejudiced by publicity that closure would prevent and no reasonable alternatives would adequately protect defendant's rights).

7. Alabama appellate courts have recognized that closure is warranted where there is "a substantial probability that [the accused's] right to a fair trial would be prejudiced by publicity that . . . closure would prevent." Ex parte Consolidated Pub. Co., 601 So. 2d 423, 433-34 (Ala. 1992) (per curiam); Ex parte Birmingham News Co., 624 So. 2d 1117, 1134-35 (Ala. Crim. App. 1993).

8. This is clearly a case where there is "a substantial probability that [Mr. Client's] right to a fair trial would be prejudiced by publicity that . . . closure would prevent." Ex parte Consolidated Pub. Co., 601 So. 2d at 434. Indeed, much of what has been reported in the media is inadmissible.

9. This Court will be called upon to determine the admissibility of other evidence that has been widely discussed in the media, such as Mr. Client's alleged confession, his criminal history, hearsay testimony regarding the surviving victim's statements, and identification testimony. (Def. Exs. 3, 5, 10, 41, 45, 50, 73, 94.) Each pretrial hearing will not only lead to dissemination of information regarding the particular matters taken up at that proceeding, but will also trigger a recounting of the case, including the fact that Mr. Pleed pleaded guilty and Mr. Kodefendant was convicted and sentenced to death.

10. There are no reasonable alternatives to closure that would be adequate to protect Mr. Client's rights. This Court's attempts to control pretrial publicity by prohibiting trial participants from commenting about the case and preventing electronic and photographic coverage of pretrial proceedings have failed to protect Mr. Client's interest in a fair trial. As discussed above, the media has continued to maintain a sensational level of coverage despite this Court's orders. Moreover, the State has violated this Court's order, which demonstrates that these measures are inadequate to protect Mr. Client's rights. See Motion to Hold the District Attorney's Office in Contempt (incorporated by reference). There is a substantial

probability that media coverage of the pretrial proceedings will prejudice Mr. Client and closure of pretrial proceedings is the only measure that will adequately protect Mr. Client's rights to due process and a fair trial by an impartial jury.

11. The closure order Mr. Client seeks is narrowly tailored to serve these interests. It enjoins only disclosure of matters from the pretrial proceedings, and therefore is limited to information not in the public record, much of which would be inadmissible at the trial. United States v. Brown, 250 F.3d 907, 914 (5th Cir. 2001) (press does not have First Amendment right of access to information not available to public generally); United States v. Gurney, 558 F.2d 1202, 1208-09 (5th Cir. 1977) (same); see also Marshall v. United States, 360 U.S. 310 (1959) (holding that exposure of jurors to newspaper articles about prior convictions that had been ruled inadmissible was so prejudicial as to require new trial).

12. Release of transcripts of the closed proceedings after the jury is sequestered in this case is sufficient to protect the public's First Amendment right. See Gannett Co., 443 U.S. at 393 (concluding that trial closure did not violate First Amendment in part because denial of access was temporary and public could subsequently attend trial); Bowden v. Keane, 237 F.3d 125, 129 (2d Cir. 2001) ("Whether a closure is deemed broad or narrow [in the context of the Sixth Amendment] depends on a number of factors, including . . . whether the public can learn (through transcripts, for example) what transpired while the trial was closed . . .").

13. On the other hand, once the damage is done by admitting the media into pretrial hearings, it cannot be undone. Particularly when the media has already demonstrated a propensity to release prejudicial and inflammatory publicity, as the media has done at every opportunity here, the defendant's Sixth Amendment rights are in considerable jeopardy and outweigh any media claim to access.

14. In order to protect the integrity of this Court's orders controlling pretrial publicity as well as this Court's suppression rulings, the court file, court records, and transcripts of pretrial proceedings must be sealed. Absent such an order, the media can access and publish the contents of any motions filed and any evidence this Court suppresses. See, e.g., United States v. McVeigh, 119 F.3d 806, 813-14 (10th Cir. 1997) (press does not have right of access to inadmissible evidence); United States v. Gurney, 558 F.2d 1202, 1210 (5th Cir. 1977) ("The press has no right of access to exhibits produced under subpoena and not yet admitted into evidence, hence not yet in the public domain."); see also Pell v. Procunier, 417 U.S. 817, 834 (1974) (Constitution does not "require government to accord the press special access to information not shared by members of the public generally").

15. It is well established in this case that the media will go to such lengths. Although the press was excluded from pretrial motions hearings on discovery and suppression issues in this case, the newspapers printed the motions for discovery and to suppress, making it abundantly clear to all readers that Mr. Client had allegedly confessed to the crime. “Accused Hearing Closed to Media,” Maycomb Courier, Mar. 21, 2012 at A1 (Def. Ex. 63.)

16. Closure of the pretrial proceedings is particularly essential here because this is a capital case. Mr. Client’s rights to due process, a fair trial, an impartial jury, and a reliable sentencing under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Alabama law outweigh the media’s First Amendment right of access to these pretrial proceedings because of the likelihood that highly sensitive and prejudicial matters may be disclosed to potential jurors. No other reasonable alternatives can properly protect Mr. Client’s rights to a fair trial and reliable determination of punishment given the character and extent of the publicity that continues to surround this case.

17. In the context of a trial in which the death penalty is sought, the need for effective protective measures is critical. “The fundamental respect for humanity” underlying the Eighth Amendment’s prohibition against cruel and unusual punishment gives rise to a special need for reliability in determining whether the death penalty is appropriate. Johnson v. Mississippi, 486 U.S. 578, 584 (1988); see also Ex parte Monk, 557 So. 2d 832, 836-37 (Ala. 1989) (death penalty is “special circumstance” that justifies expansion of constitutional rights). This case already has produced unprecedented publicity and unbridled hostility toward a defendant on trial for his life. This Court must act to ensure that a fair and reliable trial and sentencing determination are not compromised by further prejudicial publicity.

For these reasons and those developed upon an evidentiary hearing on this motion, and for such other reasons as may appear to the Court, Mr. Client moves this Court to:

- a. enter an order excluding the public and print and electronic media from all pretrial hearings and jury selection, or in the alternative, from specified pretrial proceedings; and
- b. enter an order sealing the court file, court records, and transcripts of pretrial proceedings.

Respectfully submitted,

/s/ Linda Lawyer

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[CERTIFICATE OF SERVICE]

[MOTION UPDATED ON 10/05/17]