**NO. 122261**

**IN THE SUPREME COURT OF ILLINOIS**

| | | |
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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| Plaintiff-Appellee, | ) | Appeal from the Appellate Court of Illinois, Fourth District, No. 04-17-0055 |
| -vs- | ) | |
| KIRK P. ZIMMERMAN, | ) | |
| Defendant-Appellant, | ) | Appeal from the Circuit Court of McLean County, Illinois No. 2015-SF-0894 |
| -vs- | ) | |
| THE PANTAGRAPH, WGLT FM, and THE ILLINOIS PRESS ASSOCIATION, | ) | The Honorable Scott Drazewski, Presiding Judge |
| Intervenors-Appellees. | ) | |

# BRIEF AND ARGUMENT OF INTERVENORS - APPELLEES THE PANTAGRAPH, WGLT FM, AND THE ILLINOIS PRESS ASSOCIATION

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## POINTS AND AUTHORITIES

## ARGUMENT

The issue presented by this appeal is whether the public should be allowed to view the Fourth and Fifth motions *in limine* filed by the Defendant in this case. The Fourth District properly held that the two Motions filed under seal are subject to the presumption of openness that attaches to most documents filed with the Court, and which have been the subject of a judicial ruling. The Fourth District ruling in this case is consistent with that court's previous ruling in *People v. Lagrone*, 361 Ill.App.3d 532 (4th Dist. 2005).

The Defendant argues that the First District decision in *People v. Kelly*, 397 Ill.App.3d 232 (1st Dist. 2009) holds that the motions are not subject to the presumption and were properly sealed by the trial court.

Before we turn to that precise question, it is important to restate the principles underlying the presumption that court records and court proceedings are public.

### I. ACCESS TO JUDICIAL RECORDS AND PROCEEDINGS

The Fourth District Appellate Court, in *In re Marriage of Johnson*, 232 Ill.App.3d. 1068 (4th Dist. 1992) reviewed the common law, statutory and constitutional bases relating to access to court records, including transcripts of court records. That court concluded, based on common law (*Nixon v. Warner Communications, et al*, 435 US 589, 98 S.Ct. 1306 (1978)) Illinois statutes (The Illinois Clerk of Court Act, requiring all court records to be open) and a series of constitutional cases (among them, *Press-Enterprise Co. v. Superior Court* (1984), 464 U.S. 501, 508-10, 104 S.Ct. 819, 823-24, 78 L.Ed.2d 629, 637-38; *Press-Enterprise Co. v. Superior Court* (1986), 478 U.S. 1, 10, 106 S.Ct. 2735, 2741, 92 L.Ed.2d 1, 11) that the records of the *Johnson* case were presumptively open, and found no basis in

law to seal those records. In so holding, the Court stated:

> Once documents are filed with the court, they lose their private nature and become part of the court file and "public component[s]" of the judicial proceeding (*Rittenhouse,* 800 F.2d at 343-44) to which the right of access attaches....
>
> The most direct expression of this right of access may be stated this way-the court is a part of government and what goes on in court is the business of the people. Courts function best and most effectively when they are open to the public view.
>
> When courts are open, their work is observed and understood, and understanding leads to respect. The file of a court case is a public record to which the people and the press have a right of access.

*In re Marriage of Johnson*, at 1074.

The Seventh Circuit Court of Appeals has reached similar conclusions, for similar reasons. In a case in which it considered a District Court order that sealed an entire file, the Court held:

> What happens in the halls of government is presumptively public business. Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification.

*Union Oil Co. of California v. Leavell,* 220 F.3d 562, 567–68 (7th Cir. 2000).

**II. MOTIONS *IN LIMINE* OR TO SUPPRESS EVIDENCE**

The United States Supreme Court has considered the application of these principles to suppression hearings, and determined that on both First and Sixth Amendment grounds, suppression hearings in federal courts are subject to this presumption of openness. In *Waller v. Georgia*, the court summarized the Press Enterprise line of cases, and found that the right to attend trials extends to pre-trial suppression hearings:

> In several recent cases, the Court found that the press and public have a qualified First Amendment right to attend a criminal trial. *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980). We also have extended that right not only to the trial as such but also to the voir dire proceeding in which the jury is selected. *Press–Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). Moreover, in an earlier case in this line, *Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979), we considered whether this right extends to a pretrial suppression hearing. While the Court's opinion did not reach the question, *id*., at 392, 99 S.Ct., at 2911, a majority of the Justices concluded that the public had a qualified constitutional right to attend such hearings, *id*., at 397, 99 S.Ct., at 2914 (POWELL, J., concurring) (basing right on First Amendment); *id.*, at 406, 99 S.Ct., at 2919 (BLACKMUN, J., joined by BRENNAN, WHITE, and MARSHALL, JJ., dissenting in part) (basing right on Sixth Amendment).

*Waller v. Georgia*, 467 U.S. 39, 44–45, 104 S. Ct. 2210, 2214–15, 81 L. Ed. 2d 31 (1984).

Motions *in limine*, in Illinois criminal cases, play the same role as the suppression hearing in *Waller.* The purposes of the motions is to restrict the use of evidence at trial. "A motion *in limine* can be a 'powerful' and 'potentially dangerous' weapon because it requests to restrict evidence. *Reidelberger v. Highland Body Shop, Inc.,* 83 Ill.2d 545, 550 (1981). Because a ruling on the motion can restrict evidence, the motion must be specific and allow the court and the parties to understand what evidence is at issue." *People v. Stevenson*, 2014 IL App (4th) 130313, ¶ 29.

Motions to suppress play an integral role in federal criminal trials.

> As several of the individual opinions in *Gannett* recognized, suppression hearings often are as important as the trial itself. 443 U.S., at 397, n. 1, 99 S.Ct., at 2914, n. 1 (POWELL, J., concurring); 47 *id*., at 434–436, 99 S.Ct., at 2933–2934 (BLACKMUN, J., dissenting in part); see also *id.*, at 397, 99 S.Ct., at 2914 (BURGER, C.J., concurring). In *Gannett*, as in many cases, the

> suppression hearing 2216 was the only trial, because the defendants thereafter pleaded guilty pursuant to a plea bargain.

*Waller*, 467 U.S., at 46–47.

Decisions on *in limine* motions in Illinois play the same role. Critical decisions are made based on the rulings on those motions, including whether to plead guilty, and in some cases the decision to testify will be dependent on the outcome of these motions.

> As a result, motions *in limine* often achieve great savings of time and judicial efficiency, and resolving a difficult evidentiary issue prior to trial sometimes results in settlement or a guilty plea. In criminal cases like this, a preliminary ruling on the admissibility of a defendant's prior convictions for the purpose of impeaching him would assist the defendant and his counsel in deciding whether defendant wishes to testify, and if so, whether defense counsel should bring out such convictions during direct examination in the hope that his doing so might diminish their negative impact.

*People v. Owen*, 299 Ill.App.3d 818, 822–23, 701 N.E.2d 1174, 1178 (1998).

It must be noted that the Defendant in this cause relies on *People v. Stevenson* and *People v. Owen* in support of his argument. Those cases demonstrate, however, that motions *in limine* are traditionally public. Nothing in those cases makes reference to any effort to seal the records or close the hearings to the public. The Appellate Court opinions contain very complete descriptions of the evidence sought to be suppressed, the reasons underlying the motions, and the analysis of the law by the court. The 'aim and interest' in public proceedings–to have a public record which can be analyzed and understood by the public–is demonstrated by these two cases.

Defendant also relies on *People v. Pelo*, a case involving an effort to gain access to a videotaped deposition in a criminal trial. However, the deposition in *Pelo* had not been viewed by, or submitted to the trial court. There were no motions *in limine* about the contents

of that videotape. It had not been the subject of judicial decision. As explained by the Court in *Pelo*:

> The (trial) court further stated that, in criminal cases, evidence is not in the public realm until it has been admitted at trial. The court cited Supreme Court Rules 415 (134 Ill.2d R. 415) and 207 (166 Ill.2d R. 207) for this proposition, which govern the custody and filing of depositions and other discovery materials:
>
> [The Galuska deposition] has not been admitted into evidence. It has not been received by the [c]ourt. It is simply housed in the clerk's office because Supreme Court Rules [415 and 207] require it to be housed there. It is, therefore, this [c]ourt's opinion that the deposition is a single piece of evidence; that releasing it at this point would essentially suggest that, that anybody who wants to look at evidence in any criminal case would have a right to do so. I don't think there is any [f]irst-[a] mendment[,] [rightof-access] issue here because *** * * nothing has occurred in open court with relation to this deposition to this point."**

*People v. Pelo*, 384 Ill.App.3d 776, 778 (2008). (Emphasis added). Contrary to *Pelo*, in this case the materials were presented to the court, and the court had reviewed those materials and issued a ruling about them.

The aims and interests to be served in requiring suppression hearings to be open in federal district courts are no less pressing in hearings in Illinois courts on motions *in limine*, and for all the reasons expressed by the Court in *Waller*, this Court should affirm the decision of the Fourth District that the presumption applies to the motions at issue in this case.

Just because the presumption of openness attaches to these hearings does not mean that they must be open in all circumstances. The standards for closing a hearing or sealing a record are well established:

> The U. S. Supreme Court state stated the applicable rules in *Press–Enterprise*:
>
> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is

> narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

*Press-Enterprise Company v. Superior Court of California, Riverside County*, 464 U.S. 501, 510 (1983).

Those rules are applied by Illinois courts. See, for example *People v. LaGrone* and *In re Marriage of Johnson*. The fair trial right of a defendant is not inconsistent with the right to a public trial. As demonstrated in *Waller*, often those rights, in fact, are interdependent. Specific factual findings must be made by the trial court:

> The trial court's findings, in addition to being vague and conclusory, fail to address the question that should lie at the heart of a trial court's decision to close a criminal proceeding. That question is not whether the information would taint potential jurors, but whether the circumstances of access would make it so that *voir dire* could not remedy any taint. Widespread publicity does not necessarily result in widespread knowledge among potential jurors of the facts reported (see *State v. Schaefer,* 157 Vt. 339, 352, 599 A.2d 337, 345 (1991)), and *voir dire* is the preferred method for guarding against the effects of pretrial publicity (see *In re Charlotte Observer,* 882 F.2d 850, 855 (4th Cir.1989)). See also *Press–Enterprise II,* 478 U.S. at 15, 106 S.Ct. at 2743, 92 L.Ed.2d at 14 ("Through *voir dire,* cumbersome as it is in some circumstances, a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict"). Thus, the trial court's factual findings must show that the pretrial publicity would inflame and prejudice the entire community such that even through *voir dire,* an unbiased jury could not be seated. The trial court's findings in this case did not support that conclusion.

*People v. LaGrone*, at 537–38.

## CONCLUSION

For these reasons, the Intervenors-Appellees respectfully requests this Court uphold the Fourth District Court decision to reverse the trial court's order. This ruling, as explained above, is consistent with the state and federal court decisions.

THE PANTAGRAPH, WGLT FM, and
THE ILLINOIS PRESS ASSOCIATION,
Intervenors-Appellees.

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**CERTIFICATE OF COMPLIANCE WITH RULES 341(a) AND (b)**

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, and the Rule 341 (c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(1), is 7 pages.

/s/ Donald M. Craven
Donald M. Craven, Attorney

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**PROOF OF SERVICE/NOTICE OF FILING**

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PLEASE TAKE NOTICE that on November 20, 2017, the undersigned submitted for electronic filing the BRIEF AND ARGUMENT OF INTERVENORS-APPELLEES THE PANTAGRAPH, WGLT FM, AND THE ILLINOIS PRESS ASSOCIATION, to the Office

of the clerk of the supreme court of Illinois, served the same on the above-named parties via email at the email addresses shown, and served one copy on the Attorney General of Illinois, Criminal Division, at the address shown above by depositing the same in the U.S. mail. Proper postage prepaid, before 5:00 p.m. in Springfield, Illinois.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statement set forth in this instrument are true and correct.

Date: November 20, 2017

Respectfully Submitted,

THE PANTAGRAPH, WGLT FM, and THE ILLINOIS PRESS ASSOCIATION, Intervenors-Appellees.

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