No. 122261

IN THE
SUPREME COURT OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	On leave to appeal from the Appellate Court of Illinois, Fourth District, No. 4-17-0055.
Plaintiff-Appellee,	)	
-vs-	)	
KIRK P. ZIMMERMAN,	)	There on appeal from the Court of the Eleventh Judicial Circuit, McLean County, No. 2015-SF-0894.
Defendant-Appellant,	)	
-vs-	)	
THE PANTAGRAPH, WGLT FM, and THE ILLINOIS PRESS ASSOCIATION,	)	Honorable Scott Drazewski, Judge Presiding.
Intervenors-Appellees.	)	

REPLY BRIEF OF DEFENDANT-APPELLANT KIRK P. ZIMMERMAN

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ARGUMENT

I. Intervenors' Reliance on *Waller v. Georgia* Erroneously Asserts an Equivalency Between Motions *in Limine* and Suppressions Motions/Hearings, and Intervenors Ultimately Fail to Provide any Authority Mandating Application of a Presumption of Access to Motions *in Limine*.

Intervenors argue that the Supreme Court has determined that a presumption of access applies to pretrial suppression hearings, citing *Waller v. Georgia*, 467 U.S. 39, 44-45 (1984), and attempt to analogize those proceedings (which are generally evidentiary in nature) to written motions *in limine* applying the rules of evidence to prejudicial evidence. *Waller*, for several reasons, is entirely distinguishable from the instant case.

As an initial matter, in *Waller*, the Court was examining a **defendant's** objection to the closure of a suppression hearing, based on his Sixth Amendment right to a public trial. The Court "h[e]ld that under the Sixth Amendment any closure of a suppression hearing over the objections of the accused must meet the tests set out in *Press–Enterprise* and its predecessors." *Waller*, 467 U.S. at 47 (citing *Press-Enterprise Co. v. Superior Court of California, Riverside Cty.*, 464 U.S. 501 (1984) ("*Press-Enterprise I*")). The situation here is substantially different: Defendant argues that failure to seal his motions *in limine*, until after trial, would violate his Sixth Amendment right to a fair trial by tainting the jury pool with public disclosure of prejudicial, inflammatory evidence that has been excluded from trial. The *Waller* Court distinguished its own holding from this very factual situation: "One of the reasons often advanced for closing a trial—avoiding tainting of the jury by pretrial publicity . . . —is largely absent when a defendant makes

an informed decision to object to the closing of the proceeding." *Id.* at 47 n.6 (internal citation omitted).

More importantly, *Waller* is inapplicable because at issue in that case involved a suppression hearing, whereas the proceeding in this case concerns Defendant's motions *in limine* to exclude prejudicial evidence. Intervenors insist that this Court should apply *Waller* to this case because "Motions *in limine*, in Illinois criminal cases, play the same role as the suppression hearing in *Waller*." (Brief and Arg. of Intervenors – Appellees, 4 (Nov. 20, 2017).) However, this is a false analogy. The suppression of evidence in a criminal trial is determined according to a defendant's constitutional rights, whereas motions in limine are determined on the Rules of Evidence. *People v. Smith*, 248 Ill. App. 3d 351, 357 (1993). Although courts have referred to motions *in limine* and suppression motions as "analogous," *id.* (citing *Dept. of Public Works & Bldgs. v. Roehrig*, 45 Ill. App. 3d 189, 194 (1976)), the motions are not treated the same way procedurally in criminal courts. *See, e.g., id.* ("the making of a pretrial motion to suppress evidence may be necessary for a defendant to preserve his right to object to evidence on a constitutional ground, while it is unnecessary to file a motion *in limine* to preserve his right to object to the evidence on the basis of evidentiary rules.").

The analysis in *Waller* emphasizes the very characteristics of a hearing on a motion to suppress that are distinguishable from a motion *in limine*, and renders the Court's analysis inapplicable to the motions and proceedings at issue in Defendant's case. For instance, the *Waller* Court, citing the importance of open trials under the Sixth Amendment, found that "a suppression hearing often resembles a bench trial: witnesses are sworn and testify, and of course counsel argue their positions. The outcome

frequently depends on a resolution of factual matters." *Waller*, 467 U.S. at 47. Indeed, the Court recognized:

> The need for an open proceeding may be particularly strong with respect to suppression hearings. A challenge to the seizure of evidence frequently attacks the conduct of police and prosecutor. . . . The public in general also has a strong interest in exposing substantial allegations of police misconduct to the salutary effects of public scrutiny.

Id. None of these considerations are present in a hearing on a motion *in limine* to exclude prejudicial evidence, such as Defendant's motions in this case. Those motions are generally dependent on application of the Rules of Evidence and have no bearing on public concerns such as the conduct of police and prosecutors. *See Smith*, 248 Ill. App. 3d at 357.

Moreover, recognizing that a suppression hearing often results in a guilty plea and is thus determinative of a prosecution, and provides the public its only opportunity to observe the operation of justice in such a case, the Court posited that "suppression hearings are often as important as the trial itself." *Waller*, 467 U.S. at 46-47. Intervenors try to elevate motions *in limine* to the same importance, but again, the comparison fails. Suppression motions often involve evidence that is dispositive as to the guilt or innocence of the accused, whereas motions *in limine* usually deal with more peripheral evidence, such as the kind at issue in Defendant's case, and are merely a strategic, non-dispositive attempt to resolve evidentiary issues prior to a trial on the merits. *See, e.g.*, *People v. Owen*, 299 Ill. App. 3d 818, 822-23 (1998) (discussing value of preliminary ruling on admissibility of defendant's prior convictions, noting that such rulings assist the defense in determining trial strategy). The issues raised in a motion *in limine* need not be ruled upon prior to trial, and often are resolved at the trial itself. *See, e.g., Smith*, 248 Ill.

App. 3d at 357. Often, these evidentiary issues—such as the admissibility of prejudicial evidence—may be raised at sidebar, outside the presence of the jury, and not made accessible to the public until after trial, if at all. *See People v. Pelo*, 384 Ill. App. 3d 776, 781-82 (2008) (presumption of access did not attach to an evidentiary deposition that "has not been submitted into evidence and has not been [presented] in open court," and which "may be edited before any form of it is entered into evidence").

Ultimately, Intervenors' attempt to analogize the motions *in limine* at issue in this case to suppression motions and hearings is unavailing. In analyzing whether the presumption of public access applies, the Supreme Court clearly distinguishes between different types of pretrial proceedings and determines whether the presumption of public access applies to the specific type of proceeding at issue. *See, e.g.*, *Press-Enterprise Co. v. Superior Court of California for Riverside Cty.*, 478 U.S. 1, 8 (1986) ("*Press-Enterprise II*") ("[I]n this setting the Court has traditionally considered whether public access plays a significant positive role in the functioning of the particular process in question."). *See also id.* at 11-12 ("We have already determined… that public access to criminal trials and the selection of jurors is essential to the proper functioning of the criminal justice system. California preliminary hearings are sufficiently like a trial to justify the same conclusion."). To the extent Intervenors attempt to rely on cases examining proceedings other than a motion *in limine* to exclude prejudicial evidence in a criminal case, those cases are distinguishable and do not bind the Court's decision in this matter. Intervenors' attempts to argue that a "public records" analysis dictates a different result must fail under a similar analysis. *See In re Gee*, 2010 IL App (4th) 100275, ¶ 24 ("Although the presumptions [of access] under common law and state statutory law have

different sources, [this Court] has held they are 'parallel' to the first-amendment presumption and has analyzed the three presumptions together."). Intervenors' citations to *Union Oil Co. of California v. Leavell*, 220 F.3d 562, (7th Cir. 2000), an opinion involving a court's sealing of substantially all portions of a case file, and *In re Marriage of Johnson*, 232 Ill.App.3d. 1068 (4th Dist. 1992), a case involving a settlement agreement in a divorce proceeding filed under seal because of the preference of the parties for confidentiality, are distinguishable from the facts of, and substantial interests at issue in, this case. Here, the trial court has sealed the motions at issue only until the jury is selected based on the proper exercise of its discretion. The trial court's decision was correct and should be affirmed.

II. The Trial Court Properly Addressed and Weighed the Interests at Issue in Entering Its Order, and Remand for Restatement of the Trial Court's Order is Unnecessary.

Plaintiff the People of the State of Illinois (the "State") argues that the common law presumption of public access to documents demands additional judicial findings other than those required in analyzing the First Amendment presumption of access, which this Court has recognized as a "parallel" presumption to the common law presumption, and argues that the trial court's ruling is deficient in that respect. Brief and Appx. of Plaintiff-Appellee People of the State of Illinois (the "State's Brief"), 37; *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 231, 730 N.E.2d 4, 16 (2000). Even if separate findings were necessary, the trial court's ruling duly addresses the common law right of access and is not deficient. Despite the State's position that the burden that applies to overcome the common law presumption of access is a lower burden, the State fails to

properly acknowledge that the compelling reasons it recognizes weigh heavily against finding a First Amendment presumption of access to the motions *in limine*—that public access would impede the judicial process, that motions *in limine* have not historically been subject to public access, and that the parties agree that the evidence addressed in these motions *in limine* will not be admitted at trial—necessarily also impact a trial court's discretionary analysis of whether the common law presumption of access has been rebutted. State's Brief at 31 (recognizing no tradition of public access to motions *in limine*), 35 (evidence at issue here will not be offered at trial), 36 (public access to sensitive motions *in limine* will discourage filing them). These considerations relate substantially to the specific factual circumstances of these motions *in limine* and this case.

Ultimately, "whether court records in a particular case are opened to public scrutiny rests with the trial court's discretion, which must take into consideration all facts and circumstances unique to that case." *Skolnick*, 191 Ill. 2d at 231. Here, the trial court, familiar with the charges and history of the case, reviewed the sealed motions at issue, ruled that the motions should be initially sealed, heard representations on the record that the prosecution did not intend to offer the evidence at issue in the sealed motions, then ordered that the motions remain sealed until trial. A12, A71-73. The trial court explicitly cited its discretion and "supervisory power over its own records" in ordering that "the Motions in Limine will remain sealed." The trial court, moreover, referencing *In re Gee*, 2010 IL App (4th) 100275, recognized that the factual matters at issue in the motions in limine in this case "were not subject to disclosure or availability to the public at large" in ordering that they remain sealed, a factual consideration driven by the specific

circumstances of this case, the representations of the State's Attorney that the State did not intend to offer the disputed evidence, and the specifics of the motions. A71. Under these circumstances, there is no need for this matter to be remanded for reconsideration by the trial court to determine whether "sufficient countervailing interests warrant concealing the presumptively public motions," as the State requests. State's Brief at 38. To do so would serve no purpose here, where the trial court has already done what the State requests it redo, and will merely demand that the trial court provide unnecessary elaboration to its prior ruling. The trial court need do no more than it has already done.

CONCLUSION

For the foregoing reasons, Defendant Kirk Zimmerman respectfully requests this Court vacate the Court of Appeals' decision and remand the cause, affirming the trial court's order dated January 3, 2017, granting Defendant's fourth and fifth motions *in limine* and ordering them sealed until after jury selection.

Respectfully submitted,

/s/ John P. Rogers

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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 contained in the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the certificate of service, is 6 pages.

/s/ John P. Rogers

John P. Rogers

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	)	County, Illinois, No.
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	)	Scott Drazewski,
THE ILLINOIS PRESS ASSOCIATION,	)	Judge Presiding.
	)	
Intervenors-Appellees.	)	

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PLEASE TAKE NOTICE that on March 20, 2018, the undersigned submitted for electronic filing the REPLY BRIEF OF DEFENDANT-APPELLANT KIRK P. ZIMMERMAN to the Office of the Clerk of the Supreme Court of Illinois, and served the same on the above-named parties via email at the email addresses shown.

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

Date: March 20, 2018

Respectfully Submitted,

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