IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT IN AND FOR MARTIN COUNTY, FLORIDA

State of Florida	)	
	)	
v.	)	**2016-CF-883**
	)	
Austin Kelly Harrouff	)	

ORDER GRANTING SCRIPPS MEDIA, INC.'S MOTION TO INTERVENE AND PETITION FOR ACCESS AND DENYING DEFENDANT'S MOTION TO RESTRICT MEDIA ACCESS TO AN ITEM IN DISCOVERY (THE DR. PHIL INTERVIEW OF THE DEFENDANT)

THIS CAUSE came before the Court after a hearing on the above styled motions.

Standing of the Media

No one contests that the media is an affected third party regarding the Defendant's motion to restrict public access. The media has standing. *Miami Herald Pub. Co. v. Lewis*, 426 So. 2d 1 (Fla. 1982).

In Camera Review and Limited Discussion of Case Facts

The court has reviewed, in camera, the Defendant's videotaped statement to "Dr. Phil." From its content, it is apparent that this video interview was conducted at the request of the Defendant or, more likely, his father while the defendant was hospitalized after the events giving rise to his arrest. Apparently, the police had absolutely nothing to do with the creation of this item of evidence. The state subpoenaed this material from "Dr. Phil." In addition to this interview, the father of the Defendant did a full blown, one-on-one interview with Dr. Phil discussing this case. That interview was aired on Dr. Phil's nationally broadcast television show just weeks after the homicides in this case.

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In this opinion, the court will only draw necessary legal conclusions regarding its observations of the inspection to resolve the issue subject of the motion. In order to avoid unnecessary judicial comment on this case and to properly preserve the Defendant's right to possible appellate review of this ruling, the court will not describe the contents of the exhibit any further.

Is the Video a Confession Exempt from Public Disclosure under 119.071(2)(c)?

This court, finding no authority to the contrary, agrees with the opinion of the Attorney General, as cited in *Times Pub. Co. v. State*, 827 So. 2d 1040, 1042 (Fla. 2d DCA 2002)(emphasis added) regarding the meaning of the term confession in this provision:

> ***Statutory exemptions to the public's right of access to records must be "narrowly construed."*** Tribune Co., 493 So.2d at 484. The Times and Gutierrez differ on what constitutes the "substance of a confession" referred to in section 119.07(3)(k). We have found no appellate case law interpreting the term "substance of a confession" in reference to section 119.07(3)(k***). The Times and the State cite to an Attorney General opinion for a narrow definition of "substance of a confession."*** See Op. Att'y Gen. Fla. 84-33 (1984). ***The Attorney General opinion defines "substance of a confession" as "the material parts of a statement made by a person charged with commission of a crime in which he or she acknowledges guilt of the essential elements of the act or acts constituting the entire criminal offense." Id.***

The Court finds that the interview does not constitute a confession to first degree premediated murder, or any other charged crime. The statement is not an acknowledgment of guilt as to first degree murder or any other charged crime. It is also not made to law enforcement authorities: thus, it is not a formal confession, to which the section may arguably be limited. Thus, section 119.071(2)(c)'s exception to public disclosure for such is inapplicable.[1]

[1] The court notes for further discussion purposes, as to prejudice regarding a fair trial, its belief that the

Whether Restricting Public Access to this Discovery is Necessary to Preserve the Defendant's Right to a Fair Trial

The media is correct that the Defendant is relying upon a fair-trial rights argument as a basis to restrict access to discovery. However, in the pleadings, the media refers to this as the Defendant "resorting" to such an argument. The media is correct in asserting that the defense request to restrict public access regarding an item released to the defense in discovery is governed by *Florida Freedom Newspapers, Inc. v. McCrary,* 520 So. 2d 32, 35 (Fla. 1988). In *McCrary,* the trial court properly considered the factors contained in the three-prong test of *Miami Herald Publishing Co. v. Lewis*, 426 So.2d 1 (Fla.1982). The *McCrary* trial court properly restricted discovery material that was "graphically incriminating, and containing materials which might not be admissible at trial": in other words, highly prejudicial, possibly or likely inadmissible material. *McCrary*, at 33.

However, as stated in *McCrary* at 34 (emphasis added):

> "The United States Supreme Court has characterized the right to a fair trial ***as the most fundamental of all freedoms*** and one which must be preserved at all costs. *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965). Moreover,
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> > [t]o safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of ***prejudicial*** pretrial publicity. *Sheppard v. Maxwell*, [384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966)] supra. And because of the Constitution's pervasive concern for these due process rights, a trial judge may surely take protective measures **even when they are not strictly and inescapably necessary.**
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> Gannett Co. v. DePasquale, 443 U.S. 368, 378, 99 S.Ct. 2898, 2904, 61 L.Ed.2d 608 (1979). Accord Palm Beach Newspapers, Inc. v. Burk, 504 So.2d 378, 380

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statutory confession exception exists in large part to automatically protect the trial rights of defendants whose cases may involve potentially inadmissible law enforcement confessions. Potential jurors can still be fair when exposed to much pretrial publicity; however, in that scenario it can extremely difficult to find jurors who can put aside *inflammatory* exposure to an inadmissible confession. Therefore, in this court's belief, to generally assist the trial process, the legislature created a blanket, prophylactic statutory rule whereby actual, formal confessions are excluded from public records disclosure. *Noe v. State*, 586 So. 2d 371, 379 (Fla. 1st DCA 1991)(publicity about a confession, though *inflammatory*, it is not enough, standing alone, to warrant a change of venue.)

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(Fla.1987) (**"where a defendant's right to a fair trial conflicts with the public's right of access, it is the right of access which must yield"**); Bundy v. State, 455 So.2d 330, 338 (Fla.1984) (**a balancing test between the right of public access and a defendant's right to a fair trial must be applied so as to recognize the weightier considerations of the defendant**)."

Therefore, this is not much of a "resort." One does not desperately "resort" to preserve fundamental constitutional rights. Defendant seeks to protect a fundamental right. Let there be no doubt that this court has viewed this matter through that lens.

Nevertheless, this Court must apply the *Lewis* three pronged test for closure of judicial proceedings. Miami Herald Pub. Co. v. Lewis, 426 So. 2d 1, 3 (Fla. 1982) Those three prongs are:

1. Closure (restricted access) is necessary to prevent a ***serious*** and ***imminent*** threat to the administration of justice;
2. No less restrictive alternative measures than closure are available; and
3. Closure (restricted access) ***will in fact achieve the court's purpose.***

After viewing the videotape, this Court is of the opinion that restricting dissemination of the videotape to the press at this juncture is not necessary to prevent a serious and imminent threat to a fair trial.

Firstly, and most importantly, the threat is not serious because the tape is ***not prejudicial*** to the Defendant in its content. Put differently, this Court does not believe that exposure by potential jurors to this content will change the status quo regarding the ability of the court and parties to get a fair jury in this case. The court does not liken this situation to exposure by potential jurors to *inflammatory*, likely inadmissible material, as in *McCrary*. With regard to admissibility, for reasons that should not be further elaborated on by this court at this time, it is extremely likely that this case will involve expert evaluation and testimony. *At a minimum*, those experts will be properly allowed to rely upon the item in question in their opinions and testimony. They will take

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into account the Defendant's medical condition at the time of the statement. They will be subject to cross examination as it relates thereto.[2]

As the parties know, the case has already received substantial, nationwide and world-wide press coverage.[3] The national and world press has and will discuss this case, and members of the public will form opinions. This is not a case in which media coverage has been or will be limited to local press coverage. This must be factored into the Defendant's argument regarding not polluting the jury pool of the local venue, where he has a right to be tried.

Extensive media coverage, regardless of venue, does not preclude jurors from serving as long as they can put any formed opinions aside and fairly judge this case on the facts presented at trial, and the testimony of experts regarding those facts. *Bundy v. State*, 471 So. 2d 9 (Fla. 1985) (Mere existence of a preconceived notion as to guilt or innocence is insufficient to rebut presumption of a prospective jurors' impartiality and, as long as juror can lay aside his opinion or impression and render a verdict based on evidence presented in court).

In the Court's analysis, without further judicial comment on the facts of this case or the video as it relates to those facts, this Court can, without reservation, say that the video subject of this ruling does not materially affect that situation whatsoever. In the context of this case, the material is simply not inflammatory or prejudicial at all.

[2] The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. § 90.704, Fla. Stat.

[3] See for instance coverage from England: http://www.dailymail.co.uk/news/article-3966932/Pictures-aftermath-Cannibal-frat-boy-killing-Florida.html, Cosmopolitan magazine: http://www.cosmopolitan.com/lifestyle/a4475312/florida-frat-boy-austin-harrouff-murder; and People magazine http://people.com/crime/dr-phil-interview-face-biter-suspect-austin-harrouff-canceled/

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Secondly, the threat is not imminent. This case is very early on in the trial litigation process. It is likely at least over a year away from proceeding to trial. Experts' review of this case and discovery related thereto will take many months or years.

One can only speculate on how and when the press will disclose to the public the contents of the exhibit in question. It is a fair conclusion that before the actual trial there will be additional press coverage to remind the public of the case. It is not a foregone conclusion that the exhibit in question will be republished in detail at that time. Even it were, the Court's opinion is still that it would not affect the Defendant's right to a fair jury and trial.

Thirdly, the restriction may not in fact achieve the court's purpose. The video in question is a media video. The "Dr. Phil" show possess it. There is no extant order restricting the "Dr. Phil" show from disclosure of this item it possesses. To date, "Dr. Phil" has chosen not to air the interview. Yet, the parties have advised the court that there is no other contractual restriction in place: a legal agreement between the defendant or his representatives conditioning the interview on non-disclosure. Therefore, the Court seriously questions that restriction of public access at this juncture would be meaningful to achieve the purpose. The item was lawfully obtained by "Dr. Phil" and is currently in his possession. There is no request to prohibit "Dr. Phil" from airing the contents of the exhibit. Such a request would have been a request for an impermissible prior restraint. *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 102, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979) (any restraint or sanction on publication of lawfully obtained, truthful information requires "the most exacting" constitutional scrutiny). *Palm Beach Newspapers, LLC v. State*, 183 So. 3d 480, 483 (Fla. 4th DCA 2016).

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The Defendant's motion to restrict public access also alleges that allowing public access will "interfere with the ability of the parties to obtain other evidence, via subpoena and other means, that may determine legal issues in this case." It is not at all apparent to this Court what was attempted to be argued by that assertion. Nor is there any evidence to support it.

Additionally, the Court does not find that the item in question is in any other way confidential under the law.

WHEREFORE, the media's motion to intervene and get access is GRANTED. The Defendant's motion to restrict access is DENIED. At the request of the Defense the Court is granting an automatic stay of this Order for two days to allow the Defendant to seek certiorari review of this Order should he so desire.

DONE AND ORDERED this 22nd day of February, 2017.

Lawrence Mirman

Circuit Judge Lawrence Mirman

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