

Via Email

April 12, 2024

Honorable Juan M. Merchan
Judge - Court of Claims
Acting Justice - Supreme Court, Criminal Term
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New York, NY 10013

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ADA Joshua Steinglass
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Re: *People v. Donald Trump, Ind. No. 71543-23, Press Access to Voir Dire*

Dear Justice Merchan:

We write to you on behalf of the courthouse press corps who regularly report on proceedings in the New York State Unified Court System and plan to cover Donald Trump's criminal trial on a daily basis.

1. We ask that the Court allow at least one pool reporter to be present during all individual voir dire or questioning of potential jurors – that is, to see, hear and report on the entirety of voir dire.
2. We further request that transcripts of court proceedings during the voir dire process, including questioning of potential jurors, be made available immediately.

While we are aware of the Court's protective order shielding the names and addresses of prospective jurors as well as the practice of a 48-hour redaction period for court filings, we believe the public has a compelling right of contemporaneous access to proceedings and documents in this case.

As you are well aware, this trial involves felony charges levied against a former president of the United States and the current presumptive presidential candidate for the Republican Party. The defendant has repeatedly questioned the fairness of these proceedings. Given these facts, we believe the need for transparency – in real time or as close to it as possible – is paramount.

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As described on the New York State Unified Court System website, “all judicial proceedings, both civil and criminal, are presumptively open to the public” in New York state courts under N.Y. Jud. Law 4. Indeed, “The First Amendment to the United States Constitution guarantees the press and the public a right of access to trial proceedings.” *Courtroom Television Network LLC v. State*, 5 N.Y.3d 222, 231 (2005) (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980)); see also *Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d 707,715 (1980).

We recognize that while there is a presumption of openness, the “right of the public and the press to attend court proceedings is not absolute.” *Westchester Rockland Newspapers, Inc. v. Leggett*, 48 N.Y.2d 430, 446-47 (1979).

"The right of public access to trials is subject to the Court's inherent authority to close a courtroom to preserve order and decorum in the courtroom, to protect the parties and witnesses, and to further the administration of justice. See *Matter of Gannet Co. v. De Pasquale*, 43 N.Y.2d 370,377; *People v. Jelke*, 308 N.Y. 56,63 (1954).

However, “this discretion should be exercised only when ‘unusual circumstances necessitate it, and the court must conduct an inquiry to assure that the right to a public trial is not being sacrificed for less than ‘compelling reasons.’” *People v. Jones*, 47 N.Y.2d 409,413-15, cert. denied, 444 US. 946 (1979).”

The media has standing to challenge closure and/or sealing on behalf of the public, and before a proceeding is closed or a record is sealed, “the Court is obligated, where possible, to afford the news media an opportunity to be heard.” *Nat'l Broad. Co., Inc. v. Cooperman*, 116 A.D.2d 287, 289, 501 N.Y.S.2d 405, 406 (2d Dep’t 1986) (citing *Herald Co. v. Weisenberg*, 59 N.Y.2d 378, 383, 465 N.Y.S.2d 862 (1983); *Gannett Co. v. DePasquale*, 43 N.Y.2d 370, 381, 401 N.Y.S.2d 756 (1977), *aff'd*, 443 U.S. 368 (1979); *Poughkeepsie Newspapers, Inc. v. Rosenblatt*, 92 A.D.2d 232, 459 N.Y.S.2d 857 (2d Dep’t 1983), *aff'd*, 61 N.Y.2d 1005, 475 N.Y.S.2d 370 (1984)).

The right of the press to attend voir dire is well established (*Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501 (1984)). “The ability of the public to observe questioning of [jurors] is important, both so that the judge, the lawyers and the prospective jurors will be conscious that they are observed, and so that the public can evaluate the fairness of the jury selection process.” *Id.* (citing *Martin*, 16 N.Y.3d at 613).

“Jury selection is open to the public and closure is permitted only when there is an overriding interest essential to preserve a higher value and closure is narrowly tailored to serve that interest,” according to the New York courts’ guide on [Access to Court Records](#).

According to the access guide, “the constitutional provisions at issue in criminal actions involve the defendant's guarantees of a public trial under the Sixth and Fourteenth Amendments. Any restriction on public access depends upon the balancing of the First Amendment guarantees of public access with the defendant's guarantees to a public trial and the public interest in closure.”

The function of individually questioning jurors is either to avoid tainting the larger jury pool or

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to protect juror privacy, as described in the New York State Unified Court System's guide to Implementing New York's Civil Voir Dire Law and Rules. We believe the same principles apply in a criminal matter.

While we understand the Court may exercise its discretion in not allowing the pool reporter to be present for questioning that relates to intimate personal or medical matters, we believe the press should be present for any individual questioning that may address the "risk that one juror's responses to questions will affect other jurors' attitudes or opinions" or "when there is an indication that a juror may have some bias or experience that could impact on service."¹

We are aware of numerous high-profile cases in both state and District courts in New York where the press was granted access to observe and report on the jury selection process, including the Second Circuit's opinion in *ABC v. Martha Stewart* (1:03-cr-00717-MGC-1).²

Other cases in which an individual pool reporter has been present during the questioning of jurors out of the presence of other jurors include but are not limited to: *People v. Shamel Borroughs* (Brooklyn State Supreme Court Justice Gloria Goldstein, 14722/1992); *US v. John Gotti* (171 F.R.D. 19 EDNY. 1997), *US v. Sheikh Omar Abdel Rahman* (SDNY US District Judge Michael Mukasey 1:93-cr-00181-PKC-12); *US v. Martin Shkreli* (US District Judge Kiyoo Matsumoto EDNY, 1:15-cr-00637-KAM-1); *US v. Imelda Marcos* (1:87-cr-00598-JFK-5, US District Court Judge John Keenan SDNY); *US v. Michael Steinberg, Anthony Chiasson, Todd Newman* (US District Judge Richard Sullivan SDNY, 1:12-cr-00121-RJS); *US v. Charles Schwarz* (US District Judge Reena Raggi, 1:98-cr-00196-RXR-3); *US v. Billy Walters*

¹ [IMPLEMENTING NEW YORK'S CIVIL VOIR DIRE LAW AND RULES](#), 2009, Pfau, p.15. - "*G. Questioning out of the presence of other jurors: In order to protect juror privacy and avoid the risk that one juror's responses to questions will affect other jurors' attitudes or opinions, when there is an indication that a juror may have some bias or experience that could impact on service, the juror may be questioned at that time individually and out of the presence of others.*"

p. 7 - "*As a result of responses to these general questions, some prospective jurors may immediately be questioned individually and out of the presence of other jurors. Challenges for cause or consent excusal of jurors anywhere in the panel may occur after these general questions are asked. 12 As needed, counsel may question members of the panel individually and out of the presence of the other jurors.*"

² The District Court Judge ruled that "no member of the press [could] be present for any voir dire proceedings [to be] conducted in the robing room" and that, instead, "a transcript of each day's voir dire proceedings [would] be made public the following day, with the names of prospective or selected jurors redacted from the transcripts, as well as such deeply personal information as any juror [should] reasonably request not be made public." *United States v. Stewart*, No. 03 Cr. 717, slip op. at 3, 2004 WL 65159, 2004 U.S. Dist. LEXIS 426 (S.D.N.Y. Jan. 15, 2004). The Second Circuit later ruled that this wasn't adequate: "Documentary access is not a substitute for concurrent access, and vice versa. . . . Where a right of access exists, a court may not deny access to a live proceeding solely on the grounds that a transcript may later be made available. Such a transcript would not fully implement the right of access because some information, concerning demeanor, non-verbal responses, and the like, is necessarily lost in the translation of a live proceeding to a cold transcript."

The court also ruled: "A trial transcript is no substitute for a public presence at the trial itself. As any experienced appellate judge can attest, the cold record is a very imperfect reproduction of events that transpire in the courtroom." (internal quotation marks omitted); *Soc'y of Prof'l Journalists v. United States Sec'y of Labor*, 616 F.Supp. 569, 578 (D.Utah 1985). "[T]he full flavor of [a] hearing cannot be sensed from the sterile sheets of a transcript. Emotions, gestures, facial expressions, and pregnant pauses do not appear on the reported transcript. Much of what makes good news is lost in the difference between a one-dimensional transcript and an opportunity to see and hear testimony as it unfolds." (citation omitted).

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(1:16-cr-00338-PKC, US District Judge P. Kevin Castel SDNY); US v. Jia Hou and Xing Wu Pan (US District Judge Richard Sullivan SDNY, 1:12-cr-00153-RJS-2); US v. Michael Avenatti (US District Judge Paul Gardephe SDNY, 1:19-cr-00373); US v. Keith Raniere (US District Judge Nicholas Garaufis EDNY, 1:18-cr-00204); US v. Joaquin “El Chapo” Guzman (US District Judge Brian Cogan, 1:09-cr-00466); and People v. Harvey Weinstein (NY State Supreme Court Justice James Burke, 02335/2018).

If the Court does not intend to follow the Second Circuit's ruling from Stewart – and to be clear, we strongly urge that it should – at the very least, we request the Court order the timely public release of full transcripts to mitigate the harm caused by this plain denial of access.

For all the reasons above, we seek to have a pool reporter present at the questioning of potential jurors out of the presence of other jurors, as well as timely access to transcripts of those proceedings.

Respectfully,

Frank G. Runyeon
Law360

Alice Gainer
WCBS

Emily Saul
New York Law Journal

Kennett Werner
The Economist

Molly Crane-Newman
New York Daily News

Janon Fisher
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Laura Italiano
Business Insider

Erik Uebelacker
Courthouse News Service

Michael Sisak
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