VIRGINIA:

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JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	:	
vs.	:	Criminal No. FE-2014-1313
JESSE MATTHEW	:	
Defendant.	:	

DEFENDANT'S OPPOSITION TO THE NEWS MEDIA'S MOTION TO CONTINUE ELECTRONIC COVERAGE OF THE PROCEEDINGS

COMES NOW the defendant, Jesse Matthew, by counsel, Dawn M. Butorac and Robert Frank, and files his opposition to the News Media's motion and states as follows:

There is no constitutional right to use cameras in court to report on a trial or court proceedings. See Virginia Broadcasting Corporation v. Virginia, 286 Va. 239, 254 (2013). Mr. Matthew's right to a fair and impartial trial would be significantly impaired by the presence of cameras in the courtroom and the rights of a defendant are the most paramount concern to be considered, therefore, the News Media's motion should be denied.

To begin with, the News Media applies the wrong standard when advocating the court must find good cause to not permit cameras in the courtroom. See The News Media's brief, pages 2 and 3. "The initial decision whether to permit electronic media coverage in the courtroom is solely within the discretion of the trial court." Virginia Broadcasting Corporation v. Virginia, 286 Va. 239, 252 (2013). "The trial court [is] not required to apply the good cause standard for its initial determination whether to permit a camera in the courtroom." Id. at 253.

Mr. Matthew's case has received an extensive amount of publicity, mostly because of pending charges in another jurisdiction. It was only after Mr. Matthew's arrest on those charges

that the charges in Fairfax were brought. There are cases similar to the charges that Mr. Matthew faces that are in the Fairfax County courts on a regular basis that are not subject to media scrutiny or report. Yet, because of unrelated charges in Charlottesville and Albemarle County, Mr. Matthew's case in Fairfax has become a "case of immense local and national interest." That is most certainly not a reason to allow cameras to record his trial and any pre-trial proceedings.

The United States Supreme Court "has long recognized that adverse publicity can endanger the ability of a defendant to receive a fair trial." Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 378 (1979) citing Sheppard v. Maxwell, 384 U.S. 333 (1966), Irving v. Dowd, 366 U.S. 717 (1961), Marshall v. United States, 360 U.S. 310 (1959), Cf. Estes v. Texas, 381 U.S. 532 (1965). "To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity." Id.

Pre-trial proceedings

If any of Mr. Matthew's pre-trial hearings are recorded, it will serve only to taint any potential jury pool both in Fairfax and any other jurisdiction wherein Mr. Matthew has pending charges. It is important to note that the other charges against Mr. Matthew include not only the pending charge of abduction with the intent to defile but also possibly other sex offenses, murder, and/or capital murder. Because of the publicity already focused on this case, it will be difficult enough to select a fair and impartial jury. If any additional information is broadcast to the masses, that difficulty will grow exponentially.

In Gannett Co., Inc. v. DePasquale, the United States Supreme Court held that there was no constitutional violation by excluding the media from a pre-trial suppression hearing. Gannett, 443 US. at 394. The holding was based in part on the fact that the 6th Amendment guarantee of a

public trial was for the benefit of the defendant so he could be fairly dealt with and not unjustly condemned. Id. at 381. The Court also held that the public interest in the administration of justice was protected by the participants to the litigation. Id. at 384. The Supreme Court ultimately agreed with the trial court's rationale for precluding the media from the suppression hearing because the defendant's right to a fair trial outweighed that of the media to be present for the proceedings. Id. at 392-394.

In the context of pre-trial motions, the topics very often being discussed are the inadmissibility of certain evidence and the exclusion of certain testimony. The jury pool would become aware of information that may not actually come in at a trial and taint their ability to be fair and impartial. For that type of information to be broadcast would inhibit Mr. Matthew's right to a fair trial. As such, all pre-trial proceedings should not be covered by electronic media.

Trial

"Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the *sin qua non* of a fair trial." Estes v. Texas, 381 U.S. 532, 540 (1965). As such, "the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs." Id. The Supreme Court found that unfairness existed at several levels when a trial is televised: 1) the potential impact of the television on the jurors, 2) the quality of testimony being impaired because it will affect the manner in which a witness testifies and because the rule on witnesses becomes moot, 3) the additional responsibility the presence the electronic media places on the trial judge because it divides the judges attention between assuring a fair trial to the accused and the supervision of the cameras, and 4) the impact it would have on the defendant as it will open him up to heightened scrutiny and possibly infringe on his ability to speak freely with counsel. Id. at 544-549.

While Estes would seem to stand for a per se exclusion of television cameras from a trial, subsequent cases from the Supreme Court have held that having photographic or broadcast coverage is not inherently a denial of due process. See Chandler et al. v. Florida, 449 U.S. 560, 574. The News Media's brief suggests that the Supreme Court in Chandler held that electronic coverage did not hamper a defendant's right to a fair trial. See The News Media's brief, page 3, FN 1. That would be an inaccurate reading of that case. Chandler simply stands for the proposition that the Supreme Court found no constitutional violation in a state statute that allowed an experimental program that permitted cameras in courtrooms. Contrary to the assertion of the News Media, the Supreme Court actually found that the program in Florida that allowed electronic media in the courtroom carried with it "the risk of prejudice to particular defendants" that "must be examined carefully as cases arise." Chandler, 449 U.S. at 582. Furthermore, the Court did not endorse or invalidate the program, but was satisfied that with the judicial oversight present in the statute allowing media coverage, it was not unconstitutional. Id. at 582-583.

The News Media asserts that other high-profile cases have been televised without any prejudice to either party. However, the News Media does not offer anything other than the assertion to support that contention. Defense counsel for Mr. Matthew has spoken to attorneys involved in televised cases and, anecdotally, the opposite assertion was made. For example, specific witnesses were not called to testify for fear of retaliation in their personal and professional lives based on their support of the defendant at trial. That decision was made based solely on the fact that the witness would have been on television if they testified. It is a clear violation of one's right to a fair trial if an attorney can't call a favorable witness to aid the defendant.

Even if this court finds that fact that other cases have been televised as somehow persuasive, Mr. Matthew's case is markedly different than any other case mentioned in the News Media's brief. Specifically, he has another case pending, which at this point, has been continued until after the currently set trial date. As such, any coverage of his Fairfax case will affect the proceedings in Charlottesville and Albemarle County. While it would be hard to quantify the prejudice to Mr. Matthew, it would defy common sense to suggest that watching the trial proceedings in a trial that involves an abduction with the intent to defile charge would not affect potential jurors for a case involving the exact same charge. As "our system of law has always endeavored to prevent even the probability of unfairness," the prejudice inherent in broadcasting the trial significantly outweighs any rights of the News Media to have cameras in the courtroom for Mr. Matthew's trial. Sheppard v. Maxwell, 384 U.S. 333, 352 (1966).

Throughout the News Media's brief, the right of access to trials is conflated with the right to have cameras in the courtroom. It is important to note that the right to access to a trial is not the same as being able to broadcast court proceedings or to take photographs during the court proceedings. The case of Virginia Broadcasting Corp. v. Virginia, 286 Va. 239 (2013) best demonstrates the importance of that difference. In that case, the media was denied the ability to broadcast the trial of Mr. Huguely, a highly publicized case wherein the defendant was charged with the murder of his former girlfriend, Yeardley Love. The trial court found that the impact of cameras on the juror and the witnesses was sufficient to preclude cameras from the trial. The media requested to have cameras in the courtroom for the sentencing hearing in the case. That request was again denied based on two main principles: first, the court was concerned about the effect of cameras on the witnesses and, second, the court was concerned about the effect the coverage would have on the potential witnesses and jurors involved in a pending civil suit that

Ms. Love's family had against Mr. Huguely. Virginia Broadcasting Corp. v. Virginia, 286 Va. 239, 244 (2013).

The Virginia Supreme Court found that it was not an abuse of discretion for the trial court to consider those factors and exclude cameras from the courtroom. Specifically, the Court found that the chilling effect on the witness testimony was a legitimate concern. Additionally, the trial court's consideration of pending litigation involving the same parties was found to be a valid basis for the trial court's decision.

Mr. Matthew's situation is very similar to that in Mr. Huguely's case. While the pending litigation does not involve the same parties, it is a case involving similar charges and could potentially involve a capital murder charge. Clearly, the punishment at stake in a murder charge is much greater than the possible consequences in a civil suit and it was not an abuse of discretion to consider that in prohibiting cameras in the courtroom. Additionally, because of the intensity of the media attention to Mr. Huguely's case, it was not an abuse of discretion to consider the effect of cameras on the potential witnesses; the same rationale applies to Mr. Matthew's case.

"No right ranks higher than the right of an accused to a fair trial." Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501, 508 (1984). To preserve Mr. Matthew's right to a fair trial, cameras should not be permitted in court for any pre-trial proceedings as well as a trial.

WHEREFORE, the defendant respectfully requests that this court deny the News Media's motion.

Respectfully submitted

JESSE MATTHEW
By Counsel

OFFICE OF THE PUBLIC DEFENDER

By: [redacted]
Dawn M. Butorac
Deputy Public Defender
4103 Chain Bridge Road, Suite 500
Fairfax, Virginia 22030
(703) 934-5600

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion was delivered, this 5 day of January, 2015, to the Commonwealth Attorney's Office, 4110 Chain Bridge Road, Fairfax, Virginia 22030 and to counsel for the News Media, via facsimile, at (703) 647-5953.

[redacted]
Dawn M. Butorac