THE STATE OF NEW HAMPSHIRE

GRAFTON, SS. **SUPERIOR COURT**

No. 01-S-199, 200, 711, 712, & 02-S-117

State of New Hampshire

vs.

Robert Tulloch

ORDER ON PETITION FOR ENTRY OF ORDER TO PERMIT VIDEOTAPING, AUDIO RECORDING, AND PHOTOGRAPHING IN THE COURTROOM

WBZ-TV, WBZ-AM Radio, WMUR Channel 9, The Boston Globe, Courtroom Television Network, LLC, and the Massachusetts and New Hampshire Associations of Broadcasters, (hereinafter "the petitioners"), request that the Court enter an order permitting them to videotape, record, and photograph the remaining proceedings in the matter of the State v. Robert Tulloch. Robert Tulloch is charged with two counts of first-degree murder. For the reasons that follow, the petition is DENIED.

Two of the petitioners, Courtroom Television and WBZ-AM Radio, have made previous requests to be allowed to videotape, record, and photograph inside the courtroom for the Tulloch proceedings. On May 3, 2001, the Court (Smith, J.) denied those requests, finding that the presence of electronic media in the courtroom could, for a number of reasons, lead to possible infringement of the defendant's rights and compromise the dignity of the Court. The petitioners now come before the Court requesting that it allow electronic media inside the courtroom on

the ground that they have a presumptive constitutional right to videotape, record, and photograph during the Tulloch proceedings. The petitioners contend that recent federal and state case law has held that the public and the press have a presumptive, constitutional right to access and observe courtroom proceedings. They further contend that in a time when most of the public receives information through electronic media, the words "access and observe" contemplate a presumptive right of the media to use electronic equipment in the courtroom. The petitioners claim that this presumptive right of access by the media can only be overcome on a case-by-case basis, and only where the court cannot find any less restrictive means. The Court disagrees. As the following analysis will demonstrate, there exists no basis for the claim that either the federal or state constitutions grant a presumptive right for electronic equipment to be allowed into the courtroom.

I. State Law Analysis

The petitioners have invoked the protection of the New Hampshire constitution, and therefore the Court is obligated to address that claim first. See State v. Ball, 124 N.H. 226, 231-32 (1983).

The petitioners contend that the New Hampshire constitution, Part I, art. 8 and Part I, art. 22, grant the press a presumptive right to videotape, record, and photograph the Tulloch

proceedings. The constitutional provisions cited by the petitioners do not expressly provide for such a right. Part I, art. 8 provides that

> [a]ll power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore should be open accessible, accountable, and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.

Part I, art. 22 provides that, "[f]ree speech and liberty of the press are essential to the security of freedom in a state: [t]hey ought, therefore, to be inviolably preserved." In light of the fact that the express language of these provisions does not create a right to videotape, record, and photograph judicial proceedings in the State of New Hampshire, the Court will look to the New Hampshire Supreme Court jurisprudence that the petitioners contend provides an implied, presumptive right.

The first case the Court examines is the Petition of Keene Sentinel, 136 N.H. 121 (1992). The case involved a newspaper's attempts to examine court records of divorce proceedings of a candidate for public office. Petition of Keene Sentinel, 136 N.H. at 123-24. The Superior Court denied the request for access, finding that, "despite a longstanding policy in this state favoring open judicial proceedings, and court records," there was no evidence that the trial judge [in the divorce proceedings] erred in sealing the records. Id. at 124. On appeal, the New

Hampshire Supreme Court reversed and remanded, holding that, the burden of proof, in such cases, is on the party seeking nondisclosure, because "the presumption is strongly in favor of open judicial proceedings and unsealed records." Id. at 127. (citation omitted). To overcome this presumption, the Superior Court needed to find a compelling interest that would justify preventing public access to the records. Id.

This Court finds the Keene Sentinel decision unpersuasive as to the petitioners' argument that the state constitution creates a presumptive right for the media to videotape, record, or photograph proceedings in the courtroom. First, the facts in the Keene Sentinel case are distinguishable from those in the present case. In the Keene Sentinel petition, a newspaper was seeking access to sealed court records to which no member of the press or public had access. In the present case, the petitioners are seeking to gather, in electronic form, information on criminal proceedings that are already open to the press and public. Second, this Court does not dispute the presumption of open judicial proceedings, nor does it question the premise that news gathering and reporting are "essential to the security of freedom in a state." See id. at 127 (citation omitted). The Court, however, disagrees with the petitioners' contention that the introduction of electronic media equipment into the courtroom guarantees the security of freedom in the state. The present

openness of the Court's proceedings in Tulloch, which allow members of the press to freely gather and disseminate any information they wish, satisfies the constitutional requirements of Part I, arts. 8 & 22.

The Court next addresses the petitioners' citation to the Opinion of the Justices, 117 N.H. 386 (1977). The opinion was issued in response to a query by the Senate and the Council as to whether the state constitution prevented the Governor or Council, in a proceeding to remove a state official, from ordering a witness to disclose sources he utilized in preparing a series of articles related to the performance of the official. See Opinion of the Justices, 117 N.H. at 388. The Court held that Part I, art. 22 of the state constitution did in fact prevent the Governor and Council from taking such an action. See id. at 389. In support of its conclusion the Court noted that, "[o]ur constitution quite consciously ties a free press to a free state, for effective self-government cannot succeed unless the people have access to an unimpeded and uncensored flow of reporting. News gathering is an integral part of the process." Id.

The petitioners argue that the Supreme Court's language supports unrestricted news flow to the public, and that this Court's order impedes that flow of information. The petitioners take the Supreme Court's language out of context. The facts surrounding the narrow holding in the opinion under discussion

contemplate avoiding a chilling effect on the gathering of news, by exposing the identity of news reporters' sources. In the present case, the Court's order will have no chilling effect on the gathering of news, as the Tulloch proceedings are open to the media, and they are free to gather any information they wish. The petitioners' argument goes more to a restriction of the manner in which news is gathered in the courtroom, rather than a restriction of its content. Therefore, while the Court agrees that news gathering is an integral component to the maintenance of a free, self-governed state, the Court disagrees with the petitioners' argument that an order not allowing video recorders, cameras, or tape recorders will impede or censor the flow of information on the Tulloch proceedings to the public.

The final two cases upon which the petitioners rest their state constitutional argument are Keene Publishing Corp. v. Cheshire County Superior Court, 119 N.H. 710 (1979)(per curiam), and Keene Publishing Corp. v. Keene Dist. Ct., 117 N.H. 959 (1977). Both cases involved New Hampshire courts and the right of the press to gather news from judicial proceedings.

In the Cheshire County Superior Court case, the petitioner requested that the Supreme Court review a Superior Court ruling that counsel for newspaper publisher attend pretrial hearings on motions to suppress so as to advise his client what information obtained during the hearings could be published. Cheshire County

Superior Court, 119 N.H. at 711. The Supreme Court granted relief to petitioner on the ground that the Superior Court order was a prior restraint on the press, the least tolerable of all First Amendment infringements. Id. at 712.

In the Keene District Court case, the Court ordered a probable cause hearing closed to the press and the public, causing the petitioner to request relief from the Supreme Court. Keene Dist. Ct., 117 N.H. at 960. The Supreme Court, in vacating the order, held that there is a presumption in favor of open judicial proceedings, and that the burden is on the party moving for closure to demonstrate the necessity of such action and the lack of effectiveness of alternative procedures. Id. at 962-63.

The Court finds nothing in either the Cheshire County Superior Court case, or the Keene District Court case that provides support for the petitioners' claim that the New Hampshire constitution supports a presumptive right for the press to bring electronic equipment into the courtroom. The petitioners again utilize language from "right of access" cases that have different factual circumstances and whose holdings are specific to those factual circumstances. In the Cheshire County Superior Court case, the Supreme Court explicitly noted that the case did not present a closure issue, but instead, involved a prior restraint on the press. Cheshire County Superior Court, 119 N.H. at 712. The petitioners do not contend, nor could they, that the Court is

attempting a prior restraint on the press. The Supreme Court does discuss, in dicta, the policy for the closure of judicial proceedings to the press, but it is clear that the procedure outlined applies only to the press' right to attend and observe proceedings. As has been previously stated, the Court is not denying the press the right to attend and observe the Tulloch proceedings.

The Keene District Court case is similar to Press-Enterprise II, 478 U.S. 1 (1986), in the federal jurisprudence discussion; see infra at 13-14, in that it involves an attempt by the Court to completely exclude the press and the public from a pre-trial proceeding. See Keene District Court, 117 N.H at 960. As with its federal law counterpart, the Keene District Court decision found that the complete closure to outsiders of a judicial proceeding, without a demonstration of necessity and narrow tailoring, impinges on the state constitutional right to gather news. See id. at 963. The Court's decision, while clearly focusing on the right of the press to be present and gather news, does not state that the press has presumptive, constitutional right to determine the manner in which that news will be gathered. In the present case, the press will have the right to be present and gather news, as the courtroom will be open during the Tulloch proceedings; this Court's May 3, 2001 order does not impinge on that right. However, consistent with the foregoing New Hampshire

jurisprudence, the press will not be allowed to gather news, inside the courtroom, in the manner it deems fit. It is clear that New Hampshire Superior Court Rule 78 provides the trial judge with the discretion to decide the manner in which the press will gather news inside the courtroom. See infra at 18-21.

Therefore, consistent with foregoing analysis of New Hampshire jurisprudence, the Court finds that the state constitution does not grant a presumptive, First Amendment right to bring electronic equipment into the courtroom.

II. Federal Law Analysis

The United States Supreme Court first analyzed the constitutional implications of electronic media in the courtroom in Estes v. Texas, 381 U.S. 532 (1965)(plurality). The Estes case involved a petitioner who claimed his right to due process pursuant to the Fourteenth Amendment had been violated by the televising and broadcasting of his trial. Estes, 381 U.S. at 535. The Court agreed with the petitioner, holding the atmosphere created by the media in the courtroom infringed on the defendant's right to a fair trial. Id. The Court in Estes directly addressed the question of whether the First Amendment extends a right to the news media to televise from the courtroom:

> It is said...that the freedoms granted in the First Amendment extend a right to the news media to televise from the courtroom, and that to refuse to honor this privilege is to discriminate between newspaper and

> television. This is a misconception of the rights of the press. While the state and federal courts have differed over what spectators may be excluded from a criminal trial, (citation omitted), the *amici curie* brief of the National Association of Broadcasters and the Radio Television News Directors Associations, says, as indeed it must, that "neither of these two [First and Sixth] amendments speak of an unlimited right of access on the part of the broadcast media."

Id. at 539.

Justice Harlan, in his concurrence reiterated this fact, stating that, "[n]o constitutional provision guarantees the right to televise trials." Id. at 588.

The Supreme Court did not, however, foreclose future consideration of allowing electronic media into the courtroom in Estes. The Court remarked that, "[w]hen advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case." Id. at 540. Justice Harlan's concurrence echoed the same sentiment, when he stated,

> the day may come when television will have become so commonplace as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process...if and when that day arrives the constitutional judgment called for now would...be subject to reexamination."

Id. at 595-96.

The petitioners contend that these statements left open the possibility that the Court would reconsider their judgment in Estes, and find that the presence of electronic media does not violate a defendant's due process.

The Court did revisit Estes, in a limited sense, in Chandler v. Florida, 449 U.S. 560 (1981). In that case, the Court held that televising a trial against the wishes of two criminal defendants was not a violation of their due process rights. Chandler, 449 U.S. at 582-83. Chandler clarified Estes by holding that the latter does not require a per se ban on electronic media in the courtroom. Id. at 574. Chandler, however, does not stand for the proposition that the media has a constitutional right to have electronic equipment in the courtroom. The Court, this time speaking with unanimity, stated that:

> [w]hile we have concluded that the due process clause does not prohibit electronic media coverage of judicial proceedings per se, by the same token we reject the argument of the [Post-Newsweek stations] that the first and sixth amendments to the United States Constitution mandate entry of electronic media into judicial proceedings.

Id. at 569.

Thus, for the second time in two decades, the Court explicitly rejected the notion that the federal constitution gives electronic media the right to be in the courtroom.

Nevertheless, the petitioners contend that other, recent Supreme Court jurisprudence confirms their claim that under the federal constitution there exist a presumptive right for electronic media to have access to the courtroom. In support of their contention, the petitioners rely heavily on Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)(plurality). The

Court finds that the petitioners' reliance on Richmond Newspapers is misplaced. First, Chandler was decided one year after Richmond Newspapers. Therefore assuming, arguendo, that Richmond Newspapers implied a presumptive right, based on the federal constitution, for electronic media to be present in the courtroom, that implied right would have been quashed by the Court's explicit statements to the opposite in Chandler.

Second, a detailed reading of Richmond Newspapers does not reveal any grounds on which the petitioners argument would find support. As a preliminary matter, we note that the facts in Richmond Newspapers are very different from the facts in the present petition. In Richmond Newspapers, a Virginia trial court judge, upon a motion from defense counsel, ordered the courtroom closed to all members of the public and press. Richmond Newspapers, 448 U.S. at 549. The appellant, a newspaper company, requested that the order be vacated. Id. Their request was denied. Id. In the present matter, the Court has only ordered that electronic media devices be kept out of the courtroom. Nothing in the Court's order prevents any member of a television station, radio station, newspaper, or the general public as a whole from attending the proceedings in the matter of State v. Tulloch.

As to the Court's holding in Richmond Newspapers, the Supreme Court, relying on extensive traditions in Anglo-American law, held

that "the right [of the public and the press] to attend criminal trials is implicit in the guarantees of the First Amendment[.]" Id. at 580. Accordingly, the trial judge could not order the courtroom closed to members of the press and public, "absent an overriding interest articulated in findings." Id. at 581. This Court notes, however, that the concerns that Richmond Newspapers address are not implicated in the present petition as the Court is not seeking to close the proceedings to either the press or the public. Therefore, consistent with Richmond Newspapers, the Court need not articulate an overriding interest, as there is no fundamental right implicated by not allowing electronic equipment into the courtroom. Without question, the Supreme Court's decision in Richmond Newspapers is a powerful statement about the intrinsic value of open trials, but this Court fails to see how the opinion could be construed as the granting a presumptive, constitutional right to allow electronic media into the courtroom.

The petitioners also rely on the Supreme Court's decisions in the Press-Enterprise cases. In Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (Press-Enterprise I), a California trial judge denied the defendant's motion to open juror selection to the public and press. Press-Enterprise I, 464 U.S. at 503. The judge, agreeing with the State's objection, found that having the press attend juror voir dire would affect juror candor. Id. The Supreme Court vacated the decision and remanded, holding that the

guarantees of open, public proceedings in criminal trials covers proceedings for voir dire examination of potential jurors. Id. at 508-09. In Press Enterprise Co. v. Superior Court, 478 U.S. 1 (1986)(Press-Enterprise II), a California Magistrate granted a criminal defendant's motion to exclude the public from a preliminary hearing on a complaint. Press-Enterprise II, 478 U.S. at 4. Press-Enterprise sought access to the transcript of the hearing, and was denied by the Court. Id. at 5. The Supreme Court reversed, holding that there is a qualified, First Amendment right of access to preliminary, criminal hearings. Id. at 10.

The Supreme Court's decisions, in both Press-Enterprise I and Press-Enterprise II, relied on its holding in Richmond Newspapers. More specifically, the Court found that there was a tradition of accessibility in both preliminary hearings and juror selection in criminal trials. See Press-Enterprise I, 464 U.S. at 505-08; see also Press-Enterprise II, 478 U.S. at 8. Moreover, the Court found that there were specific benefits that adhered to the presence of public and press at both preliminary proceedings and juror selection in criminal proceedings. See id. These conclusions are consistent with Richmond Newspapers' findings that public access to criminal trial proceedings is deeply rooted in the traditions of Anglo-American law, and that open, criminal proceedings provide specific benefits to the trial process and society as a whole. See generally Richmond Newspapers, 448 U.S.

555.

The Court finds, however, that neither Press-Enterprise I, nor Press-Enterprise II, set forth any new constitutional consideration that was not already set forth in Richmond Newspapers. As discussed above, the Supreme Court's Richmond Newspapers concerns are clearly not applicable in the petition before the Court, as the Court has not closed access to the public or press for the Tulloch proceedings. See supra at 11-12. While Press-Enterprise I and Press-Enterprise II did expand the breadth of Richmond Newspapers, by holding that the public and press has a right of access to preliminary proceedings and jury selection, they did not expand the First Amendment right of access by granting the press a constitutional right to have electronic equipment at those proceedings. Therefore, the petitioners' reliance on the Press-Enterprise cases is misplaced.

Likewise, petitioners' reliance on Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), is misplaced. In Globe Newspaper, a Massachusetts trial court, relying on a Massachusetts statute providing for the exclusion of the general public from trials of specified sexual offenses involving victims under the age of 18, ordered the exclusion of the press and public from the courtroom during the trial of a defendant charged with the rape of three minor girls. Globe Newspaper, 457 U.S. at 599. The Supreme Court reversed, holding that the statute, as construed by the

Massachusetts Supreme Judicial Court, violated the First Amendment. Id. at 610-11. While the Supreme Court recognized that the right of access to criminal trials is not an absolute one, it held that the State must show that the denial of such a right is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest. Id. at 606-07. The Supreme Court, once again, looked to its analysis in Richmond Newspapers to provide support for its conclusions. See id. at 604-05.

Petitioners in the present case contend that this Court has not offered a viable, compelling interest to justify the denial of their right to bring electronic equipment into the courtroom, and even if the Court has, the Court has not shown that its denial is narrowly tailored to serve that interest. The petitioners' contention, and reliance on Globe Newspaper in support of that contention, is mistaken for the same reason that their reliance on Richmond Newspaper and the Press-Enterprise cases was misplaced. In each of the aforementioned cases, the trial court involved ordered the complete closure of the courtroom to the press and public for some portion or all of the criminal proceeding. See supra at 11-14. The closure impinged on what the Supreme Court held in Richmond Newspapers to be fundamental right imbued in the First Amendment: the right of the press and public to attend and observe criminal proceedings. See Richmond Newspapers, 448 U.S. at 589. Accordingly, when a fundamental right is impinged, the

offending party must show that that the denial of the right is necessitated by a compelling governmental interest that is narrowly tailored to serve that interest. See Globe Newspaper, 457 U.S. at 606-07.

As previously mentioned, however, the Court in the present case has not denied the petitioners' right to attend and observe the proceedings in State v. Tulloch, it has only prohibited the use of electronic equipment by media. Moreover, the Supreme Court has explicitly disavowed that the media has a right, imbued in the First or Sixth Amendment, to use electronic equipment in the courtroom. See Estes, 381 U.S. at 539; see also Chandler, 449 U.S. at 569. Therefore, in the present matter, there is no fundamental right that is being impinged upon by this Court. Accordingly, the Court is not required to show that its denial is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest.

Finally, the Court addresses the petitioners' request that it look to the decision of a Federal District Court in Katzman v. Victoria's Secret Catalogue, 923 F. Supp. 580 (S.D.N.Y. 1996), for instruction. In Katzman, the Courtroom Television Network petitioned to be allowed to televise civil proceedings involving alleged violations of RICO and the Lanham Act. Katzman, 923 F. Supp. at 582. The District Court, pursuant to its authority under Local Rule 7, granted the petition. Id. at 584-85. The District

Court went further, however, and noted that

> twenty two years after the Estes holding, the advances in technology and the...experiments [in field of televised proceedings] have demonstrated that the stated objections can readily be addressed and should no longer stand as a bar to a presumptive First Amendment right of the press to televise as well as publish court proceedings, and the public to view those proceedings on television.

Id. at 589.

This Court disagrees with the District Court's finding in Katzman that there exists a presumptive, First Amendment right of the press to televise proceedings. As a preliminary matter, the Court notes that a Federal District Court decision outside the First Circuit has limited persuasive authority. Moreover, the District Court's decision in this case was a step that the Second Circuit was not prepared to take. The Second Circuit, in Westmoreland v. Columbia Broadcasting Sys., Inc., 752 F.2d 16 (2d Cir. 1985), stated that

> there is a long leap...between a public right under the First Amendment to attend trials and a public right under the First Amendment to see a given trial televised. It is a leap that is not supported by history. It is a leap that we are not yet prepared to take. It is a leap that many federal judges, and indeed, the judges of the Southern District of New York...oppose.

Westmoreland, 752 F.2d at 23.

As to the substance of the Katzman decision, regarding its finding that there exists a presumptive, First Amendment right to televise in the courtroom, the Federal District Court relied on

the Supreme Court's decisions in Richmond Newspapers and Press-Enterprise I and II. See Katzman, 923 F. Supp. at 588. The District Court found that these cases laid the groundwork for the finding of such a right. See id. This Court disagrees, and finds that the finding of a presumptive, First Amendment right from these cases is in error, as the cited cases do not support such a conclusion. See supra at 11-14.

Therefore, consistent with the foregoing analysis of federal jurisprudence, the Court finds that the federal constitution does not grant a presumptive, First Amendment right to bring electronic equipment into the courtroom.

III. The Trial Court's Discretion Pursuant To Rule 78

So long as the trial court's decisions regarding courtroom access are consistent with the foregoing constitutional mandates, Rule 78(a) vests the trial court judge with the discretion to allow or deny the videotaping, recording, or photographing of a judicial proceeding. Rule 78(a) provides that

> [e]xcept as specifically provided in these rules, or by order of the Presiding Justice, no person shall within the courtroom take any photograph, make any recording, or make any broadcast by radio, television, or other means in the course of any proceeding.

As with any claim of abuse of a trial court's discretion, the petitioners must show that Court's order is unreasonable, and prejudicial to them. Cf. Smart v. State, 136 N.H. 639, 658

(1993)("As with any claim of abuse of the trial court's discretion, the defendant must show the [C]ourt's ruling was unreasonable, and prejudicial to her"). The petitioners allege that this Court's decision is unreasonable. They base their claim on the fact that numerous state and federal studies and experiments with audio/visual coverage permit only one conclusion: "that the electronic media does not have an adverse impact on courtroom proceedings." Petitioners' Memorandum of Law at 55.

The Court disagrees with the petitioners' contention that the Court's May 3, 2001 order, excluding electronic equipment from the courtroom during the Tulloch proceedings, is unreasonable. In the order, the Court raised several issues of concern with regard to the presence of electronic equipment in the courtroom during the Tulloch proceedings. While the petitioners' memorandum of law, with its ample supply of data, addresses some of these concerns to the Court's satisfaction, it does not address, conclusively, the most important concern: that knowledge on the part of the trial's participants that the proceedings are being telecast and broadcast on radio could affect the outcome of the trial. While it is possible that some or all of the trial's participants would not be affected by the knowledge that millions of people were viewing or hearing the proceedings, the petitioners cannot offer a guarantee that none of the trial's participants would be affected.

As the Court stated in its May 3, 2001 order, its primary

concern is the effect the knowledge of televised or recorded proceedings would have upon potential witnesses. As Justice Black pointed out in Estes, "the impact upon a witness of the knowledge that he [or she] is being viewed by a vast audience is simply incalculable. Some may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statement may be severely undermined." Estes, 381 U.S. at 547. Therefore, while the petitioners may be able to reduce their presence in the courtroom to a single, silent camera, they cannot eliminate the knowledge of every trial participant that the proceedings are being broadcast to a potential audience of millions.

Moreover, while the jury's performance in State v. Smart, 136 N.H. at 657, makes a persuasive case for a jury's ability to ignore the presence of cameras, the layout of the courtroom in Grafton County Superior Court makes it impossible to completely obscure cameras from the view of the jury. Once again the Court notes that while it is likely that most, if not all, jurors will not take notice of electronic equipment in the courtroom, petitioners cannot guarantee that some jurors may not be affected by the presence of cameras. As the Estes Court noted,

> our system of law has always endeavored to prevent even the *probability* of unfairness[,][and][e]very procedure which would offer a *possible* temptation to the average [person] to forget the burden of proof required to convict a defendant...denies [the defendant] due process of law. [Emphasis in original].

Id. at 543 (quoting In Re: Murchison, 349 U.S. 133 (1955) and Tumey v. State of Ohio, 273 U.S. 510 (1935)).

Given these possibilities, the Court will err on the side of being overprotective of the defendant's right to fair trial, which is explicitly guaranteed by the state and federal constitutions, as opposed to being under protective on the basis of a presumptive right that federal and state jurisprudence does not support. Accordingly, the petition for the entry of an order permitting videotaping, recording, and photographing in the courtroom during the proceedings in the matter of State v. Tulloch is DENIED.

SO ORDERED.

Dated: March 8, 2002

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Peter W. Smith
Presiding Justice