STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

Filed October 12, 2006

In Re MICHAEL DERDERIAN **M.P. No.: 06-835**

DECISION

DARIGAN, J. The issue before the Court relates to the criminal case of State v. Michael Derderian, case number K1-03-0655A. On February 20, 2003, the Defendant's nightclub, The Station, burned to the ground, killing 100 people. The Defendant was charged with 100 counts of involuntary manslaughter under the criminal negligence theory and 100 counts of involuntary manslaughter under the misdemeanor manslaughter theory.

The Court, the Defense Counsel, and the Attorney General's Office realized that, due to the overwhelming media exposure and the highly controversial nature of this case, many problems would arise in selecting an impartial jury. It was determined that, to assist the parties in this difficult task, the Court should make every effort to obtain as much information as possible about the venire persons prior to trial, including information about their attitudes, opinions and possible prejudices on various topics pertinent to the case, as well as a comprehensive personal history of each prospective juror. To that end, the Court, with input from both parties, developed a 32-page preliminary jury questionnaire in preparation of the voir dire process.

The purpose of the questionnaire was two-fold. First, it was meant to speed up the voir dire process by eliminating days of repetitious questioning, an efficiency the parties

considered essential for a trial already scheduled to last numerous months. Second, and more importantly, the questionnaire was meant to elicit candid and complete answers to the questions of counsel and the Court so that the parties could select an impartial jury, despite the fact that most potential jurors would have heard of – and likely have opinions about – the Defendant and the events underlying this case.

On the mornings and afternoons of September 5th and 6th, 421 individuals filled out the questionnaires under the supervision of the Jury Commissioner. The Jury Commissioner returned the filled-in questionnaires to the Court, and the Court made and delivered copies to both parties. By Court order, no one else was given access to these questionnaires. After the State and the Defendant each had an opportunity to review approximately 200 filled-in questionnaires, they each submitted a list of those potential jurors in that group that they hoped the Court would excuse for cause. However, before the Court so excused any individual, before the parties had an opportunity to evaluate the remainder of the jury questionnaires, and before any potential juror was subjected to any in-court questioning, the Defendant changed his plea to *nolo contendere* on the 100 counts of involuntary manslaughter under the misdemeanor manslaughter theory. On September 29th, this Court accepted the plea and sentenced the Defendant accordingly.

Prior to the Defendant's change of plea, and the imposition of his sentence, the Providence Journal Company ("Petitioner") petitioned this Court to access the preliminary jury questionnaires used in this case. During a telephone conversation on September 6th, a reporter from the Petitioner requested from a representative of this Court a copy of the blank questionnaire. The Court subsequently denied this oral request, suggesting that the Petitioner file an official petition in order to hear the merits of its

argument, and to see if either the State or the Defendant objected. On September 11th, the Petitioner filed a miscellaneous petition based on the First Amendment right of access to criminal trials. Maintaining that the Court's blanket closure of the juror questionnaire was insufficient under federal and state law, the Petitioner requested copies of the blank questionnaire, the filled-in questionnaires and access "to all proceedings related to jury selection."

The State filed an objection to this miscellaneous petition, arguing that the press' right to access criminal trials is not absolute and should not be granted in this instance. There were two compelling governmental interests which the State said in this case rebutted the presumption of the "openness" of the preliminary juror questionnaires requested by the Petitioner. First, the State argued that government has a legitimate interest in the right of individual privacy as it applies to the potential jurors who filled out the questionnaires. Second, the State reasoned that the government has an interest in upholding the Sixth Amendment right to a fair trial as it applies to *all* defendants within the criminal justice system, a right that would be infringed if future potential jurors were less forthcoming in their responses to preliminary jury questionnaires for fear of public exposure. The State considered the Court's closure regarding the blank and filled-in questionnaires necessary *and* narrowly tailored to protect legitimate governmental interests.

On October 4, 2006, Petitioner responded to the State's objection, as well as to the Defendant's change of plea. After arguing that Defendant's plea removed all Sixth Amendment considerations from the issue at bar, the Petitioner went on to describe what it considered to be, under the relevant case law, the appropriate process for evaluating

privacy rights in light of the Petitioner's First Amendment rights. The Petitioner claimed that the prospective juror must first have made an affirmative request for an *in camera* hearing in order for the Court's closure based on privacy concerns to be proper. Alternatively, the Petitioner claimed that a privacy right only trumps the First Amendment right of access to criminal trials when "socially sensitive issues" – such as a history of rape or a racial bias – are raised during the voir dire process. Unaware of any affirmative requests for an *in camera* hearing or of any socially sensitive issues raised by the jury questionnaire, the Petitioner once again submitted that the information gathered by the Court did not warrant protection from disclosure. Specifically, the Petitioner requested information regarding the prospective jurors' possible acknowledged predispositions or biases in this case, arguing that this in no way should be considered a matter of private concern.

After making the specific findings of fact required under Rhode Island case law, the Court holds today that the Petitioner's motion is denied as to the filled-in questionnaires, but is granted as to a copy of the blank questionnaire, which will be released at the time this decision is entered. Alternatively, the Court holds that, as no juror was called to be orally questioned and no jury was actually seated in this case, the release of the filled-in juror questionnaires serves no legitimate public interest under the First Amendment except to engage in rank speculation or to satisfy idle curiosity about what jurors, if any, may have been seated in this case or what role, if any, the jury questionnaires may have had in the Defendants' motives to change their plea.

THE PETITIONER'S MOTION IS NOT MOOT

The Court must first determine whether it has jurisdiction over the Petitioner's motion under Article III, § 2 of the United States Constitution. U.S. Const. Art. III, § 2, Cl 1. ("The judicial Power shall extend to all Cases [and] Controversies . . . ."). Although Defendant has changed his plea to *nolo contendere* and been sentenced accordingly, the Court finds that the issues presented by the Petitioner's motion are not moot.

In order for this Court to hear a case there must be an underlying claim or controversy. Id. Courts generally seal documents or proceedings in order to protect the defendant's Sixth Amendment right to a fair trial. State v. Cianci, 469 A.2d 139, 142 (R.I. 1985) (citing Sheppard v. Maxwell, 384 U.S. 333, 362 (1966); Estes v. Texas, 381 U.S. 532, 538 (1965)). When a defendant pleads guilty to a charge and is sentenced by the court, Sixth Amendment considerations no longer apply. Id. Once a defendant has pled guilty and been sentenced by a court, the claims of the press to unseal documents are technically moot because the claims are unrelated to an actual controversy. Witt v. Moran, 572 A.2d 261, 264 (R.I. 1990).

However, "a case is not moot if a definite governmental action or policy continues to adversely affect a present interest." Gaynor v. R.I. Dept. of Human Serv., 1993 R.I. Super. LEXIS 30 (R.I. Super. Ct. 1993) (citing Weinstein v. Bradford, 423 U.S. 147, 148 (1975)). In other words, review of these motions remains appropriate "when it appears that [a] resolution of the question is in the public interest, as for guidance in future cases, and when the controversy is capable of repetition, yet evades review." Cianci, 496 A.2d

at 142 (citing Edward A. Sherman Publishing Co. v. Goldberg, 443 A.2d 1252, 1256 n. 6 (R.I. 1982); Morris v. D'Amario, 416 A.2d 137, 139 (1980)).

In this case, although the Defendant has pled *nolo contendere* and been sentenced by the Court, the Press' access to juror questionnaires used in future criminal trials is an ongoing issue of great public interest. The Court is cognizant that its decision today will affect not only the parties to this case, but perhaps also those courts that might develop future juror questionnaires, not to mention the potential jurors who would be asked to fill them out. Additionally, the Court notes that "most challenges to the closure of the individual voir dire examination of prospective jurors will have been rendered moot by the completion of such individual voir dire examination . . . ." Providence Journal Co. v. Superior Court, 593 A.2d 446, 448 (R.I. 1991). If the case were mooted simply because the Defendant pled before this petition reached the Court it is highly likely that this issue would eventually be raised again, and it would be just as likely that it would be dismissed without ever being resolved.

Therefore, mindful of the fact that this decision may guide future cases on this important issue, the Court holds that the motions of the parties are not moot as they concern a governmental action that continues to adversely affect present interests.

THE FIRST AMENDMENT CREATES A PRESUMPTION OF OPENNESS AND ACCESS TO CRIMINAL TRIALS

The Petitioner contends that the sealing of all of the preliminary jury questionnaires, or the failure of the Court to make specific findings justifying such a closure, is a violation of the Petitioner's right of access to criminal trials under the U.S. and Rhode Island Constitutions, as well as under common law. The Court holds that

although the Petitioner has a presumptive right to access jury questionnaires used in criminal trials, that presumption is rebutted by the specific facts of this case.

In this country, and in England before us, public access to criminal trials has historically been regarded as an important aspect of the criminal justice system. Richmond Newspapers v. Va., 448 U.S. 555, 575 (U.S. 1980) (citing 1 Journals 106, 107). The expressly guaranteed freedoms of the First Amendment are meant to assure "freedom of communication on matters relating to the functioning of government." Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 517 (U.S. 1984) ("Press-Enterprise I") (citing Richmond Newspapers, Inc., 448 U.S. at 575). It "would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." Richmond Newspapers, Inc., 448 U.S. at 575. Thus, it is well-settled state and federal law that the press and the public have a right to access criminal trials flowing from the "core principles" of the First Amendment. See Press-Enterprise I, 464 U.S. at 517; Providence Journal Co., 593 A.2d at 448 (citing United States v. Peters, 754 F.2d 753, 758 (7th Cir. 1985)). "What this means in the context of criminal trials is that the First Amendment guarantees of speech and press, standing alone, prohibit [the] government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted." Richmond Newspapers, Inc., 448 U.S. at 576.

The Supreme Court has explicitly held that voir dire is part of the criminal trial process and is therefore subject to the First Amendment right of access to a criminal trial. Providence Journal Co., 593 A.2d at 448 (citing Press-Enterprise I, 464 U.S. 501). Even more pertinent to the Court's decision today, the right of access articulated by the U.S.

Supreme Court in Press-Enterprise I has been uniformly applied to preliminary jury questionnaires. See, e.g. United States v. King, 140 F.3d 76, 82 (2d Cir. 1998); Cable News Network, Inc. v. United States, 263 U.S. App. D.C. 66 (D.C. Cir. 1987); Dayton Newspapers, Inc. v. United States Dep't of the Navy, 109 F. Supp. 2d 768, 772 (D. Ohio 1999); Bellas v. Superior Court, 85 Cal. App. 4th 636, 644 (Cal. Ct. App. 2000) (citing Lesher Communications, Inc. v. Superior Court, 224 Cal. App. 3d 774 (Cal. Ct. App. 1990)). Under this reasoning, the Petitioner, as a member of the press and the public, has the presumptive right to access the jury questionnaires filled out in this case.

However, the presumptive right of access to criminal trial information under the First Amendment is not absolute. Providence Journal Co., 593 A.2d at 448 (citing Press-Enterprise I, 464 U.S. 501). To determine whether or not the presumption of "openness" is rebutted, the Court must balance the competing constitutional interests of the defendant's right to a fair trial and the public's right of access to criminal proceedings, as well as the legislatively-created right of privacy in Rhode Island. Id. at 449 (citing Cianci, 496 A.2d at 144). When making this determination the Court is cognizant that a juror's right to privacy and a defendant's Sixth Amendment rights are both "subordinate to the First Amendment except in '*uniquely compelling' situations*." Cianci, 496 A.2d at 143 (citing Nebraska Press Asssn. V. Stuart, 427 U.S. 539, 570 (1976); Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 10 (1986) ("Press-Enterprise II"). Indeed, as the U.S. Supreme Court announced in Press-Enterprise I, "[t]he presumption of openness may be overcome *only* by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." 464 U.S. at 510. (Emphasis added.)

In Cianci, the Rhode Island Supreme Court delineated the process which a trial court must go through when determining whether the presumption of access to criminal trials is rebutted. 496 A.2d at 144 (citing Press-Enterprise I, 464 U.S. at 511-514). In order for a Rhode Island trial court's closure of criminal trial documents, such as preliminary jury questionnaires, to be considered proper the protective order must (i) be accompanied by the trial justice's specific findings which explain how the order (ii) is narrowly tailored to serve the important government interests sought to be protected, (iii) permits access to those parts of the record that are not deemed sensitive, and (iv) is the only reasonable alternative under the circumstances. Id. This inquiry ensures that the underlying principles of the First Amendment aren't circumvented by the trial court and "minimizes the risk of unnecessary closure." Id.

The Court will now apply this inquiry to the Petitioner's motion regarding the preliminary jury questionnaires filled out for this case.

THE PRESUMPTION OF OPENESS IS REBUTTED BY THE APPLICATION OF THE CIANCI FOUR-PART INQUIRY

I .The Closure Contemplated By The Court Is Justified By Its Specific Findings

The closure contemplated by the Court today is a denial of access to all 421 questionnaires filled-in on September 5th and 6th. The Court is mindful that such "blanket" closures are generally disapproved of under Rhode Island law. Id. (The "brief inquiry and blanket statement of potential prejudice" of the Cianci Trial Court was insufficient to justify such a closure.) Nevertheless, the Court now makes the specific findings, required by the Cianci four-part inquiry, that demonstrate a compelling reason for such a closure.

II. The Closure Protects Two Important Governmental Interests

The Court holds that the blanket closure of the filled-in questionnaires protects two important and legitimate governmental interests: the right to a fair trial as protected by the Sixth Amendment, and the right of privacy as protected by the General Laws of Rhode Island.

a. The Right to a Fair Trial

The first interest is a defendant's Sixth Amendment right to a fair trial. As the court stated in In re South Carolina Press Ass'n, "[i]f the voir dire is to serve its function as the safeguard of defendants' Sixth Amendment rights, then clearly candor must be the hallmark of such a proceeding." 946 F.2d 1037, 1042 (4th Cir. 1991). Even in instances such as the one at bar, where the Defendant has already pled guilty and his sentence has already been imposed, the public release of personal information gathered from preliminary jury questionnaires would infringe on the Sixth Amendment guarantee to a fair trial by discouraging the required candor essential to the voir dire process.

This Court finds that potential jurors would not respond in a frank and forthright matter to a jury questionnaire if their remarks might later be published in the press. This failure to answer fully and honestly would critically undermine counsels' ability in later cases to select an unbiased jury, as mandated by the Sixth Amendment. Therefore, the Court holds that the right to a fair trial is an important governmental interest and further holds that this right is implicated even where the Defendant has plead guilty and been sentenced, by virtue of the fact that the public disclosure of a preliminary jury questionnaire today will inhibit the full and frank responses from the potential jurors of tomorrow.

b. The Right of Privacy

The second governmental interest the Court seeks to protect with this order is the legislatively created right of privacy extended to the potential jurors in this case. R.I. Gen. Laws 1956 § 9-1-28.1(a)(3) states that "every person in this state shall have a right to privacy," including the "right to be secure from unreasonable publicity given to one's private life." As the U.S. Supreme Court noted, the jury selection process may, in some instances, "give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public domain." Press-Enterprise I, 464 U.S. at 511-512. Protecting potential jurors from "post-verdict harassment and invasions of privacy" are therefore legitimate governmental concerns, particularly in cases – like the one at bar – which receive extensive publicity. United States v. Brown, 250 F.3d 907, 921 (5th Cir. 2001) (citations omitted).

This right of privacy is a legitimate governmental concern, even where a potential juror makes no affirmative request to be interrogated *in camera* regarding matters of a personal nature. Certainly, as the Petitioner noted in its Supplemental Memorandum, Press-Enterprise I requires this affirmative action on the part of individual potential jurors in order to "preserve fairness and at the same time protect legitimate privacy requirement. Id. However, this requirement would only apply "once the general nature of sensitive questions is made known" to the prospective jurors, and when they likewise have an "opportunity to present the problem to the judge *in camera* but with counsel present and on the record." Id.

In this case, no opportunity to request an *in camera* hearing was presented to the venire. Prior to handing out the questionnaire, the Court and counsel for the State and the Defendant introduced themselves to each of the four panels brought in on September 5th and 6th. The Court then qualified the jury pool and briefly discussed the jury selection process, including the importance of filling out the questionnaire fully and frankly to the best of each person's ability. After this introduction, the Court and counsel left the courtroom and the Jury Commissioner handed out the questionnaire and supervised the courtroom as the questionnaires were answered en masse.

Moreover, while the Petitioner is correct that the Court should not presume that any of the prospective jurors would have invoked an *in camera* process if it had been made available, the Court recognizes that neither should it presume a juror would *not* have done so if provided the opportunity. In this case, potential jurors were indeed warned that their answers may be made public, but were asked to fill out the questionnaire as completely as they could. Importantly, those potential jurors were each told by this Court that every reasonable effort would be made by the Court to keep their answers private.

The right of privacy is also a legitimate governmental concern, even in cases which request information not considered "socially sensitive," as Petitioner suggests. To begin with, this Court is unclear as is the general state of the law as to what the distinction would be between "socially sensitive" information and "regular" sensitive information. Moreover, the right of privacy in Rhode Island recognizes no such limiting factor, and instead declares something is sensitive if an ordinary person would consider it so. R.I. Gen. Laws 1956 § 9-1-28.1(a)(3)(i)(B) ("The fact which has been made public

must be one which would be offensive or objectionable to a reasonable man of ordinary sensibilities.") Nor has any case the Court is aware of ever enunciated such a rule when determining whether the right of privacy rebuts the presumption of access to criminal trials. Indeed, as stated by Press-Enterprises I, the right of privacy extends to all "*deeply personal matters* that [a] person has legitimate reasons for keeping out of the public domain," which may even include an individual's acknowledged predispositions or biases regarding the case at issue. 464 U.S. at 511-512 (emphasis added). This is of particular concern in The Station fire case, where there remains a strong and strident public discussion regarding the Defendant, his brother, and the tragic underlying events.

The Court holds that the release and publication of sensitive information gathered by a preliminary jury questionnaire may infringe on the Rhode Island right to privacy from unreasonable publicity. Thus, the right of privacy is also a compelling governmental interest which further necessitates a protective order sealing the filled-in jury questionnaires requested by the Petitioner.

III. The Closure Is Narrowly Tailored

Having determined that there are important governmental interests involved in this case, the Court must now fashion its closure order narrowly in relation to those interests. Cianci, 496 A.2d at 144. Despite seeking to seal *all* of the information gathered from the filled-in jury questionnaires, the Court nonetheless holds that this order is as narrowly tailored as it could reasonably be in this case. To determine whether this closure is narrowly tailored, the Court has closely considered the questionnaires under review, and finds that the breadth of the document and the actual answers to the questions

therein requires a blanket closure in order to protect the government's legitimate interests.

Due to the extensive publicity and public scrutiny surrounding the underlying case in this instance, the Court, with the input of both parties, has created what it considers to be one of the most far-reaching and comprehensive juror questionnaires ever used in a criminal trial in this state. More questions were asked of the venire by this questionnaire than would ordinarily be asked in a traditional voir dire. In order to ensure the Defendant was granted a fair trial, some of these questions were extremely personal and sensitive in nature. Indeed, the Court considers the vast majority of these questions to be sensitive in nature.[1]

A review of the filled-in questionnaires by the Court has disclosed intensely personal information, including potential jurors' employment, romantic, criminal and medical histories, which the Court finds should not be disclosed to the public in any event. For example, in an attempt to be as forthright as possible with the Court, some potential jurors disclosed, among many other things, that they are adopted or have

[1] For example: #4 (regarding anything going on in the respondent's life or work that would prevent them from being a juror on the case), ##20-23 (regarding the respondent's exposure to and personal opinions about the Station fire cases), ##24-25 (regarding any reasons the respondent would or would not want to be a juror on this case), ##32-34 (regarding where the respondent was born and where they now live) ##35-43 (regarding the respondent's exposure to fires and fireworks), ##49-50 (regarding the respondent's medical conditions and prescriptions), ##51-80 (regarding the respondent's biographical information, including their personal interests, what groups they are members of, what political parties they are affiliated with, their prior Grand Jury experience, their criminal record and whether they have been a victim of a crime), ##82-92 (regarding the respondent's subjective attitudes about certain professions within the criminal justice system and the criminal justice system itself), and ##93-97 (regarding what books the respondent has recently read, or movies and shows they've watched, who they admire and how they spend their free time).

adopted children, that they have emotional problems (*e.g.* diagnoses of bipolar, manic depressive, or other mental conditions), that they have relationship or marital problems, that they have been victims of crimes (*e.g.* arson, robbery or rape), that they are currently on medication (*e.g.* psychotropic medications such as Prozac) or have surgeries scheduled, or that they are considering looking for a new job. Some jurors even went so far as to make disclosures which might subject them to civil or even criminal penalties. These sensitive disclosures are replete throughout each and every one of these documents, and often appear even where the specific question did not solicit such information.

The Court also notes that many of the questions which solicited such sensitive information are not limited in scope to the individuals responding. These questions ask not only for information about the respondent, but also about the potential juror's close friends and family members. It is one thing to allow the public to access information about the individual who arguably provided it voluntarily, but it is another thing entirely to allow public disclosure of extremely personal information provided about a third party.

Based on the intrusiveness and expansive scope of questions used in this questionnaire, and based on the responses provided, the Court holds that only a blanket closure of the filled-in questionnaires would adequately protect the important governmental interests discussed above. Any less narrow closure would thwart the interests sought to be protected. On the other hand, the blank questionnaire the Petitioner requested contains no sensitive information and therefore, as mandated by Cianci, it will be released at the time of the filing of this decision.

IV. There Are No Reasonable Alternatives To The Closure

Not only must the closure contemplated be narrowly tailored to serve the governmental interests sought to be protected, the Court must also determine whether there are reasonable alternatives which would protect those interests while permitting public access to the non-sensitive parts of the record. Cianci, 496 A.2d at 144. Cianci mandates that the Court must implement any such reasonable alternatives if they exist. Id. The Court, however, holds that no such alternative methods are reasonable in this case.

Some appeals courts in other jurisdictions have held that it is reasonable for a trial court to redact the sensitive parts of the record in order to permit the press to access the other portions of the criminal trial documentation, rather than order the entire document or proceeding sealed altogether. See, e.g., United States v. Edwards, 823 F.2d 111, 120 (5th Cir. 1987); In re Search Warrants Issued August 29, 1994, 889 F. Supp. 296, 299 (D. Ohio 1995). Indeed, redaction appears to be the alternative method most contemplated by courts in this area.

One method of redaction would be to limit the closure to a specific set of questions. However, this method would not protect the interests involved, because, as mentioned previously, the sensitive information gathered in these questionnaires is not limited to one section, or even a definitive set of questions. Respondents frequently answered multiple questions with sensitive information, even where such information was unexpected and unsolicited. Certainly some questions were more likely to have garnered information which jurors might consider personal, but in practice some of those questions were not answered with any personal information whatsoever. Conversely,

some questions unexpectedly elicited very sensitive responses. Not only would a by-the-numbers redaction allow the Petitioner to have access to sensitive information in the questions – negating the point of the closure order – but it would also prohibit the Petitioner's access to some information that the Court would ordinarily not consider sensitive. Thus, for a redaction to be appropriate in this situation the Court would have to go through each of the filled-in questionnaires page-by-page and line-by-line.

In this case the Petitioner has requested access to all 421 questionnaires, each consisting of 32-pages, making for a total of 13,472 pages of answers this Court would need to go through, line-by-line, in order to adequately redact sensitive information. This process would be over burdensome on the Court to say the least, requiring the Court to expend an unreasonable amount of time and effort. Moreover, as the Court has already stated, it considers the vast majority of the information provided in these questionnaires to be sensitive information. Even if the Court were to spend the weeks necessary to properly redact these documents, the Petitioner in the end would likely be left with very little information which may well be of no or very little interest to the Petitioner.[2] Therefore, under the very unusual facts of this case – where so many potential jurors were called and an extensive questionnaire was created by the Court – any request that the Court redact the sensitive information contained within the filled-in questionnaires and release the remainder is unreasonable as determined by this Court as a matter of fact and law.

Other suggestions made by other appeals courts based on similar petitions are likewise unreasonable in the current circumstances. For instance, handling sensitive

[2] See the following section for reasons why the Court does not consider this speculation an exercise that necessitates the exercise of the Petitioner's First Amendment rights.

issues in a sidebar or relying on juror numbers to protect their anonymity are equally unreasonable alternatives in this instance, particularly considering that the Defendant has already been sentenced by this Court. In re South Carolina Press Ass'n, 946 F.2d at 1042. The Court cannot, at this stage of the proceedings, resolve any practical or reasonable alternatives to a blanket closure of the preliminary jury questionnaires. Id. Nor has Petitioner offered any alternatives beyond redaction at this time. As such, the Court finds that no reasonable alternative methods are available which would protect the legitimate interests mentioned above while permitting access to the non-sensitive information within the jury questionnaires.

The Court has found that the closure objected to by the Petitioner is both necessary and narrowly tailored to protect legitimate governmental interests. Additionally, this decision serves as the Court's specific findings of fact necessary to justify this closure. Therefore, the Court holds that the closure contemplated today conforms to the Cianci four-part inquiry and is appropriate in these circumstances.

ACCESS IS ALSO DENIED BECAUSE NO VOIR DIRE OR IN-COURT QUESTIONING TOOK PLACE IN THIS INSTANCE

Notwithstanding whether the Court's decision today is in compliance with the Cianci four-part inquiry or not, the Court nevertheless denies access to the filled-in questionnaires as no juror was ever called to answer questions in this case. In reaching this decision, the Court agrees with the reasoning of Lesher Communications, Inc., a non-binding California appellate case, which explicitly held that the First Amendment does not mandate disclosure of those answers if a prospective juror is never called to the jury box for oral questioning. 224 Cal. App. 3d at 777 (despite First Amendment right of access to criminal trials, publisher was denied access to preliminary jury questionnaires

used in a triple homicide case as prospective jurors had not been subject to oral examination).

The Press-Enterprise cases upon which the Petitioner relies rest on the historical and legal conclusion that the public has an interest in open government, including the voir dire process in criminal trials. Id. The First Amendment right to access to criminal trial jury selection exists because the public has a legitimate interest in knowing the bases for each potential juror's ultimate selection or dismissal. Id. The public can only ensure the criminal justice system is functioning properly if it has access to the information the parties used to determine who would or would not make an impartial jury member. Id.

However, "venire-persons who are never called to a jury box do not play any part in the voir dire or the trial." Id. at 779. Instead, they "fill out the questionnaire only as a prelude to their participation in the voir dire." Id. Preliminary jury questionnaires, in and of themselves, serve "no function in the selection of the jury unless the person filling it out is actually called to be orally questioned." Id.

The answers within the jury questionnaires filled out by the 421 Kent County citizens on September 5th and 6th do not in any way indicate what the opinions or biases of the hypothetical jury in this case would have been. There is no indication which – if any – of those potential jurors would have been selected or dismissed prior to or during the voir dire process. Indeed, the voir dire process never began in this case. The Court wishes to make it clear, however, that even if the voir dire process *had* begun in this case, the only questionnaires subject to the First Amendment right of access would have been those of the individuals actually brought into court for oral questioning. The

questionnaires of individuals dismissed for cause prior to voir dire,[3] along with individuals excused once the jury was selected, would not in any way implicate the First Amendment right of access to criminal trials.

Moreover, an order preventing access to the jury questionnaires does not wholly abridge the Petitioner's First Amendment rights. The Court's order does not ban interaction with the potential jurors – whose names have already been released to the public. Nor does it prevent the Petitioner from discussing with the State or the Defendant whether or to what extent the jury questionnaires influenced their views of the plea arrangement. Indeed, it would likely be *more* informative for Petitioner to have those discussions with the parties themselves than to hypothesize based on nothing but the jury questionnaires.

The information Petitioner seeks to access could only engender wild speculation as to the composition and opinions of a hypothetical jury or whether or not the questionnaires moved the Defendants to plead in this case. This speculation would come at the expense of both the potential juror's privacy and the future efficacy of preliminary jury questionnaires as a tool of the criminal justice system. This conjecture would not be helpful to the public, nor is it mandated by the First Amendment. As such, the public's right of access to these questionnaires is clearly outweighed by the privacy and Sixth

[3] Although the State and the Defendant combined requested approximately 140 jurors dismissed for cause, the Court did not actually dismiss any of them when the Defendant changed his plea. However, *even if* the Court had dismissed some jurors prior to in-court voir dire the right of access would not have attached to those questionnaires. Similar to the information gathered by the Jury Commissioner's Office as it determines which individuals are to be excused from jury duty each day, these questionnaires would be irrelevant to the ultimate issue of who is properly or improperly seated on the jury. Therefore closure of this information would not implicate the public's First Amendment rights.

Amendment rights discussed earlier in this decision. This Court finds that there is no legitimate First Amendment interest in disclosure of filled-out questionnaires unless and until a potential juror is asked questions in oral voir dire hearings. No potential juror was brought in for such oral questioning in this case, and therefore the Court has sealed all 421 filled-in questionnaires from public view, an appropriate order in the circumstances of this case and in light of the Sixth Amendment and privacy rights sought to be protected.

CONCLUSION

For the foregoing reasons, the Petitioner's motion for access to the filled-in preliminary jury questionnaires is hereby denied. However, the Petitioner's motion as to a copy of the blank questionnaire used in this case is hereby granted. As the Defendant pled guilty and was sentenced in this case prior to any additional voir dire proceedings, the Court does not reach the Petitioner's motions regarding "all proceedings related to jury selection" or the "voir dire of individual prospective jurors."