

FOR EMERGENCY REVIEW

NO. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COWLES PUBLISHING COMPANY, d/b/a THE SPOKESMAN-REVIEW,

Petitioner,

v.

UNITED STATES DISTRICT COURT, DISTRICT OF IDAHO

Respondents.

PETITION OF COWLES PUBLISHING COMPANY, d/b/a
THE SPOKESMAN-REVIEW FOR WRIT OF MANDAMUS

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TABLE OF CONTENTS

	<u>Page</u>
I. EMERGENCY NATURE OF THE PETITION	1
II. NATURE OF CASE/RELIEF SOUGHT	2
III. ISSUES PRESENTED.....	3
IV. STATEMENT OF FACTS	4
V. REASONS THE WRIT SHOULD ISSUE.....	5
1. Petitioner Meets the Procedural and Substantive Requirements Governing Issuance of a Writ as Set Forth in <i>Bauman v. United States District Court.</i> ..	5
A. Petitioner Has No Other Adequate Means to Attain the Relief It Desires. .	6
B. Petitioner Will be Damaged or Prejudiced in a Way Not Correctable on Appeal.	8
C. District Court Order Is Clearly Erroneous as a Matter of Law.....	8
(1) The Public Has a First Amendment Right of Access to Criminal Proceedings.....	9
(2) Rarity and Significance of Death Penalty Cases Underscore Need for Public Access to Proceedings Relating to Capital Punishment.....	12
(3) Given the Violent Nature of the Crimes to Which Defendant Has Pleaded Guilty, Therapeutic Value of Openness Is Significant.	14
(4) Order of Closure Will Not Protect S.G. from Emotional Trauma.	15
(5) Providing a Transcript of the Hearing Will Not Allow the Public to Fully Comprehend What Occurred in a Closed Courtroom.....	19
(6) Less Restrictive Alternatives Are Available.	21
(7) 18 U.S.C. § 3509(b)(1)(D) Mandates Courtroom be Open to Public if S.G.'s Testimony is Transmitted by Closed- Circuit Television.	23
VII. CONCLUSION	24

TABLE OF AUTHORITIES

Pages

CASES

<i>Bauman v. United States Dist. Court,</i> 557 F.2d 650, (1977)	5, 6
<i>Craig v. Harney,</i> 331 U.S. 367, 374, 67 S.Ct. 1249, 1254 (1947)	20
<i>Gulfstream Aerospace Corp. v. Mayacamas Corp.,</i> 485 U.S. 271, 279, 108 S.Ct. 1133, 1138 (1988)	7
<i>Kansas v. Marsh,</i> 548 U.S. 163, 126 S.Ct. 2516, 24-25 (2006)	13
<i>Kennedy v. Louisiana,</i> Slip Opinion 07-343 (S.Ct. June 25, 2008)	12
<i>Lexington Herald Leader Company v. Tackett,</i> 601 S. W.2d 905, 906 (Ky. 1980)	11
<i>Lockett v. Ohio,</i> 438 U.S. 586, 604, 98 S.Ct. 2954 (1978)	13
<i>Murray v. Giarratano,</i> 492 U.S. 1, 89, 109 S.Ct. 2765 (1989)	13
<i>Nebraska Press Association v. Stuart,</i> 427 U.S. 539, 96 S.Ct. 2791 (1976)	11, 19
<i>Oregonian Publishing Company v. U.S. District Court for District of Washington,</i> 920 F.2d 1462, 1465 (9th Cir. 1990)	10
<i>Press Enterprise v. Superior Court of California,</i> 464 U.S. 501, 508, 104 S.Ct. 823 (1984)	15, 19
<i>Press Enterprise v. Superior Court of California,</i> 478 U.S. 1, 106 S.Ct. 2735 (1986)	7, 9, 10

Pages

Richmond Newspapers, Inc. v. Virginia,
448 U.S. 555, 580, 100 S.Ct. 2814 (1980)7

Switzerland Cheese Ass'n, Inc. V. E. Horne's Market,
385 U.S. 23, 25, 87 S.Ct. 193, 195 (1966)7

United States v. Biagon,
510 F.3d 844 (9th Cir. 2007)9

United States v. Thunder,
438 F.3d 866 (8th Cir. 2006)11

Witson v. North Carolina,
428 U.S. 280, 305, 96 S.Ct. 2978 (1976)14

STATUTES

FRAP 21(a)1

18 U.S.C. § 3509(b)(1)(C)23

18 U.S.C. § 3509(b)(1)(D) 3, 23

18 U.S.C. § 35911

18 U.S.C. § 3593(c)8

28 U.S.C. § 12917

28 U.S.C. § 1292(a)(1).....7

COMES NOW Cowles Publishing Company, d/b/a *The Spokesman-Review* (hereinafter "Petitioner"), by and through its attorneys, Witherspoon, Kelley, Davenport & Toole, P.S., and pursuant to FRAP 21(a), respectfully files the following Petition for Writ of Mandamus concerning access to witness testimony during a criminal proceeding concerning potential imposition of the death penalty.

I. EMERGENCY NATURE OF THE PETITION

Petitioner seeks issuance of a writ of mandamus because of the exigent nature of the circumstances in this criminal proceeding, which focuses on potential imposition of the death penalty pursuant to 18 U.S.C. § 3591, *et seq.* (hereinafter the "Death Penalty Act"). Petitioner's request that the public be provided access to the courtroom during the testimony of S.G.¹, a minor, as part of the sentencing phase of this capital case, was denied by Memorandum Order of the District Court entered on August 5, 2008 (attached hereto as Exhibit "A"). Jury selection resumed the following day, on August 6, 2008. The sentencing phase concerning Defendant Joseph Duncan (hereinafter "Defendant") is scheduled to begin immediately after the jury is selected, which, it is estimated, will be completed in approximately two-three weeks. S.G.'s testimony is scheduled to occur as part of the sentencing proceedings. If the testimony occurs in a closed courtroom,

¹ Initials have been used in all District Court pleadings concerning S.G.'s identity. However, as recognized by the District Court in its Memorandum Order, S.G.'s identity has previously been publicly disclosed and has been reported on widely by the media.

Petitioner will be left without any adequate recourse under the law. Therefore, the situation is emergent and must be reviewed by this Court on an expedited basis.

II. NATURE OF CASE/RELIEF SOUGHT

At issue before the Court is public access to a portion of the upcoming proceedings concerning the potential imposition of the death penalty as to Defendant, who has previously pleaded guilty in District Court to the abduction and sexual abuse of S.G. and the torture and murder of her brother, D.G. The District Court has ordered the courtroom closed to the public during the key in-court testimony of S.G., even if her testimony is transmitted into the courtroom by closed-circuit television from another room. *See* Memorandum Order. This Order contravenes established precedent and violates the public's First Amendment right of access to criminal court proceedings. First, the test for courtroom closure, as established by the Supreme Court in *Press Enterprise Co. v. Superior Court* ("*Press Enterprise II*"), 478 U.S. 1, 106 S.Ct. 2735 (1986), has not been met in this case. Second, Petitioner has suggested reasonable, less restrictive alternatives to the complete closure of the courtroom. And third, although there may be concerns as to the privacy interests of S.G., the unique facts and circumstances of this case warrant public access to the proceedings to provide public scrutiny of the process by which the death penalty may be imposed.

Petitioner respectfully requests this Court grant its Petition for a Writ of Mandamus directing the District Court to allow public access to the testimony of S.G., whether presented in-court or by closed-circuit television transmitted into the courtroom.

III. ISSUES PRESENTED

1. A. Whether a federal courtroom should be closed to the public during the key testimony of the sole surviving minor victim presented at a Death Penalty Act sentencing trial where (1) the testimony bears directly on the aggravating factors necessary for imposition of the death penalty, (2) emotional trauma is experienced by the minor merely as a result of the proceedings and regardless of whether she testifies in an open courtroom or by closed-circuit television transmitted into the courtroom, (3) a transcript of the testimony will not allow review by the public of the demeanor of the witness and other trial participants, and (4) the less restrictive alternative of closed-circuit televising of the testimony of S.G. is available.
- B. Whether the public may be barred from viewing testimony of the victim transmitted into the courtroom by closed-circuit television under the factors described in Issue (A) and where 18 U.S.C. § 3509(b)(1)(D) requires that the public shall be present in the

courtroom into which testimony by closed-circuit television is transmitted.

IV. STATEMENT OF FACTS

The Defendant previously pleaded guilty in Idaho state court to the murder of four individuals, including S.G.'s mother and older brother. In this Federal proceeding, he has pleaded guilty to kidnapping and sexually abusing S.G. (now 11 years old and 8 years old at the time of the abuse) and murdering her brother, D.G.

In anticipation of access issues, the Honorable Edward Lodge appointed Betsy Russell, a *Spokesman-Review* reporter, as media liaison in the underlying case. Thereafter, Judge Lodge requested input from media representatives concerning whether the public may be excluded from viewing certain courtroom proceedings that are essential to the Government's case for the death penalty. The Court sought briefing on whether the courtroom should be closed during 1) the testimony of S.G. and 2) during the playing of a videotape made by the Defendant, which apparently depicts the torture and murder of D.G. by Defendant.

After reviewing a consolidated memorandum and reply memorandum submitted on behalf of various local and national media, and responses from counsel for the Government, the Defendant, and S.G.'s Guardian ad Litem, the District Court, on August 5, 2008, issued an Order that: 1) the courtroom would be closed to the public during S.G.'s testimony and 2) the courtroom would remain

open during the playing of the videotape concerning D.G. In the Memorandum Order, the Court also stated that, even if it decided S.G.'s testimony would be conducted by closed-circuit television transmitted into the courtroom, the courtroom would be closed to the public during such transmission. In either event, only a transcript of S.G.'s testimony would be made available to the public.

After the District Court determined Defendant was competent to proceed as to the sentencing phase of the case and to act *pro se*, jury selection resumed on August 6, 2008, and opening statements and testimony are expected within the next three weeks. Because the District Court's decision is clearly erroneous as a matter of law and because the testimony of S.G. is imminent, Petitioner respectfully requests this Court issue a writ of mandamus directing the District Court to allow the courtroom to remain open to the public during S.G.'s testimony, whether S.G. testifies in court or by closed-circuit television.

V. REASONS THE WRIT SHOULD ISSUE

1. Petitioner Meets the Procedural and Substantive Requirements Governing Issuance of a Writ as Set Forth in *Bauman v. United States District Court*.

Mandamus is appropriate in "extraordinary" circumstances to prevent a judicial "usurpation of power." *Bauman v. United States Dist. Court*, 557 F.2d 650, (1977) (citations omitted). In *Bauman*, the Ninth Circuit adopted a five part

test to direct a court's analysis when determining whether exceptional circumstances exist to justify mandamus:

- (1) The party seeking the writ has no other adequate means, such as direct appeal, to attain the relief he or she desires.
- (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal.
- (3) The District Court's order is clearly erroneous as a matter of law.
- (4) The District Court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules.
- (5) The District Court's order raises new and important problems, or issues of law of first impression.

Id. at 654-655. These considerations are cumulative and proper analysis requires a balancing of conflicting indicators. *Id.* *Bauman* also makes clear that not every factor must be present in each case to issue a writ, but that the factors must be considered in conjunction to determine the writ's appropriateness. Based on these guidelines, it is "clear and indisputable" that Petitioner is entitled to the relief sought.

A. Petitioner Has No Other Adequate Means to Attain the Relief It Desires.

Petitioner cannot appeal the District Court's order closing the courtroom during S.G.'s testimony. The Order is neither a final decision under 28 U.S.C.

§ 1291 nor an interlocutory order granting an injunction under 28 U.S.C. § 1292(a)(1). Since the order in question relates only to the conduct or progress of litigation before the District Court, it cannot be considered an injunction appealable under § 1292(a)(1). *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 279, 108 S.Ct. 1133, 1138 (1988). Orders that in no way touch on the merits of the claim but only relate to trial procedures are not "interlocutory" within the meaning of § 1292(a)(1). *Switzerland Cheese Ass'n, Inc. V. E. Horne's Market*, 385 U.S. 23, 25, 87 S.Ct. 193, 195 (1966). A writ of mandamus is an appropriate method by which the media may seek review of a district court's order to close a courtroom during a criminal trial. *Press Enterprise II*, supra, (writ of mandate process used to challenge a trial court's denial of access to preliminary hearing transcript); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580, 100 S.Ct. 2814 (1980) (writ of mandamus was improperly denied where trial judge ordered the courtroom closed to the public during a murder trial).

Nor can Petitioner avail itself of the normal appellate procedures due to the timeframe of the underlying matter. Jury selection resumed August 6, 2008. S.G. will testify during the penalty phase proceedings to begin in approximately three weeks, much sooner than an appeal could be heard. Petitioner is without an alternative remedy at law and a writ of mandamus is the only possible relief available in this case.

B. Petitioner Will be Damaged or Prejudiced in a Way Not Correctable on Appeal.

Because of the timeframes set out in the Federal Rules of Appellate Procedure for appeals and motions to be heard, a notice of appeal does not provide Petitioner an adequate remedy because the minor victim's testimony will have occurred before Petitioner's appeal could be heard. After the testimony takes place in a closed courtroom, Petitioner is obviously harmed in a way that no appeal can undo. A writ of mandamus is the only relief available to Petitioner in this case.

C. District Court Order Is Clearly Erroneous as a Matter of Law

The Government has chosen to put forward the testimony of S.G. as evidence of aggravating circumstances under 18 U.S.C. § 3593(c) justifying imposition of the death penalty. The District Court has ordered closure of the courtroom to the public during the testimony of S.G., who will provide the key testimony as to why, at least in the Government's opinion, Defendant should be put to death.² The testimony of S.G. will apparently focus on her sexual abuse by Defendant and on her being an eyewitness to the torture and eventual murder of

² Counsel for Defendant and Government counsel, on July 14, 2007, filed under seal with the District Court a Stipulation that the courtroom be closed during the testimony of S.G. Docket No. 63. Having learned the nature of the document, which was not described on the Court's docket, Petitioner, on April 23, 2008, moved to access the same along with other Court records, and the District Court on August 5, 2008 entered an Order, Docket No. 524, providing access to the Stipulation and the other documents, Docket Nos. 112, 158 and 171, that address S.G. testifying in a closed courtroom. The sealing of these records follows a pattern of denying public access that has made monitoring by the public of court proceedings difficult. Of the 530 docket entries in this case, 270 reflect that court records have been filed under seal by the Government, defense counsel or the Guardian ad Litem. Defense counsel, in arguing that a Status Conference originally ordered closed should be open to the public, acknowledged that there has been a "culture of secrecy" in this capital case. "Throughout the proceedings in this case, both the parties and the Court have liberally sealed numerous pleadings and orders on the record." Docket No. 467. The District Court, in partially granting Petitioner's Motion for Access to Court Records, acknowledged, too, that proper procedures as to excluding public access to records have not been followed. Docket No. 469.

her brother, D.G., by Defendant. There will be no other eyewitness testimony concerning either the sexual abuse of S.G. or the death of D.G. and "her testimony will be necessary for the jury to see as she is the only witness to most of the conduct alleged against Mr. Duncan." Memorandum Order, at 13.

Although the District Court expressed concern as to the privacy interests and emotional welfare of S.G., the Court erred in ordering closure of her testimony because such interests do not, under the circumstances and evidence presented, override the recognized public right of access to criminal proceedings that may result in imposition of the death penalty and because the Judge's Order will not accomplish protecting S.G. from emotional trauma.

(1) The Public Has a First Amendment Right of Access to Criminal Proceedings.

The rule is well-established that the public has a qualified First Amendment right of access to criminal court proceedings. "The right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness." *Press Enterprise II*, 106 S.Ct. at 2739. The Ninth Circuit has recognized this Constitutionally-based right of the public to attend court proceedings. *United States v. Biagon*, 510 F.3d 844 (9th Cir. 2007).

In analyzing whether a particular proceeding should be open to the public, *Press Enterprise II* directs courts to review both the tradition of openness and the

role public access plays in the functioning of the particular process in question. 106 S.Ct. at 2740.

In the case at bar, the Defendant has pleaded guilty to the sexual abuse of S.G. and the murder of D.G. At issue in the proceedings in which S.G. will testify is whether Defendant will face the death penalty. It has not been disputed by the Government, defense counsel, the Guardian ad Litem for S.G., nor the District Court that there is a tradition of openness for such proceedings or that public access is an important part of this process. As the District Court said, "The Supreme Court has applied this First Amendment right of access to criminal proceedings which have historically been, and logically should be, open to the public." Memorandum Order at 2. As a result, there is no dispute that the qualified First Amendment right of access applies to the proceeding at hand.

Closure of the courtroom, thus, may be ordered only upon a showing that (1) there is a compelling reason for closure that outweighs the public's right of access under the First Amendment; (2) there is a substantial probability that, in the absence of closure, the compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest. *Press Enterprise II*, 106 S.Ct. at 2743; *Oregonian Publishing Company v. U.S. District Court for District of Washington*, 920 F.2d 1462, 1465 (9th Cir. 1990). In addition, when Constitutional rights of the public are impacted, courts may not

enter orders restraining those rights where the orders cannot accomplish what the orders are intended to protect. *Nebraska Press Association v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791 (1976).

Courts have required open courtrooms during testimony of minor victims of sexual abuse. For instance, in the case of the *United States v. Thunder*, 438 F.3d 866 (8th Cir. 2006), the court held that the testimony of 11-year old girls who were sexually abused by Defendant was required to be held in open court. In rejecting the Government's argument that the courtroom should have been closed so as not to expose the two children to voyeuristic or prurient interests, the court stated, "We believe that this argument is untenable. We have an open government, and secret trials are inimical to the spirit of a republic, especially when its liberty is at stake. The public, in a way, is necessarily a party to every criminal case." 430 F.3d at 867. Significantly, the Eighth Circuit noted that "while the Supreme Court has held that the right of access to a criminal trial is 'not absolute,' [citations omitted], "the Court has never actually upheld the closure of a courtroom during a criminal trial or any part of it, or approved the decision to allow a witness in such a trial to testify outside the public eye." 438 F.3d at 866.¹

¹The Kentucky Supreme Court in *Lexington Herald Leader Company v. Tackett*, 601 S. W.2d 905, 906 (Ky. 1980), held that closure of the courtroom during the testimony of 10 male victims under the age of 12 in a case involving allegations of sodomy was in violation of the public's common law right of access to trial proceedings.

(2) Rarity and Significance of Death Penalty Cases Underscore Need for Public Access to Proceedings Relating to Capital Punishment.

Imposition of the death penalty continues to be a controversial topic, as evidenced by the Supreme Court's recent 5-4 decision in *Kennedy v. Louisiana*, Slip Opinion 07-343 (S.Ct. June 25, 2008), in which the court held that the Eighth Amendment barred imposition of the death penalty as to a defendant convicted of rape of a child.

Since expansion by Congress in 1988 of the matters for which the death penalty may be imposed and through the Fall of 2007, the number of cases in which the Department of Justice has sought capital punishment was 431. This was out of 2,545 cases in which the crime alleged could have resulted in imposition of the death sentence. *Pittsburg Post-Gazette*, October 28, 2007. Since 1988 only three persons have been executed under the Death Penalty Act, none in the state of

In rejecting closure as violative of the public's right to attend criminal proceedings, the court stated:

The trial judge took cognizance of the delicate and distasteful matters about which young witnesses were to testify and decided that they would suffer less embarrassment and emotional trauma if such testimony were given in a closed courtroom. We do not quarrel with this concern. The problem is, however, that by the very nature of certain trials, civil as well as criminal, this embarrassment and emotional strain commonly occur. One can think of instances in trials involving rape, incest, sodomy, criminal conversation, paternity, child abuse, seduction of a minor, loss of consortium, alienation of affection, divorce, child custody, fraud, etc., where the witnesses, child and adult alike, will be greatly embarrassed and traumatized by testifying publicly. Yet this embarrassment and trauma has not been deemed sufficient justification to bar 'a reasonable portion of the public from these proceedings. [Citation omitted.] Embarrassment and emotional trauma to witnesses simply do not permit a trial judge to close his courtroom to the entire public. 906-907.

Idaho, and none of the prisoners on federal death row were convicted of crimes that occurred in the state of Idaho. *Federal Death Penalty Resource Counsel Project*, June 20, 2006.

From these statistics, it is evident that, even with the expansion by Congress in 1988 of Federal crimes for which the death penalty can be imposed, the seeking and imposition of the death penalty for a Federal crime is an extremely rare occurrence, and one that has not been imposed in the state of Idaho.

The procedures that are required concerning imposition of the death penalty under the Death Penalty Act recognize the rarity and severity of this ultimate punishment. The two phases of analyzing whether the death penalty will be imposed -- the eligibility phase and the selection phase -- ensure that the procedure "rationally narrow[s] the class of death-eligibility defendants" and permit the jury to "render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics and the circumstances of the crime." *Kansas v. Marsh*, 548 U.S. 163, 126 S.Ct. 2516, 24-25 (2006). The Supreme Court has devised this two-phase procedure in recognition of the need for heightened reliability in death penalty proceedings. *See Murray v. Giarratano*, 492 U.S. 1, 89, 109 S.Ct. 2765 (1989) (recognizing that "[t]he finality of the death penalty requires a 'greater degree of reliability' when it is imposed") quoting *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954 (1978). The Supreme Court has

recognized that "the penalty of death is qualitatively different from all other forms of punishment". *Witson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978 (1976) (plurality opinion).

Public understanding of proceedings under the Death Penalty Act is heightened because of the unique nature of the proceedings and the requirement that a jury be impaneled, under a very detailed process, to determine whether the selection of punishment is that of the death penalty.

In addition, overlaying the potential imposition of the death penalty in this case is the District Court's determination that Defendant is not only competent to participate in the death penalty proceedings, but is also competent to represent himself *pro se* in the proceedings. Thus, not only will S.G. be testifying, but also it is likely she will face cross-examination by Defendant, and how such examination proceeds has bearing not only on the demeanor and substantive testimony of S.G. but also on the Court's determination as to the competency of Defendant, none of which can be fully comprehended by the public from the pages of transcribed testimony.

(3) Given the Violent Nature of the Crimes to Which Defendant Has Pleaded Guilty, Therapeutic Value of Openness Is Significant.

Defendant has already pleaded guilty in the case at bar to the sexual abuse of S.G. and to the murder of D.G. Previously, in Idaho state court, he pleaded guilty

to the murder of S.G.'s older brother and mother, and her mother's boyfriend. The Supreme Court has recognized that the fundamental principle of openness is particularly important where violent crimes have occurred.

This openness has what is sometimes described as a 'community therapeutic value.' [Citation omitted]. Criminal acts, especially violent crimes, often provoke public concern, even outrage and hostility; this in turn generates a community urge to retaliate and desire to have justice done. [citation omitted]. Whether this is viewed as retribution or otherwise is irrelevant. When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions. Proceedings held in secret would deny this outlet and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the victims in the community and knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected.

Press Enterprise v. Superior Court of California ("Press Enterprise I"), 464 U.S. 501, 508, 104 S.Ct. 823 (1984).

The concern as to potential emotional impact on S.G. from testifying cannot override this therapeutic value of openness necessitated by the violent nature of the crimes that have occurred and the need for the public to be able to fully understand and scrutinize all proceedings related to the potential imposition of the death penalty.

(4) Order of Closure Will Not Protect S.G. from Emotional Trauma.

Barring the public from viewing S.G.'s testimony will not protect her from

emotional trauma, and, thus, the Court's Order is improper because it cannot accomplish its intended purpose.

As indicated in briefing submitted to the Court, the identity of S.G. is well known. S.G.'s identity first became known when law enforcement officials in north Idaho issued an "amber alert" on May 17, 2005, when she and her brother D.G. were first abducted from their home in north Idaho. It was also revealed during state court proceedings where Defendant pleaded guilty to the death of S.G.'s older brother, her mother and her mother's boyfriend.

S.G. has been interviewed on television on the occasion of what would have been the birthday of her older deceased brother. In the interview she discussed her brother D.G. Details of this event were covered extensively by the Associated Press, the *Spokesman-Review* newspaper, three television stations in Spokane, Washington, and other media. Moreover, S.G. has been interviewed by the national media, including on the syndicated Geraldo Rivera program, and the interview can be accessed on Geraldo Rivera's website. S.G.'s father appeared on the Oprah Winfrey show to discuss the impact of these incidents on his family, including S.G.

As currently contemplated by the Court, S.G.'s testimony will occur before numerous individuals, many of whom are strangers to her. Thus, even though the Court's Memorandum Order excludes the public from the courtroom, the jurors

will necessarily be present, as will the Judge, lawyers for the Government, lawyers for Defendant, court reporter, bailiffs, and security personnel. It is likely that at least two dozen persons, if not more, will be in the courtroom during S.G.'s testimony. Thus, closing the courtroom will not protect whatever sensitivities S.G. may have about having to relate the nature of her abuse and the death of D.G. before persons with whom she is not familiar.

Secondly, the materials presented to the Court, according to the response of S.G.'s Guardian concerning the issue of openness, demonstrate that S.G. will experience emotional trauma merely because the case against Defendant is proceeding. In his brief, the Guardian ad Litem states:

The press is certainly unaware that testimony (in affidavit form) already received by the Court from S.G.'s counselors regarding the certain emotional trauma to her concomitant with her testifying in the physical presence of the Defendant. And the press (as well as the Court) is unaware of the opinions rendered by no fewer than six (6) experts retained by the defense team who declare unequivocally that the sentencing proceeding itself (i.e. even without S.G.'s testifying in it) will provoke mental injury and exacerbation of existing symptomology in S.G. (Emphasis supplied).

Docket No. 497 at 3, 4.

While the District Court in its Memorandum Order states that a transcript of the testimony will be provided, the Guardian ad Litem point out that, too, may cause emotional trauma to S.G.

Both alternatives obviously will have to be reconsidered in the context of the press' motions, but the GAL would again respectfully assert the position that excluding the public physically from the courtroom but supplying them with a transcript of S.G.'s testimony seems to defeat the purpose and intent of alternative means of testimony (e.g. by close circuit television) in general, and in S.G.'s case will not (according to her counselor and according to the defense experts) significantly reduce S.G.'s trauma in having to testify, since she will know that the public has access at least to her testimony by written transcript.

GAL Response at p. 5.

The District Court, too, emphasized that trauma to S.G. will occur merely from "further dissemination of information to the public regarding the substance of her testimony," (Memorandum Order, at 6) and that S.G.'s fears as to testifying "are not focused entirely on the mere presence of the public in the courtroom but, instead, hinge on the further dissemination of the details of the manner of her testimony." (Memorandum Order, 11-12).

Thus, the conclusion of several experts concerning S.G., according to the Guardian ad Litem, is that she is suffering emotional trauma merely because the proceedings are continuing as to the Defendant, that her emotional trauma will be severe from having to confront her abuser in the courtroom, and that, in fact, her trauma will still occur even if her testimony is released by transcript. In entering an Order in which the Constitutional rights of the public are impacted, the Court must analyze, in the words of former Chief Justice Burger, "the probable efficacy"

of any order restricting those rights. *Nebraska Press Association*, 96 S.Ct. at 2806. Since, based on the various opinions provided to the Court, S.G. will suffer, and is suffering, emotional trauma regardless of how this case proceeds, the Order will not accomplish what the trial court desires that it accomplish.

(5) Providing a Transcript of the Hearing Will Not Allow the Public to Fully Comprehend What Occurred in a Closed Courtroom.

The essence of what is being protected through open court proceedings is confidence in the judicial system.

The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that the deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

Press Enterprise I, 104 S.Ct. 819, 823.

This understanding and ability to comprehend how justice is served relates not only to the testimony of S.G. but also how that testimony was conducted and what role the various participants in the courtroom played in the proceeding. A transcript of the testimony will not allow the public to understand how the testimony of S.G. was handled by the prosecution and by the Defendant. A transcript will not describe the demeanor of the Defendant or counsel for the Government. A transcript will not reveal the demeanor of the Court to the extent

the Judge may be required to intervene concerning S.G.'s testimony. A transcript will not describe the demeanor of S.G. nor will it reflect the impact of S.G.'s testimony on the jury.

Seemingly, if transcripts were all that were required to understand how justice proceeds in criminal cases, then juries would, as a matter of course, be presented only with transcripts of testimony and would not need to actually observe witnesses' testimony and the demeanor of prosecutors and defense counsel as they examine witnesses, nor the demeanor of the court as it played a role in the proceedings. Such neutered proceedings, however, have never been part of the American criminal justice system because, as the court stated in *Craig v. Harney*, 331 U.S. 367, 374, 67 S.Ct. 1249, 1254 (1947), "A trial is a public event. What transpires in the courtroom is public property. . . ."

The importance of being able to observe a witness testify was highlighted by the Supreme Court in *Maryland v. Craig*, 497 U.S. 836, 849, 110 S.Ct. 3157 (1990), in which the Court upheld *Maryland's* closed-circuit television procedure as not violating defendants' Sixth Amendment right of confrontation. In upholding the *Maryland* statute, the Court noted that the closed-circuit television procedure allows the judge, jury and defendant "to view (albeit by video monitor) the demeanor (and body) of the victims . . . The presence of these other elements of confrontation – oath, cross-examination and observation of the witness demeanor –

adequately ensure that the testimony is both reliable and subject to rigorous adversarial testimony . . ." (Emphasis supplied). *Id.*, 110 S.Ct. at 3166.

Because the demeanor of the victim S.G. is important to the jury's decision, Petitioner is requesting to see nothing more than what the jury observes in the courtroom -- the demeanor, reaction and participation of the judge, attorneys, Defendant and jury to S.G.'s testimony – none of which is not available through a transcript of the testimony.

(6) Less Restrictive Alternatives Are Available.

Whenever a court seeks to close a criminal proceeding to the public, less restrictive alternatives must be analyzed and rejected as not being capable of protecting the interest in question. Other alternatives that would protect S.G. are available.

In their initial Memorandum, media representatives proposed to the District Court that S.G. testify by closed-circuit television. That is, S.G. could be in an adjoining room and testify by closed-circuit television transmitted into the courtroom. That would allow those members of the public in the courtroom to observe her testimony and to observe how the other participants in the proceeding – be they jurors, judge, government lawyers, defense counsel or Defendant – reacted and played a role in the testimony.

However, the District Court has determined in its Order that, if it later determines that S.G.'s testimony would be by closed-circuit television, the public would still be excluded from the courtroom. Memorandum Order at 11-12. This decision by the Court is without any sound foundation.

None of the opinions of defense experts or counselors submitted by the Guardian ad Litem support that having S.G. testify by closed-circuit television with her testimony being transmitted into an open courtroom would, in and of itself, increase S.G.'s emotional trauma. Docket No. 22. A fair summary of their opinions is expressed in the February 3, 2008 report of S.G.'s counselor that "In my professional opinion, any legal proceedings that would bring public attention to added details regarding [S.G.'s] ordeal would exacerbate her PTSD symptoms and increase the peer cruelty and questioning already present in her life." Docket No. 22. Thus, since the District Court has ordered the public release of the transcript of S.G.'s testimony (because "the public's right to comprehend and understand the basis upon which the jury will decide whether to impose the death penalty . . . goes to the core of public access [and] can only be done where the public is privy to the substance of the testimony" (Memorandum Order at 12)), public dissemination of "added details" will necessarily occur. How trauma to S.G. would be exacerbated by having her live testimony transmitted by closed-circuit television into an open

courtroom is not addressed by any of the expert opinions presented to the Court.³

In addition, while the Court determined, in allowing that the graphic video tape concerning D.G. be played in open court, that cautionary instructions to the jury and members of the public who choose to attend would help alleviate concerns about playing the video in open court, the Court rejected cautionary instructions or screening of members of the public as alternatives to completely barring the public from either being present in the courtroom while she testifies or being able to view her testifying by closed-circuit television from another room.

(7) 18 U.S.C. § 3509(b)(1)(D) Mandates Courtroom be Open to Public if S.G.'s Testimony is Transmitted by Closed-Circuit Television.

18 U.S.C. § 3509(b)(1)(D) provides that, if testimony by closed-circuit television is selected as the alternative, then "The child's testimony shall be by closed circuit television into the courtroom for viewing and hearing by the defendant, jury, judge, and public. (Emphasis supplied). The statute is mandatory ("shall") in providing for the public's presence and mandates that if the District Court determines that the testimony of S.G. is to be by closed-circuit television, then the public must be permitted in the courtroom into which the transmission of

³ It should be noted that, of the four experts whose reports were submitted by the Guardian ad Litem, only her counselor has actually treated S.G. The defense experts – who reside in California, Georgia and Switzerland – base their opinions only on written materials submitted to them and on their prior experiences. Moreover, although 18 U.S.C. § 3509(b)(1)(C) provides that the court may interview a minor victim in chambers, such an interview is not referenced in the District Court's Memorandum Order concerning any first-hand knowledge by the Court of potential negative impact on S.G. from having her closed-circuit television testimony transmitted into an open courtroom.

the testimony is made. There is no provision that providing a transcript of testimony conducted by closed-circuit television is permissible as a satisfactory substitute for the public being able to view and hear the testimony. Nor is Petitioner aware of any case in which the public has been barred from courtrooms during closed-circuit television testimony of a witness. The *Maryland* statute providing for testimony by closed-circuit television, upheld by the Superior Court as Constitutional in *Maryland v. Craig*, supra, does not provide for closing of the courtroom to the public.

VII. CONCLUSION

Significant decisions are yet to be made by and proceedings yet to occur before the Court, and, given the complexity and public significance of the issues presented in this capital case, including potential imposition of the death penalty, openness, essential to the ability of the public to understand the proceedings and the fairness of the same, must be provided. The record before the Court does not support closure of the courtroom during the testimony of S.G., whether in court or by closed-circuit television. Petitioner respectfully requests that a writ of mandamus be issued requiring the District Court to open the courtroom for the testimony of S.G., however presented.

DATED this 7th day of August, 2008.

WITHERSPOON, KELLEY, DAVENPORT
& TOOLE, P.S.

By: /s/ Duane M. Swinton

DUANE M. SWINTON

JOEL P. HAZEL

Attorneys for Petitioner

CORPORATE DISCLOSURE STATEMENT

Petitioner Cowles Publishing Company, d/b/a *The Spokesman-Review*, is a wholly owned subsidiary of Cowles Company.

WITHERSPOON, KELLEY, DAVENPORT
& TOOLE, P.S.

By: */s/ Duane M. Swinton* _____

DUANE M. SWINTON
JOEL P. HAZEL
Attorneys for Petitioner

STATEMENT OF RELATED CASES

The case before this court, Case No. MC 08-6420-S-EJL is related to Case No. CR07-23-N-EJL.

WITHERSPOON, KELLEY, DAVENPORT
& TOOLE, P.S.

By: */s/ Duane M. Swinton* _____

DUANE M. SWINTON

JOEL P. HAZEL

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 7th day of August, 2008, I caused a true and correct copy of the PETITION OF COWLES PUBLISHING COMPANY, d/b/a THE SPOKESMAN-REVIEW FOR WRIT OF MANDAMUS to be forwarded, with all required charges prepaid, by the method(s) indicated below, to the following parties:

Judy Clarke	_____	U.S. Mail
Federal Defender's Office	_____	Hand Delivered
225 Broadway, Suite 900	_____	Overnight Mail
San Diego, CA 92101	<u>✓</u>	Via E-Mail: judyclarke@jcsrlaw.net

Mark A. Larranaga	_____	U.S. Mail
Walsh & Larranaga	_____	Hand Delivered
705 Second Ave., #405	_____	Overnight Mail
Seattle, WA 98104	<u>✓</u>	Via E-Mail: mark@jamlegal.com

Roger Peven	_____	U.S. Mail
Federal Defender's Office	_____	Hand Delivered
10 N. Post St., #700	_____	Overnight Mail
Spokane, WA 99210	<u>✓</u>	Via E-Mail: Roger_Peven@fd.org

Thomas Monaghan	_____	U.S. Mail
Federal Defender's Office	_____	Hand Delivered
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Boise, ID 83702	<u>✓</u>	Via E-Mail: Thomas_Monaghan@fd.org

Thomas E. Moss	_____	U.S. Mail
U.S. Attorney's Office	_____	Hand Delivered
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800 Park Blvd., Suite 600	<u>✓</u>	Via E-Mail: Thomas.Moss@usdoj.gov
Boise, ID 83712		

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U.S. Attorney's Office
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Coeur d'Alene, ID 83814

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/s/ Terry Erickson
TERRY ERICKSON, Legal Assistant

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 7th day of August, 2008, I caused a true and correct copy of the PETITION OF COWLES PUBLISHING COMPANY, d/b/a THE SPOKESMAN-REVIEW FOR WRIT OF MANDAMUS to be forwarded, with all required charges prepaid, by the method(s) indicated below, to the following parties:

Joseph Edward Duncan
c/o Ada County Jail
7210 Barrister Drive
Boise, ID 83704

_____ U.S. Mail
_____ Hand Delivered
 OVERNIGHT Mail
_____ Via fax:

/s/ Terry Erickson
TERRY ERICKSON, Legal Assistant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

In re:)	CASE NO. MC 08-6420-S-EJL
THE SPOKESMAN-REVIEW, THE)	
ASSOCIATED PRESS, THE IDAHO)	RELATED CASE NO. CR07-23-N-EJL
STATESMAN, IDAHO PRESS CLUB,)	
IDAHO NEWSPAPER FOUNDATION,)	MEMORANDUM ORDER
IDAHOANS FOR OPENNESS IN)	
GOVERNMENT, IDAHO ALLIED DAILIES,)	
IDAHO STATE BROADCASTERS)	
ASSOCIATION, BOISE STATE RADIO,)	
KHQ-TV, KREM-TV, KXLY-TV, KTVB-TV,)	
KTRV-TV, KBCI-TV and KIVI-TV)	
Movants.)	

Before the Court is a request by sixteen Media outlets (collectively “the Media”) asking that the courtroom be open during the proceedings in United States of America v. Joseph Edward Duncan, III, CR07-23-N-EJL. In particular, the Media asks that the proceedings be open to the public during the testimony of the minor victim and when certain graphic video evidence is presented. The parties have filed their briefing and the matter is now ripe for the Court’s consideration.

Having fully reviewed the record herein, the Court finds that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, this motion shall be decided on the record before this Court without oral argument. Local Rule 7.1(d)(2)(ii).

Standard of Law

I. First Amendment

The First Amendment protects the right of the public and the press to attend criminal trials. Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 558-81 (1980) (plurality opinion). The Supreme Court has applied this First Amendment right of access to criminal proceedings which have historically been, and logically should be, open to the public; allowing the public access except in those instances where closure is essential to serve a higher interest and where closure is narrowly tailored. See Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 7-9 (1986) (Press-Enterprise II); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (Press-Enterprise I). This First Amendment right guarantees that the press and the public “have a presumed right of access to court proceedings and documents.” Oregonian Pub. Co. v. United States Dist. Court for Dist. Of Oregon, 920 F.2d 1462, 1466 (9th Cir. 1990) (citing Press-Enterprise I, 464 U.S. at 510). “This presumed right can be overcome only by an overriding right or interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” Id.

In determining whether the First Amendment right of access extends to a proceeding, the Court must decide: (1) whether the type of proceeding at issue has traditionally been conducted in an open fashion and (2) whether public access to the proceeding would serve as a curb on prosecutorial or judicial misconduct or would further the public's interest in understanding the criminal justice system. Oregonian Publishing, 920 F.2d at 1466 (citing Press-Enterprise II, 478 U.S. at 8-9; Globe Newspaper, 457 U.S. at 605-06; United States v. Brooklier, 685 F.2d 1162,

1167-71 (9th Cir. 1982)). Where the First Amendment right of access is implicated in a case, “[t]he Supreme Court has made clear that criminal proceedings and documents may be closed to the public without violating the first amendment only if three substantive requirements are satisfied: (1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest.” Id. at 14466-67.

Before the Court can order a criminal proceeding be closed: (1) those excluded from the proceeding must be afforded a reasonable opportunity to state their objections and (2) the reasons supporting closure must be articulated in findings. Oregonian Publishing, 920 F.2d at 1466. “An order of closure should include a discussion of the interests at stake, the applicable constitutional principles and the reasons for rejecting alternatives, if any, to closure.” Id. (citing Brooklier, 685 F.2d at 1167-68; In re Washington Post, 807 F.2d at 390-91). “The interest [to be protected] is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.” Id. “The court must not base its decision on conclusory assertions alone, but must make specific factual findings.” Id. (citing Press-Enterprise II, 478 U.S. at 13-15).

II. Sixth Amendment

The Defendant has a Sixth Amendment right to a public trial that must also be considered. “The Sixth Amendment guarantees that a defendant shall enjoy ‘the right to a speedy and public trial.’ The public trial guarantee was created for the benefit of defendants. It discourages perjury and ensures that judges, lawyers and witnesses carry out their respective functions responsibly.”

United States v. Sherlock, 962 F.2d 1349, 1356 (9th Cir. 1989) (quoting Waller v. Georgia, 467 U.S. 39, 46 (1984)) (citations omitted). “Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously, and generally give the public an opportunity to observe the judicial system.” Id. (citing Gannett Co. v. DePasquale, 443 U.S. 368, 383 (1979); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605-06 (1982)). “The right to a public trial, however, is not absolute and must give way in some cases to other interests essential to the fair administration of justice.” Sherlock, 962 F.2d at 1356 (citations omitted).

In Waller v. Georgia, the United States Supreme Court adopted the following test for determining when the defendant's right to a public trial is outweighed by other considerations: (1) a party seeking to close a court proceeding must advance an overriding interest that is likely to be prejudiced; (2) the closure must be no broader than necessary to protect that interest; (3) the trial court must consider reasonable alternatives to closing the proceeding; and (4) it must make findings adequate to support the closure. 467 U.S. 39, 46; see also Bell v. Jarvis, 236 F.3d 149, 178 (4th Cir. 2000).

Analysis

I. Testimony of the Minor Victim:

The Media asserts an open courtroom during the testimony of the minor victim is important to allow the public to observe and understand the impact this key and crucial testimony including how the minor victim conducts herself during the testimony as well as how counsel, the jury, and Mr. Duncan react. The Media's request points to the importance of public access to the courtroom

courtroom will ensure the accuracy and completeness of the minor victim's testimony as she will be more able to testify openly. See 18 U.S.C. § 3509(e).

A. Compelling Interest

Recalling the details of the crimes in front of a group of disinterested peers will cause the minor victim in this case undue embarrassment, as well as psychological and possible physical harm. The facts alleged in this case that will be revealed during the testimony of the minor victim will relate to the multiple traumatic events experienced by the minor victim when she was eight years of age including the homicide of several family members, the abduction of she and her brother for several weeks during which time she and her brother were sexually assaulted and exploited, and the eventual murder of her brother. The parties have previously filed sealed affidavits in this case which include opinions of medical personnel who have interviewed and evaluated the minor victim.² (CR07-23-N-EJL, Dkt. No. 30). These affidavits reflect that the minor victim suffers from ongoing and overwhelming concerns regarding this trial and further dissemination of information to the public regarding the substance of her testimony. The treatment providers are concerned about the re-exposure to the traumatic events that her testimony will require. The Court also notes the

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The Media has filed a motion for access to these records and others. These affidavits are appropriately filed under seal as they relate to evidence that may be presented in this matter. The Court has a legitimate concern with protecting the compelling interests of a fair trial by impartial jurors. Unsealing of these documents would potentially reveal testimony and/or evidence which would jeopardize the interest in a fair and impartial trial. There are no other less restrictive alternatives available at this time. Though the media is not privy to these documents, the media's interests are well represented in their briefing and the Court has considered the same in issuing its ruling denying the Media's request in a separate Order entered in MC08-6420-S-EJL. The Court incorporates the reasoning of that Order here as applicable.

Memorandum Order - 6

08/orders/duncan_media_sealed_hearings

ongoing health concerns of the victim's father has likely caused additional stress to the victim. These concerns regarding the well-fare of the minor victim in this case are compelling.

B. Weighing the Interests and Alternatives to Closure

Having found a compelling interest exists, the Court must now consider whether that compelling interest outweighs the public's right of access and whether there are narrowly tailored alternatives to completely closing the courtroom. The "circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one. Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." Globe Newspaper, 457 U.S. at 604-06 (citations omitted). The Media argues that the minor victim's compelling interest does not outweigh the public's right of access because the identity of the minor victim and general nature of the crimes has already been made public, closing the courtroom will still require the minor victim to testify before several people, and there are alternatives to closing the courtroom available.

1. Identity and Prior Publicity

The Media argues that the minor victim's privacy will not be protected by closing the courtroom where her identity and the general nature of the abuse alleged to have occurred have already been publicly disclosed. The Media notes that the minor victim's photograph has been widely disclosed and she has been interviewed by the Media.

It is true that this case has received national attention in the public which will likely intensify when the sentencing hearing begins. Much of the attention is focused on this minor victim and the testimony she will give. Having considered the nature of the testimony, the age of the minor victim, and the comments of the medical professionals regarding the increasing stress the attention from this case has put on the minor victim; the Court finds the compelling interests in protecting the minor victim from further harm and embarrassment significantly outweighs the First Amendment interests of the public. The minor victim not only has been dealing with the ongoing stress of the events about which she will testify, but also the increasing attention from her peers at school and the public in general. The victim's fears regarding the coverage of her testimony is certain to occur, not mere speculation. The media attention of the related state case was extensive and was focused in large part on this victim.

Because much of this case has already been made public, however, does not mean that further harm will not result to the minor victim where the public is allowed greater access to her private and personal suffering. Just the opposite, because these facts have already been revealed to the public demonstrates that the public's interest in access is dampened because it is already privy to many of the relevant facts and gritty details of this minor victim's testimony. All that is left is the incessant desire to watch the minor victim have to again relay the traumatic events in greater detail. This is wholly unnecessary and serves only to further sensationalize an already horrific event in this young child's life which she and she alone will have to live with for the rest of her life. Her testimony will be forever memorialized in the written transcript, which the Media and public will

have access to and which will be more than sufficient to satisfy the right of access.

2. Testifying in Front of Court Personnel

The Media argues that closing the courtroom will not protect the minor victim's privacy because she will still be testifying in front of many individuals including court personnel, the jury, counsel, and Mr. Duncan. The Media states that because the minor victim will have to testify before this number of individuals, "[i]t is not clear...how testifying perhaps before additional members of the public would create any different impact on her, particularly where she has already been interviewed on television and her identity is publicly known." Stated differently, since the damage to this young victim has already been done, what is the harm in causing a little more damage? This argument holds no weight with this Court. Closing the courtroom to only necessary persons is the narrowest means available for protecting the compelling interests of the minor victim even though it requires the victim to testify in front of court personnel, the jury, counsel, and Mr. Duncan. The only interest acknowledged by the Media as a valid interest appears to start and end with the protection of the identity of the minor victims; because their names and the general nature of the crimes have been publicized already the Media can see no reason not to be allowed to view the entire process. This position, however, ignores the victim's compelling interests noted above.

The Court does not doubt nor minimize the Media and the public's right to access and interest in viewing judicial processes particularly ones such as this which carry the ultimate penalty. However, the Court could not disagree more with the Media's position. The fact that much of this case including the names and identities of the minor victims, pictures, and the general nature of the

crimes committed against them has been exposed in the public is not reason enough for the Court to conclude that the public's interest outweighs the compelling interest such that the testimony of the minor victim should be held in open court. Accordingly, the courtroom must be closed during the testimony of the minor victim.

The Court is sensitive to the public and the media's First Amendment rights and interests in open access and has considered these rights in reaching its ruling. However, the compelling interests of the minor victim are not extinguished or eliminated simply because some information has already been aired in the public. The Court is not attempting to rewind history and expunge the identity of the minor victim from the public's mind or to keep secret the nature of the abuse suffered by the minor victim. What is done is done. The interests of the minor victim that the Court concludes are compelling and that outweigh the interest of the public at this stage have to do with the further harm the minor victim will suffer. The harm goes beyond mere embarrassment or prudishness. The damage to the minor victim's mental, physical, and psychological well-being that is likely to result from having to testify before the public is very real and lasting. While the Court does not believe that in every case involving a minor victim that closing the courtroom is necessary, this case presents precisely the circumstances that demand such action. If the compelling interests in this case are not sufficient to warrant closing the courtroom, the Court can think of no case where a courtroom could be closed.

3. Alternatives

The Media advocates for the Court to employ less restrictive measures to avoid closing the courtroom such as giving a cautionary instruction, testimony by closed-circuit television, or a

videotaped deposition. The Media argues that open courtrooms enhance the quality and safeguards the integrity of the judicial process by assuring that proceedings are conducted fairly, discourages perjury, misconduct, and bias decisions. Again, the Media contends that these interests are particularly applicable here given the controversial nature of the death penalty.

The Court agrees that open courtrooms and proceedings work to assure the quality and safeguard the integrity of the judicial process. See Press-Enterprise II, 478 U.S. at 9 (quoting Press-Enterprise I, 464 U.S. at 501); Sherlock, 962 F.2d at 1356 (citations omitted). The alternatives offered by the Media here, however, do not address the concerns at play in this case. Simply instructing the public to conduct themselves accordingly addresses the impact an outburst might have on either the jury or the witness. While this is a valid concern in any trial, the Court has not relied upon this concern in deciding to close the courtroom in this case because it does not address or resolve the compelling interests the Court has found that outweigh the public's First Amendment right of access in this case.

The Court is still considering allowing the minor victim to testify from a separate room via closed circuit television, particularly in light of Mr. Duncan's election to proceed *pro se*. This alternative form of testimony is usually employed to address circumstances where a witness is unable to testify in the presence of the defendant; which is undoubtedly true of the minor victim in this case. However, this alternative also does not resolve the compelling interests in this case that the Court has found to outweigh the public's First Amendment right of access in this case. The minor victim's fears regarding testifying are not focused entirely on the mere presence of the public in the courtroom but, instead, hinge on the further dissemination of the details of the manner of her

testimony. Knowing the Media is watching and reporting during her testimony, whether from a separate location or in the same location, is a concern the Court finds it to be a compelling one given the strong likelihood of further injury to the minor victim as noted above.

However, the public right of access as to the substance of the testimony is not outweighed by the minor victim's interests. Thus, the written transcript of the testimony will be provided to the public as soon as possible following the minor victim's testimony. The strongest argument advanced by the Media is the public's right to comprehend and understand the basis upon which the jury will decide whether to impose the death penalty. This interest goes to the core of public access and is not outweighed by the minor victim's interests. This can only be done where the public is privy to the substance of the testimony. Providing the written transcript of the minor victim's testimony to the public will satisfy the public's interest. The written record will convey to the public the substance of the testimony including the details of the crimes as well as the actual words the minor victim uses while testifying to describe the crimes. Actually viewing the reactions and conduct of the court participants, however, is not necessary to further the public's right of access such that it outweighs the compelling interests of protecting the victim's stated interests. Accordingly, the Court concludes that providing the transcript to the public is necessary to fulfill the public right of access.

C. Conclusion

Closing the courtroom during this witness' testimony and providing a written transcript of the same to the media is narrowly tailored to best serve to protect the compelling interests of the victim while still ensuring the public's First Amendment rights are protected. See Press-Enterprise

Co. v. Superior Court, 464 U.S. 501, 512 (1984) (“the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time.”). In reaching this conclusion, the Court has considered other alternatives to closing the courtroom including the various alternative forms of testimony for child witnesses outlined in 18 U.S.C. § 3509, the possibility of using alternative devices, and a limited closure of the courtroom. In the event the parties are unable to reach an alternative to having the minor victim testify, her testimony will be necessary for the jury to see as she is the only witness to most of the conduct alleged against Mr. Duncan. While providing such testimony will undoubtedly be difficult, it may prove impossible and harmful to the minor victim where the courtroom contains members of the public and the media. As such, the courtroom will be closed during the minor victim’s testimony.

The Media’s request to open the courtroom during the minor victim’s live testimony or for alternative procedures is denied. The Court may reconsider the request to have the minor victim testify from a separate room in the future.³ Regardless of the format for the minor victim’s testimony, the Court will provide a copy of the written transcript to the Court’s Media Representative as soon as possible following the testimony of the minor victim.

III. Graphic Video Evidence:

The Media also asks that the courtroom remain open during the presentation of the graphic video tapes in order to allow the public to: understand the death penalty process, fully comprehend

³ The Court notes the defense’s Sixth Amendment Confrontation Clause concerns regarding the use of two-way closed circuit television. (Dkt. No. 20, p. 6).

what evidence has been presented to the jury for its consideration, and observe the impact that the playing of the video has on the trial participants including the jury, counsel, and Mr. Duncan. The Media makes clear that they are not seeking a copy of the video tape, but only to observe the video tape as it is presented in Court. The Government opposes this request.

Though the videos in question are disturbing, they are direct evidence of the crimes and are necessary to the jury's consideration and must be presented to the jury. The Court is sensitive to the family's interest in maintaining their privacy and the dignity of the victim. However, ours is an open judicial system that requires a compelling interest that outweighs the lengthy history of public access to open court proceedings. Unlike the compelling interests noted above as to the surviving minor victim, such interests that outweigh the public's right of access as to the videos have not been shown here. As such, the courtroom will remain open during the presentation of the videos in question. The Court will give a cautionary instruction to the jury and to the members of the public who choose to attend. Because the videos will be played in open court, the Media and the public will not be provided access to or copies of the same. See Nixon 435 U.S. at 609-10 (no right to physically access and copy the Watergate tapes that had already been played in open court where transcripts of the tapes were available to the media and the public generally).

ORDER

Based on the foregoing and being fully advised in the premises the Court **GRANTS IN PART AND DENIES IN PART** the Media's request (Dkt. No. 1). The request is granted as to the graphic video evidence. The courtroom will be open during the presentation of the video evidence.

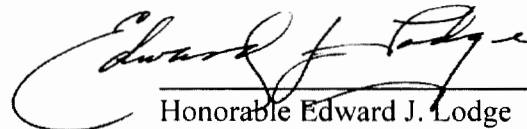
The request is denied as to the testimony of the minor victim. The courtroom will be closed during this testimony of the minor victim with a written transcript being provided to the Media Representative as soon as possible thereafter.

The Clerk of the Court is directed to file this Order in the normal course in both MC08-6420-S-EJL and CR07-23-N-EJL. The Clerk shall serve the same upon all parties.

IT IS SO ORDERED.



DATED: August 5, 2008


Honorable Edward J. Lodge
U. S. District Judge