IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANDREA CONSTAND,	:	
	:	
Plaintiff,	:	
	:	No. 05-cv-1099-ER
v.	:	
	:	
WILLIAM H. COSBY, JR.,	:	
	:	
Defendant.	:	

MOTION OF THE ASSOCIATED PRESS TO INTERVENE AND TO FILE OPPOSITION TO DEFENDANT'S MOTION FOR PROTECTIVE ORDER

The Associated Press ("The AP") hereby moves to intervene in this matter pursuant to Rule 24(b) of the Federal Rules of Civil Procedure for the purpose of filing a memorandum in opposition to the motion of defendant William H. Cosby, Jr., for a protective order. The AP hereby incorporates by reference as if fully set forth herein, the grounds stated in support of this motion set forth in the accompanying memorandum of law.

Dated: May 13, 2005

Respectfully submitted,

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MEMORANDUM OF THE ASSOCIATED PRESS IN SUPPORT OF MOTION TO INTERVENE AND IN OPPOSITION TO DEFENDANT'S MOTION FOR PROTECTIVE ORDER

The Associated Press ("the AP") hereby moves to intervene in this matter in order to oppose the motion of Defendant William H. Cosby, Jr., for a blanket protective order that would render confidential "[a]ll information uncovered or obtained in discovery in this matter," prohibit the parties and their representatives from discussing any such information, mandate the filing under seal of any portion of any document referring to such information and permitting the parties the discretion to file any document they choose under seal. Such wholesale and presumptive sealing – both of the public record and the lips of the parties – violates clear precedent in the Third Circuit and is unconstitutional.

STATEMENT OF FACTS

The plaintiff, Andrea Constand, charges that Mr. Cosby drugged her and sexually assaulted her in his home near Philadelphia and seeks to recover damages based on a host of tort claims. Montgomery County prosecutors investigated Ms. Constand's charges and ultimately refused to charge Mr.Cosby with any crime. However, during the period of

their investigation, the existence of the allegations was publicly disclosed and became the subject of widespread media coverage. *See, e.g.*, Defendant's Motion for Protective Order ("Mot. Prot. Order"), Exs. I.

Plaintiff alleges that, after the allegations became publicly known, Mr. Cosby "and his authorized agents and/or representatives . . . made publicized statements to the media, including, Celebrity Justice." Complaint ¶ 27. Mr. Cosby denies this allegation. Answer, ¶ 27. However, according to the website of *Celebrity Justice*, a syndicated television show, "a Cosby rep call[ed] this a classic shakedown." *See* http://celebrityjustice.warnerbros.com/news/0502/07a.html (link to segment entitled, "Cosby Accuser's Mom Contacted Cosby Before Cops?", Feb. 7, 2005); *see also* http://celebrityjustice.warnerbros.com/news/0502/09b.html (link to segment entitled "Cosby's Attorney Claims Accuser After Cash," Feb. 9, 2005, quoting Mr. Cosby's attorney, Marty Singer, as follows: "These people contacted Mr. Cosby with the intention of requesting money from Mr. Cosby. It is very obvious."). Copies of these web pages are attached hereto as Exhibit A.

On February 17, 2005, Montgomery County District Attorney, Bruce L. Castor, Jr., issued a press release announcing that no charges would be brought against Mr. Cosby in connection with the allegations. According to the press release, the District Attorney found that "insufficient, credible, and admissible evidence exists upon which any charge against Mr. Cosby could be sustained beyond a reasonable doubt." Mot. Prot. Order, Ex. J, p. 2. At the same time, the District Attorney noted the "much lower standard of proof" applicable in a civil case and stated that by his decision he did not render any "opinion concerning the credibility of any party involved." *Id.*

After the District Attorney's announcement, Mr. Cosby spoke with the *National Enquirer*, saying, among other things, "Looking back on it, I realize that words and actions can be misinterpreted by another person." *National Enquirer*, March 2, 2005 (quoting Feb. 21, 2005 interview with Mr. Cosby) (attached hereto as Exhibit B). Mr. Cosby also reportedly told the *Enquirer* that he would not "give in to people who try to exploit me because of my celebrity status." *Id.*

Shortly thereafter, plaintiff filed this civil action. She contends that there are many other women who have come forward with allegations that Mr. Cosby has acted abusively toward them. Plaintiff has agreed to identify those women to defendant, but has filed a motion to keep those identifications out of the public record.[1]

Defendant now seeks to subsume plaintiff's motion in the far broader sealing motion that he has filed, a motion in which he seeks a protective order that would wholly enshroud in secrecy the facts that may support – or refute – plaintiff's allegations in this case.

Mr. Cosby asks the Court to enter the following order:

> 1. All information uncovered or obtained in discovery in this matter shall be treated as confidential, subject to review by the Court upon application of any party;
>
> 2. No party may disclose any information covered by paragraph one to anyone other than the parties in this case, their counsel, and representatives working on their behalf, and no party may use any such information for any purpose other than this litigation.

[1]AP does not as a matter of policy publish the names of alleged victims of sex crimes who wish to remain anonymous. It takes no position on plaintiff's request to maintain the names of other alleged victims in confidence except to note that any such sealing in records filed with the Court must still satisfy the constitutional standards that apply to all court records. *See, infra*, II.B.

> 3. The parties are granted leave to file documents under seal, subject to review by the Court upon application of any party.
>
> 4. All court filings referring to, quoting, summarizing, or attaching any information covered by paragraph one must be filed under seal, with a substitute copy, expressly omitting the reference, quotation, summary or attachment filed publicly.

Mot. Prot. Order.

As discussed below, this proposed order is objectionable in several respects and the AP, therefore, respectfully requests that the Court deny defendant's motion for a protective order.

ARGUMENT

I. THE ASSOCIATED PRESS SHOULD BE PERMITTED TO INTERVENE

The AP has standing to intervene in this action pursuant to Rule 24(b) of the Federal Rules of Civil Procedure. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3d Cir. 1994) ("By virtue of the fact that the Newspapers challenge the validity of the Order of Confidentiality entered in the main action, they meet the requirement of Fed.R.Civ.P. 24(b)(2) that their claim must have 'a question of law or fact in common' with the main action."). Similarly, here, the AP wishes to challenge the blanket sealing order proposed by defendant and therefore has "a question of law or fact in common with the main action."

II. DEFENDANT SEEKS A PROTECTIVE ORDER THAT VIOLATES THIRD CIRCUIT PRECEDENT AND IS FACIALLY UNCONSTITUTIONAL.

A. Defendant Has Not Demonstrated – and Cannot Demonstrate – the Good Cause Required By *Pansy* for Court-ordered Confidentiality.

Under *Pansy*, defendant's request for a rote and blanket confidentiality order that would banish from public view "[a]ll information uncovered or obtained in discovery" must be denied. Defendant's Proposed Order. ¶ 1. For the same reason, defendant's request for a gag order regarding all such information (proposed order, ¶ 2) is similarly flawed.

In *Pansy*, the Third Circuit held that the party seeking a protective order, whether governing discovery material or settlement agreements, must demonstrate with respect to "*each and every document sought to be covered*" good cause for the sealing of *that document*. *Id.* at 786-87 (emphasis added). *Cf. Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 166 (3d Cir. 1993) ("the burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the party seeking the protective order; any other conclusion would turn Rule 26(c) on its head" (quoting *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1122 (3d Cir. 1986)); *Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996) (protective orders under Fed. R. Civ. P. 26(c) authorizing the sealing of documents that either party "considers . . . to be of a confidential nature" are facially overbroad); *United States v. Corbitt,* 879 F.2d 224, 228 (7th Cir.1989) ("[T]he public's right to inspect judicial records may not be evaded by a wholesale sealing of court papers. Instead, the district court must be sensitive to the rights of the public in determining whether any particular document, or class of documents, is appropriately filed under seal."). Any

request for a general, prospective and total shroud of secrecy over material designated confidential by a party runs afoul of *Pansy's* clear rule.[2]

In determining whether good cause exists, the proponent of the sealing must demonstrate how he will be harmed by each public disclosure. *Pansy*, 23 F.3d at 787. As the Court in *Pansy* explained, the risk of harm cannot be based on speculation:

> "Good cause is established on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure. . . . Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning," do not support a good cause showing.

Id. (quoting *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986), *cert. denied*, 484 U.S. 976 (1987). *See also Aetna Casualty & Surety Co. v. George Hyman Construction. Co.*, 155 F.R.D. 113 (E.D. Pa. 1994) (Robreno, J.) (relying on *Pansy* to deny approval of a stipulated protective order based on the parties' failure to demonstrate good cause).

While defendant may wish to litigate behind a blanket of secrecy, that is simply not the way our courts operate. If defendant's concern is that he not be tarred by false accusations, this concern is not properly answered by imposing secrecy. Rather, the concern is more properly addressed by full disclosure – the employment of defendant's right and demonstrated ability to publicly refute accusations being made in court proceedings. If defendant's concern is about tainting the jury pool by publication of plaintiff's accusations, the answer, again, is not secrecy. Any potential taint in the jury pool can be addressed and resolved by a number of available alternatives, such as

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[2] As the Third Circuit explained in *Pansy*, even if the parties agree to confidentiality, which is not the case here, they cannot be given "carte-blanche" by the Court to seal or withhold documents from the public eye. 23 F.3d at 786 (quoting *City of Hartford v. Chase*, 942 F.2d 130, 136 (2d Cir. 1991) ("it is only after very

extensive *voir dire* and cautionary instructions from the court. *United States v. Criden*, 648 F.2d 814, 827 (3d Cir. 1981) ("*Criden I*")(observing, in an access matter arising in an Abscam prosecution, that Supreme Court precedent "suggests that the appropriate course to follow when the spectre of prejudicial publicity is raised is not automatically to deny access but to rely primarily on the curative device of voir dire examination").

Defendant's primary concern, that he will be embarrassed by discovery and by the public filings in this matter, is simply not sufficient to warrant the imposition of a blanket confidentiality or sealing order. Under *Pansy*, a party who chooses to rely on embarrassment as the reason for secrecy "must demonstrate that the embarrassment will be particularly serious." 23 F.3d at 787 (quoting *Cipollone*, 785 F.2d at 1121). Mr. Cosby has made no such showing. He has simply stated that some of the District Attorney's records contain "several salacious statements from alleged witnesses whose credibility has never been tested" (Mot. Prot. Order, p. 4), and has quoted the District Attorney's comment that "[m]uch exists in this investigation that could be used (by others) to portray persons on both sides of the issue in a less than flattering light." (*id.*, p. 5). But, as noted, Mr. Cosby has already spoken to at least one media entity about the motives of his accuser and has reportedly said, among other things, "I'm not saying what I did was wrong, but I apologize to my loving wife, who has stood by my side for all these years, for any pain I have caused her." Ex. A. This public apology demonstrates Mr. Cosby's voluntary decision to bring at least some aspects of this dispute into the public arena, at least when he believes his purposes will be served. *See also* N. Egan,

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careful, particularized review by the court that a Confidentiality Order may be executed"). Here, defendant goes even one step further, asking the Court to brand "confidential" *information*, not simply documents.

"Cosby jokes on stage about doping drink," *Phila. Daily News*, Mar. 8, 2005, attached hereto as Exhibit C.

Although the Court should take account of the potential for embarrassment as a factor in its determination as to whether good cause for the imposition of confidentiality exists, *Pansy* explicitly directs that this interest should be given little weight when the party "is a public person subject to legitimate public scrutiny." 23 F.3d at 787. "Bill" Cosby, without question one of the important entertainment icons and role models this City has ever produced, is such a public person.

Given Mr. Cosby's preeminence in this community, the *Pansy* court's admonition regarding public figures particularly applies. While the AP does not suggest that Mr. Cosby made any improper attempt to influence the District Attorney's determination, the public is entitled to understand how the District Attorney came to the conclusion that Mr. Cosby should not be charged with any crime. Mr. Castor's statement suggests, on the one hand, that he found "insufficient, credible, and admissible evidence," but, in the same statement, says that he "renders no opinion concerning the credibility of any party involved." Mot. Prot. Order, Ex. J, p. 2. At this juncture, just as all of the comments by Mr. Cosby, his representatives, and plaintiff's representatives, and the conclusions underlying the District Attorney's decision not to prosecute Mr. Cosby, are about to be tested in the crucible of discovery, it is all the more important for the public to have access to the facts that will explain what has occurred in this matter and why.

Finally, as this Court noted in *Aetna Casualty*, the Court may not, under *Pansy*, permit the parties to "self-select" the information that a proposed confidentiality order will cover. 155 F.R.D. at 116. Such a delegation of authority "results in judicial

discretion yielding to private judgment," *id.*, an outcome not permitted by *Pansy*. In this case, defendant apparently attempts to sidestep this roadblock by adding to paragraphs 1 and 3 of his proposed order the phrase, "subject to review by the Court upon application of any party." But this afterthought cannot salvage the broad proscriptions on disclosure that precede it. First, this formulation presumes that the material will be treated as secret *ab initio*, without any particularized threshold explanation of why such secrecy is required or even whether the material sought to be protected has already slipped into public view, thus nullifying any need for confidentiality. Second, it fails to account for the fact that *Pansy* places the burden to support secrecy squarely on the party seeking it, and not on the party seeking disclosure. Third, it prescribes that the only *parties* may challenge secrecy; thus, an intervenor, such as the AP, would not be permitted to challenge the seal.

Defendant wholly fails to support his request for blanket secrecy in this matter; indeed, there is no way he could do so on the facts before the Court.

B. Blanket Sealing of Judicial Records Would Be Unconstitutional and Would Violate Third Circuit Precedent.

Defendant also asks this Court, in effect, to create a shadow record that contains only the barebones of the parties' filings, shielding the substantive aspects of their filings from public view and public accountability:

> All court filings referring to, quoting, summarizing, or attaching any information covered by paragraph one [which is "[a]ll information uncovered or obtained in discovery"] must be filed under seal, with a substitute copy expressly omitting the reference, quotation, summary or attachment filed publicly.

Defendant's proposed order, ¶ 4; *see also id.*, ¶ 3 (permitting the parties to file *any* document under seal).

Such an order would be unconstitutional on its face, as well as a violation of the common law right to access. The jurisprudence of access in the Third Circuit and in the federal courts generally clearly bestows a qualified right of access to judicial records and proceedings.

The essence of this jurisprudence is that public understanding and monitoring of the judicial function is critical to the exercise of self-government and to the concomitant constitutional rights to speak and publish freely. Hence, the right of access 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." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 9 (1986) (*Press-Enterprise II*) (quoting *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (*Press-Enterprise I*)); *see also United States v. Raffoul*, 826 F.2d 218, 225 (3d Cir. 1987).

1. **There is a common law and constitutional right of access to judicial proceedings and records.**

This right, now deeply ingrained in Third Circuit jurisprudence, was first recognized by the Supreme Court in criminal matters, beginning with *Richmond Newspapers v. Virginia*, 448 U.S. 555, 580 (1980). There, the Virginia Supreme Court had affirmed the trial court's closure of an entire criminal trial on the defendant's motion, citing the concern that having the press and public present would prejudice the defendant and impair his right to a fair trial. 448 U.S. at 560 (Burger, C.J., plurality opinion). Chief Justice Burger, joined by Justices White and Stevens, held that the Court "was bound to conclude that a presumption of openness inheres in the very nature of a criminal

trial under our system of justice." *Id.* at 573 (Burger, C.J., plurality opinion). He further reasoned that "[t]he explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily." *Id.* at 576-77 (Burger, C.J., plurality opinion). Indeed, Justice Burger concluded that, without such a right, "which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated.'" *Id.* at 580 (Burger, C.J., plurality opinion) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)). He further observed that "[a] trial courtroom is a public place where the people generally – and representatives of the media – have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place." *Id.* at 578 (Burger, C.J., plurality opinion). *Cf. Nixon v. Warner Commun.*, 435 U.S. 589, 597-98 (1978) (common law right to access historically found "in the citizen's desire to keep a watchful eye on the workings of public agencies . . . and in a newspaper publisher's intention to publish information concerning the operation of government").

Announcing the formulation of the right that is adhered to by courts to this day, the Chief Justice held that "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." *Richmond Newspapers,* 448 U.S. at 581 (Burger, C.J., plurality opinion). The trial judge had made no findings to support the closure, had failed to consider any alternatives and did not consider the competing constitutional right to access. Thus, the Court concluded that the closure was unconstitutional.[3] *Id.* at 580-81 (Burger, C.J., plurality opinion).

[3] Justice Brennan concluded that "[a] trial is public event. What transpires in the court room is public property." *Id.* at 593 (Brennnan, J., concurring).

In short order, the Supreme Court extended the reach of the constitutional right to hearings on preliminary motions (*Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), voir dire (*Press-Enterprise I*) and preliminary hearings (*Press-Enterprise II*). *See also United States v. Simone*, 14 F.3d 833 (3d Cir. 1994) (right of access applies to criminal post-trial proceedings).

The Third Circuit concluded in *Publicker Industries v. Cohen* that the constitutional and common law rights to access apply equally to civil trials. 733 F.2d 1059, 1071 (3d Cir. 1984): "[T]he public and the press possess a First Amendment and a common law right of access to civil proceedings; indeed, there is a presumption that these proceedings will be open." *Id. See also North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 206-07 & n.3 (3d Cir. 2002) (noting that "each Court of Appeals to examine this question has concluded that . . . a First Amendment right [of access to civil proceedings] exists."), *cert. denied*, 538 U.S. 1056 (2003); *In re Cendant Corp.*, 260 F.3d 183, 193-94 (3d Cir. 2001) (noting "strong presumption" of accessibility).

The opinion of the Third Circuit in *Publicker Industries* sets out in great detail the underpinnings of this bedrock right and the need to recognize the constitutional importance of open proceedings, be they criminal or civil. In sum, the court concluded that "[t]he explanation for and the importance of this public right to access to civil trials is that it is inherent in the nature of our democratic form of government." 733 F.2d at 1069 (citing, *inter alia*, *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884), in which Justice Holmes said: "It is desirable that the trial of [civil] causes should take place under the public eye . . . . [I]t is of the highest moment that those who administer justice should always act under the sense of public responsibility . . . " *Id.* at 394.).

The right adheres equally to judicial records. Indeed, the Third Circuit is noteworthy among the federal circuit courts for its long recognition and detailed explication of the constitutional and common law rights of access to judicial records. The court's discussion in *Leucadia* bears quoting at length:

> In numerous cases since our decision in *United States v. Criden,* 648 F.2d 814 (3d Cir.1981) ["*Criden I*"], this court has acknowledged the existence of a pervasive common law right "to inspect and copy public records and documents, including judicial records and documents." *Id.* at 819 (quoting *Nixon v. Warner Communications, Inc.,* 435 U.S. 589 (1978)). The existence of this right, which antedates the Constitution and which is applicable in both criminal and civil cases, is now "beyond dispute." *Littlejohn v. BIC Corp.,* 851 F.2d 673, 677-78 (3d Cir.1988) (quoting *Publicker Indus., Inc. v. Cohen,* 733 F.2d 1059, 1066-67 (3d Cir.1984)). *[FN6]*
>
> [*FN6.* In addition, we have stated that the First Amendment, independent of the common law, protects the public's right of access to the records of civil proceedings. *Republic of the Philippines v. Westinghouse Elec. Corp.,* 949 F.2d 653, 659 (3d Cir.1991). In this case, however, we limit our inquiry to the common law.]
>
> As we recently explained, the presumption that the public has a right to inspect and copy judicial records serves numerous salutary functions:
>
> > "The public's exercise of its common law access right in civil cases promotes public confidence in the judicial system.... As with other branches of government, the bright light cast upon the judicial process by public observation diminishes the possibilities for injustice, incompetence, perjury, and fraud. Furthermore, the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness."
>
> *Westinghouse,* 949 F.2d at 660 (quoting *Littlejohn,* 851 F.2d at 678). In addition, "[a]ccess to civil proceedings and records promotes 'public respect for the judicial process' and helps to assure that judges perform their duties in an

> honest and informed manner." *Id.* (citation omitted) (quoting *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 606 (1982)).
>
> Accordingly, we have applied the presumption of public access to a wide variety of civil records and documents, including papers filed in connection with a motion for summary judgment, *Westinghouse,* 949 F.2d at 660-62; the transcript of a civil trial and exhibits admitted at trial, *Littlejohn,* 851 F.2d at 678-80; settlement documents and post-settlement motions seeking to interpret and enforce the agreement filed with the district court, *Bank of America Nat'l Trust & Savings Ass'n. v. Hotel Rittenhouse Assocs.,* 800 F.2d 339, 343-46 (3d Cir.1986); and transcripts of a hearing for a preliminary injunction, *Publicker,* 733 F.2d at 1066-67.

Leucadia, 998 F.2d at 161-62. *See also* Local Rule 5.1.5 (a)(2) ("A document in a civil action may be filed under seal *only if* . . . the Court orders the document sealed." (emphasis added)).

Finally, and particularly pertinent here, the Second Circuit recently reviewed the law of access in holding unconstitutional the Connecticut judiciary's practice of sealing the court dockets related to what the newspaper described as "divorce, paternity and other cases involving fellow judges, celebrities and wealthy CEO's that, for most people, would play out in full view of the public." *The Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 86 (2d Cir. 2004). There, the court reviewed the "numerous federal and state courts [that] have also extended the First Amendment protection provided by *Richmond Newspapers* to particular types of judicial documents, determining that the First Amendment itself, as well as the common law, secures the public's capacity to inspect such records. *Id.* at 91-92 (citing *In re Providence Journal Co.*, 293 F.3d 1, 10-13 (1st Cir. 2002) (blanket policy of refusing to file memoranda of law accompanying motions violated First Amendment); *Phoenix Newspapers, Inc. v. United States Dist. Court*, 156

F.3d 940, 948 (9th Cir. 1998) (First Amendment requires release of transcripts of closed criminal hearings when interests supporting closure no longer exist); *United States v. Antar*, 38 F.3d 1348, 1359-60 (3d Cir. 1994) (right of access applies to voir dire proceedings and transcript of proceedings); *Grove Fresh Distrib., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (First Amendment right of access applies where proceedings and documents have "historically been open to the public" and disclosure serves "significant role in the functioning of the process"); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 505 (1st Cir. 1989) (*blanket* prohibition on disclosure of records of closed criminal proceedings "implicates the First Amendment"); *In re Search Warrant*, 855 F.2d 569, 573 (8th Cir. 1988) (First Amendment right of access extends to "documents filed in support of search warrant applications.")).

Thus, there can be no doubt that defendant's proposed protective order impinges upon the constitutional and common law right of access to judicial records.

2. To Give Effect to the Right of Access, the Trial Court Must Give Notice of the Request for Sealing, Must Permit the Challenging Party an Opportunity to Be Heard and Must Place Findings Supporting any Sealing on the Record.

As the parameters of the right of access have been brought into full relief, the Supreme Court and the Courts of Appeal have clarified the procedural requirements for dealing with sealing and closure issues. These requirements can be summarized as follows: *notice*, *hearing* and *specific record findings*. *Globe Newspaper Co.*, 457 U.S. at 609 n.25; *Press-Enterprise I*, 464 U.S. at 510; s*ee also Antar*, 38 F.3d at 1359; *Raffoul*, 826 F.2d at 223-24; *Publicker Industries, Inc.*, 733 F.2d at 1072. The implementation of these requirements prevents the "routine and perfunctory closing" of judicial proceedings or sealing of judicial records and ensures effective appellate review. *In re Cendant*, 260

F.3d at 193-94; *Publicker Industries, Inc.*, 733 F.2d at 1071 (citing *Press-Enterprise I*, 464 U.S. at 510).

Notice and Hearing: The Third Circuit has set out specific procedures for notice to the public of potential closure of hearings and trials. *See Antar*, 38 F.3d at 1359-62; *Raffoul*, 826 F.2d at 225; *United States v. Criden* (*Criden II*), 675 F.2d 550, 559 (3d Cir. 1982). While defendant has not yet asked to close any of the hearings in this matter, he has asked the Court to seal documents containing transcripts referring to information uncovered in discovery, so such a request may certainly be anticipated by the terms of defendant's proposed order. In *Raffoul*, the court summarized the procedure as follows:

> All motions for closure should be docketed immediately. Motions for closure that are made outside the public's hearing shall also be renewed in open court before being acted upon and the courtroom shall not be closed except upon the court's order. The trial proceedings shall be interrupted to allow those actually present and objecting to removal to be heard before a closure order is entered. Interested persons must be granted a hearing within a reasonable time upon motion for access to sealed transcripts of the closed proceeding. Before closing the courtroom, the court must consider alternatives to closure and state on the record its reasons for rejecting them.

826 F.2d at 226. As the court explained in *Raffoul*, the requirement that motions made in settings outside of public earshot be publicly renewed and recorded "is to prevent the recurrence of situations such as occurred in *Criden II* [where the court conducted in camera testimony during a preliminary hearing without notice] and in this case where even the most vigilant of reporters could not have known that the right of access was in jeopardy in time to be heard on the question of closure." *Id.* at 225.

Findings: In *Press-Enterprise I*, the Court required record findings "specific enough that a reviewing court can determine whether the closure order was properly

entered." 464 U.S. at 510; *see also Antar*, 38 F.3d at 1359 ("these determinations must be covered by specific, individualized findings articulated on the record *before* closure is effected" (emphasis in original); *Pansy*, 23 F.3d at 789 ("a district court should articulate on the record findings supporting its judgment"). In addition to providing a clear record for an appellate court, this requirement "exists, most fundamentally, to assure careful analysis by the district court before any limitation is imposed, because reversal on review cannot fully vindicate First Amendment rights." *Antar*, 38 F.3d at 1362.

3. Judicial Records Cannot Be Sealed and Proceedings Cannot be Closed Unless the Party Seeking Sealing Demonstrates That There is a Compelling Need for Sealing, That No Alternatives To Sealing Are Adequate to Protect that Compelling Interest, That the Extent of the Sealing is No Broader Than Necessary and That Sealing Is Effective in Advancing the Compelling Interest.

The right to access can be overcome only where findings of fact establish a compelling need for secrecy and demonstrate that alternatives to closing the record would be inadequate. Even then, steps limiting public access must be no broader than necessary. Any sealing must also be shown to be effective in advancing the interests requiring secrecy in the first place, because the public's rights are not lightly to be abridged for an idle purpose. *See, e.g., Press-Enterprise I*, 464 U.S. at 510; *Press-Enterprise II*, 478 U.S. at 13-14.

Thus, four distinct factors must be satisfied and each of these must be evaluated by the Court:

> 1. *Compelling Interest*. A party seeking to seal court records must first demonstrate that public access is likely to harm a compelling interest. *See, e.g., Publicker Industries, Inc., 733 F.2d at 1071 (citing Press-Enterprise I*, 464 U.S. at 510) (denial of access is permissible only when "essential to preserve higher values"); *see also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 581(plurality opinion of Burger, C.J.); *Press-*

Enterprise II, 478 U.S. at 13-14; *United States v. Smith*, 787 F.2d 111, 115 (3d Cir. 1986).

2. *No alternative*. A party seeking to seal records must further demonstrate that no alternative to secrecy can adequately protect the threatened interest. *Publicker Industries*, 733 F.2d at 1072 ("alternatives to closure" must be considered). *See also Press-Enterprise II*, 478 U.S. at 13-14; *In re The Herald Co.*, 734 F.2d 93, 100 (2d Cir. 1984); *United States v. Brooklier*, 685 F.2d 1162, 1167 (9th Cir. 1982).

3. *Narrow*. If no adequate alternative exists, any sealing imposed must be no broader than necessary to protect the threatened interest. *See, e.g., Richmond Newspapers Inc.*, 448 U.S. at 581; *Press-Enterprise II*, 478 U.S. at 14; *Publicker Industries*, 733 F.2d at 1073-74 (closure must be "narrowly tailored to serve [the] interest" at issue) (citing *Press-Enterprise I*, 464 U.S. at 510; *Criden I*, 648 F.2d at 824. Thus, if a more narrowly tailored means of protecting the interest exists, such as producing transcripts in redacted form, it must be employed to limit any impact on the public's access rights.

4. *Effective*. Any order limiting access must be effective. The public's rights must not be restricted for a futile reason. *See Press-Enterprise II*, 478 U.S. at 14 (must demonstrate that substantial probability exists that defendant's rights would be prejudiced by publicity "that closure would prevent"); *Associated Press v. United States District Court*, 705 F.2d 1143, 1146 (9th Cir. 1983) ("there must be 'a substantial probability that closure will be effective in protecting against the perceived harm'").

Thus, in order to seal *any* document in this case, defendant must demonstrate and the Court must agree that *each* these interests is affirmatively served by complete secrecy.

In this matter, there can be little doubt that the defendant's request that the Court seal any portion of any document that pertains to material "uncovered or obtained in discovery" sweeps far too broadly. Indeed, paragraph four of defendant's proposed order does not even contain the perfunctory nod to the Court's discretion that is appended to paragraphs one and three. In any event, this overbroad and prospective demand for sealing ignores the fact that sealing is the exception to the rule. Without offering any

showing of a compelling need to seal any particular part of any particular document, defendant simply cannot overcome the presumption of access to judicial records.

CONCLUSION

Because defendant has not made the requisite showing of need for confidentiality with respect to any document or fact, the AP respectfully requests that Court deny his motion for entry of a protective order that would make confidential "[a]ll information uncovered or obtained in discovery." In addition, because defendant fails to overcome the presumption of access to judicial records, the AP respectfully requests that the Court deny defendant's request for an order permitting the parties leave to file any document under seal or for an order mandating filing under seal all documents that in any way relate to "information uncovered or obtained in discovery."

Dated: May 13, 2005

Respectfully submitted,

LEVINE SULLIVAN KOCH & SCHULZ, LLP

By:_____

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused a copy of the Motion of the Associated Press to Intervene and to File a Memorandum in Opposition to Defendant's Motion for a Protective Order by facsimile and first-class mail on all counsel at the following addresses:

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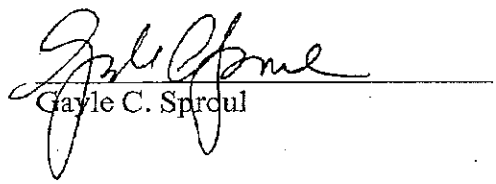
Dated: May 13, 2005



Gayle C. Sproul

Exhibit A, p.1

Cosby Accuser's Mom Contacted Cosby Before Cops?

February 7, 2005

A "Celebrity Justice" Exclusive.

Sources connected with Bill Cosby tell "CJ" that before his accuser went to police, her mother asked the comedian to make things right with money.

Cosby has been accused of sexual assault by a woman who played basketball for the University of Arizona before taking a job at Temple University in Philadelphia. She has claimed that Cosby drugged and then fondled her. The incident in question took place a year ago January at Cosby's home in Philadelphia.

Cosby has told police that there was a sexual encounter, but that it was consensual.

According to "CJ" Executive Producer Harvey Levin, "Sources tell us that Cosby and his accuser had a cordial relationship throughout 2004, but we're told her mother contacted Cosby last month and complained."

Sources say Cosby was under the impression the mother wanted money, so to keep the encounter quiet, he called the mother back. We're told she asked Cosby to help pay for her daughter's education and to generally help her out financially, and this conversation occurred before the accuser ever contacted police.

It appears the accuser and her mother may have taped at least one conversation with Cosby.

As police continue to investigate, a Cosby rep call this a classic shakedown.

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Robin Williams Sues Impersonator for Alleged Imposter Scam
Mindy McCready Suffers Brutal Beating
Robert Blake Explodes in Charged Deposition
Brad Pitt Lawyers Up for Divorce
Robert Blake's Freedom Style
Prison Tapes Reveal Blake Craved Celeb Support
James Denton's 'Desperate' Move

Exhibit A, p.2

Cosby's Attorney Claims Accuser After Cash

February 9, 2005

Bill Cosby is facing accusations of sexual assault, and now his lawyer is firing back big time. The comedian's Los Angeles based attorney, Marty Singer spoke with "CJ" about alleged tape-recorded phone calls in which, he says, his client was approached for money.

A Canadian woman has accused Cosby of sexually assaulting her. Sources tell "CJ" that the accuser and her mother had at least two phone conversations with Cosby during the same week that she went to police. Sources also tell us they believe those phone conversations were taped.

CJ contacted the accuser's mother by phone. The mother would not comment on the alleged phone calls, but she insisted to the "CJ" producer that neither she nor her daughter ever asked Cosby for money or other assistance. Cosby's attorney strongly disputes that. Marty Singer tells "CJ," "These people contacted Mr. Cosby with the intention of requesting money from Mr. Cosby. It is very obvious."

Meanwhile, the DA in the case is speaking out on Philly talk-radio. On Tuesday, District Attorney Bruce Castor of Montgomery County, Pennsylvania, told talk show host Michael Smerconish on 1210 AM that his public statements about the strength of the case have been misunderstood. "You'll find no place where I said the case was weak or anything of that nature," Castor insisted.

TOP STORIES

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Robert Blake's Freedom Style

Prison Tapes Reveal Blake Craved Celeb Support

James Denton's 'Desperate' Move

Exhibit B, p.1

May 12, 2005

DAILY GOSSIP: ON TODAY'S CELEBRITY'S

What's New

DAILY GOSSIP

- Rivers And Reagan Evacuated
- Thicke Gets Married
- Martin Wins Twain Prize

POLITICS

- Al Qaeda Targets Vegas
- The Pope In His Words...
- Wayne Backs Our Crusade

CRIME / INVESTIGATION

- New Evidence To Clear Ramseys
- Feds: We Fear More Attacks
- AIDS Victims in Iraq Suicide Bomb Attacks

ANNA NICOLE

- HOME SWEET HOME...OR SO I THOUGHT
- My Revealing Night at the Opry
- My So-Called 'Sister' is a User-Loser

BILL COSBY SPEAKS OUT TO THE NATIONAL ENQUIRER

In a blockbuster exclusive interview with The *National ENQUIRER*, **Bill Cosby** speaks out for the first time since he was cleared of the headline-making sexual molestation charges brought by a Canadian woman.

"I'm not saying that what I did was wrong, but I apologize to my loving wife, who has stood by my side for all these years, for any pain I have caused her," the 67-year-old entertainer told *The ENQUIRER*. "These allegations have caused my family great emotional stress." The soul-baring interview took place on February 21 in a hotel suite in Houston, Tex., during Cosby's concert tour. Reacting to the prospect of a civil action from the young Canadian woman, furious Cosby vowed to *The ENQUIRER*: "I am not going to give in to people who try to exploit me because of my celebrity status."

On January 13, the woman filed a complaint with police saying she was drugged and attacked by Cosby in January 2004.

She is a 31-year-old former pro basketball player who met Cosby while she worked in the athletic department at Philadelphia's Temple University, Cosby's alma mater.

Cosby vigorously denied the woman's allegations.

And on February 17, following a five-week investigation, Montgomery County, Pa., District Attorney **Bruce L. Castor Jr.** said there was

Exhibit B, p. 2

MIKE WALKER

- New York Gets Tough On Ben Stiller
- Paris Hilton Partying Late So Yesterday
- 'Desperate' Pooch Found On Net

- Astrology: Week of May 16
- 20 Amazing Treats For Under 100 Calories
- Donatella Versace's Duck a l'Orange

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"insufficient credible and admissible" evidence to support a charge.

"Looking back on it, I realize that words and actions can be misinterpreted by another person," Cosby told The ENQUIRER.

"Sometimes you try to help people and it backfires on you and then they try to take advantage of you."

Cosby admitted that the recent scandal intensified when a California lawyer, 57-year-old **Tamara Green**, made additional allegations against him.

The one-time actress said she met Cosby at his Los Angeles nightclub 30 years ago. She claimed he gave her two drug tablets that left her "stoned," then tried to take advantage of her.

But Cosby called Green a "wrecking ball" and complained that media covering her charges did not discover -- or failed to mention -- that she had entered a program for lawyers with substance abuse or mental health problems in October.

Also, for the first time ever Cosby personally thanked The ENQUIRER for solving the murder of his son Ennis, who was killed in January 1997 during a bungled late-night robbery attempt.

A $100,000 reward offered by The ENQUIRER led to the arrest and conviction of the killer, Mikail Markhasev.

"Today I can look back on it, and there should be accountability," Cosby declared.

"Thank you, National ENQUIRER!"

Published on: 03/02/2005

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Exhibit C

Posted on Tue, Mar. 08, 2005

Cosby jokes on stage about doping drink

By NICOLE WEISENSEE EGAN
weisenn@phillynews.com

A little over a week after being cleared of doping and groping a former Temple University women's basketball executive, Bill Cosby joked during a performance at the State Theater in New Brunswick, N.J., about whether he had slipped drugs into a woman's drink.

"He brought this woman up from the audience," said Stuart Zakim, a spokesman for the *National Enquirer*, who happened to be in the audience for the Feb. 26 show. "He said, 'Before I get started, let me ask you: Did I put anything into your drink? She said, 'No.' "

She was laughing and the audience was hysterical, Zakim said.

"I laughed, too," Zakim said. "It was very smart on his part. Obviously the people who went to see him are fans and are aware of what's beer going on and that the charges were never filed."

On Feb. 17, Montgomery County District Attorney Bruce Castor announced he wasn't filing criminal charges in connection with the Temple woman's complaint that Cosby had drugged and groped her at his Cheltenham Township mansion. The woman quit her Temple job after the alleged assault and returned to her native Canada. A year after the incident, she reported it to the police.

The Canadian woman's lawyers say she'll soon file a civil lawsuit against Cosby.

Zakim took Cosby's joke to be a reference to the Canadian woman's allegations. Cosby attorney Marty Singer and Cosby spokesman David Brokaw took no issue with Zakim's account of what Cosby had said. But they said Cosby's joke had not been about the Canadian woman.

Brokaw said Cosby's joke referred to a Feb. 14 story in the *National Enquirer* in which Shawn Upshaw was quoted as saying that during an affair she had with the comedian, he had given her "a funny-tasting drink."

"And then she says she woke up, knowing that something funny had happened, knowing she was pregnant. The morning after, so to speak," Brokaw said, ridiculing Upshaw's story.

Singer said Cosby had been joking "about a woman who sold a story to a tabloid" - not about the Canadian woman.

"He's never treated it in a joking or light manner," Singer said, referring to the allegations raised by the Canadian woman. He added that Upshaw's story was false.

Upshaw's daughter is Autumn Jackson, who threatened to tell the world she was Cosby's daughter if the entertainer didn't pay her $24 million. Autumn Jackson was convicted of extortion and sentenced to 26 months in jail. Cosby admitted having had an affair with Upshaw in the early-1970s, but denies having fathered Autumn Jackson.

In a phone interview last week, Upshaw said Cosby's joke had been "in poor taste."

With regard to her story, she said, "He's making light of it as damage control. He's trying to make the community think he didn't do it; that's why he can joke about it."