In The

Supreme Court of Virginia

RECORD NO. 122013

VIRGINIA BROADCASTING CORPORATION,

Appellant,

v.

COMMONWEALTH OF VIRGINIA and GEORGE HUGUELY,

Appellees.

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The trial court erred by failing to apply a "good cause shown" standard, instead believing that it had unfettered discretion pursuant to Section 19.2-266 of the Code of Virginia to prohibit the use of a camera during the sentencing of Mr. George Huguely. **(September 6, 2012 Motion for Reconsideration (App. 40-43); July 25, 2012 Transcript, pp. 5, 7 (App. 13, 15)).**

Assignment of Error No. 2: The trial court erred in denying Virginia Broadcasting's request to use a camera to cover the sentencing of Mr. George Huguely because there was no "good cause shown" pursuant to Section 19.2-266 of the Code of Virginia since no evidence was presented in the record to support that finding. **(September 6, 2012 Motion for Reconsideration (App. 40-43); September 17, 2012 Order (App. 44-46); July 25, 2012 Transcript, pp 21-22 (App. 29-30)).**

Assignment of Error No. 3: The trial court erred in relying on its own speculation and the speculations of counsel for Mr. George Huguely and the Charlottesville Commonwealth's Attorney in denying Virginia Broadcasting Corporation's Request for electronic media coverage of the sentencing of Mr. George Huguely. **(September 6, 2012 Motion for Reconsideration (App. 40-43); September 17, 2012 Order (App. 44-46); July 25, 2012 Transcript, pp. 21-22 (App. 29-30)).**

Assignment of Error No. 4: The trial court erred in holding that Virginia Broadcasting Corporation's newsgathering and reporting activities via electronic media were entitled to no protection under the First Amendment to the United States Constitution or the Constitution of Virginia, including its denial of Virginia Broadcasting's request to use a camera to acquire the news while allowing the print media to use the primary tools of its trade. **(September 6, 2012 Motion for Reconsideration (App. 40-43); September 17, 2012 Order (App. 44-46); July 25, 2012 Transcript, pp. 4-5, 21 (App. 12-13, 29)).**

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS BELOW

This appeal involves the constitutional and statutory protections afforded the public and the press to be present at and effectively report on criminal trials in Virginia. This is a case of first impression and it provides this Court with an opportunity to establish precedent to guide the trial courts in an area where there is a lack of uniformity.

On April 16, 2012, Virginia Broadcasting Corporation ("Virginia Broadcasting") filed a Request for Electronic Media Coverage of the sentencing of Mr. George Huguely to be held on August 30, 2012 in the Charlottesville Circuit Court ("Request"). Mr. Huguely was found guilty of second degree murder of a University of Virginia Women's lacrosse player and the jury recommended a sentence of 26 years. Mr. Huguely's actions and the facts brought to light in his criminal trial were of great interest to the public and they were covered extensively by the media. In its Request, Virginia Broadcasting agreed to abide by all of the requirements of Section 19.2-266 of the Code of Virginia related to media coverage of judicial proceedings.

The lower court scheduled Virginia Broadcasting's Request for a hearing on July 25, 2012. At that hearing, neither the Commonwealth's Attorney nor Mr. Huguely presented any evidence. Rather, both merely

speculated about the possible effect a camera in the courtroom might have on the sentencing of Mr. Huguely.

The lower court, exercising what it believed was its unfettered discretion, relied on the speculations of counsel. In addition, the lower court relied on its own speculations about the effect a camera at Mr. Huguely's sentencing might have on a jury of unknown persons in a civil action recently filed against Mr. Huguely by the family of Mr. Huguely's victim to be tried at some unknown date a year or more in the future in Charlottesville or possibly somewhere else. (App. 12, 31-32).

On August 30, 2012 the lower court entered an Order denying Virginia Broadcasting's Request. (App. 38).[1] On September 5, 2012, Virginia Broadcasting filed a Motion for Reconsideration of the lower court's Order. (App. 40-43). On September 17, 2012, the lower court denied Virginia Broadcasting's Motion for Reconsideration without a hearing. (App. 44).

On September 24, 2012, Virginia Broadcasting filed its Notice of Appeal.

[1] Because the Request sought access to Mr. Huguely's sentencing, there are no issues regarding the possible effects of a camera on any juror.

STATEMENT OF FACTS

The presiding judge of the Charlottesville Circuit Court has never allowed a camera in his court to gather news in a criminal jury trial. (App. 5). The lower court believes that the broadcast media is in no way entitled to any constitutional protection and that the decision whether to prohibit a camera from covering a criminal proceeding is "totally within the discretion of the Court…" (App. 13).

Virginia Broadcasting owns and operates WVIR-TV in Charlottesville, Virginia and has done so since 1973. Virginia Broadcasting is licensed by the Federal Communications Commission and is required to act in the public interest. As part of its public duties, it televises six and a half (6.5) hours of local news per day and several additional hours of national news per day. On April 16, 2012 Virginia Broadcasting filed a Request to utilize a camera at Mr. Huguely's sentencing. (App. 8).

In response to Virginia Broadcasting's Request, a hearing was scheduled for July 25, 2012 to afford Mr. Huguely and the Commonwealth an opportunity to present evidence in opposition to this Request. During this hearing, neither the Commonwealth nor Mr. Huguely presented any evidence of any nature. There was no evidence that demonstrated that

denial of Virginia Broadcasting's Request was required to protect Mr. Huguely's right to a fair hearing. (App. 9-37).

Instead of presenting evidence in the record, counsel for Mr. Huguely and the Commonwealth merely speculated about the possible effects of using a camera to report the news. For instance, Mr. Huguely's able counsel speculated that (1) Virginia Broadcasting's news coverage might be found on the internet (App. 24); and (2) that having a camera in court might create a "poisonous environment." (App. 26). Counsel for Mr. Huguely then expressed concern that a camera might intrude on attorney-client discussions. (App. 26).[2] There was no evidence to support any of these speculations. (App. 9-37).

The Charlottesville Commonwealth's Attorney opposed Virginia Broadcasting's Request because (1) potential witnesses would know this case was such as to attract the attention of the broadcast media; (2) witnesses <u>may</u> have some reaction to seeing a camera in the courtroom; (3) there <u>may</u> be unidentified "potential proceedings" post-sentencing that should be considered; (4) there <u>may</u> be possible concerns

[2] Virginia Broadcasting had already agreed in writing to abide by the requirements of Section 19.2-266 of the Code of Virginia. That statute prohibits coverage of communications between attorneys and their clients. *See*, Request filed with the lower court on April 16, 2012. (App. 8).

over an "unrelated" civil case and (5) the hearing may be accessible via the internet shortly after it occurs. (App. 21-24).

On August 30, 2012, the lower court entered an Order denying Virginia Broadcasting's Request. (App. 38). The lower court did not attempt to narrowly tailor its prohibition, even though Virginia Broadcasting agreed to tailor its coverage by not covering witnesses and otherwise following the lower court's instructions. (App. 29-33). The lower court did not articulate any findings of fact based on any evidence to support its Order. (App. 9-37). And, while stripping Virginia Broadcasting of its primary equipment (a camera) the lower court allowed the print media to use its primary equipment (a pad and pencil).

There are no issues in this case regarding any improper conduct by Virginia Broadcasting. It conducted itself with "great professionalism." (App. 33).

ARGUMENT AND AUTHORITIES

I. STANDARD OF REVIEW

Whether the lower court had total unfettered discretion under Section 19.2-266 of the Code of Virginia requires statutory interpretation and presents a question of law. Questions of law are reviewed *de novo* on appeal. *Lacava v. Commonwealth*, 283 Va. 465, 722 S.E.2d 838 (2012).

The application of law to undisputed facts is also reviewed *de novo* by this Court. *Johnson v. Hart*, 279 Va. 617, 692 S.E.2d 239 (2010). When statutory and constitutional considerations implicate the right of access, a *de novo* standard of review is utilized. *The Daily Press v. Commonwealth*, 285 Va. 447, ___ S.E.2d ___ (2013).

Whether Virginia Broadcasting's right to use a camera to gather and report the news is protected by the First Amendment or the Virginia Constitution in this case and whether Mr. Huguely or the Commonwealth presented evidence sufficient to show that having a camera in the courtroom would have prejudiced Mr. Huguely are constitutional arguments. Similarly, whether the lower court erred by denying Virginia Broadcasting's Request while allowing the print media full use of the normal tools of its trade is a constitutional argument. Constitutional arguments present questions of law that are considered *de novo* on appeal. *Montgomery County v. Virginia Dept. of Rail and Pub. Trans*., 282 Va. 422, 435, 719 S.E.2d 294 (2011); *See*, *In Re Charlotte Observer*, 882 F.2d 850, 853 (4th Cir. 1989) (Courts require specific reasons in the record to facilitate *de novo* review in right of access cases).

II. THE LOWER COURT ERRED IN FAILING TO APPLY THE "GOOD CAUSE SHOWN" STANDARD

The lower court believed that the decision whether to prohibit a camera in the courtroom during Mr. Huguely's sentencing was "totally within the discretion of the Court." (App. 13). Because of this belief, the lower court just did as it pleased. In doing so, however, the lower court ignored the "good cause shown" standard in Section 19.2-266 of the Code of Virginia. (App. 15-16, 29-30).

Under well-accepted rules of statutory construction all words of a statute must be given effect if possible. *Tilton v. Commonwealth*, 190 Va. 774, 784, 85 S.E.2d 368, 374 (1955). Here, the lower court failed to consider and give effect to the "good cause shown" standard enacted by the Virginia General Assembly. The lower court was not free to just ignore this language, however. *Signal Corp. v. Keane Federal Systems, Inc*., 265 Va. 38, 574 S.E.2d 254 (2003); *Appalachian Power Co. v. State Corporation Comm'n*, 284 Va. 695, 706, 733 S.E.2d 250, 256 (2012). By ignoring and failing to apply the "good cause shown" standard, the lower court erred and its decision should be reversed.

Even if this Court were to find that the trial court applied the proper "good cause shown" standard, the lower court erred in relying on mere speculations with no evidence to support its decision.

III. EVEN IF THE LOWER COURT APPLIED THE PROPER STANDARD, IT ERRED IN FINDING THAT "GOOD CAUSE" WAS "SHOWN" PURSUANT TO SECTION 19.2-266 OF THE CODE OF VIRGINIA. NO "GOOD CAUSE" WAS "SHOWN"

"A trial is a public event. What transpires in the courtroom is public property." *Craig v. Harney*, 331 U.S. 367, 374, 67 S. Ct. 1249, 91 L. Ed 1546 (1947). The public's constitutional right of access to criminal proceedings is essential to our judicial system. This right is furthered by allowing legitimate broadcasters to use cameras to gather and report the news on criminal trials. Such coverage of a criminal sentencing hearing must be allowed unless good cause is shown to prohibit it. Va. Code Ann. Section 19.2-266 (1950). This statute provides in pertinent part that "[f]or good cause shown, the presiding judge may prohibit coverage in any case and may restrict coverage as he deems appropriate to meet the ends of justice." *Id.*[3]

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[3] The authority to prohibit electronic media coverage should not be confused with the authority to permit such coverage. A trial court judge "may solely in its discretion permit the taking of photographs…and the broadcasting of judicial proceedings….Va. Code Ann. Section 19.2-266 (1950). But, "good cause" must be "shown" to prohibit such coverage. *Id*. And, even when "good cause" is "shown," a trial court is not required to prohibit coverage. Rather, upon finding "good cause" a court "may" prohibit coverage. The fact that the General Assembly used different standards in the same statute is strong evidence that the standards for permitting and prohibiting the broadcast of trials are different. This statute creates a presumption of access in favor of cameras in the courtroom. And, it is the General Assembly's attempt to recognize the common-law rule of openness while reserving its power to place statutory limitations on that rule.

The lower court's absolute prohibition of cameras in that court amounts to a *de-facto per se* ban on all broadcast coverage of criminal trials. The possible importance of excluding cameras in some cases does not justify excluding them in all cases, however. Even the trial court acknowledged that it was an outlier and that its position is "not in accord with a lot of what other courts do…." (App. 33).

A. The Party Opposing Broadcast Coverage Bears The Burden of Proof in Establishing "Good Cause Shown" And There Must Be At Least Some Evidence "Shown" To Establish "Good Cause"

The party opposing television coverage bears the burden of demonstrating "good cause" that justifies prohibiting coverage. *Id.*; *See*, *e.g.*, *Diehl v. Commonwealth*, 9 Va. App. 191, 197, 385 S.E.2d 228, 232 (1989) (burden on party opposing coverage); *Novak v. Commonwealth*, 20 Va. App. 373, 390-91, 457 S.E.2d 402, 410 (1995) (defendant failed to demonstrate "good cause"). Neither Mr. Huguely nor the Commonwealth met this burden.

Mere conclusory allegations of prejudice do not amount to "good cause" or establish prejudice and do not suffice to warrant any limitation on public access to judicial proceedings. *Chandler v. Florida*, 449 U.S. 560, 101 S. Ct. 802, 66 L. Ed. 2d 740 (1982); *See*, *e.g.*, *Fisher v. Commonwealth*, 236 Va. 403, 410, n. 2, 374 S.E.2d 46, 50 n. 2 (1988)

("generalized objection" to cameras not sufficient); *Vinson v. Commonwealth*, 258 Va. 459, 471, 522 S.E.2d 170, 178 (1999) (rejecting defendant's "conclusory argument" that he was prejudiced by presence of cameras in the courtroom). A court simply "may not base its decision to limit public access to court proceedings or records upon [ ] conclusory assertions." *Perreault v. The Free Lance-Star*, 276 Va. 375, 390, 666 S.E.2d 352 (2008). *See*, *In Re Washington Post Co.*, 807 F.2d 383, 392 (4th Cir. 1986) ("court may not base its decision on conclusory assertions alone, but must make specific factual findings.").

And, while the "good cause" standard invests trial courts with some discretion, this discretion does "not mean that the trial court can do whatever pleases it." *Landrum v. Chippenham & Johnston-Willis Hosps.*, 282 Va. 346, 352, 717 S.E.2d 134 (2011). Here, no evidence was shown. (App. 9-37). *A fortiori*, "good cause" was not "shown." *Stevens v. Commonwealth*, 274 Va. 157, 162, 645 S.E.2d 276 (2007); *See*, *State v. Hovey*, 106 N.M. 300, 742 P.2d 512 (N.M. 1987) (In determining whether television cameras should be allowed in courtroom, good cause to prohibit such coverage not shown when no evidence presented). Again, the lower court just simply did as it pleased believing it had total unfettered discretion to do so. The lower court erred.

While this Court has not established the quantum of evidence needed to be "shown" to establish "good cause" under Section 19.2-266 of the Code of Virginia, it must be more than no evidence at all. This is consistent with the Virginia Court of Appeals decision in *Diehl* in which evidence was presented to the trial court from an experienced trial attorney "who opined that permitting cameras in the court to document the proceedings 'may' have an adverse effect upon the interest of a defendant." *Id*. at 197. The Virginia Court of Appeals held that this evidence did not establish "good cause." *Id.* If actual testimony from an expert testifying to what "may" occur does not constitute "good cause," as in *Diehl*, then the total lack of evidence in this case does not establish "good cause" either.

If "good cause shown" means anything, it means at least that some relevant evidence having a basis in fact must be presented and it requires more than mere speculation. In a case like the one presently before the Court where the only basis for denying the use of a camera was potential prejudice, this Court should adopt the "substantial probability" test set forth in *Press Enterprise Co. v. Superior Court*, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) for determining when it is appropriate to exclude the

use of cameras in a public criminal trial.[4] *See*, *e.g.*, *The Daily Press v. Commonwealth*, 285 Va. 447, __ S.E.2d __ (2013) (adopting *Press-Enterprise* standard to determine propriety of sealing court records); *In Re WLBT, Inc*., 905 So. 2d 1196, 1199 (Miss. 2005) (applying *Press-Enterprise* "substantial probability" test to determine when it is appropriate to prohibit the use of cameras at a criminal sentencing hearing).

B. Statements Of Counsel And The Lower Court Are Not Evidence And Mere Speculations And Beliefs Do Not Suffice To Establish "Good Cause." A Determination Of "Good Cause" Must Be Based On Evidence In The Record

As noted above, neither Mr. Huguely nor the Commonwealth presented any evidence in opposition to Virginia Broadcasting's Request. (App. 9-37). Instead, their attorneys just speculated on the possible effects of having a camera in the courtroom for Mr. Huguely's sentencing. But statements from counsel are not evidence. *See*, *e.g*., *Cook v. Hayden*, 183 Va. 203, 226, 31 S.E.2d 625 (1944) (acknowledging statements of counsel are not evidence); *Waye v. Commonwealth*, 219 Va. 683, 691, 251 S.E.2d

[4] Under this test, the right of access of the public and the press can be overcome only if the trial court makes specific findings that (1) there is a substantial probability that a defendant's right to a fair trial will be prejudiced by publicity and that a restriction on access would prevent that prejudice, and (2) reasonable alternatives to the restriction will not adequately protect the defendant's rights. *Press-Enterprise Co.*, at 14.

202, 206 (1979) (approving an instruction to "the jury that the [attorney's] statement was not evidence").

Similarly, the lower court's own speculation on the possible effect a camera at Mr. Huguely's sentencing might have on a jury of unknown persons in a civil action to be tried at some unknown time a year or more in the future in Charlottesville or possibly in another venue is not evidence either and cannot constitute "good cause." (App. 12, 23). The trial judge cannot give the evidence and then base a decision on it. A judge's statements are not evidence. "Individual and extrajudicial knowledge on the part of a judge will not dispense with proof of facts not judicially cognizable, and cannot be resorted to for purposes of supplementing the record…[and] consideration of facts outside the record is improper." *Bernau v. Nealon*, 219 Va. 1039, 1041, 254 S.E.2d 82 (1979).

With regard to the "more important[]" consideration of the effect a camera in the courtroom <u>may</u> have had on potential witnesses at sentencing, even the lower court acknowledged that "I – we can't know that." (App. 32). Of course, the lower court could not know that – it was pure speculation, having no basis in fact in the case *sub judice*. None of the potential witnesses came forward to object to coverage or express any concern of any nature. (App. 9-37). To show prejudice in a specific case,

"a defendant must show something more than [participant] awareness that the trial is such as to attract the attention of broadcasters." *Chandler*, at 581; *Novak*, at 390; *Diehl v. Commonwealth*, 9 Va. App. 28, 42, 384 S.E.2d 801 (1989). There was no attempt to make any such showing in this case.

Speculations do not establish "good cause." Similarly, a party's beliefs do not constitute "good cause shown." *MacPherson v. Green*, 197 Va. 27, 87 S.E.2d 785 (1955). As stated by this Court in *MacPherson*, a court's conclusions must be based on the "facts and circumstances sworn to" and a party's beliefs do not amount to "good cause shown." *Id*. at 29. Concern in the abstract does not establish good cause and is not sufficient to justify a restriction on public access to Virginia's courts.

Rather, a determination that "good cause" is "shown" must be supported by evidence in the record. As this Court held in *Stevens*, "to be a proper exercise of discretion [ ], a circuit court's determination [ ] must be supported by evidence in the record." *Stevens*, at 162; *See*, *e.g.*, *MacPherson*, at 29 (court's conclusions must be based on "the facts and circumstances sworn to"); *In Re Petition of WMUR*, 148 N.H. 644, 651, 813 A.2d 455 (N.H. 2002) (In determining whether to prohibit cameras in a

courtroom, a "trial court's findings should not be based upon speculation, but rather upon the specific facts of the case at hand").

Clearly, no "good cause" was "shown." The lower court erred.

IV. THE LOWER COURT ABUSED ANY DISCRETION IT MAY HAVE HAD PURSUANT TO SECTION 19.2-266 OF THE CODE OF VIRGINIA

A. Assuming, *Arguendo*, That The Lower Court Applied The Proper Good Cause Standard, It Erred By Concluding That "Good Cause" Was "Shown" When No Evidence Was Presented To Support That Conclusion, By Relying On Speculation and Irrelevant Factors And By Making An Error Of Law

Assuming, *arguendo*, that the lower court applied the proper "good cause shown" standard, it erred and abused any discretion it had by concluding that "good cause" was "shown" when there was not a scintilla of "evidence in the record" to support that conclusion. *Stevens*, at 162. By relying solely on the speculations of counsel and its own speculations, the lower court considered and gave significant weight to its own and counsels' speculative conclusory allegations. This was improper. *See*, *e.g.*, *The Daily Press*, at 455-456 (rejecting speculative trial court rationale when not supported by particularized factual findings).

For instance, both Mr. Huguely and the Commonwealth speculated that Virginia Broadcasting might put some of its in-court coverage on the internet. Virginia Broadcasting did not indicate in its Request that any

in-court coverage would be put on the internet and neither Mr. Huguely nor the Commonwealth put forth any evidence that this would occur. It was all just speculation. If this had been a real concern for the lower court, it could have narrowly tailored its permission to allow coverage conditioned on no internet coverage, but it did not do so.

Further, the lower court erred and abused any discretion it had by considering and relying on the potential effect of a camera at Mr. Huguely's sentencing on a jury of unknown persons in the civil action filed by the family of Mr. Huguely's victim to be tried at some unknown time more than a year in the future, either in Charlottesville or possibly some other venue. Even the Charlottesville Commonwealth's Attorney acknowledged that this civil action was "completely unrelated" to Mr. Huguely's sentencing (App. 21). *See*, *Landrum*, at 352 (trial courts abuse their discretion when they consider irrelevant factors). The lower court's consideration of this "completely unrelated" action was improper. (App. 21).

The lower court also gave weight to the fact that both Mr. Huguely and the Commonwealth opposed Virginia Broadcasting's Request. (App. 33). This fact is also irrelevant. The Virginia General Assembly could have easily required consent from all parties in Section 19.2-266 of the Code of Virginia as a condition precedent to coverage, but it did not do so.

Consideration of this irrelevant fact was error. The openness of Virginia's courtrooms does not depend on the consent of litigants. *See*, *e.g.*, *Perreault*, at 392 ("The desire of litigants is not sufficient reason to override the presumption of openness"); *Shenandoah Publishing House, Inc. v. Fanning*, 235 Va. 253, 259, 368 S.E.2d 253 (1988) (even parties acknowledge that desire of litigants is not sufficient to override presumption of openness).

Further still, the lower court suggested that merely having a camera in the courtroom may have an effect on witnesses. However, even the trial judge admitted "I - - - we can't know that." (App. 32). This was just additional speculation. Importantly, the fact that witnesses know there is a camera in the courtroom, without more, does not establish prejudice or good cause. *Chandler*, at 581; *Novak*, at 390; *Diehl*, 9 Va. App. at 42.[5] To the extent the trial court believed that the mere presence of cameras

[5] Interestingly, every person who participates in a proceeding in the Charlottesville Circuit Court is under the constant watchful eye of a closed-circuit video camera. The lower court did not seem to be concerned about the effect of that camera on trial participants. Further, during both the trial and sentencing of Mr. Huguely, the lower court placed another camera and a cameraman in the courtroom to video the entire proceedings so that they could be streamed to a second location for some of the overflow crowd and media. Clearly, the lower court was undaunted by the hobgoblin of inconsistency and was not concerned that the presence of a camera and a cameraman in the courtroom would prejudice or effect anyone. *See*, App. at 32 (referring to remote audio-video setup).

resulted in prejudice, it was wrong as a matter of law. The lower court's decision in this regard ignored *Chandler*, *Novak*, and *Diehl* and constituted an error of law.[6]

In short, assuming, *arguendo*, that the trial court applied the proper "good cause shown" standard, it erred and abused any discretion it had because (1) there was no evidence to support its decision; (2) because it relied on mere speculations and irrelevant factors; (3) because it made an error of law and (4) as set forth immediately below, because it ignored relevant factors.

B. The Lower Court Ignored The Language Of Section 19.2-266 Of The Code Of Virginia And Erred And Abused Its Discretion By Failing To Give Weight to Relevant Factors

In addition to giving weight to irrelevant speculative factors, the lower court ignored relevant factors. Section 19.2-266 of the Code of Virginia represents an attempt by the General Assembly to effectuate reasonable time, place and manner restrictions upon electronic media coverage of trial court proceedings. This statute identifies nine judicial proceedings that cannot be covered. These include juvenile proceedings, child custody proceedings, etc. *Id*. A criminal sentencing hearing is not among the

[6] Further, by adopting Rule 1:14, that allows courts to use electronic or photographic means to preserve the record, this Court has implicitly recognized that having cameras in the courtroom does not have a deleterious effect on the proceedings or its participants.

prohibited proceedings. *Id*. The negative inference is that electronic media coverage of criminal sentencing hearings should normally be allowed absent an overriding interest established by the evidence. Even though this argument was squarely before the lower court, it chose to ignore it. (App. 15-16). Thus, the lower court failed to consider a relevant factor (the language of the statute). *Landrum*, at 352. *See*, *Atlas Underwriters Ltd. v. State Corp. Comm'n*, 237 Va. 45, 49, 375 S.E.2d 733 (1989) (acknowledging use of negative inference as interpretative tool).

In addition, as noted above, one of Mr. Huguely's speculations was that Virginia Broadcasting might infringe on the attorney-client relationship. Mr. Huguely's counsel stated that

> We had all kinds of legitimate concerns about our ability to sit at that table, communicate with our client. He still has the right to communicate with his attorneys even during a sentencing proceeding…[I]n the absence of reassurances that things don't…interfere with Mr. Huguely's right to sit at that table, communicate with his lawyers…I don't think the Court should grant [ ] the motion. (App. 26-27).

While intrusion on the attorney-client relationship could be a legitimate concern in a particular case, this is not that case. The initial problem with this potential concern in this case is that there is no evidence to support it. (App. 9-37). Equally important, is the fact that Section 19.2-266 of the Code of Virginia specifically prohibits broadcast of sound

between a client and his attorney and Virginia Broadcasting agreed specifically in writing in its Request that it would "abide by all of the requirements of Virginia Code Section 19.2-266 concerning media coverage of judicial proceedings" and it fully intended to do so.[7] (App. 8).

The lower court gave weight to this attorney-client communication speculation while at the same time it ignored (1) the language of the statute and (2) the only evidence before it, Virginia Broadcasting's Request. This was error in this case and in doing so, the lower court further abused any discretion it had.

V. PROHIBITING THE USE OF A CAMERA WOULD NOT REMEDY THE PERCEIVED HARM. THUS, NO GOOD CAUSE EXISTED TO EXCLUDE CAMERAS AT MR. HUGUELY'S SENTENCING

Any good cause and right of access determination should consider whether the decision to exclude cameras would further the goal of protecting a defendant's fair trial rights. If the exclusion of cameras does not remedy the perceived harm, then no good cause could exist to prohibit their use. That is the case here.

[7] This statute provides in pertinent part that "[t]o protect the attorney-client privilege and the right to counsel, there shall be no recording or broadcast of sound from such conferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, between adverse counsel or between counsel and the presiding judge held at the bench or in chambers." Va. Code Ann. Section 19.2-266.

All aspects of Mr. Huguely's trial were covered extensively by the media and all the facts surrounding Mr. Huguely and his actions were in the public domain prior to his sentencing hearing. The trial court expressed concern that possibly a discrete bit more coverage of these public facts might "add, sort of, fuel to the fire…." (App. 32). By the time of sentencing, there had been hundreds (if not thousands) of articles about Mr. Huguely in the local, regional and national press. *See*, App. at 31 (lower court noting the intensity of the media coverage). The only fact that was not already in the public domain was the sentence to be imposed on Mr. Huguely by Judge Hogshire; the jury had already recommended a sentence of 26 years. The lower court expressed no concern that this one new fact would be prejudicial to Mr. Huguely if covered. (App. 9-37).

Rather, the lower court, noting the "notoriety" the case had already achieved and noting that the facts surrounding it were "already pretty far out there," was mostly concerned about the effect coverage at sentencing might have on any future civil jury in the action filed against Mr. Huguely by the family of his victim. (App. 12, 31).[8] Every fact that was potentially harmful to Mr. Huguely was already in the public domain. Republication of

[8] The lower court also expressed concern whether there could be any possible effect on potential witnesses but then candidly admitted that "I --- we can't know that." (App. 32).

those public facts more than a year in advance of the civil trial would not be harmful to Mr. Huguely.[9]

Since the prohibition on the use of a camera at Mr. Huguely's sentencing would not prevent the perceived harm, no good cause existed to deny Virginia Broadcasting's Request. *See*, *In Re Charlotte Observer*, at 854-855 (In a case involving extensive publicity, a determination that defendant would be prejudiced by a republication of public information is "highly dubious" and holding that "[w]here closure is wholly inefficacious to prevent a perceived harm, that alone suffices to make it constitutionally impermissible"). The rationale of *In Re Charlotte Observer* applies with equal force in the case *sub judice*.

[9] Even if republication of those public facts were potentially harmful to Mr. Huguely, the trial court in the civil action could ameliorate such potential harm in voir dire. *See*, *In Re Charlotte Observer*, 882 F.2d 850, 855 (4th Cir. 1989) (finding that trial court gave much too short shrift to the capability of jury voir dire to guard against potential prejudice from publicity).

VI. THE CIRCUIT COURT ERRED IN HOLDING THAT THE CONSTITUTION WAS NOT IMPLICATED BY VIRGINIA BROADCASTING'S REQUEST. THE LOWER COURT ERRED IN ITS UNEQUAL TREATMENT OF THE PRINT AND BROADCAST MEDIA. AND, NO EVIDENCE ESTABLISHING CONSTITUTIONAL PREJUDICE WAS PRESENTED TO THE LOWER COURT TO JUSTIFY ITS DECISION

A. Introduction

Virginia Broadcasting acknowledges that neither the U.S. Supreme Court nor this Court has to date held that a broadcaster has a constitutional right to use cameras in a court to gather and report the news. However, the U.S. Supreme Court has held that the acquisition of newsworthy matter is entitled to constitutional protection and that the U.S. Constitution implicitly guarantees the public and the press a qualified right of access to a criminal trial. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980). This Court has acknowledged this right. *Richmond Newspapers, Inc. v. Commonwealth*, 222 Va. 574, 281 S.E.2d 915 (1981). And, some courts have begun to extend constitutional protection to legitimate broadcasters.[10]

The reasons that once justified denying full constitutional protection to the use of cameras to cover a criminal trial, such as noisy, bulky equipment

[10] At least one court has held that there now exists a "presumptive constitutional right to televise court proceedings." *People v. Boss*, 701 N.Y.S.2d 891, 894 (N.Y. Supp. 2000).

and uncertainty over the effects of cameras on courtroom decorum no longer exist. *See*, *e.g.*, *Katzman v. Victoria's Secret Catalogue*, 923 F. Supp. 580, 582, 585-586 (S.D.N.Y. 1996) (modern cameras are no more distracting than reporters with notebooks or artists with sketch pads and do not impair the fair administration of justice). The public should not be limited to the technology of 200 years ago in the place where the First Amendment means the most – a public courtroom. As noted by Oliver Wendell Holmes,

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Oliver W. Holmes, *The Path of Law Address*, 10 Harv. L. Rev. 457, 469 (1897).

The use of cameras by broadcasters is a useful extension of the reporting function of the historical arms of the press. If the First Amendment and Article I, Section 12 of the Constitution of Virginia are parts of living documents they must be strong enough to bend to accommodate advances in technology, or else, they will cease to function

effectively.[11] *See*, *e.g.*, *Richmond Newspapers*, 222 Va. at 588 (1981) (the Virginia Bill of Rights should be a living and operating instrument); *Myricks v. United States*, 370 F.2d 901, 904 (5th Cir. 1967) (It is often acknowledged that the U.S. Constitution is a living document). The time has come to recognize the important role broadcasters and their technology play in the public's right of access to criminal trials and the protections afforded all citizens by the First Amendment and Virginia's Constitution.

According to the trial court there are no "first amendment indications involved in this. It's totally within the discretion of the Court…." (sic) (App. 13). The lower court was wrong. *See*, *Chandler*, at 572-73 (this area is "charged with constitutional nuances"); *See also*, *Cosmos Broadcasting Corp. v. Brown*, 14 Ohio App. 3d 376, 382, 471 N.E.2d 874 (finding that trial court's order excluding the use of cameras was "rife with constitutional

[11] This is particularly true here given the drastic reduction in recent years of the print media. Daily newspapers, the one-time stalwart of the First Amendment are going out of business at an alarming rate due to many factors, including competition from internet media. In the past few years alone such long-standing daily newspapers such as *The Rocky Mountain News* (started in 1859), the *Baltimore Examiner*, *Kentucky Post*, *Cincinnati Post* (closed after 126 years of operation) and many others have ceased publishing printed daily newspapers. Others, like Cleveland's *The Plain Dealer* have reduced delivery of its printed paper to just three days a week (reduction announced April 4, 2013). If these trends continue, there will be few print media left to carry out the important functions of the First Amendment.

implications"). Virginia Broadcasting does not suggest that either *Chandler* or *Cosmos Broadcasting* guarantees the absolute right to use cameras in a courtroom. They do not. However, they do make clear that the lower court erred in concluding that there were no "first amendment [sic] indications involved in this" case. (App. 13).

The First Amendment to the United States' Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press…." *U.S. Const., Amend, I*. The Fourteenth Amendment makes this provision applicable to the States. Since the "First Amendment draws no distinction between the various methods of communicating ideas" courts should allow all forms of the press to report the news of criminal trials consistent with prudent journalistic practices, absent overriding constitutional concerns. *Superior Films, Inc. v. Dept. of Education of Ohio*, 346 U.S. 587, 74 S. Ct. 286, 98 L. Ed. 329 (1954). *See*, *Chandler*, at 575 (often treating print and broadcast media the same).

In *Richmond Newspapers*, 448 U.S. at 569, the United States Supreme Court recounted and acknowledged the long history of open trials. *Id*. Open not just for certain categories of people, but for everyone. Virginia shares in this tradition. *Richmond Newspapers*, 222 Va. at 586.

Today, however, "instead of acquiring information about trials by firsthand observation…, people now acquire it chiefly through the print and electronic media." *Richmond Newspaper*, 448 U.S. at 572-73. In fact, more people receive their local news by watching local television than by any other means. *See*, The Pew Research Center's Project for Excellence in Journalism*, The State of The News Media 2012* (2012), *available at* http://stateofthemedia.org/2012/local-tv-audience-rise-after-years-of-decline/ (2011 survey found that local TV remains America's most popular source of local news, particularly breaking news).

The press, including Virginia Broadcasting, are surrogates for the public. Broadcasters serve the important functions of a free press at least as well as the print media. *See*, *e.g.*, *Richmond Newspapers*, 448 U.S. at 573 (setting forth the values of open trials); *The Daily Press*, at 453 (noting benefits of public trial).[12] The public had a great interest in Mr. Huguely's criminal trial. Not everyone who is interested in a criminal proceeding can be there, however. Many people work, many go to school, many cannot

[12] Long gone are the days of bulky, noisy, and disturbing equipment at issue in *Estes v. Texas*, 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965). *Estes* was effectively overruled in *Chandler*. Even the *Estes* court recognized that with advances in technology "we will have another case" and "the constitutional judgment called for now would of course be subject to reexamination in accordance with the traditional workings of the Due Process Clause." *Estes*, at 540, 595-96. The advances in technology contemplated by the Court in *Estes* have now been realized.

travel to court, etc… The only way these citizens can see what actually transpires is via the use of electronic media. The lower court recognized this important function of the broadcast media, but then proceeded to abandon the rights of those members of the public. (App. 30).

As a result, the right of access was a hollow one for Virginia Broadcasting since it could not effectively exercise its right. *See*, *Houchins v. KQED, Inc*., 438 U.S. 1, 17-18, 98 S. Ct. 2588, 57 L. Ed. 2d 553 (1978) (Stewart, J., concurring). (First Amendment requires that broadcasters be given "effective" access). It was also a hollow right for the public for whom Virginia Broadcasting is a surrogate.

In addition to the protections afforded by the First Amendment against abridgement of the freedom of press, the Constitution of Virginia protects the press from restraints. Article 1, Section 12 of the Constitution of Virginia provides in pertinent part "that the freedoms of speech and of the press are among the greatest bulwarks of liberty, and can never be restrained except by despotic governments…." To "restrain" means "to limit" or "restrict" or "prohibit from action." Black's Law Dictionary 1181 (5th ed. 1979). Prohibiting Virginia Broadcasting's use of a camera at Mr. Huguely's sentencing was a restraint of its newsgathering and reporting activities and a restraint on the publics' right of access. Such restraint

should not be made to bear absent an overriding compelling interest supported by specific factual findings in the record and only after consideration of less restrictive alternatives. Like the First Amendment, Article 1, Section 12 of the Constitution of Virginia was implicated by Virginia Broadcasting's Request.

B. The Presumption Of Openness And The Right Of Access Applies To A Criminal Sentencing Hearing

Whether sentencing hearings fall under *Richmond Newspapers'* right of access requires two determinations. The first is whether the sentencing portion of the criminal trial has historically been open. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (*Press-Enterprise II*). It has. *Washington Post Co. v. Soussoudis*, 807 F.2d 383, 389 (4th Cir. 1987). *See*, *United States v. Byrd*, 20 Media L. Rep. (BNA) 1804 (D.S.C. 1992) ("The court finds that sentencing has traditionally been an open part of the criminal process.").

The second inquiry is whether sentencing is a stage of a criminal trial in which public access plays a role in ensuring the integrity of the process. *Press-Enterprise II*, at 11-13; *Byrd*, at 1806. The public often views sentencing with skepticism. For instance, many believe that certain types of defendants receive shorter sentences than others guilty of the same crime. Here, the defendant was a white male from a wealthy family

attending a prestigious university – just the kind of defendant some members of the public believe is treated with leniency by the criminal justice system. Indeed, as expressed by Mr. Huguely's counsel in this case, a citizen expressed distrust of the criminal justice system believing that "trials are all about lawyer maneuvering and buying your way out of trouble." (App. 2).

Perhaps, views like these result from a lack of public familiarity with court proceedings. Allowing all members of the public to view the sentencing process insures a fair hearing for the defendant, promotes public confidence and aids in maintaining (or perhaps even enhancing) the integrity of the criminal process. The trial court's universal prohibition of cameras serves only to effectively preclude the public at large from acquiring any meaningful acquaintance with the workings of Virginia's criminal trial courts.

Clearly, both of these inquiries must be answered in the affirmative. Thus, the public's First Amendment right of access applied to the sentencing of Mr. George Huguely. This same analysis and conclusion applies to the right of access under the Constitution of Virginia. *In Re Worrell Enterprises, Inc.*, 14 Va. App. 671, 676 (1992); *See*, *Richmond Newspapers*, 222 Va. at 586 (applying analysis to suppression hearing).

C. The Lower Court Erred In Failing To Recognize Virginia Broadcasting's Right Of Access. The Trial Court Should Have Balanced Virginia Broadcasting's Right of Access With Mr. Huguely's Right To A Fair Sentencing Hearing

While this Court has not opined specifically on the test to use in determining when and whether it is appropriate to use a camera in a criminal trial to gather and report the news, other courts have. *West Virginia v. Hanna*, 180 W.Va. 598, 378 S.E.2d 640 (1989). In *Hanna*, one of the question's before the West Virginia Supreme Court was "whether and under what circumstances [it would] allow cameras and electronic media in the courtroom during a criminal trial." *Id.* at 602-603. In answering this question, the West Virginia Supreme Court stated that:

> The decision involves a balancing test. On the one hand, there are constitutional guarantees of freedom of press and the right to a public trial. On the other hand, there is the defendant's due process right to a fair and impartial trial.

Id. at 603.[13]

Virginia Broadcasting does not suggest that any right to gather and report the news via electronic or any other means is absolute. It is not. Rather, Virginia Broadcasting asserts merely that its right to effectively acquire newsworthy information via the use of a camera should have been

[13] While *Hanna* was decided under the West Virginia Constitution, its provision for freedom of the press is not substantively different from Article 1, Section 12 of the Virginia Constitution or the First Amendment.

balanced against any prejudice to Mr. Huguely established by the evidence. That was not done in this case. The lower court merely exercised what it believed was its unfettered discretion. This was error. *See*, *e.g.*, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607-08, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (holding that even in the face of a statute requiring closure of courtroom during testimony of minor in sex crime cases courts must balance First Amendment rights with other interests at stake on a case-by-case basis); *Richmond Newspapers*, 448 U.S. at 598 (where trial court made no evidentiary findings, the exercise of total discretion pursuant to Section 19.2-266 of the Code of Virginia violates the First and Fourteenth Amendments).[14]

The exercise of such unfettered discretion should be reversed in the present case.

D. This Court Should Acknowledge The Importance And Effectiveness Of Modern Technology And Establish A Rule To Guide The Trial Courts

The use of cameras to gather and report the news is merely a modern-day advancement of the more traditional arm of the press. As such, traditional freedom of press protection should be afforded to their

[14] While what transpired in the court below was not a complete closure of the sentencing hearing to everyone, it was certainly a restriction on the public's access and on Virginia Broadcasting's ability to effectively gather and report the news.

use. In *In Re Petition of WMUR Channel 9*, 148 N.H. 644, 813 A.2d 455 (N.H. 2002) the Supreme Court of New Hampshire had to determine whether the time had come to discard a 25 years old rule that created a presumption against cameras in the courtroom. After noting the great advances in modern technology and consideration of numerous studies finding that cameras had no, or minimal, impact on the trial process, the New Hampshire Supreme Court discarded its rule. *Id*. at 650.

In so doing, the court in *In Re Petition of WMUR* stated:

> We conclude that the use of cameras by the electronic media is merely an extension of the reporting function of the more traditional arms of the press. Allowing cameras in all courtrooms…and restricting or prohibiting cameras only upon specific findings…, will ensure that a proper balance is maintained between maximizing technology use by the media and conducting a fair trial by the court.
>
> …
>
> We conclude that media access to judicial proceedings includes technological advances applicable to the media profession.

Id.

Cameras are not the villain. They should not be prohibited in public trial courtrooms absent "an overriding interest articulated in findings." *Richmond Newspapers*, 448 U.S. at 581; *Richmond Newspapers*, 222 Va. at 588. Here, the lower court failed to articulate any findings of fact that

established any overriding interest. The lower court's decision should be reversed.

It is time to move Virginia into the 21st century. The right to effectively gather news, indispensable in the press's ability to inform the public, should not be limited to the technology of 200 years ago.

In sum, the right to acquire newsworthy matter via electronic means should be balanced with a criminal defendant's Sixth Amendment right to a fair hearing and any decision to exclude electronic media from a criminal trial should be narrowly tailored and based on evidence of "an overriding interest articulated in findings." *Richmond Newspapers*, at 581. And, in a case like the present where the only basis for denying the use of a camera was potential prejudice, this Court should adopt the *Press-Enterprise* "substantial probability" test for determining when it is appropriate to prohibit the use of cameras in a public criminal trial. There no longer exists any valid reason treat the print and broadcast media differently or to deny the public the benefits of modern technology.

E. The Lower Court Erred In Its Unequal Treatment Of The Print And The Broadcast Media

Under the lower court's Order, the print media was free to use the primary tools of its trade, its pens, pencils, notepads, etc…, to facilitate its in-court reporting activities. Virginia Broadcasting, however, was denied

the right to use the primary tool of its trade – a camera. This unequal treatment should not be allowed to stand. The right of access analysis should be driven by the important function served by the press, not by the tools used to fulfill that function.

While this Court has not addressed a case in which the print media was free to conduct its reporting activities using the traditional tools of its trade while the broadcast media was constrained, other courts have. *Cosmos Broadcasting Corp. v. Brown*, 14 Ohio App. 3d 376, 471 N.E.2d 874 (Ohio App. 1984); *In Re WLBT, Inc.*, 905 So. 2d 1196 (Miss. 2005); *State v. Hovey*, 106 N.M. 300, 742 P.2d 512 (N.M. 1987).

In *Cosmos Broadcasting*, the court order appealed from, just as in the case *sub judice*, did not deny the public or media access in total, but merely prohibited the in-court use of cameras and other broadcast equipment. *Id*. at 377. After noting that the trial court's order was "rife with constitutional implications," the court in *Cosmos Broadcasting* held that

> In practice, of course, what goes on in a courtroom can only be effectively reported if the technology for doing so is permitted to be used. Thus, if the print media, with its pens, pencils and notepads, have a right of access to a criminal trial, then the electronic media, with its cameras, must be given equal access too….
>
> …
>
> Consequently, under the First Amendment, the concept of equal access to courtroom proceedings and the effective

> reporting of courtroom events means at least this: unless there is an overriding consideration to the contrary, clearly articulated in the trial court's findings, representatives of the electronic media must be allowed to bring their technology with them to the courtroom, even if only to a small degree (*e.g*., a single camera [ ])."

Id. at 382-383. *See*, *Houchins v. KQED, Inc*., 438 U.S. 1, 17-18, 98 S. Ct. 2588, 57 L. Ed. 2d 553 (1978) (Stewart J., concurring) (First and Fourteenth Amendments require states to give press *effective* access and they may not impede effective reporting without sufficient justification) (emphasis in original).

Similarly, in *In Re WLBT*, a case in which a television station sought to cover a criminal sentencing hearing, the Supreme Court of Mississippi faced a case not "closing the proceedings, but rather one which restricts the methods and technology used, i.e., television cameras." *Id*. at 1198. In deciding this issue, the court in *In Re WLBT* stated that prohibiting cameras restricts the ability of the public to access proceedings and it should be a last resort utilized only when less restrictive alternatives have been considered and found inadequate. *Id.* at 1199. The court in *In Re WLBT* held that

> The proper standard for restricting press coverage is that there is a substantial probability that the accused will be deprived of a fair trial… The decision to restrict press access, whether by closing proceedings or by eliminating the use of the tools of the trade must be supported by specific, on the record findings of

> fact which show in what manner the coverage will cause a party to lose the right to a fair trial.

Id.

Finally, in *State v. Hovey*, 106 N.M. 300, 742 P.2d 512 (N.M. 1987), the Supreme Court of New Mexico had to consider a rule that granted trial judges discretion to limit or deny television coverage for "good cause." *Id*. at 302. The Court in *Hovey* stated the standard to be followed and its holding as follows:

> [T]he trial judge [before excluding media coverage of a particular participant in a trial] should require evidence sufficient to support a finding that such coverage will have a substantial effect upon [the] particular individual which would be qualitatively different from the effect on the members of the public in general and that such effect will be qualitatively different from coverage by other types of media.

Id. (quoting from *N.M. Press Ass'n v. Kaufman*, 98 N.M. 261, 648 P.2d 300 (1982)). Importantly, the defendant in *Hovey* alleged that television cameras made him nervous. *Id*. But just like Mr. Huguely, he failed to present any evidence in support of his assertion. Accordingly, his request to prohibit cameras in the courtroom failed. *Id*. The same result should have attained in the present case.

The standards set forth in *Cosmos Broadcasting*, *In Re WLBT* and *Hovey* acknowledge the great advancements in technology and establish a proper balance between the rights of broadcasters and the public on the

one hand and a criminal defendant on the other. This Court should adopt a similar rule. The trial courts in Virginia need guidance from this Court.

Of course, this right of access is not unlimited, nor should it be. If Virginia Broadcasting were to potentially prejudice a defendant during a trial by engaging in any impropriety, or by creating a disturbance, it could, and should, be removed from the courtroom. Absent a factual showing of prejudice, however, legitimate print and broadcast media should both be allowed to effectively represent the public and report what they see and hear, utilizing the most effective means available. And, both should be judged by the same standard. Their constitutional function is exactly the same.

Given the absence of a showing of prejudice and no consideration of any less restrictive alternatives, the lower court erred by denying Virginia Broadcasting the ability to effectively gather and report the news using the tools of its trade while at the same time allowing the print media to use the traditional tools of its trade unabated. The lower court's decision should be reversed.

F. No Evidence Rising To The Level Of Constitutional Prejudice Was Presented To The Lower Court

There was no evidence presented to the lower court that rose to the level of constitutional prejudice sufficient to warrant the denial of Virginia

Broadcasting's Request for electronic media coverage of Mr. Huguely's sentencing. Mr. Huguely and the Commonwealth failed to call a single witness, request judicial notice of adjudicative facts or even proffer any evidence. (App. 9-37).

Absent a showing of constitutional magnitude, the mere presence of cameras in a courtroom does not render a trial unfair. *Chandler*, at 582. In order to show constitutional prejudice, Mr. Huguely must have shown that there was a "substantial probability" that coverage would result in an unfair trial or hearing, that excluding coverage would prevent that prejudice and that reasonable alternatives could not protect Mr. Huguely's rights. *Press-Enterprise Co.*, at 14. This was not shown in the present case. *See*, *Diehl*, at 42 ("absent a showing of prejudice of constitutional dimension, the mere presence of cameras in a courtroom does not render a trial unfair."); *accord*, *Novak*, *at 390.* Mr. Huguely and the Commonwealth failed to make any showing at all. *A fortiori*, no showing of prejudice of constitutional dimension was made.

There is no doubt that publicity, be it printed or broadcast, has the potential to prejudice, "but the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the media's coverage of his case – be it printed or broadcast – [resulted in an unfair hearing]."

Chandler, at 575. Such potential prejudice does not justify the universal denial of the broadcast media's requests to use cameras to gather and report the news in criminal trials. This is particularly true when there was not a scintilla of evidence of prejudice presented to the trial court.

CONCLUSION

No "good cause" was "shown" to warrant the lower court's denial of Virginia Broadcasting's Request pursuant to Section 19.2-266 of the Code of Virginia. Indeed, no evidence of any nature was presented to the lower court by Mr. Huguely or the Commonwealth. The lower court erred by failing to apply the "good cause shown" standard and by relying on mere speculations to justify the continuation of its *de facto per se* ban on cameras in its courtroom to gather and report the news in criminal trials.

The right to gather and report the news in a criminal trial via electronic means should be balanced with a criminal defendant's Sixth Amendment right to a fair hearing. Any decision to exclude the use of electronic media by legitimate broadcasters in a criminal trial should be narrowly tailored and based on specific evidence that there is a substantial probability that a defendant's right to a fair trial will be prejudiced by publicity and that prohibiting the use of cameras would prevent that prejudice.

Whether gauged by the requirements of Section 19.2-266 of the Code of Virginia or by the constitutional guarantee of access to criminal trials, the lower court erred. Absent a factual showing of prejudice, legitimate print and broadcast media should both be allowed to gather and report the news of criminal trials in a manner that will best inform the public of what they see and hear while they are present in the courtroom. Virginia citizens should not be limited to the technology of 200 years ago.

This Court should reverse the Circuit Court's August 30, 2012 Order.

Respectfully Submitted,

Virginia Broadcasting Corporation

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CERTIFICATE

Pursuant to Rule 5:26(h) of the Rules of the Supreme Court of Virginia, counsel for Virginia Broadcasting Corporation certifies that fifteen bound copies of the foregoing Brief of Appellant and ten copies of the Appendix, with ten electronic copies on CD of both, were hand-filed with the Clerk of the Supreme Court of Virginia on this 17th day of May, 2013. On this same day, three bound copies of the Brief of Appellant and one bound copy of the Appendix, with one electronic copy of both on CD, were served via U.S. Mail, postage prepaid, to counsel for the Appellees at the following addresses:

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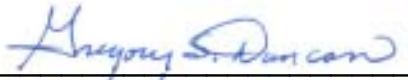
Given under my hand this 17th day of May, 2013.



Gregory S. Duncan