In The

# Supreme Court of Virginia

**RECORD NO. 122013**

## VIRGINIA BROADCASTING CORPORATION,

*Appellant,*

**v.**

## COMMONWEALTH OF VIRGINIA and GEORGE HUGUELY,

*Appellees.*

## BRIEF OF *AMICI CURIAE* WCAV-TV, WHSV-TV, WVAW-TV, WAHU-TV, WAVY-TV, WVBT-TV, AND WSLS-TV

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## STATEMENT OF THE CASE AND MATERIAL TRIAL PROCEEDINGS

This appeal presents an issue of statutory interpretation that has not yet been addressed by this Court. Appellant Virginia Broadcasting Corporation operates WVIR-TV in Charlottesville. Pursuant to Va. Code § 19.2-266, Appellant filed a Request for Electronic Media and/or Still Photography Coverage of Judicial Proceedings, seeking permission to record with a television camera the sentencing hearing held in *Commonwealth v. George Huguely*. The trial court denied that request, as well as Appellant's reconsideration motion. This appeal relates to the trial court's erroneous denial of the request for camera access at that sentencing hearing.

## ASSIGNMENT OF ERROR

The trial court erred in denying camera access to the sentencing hearing by failing to make an evidence-based finding of "good cause" in violation of Va. Code § 19.2-266. Error was preserved at pages 21-22 of the July 25, 2012 hearing transcript (Appx. 29-30), and in Appellant's counsel's endorsement to the September 17, 2012 order (Appx. 45-46).

## STATEMENT OF FACTS

*Amici Curiae* adopt and incorporate the Appellant's Statement of Facts.

## STATEMENT OF INTEREST OF *AMICI CURIAE*

*Amici Curiae* WCAV-TV, WHSV-TV, WVAW-TV and WAHU-TV, owned by Gray Television, Inc., WAVY-TV and WVBT-TV, owned by LIN Television Corporation d/b/a LIN Media, and WSLS-TV, owned by Media General Operations, Inc., are Virginia television broadcast stations committed to producing high-quality journalism for their viewers. Through their daily newscasts, *Amici* make comprehensive news reports on all three branches of local and state government, including newsgathering by video cameras directly inside Virginia's courtrooms pursuant to Va. Code § 19.2-266. *Amici* thus have a keen interest in this case, as it may affect their continuing ability to gather the news and present it to the public.

## STANDARD OF REVIEW

*De novo* review is required here as this case (1) involves statutory interpretation and presents a question of law on undisputed facts, *Lacava v. Commonwealth*, 283 Va. 465, 722 S.E.2d 838 (2012), and (2) implicates constitutional considerations regarding the right of access. *See Daily Press, Inc., v. Commonwealth*, 285 Va. 447, 739 S.E.2d 636, 640 (2013). *See also* Brief of Appellant at 6-7.

## ARGUMENT

**I. The Virginia presumption of access to courtrooms for cameras, under Va. Code § 19.2-266, follows the Commonwealth's long tradition of public and press access as well as the First Amendment.**

> "[T]hroughout its evolution, the trial has been open to all who care to observe."
>
> *Richmond Newspapers v. Virginia*, 448 U.S. 555, 564 (1980).

The Commonwealth of Virginia, since the pre-Revolutionary Era, has provided a rock-solid foundation for the Nation's commitment to public access to criminal proceedings. *See Richmond Newspapers v. Virginia*, 448 U.S. 555, 566 (1980). Dating back to colonial times, criminal trials in the Commonwealth have been open to public view. *Id.* In the mid-1600's, when the Virginia General Assembly perceived that respect for the courts was waning, "the response was not to restrict the openness of the trials to the public, but instead to prescribe rules for the conduct of those attending them." *Id.* In the celebrated treason trial of Vice President Aaron Burr, United States Chief Justice Marshall, sitting as trial judge, convened the probable cause hearing in the Hall of the Virginia House of Delegates because a courtroom was too small to accommodate the crush of interested citizens. *See United States v. Burr*, 25 F. Cas. 1 (No. 14,692) (CC Va. 1807).

Virginia has thus presaged U.S. Supreme Court's later establishment of the bedrock First Amendment principles in two significant cases arising out of the Commonwealth. In *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978), the Court held that "[t]he operations of the courts and the judicial conduct of judges are matters of utmost public concern." And in *Richmond Newspapers*, 448 U.S. at 573, it held that the First Amendment requires that all criminal trials be open to the press and public, absent compelling and clearly articulated reasons for closing such proceedings.

This Court and the Virginia Court of Appeals consistently apply the First Amendment and Virginia's tradition of openness to furnish maximum public access while safeguarding the fair administration of justice. *See Daily Press, Inc., v. Commonwealth*, 285 Va. 447, 739 S.E.2d 636, 640 (2013) (affirming underlying constitutional principles affording public access to courts, upholding access to court documents); *Richmond Newspapers, Inc. v. Commonwealth*, 222 Va. 574, 588, 281 S.E.2d 915, 923 (1981) (right of public access to pretrial proceedings); *In re Times-World Corp.*, 25 Va. App. 405, 418, 488 S.E.2d 677, 683 (1997) (right of public access to criminal competency hearings).

Consistent with the principles of settled law, and centuries of practice, in 1987 the General Assembly enacted section 19.2-266 of the Virginia Code to grant to the electronic-media the presumptive right to record and broadcast court proceedings. That language of the code furnishes an appropriate balance between the public right of access and the parties' fair trial rights[1] by permitting television coverage of court proceedings under carefully prescribed conditions. Va. Code § 19.2-266. The law plainly provides for camera access to court proceedings except "for good cause shown." *Id. See also* Amicus Brief of Virginia Association of Broadcasters, at 5-6 (discussion of statute's origin and legislative intent).

## II. This case provides the Court with the opportunity to guide trial courts in their application of § 19.2-266, to provide maximum public access while ensuring fair-trial rights are preserved.

In the *Commonwealth v. George Huguely* prosecution, the trial court's chief rationale for denying Appellant Virginia Broadcasting Corp.'s request to bring a camera into the sentencing proceedings was its speculation, without reference to any evidence at all, that participants might play to the cameras, (App. 32:15-18), and that television coverage would "add [] fuel to

[1] The Supreme Court has held that, in and of itself, electronic coverage of criminal court proceedings will not hamper a defendant's right to a fair trial. *Chandler v. Florida*, 449 U.S. 560, 574-75 (1981). *See also Novak v. Commonwealth*, 20 Va. App. 373, 390, 457 S.E.2d 402, 410 (1995); *Savino v. Commonwealth*, 239 Va. 534, 547 n. 4, 391 S.E.2d 276, 283 (1990); *Fisher v. Commonwealth*, 236 Va. 403, 410 n. 2, 374 S.E.2d 46, 50 (1988).

the fire with respect to the intensity of the coverage by allowing graphic images out there to the public, online, on television, wherever they're going to be . . . ." (App. 32:21-25-33:1-3). Neither party, nor the trial court, cited any evidence in the record. As a result, and despite the understandable interest of the University of Virginia, the City of Charlottesville, and state and national communities in these proceedings, the court denied Appellant the opportunity to cover, and most of the public the opportunity to see, the conclusion to this controversial murder prosecution.

With all respect to the trial court, and its important obligation to oversee the fair administration of justice, its speculation in this case plainly fails to constitute "good cause" under Virginia's law, which presumes access for cameras in courtrooms. *See e.g.*, *Novak v. Commonwealth*, 20 Va. App. 373, 390, 457 S.E.2d 402, 410 (1995); *see also* Amicus Brief of Virginia Association of Broadcasters, at 13-15. Appellant correctly argues that the General Assembly did not intend to give trial courts unbridled discretion to exclude cameras under the statute. *See* Brief of Appellant at 10-16. Instead, the statute obligates the court to make an evidentiary finding of "good cause" sufficient to warrant the closure.

This case presents the Court an opportunity to guide the Commonwealth's trial courts with instruction for application of the "good

cause" standard. *Amici curiae* respectfully submit that the "good cause" standard adheres to the well-established First Amendment principles that have guided the conduct of trials in the Commonwealth since its inception. The "good cause" standard should require any party opposing cameras to make an evidentiary showing: (1) of a specific and compelling need for the exclusion of cameras from the courtroom, which the exclusion of cameras is essential to prevent; and (2) that the cameras are excluded only to the extent necessary, and in the least-restrictive manner possible. *See Daily Press, Inc., v. Commonwealth*, 285 Va. 447, 739 S.E.2d 636, 640 (2013) (presumption of access to courts defeated only upon "specific findings" that "there is (1) a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity and that closure would prevent that prejudice and (2) reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights").

Through implementing this high standard of "good cause," this Court will ensure that Virginia's television broadcasters maintain their presumptive right to broadcast court proceedings, as Va. Code § 19.2-266 requires, balanced against any legitimate countervailing interest to the contrary.

## III. The First Amendment guarantees the right to attend court proceedings, and should thus inform this Court's interpretation of the "good cause" standard.

Although it has never held that the First Amendment provides a right to cameras in the courtroom, the United States Supreme Court, in a clear and consistent succession of decisions, has firmly acknowledged the important rights of the public and the press to attend and observe court proceedings. *Richmond Newspapers*, 448 U.S. at 573. The Supreme Court in *Richmond Newspapers* recognized that, in modern times, access to merely "observe" proceedings only goes so far, stating that "[i]nstead of acquiring information about trials by firsthand observation . . . people now acquire it chiefly through the print and electronic media. In a sense this validates the media claim of functioning as surrogates for the public." *Id.* at 572-73. Acting as "surrogates" for the public, the media is routinely provided courtroom access "so that they may report what people in attendance have seen and heard," furthering "public understanding of the rule of law and . . . comprehension of the functioning of the entire criminal justice system." *Id.* at 572 (citation omitted). Indeed, the constitutional right to attend and observe trials serves to reinforce crucial, democratic public acceptance of "both the process and its results." *Id.* at 570-71.

The Court further held, in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), that *per se* closures of court proceedings, without any specific findings on the record as to the particularized, identifiable harm to the parties' rights or to the administration of justice, is unconstitutional. 457 U.S. at 607-08.

Finally, in *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1 (1986) *("Press Enterprise II')*, the Court quoted from its earlier decision in *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501 (1984) *("Press Enterprise I")*, holding that the presumption of openness "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise I*, 464 U.S. at 510. The Court further required that, "[t]he interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.*

Virginia Courts have routinely and recently applied these constitutional principles when adjudicating access to court proceedings and records. *Daily Press, Inc., v. Commonwealth*, 285 Va. 447, 739 S.E.2d 636, 640 (2013) ("Court documents can only be sealed on the basis of "an interest so compelling that it cannot be protected reasonably by some measure other than a protective order," and "any such order must be

drafted in the manner least restrictive of the public's interest."); *Shenandoah Publ'g House, Inc. v. Fanning*, 235 Va. 253, 259, 368 S.E.2d 253, 256 (1988);[2] *see also Richmond Newspapers, Inc. v. Commonwealth*, 222 Va. 574, 588, 281 S.E.2d 915, 923 (1981) (extending right of access to pretrial proceedings); *In re Times-World Corp.*, 25 Va. App. 405, 418, 488 S.E.2d 677, 683 (1997) (extending right of access to criminal competency hearings).[3]

Accordingly, the proposed "good cause" test comports with the First Amendment and Virginia's established tradition of open courts. A court should only deny camera access to court proceedings if it finds "good cause" supported with an evidentiary showing, by the party seeking to exclude cameras, of: (1) a specific and compelling need for the exclusion of cameras from the courtroom, which the exclusion of cameras is essential to

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[2] Other state appellate courts follow a similarly strong, evidence-based test when determining whether to exclude cameras under their own states' laws. *See e.g. State ex rel. Cosmos Broad. Corp. v. Brown*, 14 Ohio App. 3d 376, 382-83, 471 N.E.2d 874, 883 (1984); *In re WLBT, Inc.*, 905 So. 2d 1196, 1199 (Miss. 2005); *State v. Hovey*, 742 P.2d 512, 514-15 (N.M. 1987). *See also Morris Communications, LLC v. Griffin*, 620 S.E.2d 800 (Ga. 2005). ("A party's objection to [cameras] must set forth an adequate ground for denying a request for such coverage, and the record must contain some factual basis supporting that ground; otherwise, a party, by lodging a simple, unsupported objection to open courtroom proceedings, will control the public's right of access to those proceedings.").

[3] This Court recently held that the constitutional right of access under the First Amendment also applies under Article I, § 12 of the Constitution of Virginia, which is virtually identical. *Daily Press, Inc.*, 739 S.E.2d at 640.

prevent; and (2) that the cameras are excluded only to the extent necessary, and in least-restrictive manner possible.

## IV. The language of the statute, and sound public policy, support a strong "good cause" test.

The provisions of the statute itself suggest that courts should carefully consider whether to take the drastic step of banning cameras from Virginia's courtrooms. Indeed, the first half of the test *Amici* urge—whether there is a specifically-identified and compelling need for prohibiting cameras—is already implicitly required under the statute. The party seeking to deny the media's right to cameras already has the burden of demonstrating "good cause," and must do so with evidence, not speculation. *See Novak*, 20 Va. App. at 390; *Diehl v. Commonwealth*, 9 Va. App. 191, 198, 385 S.E.2d 228, 232 (1989). *See also* Brief of Appellant at 10.

Moreover, the statute contains a lengthy list of items that broadcasters are prohibited from recording and broadcasting, and that address the primary concerns a presiding judge may have with a camera's presence. These include prohibiting cameras from covering: certain

proceedings[4]; certain witnesses[5]; all jurors; attorney-client communications; and bench conferences or those held in chambers. Va. Code § 19.2-266. Any closure beyond these categories should be based upon record evidence showing that, absent barring video cameras from the courtroom, no other alternatives exist to protect a specific and compelling need for closure. *See Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 563–65 (1976) (suggesting as possible alternatives, change of venue, postponement of trial, sequestration of jurors); *Richmond Newspapers v. Commonwealth*, 222 Va. 574, 589-90, 281 S.E.2d 915, 923-24 (1981) ("Upon entering a closure order, the trial judge shall articulate on the record his findings that the evidence supports the moving party's contention that an open hearing would jeopardize the defendant's fair-trial rights, that alternatives will not protect these rights, and that closure will be effective in protecting them").

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[4] "Coverage of the following types of judicial proceedings shall be prohibited: adoption proceedings, juvenile proceedings, child custody proceedings, divorce proceedings, temporary and permanent spousal support proceedings, proceedings concerning sexual offenses, proceedings for the hearing of motions to suppress evidence, proceedings involving trade secrets, and in camera proceedings." Va. Code § 19.2-266.

[5] "Coverage of the following categories of witnesses shall be prohibited: police informants, minors, undercover agents and victims and families of victims of sexual offenses." Va. Code § 19.2-266.

Finally, the many public-policy reasons supporting the constitutional mandate of public trials also support a strong test before the exclusion of cameras under state law.[6] Virginia's statute presumptively permitting cameras in courtrooms allows the public unfettered and unfiltered access to all judicial proceedings.[7] Cameras are the one true substitute for "being there," allowing the public to virtually "sit in the back of the courtroom" and observe justice in action. They permit the public to see for themselves what has transpired, to evaluate for themselves whether the judicial branch of their government is functioning properly, and to determine for

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[6] The Supreme Court noted the many positives associated with public trials:

> [P]ublic scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact-finding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process — an essential component in our structure of self-government.

*Globe Newspaper*, 457 U.S. at 606.

[7] Other jurists who have examined the primary grounds articulated by the trial court below in excluding cameras—of participants altering their behavior and rebroadcast of court proceedings to wide audiences—have disagreed with these concerns. *See Chandler v. Florida*, 449 U.S. 560, 574-75 (1981); Chief Judge Alex Kozinksi and Robert Johnson, *Of Cameras and Courtrooms*, 20 Fordham Intell. Prop., Media and Ent. L. J. 1107, 1110-1119 (2010) ("if we don't like the way courtrooms look on camera, the solution is to change the courtrooms, not toss out the cameras.").

themselves whether the administration of justice is being served. Whether the public has the right to observe court proceedings, albeit through the lens of a camera, should not be subject to the diffuse, unsupported arguments of the parties and conclusory findings of a trial court.

## V. Virginia broadcasters, through Va. Code § 19.2-266, have served the public interest through the orderly broadcast of Virginia courtroom proceedings, with no interference in the fair administration of justice.

Through the leave of a number of courts in the Commonwealth, Virginia broadcasters, including the *Amici Curiae* here, have respectfully and in non-disruptive fashion broadcast video images of major criminal trial proceedings of significant importance to the public. For example:

- WAVY-TV broadcast multiple days of the 2010 trial of Phillip Bay, a teenager convicted of plotting a Columbine-style attack on a local high school, before the Honorable William R. "Buster" O'Brien of the Virginia Beach Circuit Court.[8] In addition to reporting on the trial from gavel to gavel, the station posted critical video evidence presented at the trial on its website.[9]

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[8] *Teen in bomb trial guilty on all counts*, http://www.wavy.com/dpp/news/local_news/va_beach/teen-in-bomb-trial-guilty-on-all-counts (Nov. 22, 2010).

[9] *See* http://www.wavy.com/dpp/video/video-evidence-presented-at-trial (Nov. 16, 2012).

- WSLS-TV in Lynchburg presented daily coverage, and frequent updates on its website, of the 2010 murder retrial of local high-school principal Wesley Earnest, before the Honorable James W. Updike, Jr. in the Amherst Circuit Court.[10]
- WCAV-TV and Appellant WVIR-TV, just this week, live-streamed on their websites the entire court hearing arising from a citizens' petition to remove a public official convicted of sexual assault from office, before the Honorable Cheryl V. Higgins in the Albemarle Circuit Court.[11]
- WAVY-TV, as pool-coverage coordinator for the Hampton Roads region in March 2013, covered the arraignment of a prominent local pastor arrested for possessing child pornography before the Honorable Joseph A. Migliozzi, Jr., in the Norfolk General District

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[10] *See* http://www.wsls.com/story/20845512/wesley-earnest-murder-retrial-thursday-testimony (Nov. 18, 2010).

[11] *See Judge to decide if supervisor can stay in office*, http://www.newsplex.com/home/headlines/Judge-to-Decide-if-Dumler-Can-Stay-in-Office-208073301.html (May 19, 2013).

Court.[12] The pastor's lawyer has announced plans to plead guilty to all counts, and the station plans to continue its coverage.[13]

- WHSV-TV and Appellant WVIR-TV, in June 2012, covered a district court bench trial of Waynesboro mayor Frank Lucent, who was being charged under Virginia's dangerous-dog law in the Waynesboro General District Court. The stations continued their coverage of Lucente's appeal to the circuit court, which resulted in one of the first jury trials under that law.[14]

These are just a few examples of electronic newsgathering by broadcasters from inside Virginia's courtrooms. The public was kept informed, the Commonwealth's interest in open courts was preserved, and the proceedings were recorded and broadcast with no sacrifice to fairness or decorum. A strong "good cause" test rooted in the Constitution and Virginia's long history of open courtroom access is necessary to ensure

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[12] *Attorney: Pastor admits having child porn*, http://www.wavy.com/dpp/news/crime/norfolk-pastor-arrested-for-child-porn (Mar. 27, 2013).

[13] *Norfolk pastor to plead guilty*, http://www.wavy.com/dpp/news/crime/norfolk-pastor-to-plead-guilty (May 7, 2013).

[14] *Mayor's dog is declared dangerous*, http://www.whsv.com/home/headlines/Mayors_Dog_Declared_Dangerous_159252305.html (June 15, 2012); *Former mayor to defend dog in court*, http://www.whsv.com/news/headlines/Former-Mayor-to-Defend-Dog-in-Court-201333461.html#.UZPyb6LSTSg (Apr. 3, 2013).

that Virginia's television broadcasters may continue to keep the public informed about their state courts.

## CONCLUSION

It has been over thirty years since the United States Supreme Court held that the Constitution does not bar electronic coverage of trials, and during that time, the electronic media has covered countless judicial proceedings. *Amici Curiae* therefore urge this Court to apply a "good cause" test under § 19.2-266 guided by the bedrock First Amendment principles, requiring an evidentiary showing: (1) of a specific and compelling need for the exclusion of cameras from the courtroom, which the exclusion of cameras is essential to prevent; and (2) that the cameras are excluded only to the extent necessary, and in least-restrictive manner possible.

Respectfully submitted,

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## CERTIFICATION

Undersigned counsel certifies this brief complies with Rule 5:26(h), and that on May 21, 2013, fifteen paper copies, and one electronic copy on CD, of this Brief of *Amici Curiae* WCAV-TV, WHSV-TV, WVAW-TV, WAHU-TV, WAVY-TV, WVBT-TV, and WSLS-TV were hand filed with the Clerk of this Court, and that on the same day, three copies of this Brief were mailed, via U.S. Mail, postage prepaid, to:

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