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VIA FAX (315) 736-6349
VIA FIRST CLASS MAILHon. Richard Montgomery
Justice, Oriskany Village Court
Oriskany Village Municipal Building
Oriskany, New York 13424Re: People v. Mathew T. Heinig
People v. James J. Ranaudo

Dear Justice Montgomery:

We represent *The Utica Observer-Dispatch* (*The "Observer-Dispatch"*) in connection with the above-captioned proceedings, in which we understand both defendants have been charged with criminal possession of a weapon and defendant Heinig has been further charged with reckless endangerment for firing a handgun while on board a Holland Patent school bus transporting other students. We understand that the defendants were arraigned on the evening of November 26, 2007, at your Honor's residence rather than at the Oriskany Village Municipal Building, where reporters – including Rocco LaDuca of *The Observer-Dispatch* – were waiting to cover the proceeding. We respectfully submit this letter to object to this practice, which effectively negated the public's presumptive constitutional and common law rights of access to court proceedings in this state.

All phases of proceedings in criminal courts in New York State, from initiation through sentencing, are presumptively open to the public and the press. *Westchester Rockland Newspapers, Inc. v. Leggett*, 48 N.Y.2d 430, 437-40 (1979); *Capital Newspapers v. Moynihan*, 71 N.Y.2d 263, 265, 267 (1988); *Capital Newspaper Corp. v. Parker*, 101 A.D.2d 108 (4th Dep't), *app. dismissed*, 63 N.Y.2d 673 (1984); *see New York Judiciary Law* §4 (McKinney's 1945). It is well established that the public's right of access to judicial proceedings under the First Amendment is not limited to the criminal trial itself but pertains "equally to other phases of a criminal action." *Associated Press v. Bell*, 70 N.Y.2d 32, 37-38 (1987) (collecting authorities).

In *Press-Enterprise v. Superior Court*, 478 U.S. 1 (1986), the United States Supreme Court held that the press and public have a qualified right under the First Amendment to attend criminal proceedings in general, and specifically to attend preliminary hearings. This right also applies in New York State court proceedings, under both the state and federal constitutions. The

right specifically applies to arraignments in criminal proceedings – even if the defendant is eligible for youthful offender status. *Matter of Herald Co. v. Tormey*, 142 Misc.2d 675 (Onondaga Co. Sup. Ct.) (order closing arraignment of defendants eligible for youthful offender status held constitutionally invalid), *aff'd for reasons stated in op. below*, 152 A.D.2d 1006 (4th Dep't 1989).

Indeed, more than seven decades ago the New York Court of Appeals emphasized the value of public arraignments conducted at regularly scheduled court sessions:

Publicity, not secrecy, in arraignment...is part of our tradition. It is deemed necessary not only for individual security but also in the public interest. ***Only at stated terms where the general public is advised of the time and place of sessions, both regular and adjourned, is such publicity possible.***

Matter of Rudd v. Hazard, 266 N.Y. 302, 306 (1935) (emphasis supplied) (citations omitted). *Accord, Westchester Rockland Newspapers v. Leggett*, 48 N.Y.2d at 439 (“There would, for instance, be little justification for holding a private arraignment.”) (citation omitted).

In a case where the factual circumstances similarly suggest that a trial court's arraignment of a criminal defendant was conducted in secret “so as to avoid press coverage and the publicity almost certain to follow,” *Capital Newspapers Div. of Hearst Corp. v. Harris*, 71 A.D.2d 333, 334 (3d Dep't 1979), the language of the appellate court is instructive:

Whether the unusual procedures adopted here by the respondent Judge...were premeditated, as petitioners infer, or coincidentally occurred when representatives of the press had left the building is of little matter, nor do we in any way impune [*sic*] the motives of [the court] since it clearly appears that he proceeded as he did solely for the purpose of insuring the defendant a fair trial. However, we cannot condone or acquiesce in the course he followed no matter how meritorious his purpose.

Id. at 335. The same could be said of the Court's conduct in this instance, particularly given the established and routine practice (in Oneida County and elsewhere) when a Judge is unavailable of finding another Judge who is available for an immediate arraignment in their courtroom.

A local court's discretion to deny public access to a criminal proceeding must be exercised on a case-by-case basis in accordance with both the procedural and substantive requirements established under the First Amendment, the New York State Constitution, and Section 4 of the *Judiciary Law*. In *Westchester Rockland Newspapers v. Leggett*, *supra*, the Court of Appeals set forth procedures for the courts to follow so as to protect the press and public from arbitrary or unjustified closure of criminal proceedings, and so as to protect the right of those concerned to seek review, and the ability of higher courts to review denials of access.

The protections include *The Observer-Dispatch's* right to an adequate opportunity to oppose any closure of court proceedings, and specifically mandate that the Court either hear the undersigned's argument on the telephone, or grant a short adjournment to permit me to attend and oppose any closure request through oral argument.¹ *Herald Co. v. Weisenberg*, 59 N.Y.2d 378, 383 (1983); *New York Times Co. v. Demakos*, 137 A.D.2d 247, 259 (2d Dep't 1988); *Johnson Newspaper Corp. v. Parker*, 101 A.D.2d at 709; *Capital Newspapers v. Lee*, 139 A.D.2d 31, 36 (3d Dep't 1988); *Glens Falls Newspapers, Inc. v. Berke*, 206 A.D.2d 668 (3d Dep't 1994).

In this case, where we understand your Honor had been informed that reporters were assembled at the Oriskany Village Municipal Building to cover the arraignments, these constitutional procedural requirements imposed an affirmative obligation on the Court to notify the press – as the eyes and ears of the public – sufficiently beforehand to permit their attendance at the proceedings conducted at your residence on the evening of November 26th. *See United States v. Criden*, 675 F.2d 550, 559 (3d Cir. 1982); *United States v. Brooklier*, 685 F.2d 1162, 1168 (9th Cir. 1982); *In re Herald Co.*, *supra*, 734 F.2d at 102-03. The apparent circumvention of these requirements here prevented *The Observer-Dispatch* from reporting completely and contemporaneously on a significant judicial proceeding in this newsworthy case, which can only diminish public confidence in the administration of justice and erode public perception of its fairness.

Finally, we respectfully submit that the perception of judicial integrity is enhanced when court proceedings are readily accessible to the public. “People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.” *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 572 (1980).

Thank you for the Court's consideration of these arguments. If your Honor has any questions concerning the foregoing, please do not hesitate to contact me at your convenience.

Respectfully submitted,

Michael J. Grygiel

MJG:dd:pab

¹ *The Observer-Dispatch* recognizes that the procedural requirements which apply here, including the due process protection of a hearing enabling it to contest any request to deny access to proceedings in the instant cases (*Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982); *In re Herald Co.*, 734 F.2d 93, 102 (2d Cir. 1984)), may burden the Oriskany Village Court, but respectfully submits that compliance therewith is required under the First Amendment: “We sympathize with the burdens placed on trial judges today. Nevertheless, where the rights of the litigants come into conflicts with the rights of the media and public at large, the trial judge's responsibilities are heightened. In such instances, the litigants' purported interest in confidentiality must be scrutinized heavily.” *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 899 (7th Cir. 1994).

Hon. Richard Montgomery
November 30, 2007
Page 4

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