

**COMMONWEALTH OF KENTUCKY  
JEFFERSON CIRCUIT COURT  
DIVISION 13  
INDICTMENT NO. 20-CR-1473**

*ELECTRONICALLY FILED*

**COMMONWEALTH OF KENTUCKY**

**PLAINTIFF**

v.

**COMMONWEALTH'S RESPONSE TO DEFENDANT'S  
MOTION FOR CLOSURE OF INDIVIDUAL VOIR DIRE  
TO THE PUBLIC AND THE MEDIA**

**BRETT HANKISON**

**DEFENDANT**

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Comes the Commonwealth, by and through counsel, and in response to Defendant's motion for closure of individual voir dire to the public and media, states as follows:

The Commonwealth opposes the Defendant's request to close individual voir dire to the media and public. The method of jury selection is within a trial court's discretion, and a trial court may order individual voir dire that is closed to the media and public in certain limited situations. To do so, however, the trial court must follow the path established in *Lexington Herald-Leader v. Meigs*, 660 S.W.2d 658 (Ky. 1983). Here, following that path cautions against full closure.

The manner of jury selection is "within the province of the trial judge." *Ristaino v. Ross*, 424 U.S. 589, 594-95 (1976) (quoting *Rideau v. Louisiana*, 373 U.S. 723, 733 (1963) (Clark, J., dissenting)); *see also* RCr 9.38. Here, the Court has indicated that it will conduct a portion of voir dire on an individual basis, which is permitted under Kentucky law. *See Woodford v. Commonwealth*, 376 S.W.2d 526, 527 (Ky. 1964); RCr 9.38 (requiring individual voir dire about certain topics in capital cases). The Defendant wants to close this individual voir dire to the media and public.

Closing trial proceedings “turns on a balancing of constitutional rights, those of the accused and those of the press and public.” *Meigs*, 660 S.W.2d at 662. The Defendant holds the right “to ‘an impartial jury’ guaranteed by the Sixth Amendment of the United States Constitution and Section 11 of the Kentucky Constitution.” *Meigs*, 660 S.W.2d at 661. Conversely, the “‘right of access’ of the public and the press to be in attendance during a criminal trial” has Constitutional protection as well. *Id.* (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)). Therefore, the trial court must give “adequate consideration to both the First Amendment rights of the press and the public and the Sixth Amendment rights of the accused.” *Meigs*, S.W.2d at 665. “When pretrial publicity is at issue, ‘primary reliance on the judgment of the trial court makes [especially] good sense’ because the judge ‘sits in the locale where the publicity is said to have had its effect’ and may base her evaluation on her ‘own perception of the depth and extent of news stories that might influence a juror.’” *Skilling v. United States*, 561 U.S. 358, 386 (2010) (quoting *Mu’Min v. Virginia*, 500 U.S. 415, 424 (1991) (alteration in original)).

*Meigs* established certain rules for trial courts to follow prior to ordering closure. *Id.* at 663-64; *see also Press-Enterprise Co. v. Superior Ct. of Cal., Riverside County*, 464 U.S. 501, 511 (1984) (establishing similar rules). First, the trial court must hold a hearing to consider reasonable alternatives and permit the public and press an opportunity to be heard. *Id.* at 663. If closure is ordered, the trial court must make specific findings setting forth the need for closure. *Id.* Second, the person seeking closure has the burden to prove its need. *Id.* And third, the burden of proof requires the person seeking closure to prove (1) that the right he or she seeks to protect is sufficiently important,<sup>1</sup> (2) the “right or interest probably cannot be adequately

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<sup>1</sup> The Kentucky Supreme Court has held that the right to an impartial jury is sufficiently important to meet this prong. *Meigs*, 660 S.W.2d at 664.

protected by less restrictive alternatives to closure,” and (3) the right or interest “will be protected by a closed proceeding.” *Id.* at 664.

The Court has indicated its familiarity with the case law that requires a hearing and specific findings if closure is ordered. Accordingly, prong one will be satisfied following the hearing scheduled by the Court on Wednesday, January 26. Likewise, the Commonwealth recognizes that Defendant’s right to an impartial jury is sufficiently important to warrant protection and that this case has received widespread media coverage.

Given these facts, the Court’s decision will rest upon whether closing individual voir dire is necessary to ensure an impartial jury and whether less restrictive alternatives are available. Moreover, the charges involved, which are Class D felonies, should factor into the equation. This is not a capital case, as was *Meigs*. In fact, *Meigs* recognized that the concept of an impartial jury is “always important, but particularly so in qualifying a jury to consider the death penalty.” *Id.* at 661; *see also* William H. Fortune, *Voir Dire in Kentucky: An Empirical Study of Voir Dire in Kentucky Circuit Courts*, 69 *Ky. Law J.* 273 (1981) (noting that courts are more likely to order sequestered questioning in death penalty cases).

If the Court believes that the Defendant meets his burden to prove that some level of closure is required, then the Court should consider whether closure short of a total ban on the public and media will be sufficient. *See Press-Enter. Co.*, 464 U.S. at 511 (“Absent consideration of alternatives to closure, the trial court could not constitutionally close the *voir dire*.”). For example, the Court could consider whether to require the media and public to remain in a certain location in the courtroom; whether to prohibit still photography, video footage, or recording devices;<sup>2</sup> whether

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<sup>2</sup> The Commonwealth notes the longstanding, accepted practice that jurors not be identified by name and that jurors not be shown in any photograph or video recording, and these longstanding practices should of course apply here too regardless of the level of media access.

to prohibit livestreaming; whether to require that certain juror responses be given at the bench and while the Court utilizes white noise;<sup>3</sup> or whether real time audio-only access be provided to media and the public outside of the courtroom. Another potential option noted by the United States Supreme Court is to provide a copy of the court record (via DVD) of individual voir dire proceedings to interested parties following completion of individual voir dire of all potential jurors. *See generally Press-Enter. Co.*, 464 U.S. at 512 (“When limited closure is ordered, the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time, if the judge determines that disclosure can be accomplished while safeguarding the juror’s valid privacy interests.”).

In closing, the Commonwealth recognizes the competing interests between the right to an impartial jury and the right to public and media access. Here, the Commonwealth believes the balance favors access, even if the Court decides to place some limitations on that access.

Respectfully submitted,

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<sup>3</sup> This more limited closure for certain juror responses related to sensitive or personal information was approved by the United States Supreme Court in *Press-Enterprise Co.*, 464 U.S. at 512.

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### **CERTIFICATION**

This is to certify that the Response herein was filed electronically with the Jefferson Circuit Court Clerk, and that a true copy was sent by electronic mail to: Hon. Ann Bailey Smith, Judge, Jefferson Circuit Court, Division 13; and Hon. Stewart Mathews, Dolle & Mathews and Co. LPA, 817 Main Street, Suite 500, Cincinnati, OH 45202, counsel for defendant, this 24<sup>th</sup> day of January, 2022.

/s/ Barbara Maines Whaley  
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