
In the Supreme Court of the United States

VIRGINIA DEPARTMENT OF STATE POLICE,

Petitioner,

v.

**THE WASHINGTON POST, THE VIRGINIAN PILOT, RICHMOND TIMES-
DISPATCH, VIRGINIA PRESS ASSOCIATION, MEDIA GENERAL OPERATIONS,
INC. and EARL WASHINGTON, JR.**

Respondents.

**APPLICATION TO CHIEF JUSTICE REHNQUIST
FOR AN EMERGENCY STAY PENDING REVIEW ON CERTIORARI**

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November 9, 2004

**APPLICATION TO CHIEF JUSTICE REHNQUIST
FOR AN EMERGENCY STAY PENDING REVIEW ON CERTIORARI**

Pursuant to Rule 23 of this Court, the Virginia Department of State Police (“the Commonwealth”) respectfully applies to Chief Justice Rehnquist, as Circuit Justice of the Fourth Circuit, for an Emergency Stay Pending Review on Certiorari. Specifically, the Commonwealth asks Chief Justice Rehnquist to stay the decision of the United States Court of Appeals for the Fourth Circuit requiring public release of certain documents, currently held under seal pursuant to a protective order, that are part of an on-going criminal investigation and that are likely to be presented to a grand jury. Quite simply, if the Emergency Stay does not issue, this Court may be deprived of jurisdiction to consider the Commonwealth’s Petition for Certiorari and the Commonwealth’s ability to complete the investigation and successfully indict and prosecute will be severely undermined.

On November 8, 2004, the Fourth Circuit denied the Commonwealth’s Motion to Stay the Mandate Pending a Petition for Certiorari and, more importantly, issued the Mandate. Thus, at the moment, the Respondents, The Washington Post, The Virginian Pilot, Richmond Times-Dispatch, Virginia Press Association, Media General Operations, Inc. and Earl Washington, Jr., have a legal right to obtain the documents at issue even though the documents are part of an on-going criminal investigation and the information contained in them is likely to be presented to a grand jury. Nevertheless, the Respondents have agreed not to enforce their right to the documents until after the Chief Justice rules on the Commonwealth’s application for an Emergency Stay Pending Review on Certiorari. If the Chief Justice denies the Commonwealth’s Application for an Emergency Stay, the documents will be made public.

JUDGMENT SOUGHT TO BE REVIEWED

This matter involves an attempt by the Respondents to make public certain documents from the files of an on-going criminal investigation. Although no presentation has yet been made to a grand jury considering a request for an indictment, there is a substantial likelihood that the documents at issue, or information contained in the documents, will ultimately form the basis for such a presentation. Consequently, the documents at issue must be treated like grand jury materials and protected from premature public disclosure. *See In re Special Proceedings*, 373 F.3d 37, 46-47 (1st Cir. 2004)

The background of this matter is relatively straightforward. In 1982, a heinous rape and murder were committed in Virginia. The individual originally convicted of that crime, the Respondent Earl Washington, Jr., was pardoned by the Governor after subsequent forensic testing cast serious doubt on his guilt. Washington has filed a civil suit against certain individuals concerning both his prosecution and conviction. In the course of that litigation, Washington served a third-party subpoena on the Commonwealth seeking documents pertaining to the investigation of the crime. All responsive documents were released except those contained in the file of the on-going investigation of the crime. The Commonwealth objected to the production of the latter documents. Ultimately, the district court ordered that the documents contained in the file of the current investigation be produced to counsel pursuant to a protective order that limited their disclosure. Many of the documents produced under the protective order were subsequently attached to and discussed in pleadings filed in the civil action.

Washington and various media organizations seek to have those documents released for public dissemination. Although the Commonwealth consented to the public disclosure of most of the subpoenaed documents, the Commonwealth objected to the release of twenty documents.

The district court, while acknowledging the Commonwealth's compelling interest in protecting the integrity of an on-going police investigation, ordered all but one of them (Exhibit D) released because the existence of the suspect discussed in the documents was already public information and, therefore, protecting that information was not a compelling interest. Following the district court's order, the Commonwealth acquiesced in the release of five of those documents (Exhibits A, B, J, K, and L) but pursued a stay and reconsideration as to the remaining fourteen. The district court denied reconsideration because the Commonwealth did not sufficiently explain the basis for its concerns that disclosure would interfere with the on-going investigation and pose a risk of harm to suspects and witnesses alike.

The district court stayed release of the documents, however, to permit the Commonwealth to appeal. Thus, fourteen documents were before the Fourth Circuit with the Commonwealth's urgent assertion that disclosure of the information contained in them put witnesses at risk and further compromised investigative use of the information.¹ Unfortunately, the Fourth Circuit held that the First Amendment presumptive right of access applied to these documents and, after applying the attendant balancing test, held that the documents must be released. The Fourth Circuit entered its judgment on October 1, 2004. *See Attachment A*. The Commonwealth's Petition for Rehearing was denied on October 26, 2004. The Commonwealth's Motion to Stay the Mandate was denied on November 8, 2004. *See Attachment B*. The petition for certiorari is due on January 24, 2005.

¹ Only eight documents (Exhibits E, F, G, H, I, M, N, and O) were filed in connection with summary judgment in the civil action. The other six documents (Exhibits C, P, Q, R, S, and T) were filed in connection with discovery matters. Exhibit R is the same as Exhibit I. Exhibit T is part of a transcript from a hearing before a Magistrate-Judge.

REASONS WHY THE EMERGENCY STAY SHOULD BE GRANTED

Under the terms of 28 U.S.C. § 2201(f), this Court or any individual Circuit Justice may stay an order of the lower court pending review on certiorari. In determining whether to issue such a Stay, the Circuit Justices apply four factors: (1) whether there is a reasonable probability that certiorari will be granted; (2) whether there is a fair prospect that the decision below will be reversed; (3) whether the applicant will be irreparably harmed if a Stay does not issue; and (4) whether the balance of the equities favors the Stay. *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980)(Brennan, J., in chambers). *See also Gregory-Portland Indep. Sch. Dist. V. United States*, 448 U.S. 1342, 1342 (1980)(Rehnquist, J., in chambers)(In determining whether to grant a Stay, a Circuit Justice is obligated “to determine whether four Justices would vote to grant certiorari, to balance the so called ‘stay equities,’ and to give some consideration as to predicting the final outcome of the case in this Court.”). As explained below, the Commonwealth easily satisfies the four-factor test.

I. THERE IS A REASONABLE PROBABILITY THAT CERTIORARI WILL BE GRANTED.

Essentially, the lower court held that potential grand jury material—documents contained in an on-going criminal investigation file that will form the basis for a presentation to a grand jury if indictments are requested—is subject to the First Amendment presumptive right of access. Such a result contradicts the decisions of three other Circuits. The District of Columbia and Third Circuits have established a bright line rule that grand jury materials are not subject to the First Amendment presumptive right of access. *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 499-500 (D.C. Cir. 1998); *United States v. Smith*, 123 F.3d. 140 (3rd Cir. 1997). The First Circuit,

quite logically, has extended that rule to materials that are likely to be presented to a grand jury. *See In re Special Proceedings*, 373 F.3d at 46-47.

These different rules lead to different outcomes. In the First, District of Columbia, and Third Circuits, the Commonwealth would merely have to establish that these documents were contained in an on-going criminal investigation file and public access would be denied. In contrast, in the Fourth Circuit, the court of appeals will balance the First Amendment presumptive right of access against the Commonwealth's clear compelling interest in maintaining confidentiality and conduct its own document-by-document review to assess the risk of harm to the pending criminal investigation.

This outcome determinative split among the Circuits must be resolved by this Court. Consequently, the Commonwealth will seek certiorari and ask this Court to determine whether the First Amendment presumptive right of access applies to documents or content of documents that are likely to be presented to a grand jury. Given this significant split among the Circuits on the question, and that this issue is recurring, there is a strong likelihood that this Court will grant certiorari.

II. THERE IS A FAIR PROSPECT THAT THE DECISION BELOW WILL BE REVERSED.

If certiorari is granted, there is a fair prospect that the decision below will be reversed. Given the long tradition, which predates the foundation of the Republic, of maintaining the secrecy of grand jury proceedings and this Court's previous pronouncements on the secrecy of grand jury proceedings, this Court is likely to agree with the reasoning of the First, District of Columbia, and Third Circuits and reject the reasoning of the Court below. Quite simply, there is every reason to expect that this Court would adopt a bright line rule that materials an information

likely to be presented to a grand jury are not subject to the First Amendment presumptive right of access.

Moreover, while there is obviously a distinction between materials that have been shown to a grand jury and materials that might be shown or might be summarized to a grand jury in the future, it seems likely that this Court will approve the reasoning of the First Circuit and conclude that this distinction is substantively irrelevant. If a document is likely to be shown or summarized to a grand jury, then the document should be accorded as much protection as if it had been or definitely would be shown to a grand jury. The mere fact that a prosecutor has not rushed to a grand jury with the documents should not strip the documents of the secrecy accorded grand jury proceedings. Therefore, it seems quite probable that the Commonwealth would prevail on the merits.

III. THE COMMONWEALTH WILL BE IRREPARABLY HARMED IF AN EMERGENCY STAY DOES NOT ISSUE.

If an Emergency Stay does not issue, the Commonwealth will be irreparably harmed. This is so for two reasons.

First and quite simply, the secrecy of potential grand jury materials will be compromised if a Stay is not granted. The Commonwealth's ability to finish the investigation, obtain indictments, and bring the perpetrator(s) to justice will be severely undermined. *See John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1308-09 (1989) (Marshall, J., in chambers)(granting Stay where disclosure of materials could "reasonably be expected to interfere with an ongoing law enforcement investigation by apprising the targets of that investigation of the nature of the grand jury's inquiry and by facilitating hindrance of the investigation.").

Second, without an Emergency Stay of the lower court's order, this Court may well be deprived of jurisdiction to hear the case. *See New York v. Kleppe*, 429 U.S. 1307, 1310 (1976)(Marshall, J., in chambers)("Perhaps the most compelling justification for a Circuit Justice to upset an interim decision by a court of appeals [is] to protect this Court's power to entertain a petition for certiorari . . ."). If the documents are released as required, then the Commonwealth's petition for certiorari becomes moot before it is even filed. *See John Doe Agency*, 488 U.S. at 1309 (1989)(Marshall, J., in chambers)("The fact that disclosure would moot that part of the Court of Appeals' decision requiring disclosure . . . would also create an irreparable injury."). Although this Court may well conclude that the capable-of-repetition-yet-evading-review doctrine is applicable, *see Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 6 (1986); *Gannett Co. v. DePasquale*, 443 U.S. 368, 377-78 (1979), this Court may well conclude that the doctrine is inapplicable. If the documents are turned over and if this Court concludes that the capable-of-repetition-yet-evading-review doctrine does not apply, then this Court will not have jurisdiction.

IV. THE BALANCE OF THE EQUITIES FAVORS AN EMERGENCY STAY

Finally, the balance of the equities favors the issuance of an Emergency Stay. If a Stay does not issue, this Court may be deprived of jurisdiction and the Commonwealth's ability to solve the crime and indict the individual(s) responsible will be compromised. Conversely, although the Respondents purport to have a significant interest in receiving the documents immediately, the Respondents will not be adversely affected if disclosure is delayed pending review on certiorari by this Court. *See John Doe Agency*, 488 U.S. at 1309 (Marshall, J., in chambers)("Conversely, Corporation's interest in receiving this information immediately . . . poses no threat of irreparable harm.").

CONCLUSION

The Commonwealth respectfully requests Chief Justice Rehnquist to enter an Emergency Stay pending review on certiorari.

Respectfully submitted,

**THE VIRGINIA DEPARTMENT OF
STATE POLICE**

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November 9, 2004

PROOF OF SERVICE

On November 9, 2004, I served one copy of **Application To Chief Justice Rehnquist For An Emergency Stay Pending Review On Certiorari** upon all parties required to be served, by overnight mail and facsimile in accordance with Rule 29(3), as follows:

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PUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

VIRGINIA DEPARTMENT OF STATE
POLICE,

Appellant,

v.

THE WASHINGTON POST; THE
VIRGINIAN PILOT; RICHMOND TIMES-
DISPATCH; ASSOCIATED PRESS;
VIRGINIA PRESS ASSOCIATION; MEDIA
GENERAL OPERATIONS, INCORPORATED,

Appellees,

EARL WASHINGTON, JR.,

Plaintiff-Appellee,

and

KENNETH H. BURAKER; CHARLES
JONES; HARLAN LEE HART; GERALD
YANCEY; GARY L. CLOSE; DENNY M.
SLANE; TERRY SCHRUM; CURTIS REESE
WILMORE; LUTHER COX; DENNY A.
ZEETS; TOWN OF CULPEPER, VIRGINIA;
FAUQUIER COUNTY, VIRGINIA; MARY
L. JONES,

Defendants.

No. 04-1375

Appeal from the United States District Court
for the Western District of Virginia, at Charlottesville.
Norman K. Moon, District Judge.
(CA-02-106-3)

Argued: June 4, 2004

Decided: October 1, 2004

Before WIDENER and SHEDD, Circuit Judges, and
David R. HANSEN, Senior Circuit Judge of the
United States Court of Appeals for the Eighth Circuit,
sitting by designation.

Affirmed in part and remanded in part by published opinion. Judge Shedd wrote the opinion, in which Judge Widener and Senior Judge Hansen joined.

COUNSEL

ARGUED: James Owen Towey, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellant. Peter J. Neufeld, COCHRAN NEUFELD & SCHECK, L.L.P., New York, New York; John G. Kester, WILLIAMS & CONNOLLY, Washington, D.C., for Appellees. **ON BRIEF:** Jerry W. Kilgore, Attorney General, Martin L. Kent, Assistant Attorney General, Richmond, Virginia, for Appellant. Eric M. Freedman, New York, New York; Robert T. Hall, HALL, SICKELS, ROSTANT, FREI & KATTENBURG, P.C., Reston, Virginia, for Earl Washington, Jr.; Conrad M. Shumadine, WILLCOX & SAVAGE, P.C., Norfolk, Virginia, for The Virginian-Pilot; Craig T. Merritt, CHRISTIAN & BARTON, L.L.P., Richmond, Virginia, for Media General Operations, Inc., t/a The Richmond Times-Dispatch, Associated Press, and Virginia Press Association; Dane H. Butswinkas, Kenneth J. Brown, WILLIAMS & CONNOLLY, L.L.P., Washington, D.C., for The Washington Post.

OPINION

SHEDD, Circuit Judge:

Earl Washington, Jr., was convicted, sentenced to death, and eventually pardoned for the 1982 murder of Rebecca Lynn Williams. The underlying case from which this appeal comes to us is Washington's

civil rights lawsuit in which he challenges his arrest and conviction for the Williams murder, but the merits of that case are not now before us. Instead, we are presented with a challenge by the Virginia Department of State Police ("VDSP") — which is not a party in Washington's civil case — to the district court's decision to unseal certain documents that VDSP had produced pursuant to a subpoena *duces tecum* served by Washington and other documents which contain information from the VDSP documents. The documents were filed in the district court under seal, and they pertain to VDSP's criminal investigation into the Williams murder. For the reasons set forth below, we affirm the district court's decision to unseal the documents in part, and we remand in part for further proceedings.

I

On June 4, 1982, Williams was raped and murdered in her Culpeper, Virginia, apartment. In May 1983, while in custody for an unrelated crime, Washington confessed to raping and killing Williams. Washington was tried and convicted for the capital murder of Williams in January 1984, and he was thereafter sentenced to death. The Supreme Court of Virginia affirmed Washington's conviction and sentence, *see Washington v. Virginia*, 323 S.E.2d 577 (Va. 1984), and his attempts at post-conviction relief were unsuccessful, *see Washington v. Angelone*, 12 Fed. Appx. 112 (4th Cir. 2001); *Washington v. Murray*, 4 F.3d 1285 (4th Cir. 1993); *Washington v. Murray*, 952 F.2d 1472 (4th Cir. 1991).

In 1994, then-Governor L. Douglas Wilder commuted Washington's sentence to life in prison, and in 2000, then-Governor James S. Gilmore, III, pardoned Washington. Governor Gilmore based the pardon on his determination that a jury, if presented with newly available DNA test results, would have reached a different conclusion regarding Washington's guilt. Governor Gilmore explained his rationale:

According to the results of the new DNA tests, Washington is excluded from semen taken from Mrs. Williams' body and his DNA could not be located elsewhere in the apartment.

The DNA results further revealed the semen of another person on a blue blanket taken from the scene of the crime. The

DNA from semen on the blue blanket matched the DNA of a convicted rapist. However, the DNA on the blue blanket did not match the DNA of the sole sample of semen taken from Mrs. Williams' body. As a result, the Division of Forensic Science could not confirm the DNA found on the blue blanket was Rebecca Williams' rapist.

(J.A. 264-65). In conjunction with the pardon, Governor Gilmore ordered VDSP to conduct a new investigation into the Williams case.

Washington filed the underlying civil action in 2002. During pre-trial proceedings, Washington served a third-party subpoena *duces tecum* on VDSP commanding production of all documents and other materials concerning him from June 1982 to the date of the subpoena "including, without limitation, all such material related to the murder of Rebecca Lynn William [sic] and the investigation ordered thereon by Governor James S. Gilmore, III." (J.A. 74). VDSP responded by releasing all applicable documents except those it asserted were part of the ongoing criminal investigation file. VDSP objected to producing those documents, and Washington moved to compel their production. VDSP then moved to quash or modify the subpoena.

The district court granted Washington's motion to compel, denied VDSP's motion to quash, and ordered VDSP to produce the investigation file. The district court recognized the "potential sensitivity" of the information in the investigation file, but it concluded that Washington's "need for this information and the public interest outweigh the need for total secrecy." (J.A. 167). The district court, however, conditioned its ruling on the entry of a protective order. Subsequently, the district court entered a protective order that required VDSP to produce the investigation file only to the parties, counsel of record and their employees, and properly designated experts. The protective order prohibited further dissemination of the investigation file. Washington and VDSP subsequently consented to the entry of a supplemental protective order to govern documents that were created after the original subpoena had been served.

Many of the documents produced by VDSP pursuant to the protective orders were later attached to or addressed in pleadings and other documents filed with the district court, and some were also discussed

during district court hearings. Although the protective orders did not address the issue of sealing these documents, they were in fact filed under seal.

As the case progressed, Washington moved to lift the protective orders. Washington argued that the VDSP investigation was no longer ongoing and, therefore, the justification for maintaining the confidentiality of the VDSP discovery documents no longer existed. Washington also argued that under the First Amendment and the common law the public has a right of access to the VDSP documents. Several media organizations ("Media Appellees") subsequently moved to intervene and to unseal all documents that had been filed under seal.

On February 20, 2004, the district court heard oral arguments on the motions. At the conclusion of the hearing, the district court ordered VDSP to file a statement setting forth its reasons for wanting to maintain under seal any sealed pleadings, sealed documents attached to pleadings, or sealed transcripts. VDSP thereafter filed its statement ("the statement of compelling reasons"). As a result of this process, VDSP narrowed the list of documents it desired to keep under seal, and it attached those documents (under seal) to the statement of compelling reasons as Exhibits A through T. While VDSP asserted that some documents should remain under seal in their entirety, it also proposed redactions for other documents. Generally speaking, VDSP's stated reasons for keeping these documents sealed are that they concern a "certain suspect" and forensic testing relating to that suspect.

The district court thereafter issued three orders addressing the issue of the sealed documents. In the first order (dated March 5, 2004), the district court ruled "[f]or the time being" that the documents designated for redaction by VDSP in the statement of compelling reasons would be redacted and that the documents that VDSP wished to keep under seal would remain under seal. The district court unsealed all other sealed documents that were filed before February 20, 2004.

On March 10, newspaper articles about the Williams murder investigation were published in various newspapers, including the Washington Post and the Richmond Times-Dispatch. These articles, which were attributed to the Associated Press, reported that the unsealed

court documents identify Kenneth Maurice Tinsley, a convicted rapist, as a suspect in the murder because Tinsley's DNA matches samples found at the crime scene. Many additional news reports have likewise identified Tinsley as a suspect because of the DNA samples.

In the second order (dated March 18, 2004), the district court ordered that, with one exception (Exhibit D), all documents filed under seal before February 20, 2004, be unsealed.¹ The district court explained:

The documents that VDSP claims should remain under seal predominantly deal with Kenneth Maurice Tinsley ("Tinsley"), a convicted rapist who is a suspect in the murder of Rebecca Williams. The Court is sympathetic to the desire of the state police to keep aspects of a murder investigation off the public record. Because VDSP did not attempt to seal all portions of the record that disclose Tinsley as a suspect, however, Tinsley's identity is already a matter of public record. Given that Tinsley's identity has already been disclosed, and his status as a suspect in the Williams murder has already been extensively reported in the media, the Court finds that VDSP's stated interest in keeping Tinsley's identity confidential is not compelling.

VDSP also attempts to seal a recent interview [Exhibit D] with a suspect in the Tinsley case. . . . The subject of this interview discloses facts surrounding the murder of Rebecca Williams that have not been made public. The release of this document could undermine the Williams murder investigation, and the Court finds that a compelling governmental interest exists in protecting the integrity of an ongoing police investigation. Accordingly, this interview shall remain under seal.

(J.A. 425-26). Neither Washington nor the Media Appellees have

¹The district court limited the order to cover only documents that had been filed, and it expressly excluded "discovery material that is not part of the record." (J.A. 426).

challenged the district court's decision to keep Exhibit D under seal, and that issue is not before us.

VDSP immediately moved for a stay and reconsideration of the March 18 order. At a hearing on these motions, VDSP consented to the unsealing of five of the documents it had attached to the statement of compelling reasons (Exhibits A, B, J, K, and L). Thereafter, the district court entered the third order (dated March 23, 2004), in which it denied the motion for reconsideration.² The district court explained:

Under the First Amendment "the denial of access must be necessitated by a compelling government interest and narrowly tailored to serve that interest." *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (citing *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984)); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)). VDSP argues that because it objects to the release of documents that "reveal information concerning suspects, recent witnesses, and details about evidence" it has met its burden to produce a compelling governmental interest. VDSP also argues that the Rebecca Williams murder investigation would be hampered by releasing certain specified documents, that witnesses would be put at risk, and that future investigative techniques would be undermined. VDSP does not explain the basis of these concerns. General concerns stated in a conclusory fashion are not sufficient to constitute a compelling government interest, and do not grant the Court a sufficient basis [to] deny public access to documents filed in this action.

(J.A. 470). Although it denied VDSP's motion for reconsideration,

²VDSP did not cite a procedural rule upon which its motion was based, and the district court treated it as a Rule 60(b)(6) (Fed. R. Civ. P.) motion. Because VDSP filed the motion within 10 days after the order was entered, the district court should have considered it under Rule 59(e). See *Dove v. CODESCO*, 569 F.2d 807, 809 (4th Cir. 1978).

the district court granted VDSP's motion for a stay in order to allow VDSP time to file an appeal.³

On March 25, VDSP filed in the district court a "Notice of Petition for Writ of Mandamus and/or Prohibition and Interlocutory Appeal and Application for Emergency Stay" from the March 23 order, and it also filed an application for a stay of the March 23 order in this Court. In its application to this Court, VDSP stated that notwithstanding its district court filing, it is not pursuing mandamus or prohibition relief.⁴ On March 26, we stayed the March 23 order, and we conducted oral argument on an expedited basis on June 4.

On June 23, the district court denied Washington's motion to lift the protective orders. The district court found that "there is still an ongoing investigation into the Williams murder" and that the protective orders do not offend the First Amendment. *Order*, No. 3:02-CV-00106 (June 23, 2004).

The district court has entered two partial summary judgment orders which have dismissed most of Washington's claims. *See Washington v. Buraker*, 322 F. Supp. 2d 702 (W.D. Va. 2004) ("*Buraker II*"); *Washington v. Buraker*, 322 F. Supp. 2d 692 (W.D. Va. 2004). On August 9, the district court stayed its proceedings in order to allow one of the remaining defendants (Curtis Wilmore) to pursue an interlocutory appeal of an adverse summary judgment ruling on his claim of qualified immunity. The merits of that appeal are not now before us.

³It appears that the district court did not actually unseal any of the disputed documents between March 18 and March 23. However, it is not clear if the parties provided the documents to anyone during that time.

⁴VDSP has specifically appealed only the March 23 order; however, we believe that its intent to appeal the March 18 order is clear, and we therefore will review both orders. *See Brown v. French*, 147 F.3d 307, 311 (4th Cir. 1998). Moreover, although a mandamus petition is the "preferred vehicle for review" of orders sealing or unsealing records, an order unsealing district court documents is an appealable collateral order under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). *See Under Seal v. Under Seal*, 326 F.3d 479, 485 & n.5 (4th Cir. 2003).

II

This appeal presents the seeming tension between several legitimate interests. On one hand, the operation of the court system is a matter of "utmost public concern," *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978), and "[s]ociety has an understandable interest . . . in law enforcement systems and how well they work." *In re Application and Affidavit for a Search Warrant*, 923 F.2d 324, 331 (4th Cir. 1991). These interests are obviously implicated here because of the circumstances surrounding Washington's death sentence and subsequent pardon. On the other hand, law enforcement agencies must be able to investigate crime without the details of the investigation being released to the public in a manner that compromises the investigation.

VDSP frames the issue before us broadly as involving "the integrity of information contained in all on-going criminal investigation files," *Brief of the Appellant*, p. 19, and contends that the district court's decision to unseal the documents will have a dramatic effect beyond this case. We believe, however, that the issue is actually quite narrow and that its resolution is dictated by well-established precedent and the unique circumstances of this case.

A.

The right of public access to documents or materials filed in a district court derives from two independent sources: the common law and the First Amendment. *Stone v. University of Md. Med. Sys. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988) ("*Stone I*"). "Publicity of such records, of course, is necessary in the long run so that the public can judge the product of the courts in a given case." *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 203 F.3d 291, 303 (4th Cir. 2000).

The distinction between the rights of access afforded by the common law and the First Amendment is "significant," *In re Baltimore Sun Co.*, 886 F.2d 60, 64 (4th Cir. 1989), because the common law "does not afford as much substantive protection to the interests of the press and the public as does the First Amendment." *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988). Conse-

quently, "the common law does not provide as much access to the press and public as does the First Amendment." *In re State-Record Co.*, 917 F.2d 124, 127 (4th Cir. 1990).⁵

The common law presumes a right of the public to inspect and copy "all 'judicial records and documents.'" *Stone I*, 855 F.2d at 180 (quoting *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978)). "This presumption of access, however, can be rebutted if countervailing interests heavily outweigh the public interests in access," and "[t]he party seeking to overcome the presumption bears the burden of showing some significant interest that outweighs the presumption." *Rushford*, 846 F.2d at 253. Some of the factors to be weighed in the common law balancing test "include whether the records are sought for improper purposes, such as promoting public scandals or unfairly gaining a business advantage; whether release would enhance the public's understanding of an important historical event; and whether the public has already had access to the information contained in the records." *In re Knight Publ. Co.*, 743 F.2d 231, 235 (4th Cir. 1984). Ultimately, under the common law the decision whether to grant or restrict access to judicial records or documents is a matter of a district court's "supervisory power," and it is one "best left to the sound discretion of the [district] court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Nixon*, 435 U.S. at 598-99. We therefore review a district court's decision concerning common law access for abuse of discretion. *Rushford*, 846 F.2d at 253.

In contrast to the common law, "the First Amendment guarantee of access has been extended only to particular judicial records and documents." *Stone I*, 855 F.2d at 180. When the First Amendment provides a right of access, a district court may restrict access "only on the basis of a compelling governmental interest, and only if the denial is narrowly tailored to serve that interest." *Id.* The burden to overcome a First Amendment right of access rests on the party seeking to restrict access, and that party must present specific reasons in support of its position. See *Press-Enterprise Co. v. Superior Court*, 478 U.S.

⁵The rights of access of the media "are co-extensive with and do not exceed those rights of members of the public in general." *In re Greensboro News Co.*, 727 F.2d 1320, 1322 (4th Cir. 1984).

1, 15 (1986) ("The First Amendment right of access cannot be overcome by [a] conclusory assertion"). We review a district court's decision concerning access under the First Amendment de novo. *In re State-Record*, 917 F.2d at 127.

B.

Regardless of whether the right of access arises from the First Amendment or the common law, it "may be abrogated only in unusual circumstances." *Stone I*, 855 F.2d at 182. When presented with a request to seal judicial records or documents, a district court must comply with certain substantive and procedural requirements. *Rushford*, 846 F.2d at 253. As to the substance, the district court first "must determine the source of the right of access with respect to each document," because "[o]nly then can it accurately weigh the competing interests at stake." *Stone I*, 855 F.2d at 181.

A district court must then weigh the appropriate competing interests under the following procedure: it must give the public notice of the request to seal and a reasonable opportunity to challenge the request; it must consider less drastic alternatives to sealing; and if it decides to seal it must state the reasons (and specific supporting findings) for its decision and the reasons for rejecting alternatives to sealing. *Id.* Adherence to this procedure serves to ensure that the decision to seal materials will not be made lightly and that it will be subject to meaningful appellate review. *Id.* at 182. This determination "is one properly made in the first instance from the superior vantage point of the district court." *Id.*

C.

The right of access in any given case may vary depending on the nature of the case and the specific item under review. *Id.* at 180. Here, we are dealing with a civil case, and with material produced by VDSP during pretrial discovery that was later filed (or addressed in filings) in the district court. Although the majority of cases involving access to court records appear to be criminal cases, we have previously addressed the issue in the context of civil cases.

For example, in *Rushford* we considered the propriety of a district court's order sealing documents that were attached to a successful summary judgment motion. Although the documents had been the subject of a pretrial discovery protective order, we observed that once the documents were made part of a dispositive motion, they lost their status as being "raw fruits of discovery," and that discovery, "which is ordinarily conducted in private, stands on a wholly different footing than does a motion filed by a party seeking action by the court." 846 F.2d at 252 (internal quotation marks omitted). After noting that summary judgment "serves as a substitute for a trial" and that we had held in a prior case that the First Amendment standard should apply to documents filed in connection with plea and sentencing hearings in criminal cases, we held that "the more rigorous First Amendment standard should also apply to documents filed in connection with a summary judgment motion in a civil case." *Id.* at 252, 253.

Although we recognized that "there may be instances in which discovery materials should be kept under seal even after they are made part of a dispositive motion," we stated that the district court must make that determination "at the time it grants a summary judgment motion and not merely allow continued effect to a pretrial discovery protective order." *Id.* at 253. We noted that "[t]he reasons for granting a protective order to facilitate pre-trial discovery may or may not be sufficient to justify proscribing the First Amendment right of access to judicial documents," and we remanded the case to the district court in order for it to determine under the appropriate substantive and procedural standards whether the documents should remain sealed. *Id.* at 254.

We faced a similar set of circumstances in *Stone I*. In that case, the district court sealed the entire record (except for a few pleadings). Thereafter, the district court granted the defendants' summary judgment motion, and it denied a request by a media intervenor to unseal the record. As in *Rushford*, because the district court did not properly analyze the request to seal the documents, we remanded the case for further consideration. *Stone I*, 855 F.2d at 180-83.

On remand, the district court lifted the seal on all but three documents. Two of the documents had been attached as exhibits to the defendants' summary judgment motion, and one had been filed by the

plaintiff in opposition to the summary judgment motion. The district court concluded that a compelling government interest outweighed the intervenor's First Amendment right of access to these documents. On appeal, we held that the district court erred in determining that the government's asserted reason was compelling, and we therefore ordered the documents to be unsealed. *Stone v. University of Md. Med. Sys. Corp.*, 948 F.2d 128, 131 (4th Cir. 1991).⁶

III

Fourteen documents that were sealed in the district court are at issue in this appeal. In the statement of compelling reasons, VDSP states that Washington filed one of these documents (Exhibit C) in connection with a discovery matter; eight (Exhibits E, F, G, H, I, M, N, and O) in connection with his response to summary judgment motions; and four (Exhibits P, Q, R, and S) in connection with his motion to lift the protective orders.⁷ The final document (Exhibit T) is a portion of the transcript of a hearing that was held before a magistrate judge on November 24, 2003. The remainder of VDSP's crimi-

⁶We recently affirmed a district court's denial of a request by a civil litigant under *Rushford* to unseal discovery documents that had been produced pursuant to a protective order and then filed in connection with a summary judgment motion. *See Pittston Co. v. United States*, 368 F.3d 385, 406 (4th Cir. 2004). Although Washington's argument for public access in the instant appeal is similar to the one we rejected in *Pittston*, the cases are distinguishable because here (unlike *Pittston*) we have the intervention by the Media Appellees.

⁷Exhibit C is paragraphs 13-22 and the last sentence of paragraph 23 of the Declaration of Peter Neufeld, which is attached to Washington's "Brief in Opposition to Nonparty Virginia State Police's Motion to Quash Subpoena and in Furtherance of his Motion to Compel the Release of Evidence to D. Edward T. Blake." Exhibit E is a portion of page 1, all of pages 36-37, and the first two lines of page 38 of Washington's "Brief in Opposition to Motions for Summary Judgment Based on Qualified Immunity Filed by Defendants Reese Wilmore and Denny Slane," and Exhibits F, G, H, I, M, N, and O are VDSP documents that are attached to this brief. Exhibit P is a portion of page 4 of Washington's "Brief in Reply to the VSP's Opposition to Lift Protective Orders," and Exhibits Q, R, and S are VDSP documents that are attached to this brief.

nal investigation file (as it existed on February 20, 2004) has been released to the public.

In unsealing these documents, the district court focused its analysis exclusively on the First Amendment, and it implicitly held that the public has a First Amendment right of access to all of the documents. The district court then expressly held that VDSP had failed to establish a compelling governmental interest to restrict that access.

Concerning this latter finding, the district court recognized that "a compelling governmental interest exists in protecting the integrity of an ongoing police investigation," and it applied this principle in refusing to unseal Exhibit D. (J.A. 426). More specifically, the district court found that the information contained in Exhibit D (which is not before us) involves facts surrounding the Williams murder that have not been made public and that the release of the information could undermine the investigation. In contrast, the district court found that the other material VDSP seeks to keep under seal primarily deals with Tinsley, whose "status as a suspect in the Williams murder has already been extensively reported in the media" because of VDSP's failure to attempt to seal all portions of the record that disclose him as a suspect. (J.A. 425-26). The district court therefore concluded that VDSP's stated interest in keeping Tinsley's identity confidential is not compelling. (J.A. 426). The district court further concluded that VDSP failed to provide any other sufficient compelling reason to justify the documents remaining under seal. (J.A. 470).

In this posture, we review the district court's decision to unseal the documents *de novo*, and we must first determine whether the district court correctly accorded First Amendment status to each of the documents. If we find that the district court is correct in this regard, we must then determine whether it also correctly rejected VDSP's asserted compelling governmental reason to keep each document sealed. Conversely, if we find that the district court erred in according First Amendment status to any of the documents, we must then turn our attention to the issue of whether the public has a common law right of access to that document and whether VDSP has presented a sufficient reason to restrict that access.⁸

⁸Although the issue presented to us is whether the district court erred in unsealing the documents, we note that the district court actually erred

A.

As we have noted, Washington filed eight of the documents (Exhibits E, F, G, H, I, M, N, and O) in connection with his opposition to summary judgment motions. Specifically, Washington filed these documents in opposition to the summary judgment motions of defendants Curtis Wilmore and Denny Slane. Before the motions were decided, Washington dismissed all of his claims against Slane. *See Buraker II*, 322 F. Supp. 2d at 716. The district court thereafter granted partial summary judgment in favor of Wilmore. From the record before us, we cannot tell whether the district court specifically considered these eight documents in making its determination, but we also have no indication that it declined to consider them.

The district court did not elaborate on its basis for according First Amendment status to these eight documents. Nonetheless, we conclude that the district court's determination that the public has a First Amendment right of access to them is correct. We believe this conclusion is compelled by our decision in *Rushford* in which (as noted) we held that "the more rigorous First Amendment standard should . . . apply to documents filed in connection with a summary judgment motion in a civil case." 846 F.2d at 253. Because the public has a right of access under the First Amendment to these documents, the district court correctly required VDSP to proffer a compelling governmental reason to keep them sealed. *Id.* We therefore must turn to the district court's conclusion that VDSP's stated reasons concerning these documents are not compelling.

We note initially our complete agreement with the general principle that a compelling governmental interest exists in protecting the integrity of an ongoing law enforcement investigation. However, not every release of information contained in an ongoing criminal investi-

in allowing the documents to be sealed in the first instance. Regardless of whether the district court properly entered the protective orders, it clearly did not comply with our procedures in allowing the documents to be sealed. However, because the district court eventually unsealed the contested documents, its failure in this regard is not before us.

gation file will necessarily affect the integrity of the investigation.⁹ Therefore, it is not enough simply to assert this general principle without providing specific underlying reasons for the district court to understand how the integrity of the investigation reasonably could be affected by the release of such information. Whether this general interest is applicable in a given case will depend on the specific facts and circumstances presented in support of the effort to restrict public access. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607-08 (1982) ("But as compelling as that interest is, it does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest" (emphasis in original)). Although we need not attempt to catalogue the various reasons which may be considered in deciding whether an asserted interest is compelling, we note that one consideration is (as the district court recognized concerning Exhibit D) whether the granting of access to the contents of an ongoing police investigation file will disclose facts that are otherwise unknown to the public.¹⁰

VDSP's stated interest concerning these eight documents is that each document contains information about (1) the identity of "a certain suspect or suspects" and (2) evidence (including DNA evidence) involving the suspect or suspects. We have carefully examined these documents, and we have likewise given careful consideration to VDSP's arguments concerning them. We believe that the district court correctly determined that VDSP has failed to present a compelling governmental interest that is sufficient to keep these documents sealed.

The bulk of the information contained in these documents relates to Tinsley and the DNA testing that identified his semen on a blanket found at the murder scene. As the district court found, this information has already become a matter of public knowledge because VDSP

⁹This point is illustrated to some extent by the facts of this case: VDSP has in fact consented to, or acquiesced in, the release of almost its entire file concerning the Williams murder investigation, which VDSP adamantly maintains is ongoing.

¹⁰We express no opinion on the propriety of the district court's decision to keep Exhibit D under seal because (as we have noted) that issue is not before us.

allowed (or acquiesced in) the public release of other documents in which it is contained. We note, as one example, that the Joint Appendix (page 274) contains an unsealed VDSP memorandum dated September 23, 2003, which specifically identifies Tinsley and describes the results of DNA testing. Additionally, Exhibits J, K, and L — which VDSP consented to be released — specifically discuss Tinsley and contain police photographs of him. As we have recognized in a slightly different context, "[o]nce announced to the world, the information lost its secret characteristic." *In re Charlotte Observer*, 921 F.2d 47, 50 (4th Cir. 1990) (vacating injunction prohibiting reporters from disclosing information revealed in open courtroom).

We therefore affirm the district court's orders to the extent they unseal Exhibits E, F, G, H, I, M, N, and O. Because Exhibits I and R are actually the same document, we find that VDSP's challenge to the unsealing of Exhibit R is now moot.

B.

We next consider Exhibit T, which is a portion of a November 24, 2003, hearing transcript. This hearing appears to have concerned pretrial discovery matters. Although the district court accorded Exhibit T First Amendment status, we have never held that the public has a First Amendment right of access to a pretrial hearing on a non-dispositive civil motion or to the transcript of such a hearing. However, we have found a First Amendment right of access to certain pretrial criminal hearings. See *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986) ("we hold that the First Amendment right of access applies to documents filed in connection with plea hearings . . . in criminal cases, as well as to the hearings themselves"). We also recognize that although the public hearing requirement of criminal proceedings "is not inflexibly applied in all civil proceedings," *Satterfield v. Edenton-Chowan Bd. of Educ.*, 530 F.2d 567, 573 (4th Cir. 1975), proceedings in civil cases are traditionally open, see *In re Grand Jury Subpoena*, 836 F.2d 1468, 1475 n.11 (4th Cir. 1988) ("Sealing the discovery process in civil proceedings . . . sacrifices the traditional interest of the public in obtaining access to civil proceedings"), and "in some civil cases the public interest in access . . . may be as strong as, or stronger than, in most criminal cases," *Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n.15 (1979).

As we noted, in the statement of compelling reasons VDSP set forth its purported compelling reasons for keeping each document under seal. However, as to Exhibit T, VDSP offered no specific reason at all, much less a compelling reason. Likewise, it has offered no specific reason in its appellate briefs. From our review of this document, we do not see any obvious reason how its release would affect the integrity of the Williams investigation.

On this record, we need not decide whether Exhibit T should be accorded First Amendment or common law status. We believe that VDSP's failure to offer any reason at all is fatal to its attempt to maintain this document under seal under either standard. We therefore affirm, albeit on slightly different grounds, the district court's orders to the extent they unseal Exhibit T.

C.

We are left to consider four documents: Exhibits C, P, Q, and S. Washington attached Exhibit C to a brief concerning pretrial discovery matters. Exhibit P is a portion of a brief Washington filed in support of his motion to lift the protective orders, and Exhibits Q and S are attached to that brief.

We have decided to remand this case to the district court for further consideration of whether these four documents should be sealed. As with the other documents, the district court simply assumed, without explanation, that the public has a First Amendment right of access to these documents. We are not at all convinced that this is a correct assumption, and we are certainly not persuaded one way or the other by the parties' arguments on appeal. Moreover, we have no basis to ascertain to what extent, if any, the district court considered these documents in the proceedings below. We therefore believe that further consideration and explanation by the district court is warranted.

On remand, the district court should reconsider whether these documents should be accorded First Amendment status and specifically state the reasons for whatever decision it reaches. Because of the posture of this case, regardless of its conclusion concerning the First Amendment, the district court should also consider whether there is a common law right of access to these documents and whether VDSP

has presented sufficient reasons to restrict that access. As we explained in *Stone I*, these are determinations that are "properly made in the first instance from the superior vantage point of the district court" and are necessary for meaningful appellate review. 855 F.2d at 182.¹¹

IV

Based on the foregoing, we affirm the district court's orders unsealing Exhibits E, F, G, H, I, M, N, O, R, and T, and we remand this case to the district court for further consideration of whether Exhibits C, P, Q, and S should be unsealed.

*AFFIRMED IN PART
AND REMANDED IN PART*

¹¹Although VDSP contends that there is no First Amendment right of access to any of the 14 documents at issue, it did not take that position below. *See, e.g.*, J.A. 366 (VDSP counsel stating that "I do agree that First Amendment scrutiny applies to documents that are filed as judicial records" and "I agree . . . that the only documents that are subject to First Amendment scrutiny are those that have been attached to pleadings"); J.A. 399-401 (VDSP's argument concerning the First Amendment in the statement of compelling reasons).

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
November 8, 2004

No. 04-1375
CA-02-106-3

DEPARTMENT OF VIRGINIA STATE POLICE;

Appellant

v.

THE WASHINGTON POST; THE VIRGINIAN PILOT; RICHMOND
TIMES-DISPATCH; ASSOCIATED PRESS; VIRGINIA PRESS
ASSOCIATION; MEDIA GENERAL OPERATIONS, INCORPORATED

Appellees

EARL WASHINGTON, JR.

Plaintiff - Appellee

and

KENNETH H. BURAKER; CHARLES JONES; HARLAN LEE HART; GERALD
YANCEY; GARY L. CLOSE; DENNY M. SLANE; TERRY SCHRUM; CURTIS
REESE WILMORE; LUTHER COX; DENNY A. ZEETS; TOWN OF CULPEPER,
VIRGINIA; FAUQUIER COUNTY, VIRGINIA; MARY L. JONES

Defendants

O R D E R

Appellant has filed a motion to stay the mandate pending application to the United States Supreme Court for a writ of certiorari.

The Court denies the motion.

Entered at the direction of Judge Shedd, with the concurrence of Judge Widener and District Judge Hansen.

For the Court,

/s/ Patricia S. Connor

CLERK