STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF GENERAL SESSIONS NINTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA, Plaintiff, v. DYLANN S. ROOF, Defendant.	Docket Numbers: 2015-GS-10-4115- Murder 2015-GS-10-4116- Murder 2015-GS-10-4117- Murder 2015-GS-10-4118- Murder 2015-GS-10-4119- Murder 2015-GS-10-4120- Murder 2015-GS-10-4121- Murder 2015-GS-10-4122- Murder 2015-GS-10-4123- Murder 2015-GS-10-4124- Possession of a Weapon During the Commission of a Violent Crime 2015-GS-10-4186- Attempted Murder 2015-GS-10-4187- Attempted Murder 2015-GS-10-4188- Attempted Murder

Amicus Curiae Brief of the United States Regarding a Pre-Trial Protective Order

The United States of America, through Assistant United States Attorney Nathan S. Williams, appears *amicus curiae* pursuant to the Court's invitation,[1] to address how the pre-trial disclosure of materials such as reports, photographs, witness statements, and recordings from the investigation of Dylann Storm Roof's attack on Bible-study participants at the Mother Emanuel AME Church would improperly violate victims' rights, compromise victims' dignity, and invade victims' privacy.

I. Background

In the months before June 17, 2015, Defendant Dylann Storm Roof decided to attack African-Americans because of their race and color. To make his attack more notorious, he further decided to attack African-American worshipers in a historic African-American church in

[1] It is within the sound discretion of the trial judge to allow parties to appear as *amicus curiae*. Cook v. South Carolina Dept. of Highways, 309 S.C. 179 (1992).

Charleston. On the evening of June 17, 2015, Roof entered Emmanuel AME Church with the intent of killing African-Americans engaged in the exercise of their religious beliefs. Roof was welcomed into their Bible study group and sat next to Reverend Pinckney. While the parishioners were engaged in religious worship and Bible study, Roof drew his Glock, model 41, .45 caliber pistol and opened fire, killing nine parishioners.

After Roof fled, he was caught in North Carolina the next day and the State has charged him with murder, attempted murder, and possession of a firearm during a crime of violence. On July 22, 2015, a Federal Grand Jury indicted Roof with twelve counts of committing a hate crime act, twelve counts of obstructing the exercise of religion, and nine counts of the use of a firearm to commit murder during a crime of violence.

II. The Court has the Authority to Limit Disclosure of Materials to Protect the Victims and to Ensure a Fair Process

This Court is entitled to limit case participants from disclosing case-related reports, photographs, witness statements, and recordings to ensure and protect specific rights. See Sheppard v. Maxwell, 384 U.S. 333 (1966) (finding that a trial court could have proscribed trial participants from divulging investigative matters); see also Ex Parte: State-Record Co., Inc., 332 S.C. 346 (1988). Though these limitations depend on a case-specific inquiry, the case before the Court presents facts that justify a limitation on the disclosure of materials related to Roof's attack and the ongoing investigation.[2] The horrendous acts committed, the substance of the investigative materials, and the intense media coverage combine to create a circumstance where a limitation on the disclosure of materials developed in connection with Roof's attack is

[2] In so suggesting, we believe that this inquiry is appropriately considered largely a request to delay disclosure and not prevent it. Many of the matters being considered will likely be made public during a trial. Moreover, a request to disclose various materials after the resolution of the case should be examined in a different context in which the competing concerns may well weigh differently.

necessary and appropriate to protect the rights of the victims and to avoid interference with a fair trial and ongoing law enforcement activities.

A. The Rights of Victims and Their Families Should Counsel Against Disclosure at This Time

Roof's attack victimized a number of people including the nine murdered by Roof and the three who survived, as well as an array of family and friends. The disclosure of much of the investigative materials would undermine their dignity and invade the privacy to which they are entitled. The South Carolina Victims' Bill of Rights, S.C. Constitution, Article I, Section 21, preserves and protects crime victims' rights to "be treated with fairness, respect, and dignity, and to be free from intimidation, harassment or abuse, throughout the criminal . . . justice process." Federally, the Crime Victims' Rights Act gives crime victims "the right to be treated with fairness and with respect for the victim's dignity and privacy." 18 U.S.C. § 3771(a)(8). The substance of the materials related to Roof's attack is both powerful and highly personal to many of the victims and their families.

A trial court bears the duty to protect certain rights before a trial occurs. See Sheppard, 384 U.S. at 357; Nebraska Press Assoc. v. Stuart, 427 U.S. 539 (1976). In considering the unique circumstances in this case, it is apparent that the victims' rights to their privacy, dignity, and respect can only be protected at this stage of the proceedings. Cf. Sheppard, 384 U.S. at 363; Ex parte Litchfield, 343 S.C. 212, 220-24 (S.C. 2000). Once these sensitive materials are disclosed, they will be broadcasted and rebroadcasted throughout the world – with each broadcast harming those who Article I, Section 21 seeks to protect. While we will not attempt to detail the nature of the materials sought, and the content they disclose, we encourage the Court to review any materials sought to be disclosed *in camera* before lifting the order and permitting disclosure. Once viewed, we believe this Court will reach the conclusion that disclosure of these materials at

this time would violate victims' rights by considering how the disclosure would impact victims' dignity and privacy compared with any harm a pre-trial delay in releasing such materials creates.

B. Disclosure May Affect the Court's Ability to Provide a Fair Trial

Trial courts have "an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity." Gannett Co. v. DePasquale, 443 U.S. 368, 378 (1979) (noting further that "a trial judge may surely take protective measures even when they are not strictly and inescapably necessary"); In re Russell, 726 F.2d 1007, 1010-11 (4th Cir. 1984) (trial court's gag order was appropriate to ensure a fair trial where the case was "subject to intense local and national publicity" and no evidentiary hearing was necessary for the court to make its determination).[3]

[3] As the Court in Sheppard explained:

> [R]eversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.

384 U.S. at 363; see also State v. Baldwin, 2007 WL 4097743 (S.C. Gen. Sess. Aug. 1, 2007) (Trial Order) (relying upon Sheppard); KPNX Broad. Co. v. Arizona Superior Court, 459 U.S. 1302 (1982) (Rehnquist, Circuit Justice) (denying request by a media organization to stay a judicially imposed gag order restraining trial participants from speaking directly with the press about a high-profile murder trial; "[t]he mere potential for confusion if unregulated communication between trial participants and the press at a heavily covered trial were permitted is enough to warrant a measure such as the trial judge took in this case"); Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) ("Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right."); Pennekamp v. Florida, 328 U.S. 331 (1946) (Frankfurter, J., concurring) ("[I]t is indispensable ... that in a particular controversy pending before a court and awaiting judgment, human beings, however strong, should not be torn from their moorings of impartiality by the undertow of extraneous influence."); Bridges v. California, 314 U.S. 252 (1941) ("Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."); Patterson v. Colorado, 205 U.S. 454 (1907) (Holmes, J.) ("The theory of our system is that the conclusions to be reached in a case will be

Because of the high profile nature of this case, and the significant publicity it has already received, there is a demonstrated danger of pre-trial publicity preventing a fair trial.

This right to a fair trial is accorded not just to the defendant but extends to the public. The state and federal government, as representative of the public, have an interest in "having a defendant 'stand before the bar of justice upon the merits' of the crime for which she or he has been charged." King v. State, 407 Md. 682, 704 (2009); see also In re Morrissey, 168 F.3d 134, 138 (4th Cir. 1999) (noting "the important governmental interest of protecting both the accused's and the public's right to a fair trial"). Given the public's interest in a fair trial, "it is the duty of the trial judge, as well as the solicitor, to be solicitous of a defendant's rights, working to the end that a defendant's rights be fully protected." State v. Addis, 257 S.C. 482, 487 (1972). Accordingly, independent of the defendant's own interest in a fair trial, it is incumbent upon the Court and prosecutors to ensure that fair trial may be had without the perversion of unnecessary pre-trial disclosure of investigative materials.[4]

III. State and Federal Freedom of Information Acts Further Support Limiting Disclosure

The Court's July 10, 2015, Order appropriately restricted investigatory materials from disclosure under SC FOIA. Given the discretion retained by each particular state and local agency to disclose investigative materials under SC FOIA,[5] this court should issue an order

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induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.").

[4] As further discussed below, disclosure of investigative materials is likely to negatively impact the ongoing law enforcement efforts to investigate and prosecute.

[5] SC Code Section 30-4-40 states, in relevant part, that:

(a) A public body may but is not required to exempt from disclosure . . .

(2) information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy . . .

proscribing that disclosure. Leaving each agency to independently exercise its own discretion in deciding what investigative materials to disclose would unfairly violate victims' rights, impede the ongoing investigation, and jeopardize fair trial rights. As the investigative materials should be exempt from disclosure under FOIA, an order from this Court limiting disclosure will ensure uniform protection of the interests discussed below.

South Carolina's FOIA permits an agency to exempt certain matters from disclosure, while leaving the ultimate decision in the hands of the relevant public body. Determinations in the FOIA context are invariably fact specific and turn on an evaluation of the specific materials sought to be disclosed in the context of the competing interests. For example, a decade ago, the SC Supreme Court determined based on a specific fact pattern that a certain 911 calls related to a shooting incident were not exempt from disclosure under SC FOIA. Evening Post Pub. Co. v. City of North Charleston, 363 S.C. 452 (2005). No victim arguments were presented and the calls were from a witness, who had described after the fact what he had seen. The Supreme Court analyzed the recordings and sought to determine whether their disclosure would "harm the agency" from which the materials were sought. Id. at 457. The Court closely considered the arguments (and only the arguments) made by the agency that the potential was restricted to "substantial pretrial publicity, which likely would have tainted the entire jury pool, causing the venue of the trial to be changed," along with the financial cost of such a change of venue. Id. at

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> (3) Records of law enforcement and public safety agencies not otherwise available by state and federal law that were compiled in the process of detecting and investigating crime if the disclosure of the information would harm the agency by: . . .
>
> > (B) the premature release of information to be used in a prospective law enforcement action . . .
>
> (4) Matters specifically exempted from disclosure by statute or law.

457-458. Not surprisingly, the financial costs of a change of venue were not considered by the Court to be the type of harm Section 30-4-40(a)(3)(B) was intended to prevent. However, the Court did indicate that other harms could well justify a limitation on disclosure. Id. at 458 (refusing to "close the door to pre-trial publicity even factoring into a decision whether this exemption applies" and noting the limited holding that "the financial burden of a potential change in venue did not justify withholding the 911 tape").

First, disclosure of investigating materials related to Roof's attack would violate victims' rights and invade their personal privacy. SC Code 30-4-40(a)(2) directly addresses this harm by exempting from disclosure "information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy."[6] As discussed above, we believe the Court's review of these materials *in camera* will invariably lead to the conclusion that their release will unreasonably invade the personal privacy of the victims and their families. This type of material was specifically considered in In re The New York times Co. et al v. City of New York Fire Department, 835 N.Y.S.2d 92 (N.Y. App. Div. 2007). There, newspapers and journalists sought to obtain materials relating to September 11, including tapes and transcripts of victims' 911 calls made during the terrorist attacks. The Court considered the competing interests and found that a survivor's "compelling interest in preserving the privacy of their loved ones' final moments outweighs any countervailing public interest in disclosure." Id. at 94. We would urge the Court in this case to apply the same analysis to the 911 calls, photographs, witness statements, and reports regarding information obtained in the investigative process.

[6] To the extent that such a privacy interest may be waived, we only seek that each victim is afforded their rights and is not presumed to waive their rights and privacy interests. See United States v. Turner, 367 F.Supp.2d 319 (E.D.N.Y. 2005) (discussing the duty to ensure that crime victims are afforded their rights).

Second, disclosure also would interfere with the ongoing joint state and federal investigation and prosecution of Roof's attack. SC Code 30-4-40(a)(3) exempts from disclosure law-enforcement records "compiled in the process of detecting and investigating crime if the disclosure of the information would harm the agency by . . . the premature release of information to be used in a prospective law enforcement action . . ." Pre-trial disclosure of the reports, photographs, witness statements, and other materials collected during the investigation would harm any potential future charges and trial. Cf. Spannaus v. U.S. Dep't of Justice, 813 F.2d 1285, 1288 (4th Cir. 1987) (noting that establishing the requisite interference with enforcement actions does not require particularized showings of interference but is justified based on descriptions of the harms release could create with pending proceedings). Disclosure of investigative materials in this case at this stage may result in the intimidation and harassment of witnesses and chill their ongoing willingness to cooperate as well as reduce any cooperation by potential witnesses given the possibility of disclosure by the media. Moreover, the disclosure of these materials would harm the truth-seeking function of the court, enabling alteration, tailoring, or construction of testimony by witnesses. For example, the widespread dissemination pre-trial of a 911 call describing a shooting may affect the ability to determine the credibility of future witnesses by making it more difficult to determine the source of information described by other potential witnesses. Although not all disclosures of records and recordings that are gathered by law enforcement agencies will harm prospective law enforcement actions, the records in this case, which is already highly publicized, will jeopardize the ability to properly investigate and then enforce the law through a trial.

Additionally, an order of this Court limiting disclosure is supported by federal FOIA provisions. Cf. SC Code § 30-4-40(a)(4) (exempting from SC FOIA "[m]atters specifically

exempted from disclosure by statute or law"). Federal FOIA exempts records compiled for law enforcement purposes are exempt from disclosure insofar as the production of such law enforcement records:

> (A) could reasonably be expected to interfere with enforcement proceedings,
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> (B) would deprive a person of a right to a fair trial or an impartial adjudication,
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> (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy,
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> (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,
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> (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or
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> (F) could reasonably be expected to endanger the life or physical safety of any individual;

5 U.S.C. § 552(7). Similar to SC FOIA law, these provision serve to protect victims' rights and personal privacy, see 5 U.S.C. § 552(7)(C), and ongoing law enforcement proceedings, see 5 U.S.C. § 552(7)(A). See, e.g., Neely v. F.B.I., 208 F.3d 461, 464-65 (4th Cir. 2000) (finding under Exemption 7(C) that the privacy interests of individuals included in investigative materials – including agents and third-parties interviewed during the course of the investigation – would likely outweigh the relatively negligible public interest in the information given that there were no compelling allegation of agency corruption or illegality); Wichlacz v. U.S. Dept of Interior, 938 F. Supp. 325, 331-34 (E.D.V.A. 1996) (finding that the disclosure of investigative materials

would improperly invade the personal privacy under FOIA Exemption 7(C) and could reasonably be expected to interfere with law enforcement proceedings under Exemption 7(A)).

IV. Conclusion

The pre-trial release of investigative materials such as reports, photographs, witness statements, and recordings in this case would violate victims' rights, compromise victims' dignity, and invade victims' privacy. Disclosure may well jeopardize the rights to a fair trial held by both the defendant and the public. Such a disclosure would also be harmful to the ongoing investigation and prosecution. For these reasons, the United States, requests that this Court extend its temporary protective order.[7]

Respectfully submitted,

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[7] With respect to the scope of the restraint, "the clear and present danger test does not apply when the Court issues an order . . . which does not constitute a prior restraint on the press' or public's right to speak or publish but only restrains the trial participants from certain conduct thereby proscribing the flow of prejudicial information to be gained by a non-trial participant." Baldwin, 2007 WL 4097743 (citing to Central South Carolina Chapter, Society of Professional Journalists, Sigma Delta Chi v. Martin, 431 F.Supp. 1182, 1188 (D.S.C. 1977)); see also In re Russell, 726 F.2d 1007. The temporary order is appropriately limited to the disclosure of investigative materials without limiting access to documents filed with the court or to any court proceedings. According to this guidance, the Court's earlier, temporary order properly restrained only the case participants from providing reports, photographs, witness statements, and recordings to third parties, and can be extended for the reasons cited above.