No. 122261

IN THE
ILLINOIS SUPREME COURT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KIRK ZIMMERMAN, Defendant-Appellant, v. THE PANTAGRAPH, WGLT FM, and THE ILLINOIS PRESS ASSOCIATION, Intervenors-Appellees.	)	On Appeal from the Appellate Court of Illinois, Fourth Judicial District No. 4-17-0055 There on Appeal from the Circuit Court of the Eleventh Judicial Circuit, McLean County, Illinois No. 2015 CF 0894 The Honorable Scott Drazewski, Judge Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLEE PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General of Illinois

DAVID L. FRANKLIN
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

GOPI KASHYAP
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-4684
gkashyap@atg.state.il.us

Counsel for Plaintiff-Appellee
People of the State of Illinois

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ISSUES PRESENTED

1. Whether the appellate court lacked jurisdiction to review the criminal trial court's interlocutory order, and if so, whether this Court should exercise its supervisory authority to review it.

2. Whether the First Amendment presumption of public access attaches to defendant's motions *in limine*.

3. If not, whether the common-law presumption of public access attaches to those motions.

JURISDICTION[1]

On September 27, 2017, this Court allowed defendant's petition for leave to appeal. Thus, jurisdiction to review the appellate court's decision lies under Rules 315 and 612(b). However, as discussed in Part I of the argument section, the appellate court lacked jurisdiction to consider the propriety of the circuit court's interlocutory order.

RELEVANT PROVISIONS

Constitution of the United States, amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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[1] Neither defendant nor intervenors provide a jurisdictional statement, as required under Rules 612(b)(9) and 341(h)(4), (i).

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Constitution of the United States, amendment XIV, section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

705 ILCS 105/16

> 6. * * * All records, dockets and books required by law to be kept by [circuit court] clerks shall be deemed public records, and shall at all times be open to inspection without fee or reward, and all persons shall have free access for inspection and examination to such records, docket and books, and also to all papers on file in the different clerks' offices and shall have the right to take memoranda and abstracts thereto.

Supreme Court Rules

<u>Rule 307. Interlocutory Appeals as of Right</u>

> (a) Orders Appealable; Time. An appeal may be taken to the Appellate Court from an interlocutory order of court:
>
> (1) granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction[.]

<u>Rule 603. Court To Which Appeal is Taken</u>

> Appeals in criminal cases in which a statute of the United States or of this State has been held invalid shall lie directly to the Supreme Court as a matter of right. All other appeals in criminal cases shall be taken to the Appellate Court.

<u>Rule 604. Appeals From Certain Judgments and Orders</u>

> [Reproduced in People's Appendix. PA1.[2]]

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[2] Citations to defendant's appendix, and this brief's appendix appear as "C__," "A__," and "PA__, respectively. Only the appendix cite is provided where documents appear in both the record on appeal and an appendix.

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STATEMENT OF FACTS

In July 2015, defendant Kirk Zimmerman was charged in McLean County with the first degree murder of his ex-wife, Pamela. *See* A4; Results from McLean County Circuit Clerk's Online Docket, available at: <http://webapp.mcleancountyil.gov/webapps/PublicAccess/PubAC_SearchCriminal.aspx>.[3] In October 2016, defendant filed (1) a motion for leave to file two motions *in limine* under seal, A22; and (2) a motion to close the court proceedings on the motions *in limine*, A13. The motions *in limine* sought to preclude the State from introducing at trial certain information included in discovery that was uncovered during the course of the police investigation. A22-23, 58. Defendant sought to exclude "sensitive, private, and/or inflammatory information" about him, possible witnesses, and other third parties. *Id.* Due to the purportedly "high level of media saturation regarding th[e] case," defendant asserted that publication of the information would violate privacy rights and taint the jury pool. A23.

Intervenors (The Pantagraph, WGLT FM, and The Illinois Press Association) petitioned to intervene and objected to defendant's motions to file the motions *in limine* under seal and close the proceedings. A30. Citing, in relevant part, *People v. Kelly*, 397 Ill. App. 3d 232 (1st Dist. 2009), *People v. LaGrone*, 361 Ill. App. 3d 532 (4th Dist. 2005), *In re Assoc. Press*, 162 F.3d

[3] This Court may take judicial notice of the online docket. *People v. Davis*, 65 Ill. 2d 157, 161 (1976); *Wells Fargo Bank, N.A. v. Simpson*, 2015 IL App (1st) 142925, ¶ 24, n.4.

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504 (7th Cir. 1998), and federal cases applying Federal Rule of Civil Procedure 24(b), intervenors argued that intervention was appropriate to allow them to object to an effort to deny them access to court records and proceedings. A30-31, 34-35. Intervenors further argued that the First Amendment and common-law presumptions of access applied to defendant's motions *in limine* and any proceedings on those motions, and that defendant had failed to allege sufficient facts to overcome the presumptions. A35-40.

Defendant responded that no presumption of access applied to the motions in *limine* or the proceedings on those motions, and thus the trial court had "full discretion over the decision[s] to seal the motions and to conduct closed hearings on those motions." A44-46. Alternatively, defendant argued that even if a presumption applied, he had rebutted it by demonstrating that closure was essential to ensure a fair trial and protect privacy rights. A47-50.

After allowing the petition to intervene, A54, the trial court entered a preliminary order granting defendant leave to file his motions *in limine* under seal, A51. The trial court reviewed the motions *in limine* and then held a hearing to determine whether they should remain sealed. A52-79. At the hearing, defendant withdrew his motion to close the proceedings because the State agreed not to introduce in its case-in-chief the evidence that defendant sought to exclude. A56-58. As to defendant's request to seal the motions *in limine*, the assistant state's attorney explained:

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> I take no position on whether the Court continues to seal these. I will only say that this is a little frustrating because we are not, nor did we, intend on offering these things in our case in chief. During a big case like this, there may be any number of things the State's aware of through an investigation that the press would never become privy of because the State never intends on offering those things as evidence. These things fall into that vein. But for these motions filed, I don't think the public would have ever known these things. And so that's the State's frustration as to where we are at in this crossroads. But as to whether the Court decides to seal indefinitely or not, we'll leave that to the Court.

A58.

After hearing argument from intervenors and defendant, the trial court found that the First Amendment presumption of access did not apply to defendant's motions. A58-71. The court also determined that although there was a common-law right of access to court records, it had supervisory power over those records and could deny access at its discretion. A71. For these reasons, the court ordered that the motions *in limine* remain sealed until after jury selection, at which point, the court would revisit the issue. A12, 73.

Intervenors filed a notice of interlocutory appeal under Rule 307(a)(1). A77-80 (citing *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 221 (2000), and *A.P. v. M.E.E.*, 354 Ill. App. 3d 989, 990-91 (1st Dist. 2004)). After finding jurisdiction under Rule 307(a)(1), A5, the appellate court found that the First Amendment presumption of access applied to defendant's motions *in limine* and remanded to the trial court for proceedings on whether defendant had rebutted that presumption. A6-11.

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STANDARD OF REVIEW

This appeal presents purely legal questions concerning jurisdiction and the legal standards governing the public's right of access to certain documents in criminal proceedings. Thus, this Court's review is *de novo*. *People v. Peterson*, 2017 IL 120331, ¶ 28; *In re Det. of Hardin*, 238 Ill. 2d 33, 39 (2010).

SUMMARY OF ARGUMENT

The appellate court lacked jurisdiction to consider this appeal. The civil rule invoked by the appellate court as a basis for jurisdiction does not apply to this criminal case. And because no criminal rule allows for an appeal from an interlocutory order denying public access to criminal court records or proceedings, the appellate court lacked jurisdiction to consider the trial court's order. However, this Court should refer the jurisdictional issue to the Rules Committee and, in this case, exercise its supervisory authority to address the important issues concerning the parameters of, and proper standards for addressing, the public's First Amendment and common-law rights of access to court records.[4]

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[4] Although the People's representatives in the courts below did not take a position on the public's right of access to defendant's motions *in limine*, the Attorney General, as the chief legal officer of this state, has a substantial and unique interest in ensuring that the important legal questions presented in this case are resolved in a manner that best balances the competing public interests at stake. *See People ex rel. Alvarez v. Gaughan*, 2016 IL 120110, ¶ 32 & n.5.

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This Court has recognized a First Amendment presumption of access to court proceedings and records that have historically been open to the public and where access plays a significant positive role in their functioning — the so-called "experience and logic" test. It also has found a common-law presumption of access to all documents in a court file. In application, however, the Court has inaccurately suggested that the First Amendment and common-law presumptions apply equally to all court filings. Because the rights of access are distinct and provide different levels of protection, this Court should clarify that (1) the First Amendment presumption of access attaches only to those court records that satisfy the experience and logic test; and (2) this strongest presumption may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. This Court should further clarify that separate standards govern the common-law right of access; specifically: (1) a common-law presumption of access applies to all court filings; and (2) when the public seeks access to a court record, the trial court must gauge the weight to be afforded the presumption based on the record at issue, its role in the proceeding, and its value to the public, and determine whether the party seeking to preclude disclosure has demonstrated, on the basis of articulable facts, that sufficient countervailing interests warrant concealing the presumptively public filings.

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Here, the First Amendment presumption does not attach to defendant's motions *in limine*, which concern criminal discovery that will not be admitted at trial. No enduring and vital tradition of access can be attributed to the motions and a presumption of access would not play a significant positive role in the functioning of the criminal process. However, a common-law presumption of access attached to the motions when the trial court granted leave to file them. Although the trial court recognized that a common-law right of access attached to defendant's motions, it failed to acknowledge that the common-law provides a presumption in favor of access. Thus, this Court should remand to the trial court for proceedings on whether defendant has rebutted the common-law presumption.

ARGUMENT

I. The Appellate Court Lacked Jurisdiction to Review the Trial Court's Interlocutory Order, but This Court Should Review It Under Its Supervisory Authority.

A. This Court's rules do not confer jurisdiction on the appellate court to review interlocutory orders sealing motions in criminal cases.

Article VI, section 6 of the 1970 Illinois Constitution "grants this [C]ourt the exclusive and final authority to prescribe the scope of interlocutory appeals from any order or ruling that is not a final judgment." *People v. Holmes*, 235 Ill. 2d 59, 66 (2009) (citation omitted). Accordingly, "[e]xcept as specifically provided by [this Court's] rules, the appellate court is without jurisdiction to review judgments, orders or decrees which are not

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final." *Almgren v. Rush-Presbyterian-St. Luke's Medical Ctr.*, 162 Ill. 2d 205, 210 (1994) (citation omitted).

Here, it is beyond dispute that the trial court's pretrial order sealing defendant's motions was interlocutory. *See People v. Woolsey*, 139 Ill. 2d 157, 161 (1990), *distinguished on other grounds by Bochantin v. Petroff*, 145 Ill. 2d 1, 7 (1991); *People v. Braden*, 34 Ill. 2d 516, 520 (1966). And this Court's rules do not authorize an appeal from an interlocutory order sealing motions in a criminal matter. Neither Rule 603 nor Rule 604, which set forth the exceptional circumstances under which an interlocutory order may be appealed in a criminal case, includes the type of order appealed here. Thus, the appellate court lacked jurisdiction to consider the appeal. *See, e.g.*, *In re K.E.F.*, 235 Ill. 2d 530, 532 (2009) (State had no right to appeal where interlocutory order did not suppress evidence within meaning of Rule 604(a)(1)); *People ex rel. Mosley v. Carey*, 74 Ill. 2d 527, 537-41 (1979) (before current Rule 604(f), defendants had no right to interlocutory review of denied double jeopardy claims); *People v. Miller*, 35 Ill. 2d 62, 67-68 (1966) (absent rule authorizing it, defendant has no right to appeal pretrial order denying motion to dismiss indictments).

This remains true even though this case concerns an intervenor's right to appeal an interlocutory order. Even assuming that intervention was

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properly allowed,[5] absent a specific statute or rule providing otherwise, an intervening third party at most assumes rights equal to those of a party. *Cf.* 735 ILCS 5/2-408(f) (under civil intervention statute, intervenor generally has "all the rights of an original party"). And because the original parties here would have had no right to appeal the trial court's non-final order on defendant's motion to seal, *see* Sup. Ct. Rs. 603 & 604, the appellate court had no jurisdiction to review the trial court's interlocutory order.

Intervenors' notice of appeal invoked, and the appellate court found, jurisdiction under Rule 307(a)(1), A5, 77-80, which provides civil litigants a right to appeal an interlocutory order "granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction." This Court has construed Rule 307(a)(1) as conferring appellate jurisdiction to review "an interlocutory order circumscribing the publication of information" in a civil or juvenile case. *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 221 (2000) (citations omitted); *In re a Minor*, 127 Ill. 2d 247, 260-63 (1989). But Rule

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[5] The propriety of the trial court's order allowing intervention is not directly before this Court, as no party appears to have challenged that determination below. One appellate district has found that the jurisdictional question is intertwined with whether intervention was proper in the first place. *People v. Kelly*, 397 Ill. App. 3d 232, 243-45 (1st Dist. 2009). Nevertheless, although the issues may be related, this Court's rules independently limit the appellate court's jurisdiction to review interlocutory orders, notwithstanding any third-party intervention in the trial court. And, as discussed *infra*, Part I.A.2, it is unclear (1) whether third-party intervention is even permissible in a criminal prosecution, and if so, (2) whether there must also be appellate review of the resulting interlocutory order, as *Kelly* suggests.

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307(a)(1) — which is found in this Court's civil appeals rules — does not apply to criminal cases and thus provides no basis for appellate jurisdiction here. *See* Sup. Ct. R. 1, Comm. Comments ("separate articles contain the rules applicable to civil proceedings (articles II and III) and those applicable to criminal proceedings (articles IV and VI)"); Sup. Ct. R. 612(b) (not incorporating Rule 307 into criminal appeals rules); *see, e.g.*, *People v. Waid*, 221 Ill. 2d 464, 469-72 (2006) (to determine whether interlocutory appeal authorized, court must first assess whether matter was civil or criminal because appellate rules differ based on type of proceeding); *People v. Miller*, 202 Ill. 2d 328, 332-33 (2002) (Rule 302(a) applies only to civil cases and thus does not provide a basis for appeal in criminal case). Indeed, Rule 307(a)(1)'s plain language governs injunctions, a form of relief that is not typically part of a criminal prosecution. And even if the trial court's order sealing defendant's motions effectively enjoined intervenors from accessing the underlying motions, the order was entered in a criminal action governed by the criminal appeals rules.

Other appellate court decisions have also improperly found jurisdiction under Rule 307(a)(1). *See In re Gee*, 2010 IL App (4th) 100275, ¶ 17; *Kelly*, 397 Ill. App. 3d at 245-48; *People v. Pelo*, 384 Ill. App. 3d 776, 779 (4th Dist. 2008); *cf. People v. LaGrone*, 361 Ill. App. 3d 532, 534-35 (4th Dist. 2005) (reviewing interlocutory order denying media access without addressing appellate jurisdiction). The First District reasoned that once the media

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intervened in the underlying criminal action, review of the interlocutory order was necessary to protect First Amendment interests, and that because there was no "better path to review," Rule 307(a)(1) was "the appropriate vehicle." *Kelly*, 397 Ill. App. 3d at 245, 247-48. But even if this Court ultimately determines that appellate review is the most appropriate vehicle to review interlocutory orders denying access to criminal records and proceedings, the appellate court lacks the authority to make that determination and has no jurisdiction where this Court's rules do not provide for it. *See Holmes*, 235 Ill. 2d at 66; *Almgren*, 162 Ill. 2d at 210; *see also People v. Lyles*, 217 Ill. 2d 210, 216-17 (2005) ("appellate and circuit courts of this state *must* enforce and abide by the rules of this [C]ourt," and only this Court has supervisory power under Article VI, section 16 of the 1970 Illinois Constitution to consider appeals over which appellate court lacks jurisdiction). Accordingly, the appellate court lacked jurisdiction to review the trial court's interlocutory order and its judgment should be vacated.

B. This Court should refer the jurisdictional question to the Rules Committee and exercise its supervisory authority to review the trial court's interlocutory order here.

Although the appellate court lacked jurisdiction, this Court should exercise its supervisory authority to address the important issues presented by this appeal concerning the parameters of, and proper standards for addressing, the public right of access to court documents. *See Lyles*, 217 Ill. 2d at 216-17 (exercising supervisory authority to reinstate appeal after

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appellate court dismissed it for lack of jurisdiction) (citing *McDunn v. Williams*, 156 Ill. 2d 288, 299-305 (1993)). In seeking appellate review of the interlocutory order, intervenors relied on appellate court precedent that, although wrong, provided a mechanism for appellate review. And as discussed below, in the absence of a rule authorizing appellate review, there may be no vehicle other than an original action in this Court to obtain review of the interlocutory order. Thus, this Court should review the trial court's order under its supervisory authority. *Cf. People v. Ruiz*, 194 Ill. 2d 454, 458-59 (2000) (exercising supervisory authority to consider appeal where no rule expressly permitted party to appeal "an order like the one entered" by circuit court, and party could have sought review of challenged order by filing motion for supervisory order in this Court).

This Court need not determine the proper vehicle(s) for reviewing orders denying access to criminal records or proceedings. Because these issues are complex and require consideration of myriad factors, this Court should instead refer the issue to the Rules Committee. *See* Sup. Ct. R. 3(a)(1) (rulemaking procedures "provide an opportunity for comments and suggestions by the public, the bench, and the bar" and aid this "Court in discharging its rulemaking responsibilities").

For example, it is not obvious, as the First District has suggested, *Kelly*, 397 Ill. App. 3d at 245, 247-48, that allowing the media to intervene at the trial court level and then authorizing an appeal of the interlocutory order

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denying access is the best or most expeditious avenue for protecting the right of access in criminal cases. Other jurisdictions are not uniform in their approaches,[6] with many foreclosing appellate review of orders denying access and requiring the media to seek relief through other vehicles. *See Chagra*, 701 F.2d at 360 & n.14 ("great majority of cases involving challenges to closure and similar orders have been reviewed pursuant to some sort of extraordinary writ"); *see generally* Annotation, *Standing of media representatives or organizations to seek review of, or to intervene to oppose, order closing criminal proceedings to public*, 74 A.L.R. 4th 476 (1989 & Supp. 2011). Indeed, the most recent United States Supreme Court cases involving the right of access in criminal cases did not come to that Court through an appeal of an interlocutory order in the criminal action.[7] These precedents

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[6] The approaches include: (1) appellate review of the interlocutory order under the federal collateral order doctrine without requiring intervention in trial court; (2) appellate review under that same doctrine only after the media intervenes below; (3) review only by writs of mandamus or prohibition; (4) review on application for a writ of certiorari; (5) treating a motion objecting to closure as initiating a separate miscellaneous civil proceeding; and (6) review only through the filing of a separate action for declaratory judgment, mandamus, or prohibition. *United States v. Chagra*, 701 F.2d 354, 358-60 & nn.13-14 (5th Cir. 1983) (collecting cases). Illinois has not adopted the federal collateral order doctrine. *Stein v. Krislov*, 405 Ill. App. 3d 538, 544 (1st Dist. 2010).

[7] *See, e.g.*, *Press-Enterprise Co. v. Super. Ct.*, 478 U.S. 1, 4-5 (1986) (*Press-Enterprise II*) (mandamus in appellate court following denial of access in criminal trial court); *Press-Enterprise Co. v. Super. Ct.*, 464 U.S. 501, 504-05 (1984) (*Press-Enterprise I*) (same); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 599-600 (1982) (injunctive relief in state supreme court following denial of access in criminal trial court); *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 376-77 (1979) (mandamus/prohibition in state

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demonstrate that First Amendment interests can be protected other than by appellate review of interlocutory orders in criminal cases.

In Illinois, the issue is further complicated by the apparent lack of any statute or rule authorizing a third party to intervene in a criminal prosecution. Although the Civil Code of Procedure provides a mechanism for third-party intervention in a civil case, 735 ILCS 5/2-408, the People have uncovered no criminal counterpart, and section 2-408 does not indicate that it should apply to criminal cases. *Compare* Ill. Ann. Stat., ch. 110, ¶ 2-1401, Historical & Practice Notes, at 614 (Smith-Hurd 1983) (noting that this civil procedure provision also applies to criminal cases), *with* Ill. Ann. Stat., ch. 110, ¶ 2-408, Jud. Comm. Comments, and Historical & Practice Notes, at 462-67 (Smith-Hurd 1983) (containing no similar statement).[8] Whether intervention is required or permitted in criminal cases are questions that

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appellate court following denial of access in criminal trial court); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 595-96 (1978) (as explained in underlying Court of Appeals decision, *United States v. Mitchell*, 551 F.2d 1252, 1256 & n.5 (D.C. Cir. 1976), media's motion in criminal case was converted to miscellaneous civil action before appeal); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 543-44 (1976) (mandamus in state supreme court following denial of access in criminal trial court); *cf. Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 562 (1980) (press petitioned for mandamus, prohibition, and leave to appeal in state supreme court following denial of access in criminal trial court).

[8] Section 2-408 is modeled in part on Federal Rule of Civil Procedure 24. *See* Ill. Ann. Stat., ch. 110, ¶ 2-408, Jud. Comm. Comments, and Historical & Practice Notes, at 462-67 (Smith-Hurd 1983). The federal rule does not appear to apply to criminal proceedings. *See, e.g.*, Fed. R. Civ. P. 1; *United States v. Laraneta*, 700 F.3d 983, 985 (7th Cir. 2012); *DSI Assoc. LLC v. United States*, 496 F.3d 175, 185 & n.14 (2d Cir. 2007).

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could be relevant to determining the proper mechanism for reviewing an interlocutory order denying access, and the answers to those questions may themselves require additional rule changes. *See supra*, n.5; *compare In re Assoc. Press*, 162 F.3d 503, 507 (7th Cir. 1998) (intervention in criminal proceeding is "most appropriate procedural mechanism by which to" ensure full protection of media's right to "'immediate and contemporary' access"), *with State v. Cianci*, 496 A.2d 139, 145-47 (R.I. 1985) (intervention "has no place in a criminal proceeding"; media's interests are collateral to that proceeding and should be adjudicated in separate civil action without interfering with defendant's fair trial right and interrupting or side-tracking prosecution).

Even if intervention is allowed, it is unclear whether any mechanism other than an original action in this Court for supervisory relief should be adopted. A separate civil action could raise issues regarding the propriety of allowing circuit judges to review orders entered by coequal judges. *See, e.g.*, *People v. Williams*, 138 Ill. 2d 377, 391-97 (1990) (disfavoring judge-shopping). Similarly, even assuming that, like here, the trial court's decision rested solely on a question of law that involved no exercise of discretion, mandamus or prohibition actions in the circuit court would be unavailable because such actions are directed to "inferior courts." *People ex rel. Filkin v. Flessner*, 48 Ill. 2d 54, 56 (1971). And it is not clear that interlocutory appellate court review is the desired option, where, even if briefing is

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expedited, it would likely result in the losing party seeking leave to appeal from this Court and the issues could become moot before review is complete.

Therefore, an original action in this Court — in the nature of mandamus, prohibition, or supervisory relief, depending on the circumstances — may be the best vehicle for seeking review of such an interlocutory order. The media's interests in a criminal proceeding are collateral to the prosecution itself. And the ultimate question as to whether the media should have access can implicate a number of countervailing constitutional rights and interests, including a defendant's rights to a fair trial and privacy, his interests in shielding information about trial strategy and preparation, privacy interests of victims or other third parties, and the People's interest in ongoing criminal investigations. Furthermore, given the presumptions in favor of access, Illinois trial courts appear to deny it infrequently; indeed, the People have found only four other appellate cases in the past fifteen years challenging a trial court's order denying media access in a criminal case. *See Gee*, 2010 IL App (4th) 100275, ¶¶ 15-17; *Kelly*, 397 Ill. App. 3d at 232-33; *Pelo*, 384 Ill. App. 3d at 776; *LaGrone*, 361 Ill. App. 3d at 533. In light of the substantial rights at stake and the infrequency with which the issue arises, an original action in this Court is perhaps the best vehicle for review of interlocutory orders denying access in criminal cases.

In sum, determining the proper mechanisms for challenging criminal orders denying access present myriad and complex issues that should be

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addressed through this Court's normal rulemaking process. In the absence of such a rule, however, this Court should exercise its supervisory authority here to review the trial court's order sealing defendant's motion.

II. Distinct Standards Govern the First Amendment and Common-Law Presumptions of Public Access to Court Records, and Not All Court Filings Are Subject to the Constitutional Presumption.

A. The United States Supreme Court recognizes a qualified First Amendment right of public access to certain criminal proceedings and a common-law right of access to court records.

The United States Supreme Court has held that implicit in the First Amendment is a qualified right of public access to criminal proceedings that satisfy the "experience and logic" test, *i.e.*, those proceedings (1) that have been historically open to the public; and (2) where the right of access plays a significant positive role in their functioning. *Press-Enterprise II*, 478 U.S. at 8-9; *Globe Newspaper*, 457 U.S. at 603-06. Once the right attaches, it "'may be overcome only by an overriding interest based on [specific] findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Press-Enterprise II*, 478 U.S. at 9-10 (citation omitted).

Applying this test, the Supreme Court has recognized, in criminal cases, a First Amendment presumption of public access to (1) trials, *Globe Newspaper*, 457 U.S. at 603-06; *Richmond Newspapers*, 448 U.S. at 555; (2) jury selection, *Press-Enterprise I*, 464 U.S. at 505-10; (3) suppression hearings on material evidence, where the proceeding resembles a bench trial

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and is often the only criminal proceeding before the entry of a plea, *Waller v. Georgia*, 467 U.S. 39, 43-47 (1984) (applying First Amendment experience and logic test to defendant's Sixth Amendment public trial claim); and (4) preliminary hearings that operate sufficiently like a trial and are often the final and most important step in a criminal case, *Press-Enterprise II*, 478 U.S. at 10-13.

Yet the Supreme Court has never recognized a First Amendment right of access to judicial records. *United States v. McVeigh*, 119 F.3d 806, 811-12 (10th Cir. 1997); *Application of Nat'l Broad. Co., Inc.*, 828 F.2d 340, 348-55 (6th Cir. 1987) (Ryan, J., dissenting). In the only criminal case involving court records, the Court held that the press had no First Amendment right to copy audiotapes that were played at trial because the public never had access to the physical tapes, the public heard the tapes during trial, and the press received transcripts of the tapes' contents. *Nixon*, 435 U.S. at 594-96, 608-10. The Court reaffirmed that the press has no greater First Amendment right of access to information about a trial than the general public. *Id.* at 609-10.

However, the Court has recognized a common-law presumption in favor of public access to judicial records. *Id.* at 598-99, 602-03. The Court declined to "delineate precisely the contours of" the presumption, but observed that the common-law right "is not absolute" and because "[e]very court has supervisory power over its own records and files," public access may be denied based on the facts and circumstances of a particular case. *Id.* at

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598-99. For example, access may be denied "where court files might have become a vehicle for improper purposes." *Id.*

In the civil context, the Supreme Court has found no First Amendment infirmity where a pretrial protective order precludes a litigant from disseminating information obtained through the discovery process but not yet admitted in the cause of action. *Seattle Times Co. v. Rhineart*, 467 U.S. 20, 22, 29-34 (1984). This is because "pretrial depositions and interrogatories are not public components of a civil trial" and "were not open to the public at common law." *Id.* at 33 (citing *Gannett*, 443 U.S. at 389). Additionally, "[m]uch of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action." *Seattle Times*, 467 U.S. at 33. Indeed, because liberal pretrial discovery rules allow for broad disclosure of public and private information, such rules "seriously implicate privacy interests of litigants and third parties" and create "a significant potential for abuse." *Id.* at 34-35. Thus, "restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information," *id.* at 33, and serve to prevent "abuse that can attend the coerced production of information under a State's discovery rule," *id.* at 35-36.

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B. Although recognizing distinct First Amendment and common-law presumptions in favor of public access to court records, this Court has suggested that the presumptions apply equally to all court filings.

Illinois courts have long recognized that court records "should be open to the inspection and examination of every one." *Brockway v. Cook Cty.*, 15 Ill. App. 560, 566 (1st Dist. 1884); *see Johnson v. Baker*, 38 Ill. 98, 102 (1865). The legislature codified this common-law right. *Skolnick*, 191 Ill. 2d at 230-31; *see* 705 ILCS 105/16, ¶ 6 (clerk records, dockets, and books "shall be deemed public records" and "open to inspection" by "all persons"). However, the statutory right is not absolute and "does not abrogate the trial court's inherent power to control its files and to impound any part of a file in a particular case." *Deere & Co. v. Finley*, 103 Ill. App. 3d 774, 776 (1st Dist. 1981) (citation omitted). Thus, under both statutory and common-law, "the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Nixon*, 435 U.S. at 599; *Skolnick*, 191 Ill. 2d at 231; *Deere*, 103 Ill. App. 3d at 776. For example, as noted above, access may be denied "where court files might have become a vehicle for improper purposes." *Nixon*, 435 U.S. at 598; *Skolnick*, 191 Ill. 2d at 231.

In *Skolnick*, relying on cases from the Seventh Circuit Court of Appeals, this Court stated that the First Amendment presumes a right of access to court records that satisfy the experience and logic test. *Skolnick*, 191 Ill. 2d at 231-32 (citing *Grove Fresh Distributors, Inc. v. Everfresh Juice*

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Co., 24 F.3d 893, 897 (7th Cir. 1994), and *United States v. Corbitt*, 879 F.2d 224, 228 (7th Cir. 1989)). But *Skolnick* did not then apply that test. 191 Ill. 2d at 232. Instead, *Skolnick* suggested that both the First Amendment and common-law presumptions apply equally to all court filings, *i.e.*, to all "pleadings, motions and other papers filed with the court." *Id.* at 232-33, 236.

In the civil case before it, *Skolnick* held that a counterclaim "became part of the court file once the trial court granted leave to file" it and "[a]t that point, the presumption of a right of public access to the counterclaim attached." 191 Ill. 2d at 232 (citing *In re Marriage of Johnson*, 232 Ill. App. 3d 1068, 1074 (4th Dist. 1992)), and 705 ILCS 105/16(6) (1998)). The parties seeking to seal the counterclaim "failed to make the necessary showing to rebut the presumption of access to the court file" because they established no "'compelling interest'" or "'improper purpose' sufficient to justify a sealed court file." *Skolnick*, 191 Ill. 2d at 232-33 (citations and brackets omitted). And because the trial court failed to explain why it had sealed the counterclaim, *Skolnick* further held, "regardless of whether we proceed under a common law or a [F]irst [A]mendment analysis, we reach the same conclusion: the trial court abused its discretion by ordering the counterclaim to be filed under seal." *Id.*

After *Skolnick*, in civil cases, the appellate court has merged the two sources of the public's right of access (First Amendment and common-law) and found that both presumptions attach to all documents in the court files of

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probate, marriage dissolution, and personal injury cases. *A.P. v. M.E.E.*, 354 Ill. App. 3d 989, 990-95 (1st Dist. 2004); *Johnson*, 232 Ill. App. 3d at 1073-74. But in criminal cases, the appellate court has chiefly applied the experience and logic test to each particular type of document, and found no First Amendment presumption of access to (1) a search warrant affidavit, *Gee*, 2010 IL App (4th) 100275, ¶¶ 1, 4, 35-38; (2) the inventory and return of a search warrant, *id.*; (3) juror questionnaires, *Kelly*, 397 Ill. App. 3d at 259-60; (4) a pretrial motion concerning potential other-crimes evidence, *id.*; (5) an answer to discovery, *id.* at 257, 259-60; (6) the parties' witness lists, *id.*; and (7) the State's application for, and the court's order granting judicial supervision of, the use of an eavesdropping device in an ongoing criminal investigation, *In re Consensual Overhear*, 323 Ill. App. 3d 236, 238, 242 (2d Dist. 2001). *Cf. Pelo*, 384 Ill. App. 3d at 780-84 (pretrial unedited evidence deposition not introduced into evidence or played in open court not "a 'judicial record' or part of the 'criminal proceeding itself' to which the public has a constitutional, common-law, or statutory right of access"). *But see LaGrone*, 361 Ill. App. 3d at 533-36 (assuming First Amendment presumption of access to pretrial motions without applying experience and logic test).

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C. This Court should clarify that the First Amendment and common-law presumptions of access are governed by different standards.

1. The First Amendment presumption of access attaches to a narrower set of court records than the common-law presumption.

The common-law presumption of access attaches to any document that is filed with the clerk and thus becomes part of the court file. *Skolnick*, 191 Ill. 2d at 230-33; *Deere & Co.*, 103 Ill. App. 3d at 776; *see* 705 ILCS 105/16, ¶ 6; *see, e.g.*, *Corbitt*, 879 F.2d at 237 (common-law right of access attached to document once it was in trial court's possession).[9] But the narrower First Amendment right of access attaches only to the subset of court documents that satisfy the experience and logic test. *Skolnick*, 191 Ill. 2d at 231-32; *Corbitt*, 879 F.2d at 228-29, 237. Although "the common-law right of access furthers concerns also protected by the First Amendment, . . . [t]he common-law right is separate and distinct from rights guaranteed by the [F]irst [A]mendment . . . and the Supreme Court has marked out different levels of protection." *Valley Broad. Co. v. U.S. Dist. Ct.*, 798 F.2d 1289, 1293-94 (9th Cir. 1986) (citations omitted); *United States v. Beckham*, 789 F.2d 401, 406-11

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[9] This standard provides the broadest right of public access to court records and is consistent with that employed by a majority of courts. *See Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 970 A.2d 656, 676-83 (Conn. 2009) (discussing various standards used to determine when the common-law presumption attaches to particular judicial records); *see generally* William Ollie Key, Jr., Note, *The Common Law Right to Inspect and Copy Judicial Records: In Camera or On Camera*, 16 Ga. L. Rev. 659, 666-86 (1982).

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(6th Cir. 1986) (discussing distinction). The First Amendment presumption is "drawn from an enduring and vital tradition of public entree to *particular* proceedings or information." *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring) (emphasis added) (citation omitted). And "the value of access must be measured in specifics. Analysis is not advanced by rhetorical statements that all information bears upon public issues; what is crucial in individual cases is whether access to a particular government process is important in terms of that very process." *Id.*

Indeed, as Justice Powell noted in recognizing a First Amendment right of access to a pretrial suppression hearing, "not all of the incidents of pretrial and trial are comparable in terms of public interest and importance to a formal hearing in which the question is whether critical, if not conclusive, evidence is to be admitted or excluded." *Gannett*, 443 U.S. at 397 & n.1 (Powell, J., concurring). "[T]here may be numerous arguments, consultations, and decisions, as well as depositions and interrogatories, that are not central to the [criminal] process and that implicate no First Amendment rights." *Id.* For example, "grand jury proceedings traditionally have been held in strict confidence." *Id.*; *see, e.g.*, *United States v. Index Newspapers, LLC*, 766 F.3d 1072, 1084-85 (9th Cir. 2014) (no First Amendment right of access to filings relating to grand jury process); *cf. Douglas Oil Co. of Cal. v. Petrol Stops Northwest*, 441 U.S. 211, 223 (1979)

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(party seeking access to grand jury transcripts must show particularized need for transcripts).

Accordingly, although the common-law right to inspect and copy court records predates the First Amendment, *see generally* Key, *supra* n.9, at 659-72, the First Amendment presumption of access applies only to those documents that satisfy the experience and logic test, *Richmond Newspapers*, 448 U.S. at 588-89 (Brennan, J., concurring); *Valley Broad.*, 798 F.2d at 1293-94; *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 203-05 (Minn. 1986). *Skolnick* was therefore inaccurate insofar as it suggested that both the common-law and First Amendment presumptions of access attach to all court filings. 191 Ill. 2d at 232-33, 236; *cf. Corbitt*, 879 F.2d at 237 (although common-law right attached to filed presentence report, First Amendment right did not attach under experience and logic test). Extending the First Amendment presumption to all court filings would imply that the public has a broader First Amendment right of access to documents than to proceedings. But the public's interest in accessing court proceedings is certainly no less than its interest in accessing the documents generated as part of those proceedings. Thus, this Court should clarify that the First Amendment presumption of access applies only to those documents that satisfy the experience and logic test, while the common-law presumption applies to all documents filed with the court.

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2. The burden to overcome the First Amendment presumption of access is greater than that required to overcome the common-law presumption.

This Court should further clarify that the burden to overcome the First Amendment presumption is more onerous than that required to overcome the common-law presumption.[10]

The First Amendment presumption of access "'may be overcome only by an overriding interest based on [specific] findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Press-Enterprise II*, 478 U.S. at 9 (quoting *Press-Enterprise I*, 464 U.S. at 510). When a defendant alleges that disclosure would impair his Sixth Amendment right to a fair trial, access may be denied only if specific findings establish that (1) "there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that [denying access] would prevent," and (2) "reasonable alternatives" to denying access, including *voir dire* to ensure that publicity has not tainted the juror pool, "cannot adequately protect the defendant's fair trial rights." *Press-Enterprise II*, 478 U.S. at 14 (citations omitted). These stringent standards reflect the heightened public interest in records that satisfy the experience and logic test. The strongest presumption of public access therefore attaches to such

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[10] Just as they differ as to when the common-law presumption applies, *see supra*, n.9, courts differ as to the showing necessary to overcome that presumption. *See, e.g.*, *United States v. Graham*, 257 F.3d 143, 149-50 & n.2 (2d Cir. 2001); *Minneapolis Star & Tribune*, 392 N.W.2d at 202-03; Key, *supra* n.9, at 672-86.

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records, and the burden to overcome the presumption is correspondingly heavy. *Globe Newspaper*, 457 U.S. at 606-07.

In contrast, in Illinois, the common-law presumption attaches broadly to all filed documents, regardless of their purpose, value, reliability, or relevance. *Skolnick*, 191 Ill. 2d at 230-32, 236. But the public's level of interest will vary depending on the record and information at issue. *See, e.g.*, *United States v. Amodeo*, 71 F.3d 1044, 1049 (2d Cir. 1995) (weight of common-law presumption depends on record's role in exercise of judicial power and information's value to public; "information will fall somewhere on a continuum from matters that directly affect an adjudication to matters that come within a court's purview solely to insure their irrelevance"). Thus, the heavy burden for overcoming the First Amendment presumption of access should not apply to the common-law presumption. *Cf. Skolnick*, 191 Ill. 2d at 235 (suggesting that party seeking to conceal information must establish "good cause" for doing so). *But see Johnson*, 232 Ill. App. 3d at 1072-73 (equating showings required to overcome constitutional and common-law presumptions) (citing *Shenandoah Pub. House, Inc. v. Fanning*, 368 S.E.2d 253, 256 (Va. 1988), which adopted compelling interests/least restrictive means standard for overcoming state statutory presumption of access).

Rather, the weight afforded to, and the burden required to overcome, the common-law presumption will depend on a variety of factors, including the record and information at issue, their role in the judicial process, and

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their resultant value to the public. *Amodeo*, 71 F.3d at 1048-50; Key, *supra* n.9, at 672-86; *see United States v. Criden*, 648 F.2d 814, 823 (3d Cir. 1981) ("strength of the presumption can be effectively considered only in relationship to the factors which would justify denial of the application" for access). As the United States Supreme Court has explained, "the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Nixon*, 435 U.S. at 599; *see Skolnick*, 191 Ill. 2d at 231; *Deere*, 103 Ill. App. 3d at 776. For example, access may be denied where court files "have become a vehicle for improper purposes," *Nixon*, 435 U.S. at 598, such as "'to gratify private spite or promote public scandal,'" *id.* at 603 (quoting *In re Caswell*, 29 A. 259 (R.I. 1893)); publish "'libelous, pornographic, or trade secret materials; infringe[] o[n] fair trial rights of the defendants or third persons; [or violate] residual privacy rights,'" *Valley Broad.*, 798 F.2d at 1294 (citation omitted). The court's task is to weigh such interests "in light of the public interest and the duty of the courts." *Nixon*, 435 U.S. at 602; *see Amodeo*, 71 F.3d at 1048-50. But "the presumption—however gauged—[is] in favor of public access," *Nixon*, 435 U.S. at 602, and may "be overcome only 'on the basis of articulable facts known to the court, not on the basis of unsupported hypothesis or conjecture,'" *Valley Broad.*, 798 F.2d at 1293 (quoting *United States v. Edwards*, 672 F.2d 1289, 1294 (7th Cir. 1982)) (remaining citations omitted).

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Accordingly, this Court should clarify the distinct burdens required to overcome the First Amendment and common-law presumptions of access. *See Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) ("common law does not afford as much substantive protection to the interests of the press and the public as does the First Amendment").

III. The First Amendment Presumption of Access Does Not Attach to Defendant's Motions *in Limine*.

Initially, contrary to the appellate court's analysis, A10-11, the question presented is whether the First Amendment presumption of access applies to *defendant's* motions *in limine* in this case, not *all* motions *in limine*.[11] The experience and logic test is individualized, allowing courts to consider various factors, including the nature and importance of the particular proceeding or record, and the degree of interest that the public has in that proceeding or record. *Richmond Newspapers*, 448 U.S. at 588-89 (Brennan, J., concurring). Thus, whether the presumption applies to a specific motion *in limine* may turn on the source of the evidence at issue and its role in the criminal case. *See, e.g.*, *Gannett*, 443 U.S. at 397 n.1 (Powell, J., concurring) (distinguishing critical and noncritical evidence); *In re a*

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[11] The appellate court also improperly conflated *in limine* and suppression motions. A10. Motions to suppress uniquely address whether "illegally obtained evidence" will be excluded at trial. *Black's Law Dictionary* 1110 (9th ed. 2009). By contrast, motions *in limine* relate generally to whether evidence will be admitted under ordinary evidentiary rules. *People v. Smith*, 248 Ill. App. 3d 351, 356-59 (2d Dist. 1993) (discussing differences between suppression and *in limine* motions).

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Minor, 149 Ill. 2d 247, 252 (1992) (distinguishing information learned through closed court proceedings from that obtained through routine, reporting techniques). Here, experience and logic weigh against a First Amendment presumption of access to defendant's motions *in limine*.

A. No enduring and vital tradition of public access can be attributed to defendant's motions *in limine*.

Motions *in limine* did not exist "when our organic laws were adopted," *Richmond Newspapers*, 448 U.S. at 569, and have been used in criminal cases for less than 100 years. Douglas L. Colbert, *The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial*, 39 Stan. L. Rev. 1271, 1271-72, 1274-83 (1987) (first recorded use in civil case in 1867, in criminal case in 1937, but no general acceptance in criminal cases until 1960s). Because motions *in limine* were not a "common practice in America when the Constitution was adopted," *Press-Enterprise I*, 464 U.S. at 508, the First Amendment cannot have been originally understood to embody a presumption of access to such motions, *Globe Newspaper*, 457 U.S. at 605.

Nor was the pretrial process historically public such that experience would support a tradition of access to defendant's motions *in limine*. To the contrary, when the First Amendment was adopted, the public had no right to attend pretrial evidentiary proceedings. *Gannett*, 443 U.S. at 384-91 & nn.15-23; *id.* at 394-95 (Burger, C.J., concurring); *id.* at 436 (Blackmun, J., concurring and dissenting); *Press-Enterprise II*, 478 U.S. at 22-23 (Stevens, J., dissenting) (discussing sources of this "uncontroverted" fact); *cf. generally*

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Corbitt, 879 F.2d at 228-29 n.4 (collecting cases holding that if public has constitutional right to attend hearing, it acquires right to inspect documents filed in connection with that hearing). Of course, not all pretrial procedures are equal in form and purpose, and some pretrial procedures are critical or decisive parts of the criminal process or function sufficiently like a trial that the tradition of openness that attaches to criminal trials may be attributed to them. *See, e.g.*, *Waller*, 467 U.S. at 46-47; *Gannett*, 443 U.S. at 397 n.1 (Powell, J., concurring); *Richmond Newspapers, Inc. v. Commonwealth*, 281 S.E.2d 915, 921-23 (Va. 1981). But motions *in limine* that concern only the admissibility of noncrucial evidence found in discovery are not part of a proceeding that resembles a full-scale trial or constitutes the only step in the criminal process before entry of a plea. *See Kelly*, 397 Ill. App. 3d at 258-59. Thus, the "enduring and vital tradition of public" access to criminal trials, *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring), does not extend to defendant's motions. *See Kelly*, 397 Ill. App. 3d at 258-59.

To the contrary, there is no tradition of access to criminal discovery not yet admitted at trial. *Seattle Times*, 467 U.S. at 33; *North Jersey Media Grp., Inc. v. United States*, 836 F.3d 421, 430 (3d Cir. 2016). Because the evidence at issue in defendant's motions was disclosed during the discovery process, is not otherwise publicly available, and will not be admitted at trial, it is not subject to a tradition of access. *See, e.g.*, *Richmond Newspapers*, 448 U.S. at 598 n.23 (Brennan, J., concurring) (First Amendment does not mandate

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contemporaneous "public or press intrusion upon the huddle" at sidebar or chambers conferences that traditionally are not open to the public); *Globe Newspaper*, 457 U.S. at 609 n.25 (similar); *McVeigh*, 119 F.3d at 813 (no First Amendment right of access to inadmissible discovery information discussed in suppression motion); *In re Gannett News Serv., Inc.*, 772 F.2d 113, 116 (5th Cir. 1985) (material filed in court solely in connection with defendants' motions *in limine* is not "evidence . . . at all," but rather akin to pretrial discovery that may be restricted from public); *Resnick v. Patton*, 258 Fed. App'x 789, 792 (6th Cir. 2007) (nonprecedential) (unlikely that that press has right of access to motions *in limine* where evidence ruled inadmissible) (citing *Beckham*, 789 F.2d at 411). Indeed, "[h]ad it not been for [defendant's] motions there would be no material on file for [intervenors] to seek access to." *In re Gannett News Serv.*, 772 F.2d at 116; *see* A58 (prosecutor expresses similar sentiment); *cf.* Sup. Ct. R. 415(c) (criminal discovery furnished to an attorney "shall remain in his exclusive custody and be used only for the purposes of conducting his side of the case"). Accordingly, the experience prong weighs against a constitutional presumption of access. *See, e.g.*, *Kelly*, 397 Ill. App. 3d at 260 ("other crimes evidence has historically not been accessible to the public prior to its introduction at trial") (citing *Pelo*, 384 Ill. App. 3d at 782-83).

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B. Allowing a constitutional right of access to defendant's motions will not play a significant positive role in the functioning of the criminal process.

The logic prong also weighs against a constitutional presumption of access here. Defendant's motions sought to exclude from trial evidence that is at best "tangentially related" to the underlying criminal action, *Seattle Times*, 467 U.S. at 33, rather than critical evidence that police allegedly obtained in violation of the Constitution. *Cf. Waller*, 467 U.S. at 47 ("particularly strong" need for open suppression hearings because "challenge to the seizure of evidence frequently attacks the conduct of police and prosecutor" and public has "strong interest in exposing substantial allegations of police misconduct"); *Gannett*, 443 U.S. at 397 n.1 (Powell, J., concurring) (public's interest in formal pretrial hearing addressing admissibility of "critical, if not conclusive, evidence" is "comparable to its interest in the trial itself"). This distinction is crucial because the discovery process typically generates a vast amount of irrelevant and unreliable material that plays little role in a criminal proceeding and in which the public has a limited interest. *Amodeo*, 71 F.3d at 1048-50. "The relevance or reliability of a statement or document generally cannot be determined until heard or read by counsel, and, if necessary, by the court or other judicial officer." *Id.* at 1048. Thus, a motion's value to the public depends on the information at issue, *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring), and where, as here, the evidence is merely tangential to the

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underlying action, the need for public scrutiny is substantially lessened. *Cf. Kelly*, 397 Ill. App. 3d at 259 (no First Amendment presumption of access to pretrial hearings that "did not concern allegations of police misconduct").

Moreover, because the pertinent evidence will not be admitted at trial, public access "will not play a significant positive role in the functioning of the criminal process, as that evidence is simply irrelevant to the process." *McVeigh*, 119 F.3d at 813; *cf. North Jersey Media Grp.*, 836 F.3d at 433 (logic weighs against constitutional presumption of access where document has "no evidentiary significance"). Rather, presumptive disclosure of the evidence would play a negative role in the criminal process, by likely exposing the public and potential jurors to arguably irrelevant information that will not be used to support a conviction, *McVeigh*, 119 F.3d at 813, but could negatively affect myriad countervailing interests, including a defendant's rights to a fair trial and privacy, his interests in shielding information about trial strategy and preparation, privacy interests of victims or other third parties, and the People's interest in ongoing criminal investigations. *Cf. Amodeo*, 71 F.3d at 1048-49 (discussing negative effects of unlimited public access to discovery).

Indeed, "the motion *in limine* device itself is often very important in securing a fair trial," *In re Gannett News Serv.*, 772 F.2d at 116, as it allows a party to obtain a pretrial order excluding inadmissible evidence and "protect[s] the movant from whatever prejudicial impact the mere asking of the questions and the making of the objections may have upon a jury," *People*

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v. Williams, 188 Ill. 2d 365, 368 (1999) (citations omitted). Motions *in limine* facilitate more efficient trials by allowing for resolution of evidentiary questions before jury selection, thus avoiding foreseeable interruptions at trial that waste a jury's time. *People v. Owen*, 299 Ill. App. 3d 818, 822-24 (4th Dist. 1998). Obtaining pretrial evidentiary rulings also assists parties in preparing trial strategies. *See id.* at 822-24; *United States v. Agosto-Vega*, 731 F.3d 62, 65 (1st Cir. 2013); *Jones v. Stotts*, 59 F.3d 143, 146 (10th Cir. 1995). In criminal cases such motions may be particularly important to a defendant, who must make an informed choice as to whether to testify at trial; knowing whether certain discovery information will be introduced at trial may affect the defendant's decision. *See Owen*, 299 Ill. App. 3d at 822-23; *see generally People v. Patrick*, 233 Ill. 2d 62, 70-74 (2009).

Attaching a constitutional presumption of access to motions *in limine* concerning tangential discovery information that will not be admitted at trial and to which the public has a diminished interest could defeat the advantages of such motions, by dissuading parties from filing them and encouraging parties to wait until trial to resolve known evidentiary questions.[12] "The undesirability of putting such a 'price' on" filing such

[12] Here, the trial court's order sealed the motions *in limine* until after jury selection. A12. Defendant later withdrew his motion to close the proceedings after the People made clear that they would not introduce the evidence in question. A56-58. Thus, this case concerns only the public's right of access to the written motions at or near the time of filing. It does not concern the public's right of access to any trial proceedings or exhibits relating to the discovery information revealed in the motions.

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motions weighs against recognizing a First Amendment presumption of access. *In re Gannett News Serv.*, 772 F.2d at 116.

Accordingly, the First Amendment presumption of access does not attach to defendant's motions *in limine*. *Cf. Kelly*, 397 Ill. App. 3d at 259-60 (neither experience nor logic supports public access to State's motion concerning other-crimes evidence); *McVeigh*, 119 F.3d at 813-14 (same for inadmissible evidence or portions of motions discussing such evidence).

IV. The Common-Law Presumption of Public Access Attaches to Defendant's Motions, and This Court Should Remand to the Trial Court for Proceedings on Whether Defendant Has Rebutted that Presumption.

As discussed *supra*, Part II.C.1, the common-law presumption of access attaches to all documents in a court file. Accordingly, the presumption attached to defendant's motions when the trial court granted him leave to file them. *Skolnick*, 191 Ill. 2d at 232; *cf. Rosado*, 970 A.2d at 676-85 (collecting cases, and holding that motions *in limine* are subject to common-law presumption of access). Although the trial court recognized that the public has a common-law right of access to defendant's motions, it failed to acknowledge that the common law itself provides a presumption of access. A71; *cf.* Key, *supra* n.9, at 677 ("Where the appropriate interests in a particular case counterbalance each other equally, this presumption tips the scale in favor of the party requesting access."). Thus, this Court should remand to the trial court for further proceedings on whether defendant has rebutted the common-law presumption. Specifically, the trial court must

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gauge the weight to be afforded the presumption for each motion and determine whether defendant has demonstrated — on the basis of articulable facts — that sufficient countervailing interests warrant concealing the presumptively public motions.

CONCLUSION

This Court should vacate the appellate court's judgment and remand to the circuit court for further proceedings.

March 7, 2018

Respectfully submitted,

LISA MADIGAN
Attorney General of Illinois

DAVID L. FRANKLIN
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

GOPI KASHYAP
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-4684
gkashyap@atg.state.il.us

Counsel for Plaintiff-Appellee
People of the State of Illinois

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RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341. The length of this brief, excluding the pages permitted to be excluded under Rule 341, is thirty-eight pages.

/s/ Gopi Kashyap
GOPI KASHYAP
Assistant Attorney General

APPENDIX

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Table of Contents to the Appendix

Supreme Court Rule 604 .... PA1

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West's Smith-Hurd Illinois Compiled Statutes Annotated
Court Rules
Illinois Supreme Court Rules (Refs & Annos)
Article VI. Appeals in Criminal Cases, Post-Conviction Cases, and Juvenile Court Proceedings (Refs & Annos)

ILCS S. Ct. Rule 604
Formerly cited as IL ST CH 110A ¶604;IL ST S. Ct. Rule 604

Rule 604. Appeals From Certain Judgments and Orders

Currentness

(a) Appeals by the State.

(1) *When State May Appeal.* In criminal cases the State may appeal only from an order or judgment the substantive effect of which results in dismissing a charge for any of the grounds enumerated in section 114-1 of the Code of Criminal Procedure of 1963; arresting judgment because of a defective indictment, information or complaint; quashing an arrest or search warrant; or suppressing evidence.

(2) *Leave to Appeal by State.* The State may petition for leave to appeal under Rule 315(a).

(3) *Release of Defendant Pending Appeal.* A defendant shall not be held in jail or to bail during the pendency of an appeal by the State, or of a petition or appeal by the State under Rule 315(a), unless there are compelling reasons for his or her continued detention or being held to bail.

(4) *Time Appeal Pending Not Counted.* The time during which an appeal by the State is pending is not counted for the purpose of determining whether an accused is entitled to discharge under section 103-5 of the Code of Criminal Procedure of 1963.

(b) Appeals When Defendant Placed Under Supervision or Sentenced to Probation, Conditional Discharge or Periodic Imprisonment. A defendant who has been placed under supervision or found guilty and sentenced to probation or conditional discharge (see 730 ILCS 5/5-6-1 through 5-6-4), or to periodic imprisonment (see 730 ILCS 5/5-7-1 through 5-7-8), may appeal from the judgment and may seek review of the conditions of supervision, or of the finding of guilt or the conditions of the sentence, or both. He or she may also appeal from an order modifying the conditions of or revoking such an order or sentence.

(c) Appeals From Bail Orders by Defendant Before Conviction.

(1) *Appealability of Order With Respect to Bail.* Before conviction a defendant may appeal to the Appellate Court from an order setting, modifying, revoking, denying, or refusing to modify bail or the conditions thereof. As a prerequisite to appeal the defendant shall first present to the trial court a written motion for the relief to be sought on appeal. The motion shall be verified by the defendant and shall state the following:

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(i) the defendant's financial condition;

(ii) his or her residence addresses and employment history for the past 10 years;

(iii) his or her occupation and the name and address of his or her employer, if he or she is employed, or his or her school, if he or she is in school;

(iv) his or her family situation; and

(v) any prior criminal record and any other relevant facts.

If the order is entered upon motion of the prosecution, the defendant's verified answer to the motion shall contain the foregoing information.

(2) *Procedure.* The appeal may be taken at any time before conviction by filing a verified motion for review in the Appellate Court. The motion for review shall be accompanied by a verified copy of the motion or answer filed in the trial court and shall state the following:

(i) the court that entered the order;

(ii) the date of the order;

(iii) the crime or crimes charged;

(iv) the amount and condition of bail;

(v) the arguments supporting the motion; and

(vi) the relief sought.

No brief shall be filed. The motion shall be served upon the opposing party. The State may promptly file an answer.

(3) *Disposition.* Upon receipt of the motion, the clerk shall immediately notify the opposing party by telephone of the filing of the motion, entering the date and time of the notification on the docket, and promptly thereafter present the motion to the court.

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(4) *Report of Proceedings.* The court, on its own motion or on the motion of any party, may order court reporting personnel as defined in Rule 46 to file in the Appellate Court a report of all proceedings had in the trial court on the question of bail.

(5) *No Oral Argument.* No oral argument shall be permitted except when ordered on the court's own motion.

(d) Appeal by Defendant From a Judgment Entered Upon a Plea of Guilty. No appeal from a judgment entered upon a plea of guilty shall be taken unless the defendant, within 30 days of the date on which sentence is imposed, files in the trial court a motion to reconsider the sentence, if only the sentence is being challenged, or, if the plea is being challenged, a motion to withdraw the plea of guilty and vacate the judgment.

No appeal shall be taken upon a negotiated plea of guilty challenging the sentence as excessive unless the defendant, within 30 days of the imposition of sentence, files a motion to withdraw the plea of guilty and vacate the judgment. For purposes of this rule, a negotiated plea of guilty is one in which the prosecution has bound itself to recommend a specific sentence, or a specific range of sentence, or where the prosecution has made concessions relating to the sentence to be imposed and not merely to the charge or charges then pending.

The motion shall be in writing and shall state the grounds therefor. When the motion is based on facts that do not appear of record it shall be supported by affidavit unless the defendant is filing the motion *pro se* from a correctional institution, in which case the defendant may submit, in lieu of an affidavit, a certification as provided in section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109). The motion shall be presented promptly to the trial judge by whom the defendant was sentenced, and if that judge is then not sitting in the court in which the judgment was entered, then to the chief judge of the circuit, or to such other judge as the chief judge shall designate. The trial court shall then determine whether the defendant is represented by counsel, and if the defendant is indigent and desires counsel, the trial court shall appoint counsel.

If the defendant is indigent, the trial court shall order a copy of the transcript as provided in Rule 402(e) be furnished the defendant without cost. The defendant's attorney shall file with the trial court a certificate stating that the attorney has consulted with the defendant either by phone, mail, electronic means or in person to ascertain defendant's contentions of error in the sentence and the entry of the plea of guilty, has examined the trial court file and both the report of proceedings of the plea of guilty and the report of proceedings in the sentencing hearing, and has made any amendments to the motion necessary for adequate presentation of any defects in those proceedings.

The motion shall be heard promptly, and if allowed, the trial court shall modify the sentence or vacate the judgment and permit the defendant to withdraw the plea of guilty and plead anew. If the motion is denied, a notice of appeal from the judgment and sentence shall be filed within the time allowed in Rule 606, measured from the date of entry of the order denying the motion. Upon appeal any issue not raised by the defendant in the motion to reconsider the sentence or withdraw the plea of guilty and vacate the judgment shall be deemed waived.

The certificate of counsel shall be prepared by utilizing, or substantially adopting the appearance and content of, the form provided in the Article VI Forms Appendix.

(e) Appeal From an Order Finding Defendant Unfit to Stand Trial or Be Sentenced. The defendant or the State may appeal to the Appellate Court from an order holding the defendant unfit to stand trial or be sentenced.

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(f) Appeal by Defendant on Grounds of Former Jeopardy. The defendant may appeal to the Appellate Court the denial of a motion to dismiss a criminal proceeding on grounds of former jeopardy.

(g) Appeal From an Order Granting a Motion to Disqualify Defense Counsel. The defendant may petition for leave to appeal to the Appellate Court from an order of the circuit court granting a motion to disqualify the attorney for the defendant based on a conflict of interest. The procedure for bringing interlocutory appeals pursuant to this subpart shall be the same as set forth in Supreme Court Rule 306(c).

Credits

Amended eff. July 1, 1969; Oct. 21, 1969, eff. Jan. 1, 1970; eff. Oct. 1, 1970, July 1, 1971, Nov. 30, 1972, Sept. 1, 1974, and July 1, 1975; Feb. 19, 1982, eff. April 1, 1982; June 15, 1982, eff. July 1, 1982; Aug. 9, 1983, eff. Oct. 1, 1983; April 1, 1992, eff. Aug. 1, 1992; Oct. 5, 2000, eff. Nov. 1, 2000; Feb. 1, 2005, eff. immediately; Dec. 13, 2005, eff. immediately; Feb. 10, 2006, effective July 1, 2006; Nov. 28, 2012, eff. Jan. 1, 2013; Feb. 6, 2013, eff. immediately; Dec. 11, 2014, eff. immediately; Dec. 3, 2015, eff. immediately; Mar. 8, 2016, eff. immediately; June 22, 2017, eff. July 1, 2017.

COMMITTEE COMMENT

(February 10, 2006)

Paragraph (g)

Paragraph (g) permits interlocutory review of certain attorney disqualification orders but does not change attorney disqualification law. The circuit court still has discretion to accept or reject a defendant's conflict of interest waiver, based on consideration of the interests identified in People v. Ortega, 209 Ill. 2d 354 (2004).

COMMITTEE COMMENTS

(February 1, 2005)

The language in paragraph (a) allowing interlocutory appeals from orders decertifying a prosecution as a capital case or finding the defendant to be mentally retarded provides for the kinds of appeals contemplated by section 9-1(h-5) of the Criminal Code of 1961 (720 ILCS 5/9-1(h-5)) and section 114-15(f) of the Code of Criminal Procedure of 1963 (725 ILCS 5/114-15(f)).

COMMITTEE COMMENTS

(Revised July 1, 1975)

Rule 604 was amended in September 1969 to add paragraph (b), dealing with appeals when probation has been granted. The 1969 amendment made what was formerly the entirety of Rule 604 into paragraph (a) and made an appropriate change in the title of the rule.

Paragraph (a)

Subparagraph (1) of paragraph (a) is former Rule 27(4), as it existed until January 1, 1967, with slight changes in language. (Rule 27(4) was derived from sections 121-1 and 120-2 of the Code.) The rule makes it clear that an order dismissing an indictment, information or complaint for any of the grounds enumerated in section 114-1 of the Code is appealable.

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Subparagraph (2) was added by amendment effective November 30, 1972.

Subparagraph (3) is former section 120-3(a) of the Code without change.

Subparagraph (4) is section 120-3(b) of the Code without change.

Paragraph (b)

Paragraph (b) is based upon sections 117-1(d) and 117-3(e) of the Code and is included in the rule in conformity with the policy of covering all appeals in the supreme court rules, as contemplated by the judicial article of the Constitution. (Ill. Const., art. VI, § 16.) Paragraph (b) was amended in 1974 to cover conditional discharge and periodic imprisonment, new forms of sentence created by the adoption in Illinois of the Unified Code of Corrections.

Paragraph (c)

Paragraph (c) was added in 1971 to establish a procedure for appeals from orders in criminal cases concerning bail. Prior to its adoption, the only avenue of relief was an original petition to the Supreme Court for a writ of *habeas corpus*. Subparagraph (c)(2) was amended in 1974 to provide that the State may file an answer.

Paragraph (d)

Paragraph (d), added in 1975, provides that before a defendant may file a notice of appeal from a judgment entered on his plea of guilty, he must move in the trial court to vacate the judgment and withdraw his plea. Issues not raised in such a motion are waived. The time within which an appeal may be taken runs from the date on which the order disposing of the motion is entered. Provision is made for appointment of counsel and provision of a free transcript of the proceedings, which, under Rule 402(e), are required to be transcribed, filed, and made a part of the common law record.

Notes of Decisions (1611)

I.L.C.S. S. Ct. Rule 604, IL R S CT Rule 604
Current with amendments received through 12/15/17.

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PROOF OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On March 7, 2018, the **Brief and Appendix of Plaintiff-Appellee People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which provided notice to the following registered parties:

John P. Rogers
Rogers, Sevastianos & Bante, LLP
120 South Central Avenue, Suite 160
Clayton, Missouri 63105
jrogers@rsblawfirm.com
Counsel for Defendant-Appellant

Donald M. Craven
Donald M. Craven, P.C.
1005 North Seventh Street
Springfield, Illinois 62702
don@cravenlawoffice.com
Counsel for Intervenors-Appellees

Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail 12 copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701.

/s/ Gopi Kashyap
GOPI KASHYAP
Assistant Attorney General

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