STATE OF INDIANA	)	IN THE HUNTINGTON CIRCUIT COURT
	)	SS:
COUNTY OF HUNTINGTON	)	
	)	
STATE OF INDIANA	)	
Plaintiff	)	
	)	
VS.	)	CAUSE NO. 35C01-1605-F3-000096
	)	
JOHN C. MATHEW	)	
Defendant		

ORDER LIMITING THE USE OF COURT RECORD AND BARRING ITS BROADCAST OR DISSEMINATION

1. News Channel ABC 21 of Fort Wayne, Indiana, has requested a copy of the digitally recorded record from this case.

2. The Court is required to provide the record as requested.

3. The requesting person may not broadcast the record, subject to the contempt power of this Court.

4. The requesting person may not alter, add, delete or replace any part of the record provided.

5. The requesting person may not allow others to do the actions prohibited by paragraphs 3 and 4.

So Ordered This 20th Day of April, 2017

Thomas M. Hakes, Judge
Huntington Circuit Court

STATE OF INDIANA	)	IN THE HUNTINGTON CIRCUIT COURT
	)	
COUNTY OF HUNTINGTON	)	CAUSE NUMBER: 35C01-1603-F3-96

STATE OF INDIANA,	)
Plaintiff	)
	)
vs.	)
	)
JOHN C. MATHEW,	)
Defendant	)

WPTA-TV'S VERIFIED MOTION TO INTERVENE AND RECONSIDER ORDER OF APRIL 20, 2017

WPTA-TV, by counsel, and pursuant to Indiana Rule of Trial Procedure 24(A)(2), and Indiana Administrative Rule 9(G), respectfully petitions the Court for leave to intervene in this matter for the limited purpose of objecting to the Court's April 20, 2017 Order ("Order") and moving for reconsideration of the same. In support of this request, WPTA-TV states as follows:

1. This criminal matter involves charges against Defendant for misdemeanor battery, I.C. § 35-42-2-1(b)(1), and level 6 felony sexual battery where the victim was compelled to submit by force or imminent threat of force, I.C. § 35-42-4-8(a)(1)(A).

2. On April 17, 2017, the Defendant entered a plea by agreement to the two level 6 felony charges. The two misdemeanor battery charges were dismissed. That same day, the Court held its sentencing hearing.

3. On April 18, 2017, WPTA-TV filed a Request for Records, seeking access to a digitally recorded victim impact statement (the "Record").

4. On April 20, 2017, the Court issued its Order acknowledging that it was required to provide the Record but limiting its use by, among other things, prohibiting WPTA-TV from broadcasting the Record, subject to the Court's contempt power. (Order at ¶¶ 2-5)

I. Motion to Intervene

5. As set forth by Rule 24(A)(2) of the Indiana Rules of Trial Procedure:

> anyone ***shall*** be permitted to intervene in an action: when the applicant claims and interest relating to a property, fund or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect his interest in the property, fund or transaction, unless the applicant's interest is adequately represented by existing parties.

(emphasis added).

6. WPTA-TV has a clear property interest in the victim impact statement which it has requested and been provided, but which it is prohibited from broadcasting or disseminating as a member of the free press. Accordingly, this Court shall permit WPTA-TV to intervene to protect its rights and interests.

II. Motion to Reconsider

7. Prohibiting the use and dissemination of the Record in this manner violates the provisions of Indiana Administrative 9(G), which does not contemplate the relief ordered. Administrative Rule 9(G) allows for the restriction of public access of individual court records in two instances.

8. First, under Administrative Rule 9(G)(2), certain individual case records **must be** excluded from public access, including records declared confidential under federal law, state law or court rule, social security numbers, financial account numbers, and so forth. Here, the Record is not the type of individual case record that must be excluded from public access pursuant to Administrative 9(G)(2), as recognized by the Order in its acknowledgment that it was required to provide the requested record. (Order at ¶ 2)

9. Second, Administrative Rule 9(G)(4) states that, "in extraordinary circumstances," an otherwise publicly available court record **may be** excluded if the following

four conditions are met: (a) a verified written request to prohibit public access to a court record; (b) notice to all parties and the right to respond; (c) public hearing; and (d) a written order. By *sua sponte* issuing a written order limiting the use of the Record here, the Court improperly bypassed the provisions of Administrative Rule 9(G)(4)(a)-(c), and its Order is thus invalid. *See Allianz Ins. Co. v. Guidant Corp.*, 884 N.E.2d 405 (Ind. Ct. App. 2008) (trial court order sealing litigation from public view violated Admin. R. 9 and was improper because no public hearing was held).

10. Even if the procedures required pursuant to Administrative Rule 9(G)(4)(a)-(c) were to be followed in this case, the victim impact statement would not qualify as a record that **may be** excluded or limited in its use. *See, e.g.*, *In re T.B.*, 895 N.E.2d 321 (Ind. Ct. App. 2008) (although juvenile court records are generally maintained confidentially affirming in part trial court's grant of access to newspaper of certain DCS and juvenile court records where newspaper had legitimate interest in informing the public about death of child); *cf. Angelopoulos v. Angelopoulos*, 2017 Ind. App. 170 (Ind. Ct. App. Apr. 19, 2017) (petitioner proved by clear and convincing evidence that portions of deposition describing financial transactions should remain excluded from public access because of increased risk to petitioner and his family, public figures in native Greece should testimony be made public).

11. The commentary to Administrative Rule 9 makes clear that "given the societal interests in access to court records, this rule also reflects the view that any restriction to access must be implemented in a manner tailored to serve the interests in open access." Commentary to Ind. Admin. R. 9(A); *see also Allianz*, 884 N.E.2d at 408. The stringent restriction placed on WPTA-TV by the Order – that WPTA-TV may not broadcast the Record – unnecessarily

impinges WPTA-TV's ability to report the circumstances of this case, which are of legitimate public interest. This restriction is not tailored to serve the interests of open access.

12. Further, the Order amounts to an impermissible prior restraint on free speech by prospectively restricting WPTA-TV's use of a publicly accessible document. *See In re K.D.*, 929 N.E.2d 863, 868 (Ind. Ct. App. 2010) (juvenile court order prohibiting mother from discussing legal proceedings with the media following the establishment of paternity of her child determined to be invalid prior restraint of mother's free speech rights). Use of the Record at issue here falls at the core of First Amendment protections and there is no basis to restrict WPTA-TV's method of reporting the allegations against the Defendant. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights" and are presumed unconstitutional); *U.S. v. Brown*, 250 F.3d 907, 914-15 (5th Cir. 2001) (finding prior restraints on media are constitutionally disfavored nearly to the point of extinction and will be upheld only if the government can establish that the activity restrained either poses a clear and present danger or a serious or imminent threat to a protected competing interest). The Order therefore violates the First Amendment and must be vacated.

For the foregoing reasons, WPTA-TV respectfully requests that it be permitted to intervene in this matter and that the Court vacate its Order which impermissibly restricts WPTA-TV's use of the victim impact statement at issue.

Respectfully submitted,

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Attorneys for Intervenor, WPTA-TV

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following by certified U.S. Mail, postage prepaid this ___ day of April, 2017:

Richison, Amy Christine
Room 420, Courthouse
Huntington , IN 46750-0000

Gevers, Robert William
809 S Calhoun Street
Suite 600
Fort Wayne , IN 46802-0000

_____
An Attorney for Intervenor

18431895

STATE OF INDIANA	)	IN THE HUNTINGTON CIRCUIT COURT
	)	
COUNTY OF HUNTINGTON	)	CAUSE NUMBER: 35C01-1603-F3-96

STATE OF INDIANA,	)
Plaintiff	)
	)
vs.	)
	)
JOHN C. MATHEW,	)
Defendant	)

ORDER GRANTING WPTA-TV'S VERIFIED MOTION TO INTERVENE AND RECONSIDER ORDER OF APRIL 20, 2017

WPTA-TV, having filed its Verified Motion to Intervene and Reconsider Order of April 20, 2017, and the Court, having reviewed said Motion and being duly advised in the premises, hereby GRANTS said Motion.

IT IS THEREFORE, ORDERED, that WPTA-TV is entitled to intervene in this action.

IT IS FURTHER ORDERED that the Court's April 20, 2017 Order restricting WPTA-TV's use of the victim impact statement it requested is vacated.

DATE: _____

_____
Judge, Huntington Circuit Court

Distribution:

Richison, Amy Christine
Room 420, Courthouse
Huntington , IN 46750-0000

Gevers, Robert William
809 S Calhoun Street
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April 21, 2017

VIA EMAIL

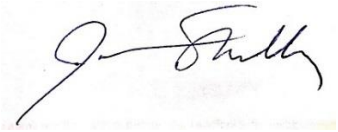
Hon. Thomas M. Hakes
Huntington Circuit Court
Huntington, Indiana

Judge Hakes,

I have reviewed your order limiting the use of a public court record related to the case State of Indiana vs. John C. Mathew. It is my hope that you will agree to meet with me and with WPTA/ABC21 anchor Alexis Gray so we may better understand your concerns and the reason for this prior restraint, including any cause for exemption from the Indiana Access to Public Records Act.

I appreciate the value of your time. We would make ourselves available at your earliest and/or immediate convenience. Thank you in advance for your consideration.

Sincerely,



Jonathan Shelley
News Director
JShelley@WPTA21.com

cc: Alexis Gray
Merry Ewing, General Manager, WPTA TV

STATE OF INDIANA	)	IN THE HUNTINGTON CIRCUIT COURT
	)	SS:
COUNTY OF HUNTINGTON	)	
	)	
STATE OF INDIANA	)	
Plaintiff	)	
	)	
VS.	)	CAUSE NO. 35C01-1605-F3-000096
	)	
JOHN C. MATHEW	)	
Defendant		

ORDER ON MOTION TO RECONSIDER

The Court has examined the Record in the case and has examined the Intervenors Motion to Reconsider. On April 18, 2017, the Court received the Request for Records; the Request was granted and the requested items were provided. On April 20, 2017, the Court issued the Order Limiting the Use of Court Record and Barring its Broadcast.

The Intervenors received as per their request the documents and CD on April, 2017. This was in proper compliance with Administrative Rule 9D. The providing of the requested items gave the intervenors the ability to inspect and copy a court record which is the definition of Public Access as found in Administrative Rule 9C(6).

The Court then, as required by Administrative Rule 9D(4) issued the order limiting the use of the record. The Intervenors entire argument in its Motion to Reconsider revolves around Administrative Rule 9G and the intervenors argument that the Court in prohibiting the use and dissemination of the Record violates the provisions of Rule 9G.

The Court followed Administrative Rule 9D4 and examined Judicial Conduct Rule 2.17 which states in part: "Except with prior approval of the Indiana Supreme Court, a Judge shall prohibit broadcasting, televising, recording or taking photos in the courtroom..." The limit placed upon Intervenors is in compliance with this rule. Broadcasting all or parts of a court record is no different than the Intervenors making their own recording and then broadcasting it...an act that is not allowed by the Rule.

Copies of all documents requested were promptly provided but limited in use by the Court in following the dictates of Administrative Rule 9D4.

The Intervenors Motion to Reconsider is DENIED.

So Ordered This 17th Day of May, 2017

Thomas M Hakes

Thomas M. Hakes, Judge
Huntington Circuit Court

IN THE
COURT OF APPEALS OF INDIANA

Cause No. 35A02-1705-CR-1060

WPTA-TV,	)	
	)	Appeal from the Huntington
Appellant (Intervenor below),	)	Circuit Court
	)	
v.	)	Trial Court Cause No.
	)	35C01-1605-F3-000096
STATE OF INDIANA,	)	
	)	The Honorable Thomas M.
Appellee (Plaintiff below),	)	Hakes, Judge
	)	
v.	)	
	)	
JOHN C. MATHEW,	)	
	)	
Appellee (Defendant below).	)	

BRIEF OF APPELLANT, WPTA-TV

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I.
STATEMENT OF THE ISSUES

A. Whether a prior restraint that prohibits the truthful and accurate broadcast of a publicly available court record passes Constitutional muster.

B. Whether an Indiana court may limit the use and dissemination of a publicly available court record without adhering to the process for limiting public access set forth in Administrative Rule 9.

C. Whether the broadcast of a publicly available court record after the conclusion of a criminal proceeding violates the prohibition against cameras in the courtroom as established by Indiana Judicial Conduct Rule 2.17.

II.
STATEMENT OF CASE

This appeal arises from the Trial Court's Order Limiting the Use of Court Record and Barring its Broadcast or Dissemination (the "Order"), which prohibited broadcast of a Court record, subject to the contempt power of the Trial Court.

On April 18, 2017, WPTA submitted a request for access to records from the sentencing hearing in this case. (App. __ [Dkt., request, And Order]). Two days later, the Trial Court issued its Order, which acknowledges "[t]he Court is required to provide the record as requested."

(App. __ at ¶2). The Order further states, "[t]he requesting person may not broadcast the record, subject to the contempt power of this Court." (App. __ at ¶3).

On May 2, 2017, WPTA filed its Verified Motion to Intervene and Reconsider Order of April 20, 2017 (the "Motion to Reconsider"). (App. __). The Motion to Reconsider argued that the Order should be vacated because it violated Administrative Rule 9 on procedural and substantive bases.[1] (App. __).

On May 4, 2017, the Trial Court granted WPTA leave to intervene and determined that it would rule on the request for reconsideration under Trial Rule 60(D). (App. __). Then, on May 17, 2017, the Trial Court issued its Order on Motion to Reconsider, which denied the relief request by WTPA. (App.__). The Trial Court reasoned that providing WPTA with a copy of the record complied with Administrative Rule 9(C)(6) by allowing WPTA to inspect and copy a public court record. (App. __). However, the Trial Court determined that allowing broadcast of the court record would violate Judicial Conduct Rule 2.17, which prohibits broadcasting in a court room or

[1] On two occasions throughout the pendency of this matter, the State filed notices of exclusion of confidential information, indicating that information was excluded from the public record in compliance with Administrative Rule 9(G). (App. __ [see Dkt at 5/27/16 and 2/2/17; also include the notices in the appendix]). WPTA does not seek access or use of any material excluded from public access in this matter.

immediately adjacent thereto during sessions of court or recesses between sessions, and concluded, "[b]roadcasting all or parts of a court record is no different than [WPTA] making their own recording and then broadcasting it . . . an act that is not allowed by the Rule." (App. __). On this basis, the Trial Court upheld its limitation on the use of the court record. (App. __).

WPTA timely filed its notice of appeal on May 19, 2017, and this appeal ensued. (App. __).

III.
STATEMENT OF FACTS

The underlying facts of the State's charges against Defendant John C. Mathew are largely irrelevant to the First Amendment issue confronting the Court. Mathew was charged with and plead guilty to multiple counts of sexual battery and battery. (App. __).

On April 17, 2017, the Trial Court conducted a sentencing hearing, which included presentation of testimony by several witnesses for the State and several witnesses for Mathew. (App. __). Mathew was ultimately sentenced to four years in the Indiana Department of Corrections, suspended subject to probation with the first two years on electric monitoring/home detention as a condition of probation. (App.__). Mathew was also ordered to special probation condition for adult sex offenders and required to register as a sex offender. (App.__).

On April 18, 2017, WPTA submitted a request to access public records. (App. __). WPTA's request sought a copy of the Court's records from the sentencing hearing, including the audio recording of the sentencing hearing, documents, including text messages, submitted as evidence at the hearing, and letters submitted on behalf of Mathew and the victim (these materials are referred to herein collectively as the "Record"). (App. __).

The State submitted notices of exclusion of confidential information on two occasions during the pendency of this matter—on May 27, 2016 and February 2, 2017. App. __ [see Dkt at 5/27/16 and 2/2/17; also include the notices in the appendix]). These notices did not pertain to submissions made during the sentencing hearing or at issue in the Record. No other party or individual sought any other confidentiality during the pendency of this matter. (App. __).

The Trial Court granted the records request but issued its Order, as set forth in more detail in the Statement of the Case, *supra*. Additional facts are provided in the Argument section below, as needed.

IV.
SUMMARY OF THE ARGUMENT

The freedom to report current events is at the core of the expression protected by the First Amendment. As recognized by our founding fathers, "[o]ur liberty depends on the freedom of the press, and that cannot be limited

without being lost. . . ." 9 Papers of Thomas Jefferson 239 (J. Boyd ed. 1954). Further, the press is recognized as "the handmaiden of effective judicial administration, especially in the criminal field" and a guard "against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 560 (1976).

This case presents the Court with a blatant and impermissible restriction of WPTA's speech. The Trial Court's Order violates WPTA's First Amendment rights by prohibiting the publication of open court records. First Amendment jurisprudence widely recognizes open government is imperative to the democratic process and that that unrestricted reporting of governmental proceedings is critical to ensuring an informed citizenry. Given their limited time and resources for first hand observation of governmental operations, citizens rely upon the media to report such facts. Here, the public has an interest in knowing why the Trial Court accepted Mathew's plea of guilt as to sexual battery charges and ultimately suspended his prison sentence in favor of probation and home detention.

In light of the substantial public interest in open access to government records and the ability to freely and accurately disseminate the contents of such records, prior restraints on the media are presumptively disfavored. Indeed, the United States Supreme Court has recognized that the media

cannot be sanctioned for publishing or broadcasting the contents of an open court record.

Prior restraints on free speech can overcome the presumption of constitutional invalidity only if there is another competing threat to fundamental rights that cannot be mitigated through other means. In the context of trial publicity, a court must determine whether the pretrial news coverage is so pervasive that it will deprive the defendant of a fair trial and whether the threat could be abated through other measures. Because the Trial Court's Order came after the sentencing hearing and did not implicate pre-trial publicity, there is no basis to restrain WPTA from accurately broadcasting the Trial Court's Record of the sentencing hearing.

In addition to violating the First Amendment, the Order should be vacated because it was promulgated in violation of the procedure required by Indiana Administrative Rule 9. The Trial Court issued the order *sua sponte*, without having received any verified request to limit access or use of the Record, without giving public notice and holding a public hearing on the question of access, and without the requisite finding by clear and convincing evidence that the balance of harms weighs in favor of restricting the access or use of the Record. The Order should be vacated on this procedural basis.

Additionally, the Trial Court's conclusion that Judicial Conduct Rule 2.17 justifies the Order is misplaced, as Rule 2.17 does not prohibit

dissemination of a Court Record after the conclusion of a court room proceeding. Finally, even if the Trial Court had followed the Administrative Rule 9 procedures to limit the use of the Record, it could not have found by clear and convincing evidence that any public or private interest outweighs the public interest in open access to the Record. The Order is an invalid prior restraint that cannot be justified under any rule, statute, or public policy governing access to Indiana court records.

V.
ARGUMENT

A. THE ORDER CONSTITUTES AN IMPERMISSIBLE PRIOR RESTRAINT ON SPEECH.

The Order restricting WPTA from broadcasting the Record violates the First Amendment to the United States Constitution because it constitutes an impermissible prior restraint on WPTA's speech (i.e., a "gag order"). As a general rule, prior restraints "bear[ ] a heavy presumption against . . . constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971). Accordingly, this Court must carefully scrutinize the Order and its constitutional implications.

Prior restraints on the news reporting of current events can be especially damaging. *Id.* at 559. Indeed,

> **prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.** A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative. **A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time.**

Id. at 559 (emphasis added).

Significantly, "there is nothing that proscribes the press from reporting events that transpire in the courtroom." *Id.* at 553. A trial is a public event and what happens in the courtroom is considered public property. *Craig v. Harney*, 331 U.S. 367, 374 (1947). It is not the judiciary's job to "suppress, edit, or censor events which transpire in proceedings before it." *Id.* at 374. Likewise, the United States Supreme Court has acknowledged that "the reporting of the true contents of [public] records by the media" benefits the public. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975).

In *Cox Broadcasting*, the United States Supreme Court explained that not only would forbidding the publication of information released to the public in official court records have a chilling effect on the reporting of public affairs, it would also violate the First and Fourteenth Amendments. *Id.* It falls to the state to determine what to include in a public record, and **[o]nce**

true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it.[2] *Id.* (emphasis added). As a result, "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Smith v. Dailey Mail Pub. Co.*, 443 U.S. 97, 103 (1979) (the State of Virginia's interest in the anonymity of juvenile trials was insufficient to justify the application of a criminal penalty to newspaper reporters who published the name of a juvenile offender).

Accordingly, a court order restricting the media from truthful reporting of a criminal proceeding is rarely appropriate. In the rare case that a gag order is upheld, it is usually to address pretrial publicity where a defendant's sixth amendment right to a fair trial is at stake. *See*, *e.g.*, *S. Bend Tribune v. Elkhart Circuit Court*, 691 N.E.2d 200 (Ind. Ct. App. 1998) (upholding a prior restraint against the trial participants, but imposing no restriction upon the media). A prior restraint will be permitted only in the extraordinary case in which the "gravity of the 'evil' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *United States v. Dennis*, 183 F.2d 201, 212 (CA2 1950), *aff'd*, 341 U.S. 494 (1951); see also L.

[2] Notably, the Court referenced broadcasting as a form of publication protected by this holding: "reliance must rest upon the judgment of those who decide what to publish or broadcast." 420 U.S. at 495.

Hand, The Bill of Rights 58-61 (1958). In making this determination, an appellate court examines the evidence that was before the trial court when the Order was entered to determine "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger." *Nebraska Press*, 427 U.S. at 562. Through consideration of these three factors, it is determined "whether the record supports the entry of a prior restraint on publication, one of the most extraordinary remedies known to our jurisprudence." *Id.*

Here, consideration of the *Nebraska Press* factors point unerringly to one conclusion: the Order's restrictions on dissemination of the Record constitute an impermissible prior restraint. Most notably, Mathew's sentencing hearing, at which the testimony comprising the Record was given, took place on April 17, 2017. (App. __). WPTA then requested the Record on April 18, 2017, after the conclusion of the sentencing hearing. (App. __). Thus, there was no longer any need to empanel a jury and there was no risk that Mathew would be denied the possibility of an unbiased jury of his peers due to excessive publicity. Unlike the situation in *Nebraska Press*, the criminal proceeding against Mathew reached its conclusion prior to the Trial Court's gag order against WPTA and there was no risk that news coverage would impair Mathew's rights. Thus, there was no need to "mitigate the

effects of unrestrained pretrial publicity." *Nebraska Press*, 427 U.S. at 562. There is no need to reach the other elements of the *Nebraska Press* test.

Further, there has been no identification of any other "state interest of the highest order," which would make it appropriate to prevent WPTA from disseminating the Record. *Smith*, 443 U.S. at 103. The only interest identified by the trial court in either of its Orders – compliance with Judicial Conduct Rule 2.17, which prohibits cameras in the courtroom – is not a compelling reason to restrict WPTA's First Amendment rights and the right of the public to be informed of important criminal proceedings. *See infra*. The Order therefore should be vacated because it is constitutionally invalid.

B. THE ORDER MUST BE VACATED BECAUSE IT IMPOSES LIMITATION ON THE USE OF PUBLIC INFORMATION WITHOUT ANY BASIS UNDER INDIANA LAW.

Pursuant to the inherent authority of the Indiana Supreme Court and Indiana Code § 5-14-3-4(a)(8), public access to and confidentiality of court records is governed by the provisions of Administrative Rule 9. The policy and procedure set forth in Administrative Rule 9 represent a balance between public safety and protection of Due Process Rights and privacy interests on one hand, and public accessibility and government accountability and transparency on the other hand. *See* Ind. Administrative Rule 9(A)(2). In accordance with these purposes, the general rule is that court records are accessible to the public. Admin R. 9(D)(1). This general rule is limited only

by the provisions of Rule 9(G), which require, among other things, a public hearing to be held before restricting public access to most categories of court records is restricted. *Id.* Here, the Trial Court failed to hold such a public hearing prior to issuing its Order restricting use of the Record and thus the Order must be vacated. Even if the Trial Court had held a public hearing, there is no valid basis to restrict access and use of the Record.

1. The Trial Court failed to adhere to the procedural requirements of Administrative Rule 9 in issuing the Order.

The Trial Court's Order denying WPTA's Motion to Reconsider erroneously relies on Administrative Rule 9(D)(4) to prohibit the use and dissemination of the court record at issue. Using Rule 9(D)(4) in such a manner – to allow "access" but prohibit use or dissemination – renders access to the record meaningless. *See Cox Broad.*, 420 U.S. at 491-92 (the public relies upon the press to report the operations of the government). The Trial Court's Order thus effectively prevents and/or limits access without following the strict procedures of Administrative Rule 9(G).

a. The Trial Court's reliance on Rule 9(D)(4) in restricting access is misplaced

In its May 17, 2017 Order denying WPTA's Motion to Reconsider, the Trial Court relied solely on Administrative Rule 9(D)(4), which states:

> A Court may manage access to audio and video recordings of its proceedings to the extent appropriate to avoid substantial interference with the resources or normal operation of the court and to comply with Indiana Judicial Conduct Rule 2.17 *[former Canon 3(B)(13)*]. **This provision does not operate to deny any person the right to access a Court Record under Rule 9(D)(1)**."

(Emphasis added). Without further elaboration, the Trial Court states that it followed Rule 9(D)(4) and examined Judicial Conduct Rule 2.17, which it reasoned prohibits broadcasting all or parts of a court record because such broadcasting "is no different than the Intervenors making their own recording then broadcasting it … an act that is not allowed by the Rule." (Order on Mot. to Reconsider). The Trial Court's Order prohibiting broadcast of the Record thus appears to be based solely on the Trial Court's perceived need to comply with Judicial Conduct Rule 2.17 and not with any need "to avoid substantial interference with the resources or normal operation of the court." Admin. R. 9(D)(4).

Judicial Conduct Rule 2.17 states, "Except with prior approval of the Indiana Supreme Court, a judge shall prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto **during sessions of court or recesses between sessions**." (Emphasis added). The Rule then goes on to list three exceptions: (1) use of electronic or photographic means for presentation of evidence, perpetuation of the record, or other administrative purposes; (2)

broadcasting, televising, or recording investitive, ceremonial, or naturalization proceedings; and (3) recording and reproduction of proceedings where the means of recording will not "distract participants or impair the dignity of the proceedings," the parties have consented, the recording will not be exhibited until after the proceeding and all direct appeals have concluded, and the reproduction will be exhibited only for instructional purposes.

The plain language of Judicial Conduct Rule 2.17 makes clear that the concern with cameras in the courtroom is cameras **in** or near the courtroom – the physical presence of recording equipment in the courtroom which may "distract participants" or "impair the dignity of the proceeding." *See* Ind. Judicial Cond. R. 2.17(3)(a). This purpose is reflected in numerous Supreme Court orders authorizing pilot projects for cameras in trial court courtrooms and authorizing cameras in the Indiana Court of Appeals. *See, e.g.,* Order, Supreme Court Cause No. 94S00-1201-MS-46 (requiring that cameras and media personnel "must not be intrusive of the judicial process"); Order, Supreme Court Cause No. 94S00-0605-MS-166 (May 9, 2006) (same; and stating that cameras must "produce no distracting sound")[3]; Order, Supreme

[3] Consistent with the concerns embodied in Judicial Conduct Rule 2.17, Justice Dickson, in an opinion dissenting from the May 9, 2006 Order allowing a pilot project in certain trial courts, further stated his concern that cameras in the courtroom "significantly jeopardize [witnesses and jurors'] ability to fully concentrate and participate in trial proceedings, and endanger the reliability and fairness of our trials." Further, "[p]eople are often aware

Court Cause No. 94S00-9705-MS-290 (August 20, 1997) (allowing cameras and microphones where they "will not intrude in the appellate process or in any way detract from the oral argument.").

The concern for the dignity of proceedings is reflected in case law as well. For example, in *Willard v. State*, the Indiana Supreme Court affirmed the conviction of a criminal defendant notwithstanding his claim that the trial court improperly disseminated video footage of proceedings to the press, permitted the taking of photographs through a window of the courtroom, and allowed tape recorders in the courtroom. 400 N.E.2d 151, 155 (Ind. 1980). In rejecting the defendant's claim that he was prejudiced by the trial's court's violation of Judicial Canon 3A(7) (the predecessor to Judicial Conduct Rule 2.17), the Court said:

> Concerning the trial proceedings here, it was not shown that special equipment was set up or that a special atmosphere of importance was attached to this trial by the procedures used. In fact, the procedures employed by Judge Wilson were also utilized by him in other trials conducted in his court. Thus, no unusual "carnival atmosphere" attached to these proceedings.

Id. Notably, the Supreme Court did not voice concern over the dissemination of recorded material after the conclusion of the proceedings. *Id.*

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of television cameras, distracted by them, and concerned about whether they are 'on camera' and how they will appear on television." These legitimate concerns are not present where broadcasting of audio previously recorded in the normal course of court proceedings is involved.

Contrary to the Trial Court's finding that "[b]roadcasting all or parts of a court record is no different than the Intervenors making their own recording and then broadcasting it … an act that is not allowed by [Rule 2.17]," (Order on Mot. to Reconsider), there is a significant difference between hauling audio equipment into a court room and operating it during sessions of the court and disseminating the audio record captured and maintained by the court in the ordinary course of its operations. As discussed above, Rule 2.17 is clearly concerned with the former situation which risks distracting witnesses and jurors and impairing the integrity of the proceeding as it occurs. By contrast, there is no risk of distracting live witnesses or jurors and no risk of impairing the dignity of the proceedings as they occur when a recording is made in the normal course of judicial administration and later released to the public.

In sum, the policy behind Rule 2.17 is not served by the Trial Court's Order. Rule 2.17 is concerned with contemporaneous recordings in courtrooms, not *ex post facto* dissemination of previously-recorded testimony. Accordingly, Administrative Rule 9(D)(4) and Judicial Conduct Rule 2.17 cannot serve as a proper basis for denying WPTA's Motion to Reconsider and upholding the Trial Court's Order limiting the use and dissemination of the Record.

b. The Record is not excludable under Rule 9(G)(1), 9(G)(2), or 9(G)(3)

Administrative Rule 9(G) delineates various categories of court records which require different levels of protection. The court record here is not properly excluded under Rule 9(G)(1), 9(G)(2), or 9(G)(3). Accordingly, in order to exclude the Record from public access, the Trial Court would have had to have followed the procedures of Rule 9(G)(4) to exclude or limit public access. Because the Trial Court did not follow these procedures, its Order restricting use of the public Record is invalid.

First, Rule 9(G)(1) lists court records that must be excluded from public access in entirety. These include entire cases where (a) all court records are declared confidential by statute or court rule; (b) all court records are sealed in accordance with the Indiana Access to Public Records Act; (c) all court records are excluded by court order in accordance with Administrative Rule 9(G)(4); or (d) the case is a mental health case. Admin. R. 9(G)(1).

Second, Rule 9(G)(2) lists individual case records that must be excluded from public access. These include, among other categories, records declared confidential or excluded from public access pursuant to federal law, state statute, or court rule, privileged records, social security numbers, bank account, credit card, or personal identification numbers, and so on. Admin. R. 9(G)(2). Notably, the record reflects that confidential information was

properly excluded from public access in this matter. (App. __ [notices of exclusion]).

Third, court administration records are confidential and excluded from public access where they constitute case records excluded in Rule 9(G)(2), or are otherwise excluded from public access or declared confidential by Indiana statute or court rule. Admin R. 9(G)(3).

None of the three provisions discussed above is applicable to the Record here, because they all relate to records that are mandatorily withheld from public access. There has been no contention that any of these provisions apply, and indeed, the Trial Court did in fact release the record to WPTA, demonstrating that the Record is not *de facto* excluded from public access.

c. The Record is not excludable under Rule 9(G)(4) because the Trial Court did not follow that Rule's procedures

Where none of the provisions of Rule 9(G)(1), 9(G)(2), or 9(G)(3) apply, Rule 9(G)(4) provides, "**In extraordinary circumstances**, a Court Record that otherwise would be publicly accessible **may be** excluded from Public Access by a Court having jurisdiction over the record," provided that four requirements are met. (Emphasis added).

First, a person affected by the release of a court record must make a verified written request demonstrating that (i) the public interest will be substantially served by prohibiting access to the record; (ii) access or

dissemination of the record will create a significant risk of substantial harm to the requestor or other persons or the general public; or (iii) a substantial prejudicial effect to ongoing proceedings cannot be avoided without prohibiting public access. Admin R. 9(G)(4)(a).

Second, the person seeking to prohibit access must provide notice to the parties and other persons as the court directs. Admin R. 9(G)(4)(b). Those given notice are given twenty days from receiving notice to respond to the request. *Id.*

Third, if the court does not initially deny the request, the court must post advance public notice of a hearing and hold a hearing on the request to prohibit public access to the court record. Admin R. 9(G)(4)(c).

Fourth, and finally, following the public hearing, the court must issue a written order stating the reasons for granting the request and finding that the requestor demonstrated, by clear and convincing evidence, that one or more of the requirements of Rule 9(G)(4)(a) have been satisfied. Admin. R. 9(G)(4)(d). The court's written order must also balance the public access interests served by Rule 9 and the grounds demonstrated by the requestor. *Id.* Additionally, the order must use the least restrictive means and duration when prohibiting access. *Id.*

Here, the Trial Court did not follow any of the mandatory provisions of Rule 9(G)(4) in limiting the use and dissemination of the Record. No party or

person affected by the records filed a written request to exclude the record from public access. There was no notice of a hearing and no hearing was held. The lack of a hearing alone makes the Order improper. *Allianz Ins. v. Guidant Corp.*, 884 N.E.2d 405, 409 (Ind. Ct. App. 2008) (applying prior codification of Administrative Rule 9, this Court found that it was improper for a trial court to seal a case record from public access without holding the public hearing required by the rule).

Although the Trial Court issued a written order with its findings, the written order did not, and could not, find that there was clear and convincing evidence that the requirements of Rule 9(G)(4)(a) had been met. Rather, the Trial Court, *sua sponte*, issued the Order restricting use and dissemination of the Record – an act which effectively excludes the Record from public access. "A trial is a public event. What transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367 (1947). Thus, limiting the dissemination of an otherwise open public record in this manner is improper. "There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it." *Id. See also Fontana Police Dep't v. Villegas-Banuelos*, 74 Cal. App. 4th 1249, 1252 n.2 (4th DCA 1999) (citing *Los Angeles Police Dept. v. Superior Court*, 65 Cal. App. 3d 661 (3d DCA 1977) ("if the record is a public record *all* persons have

access thereto")). The Trial Court's Order restricting use and dissemination of the Record must be reversed.

2. Even if the Trial Court had conducted the public hearing required by Indiana Administrative Rule 9, Rule 9 and the United States Constitution prevent the Trial Court from limiting WPTA's dissemination of the Record.

Without making any determination that the public should be excluded or limited from accessing the Record, the Trial Court has unilaterally limited WPTA's ability to use a copy of the publicly available Record.

Consistent with the Constitutional limitation against prohibiting the media from printing or broadcasting truthful information about court proceedings, *Daily Mail*, 443 U.S. at 103, Administrative Rule 9 does not contemplate Indiana courts limiting the use or republication of court records unless they are already excluded from public access. Although Rule 9(G), Section (7)(c), states that "[a] Court may place restrictions on the use or dissemination of the Court Record to preserve confidentiality," the official commentary to Rule 9 makes clear that "Section G(7) is intended to address those extraordinary circumstances in which **confidential information or information which is otherwise excluded from Public Access** is to be included in a release of information." (Emphasis added). Thus, Section G(7)(c), allowing restriction on use or dissemination, only comes into play

after the information is properly excluded from public access – *e.g.*, after a 9(G)(4) hearing has been held.

Here, even if a verified petition to prohibit access to the record *had* been submitted, and even if the Trial Court *had* followed the appropriate Administrative Rule 9(G)(4) procedures, that process would have led to the inescapable conclusion that the Record may not be excluded from public access or limited in its use. As noted above, the Trial Court would have been required to find, by clear and convincing evidence, that: (i) the public interest would be served by prohibiting access; (ii) access or dissemination of the record would create a significant risk of substantial harm; or (iii) a substantial prejudicial effect to ongoing proceedings could not be avoided without prohibiting access. Admin. R. 9(G)(4)(a). The Trial Court would also had to have balanced the public access interests with private interests in restricting access to the Record.

There is a strong public interest in allowing members of the news media to report on criminal proceedings. For example, in *In re T.B.*, 895 N.E.2d 321 (Ind. Ct. App. 2008), a panel of this Court affirmed in part the trial court's grant of access to a newspaper of certain Department of Child Services and juvenile court records in part based on its finding that there was a legitimate public interest in allowing the newspaper to inform the public about the death of a child. This was found notwithstanding the fact that

juvenile court records are generally maintained confidentially. *Craig v. Harney*, 331 U.S. at 374, is also instructive on this point. There, the United States Supreme Court pointed out that "what transpires in a court room is public property" and explained, "[i]f a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt." And yet, that is precisely what the Trial Court's Order proposes to do—punish WPTA for the broadcast equivalent of reproducing a written transcript.

Similarly, here, there is a legitimate public interest in allowing the news media to disseminate testimony involved in criminal proceedings relating to sexual battery and battery.

> [I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. [ ] With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.

Cox Broad., 420 U.S. at 491-92. This public interest is not counterbalanced by any risk of substantial harm or private interests, as shown by the fact that no interested persons petitioned the Trial Court to prevent access or

dissemination of the record.[4] (App. __ [dkt]). The names of adult crime victims are not among the information that must be excluded from public access pursuant to Administrative Rule 9(G)(2)(g). Thus, any third party would have had to carry the burden of presenting clear and convincing evidence that some restriction on the Record was necessary to i) serve the public interest; (ii) avoid a significant risk of substantial harm; or (iii) avoid a substantial prejudicial effect to ongoing proceedings. Admin. R. 9(G)(4)(a). No party challenged confidentiality or attempted to meet this burden. (App. ___).

Likewise, there is no risk of substantial prejudice to ongoing proceedings, because the proceedings are now closed. The only interest present is the public interest in access to court records, and for that reason, any 9(G)(4) proceedings would point squarely toward allowing access and dissemination. *See Cox Broadcasting*, 420 U.S. at 495 (it does not serve the public interest to limit access to criminal proceedings). For this additional reason, the Order should be vacated and WPTA, should be permitted to fulfill

[4] Indeed, the only requests for confidentiality in this matter were made by the State, pursuant to automatic exclusions of confidential information. (App. __ [the state's notices of exclusion]). These notices were submitted in connection with filings other than the evidence at the sentencing hearing. Thus, there are no third parties who desire a restriction on publication of the Record.

its responsibility to fully and accurately report the proceedings of the government and the Trial Court by broadcasting the Record.

VI.
CONCLUSION

The Trial Court's Order is an impermissible prior restraint on WPTA's speech. There is no valid basis to prohibit full and accurate reporting of Mathew's sentencing hearing because the sentencing hearing is concluded. Thus, there is no public or private interest that outweighs the public's right to be informed about the activities of its government and for WPTA to report these activities. Moreover, the Trial Court's Order violates the mandatory procedures and balancing test set forth in Administrative Rule 9. For these reasons, Appellant, WPTA-TV, respectfully requests the Order be vacated.

Respectfully submitted,

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WORD COUNT CERTIFICATE

The undersigned hereby certifies that the foregoing Brief of Appellant complies with Indiana Appellate Rule 44 word limitation in that it contains _____ words, which does not exceed the 14,000 word limit.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on June ___, 2017, the foregoing *Brief of Appellant* was filed with the Clerk of the Indiana Court of Appeals via electronic filing utilizing the Indiana E-Filing System (IEFS).

I further certify that on June ___, 2017, the foregoing *Brief of Appellant* was served upon the following counsel of records via IEFS:

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