IN THE SUPREME COURT OF GEORGIA

STATE OF GEORGIA

STATE OF GEORGIA,	:	
	:	**Supreme Court**
	:	**Case No. _____**
	:	
v.	:	**Superior Court of Floyd**
	:	**County Case No. 01-CR-16707**
JOSEPH S. WATKINS,	:	
	:	
	:	

BRIEF OF AMICUS CURIAE GEORGIA FIRST AMENDMENT FOUNDATION IN SUPPORT OF UNDISCLOSED LLC'S EMERGENCY MOTION TO AMEND ORDER PROHIBITING ACCESS TO COURT RECORDS OR, IN THE ALTERNATIVE, APPLICATION FOR LEAVE TO APPEAL

INTRODUCTION

Pursuant to Supreme Court Rule 23, Amicus Curiae Georgia First Amendment Foundation respectfully submits the following brief asking that this Court to amend the Superior Court of Floyd County's order to allow copying consistent both Uniform Superior Court Rule 21 ("Limitation of access to court files") and constitutional and common law principles, or in the alternative, in support of Appellant's application for leave to appeal. Amicus files this brief in support of Undisclosed LLC's Emergency Motion to Amend Order Prohibiting Access to Court Records or, In the Alternative, Application for Leave to Appeal.

This case provides an avenue to clarify the meaning of access to court records, within the context of both the Uniform Superior (and other) Court Rules and consistent with constitutional and common law principles. Because Georgia courts have routinely protected and promoted the

access of rights of citizens, this case offers the Court an opportunity to emphasize the public's right to meaningful access to court records and proceedings. Meaningful access to court records should mean more than just access to a cold transcript. Courts throughout the Country have repeatedly recognized that the public has "a legitimate and important interest" in seeing and hearing recorded evidence.[1]

In short, Amicus Curiae urges this Court to allow copying of court audio recordings pursuant to Uniform Superior Court Rule 21.

STATEMENT OF INTEREST

Amicus Curiae Georgia First Amendment Foundation is a Georgia nonprofit corporation organized in 1994 to inform and educate the public on government access and First Amendment issues and to provide legal support in cases in which the public's access to public institutions is threatened.

ARGUMENT AND CITATION OF AUTHORITY

A. Uniform Superior Court Rule 21 authorizes copying, in addition to inspection, of the court audio recordings.

> All court records are public and are to be available for public inspection unless public access is limited by law or by the procedure set forth below.

Uniform Superior Court Rule 21.

> In this state, 'the public and press have traditionally enjoyed a right of access to court records' … To preserve this right, this court and council of superior court

[1] *In re National Broadcasting Co., Inc.*, 635 F.2d 945, 953 (D.C. Cir. 1981) ("Though the transcripts of the videotapes have already provided the public with an opportunity to know what words were spoken, there remains a legitimate and important interest in affording members of the public their own opportunity to see and hear evidence . . ."). *See also United States v. Criden*, 648 F.2d 814, 823 (3d Cir. 1981); *United States v. Myers*, 635 F.2d 945, 950 (2d Cir. 1980).

> judges have adopted a rule that presumes the public will have access to all court records.

Green v. Dinnon, Inc., 262 Ga. 264, 417 S.E.2d 11 (1992) *citing Atlanta Journal & Constitution v. Long*, 258 Ga. 410, 411, 369 S.E.2d 755 (1988). In fact, Georgia may be more protective of the constitutional right to open courts than the federal government.

> Georgia law, as we perceive it, regarding the public aspect of hearings in criminal cases is more protective of the concept of open courtrooms than federal law. *Ga. Gazette Pub. Co. v. Ramsey*, 248 Ga. 528, 284 S.E.2d 386 (1981); *Lancaster v. State*, 168 Ga. 470, 475, 148 S.E. 139 (1929); *Moore v. State*, 151 Ga. 648, 108 S.E. 47 (1921); *Myers v. State*, 97 Ga. 76, 77, 25 S.E. 252 (1895); *Lowe v. State*, 141 Ga. App. 433, 435, 233 S.E.2d 807 (1977) … Although the sixth amendment to our federal constitution (Code Ann. 1-806) affords the accused a right to a public trial, our state constitution point-blankly states that criminal trials *shall* be public. Const. of Ga. 1976, Art. I, Sec. I, Par. XI (Code Ann. 2-111). 7 We construe that state constitutional provision to be as applicable to pre-trial, mid-trial, and post-trial hearings as to the trial itself. We see no friction between these state and federal constitutional provisions, properly interpreted, since the objectives of both are identical: access to judicial hearings for the public and fair trials for criminal defendants.

R. W. Page Corp. v. Lumpkin, 249 Ga. 576, 578-79, 292 S.E.2d 815 (1982).

Consistent with constitutional law and previous caselaw,[2] the *Green* court held that uniform court rules, as opposed to the state's open records act, required a court reporter's tape recording to be released. "An official court reporter's tape of a judge's remarks in open court is a court record." *Green v. Dinnon*, 262 Ga. at 264. The *Green* court then cited *R.W. Page Corp. v.*

---

[2] Regardless of the authority, the Georgia courts have firmly established the courts are open. *See Fathers Are Parents Too v. Hunstein*, 202 Ga. App. 716, 717, 415 S.E.2d 322 (1992) (sunshine laws do not apply to judicial branch) citing *Coggin v. Davey*, 233 Ga. 407, 411, 211, S.E.2d 708 (1975) (sunshine laws do not apply to legislative branch); *see also* 1979 Op. Atty. Gen. 79-25 (concluding that the sunshine law does not apply to the judiciary because, like the General Assembly, the courts have a history of self-regulation).

Kilgore for the proposition that "the tape or its transcript must be made available for public inspection under Rule 21." *Id*. at 264.

Yet while neither the *Green* nor *Kilgore* court suggests that the release of the tape or the transcript are mutually exclusive options, in this case, the Superior Court of Floyd County denied Appellant the opportunity to copy audiotapes. This restrictive interpretation is contrary to Georgia's public policy of as open a court system as possible.

> In the State of Georgia, the public and the press have traditionally enjoyed a right of access to court records. Public access protects litigants both present and future, because justice faces its gravest threat when courts dispense it secretly. Our system abhors star chamber proceedings with good reason. Like a candle, court records hidden under a bushel make scant contribution to their purpose.

Atlanta Journal & Constitution v. Long, 258 Ga. 410, 411, 369 S.E.2d 755 (1988).[3]

As Uniform Superior Court Rule 21 requires, and to preserve Georgia's steadfast commitment to open courts and court records, this Court should amend the Superior Court of Floyd County's order to allow copying of the court audiotapes, or, in the alternative, grant Appellant's application for leave to appeal.

B. Constitutional and common law principles require the opportunity to copy the requested court audio recordings.

The public and media have a presumptive constitutional and common law right of access to judicial proceedings and records. As courts have long recognized, in adjudicating rights of

---

[3] *See also R.W. Page Corp v. Lumpkin*, 249 Ga. 576, n. 1, 292 S.E.2d 817 (1982) ("It is noteworthy that the dry prose of most judicial proceedings is not deemed "newsworthy" by either the general public or the news media. Most judicial proceedings, even some of considerable importance to the general populace, remain unattended by the public and unreported by the news media. This court has sought to open the doors of Georgia's courtrooms to the public and to attract public interest in all courtroom proceedings because it is believed that open courtrooms are a *sine qua non* of an effective and respected judicial system which, in turn, is one of the principal cornerstones of a free society.

access to civil proceedings, "[t]here is no question that the press and the public jointly possess a common-law right to inspect and copy judicial records and public documents." *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 355 (11th Cir. 1987). *See also Littlejohn v. BIC Corp.*, 851 F.2d 673, 677-78 (3d Cir. 1988) ("The existence of such a right 'is beyond dispute'").

That the public has a correlative common law right of access to civil proceedings has also been long recognized. As the Eleventh Circuit stated, "[t]here is no question that a common law right of access exists as to civil proceedings. 'What transpires in the courtroom is public property.'" *Wilson v. American Motors Corp.*, 759 F.2d 1568, 1570 (11th Cir. 1985) (emphasis added) (quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947)); *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 22-23 (2d Cir. 1984); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1067-71 (3d Cir. 1984); *In re Continental Illinois Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177-79 (6th Cir. 1983).

Decisions construing the Georgia and United States Constitutions have underscored that the public's right of access to civil proceedings and pleadings is of constitutional magnitude. In what is now an extensive line of cases, the Georgia Supreme Court and the United States Supreme Court have held that the public right of access to judicial proceedings and to those court records that memorialize the proceedings and the court's rulings is protected by federal and state constitutional guarantees.

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the United States Supreme Court held that the right to attend criminal trials is protected by the First Amendment. *See also Globe Newspaper Company v. Superior Court*, 457 U.S. 596 (1982) (mandatory closure

rule for trials involving specified sexual offenses where the victim is less than 18 years old violates the First Amendment).

Georgia's strict standard for closure is grounded in a commitment to the importance of openness:

> This court has sought to open the doors of Georgia's courtrooms to the public and to attract public interest in all courtroom proceedings because it is believed that open courtrooms are a sine qua non of an effective and respected judicial system which, in turn, is one of the principal cornerstones of a free society. 249 Ga. at 576 n.1.

WALB-TV v. Gibson, 269 Ga. 564, 567 (1998) (Georgia has an "open courthouse door policy") (Hunstein, J.) (concurring in judgment).

Whether the right of access to proceedings and records is constitutional or based on the common law, the legal standard is the same: "where, as in the present case, the [court] attempts to deny access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to that interest." *Newman v. Graddick*, 696 F.2d 796, 802 (11th Cir. 1983) (quoting *Globe Newspapers Co.*, 457 U.S. at 606-07(emphasis added). *R.W. Page*, 249 Ga. at 579 ("in Georgia, the criminal trial itself, and all its consequent hearings on motions (pre-trial, mid-trial and post-trial) shall be open to the press and public on equal terms unless the defendant or other movant is able to demonstrate on the record by 'clear and convincing proof' that closing the hearing to the press and public is the only means by which a 'clear and present danger' to his right to a fair trial or other asserted right can be avoided").

Based upon the public and media's presumptive constitutional and common law rights of access, and the fact that no compelling government interest at all has been put forward in this case, this Court should amend the Superior Court of Floyd County's order to allow copying of court audiotapes consistent with both Uniform Superior Court Rule 21 and constitutional and common law principles, or in the alternative grant Appellant's application for leave to appeal.

C. Other state appellate courts allowing copying of court audiotapes.

Other state appellate courts have extended their analysis beyond the finite discussion set forth above in *Green v. Drinnon*. In *Labot v. LaRose*, the Louisiana Court of Appeals addressed the appeal of a mandamus ordering a district judge to allow a plaintiff to inspect and copy an audio recording of a civil hearing in which he was a party. *See Labat v. LaRose*, 2011 CA 0957 (La. App. 2011). After an extensive discussion regarding the interplay between Louisiana's public records act and the constitutional right to court access (and the particular role of the court reporter), the Louisiana Court of Appeals ordered a copy of the audiotape of the hearing be made available to the plaintiff. *Id.* at 15 ("Judge Larose is further ordered to provide to Mr. Labat an audio copy of the recording, either in the form of a compact disc or some other comparable format agreeable to Mr. Labat …").

The North Carolina Court of Appeals also concluded that "the backup tape of the plaintiff's earlier court proceeding is a public record because it is a sound recording of public business conducted by a subdivision of North Carolina government." *See Stallings v. Daniels*, No. COA02-1154 (N.C. App. 2003). In *Stallings*, the plaintiff filed a complaint seeking an order to release a copy of a backup tape made during a separate lawsuit filed by the plaintiff. *Id.*

While the case primarily addressed jurisdictional issues, the North Carolina Court of Appeals directed the defendants to permit the plaintiff to examine and inspect the backup tape, and, to provide the copy in the type of media format requested by the plaintiff. *Id.*

> As defined by statute, the backup tape of the plaintiff's earlier court proceeding is a public record because it is a sound recording of public business conducted by a subdivision of North Carolina government. N.C.G.S. § 132-1(a). Accordingly, the plaintiff has correctly stated a cause of action and defendants must permit plaintiff to examine and inspect the backup tape. N.C.G.S. § 132.6(a). Defendant also must provide a copy of the recording in the media requested by the plaintiff, subject to the defendant's capability of providing a copy of the record in the requested media. N.C.G.A. § 132-6.2(a).

Id. at 3.

As this Court reviews the decision of the Superior Court of Floyd County, and as it attempts to maintain Georgia's commitment to open courts and records, it should consider the analyses set forth by other states.

CONCLUSION

For all the foregoing reasons, Amicus Curiae respectfully asks this Court to amend the Superior Court of Floyd County's order to allow copying of court audiotape recordings consistent both Uniform Superior Court Rule 21 and constitutional and common law principles, or in the alternative, grant Appellant's application for leave to appeal.

Respectfully submitted,

/s/ Hollie Manheimer
Hollie Manheimer (468880)
Attorney for Amicus Curiae Georgia First Amendment Foundation

150 E. Ponce de Leon Avenue
Suite 230
Decatur, GA 30030
(404) 377-0485 (telephone)
(404) 377-0486 (facsimile)

IN THE SUPREME COURT OF GEORGIA
STATE OF GEORGIA

STATE OF GEORGIA,	:	
	:	**Supreme Court**
	:	**Case No. _____**
	:	
v.	:	**Superior Court of Floyd**
	:	**County Case No. 01-CR-16707**
JOSEPH S. WATKINS,	:	
	:	

CERTIFICATE OF SERVICE

This is to certify that on this 14th day of November 2016, I perfected service upon all counsel of record by e-filing of **BRIEF OF AMICUS CURIAE GEORGIA FIRST AMENDMENT FOUNDATION IN SUPPORT OF UNDISCLOSED LLC'S EMERGENCY MOTION TO AMEND ORDER PROHIBITING ACCESS TO COURT RECORDS OR, IN THE ALTERNATIVE, APPLICATION FOR LEAVE TO APPEAL** by way of the Supreme Court of Georgia's efiling system, to:

Michael A. Caplan
Sarah Brewerton-Palmer
CAPLAN COBB LLP
75 Fourteenth Street, NE
Suite 2750
Atlanta, Georgia 30309

Office of the Floyd County District Attorney
3 Government Plaza #108
Rome, Georgia 30161

Clare Gilbert
Georgia Innocence Project
2645 N. Decatur Road
Decatur, Georgia 30033

/s/ Hollie Manheimer
Hollie Manheimer (468880)
Attorney for Amicus Curiae Georgia First Amendment Foundation
150 E. Ponce de Leon Ave. Suite 230
Decatur, Georgia 30030
(404) 377-0485 (telephone)