SUPREME COURT
STATE OF GEORGIA

STATE OF GEORGIA, Plaintiff, v. JOSEPH WATKINS, Defendant.	Supreme Court Case No. _____ Superior Court Case No. 01-CR-16707

UNDISCLOSED LLC'S EXPEDITED MOTION TO AMEND ORDER PROHIBITING ACCESS TO COURT RECORDS OR, IN THE ALTERNATIVE, APPLICATION FOR LEAVE TO APPEAL

Michael A. Caplan
Georgia Bar No. 601039
CAPLAN COBB LLP
75 Fourteenth St., Suite 2750
Atlanta, GA 30309
Tel: (404) 596-5610
Fax: (404) 596-5604
mcaplan@caplancobb.com
Attorney for Undisclosed LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

INTRODUCTION

This case concerns the long-established right to access and copy court records. The trial court prohibited non-party Undisclosed LLC, a legal documentary podcast with millions of listeners, from copying certain court records—namely, the audio recordings of the pretrial and trial proceedings in a closed murder case that was tried more than 15 years ago. These recordings are court records pursuant to Uniform Superior Court Rule 21, and no court has ever sealed the transcript or audio recordings of these long-closed proceedings. Moreover, neither the State of Georgia nor the defendant has opposed Undisclosed's request to access and copy the audio recordings. Because the records are open, Undisclosed has a right under both the common law and Rule 21 to inspect and copy those records. *See Green v. Drinnon*, 262 Ga. 264 (1992); *Atlanta Journal v. Long*, 258 Ga. 410, 411 (1988); *Nixon v. Warner Comm'ns, Inc.*, 435 U.S. 589, 597 (1978); *Littlejohn v. Bic Corp.*, 851 F.2d 673 (1988) (access to the courts "encompasses the right of the public to inspect and to copy judicial records").

In blocking Undisclosed's access, the trial court adopted a highly problematic interpretation of Rule 21. Although it concluded that the audio recordings were public records and therefore could be inspected pursuant to Rule 21, the trial court held that Undisclosed "may NOT duplicate, record or copy these

tapes/recordings in any form or format" without giving any justification for this restriction. The trial court's blanket prohibition on copying—which would equally apply to any court record—is an affront to the important principle of open courts that this Court has long recognized. "Public access protects litigants both present and future, because justice faces its gravest threat when courts dispense it secretly." *Atlanta Journal*, 258 Ga. at 411.

As many courts around the country have held, a right to inspect documents without a corresponding right to copy those documents is hollow and essentially meaningless. *See infra* Sec. III.A. The real value of open court records lies in the public's ability to copy and disseminate those records for public discussion, use in other proceedings, to petition for redress, or to otherwise ensure transparency and accountability in their public institutions. A prohibition on copying a court record impermissibly chills the public's ability to scrutinize and oversee the judicial branch and discover the truth about our system's administration of justice.

Under Rule 21 and well-established common law, the recordings at issue here are open court records subject to public inspection and copying. Accordingly, Undisclosed respectfully requests that this court amend the trial court's order pursuant to Uniform Superior Court Rule 21.5 and allow Undisclosed to copy the recordings. In the alternative, Undisclosed respectfully requests that this Court grant its application to appeal on an expedited basis. Undisclosed requests

expedited treatment of this Motion and Application because it is scheduled to produce and release episodes concerning the Joey Watkins criminal trial at issue in several weeks.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Non-party Undisclosed LLC is a Delaware corporation that produces the well-known podcast, "Undisclosed," which focused on criminal cases. Season One of Undisclosed focused on the case of Adnan Syed, bringing a unique legal perspective to the case covered by the popular podcast "Serial." *See* Request to Expedite Ex. A, Aff. of Susan Simpson ("Simpson Aff.") ¶ 2. Since the podcast's debut, Undisclosed has received over 120 million listens. *Id.* ¶ 10.

Season Two of Undisclosed, which debuted on July 11, 2016, focuses on the case of Joseph Watkins. *Id.* ¶ 3. In 2001, Mr. Watkins was convicted of the murder of Isaac Dawkins following a trial in 2001 in the Floyd County Superior Court. To date, Undisclosed has produced sixteen weekly episodes discussing Mr. Watkins's case, and the weekly podcast is scheduled to run through January 2017. *Id.* ¶ 10. Currently, the podcast is focused on the final stages of the police investigation that led to Mr. Watkins' arrest and conviction. In the next three weeks, the podcast will begin to cover events that occurred in the pre-trial phase of the case, for which audio from the bond hearing and preliminary hearing will be critical. *Id.* ¶ 11. The audio recordings, both of the pre-trial proceedings and of

the trial itself, contain a great amount of information that is lost in the transcripts of those proceedings. *Id.* ¶ 12. For example, from an audio recording, the listener can discern the emotion and demeanor of the speaker, pauses between words or sentences, emphasis on specific words or phrases, inflection, and overall tone. None of this information is captured in a written transcript. *Id.* Episodes focused on the trial are scheduled to begin in early December 2016 and will continue through early January 2017. Audio from the trial will be critical for these episodes. *Id.*

During the course of Undisclosed's investigation, Mr. Watkins's attorney Clare Gilbert made arrangements with the Floyd County Superior Court to copy the tape recordings of several proceedings from Mr. Watkins's case. *Id.* ¶ 5. When Ms. Gilbert initially attempted to copy the tapes, she did not have the proper equipment to copy a 4-track tape. Upon returning with the proper equipment, the court informed Ms. Gilbert that she no longer had permission to copy the tapes. *Id.* ¶ 6.

Undisclosed then filed an open records request seeking the tape recordings. The request was denied, and the Court instructed Undisclosed to file a motion requesting access to the recordings. *Id.* ¶ 8. Undisclosed then retained counsel, and on September 16, 2016, the undersigned filed a motion seeking access to recordings of three proceedings in Mr. Watkins's case: (1) the December 14, 2000,

preliminary hearing for Mr. Watkins and his co-defendant Mark Free; (2) the January 2, 2001, bond hearing for both Mr. Watkins and Mr. Free; and (3) the trial of Mr. Watkins, which took place from June 25, 2001 through July 2, 2001. *See* Exhibit A (Undisclosed's Motion). Importantly, Mr. Watkins consented to this motion through his attorney. The Floyd County District Attorney did not oppose the motion.

Despite the lack of opposition, on October 28, 2016, the Superior Court denied Undisclosed's request to copy the recordings. *See* Exhibit B (Order of Oct. 28, 2016). Instead, the trial court held that "[n]othing in [the Georgia Supreme Court's decision in] *Green* [*v. Drinnon*] entitles Appellant to *copies* of a court reporter's back-up tapes/recordings . . . as opposed to making them available for inspection." *Id.* at 2. Thus, while the Court authorized inspection of the audio tapes, the Court ordered that "Movant may NOT duplicate, record or copy these tapes/recordings in any form or format." *Id.* The Court also required Movant to compensate the court reporter for "supervising Movant's inspection of the tapes/recordings" at a cost of $200 per day. *Id.* Undisclosed received notice of this order on November 2, 2016, and timely filed this Motion and Application.[1]

[1] In the October 28, 2016 order, the Court pointed out a defect in the certificate of service attached to Undisclosed's motion for access to the recordings. To avoid any confusion, Undisclosed filed an amended certificate of service on November 4, 2016, reflecting that Mr. Watkins's attorney Clare Gilbert received

ARGUMENT AND CITATION OF AUTHORITY

I. Uniform Superior Court Rule 21.5 Authorizes this Court to Amend or Review the Trial Court's Order.

An order limiting access to court records is subject to immediate review and amendment by this Court. "[A]n order limiting access may be reviewed and amended . . . by the Supreme Court at any time on its own motion or upon the motion of any person for good cause." Unif. Sup. Ct. Rule 21.5. Because of the emergency nature of the relief requested and the absence of any opposition by the State of Georgia or Defendant, Undisclosed respectfully moves this Court to amend the trial court's order to allow Undisclosed to copy the relevant recordings.

In the alternative, Undisclosed respectfully requests that this Court grant its application for leave to appeal.[2]

---

notice of the motion. A copy of the amended certificate of service is attached hereto as Exhibit C.

[2] In *In re Motion of Atlanta Journal-Constitution*, 269 Ga. 589 (1998), this Court described the appropriate procedure to initiate an appeal under Rule 21.5. The procedures for interlocutory appeals laid out in O.C.G.A. § 5-6-34 do not apply to such appeals. *Id*. "[T]here is no need for a certificate of immediate review, and the time limits imposed by the Code section do not apply." *Id*. Instead, the appealing party must file an application that "set[s] forth the need for review by this court" and is accompanied by a copy of the order sought to be reviewed. *Id*. The other parties in the case "shall have ten days in which to file a response to the application, after which this Court will grant or deny the application." *Id*. The Superior Court of Floyd County entered an order restricting access to court records on October 28, 2016. Ex. B. Undisclosed received notice of this order on November 2, 2016. Accordingly, this application is timely filed and meets the requirements set out by this Court. A copy of *In re Motion of Atlanta Journal-Constitution* is attached hereto as Exhibit D.

II. Audio Recordings of Trial Proceedings Constitute Public Court Records.

Uniform Superior Court Rule 21 provides as follows: "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." In *Green v. Drinnon*, this Court held that audio recordings of trial proceedings constitute "court records" subject to Rule 21. *Green* concerned Judge Robert H. Green's opening remarks at a calendar call in 1991, which were captured by the court reporter's tape recorder. *Green*, 262 Ga. at 264. The Union-Recorder, a local newspaper, sought a transcript of Judge Green's remarks, but the request was denied. The newspaper then sued the judge, alleging that it was entitled to a transcript because the recording was a public record under both the Open Records Act and Uniform Superior Court Rule 21. This Court held unequivocally: "An official court reporter's tape of a judge's remarks in open court is a court record." *Id*. "No law limits public access to the judge's taped comments nor can access to them be denied under the procedure set out in Rule 21, which he has not invoked." *Id.* This Court instructed that "the tape or its transcript must be made available for public inspection under Rule 21." *Id.*

III. The Trial Court Improperly Prohibited Undisclosed from Copying Public Records.

Citing *Green*, the trial court in this case correctly determined that tape recordings of Joey Watkins's pre-trial proceedings and criminal trial are "court records" for purposes of Uniform Superior Court Rule 21. Thus, consistent with

Rule 21, access could only be limited by following the procedures laid out in Rules 21.1 and 21.2. Those rules require a court to hold a hearing and make "a finding that the harm otherwise resulting to the privacy of a person in interest clearly outweighs the public interest" in open courts. Unif. Sup. Ct. Rule 21.2.

Here, the trial court did not hold a hearing on Undisclosed's motion and made no findings to justify limiting access. In fact, no party objected to Undisclosed's motion—Mr. Watkins consented to the motion, and the Floyd County District Attorney did not oppose Undisclosed's request. This should have resolved the matter, and the court should have provided Undisclosed with the unfettered access guaranteed by Rule 21.

But the trial court instead determined that Undisclosed had a right only to "inspect" the recordings under Rule 21, relying on the language of Rule 21 and on *Green v. Drinnon*. The court ordered that Undisclosed could "NOT duplicate, record or copy these tapes/recordings in any form or format." Ex. B at 2. The court's interpretation of Rule 21 undermines the important values that underlie the rule, ignores the practical implications of prohibiting copying of all court records, and is not supported by *Green*.

A. Rule 21 Necessarily Incorporates the Common Law Right to Copy Court Records.

Rule 21 "embodies the right of access to court records which the public and press in Georgia have traditionally enjoyed, and presumes the public will have

access to all court records." *In re Gwinnett County Grand Jury*, 284 Ga. 510, 511 (2008). As this Court has explained, the public's right of access to the courts is a fundamental value of our justice system. "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*, 258 Ga. at 411.

Although neither this Court nor the Georgia Court of Appeals has expressly considered the question of whether Rule 21's right to inspect court records includes a right to copy those records, the purpose of Rule 21 is to protect the common law and constitutional guarantee of open access to the courts. "It is clear that the courts of this country recognize a general right to inspect ***and copy*** public records and documents, including judicial records and documents." *Nixon*, 435 U.S. at 597. In the context of this common-law right, "[a]ccess means more than the ability to attend open court proceedings; it also encompasses the right of the public to inspect and to copy judicial records." *Littlejohn*, 851 F.2d at 678. The common-law right originally allowed for hand copying of information from court records, though courts have applied the right to modern forms of copying as technology has advanced. *See, e.g., People v. Peller*, 34 Ill.App.2d 372 (1962).

Federal courts have held that this common-law right extends to the copying of audio and visual recordings.

For example, in *U.S. v. Criden*, 648 F.2d 814 (3d Cir. 1981), several television networks petitioner the court for permission to copy the audio and video tapes entered into evidence at a criminal trial of several public officials charged with bribery. The Third Circuit traced the history of the common-law right to access and described the important interests supporting that right, particularly in the criminal context. The court noted that the ability to copy records led to broader dissemination, and "broader dissemination would serve the same values of 'community catharsis,' observation of the criminal trial process, and public awareness served by the open trial guarantee." *Id.* at 822. The Third Circuit held "that there is a strong presumption that material introduced into evidence at trial should be made reasonably accessible in a manner suitable for copying and broader dissemination." *Id.* That presumption can be overcome where a record would be used for improper purposes, such as private spite, or where the release of a record jeopardizes a criminal defendants rights. In *Criden*, the Third Circuit determined that such circumstances did not exist in that case and ordered that the recordings be made available for copying. *Id.* at 829.

Similarly, in *Application of National Broadcasting Co, Inc.*, 635 F.2d 945 (2d. Cir. 1980), the Second Circuit considered a common-law right to copy audio

and video recordings. There, a television station requested permission to copy and disseminate recordings that were entered into evidence at a criminal trial. The district court granted the request, and the criminal defendant appealed. The Second Circuit affirmed the district court based on the common-law right of access to court records. The Court emphasized that there is a presumption that court records are open to the public and noted:

> [I]t would take the most extraordinary circumstances to justify restrictions on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence, when it is in a form that readily permits sight and sound reproduction. . . . 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***.

Id. (emphasis added). The criminal defendant argued that dissemination of the tapes would harm his ongoing criminal trial and could prejudice potential jurors against his co-defendant, whose jury selection process would soon begin. *Id.* at 953. The Second Circuit held that, while these concerns were important, they did not overcome the strong presumption of public access to the recordings. Many other federal courts[3] and state courts[4] have similarly recognized a right to copy

---

[3] *See, e.g., U.S. v. Beckham*, 789 F.2d 401, 413 (6th Cir. 1986) (adoping analysis from *U.S. v. Criden*); *In re Associated Press*, 172 Fed. App'x 1, 3-4 (4th Cir. 2006) (ordering trial court to provide copies of trial exhibits to news media); *In re National Broadcasting Co., Inc.*, 653 F.2d 609, 620-21 (D.C. Cir. 1981) (allowing broadcasters to inspect and copy video and audio tapes introduced into evidence).

[4] *See, e.g., People v. Williams*, 920 N.Y.S.2d 243 (Sup. Ct. 2010) ("The common

court records.

A right to inspect court records without a corresponding right to copy those records renders the public's right of access meaningless. The purpose of public access to courts is to avoid creating a "star chamber" and to allow for public scrutiny of our judicial processes. That purpose is thwarted if the only way to access court records is by going to the courthouse and viewing them for oneself, without any concomitant ability to show those court records to others. Conversely, a right to copy court records allows members of the public to share information

---

law right to inspect and copy judicial records, including physical evidence, requires contemporaneous public access to it unless there is a significant risk of impairing the integrity of the evidence, interference with the orderly conduct of the trial, or some other compelling circumstance."); *see also Mickman v. Am. Int'l Processing, LLC*, No. CIV.A. 3869-VCP, 2009 WL 2244608, at *3 (Del. Ch. July 28, 2009) ("[T]he right to access and inspect books and records typically includes a right to copies of those books and records."); *Winter v. Playa del Sol, Inc.*, 353 So.2d 598 (Fl. Ct. App. 1977) ("The right to inspect public records carries with it the right to make copies. This is on the theory that the right to inspect would in many cases be valueless without the right to make copies."); *Ortiz v. Jaramillo*, 82 N.M. 445, 447 (1971) ("The right to inspect public records commonly carries with it the right to make copies thereof."); *Whorton v. Gaspard*, 239 Ark. 715, 716 (1965) ("'The right to inspect public records commonly carries with it the right to make copies, without which the right to inspect would be practically valueless.'" (quoting 45 Am. Jur. at 426 § 15, Right to Copy)); *Direct Mail Service v. Registrar of Motor Vehicles*, 296 Mass. 353, 357 (1937) ("We see no reason why the right to make copies is not coextensive with the right to inspect. We believe that in general the public interest will be best served by the largest freedom in the use for lawfull purposes of public records kept at the public expense."); *In re Becker*, 200 A.D. 178 (N.Y. App. Div. 1922) ("The right to copy seems to be a necessary incident of the right to inspect, for otherwise the purpose of the inspection would largely be thwarted.").

about the judicial process serves the principle of open courts that has been a bedrock of our judicial system and democratic institution of government.

B. The Trial Court Did Not Offer Any Justification for its Prohibition on Copying Court Records.

To protect the important policies set forth above, Rule 21 codifies several careful procedures for limiting open access to the courts. Superior courts may seal certain records and prohibit public access ***only*** if they comply with the . . . requirements of Rule 21." *Id.* (emphasis added). To do so, the court must hold a hearing and make "a finding that the harm otherwise resulting to the privacy of a person in interest clearly outweighs the public interest" in open courts. Unif. Sup. Ct. Rule 21.2. An order of limitation "shall specify the part of the file to which access is limited, the nature and duration of the limitation, and the reason for limitation." Unif. Sup. Ct. Rule 21.1. Where a court does not comply with the requirements of Rule 21, then the court record is open and accessible by the public. *Id.*

Notably, Rule 21 does not distinguish between types of court records. The plain text of the rule is clear that it applies to all court records. Moreover, this Court's jurisprudence regarding which documents are subject to Rule 21 has treated the issue as binary—either a document is a court record, and therefore subject to Rule 21, or it is not. *See, e.g.*, *In re Gwinnett Grand Jury*, 284 Ga. at 511 (holding that documents and testimony presented to a grand jury are not "court

records"); *Green*, 262 Ga. at 264 (holding that tape recordings of open court proceedings are "court records"). Thus, the analysis under Rule 21 is simple: first, a court must decide whether a document is a court record. If it is, then the public has a right to access the document unless and until it is sealed pursuant to the procedures of Rules 21.1 and 21.2, which require a hearing and specific factual findings.

In this case, Undisclosed seeks access to recordings that this Court has already determined are "court records." The trial court has never sealed these recordings, and no party has objected to Undisclosed's request to access them. While the presumption in favor of access to such records can be overcome in some cases, there are no "compelling circumstances" here. None of the parties to this case have come forward with concerns about copying the recordings, and the trial court made no findings to justify restrictions to Undisclosed's access. Therefore, the recordings are therefore on equal footing with any other type of document that is a court record. Unless and until the trial court seals the recordings using the specific procedures under Rule 21, Undisclosed has a right to inspect the recordings and copy those recordings as they could any other court record.[5] In forbidding Undisclosed from copying the recordings, the trial court essentially

[5] *Cf*. *Ortiz*, 82 N.M. at 447 ("We fail to understand how it can be said the inspection and copying of information contained on a printed and written affidavit of registration, which is a public record, is proper, but the inspection and copying of this identical information from the 'working master record' tape, which is also a public record, constitutes an invasion of the privacy of the individual named in and identified by this information.").

determined that Rule 21 provides the public with a right to inspect court records but no corresponding right to copy those records. That undermines the very purpose of Rule 21.

C. The Trial Court Misunderstood *Green*.

The trial court also misconstrued *Green* to support its conclusion that Rule 21 does not require courts to permit copying of court records. In actuality, this Court simply did not address that question in *Green* since the newpaper in *Green* did not seek to copy an audio recording and no party took the position advanced by the trial court—that the public could not copy court records.

Notably, the newspaper in *Green* sought only a transcript of the recording of proceedings. *Green*, 262 Ga. at 264. The newspaper never requested a copy of the audio recording. As a print media outlet, it would have little use for the audio itself; it merely needed to know the words Judge Green spoke. In addition, the parties did not parse the difference between inspecting and copying court records. Thus, this Court was never faced with the question of whether Rule 21 gives the public a right to obtain a copy of audio recordings.

The essential holding of *Green*—that audio recordings are court records—is useful here to show that Rule 21 plainly applies to the recordings in question. The trial court was incorrect that the *Green* decision sets a high bar on the public's rights under Rule 21.

D. The Trial Court's Interpretation of Rule 21 Is Constitutionally Infirm.

The trial court's interpretation of Rule 21 also raises serious questions under the First Amendmenrt. This Court should avoid interpretations of a statute, regulation, or court rule that result in constitutional infirmity. *State v. Fielden*, 280 Ga. 444, 448 (2006); *Banks v. Georgia Power Co.*, 267 Ga. 602, 603 (1997) ("[T]he well established rules of statutory construction requir[e] a court to construe a statute as valid when possible."). The manner in which the superior court has interpreted Rule 21 would prevent any member of the public or news media from copying any court records. This is an unacceptable barrier to exercising the public's First Amendment right to observe, examine, and speak out about the judicial process.

IV. This Court Should Consider Undisclosed's Motion on an Expedited Basis.

The Undisclosed podcast is currently in the middle of its second season. So far, Undisclosed has released sixteen episodes about Mr. Watkins' case, and the weekly podcast is scheduled to run through early January 2017. Simpson Aff. ¶ 10. Currently, the podcast is focused on the final stages of the police investigation that led to Mr. Watkins' arrest and conviction. In the next three weeks, the podcast will begin to cover events that occurred in the pre-trial phase of the case, for which audio from the bond hearing and preliminary hearing will be critical. *Id.* ¶ 11.

Episodes focused on the trial are scheduled to begin in early December 2016 and will continue through early January 2017. Audio from the trial will be critical for these episodes. *Id.*

The audio recordings, both of the pre-trial proceedings and of the trial itself, contain a great amount of information that is lost in the transcripts of those proceedings. *Id.* ¶ 12. For example, from an audio recording, the listener can discern the emotion and demeanor of the speaker, pauses between words or sentences, emphasis on specific words or phrases, inflection, and overall tone. None of this information is captured in a written transcript. *Id.*

As the podcast begins to focus more on the pre-trial proceedings and the trial over the course of the coming weeks, the audio recordings will become even more crucial. Indeed, Undisclosed has already identified areas where an audio recording would be beneficial to its reporting on Mr. Watkins's trial. *Id.* ¶ 15. For example, during Mr. Watkins's preliminary hearing, defense counsel questioned lead investigator Stanley Sutton of the Floyd County Police Department about the existence of any recorded conversations that were made outside of the court-ordered wiretaps on the phone lines of Joey Watkins and witness David Brown. *Id.* After acknowledging the existence of one such recording, Sutton stated that he would "take the Fifth" in response to defense counsel's follow-up questions about the existence of any further recordings. As recorded in notes taken by defense

counsel, Prosecutor Tammy Colston later informed defense counsel that Mr. Sutton had been "just kidding" when he pled the Fifth and had not intended his statement to be interpreted literally. The audio of Mr. Sutton's exchange with defense counsel could very well shed light on whether Sutton was being serious or was joking. *Id.*

If Undisclosed does not gain access to the recordings within the coming weeks, it will be unable to produce a podcast that comprehensively and accurately depicts the legal proceedings that led to Mr. Watkins's conviction. Because of the current production schedule, it is critical for Undisclosed to obtain the recordings as soon as possible in order to have a chance to access and utilize those tapes before Season Two concludes. *Id.* ¶ 17. The value of the recordings will significantly diminish after season two concludes because Undisclosed's regular audience will no longer be tuning in for weekly episodes about Mr. Watkins's case. *Id.*

CONCLUSION

For the foregoing reasons, Undisclosed requests that its motion to amend or, in the alternative, its application for appeal be granted.

Respectfully submitted this 14th day of November, 2016.

/s/ Michael A. Caplan
Michael A. Caplan
Georgia Bar No. 601039
CAPLAN COBB LLP

75 Fourteenth St., Suite 2750
Atlanta, GA 30309
Tel: (404) 596-5610
Fax: (404) 596-5604
mcaplan@caplancobb.com
Attorney for Undisclosed LLC

CERTIFICATE OF SERVICE

This is to certify that I have caused a true and correct copy of the foregoing **UNDISCLOSED LLC'S EXPEDITED MOTION TO AMEND ORDER PROHIBITING ACCESS TO COURT RECORDS OR, IN THE ALTERNATIVE, APPLICATION FOR LEAVE TO APPEAL** to be served on all counsel of record by U.S. mail as follows:

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

Clare Gilbert
Georgia Innocence Project
2645 North Decatur Road
Decatur, Georgia 30033

This 14th day of November, 2016.

/s/ Michael A. Caplan
Michael A. Caplan

Exhibit A

FILED IN OFFICE

SEP 1 6 2016

C. Dillard

CLERK

IN THE SUPERIOR COURT OF FLOYD COUNTY
STATE OF GEORGIA

STATE of GEORGIA,

v.

JOSEPH S. WATKINS

CASE NO. 01-CR-16707 - JFL 002

MOTION FOR AN ORDER TO ACCESS TRIAL RECORDINGS

Undisclosed LLC ("Undisclosed"), a Delaware company that is currently producing a podcast regarding the trial of Joseph Watkins, respectfully moves this Court pursuant to Uniform Superior Court Rule 21 to issue an order allowing Undisclosed to access and copy audio recordings of several proceedings in this case. Specifically, Undisclosed seeks access to all audio recordings of the following proceedings:

1. Preliminary Hearing on December 14, 2000
2. Bond Hearing on January 2, 2001
3. Trial on June 25, 2001 through July 2, 2001

Under *Green v. Drinnon*, the recordings of the above proceedings are public records and are therefore open for inspection and copying pursuant to Rule 21.[1] 262 Ga. 264, 264, 417 S.E.2d 11, 12 (Ga. 1992) ("No law limits public access to the judge's taped comments nor can access to them be denied under the procedure set out in Rule 21, which he has not invoked. Therefore, the tape or its transcript must be made available for public inspection under Rule 21."). Undisclosed needs access to the audio recordings, as they are vital to the production of Undisclosed's podcast. Given the nature of a podcast, audio recordings are much more useful than the transcripts of these proceedings. In addition, the recordings will provide necessary

[1] A copy of *Green v. Drinnon* is attached hereto as Exhibit A.

context and other information that is missing from the transcripts of these proceedings.

Accordingly, Undisclosed respectfully requests that this Court issue an order allowing Undisclosed to access and copy the recordings of the above-listed proceedings as soon as practicable. Undisclosed's counsel has conferred with Mr. Watkins's counsel, and Mr. Watkins does not oppose this motion. A proposed order on this motion is attached hereto as Exhibit B.

Respectfully submitted, this 15th day of September, 2016.

Sarah Brewerton-Palmer
Georgia Bar No. 589898
CAPLAN COBB LLP
75 Fourteenth Street, NE, Suite 2750
Atlanta, Georgia 30309
Tel: (404) 596-5600
Fax: (404) 596-5604
spalmer@caplancobb.com

Attorney for Undisclosed LLC

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the within and foregoing **MOTION FOR AN ORDER TO ACCESS TRIAL RECORDINGS** by U.S. Mail postage pre-paid, upon the following:

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

This 15th day of September, 2016.

Sarah Brewerton-Palmer
Georgia Bar No. 589898
spalmer@caplancobb.com

Exhibit A

262 Ga. 264
Supreme Court of Georgia.

GREEN
v.
DRINNON, INC.

No. S92A0486.
|
June 11, 1992.

State court judge appealed from order of the Superior Court, Baldwin County, John Lee Parrott, J., requiring him to give to local newspaper tape of comments he made in open court. The Supreme Court, Fletcher, J., held that tape of trial judge's comments made from bench that was recorded by court reporter while court was in session was a court record that was open for public inspection.

Affirmed.

West Headnotes (2)

[1] **Records**
⇐ Court records

Tape of trial judge's comments made from bench that was recorded by court reporter while court was in session was a court record that was open for public inspection under rule making court records available for public inspection. Uniform State Court Rule 21.

3 Cases that cite this headnote

[2] **Records**
⇐ Court records

Records
⇐ In general:freedom of information laws in general

Court rules, rather than Open Records Act, governed public access to court records. Uniform State Court Rule 21; O.C.G.A. § 50 18-70 et seq.

3 Cases that cite this headnote

Attorneys and Law Firms

***265** ****11** Marc T. Treadwell, Chambless, Higdon & Carson, Macon, for green.

Ed S. Sell, III, Sell & Melton, Macon, for Drinnon, Inc.

Opinion

***264** FLETCHER, Justice.

Judge Robert H. Green of the State Court of Baldwin County appeals from a superior court order requiring him to give the local newspaper a tape of comments he made in open court. We affirm that Judge Green must make available the tape or its transcript, but for a different reason than the trial court.

Judge Green made opening remarks on September 23, 1991, after court was called into session but before the call of any case.[1] The court reporter recorded Judge Green's comments on a tape recorder. The Union-Recorder, the local newspaper, ****12** sought a transcript of the judge's remarks from the court reporter and later filed a request with the judge under the Open Records Act. The requests were denied. The Union-Recorder sued the judge, alleging that the tape was a public record under the Open Records Act and a court record open for public inspection under Uniform State Court Rule 21.

[1] 1. In this state, "the public and the press have traditionally enjoyed a right of access to court records." *Atlanta Journal & Atlanta Constitution v. Long*, 258 Ga. 410, 411, 369 S.E.2d 755 (1988); see *R.W. Page Corp. v. Lumpkin*, 249 Ga. 576 n. 1, 292 S.E.2d 815 (1982). To preserve this right, this court and the council of superior court judges have adopted a rule that presumes the public will have access to all court records. See *Long*, 259 Ga. at 413, 369 S.E.2d 755. State Court Rule 21 provides: "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."

An official court reporter's tape of a judge's remarks in open court is a court record. In *R.W. Page Corp. v. Kilgore*, 257 Ga. 179, 356 S.E.2d 870 (1987), we held that the coroner could not claim that a transcript of a public inquest was not a public record.

> When a coroner, who is a public official, makes an inquest and opens it to the public, and the testimony given at the public inquest is recorded and transcribed at public expense, the coroner has waived any right which he might claim to have to contend that the transcript is not a public record.

Id. Similarly, Judge Green waived any right to claim that the tape of his comments is not a court record when he made public comments from the bench that were recorded while court was in session. No law limits public access to the judge's taped comments nor can access to them be denied under the procedure set out in Rule 21, which he has not invoked. Therefore, the tape or its transcript must be made available for public inspection under Rule 21.

[2] 2. Since court rules govern public access to court records, it is not necessary to determine whether the Open Records Act applies to the judicial branch of government. We disapprove of the trial court's ruling to the extent that it relied on the Open Records Act to grant the newspaper access to the court record. See *Coggin v. Davey*, 233 Ga. 407, 411, 211 S.E.2d 708 (1975); *Fathers Are Parents Too, Inc. v. Hunstein*, 202 Ga.App. 716, 415 S.E.2d 322 (1992); see also 1979 Att'y Gen. Op. 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).

Judgment affirmed.

All the Justices concur.

All Citations

262 Ga. 264, 417 S.E.2d 11, 20 Media L. Rep. 1359

Footnotes

1 A transcript of the judge's comments shows the following beginning:

THE COURT: Good morning, ladies and gentlemen. We will ask Deputy Shane Gladin to open court for us this morning.

DEPUTY GLADIN: The September Term of Baldwin County State Court is now in session. Honorable Robert Green presiding.

Exhibit B

IN THE SUPERIOR COURT OF FLOYD COUNTY
STATE OF GEORGIA

STATE of GEORGIA, v. JOSEPH S. WATKINS	CASE NO. 01-CR-16707 - JFL 002

[PROPOSED] ORDER

This matter came before the Court on the motion of Non-Party Undisclosed LLC pursuant to Uniform Superior Court Rule 21 for an order granting access to certain audio recordings of proceedings in this case. Having fully considered the applicable law, the court hereby **GRANTS** the motion. Undisclosed LLC and its agents may access and copy the audio recordings of the following proceedings:

1. Preliminary Hearing on December 14, 2000
2. Bond Hearing on January 2, 2001
3. Trial on June 25, 2001 through July 2, 2001

Undisclosed LLC may access the recordings by making an appointment with the Superior Court Clerk of Floyd County.

DONE and **ORDERED** this ____ day of _____, 2016.

_____
The Honorable Walter J. Matthews
Judge, State Court of Floyd County

Prepared by:

Sarah Brewerton-Palmer

Georgia Bar No. 589898
CAPLAN COBB LLP
75 Fourteenth Street, NE, Suite 2750
Atlanta, Georgia 30309
Tel: (404) 596-5610
Fax: (404) 596-5604
spalmer@caplancobb.com

Exhibit B

FILED IN OFFICE

OCT 28 2016

C. Dillard

CLERK

IN THE SUPERIOR COURT
FOR THE COUNTY OF FLOYD
STATE OF GEORGIA

STATE OF GEORGIA :

v. : CASE NO. 01-16707-JFL002

JOSEPH S. WATKINS :

ORDER PERMITTING ACCESS TO TRIAL RECORDINGS BUT DENYING REQUEST FOR COPIES OF BACK-UP RECORDINGS

The above styled case comes before the court on a Motion filed by Undisclosed LLC, a Delaware Company that is apparently producing a podcast regarding the trial in this case, seeking an Order permitting it to "access and copy" back up audio tapes/recordings of several proceedings in this case. Movant served a copy of its motion upon the District Attorney but not the Defendant. Specifically, the Movant seeks copies of the back-up audio tapes/recordings of the Preliminary Hearing, Bond Hearing, and Trial. There has been no response filed by the District Attorney.

The Movant cites *Green v Drinnon, Inc.*, 262 Ga. 264 (1992), in support of its argument that the back-up audio tapes/recordings are public records subject to inspection and copying pursuant to Uniform Superior Court Rule 21. Rule 21 provides, "[a]ll 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." *Green* held that "the tape

or *its transcript* must be made available for public inspection under Rule 21." Id. at 265 (emphasis added). Nothing in *Green* entitles Appellant to *copies* of a court reporter's back-up tapes/recordings, and Movant has not cited any other Georgia case that requires this Court to permit Movant to have *copies* of the court reporter's back-up tapes/recordings, as opposed to making them available for inspection.

The Court has spoken with the court reporter in this case, and the Court has been informed that the court reporter does have possession of back-up audio tapes/recordings from the trial of this case which took place on June 25, 2001 through July 2, 2001, but the court reporter has not yet determined if she has possession of the back-up tapes/recordings of the Preliminary Hearing and Bond Hearing sought by Movant. The Court is informed there is an ongoing effort by the court reporter to determine if she can locate those missing recordings.

The Court hereby ORDERS the court reporter to make the back-up trial recordings available for inspection by Movant at a mutually convenient time, but the Court DENIES Movant's request to copy, or for a copy, of said tapes/recordings. Should the court reporter locate the missing back-up tapes/recordings, she will so inform Movant and make those back-up tapes/recordings available for inspection as well. Movant may NOT duplicate, record or copy these tapes/recordings in any form or format, and Movant will be responsible for compensating the court reporter for her time in complying with this Order, which will require supervising Movant's inspection of the tapes/recordings, at her usual per diem rate of $200 per day. The Movant shall make payment arrangements with the court reporter, in advance of any inspection,

satisfactory to the court reporter.

So ORDERED this 28th day of October, 2016.

William F. Sparks, Judge
Superior Court of Floyd County
Rome Judicial Circuit

Cc: Sarah Brewerton-Palmer
Leigh Patterson

Exhibit C

IN THE SUPERIOR COURT OF FLOYD COUNTY
STATE OF GEORGIA

STATE of GEORGIA,	
v.	CASE NO. 01-CR-16707
JOSEPH S. WATKINS	

NOTICE OF AMENDED CERTIFICATE OF SERVICE

Undisclosed LLC ("Undisclosed"), by and through its undersigned attorney, hereby gives notice of amending the certificate of service to its Motion for an Order to Access Trial Recordings filed with this Court on September 16, 2016. Defendant Joey Watkins's attorney was inadvertently excluded from the certificate of service. Undisclosed learned of this clerical error upon receiving the Court's October 28, 2016 Order. The undersigned hereby certifies that on September 15, 2016, a copy of the motion was sent to: Clare Gilbert, Georgia Innocence Project, 2645 North Decatur Road, Decatur, Georgia 30033, clare@georgiainnocenceproject.org. In addition, Mr. Watkins's counsel consented to the motion in advance, as described in the body of the motion.

Respectfully submitted, this 3rd day of November, 2016.

Sarah Brewerton-Palmer
Georgia Bar No. 589898
CAPLAN COBB LLP
75 Fourteenth Street, NE, Suite 2750
Atlanta, Georgia 30309
Tel: (404) 596-5600
Fax: (404) 596-5604
spalmer@caplancobb.com

Attorney for Undisclosed, LLC

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the within and foregoing **NOTICE OF AMENDED CERTIFICATE OF SERVICE** by U.S. Mail postage pre-paid, upon the following:

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

Clare Gilbert
Georgia Innocence Project
2645 North Decatur Road
Decatur, Georgia 30033
clare@georgiainnocenceproject.org

This 3rd day of November, 2016.

Sarah Brewerton-Palmer
Georgia Bar No. 589898
spalmer@caplancobb.com

Attorney for Undisclosed, LLC

Exhibit D

269 Ga. 589
Supreme Court of Georgia.

In re Motion of ATLANTA JOURNAL–CONSTITUTION.

No. S98O0949.
|
July 13, 1998.

Member of press brought original action seeking review of order by the Superior Court, Fulton County, Elizabeth E. Long, J., sealing records in civil action. The Supreme Court held that party seeking review of order sealing record of civil suit was required to make interlocutory application for review with Supreme Court, rather than filing original action in Supreme Court.

Motion dismissed.

West Headnotes (1)

[1] **Courts**
Georgia
Records
Court records

Party seeking review of order sealing record of civil suit was required to make interlocutory application for review with Supreme Court, rather than filing original action in Supreme Court; application must contain copy of order sought to be reviewed by court, set forth need for court review, and contain certificate showing that petition had been served on parties to civil matter in trial court. Uniform Superior Court Rules 21.4, 21.5.

2 Cases that cite this headnote

Attorneys and Law Firms

****720** ***590** F.T. Davis, Jr., Lawrence Albert Slovensky, Long, Aldridge & Norman, LLP, Atlanta, for Atlanta Journal–Constitution.

C. Wilbur Warner, Jr., John C. Mayoue, Warner, Mayoue & Bates, A. Stephens Clay, Susan A. Cahoon, James R. Kanner, Kilpatrick Stockton LLP, William J. Linkous, Jr., Powell, Goldstein, Frazer & Murphy, Atlanta, for the State.

Opinion

***589** PER CURIAM.

The Atlanta Journal and Constitution (AJC) filed an original motion in this Court, asserting the presence of jurisdiction here pursuant to Uniform Superior Court Rule 21.5, which provides that an order limiting ****721** access to court records may be amended by this Court "at any time on its own motion or upon the motion of any person for good cause." The order attacked by AJC seals the record of a suit seeking to establish paternity of the plaintiff.

Since it is incumbent on this court to examine its own jurisdiction (*Collins v. AT & T,* 265 Ga. 37, 456 S.E.2d 50 (1995)), we address first the question of the route by which a matter such as this must come to this court. The sealing of court records is controlled by Uniform Superior Court Rule 21. Review of orders limiting access to court records is provided for in Rule 21.4: "An order limiting access may be reviewed by interlocutory application to the Supreme Court." It is apparent from the phrasing of the rule that there is no right under the rule to file an original action in this Court. Instead, one seeking review of a trial court's order restricting access to court records must file an application with this Court. It is important to note, however, that the rule does not make reference to OCGA § 5–6–34, which leads to the conclusion that "interlocutory," as used in this rule, is used in its generic sense of "interim," or, "not final," (Black's Law Dictionary, 5 th ed.), and thus does not import the full procedural structure of interlocutory appeals under that section. That being so, there is no need for a certificate of immediate review, and the time limits imposed by the Code section do not apply. The application must, however, contain a copy of the order sought to be reviewed, must set forth the need for review by this court, and must contain a certificate showing that the petition has been served on the parties to the civil matter in the trial court. The parties shall have ten days in which to file a response to the application, after which this Court will grant or deny the application. If the application

is granted, the applicant shall file a notice of appeal in the trial court, following which the appeal shall be the same as in an appeal from a final judgment.

As noted above, AJC bases its claim of original jurisdiction in this Court on USCR 21.5, which provides as follows: "Upon notice to all parties of record and after hearing, an order limiting access may be reviewed and amended by the court entering such order or by the Supreme Court at any time on its own motion or upon the motion of any person for good cause." Because the right to file actions directly in this court is severely limited and will not be enlarged upon, we construe the word "motion" in that rule, insofar as it applies to this Court, to be synonymous with "application" as it is used in USCR 21.4. Thus, whether a person seeks review by this Court under USCR 21.4 or amendment by this Court under USCR 21.5, the procedure will be the same: an application must be filed with this Court, upon the grant of which the appeal will proceed in the same fashion as other appeals.

In the present matter, AJC has proceeded as though USCR 21.5 gave it the right to file a motion in this Court as an original action. Because AJC failed to file an application for appeal in the form set out above, its motion must be dismissed for lack of jurisdiction.

Motion dismissed.

All the Justices concur.

All Citations

269 Ga. 589, 502 S.E.2d 720, 26 Media L. Rep. 2215, 98 FCDR 2369