STATE OF CONNECTICUT *v.* JOSHUA KOMISARJEVSKY
(SC 18797)

Rogers, C. J., and Norcott, Palmer, Zarella, McLachlan, Eveleigh and Harper, Js.

Argued June 24—officially released August 23, 2011

Jeremiah Donovan, special public defender, with whom were *Todd A. Bussert* and *Walter C. Bansley III*, special public defenders, for the appellant (defendant).

Harry Weller, senior assistant state's attorney, with whom, on the brief, were *Michael Dearington*, state's attorney, and *Gary Nicholson*, senior assistant state's attorney, for the appellee (state).

William S. Fish, Jr., with whom, on the brief, were *Michael C. Sorensen* and *Amy E. Markim*, for the appellees (intervenor the Hartford Courant Company et al.).

Opinion

HARPER, J. The defendant, Joshua Komisarjevsky, appeals from the Appellate Court's judgment dismissing, for lack of a final judgment, his appeal from the trial court's decision granting the motion of the intervenors, the Hartford Courant Company (Courant) and one of its reporters, Alaine Griffin, to vacate an order sealing the defendant's "witness list."[1] This court had granted the defendant's petition for certification to appeal limited to the issues of whether "the trial court's decision to grant [the intervenors'] motion to unseal a 'witness list' constitute[s] a final judgment permitting interlocutory review," and "[i]f the decision is an appealable final judgment, [whether] the trial court improperly grant[ed] the [intervenors'] motion to unseal the 'witness list?' " *State* v. *Komisarjevsky*, 301 Conn. 920, A.3d (2011). At oral argument before this court, Chief Justice Rogers raised the issue of whether the defendant's appeal could be treated as a direct public interest appeal pursuant to General Statutes § 52-265a,[2] which permits this court to consider an interlocutory appeal from the trial court. See *Foley* v. *State Elections Enforcement Commission*, 297 Conn. 764, 767 n.2, 2 A.3d 823 (2010); *State* v. *Fernando A.*, 294 Conn. 1, 5 n.3, 981 A.2d 427 (2009); *State* v. *Kemah*, 289 Conn. 411, 414 n.2, 957 A.2d 852 (2008). Following oral argument, this court ordered the parties to file supplemental briefs addressing the questions of whether this court has the authority to treat the certified appeal as a public interest appeal and, if so, whether the Chief Justice should certify the appeal on that basis in the present case. We have concluded that the appeal should be treated as a late petition for certification to appeal under § 52-265a, and the Chief Justice has certified the appeal on that basis.[3] See *State* v. *Ayala*, 222 Conn. 331, 342, 610 A.2d 1162 (1992) (treating defendant's petition for certification under General Statutes § 51-197f as late petition for certification under § 52-265a). Therefore, we do not determine whether the Appellate Court properly concluded that the trial court's decision vacating the sealing order was not a final judgment.

With respect to the merits of the trial court's decision, we conclude that the trial court improperly determined that the defendant had not sufficiently demonstrated that the disclosure of the witness list could impair his rights to a fair trial and to prepare a defense. We further conclude that the defendant demonstrated that the potential abridgement of these rights clearly outweighs the right of the intervenors and the public to access this document. Accordingly, we reverse the trial court's order granting the intervenors' motion to vacate the sealing order.

The record reveals the following undisputed facts and procedural history. The defendant has been charged with, inter alia, six counts of capital felony in

connection with a triple murder, sexual assault, and arson in a residential neighborhood in Cheshire. In a separate trial, his codefendant, Steven Hayes, has been found guilty of numerous offenses for his part in the crimes and has been sentenced to death.

On March 16, 2011, jury selection in the defendant's case commenced.[4] In accordance with standard practice, prior to jury selection, the trial court directed the parties to submit a list of potential witnesses and persons associated with the prosecution or defense. See Practice Book § 42-11 ("[t]he judicial authority shall require counsel to make a preliminary statement as to the names of other counsel with whom he or she is affiliated and other relevant facts, and shall require counsel to disclose the names, and if ordered by the judicial authority, the addresses of all witnesses counsel intends to call at trial"). The defendant e-mailed his list, containing well over 100 names, to the trial court's clerk. In light of the number of names on the parties' lists, the trial court decided to disseminate the lists to potential jurors for their review, rather than adhering to the court's usual practice of reading aloud the names to a venire panel.

On March 16, 2011, the trial court informed the parties that it had received a request from the media for witness lists and raised the question of whether the lists should be sealed temporarily pending the trial. The prosecutor stated that it would defer to the court on the matter. Defense counsel objected, stating that the witness lists in Hayes' trial had not been disclosed to the public. When defense counsel attempted to explain his more fundamental concern that the media attention given to the case had caused difficulties with witnesses, the trial court interrupted counsel, stated that it understood and that it did not need further argument at that time. The court noted: "[Defense counsel's] point is at least initially persuasive that there's some reason to believe that . . . potential witnesses might receive unwelcome attention that might discourage their willingness to testify in court." The court ordered the witness lists sealed without prejudice, subject to reconsideration should a media organization file a motion to unseal the lists.

On March 22, 2011, the intervenors filed a motion to vacate the sealing order. They contended that the defendant had not followed the requisite procedure or met the requisite burden of proof to overcome the presumptive first amendment and common-law rights of the intervenors and the public to have access to the lists. The intervenors asserted that it defied logic to limit "the public's access to a document that contained information that will inevitably and shortly become public information . . . ." The trial court ordered any party objecting to the motion to submit a list of specific names on their witness list to which further sealing was

claimed to be warranted, along with appropriate affidavits, by April 1. The defendant did not submit such a list,[5] but filed a memorandum in opposition to the motion and a supporting affidavit from Jeremiah Donovan, his lead defense counsel.

In his opposition, the defendant claimed that disclosure of his witness list would have a chilling effect on potential witnesses in violation of his sixth amendment right to a fair trial, and that this right trumped any presumptive right of the press and the public to access the list. As a threshold matter, the defendant claimed that the witness list was not a judicial document to which the presumption of public access applied. He further claimed that, if the witness list is a judicial document, its continued sealing is justified because of the substantial probability that, if disclosed, his right to a fair trial would be prejudiced and because no other measure would prevent that harm.

In support of his main contention, the defendant cited the "unprecedented media maelstrom" in which he had been thrust. He claimed that numerous penalty phase witnesses had resisted speaking with the defense team for fear of what might happen should they be associated publicly with the defendant. The defendant further asserted: "The public record offers several ready examples of the insidious and pervasive animus directed at [the defendant] and anyone close to or even perceived to be affiliated with him or . . . Hayes, and confirms the fears and concerns expressed by potential defense witnesses." The defendant pointed to, inter alia, two Courant articles written by Griffin reporting on the harassment suffered by one of Hayes' former employers, who had been compelled by subpoena to testify at the penalty phase of his trial. One of those articles reported: "After her testimony, [the witness] received harassing phone calls and e-mails and was criticized on the Internet. People also called for a boycott of her restaurant. The threats became so frightening that she called the police." A. Griffin, "Defense: Witnesses Wary Of Testifying," Hartford Courant, March 3, 2011, B1.

In Donovan's affidavit, he underscored the effect that disclosure would have on defense counsel's ability to prepare a mitigation defense for the penalty phase of the trial. He pointed to counsel's obligation to conduct an exhaustive investigation of the defendant's history, which the defense was attempting to undertake by interviewing anyone who had interacted with the defendant in a substantive way. Donovan identified twelve persons or groups, by generic descriptions, who had expressed fear of the consequences should they cooperate with the defense, including reprisals ranging from "community backlash and mistreatment" to "harassment and danger . . . ."[6] Donovan attested that members of the defense team themselves had suffered a backlash from family, friends and the public because of their involvement in

the case. He also noted threats received by the defendant's family that had resulted not only in their having to relocate from their longtime home, but also in their loss of custody of the defendant's daughter.

With respect to the contents of the witness list, Donovan attested that the defense team was certain that it would not call all of the persons listed to testify, and that it was likely that many of the names on the list would never even be mentioned in court. He asserted that "the list was overly inclusive out of an abundance of caution, so as to prevent a situation in mid-trial where a juror might have to be excused based on knowing someone associated with the case albeit tangentially." Donovan asserted that, when submitting such an expansive list, the defense team had relied on the court clerk's representation that the lists submitted in Hayes' case had not been disclosed,[7] and that, had they known that the witness list would be disclosed, they would have included far fewer names "to avoid the risk of harm and intimidation to innocent third parties."

The trial court granted the intervenors' motion to vacate the sealing order. In its decision, the court first noted that the defendant did not dispute the status of the witness list as a judicial document "filed with the court" within the meaning of Practice Book § 42-49A.[8] See footnote 11 of this opinion. Nonetheless, the court pointed out that witness lists generally are intended to be public, which triggers the presumption that the list in the present case should be made available to the public. The court then concluded: "Documents to which the public has a presumptive right of access may be sealed only if specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest. *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1, 13–14 [106 S. Ct. 2735, 92 L. Ed. 2d 1] (1986). . . . The defendant's generalized concerns are understandable, but they remain generalized concerns. No materials have been submitted, under seal or otherwise, concerning threats or intimidation with respect to specific names on the list. Under these circumstances, the motion to vacate the sealing order must be granted." (Internal quotation marks omitted.)

Thereafter, the defendant filed a motion for reconsideration, supported by another affidavit in which Donovan further elaborated on the fears expressed by certain persons mentioned in his previous affidavit regarding the consequences of cooperating with the defense team and reports by several of these persons that the press already had " 'hounded' " them. The trial court denied the motion for reconsideration, but temporarily stayed its order unsealing the list to allow the defendant to obtain a further stay from a reviewing court.

The defendant appealed from the trial court's decision unsealing the list to the Appellate Court. There-

after, the Appellate Court granted the defendant's motion for an emergency temporary stay of that decision. In that order, the Appellate Court sua sponte directed the parties to file memoranda addressing the question of whether the defendant's appeal should be dismissed for lack of a final judgment. Following submission of the parties' briefs, the Appellate Court dismissed the appeal. Thereafter, the Appellate Court granted the defendant's motion for an extension of the stay pending this court's resolution of the defendant's petition for certification to appeal.

As we previously have noted, having decided to treat the defendant's petition for certification to appeal as a § 52-265a direct appeal from the trial court's judgment, the sole issue before us is whether that court properly granted the intervenors' motion to unseal the defendant's witness list. The parties appear to agree that the trial court properly considered the issue as whether to grant a sealing order, not whether to modify an existing one, presumably because the court sealed the witness list without prejudice and did not require the defendant to satisfy the requirements of Practice Book § 42-49A.[9] Compare *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 292 Conn. 1, 66, 970 A.2d 656 (setting forth standard for modifying sealing order),[10] cert. denied sub nom. *Bridgeport Roman Catholic Diocesan Corp.* v. *New York Times Co.*, U.S. , 130 S. Ct. 500, 175 L. Ed. 2d 348 (2009) with Practice Book § 42-49A (setting forth standard for motion to seal documents).[11] "We review a trial court's decision granting or denying a motion to seal to determine whether, in making the decision, the court abused its discretion. . . . When reviewing a trial court's exercise of the legal discretion vested in it, our review is limited to whether the trial court correctly applied the law and reasonably could have concluded as it did." (Citations omitted; internal quotation marks omitted.) *Vargas* v. *Doe*, 96 Conn. App. 399, 408–409, 900 A.2d 525, cert. denied, 280 Conn. 923, 908 A.2d 546 (2006); accord *Bank of New York* v. *Bell*, 120 Conn. App. 837, 848, 993 A.2d 1022, cert. dismissed, 298 Conn. 917, 4 A.3d 1225 (2010); *Preston* v. *O'Rourke*, 74 Conn. App. 301, 317, 811 A.2d 753 (2002).

Practice Book § 42-49A, which addresses sealing or limiting disclosure of documents in criminal cases; see footnote 11 of this opinion; provides in relevant part: "Except as otherwise provided by law, there shall be a presumption that documents filed with the court shall be available to the public." Practice Book § 42-49A (a). In *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, 292 Conn. 30, this court noted, with respect to the civil case counterpart to § 42-49A, that the rule of practice codifies the common law. With respect to the basis for and parameters of the common law, the court explained: "Public access to court documents traces its roots back centuries through the common law, stemming from the practice of open trials.

. . . The rationale underlying the presumption is straightforward: Public monitoring of the judicial process through open court proceedings and records enhances confidence in the judicial system by ensuring that justice is administered equitably and in accordance with established procedures. . . . [T]he bright light cast upon the judicial process by public observation diminishes the possibilities for injustice, incompetence, perjury and fraud. Furthermore, the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness. . . .[12]

"This presumption of public access, however, is not absolute. . . . When the public's interest in judicial monitoring is outweighed by countervailing considerations, such as certain privacy concerns, or if access is sought for improper purposes . . . court documents or proceedings may be shielded from public view." (Citations omitted; internal quotation marks omitted.) Id., 34–35.

"[N]ot all documents in the court's possession are presumptively open. The presumption of public access applies only to judicial documents and records. . . . Such documents provide a surrogate to assist the public in monitoring the judicial process when it cannot be present. . . . Therefore, when determining whether a document should be open to the public, the threshold question under the common law is whether the document constitutes a judicial document." (Citations omitted; internal quotation marks omitted.) Id., 37. A judicial document is "any document filed that a court reasonably may rely on in support of its adjudicatory function . . . ." Id., 46.

We note at the outset that serious questions exist as to whether the witness list in the present case constitutes a judicial document. See footnote 8 of this opinion. Nonetheless, for purposes of this appeal, we assume, without deciding, that the witness list is a judicial document and, accordingly, that the public presumptively is entitled to access to it. Operating under this assumption, the question is whether the trial court abused its discretion in concluding that the defendant had expressed only "generalized concerns" and could not overcome the presumption of public access without submitting evidence of "threats or intimidation with respect to specific names on the list." We conclude that this standard was improper in light of the nature of the defendant's claim, the extraordinary circumstances surrounding the present case and the facts in the record.

Undoubtedly, the defendant bears the burden of proving that sealing a document is warranted. *Bank of New York* v. *Bell*, supra, 120 Conn. App. 857; *Vargas* v. *Doe*, supra, 96 Conn. App. 410. Moreover, as the trial court properly noted: "Documents to which the public has a presumptive right of access may be sealed only if spe-

cific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest. *Press-Enterprise Co.* v. *Superior Court*, [supra, 478 U.S. 13–14]." (Internal quotation marks omitted.) See Practice Book § 42-49A (c) (Documents may be sealed "only if the judicial authority concludes that such order is necessary to preserve an interest which is determined to override the public's interest in viewing such materials. The judicial authority shall first consider reasonable alternatives to any such order and any such order shall be no broader than necessary to protect such overriding interest.").

The defendant claims that his rights to a fair trial and to prepare a defense would be irreparably harmed by the disclosure of the witness list. The United States Supreme Court once observed that "[n]o right ranks higher than the right of the accused to a fair trial." *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). "Whether rooted directly in the [d]ue [p]ocess [c]lause of the [f]ourteenth [a]mendment . . . or in the [c]ompulsory [p]rocess or [c]onfrontation clauses of the [s]ixth [a]mendment . . . the [c]onstitution guarantees criminal defendants a meaningful opportunity to present a complete defense. . . . [Cf.] *Strickland* v. *Washington*, 466 U.S. 668, [684–85, 104 S. Ct. 2052, 80 L. Ed. 2d 684] (1984) (The [c]onstitution guarantees a fair trial through the [d]ue [p]rocess [c]lauses, but it defines the basic elements of a fair trial largely through the several provisions of the [s]ixth [a]mendment)." (Citations omitted; internal quotation marks omitted.) *Crane* v. *Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986). The right to prepare a defense for its presentation at trial is an integral part of a fair trial, and includes investigation of material facts and access to potential witnesses. *United States* v. *Sanchez*, 988 F.2d 1384, 1391 (5th Cir. 1993); *Kines* v. *Butterworth*, 669 F.2d 6, 9 (1st Cir. 1981), cert. denied, 456 U.S. 980, 102 S. Ct. 2250, 72 L. Ed. 2d 856 (1982); *United States* v. *Scott*, 518 F.2d 261, 268 (6th Cir. 1975); *Gregory* v. *United States*, 369 F.2d 185, 188 (D.C. Cir. 1966); *Commonwealth* v. *Campbell*, 378 Mass. 680, 699, 393 N.E.2d 820 (1979). This does not mean that the defendant has a right to the cooperation of witnesses in the course of his investigation of the material facts, but that he has the right to conduct his investigation unimpeded by the state. *Byrnes* v. *United States*, 327 F.2d 825, 832 (9th Cir.) ("It is true that any defendant has the right to attempt to interview any witnesses he desires. It is also true that any witness has the right to refuse to be interviewed, if he so desires [and is not under or subject to legal process]."), cert. denied, 377 U.S. 970, 84 S. Ct. 1652, 12 L. Ed. 2d 739 (1964).

Moreover, the Supreme Court has "long recognized that adverse publicity can endanger the ability of a

defendant to receive a fair trial. . . . To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity. . . . And because of the [c]onstitution's pervasive concern for these due process rights, a trial judge may surely take protective measures even when they are not strictly and inescapably necessary." (Citations omitted.) *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 378, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979).

In the present case, the trial court did not weigh the defendant's fundamental rights against the public's right of access to the witness list because of the defendant's failure to introduce evidence that specific persons on the list had been intimidated. This conclusion was improper for several reasons.

First, by imposing this standard, the trial court essentially required the defendant to prove that the harm he sought to avoid by obtaining the sealing order already had occurred. The sealing order is intended to shield potential witnesses or sources from public pressure, manifested through threats or condemnation, that would deter their cooperation. The harm alleged is, by its nature, somewhat predictive. Even for those persons who must know that the defendant will call them as witnesses, the fear of public reaction and the effect of the actual manifestation of that reaction are two different things. Should the harm arise that the defendant claims, it is difficult to imagine how the court could measure that harm and, if measurable, how such harm could be remedied. The defendant may never know what information he could have obtained from a reluctant source, and a person who initially refused to cooperate would seem to be no more likely to do so should a new trial be ordered.

Second, the record demonstrates that this prediction has a basis in fact. There is no doubt that the attention generated by this case is extraordinary. As the trial court's own statements in these proceedings indicate, this case has received intense media coverage, particularly in this state, but also nationally and even internationally. At a hearing on the defendant's motion for a change of venue, one defense witness submitted the results of an Internet search that had yielded more than 1800 media reports on the cases involving the defendant and Hayes. See *State* v. *Komisarjevsky*, Superior Court, judicial district of New Haven, Docket No. CR-07-241860 (February 28, 2011). The trial court expressly acknowledged in its decision denying that motion that this publicity, in turn, has "aroused intense public interest." Id. Indeed, according to evidence from that change of venue hearing, the percentage of the public who are aware of this case makes it one of this state's most notorious cases, at least in recent memory.[13] Because of the strong public sentiment generated by this coverage,

according to Donovan's affidavit in support of the defendant's motion for reconsideration of the court's decision to vacate the sealing order, the defense's mitigation expert reported that, of the twenty capital cases on which she has worked, "she has never encountered such a pervasive sense of fear and reprisal by so many individuals with connections to a defendant." Indeed, presumably it was because of concern regarding public reaction to the case that the trial court sua sponte raised the issue of whether the lists should be sealed pending trial.

Third, the record substantiates that some persons connected with the defendant's case already have been subjected to intimidation. Defense counsel and members of the defendant's family have been harassed. The hostility that was reported to be levied at Hayes' former employer following her testimony at his trial provides a reasonable basis to predict what other potential witnesses might face should their names be disclosed before trial in the present case.[14] Indeed, in light of the Courant articles reporting this matter, the question is not simply whether potential witnesses might actually receive similar treatment but whether they reasonably might fear such treatment because of what happened following Hayes' trial. Such fear undoubtedly could affect their willingness to cooperate with the defendant's investigation and the presentation of his case.

We also find significant Donovan's representation that the witness list includes potential witnesses, persons who will not testify but whose names might come up during trial, and persons who might be interviewed but never called as witnesses or mentioned at trial. With respect to witnesses or persons whose names will be mentioned at trial, the intervenors concede in their motion to vacate that these names "inevitably and shortly [will] become public information . . . ." Therefore, the public's interest in disclosure in this information is weaker than it would be if there was no timely, eventual discovery.[15] With respect to persons listed who never will testify or be mentioned at trial, the intervenors were unable to identify, upon inquiry from this court at oral argument, any interest served by public disclosure of these names beyond the general interest that public access to voir dire proceedings serves. We are fully mindful of the importance of this right as a general matter; see *Press-Enterprise Co.* v. *Superior Court*, supra, 464 U.S. 508 ("the primacy of the accused's right is difficult to separate from the right of everyone in the community to attend the voir dire which promotes fairness"); but we see nothing more than a potential de minimus impact on that right to disclosure by depriving the public of the names of persons who will have no direct bearing on the trial. See id., 511 n.10 ("[I]n some limited circumstances, closure may be warranted. Thus a trial judge may, in the interest of the fair administration of justice, impose reasonable

limitations on access to a trial. [T]he question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge . . . the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." [Internal quotation marks omitted.]). Indeed, the disclosure of the witness list would not appreciably diminish "the possibilities for injustice, incompetence, perjury and fraud"; (internal quotation marks omitted) *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, 292 Conn. 35; or contribute in any meaningful manner to "a more complete understanding of the judicial system and a better perception of its fairness." (Internal quotation marks omitted.) Id.

In a related context, one court explained: "When the rights of the accused and those of the public come irreconcilably into conflict, the accused's [s]ixth [a]mendment right to a fair trial must, as a matter of logic, take precedence over the public's [f]irst [a]mendment right of access to pretrial proceedings. There is little to be gained by admitting the public to pretrial proceedings in order to promote the appearance of fairness if the very presence of the public makes a fair trial impossible." *In re Globe Newspaper Co.*, 729 F.2d 47, 53 (1st Cir. 1984).

In light of the aforementioned factors, we conclude that the trial court abused its discretion in failing to consider the effect of disclosing the witness list on the defendant's sixth amendment rights. Moreover, in light of the nature of the harm sought to be avoided, we agree with the defendant that the only means to protect this interest is to continue the sealing of the witness list. The public's interest in knowing the identity of *possible* defense witnesses under the circumstances in the present case is extremely limited, and, to the extent that the list contains relevant information, the public's interest adequately is protected by its access to the voir dire proceedings and the trial.

The certified appeal is dismissed; upon the granting of review pursuant to § 52-265a, the order of the trial court vacating the sealing order is reversed and the case is remanded to that court with direction to reinstate the sealing order.

In this opinion ROGERS, C. J., and NORCOTT, PALMER and EVELEIGH, Js., concurred.

[1] As we explain in this opinion, the list at issue is not limited to names of persons who are expected to testify at trial. For convenience, we refer to it as a witness list, but recognize that this label does not describe it with complete accuracy.

[2] General Statutes § 52-265a provides: "(a) Notwithstanding the provisions of sections 52-264 and 52-265, any party to an action who is aggrieved by an order or decision of the Superior Court in an action which involves a matter of substantial public interest and in which delay may work a substantial injustice, may appeal under this section from the order or decision to the Supreme Court within two weeks from the date of the issuance of the order or decision. The appeal shall state the question of law on which it is based.

"(b) The Chief Justice shall, within one week of receipt of the appeal, rule whether the issue involves a substantial public interest and whether delay may work a substantial injustice.

"(c) Upon certification by the Chief Justice that a substantial public interest is involved and that delay may work a substantial injustice, the trial judge shall immediately transmit a certificate of his decision, together with a proper finding of fact, to the Chief Justice, who shall thereupon call a special session of the Supreme Court for the purpose of an immediate hearing upon the appeal.

"(d) The Chief Justice may make orders to expedite such appeals, including orders specifying the manner in which the record on appeal may be prepared."

[3] Because the court affirmatively acted to take jurisdiction of the case by granting the defendant's petition for certification to appeal from the Appellate Court, the entire court is required to determine whether to treat the petition as a petition to appeal from the trial court's decision before the Chief Justice could consider whether to certify such an appeal pursuant to § 52-265a.

We recognize that the court's decision to treat the appeal from the Appellate Court as a § 52-265a appeal from the trial court is unusual, although not unprecedented. As Justice Zarella points out in his concurring and dissenting opinion, in other cases in which this court has done so, we first have determined whether we have jurisdiction to consider the appeal on the basis presented. We have decided not to do so in the present case for the following reasons. First, in those other cases, there was a clear question as to whether this court had jurisdiction to consider the matter before it. In the present case, it is abundantly clear that this court has jurisdiction over the matter certified from the Appellate Court. Second, although it is clear that we have such jurisdiction, the facts in the present case militate in favor of choosing the most expeditious route properly available to us to avoid potentially irreparable harm to the intervenors' claimed right of access to the witness list: jury selection concluded while this appeal was pending, the presentation of evidence is scheduled to begin in mid-September and the trial court's decision vacating its sealing order has been stayed pending resolution of this appeal. Therefore, because the decision unsealing the witness list presents a matter of substantial public interest, we concluded that the most prudent course was to address the present matter as a § 52-265a appeal.

[4] According to the defendant, jury selection concluded on June 14, 2011.

[5] In his motion for reconsideration of the trial court's decision granting the intervenors' motion to vacate the sealing order, the defendant asserted that it was unrealistic to expect him to obtain more than 100 affidavits from "already reluctant parties" within the short deadline set by the trial court, and requested an additional six weeks to do so if the court required the affidavits.

[6] The descriptions broadly described the person's relationship to the defendant or the victims, i.e., "[a]n extended family member through marriage," "[a] childhood friend of [the defendant] who still resides in Cheshire," "[i]ndividuals with ties to [the victims'] United Methodist Church . . . ." The defendant explained in his motion for reconsideration that Donovan had provided general descriptions to protect the identity of these persons in documents that would be part of the court record.

[7] The parties dispute whether the witness list in Hayes' trial actually was disclosed. The defendant submitted an affidavit from Thomas Ullmann, one of Hayes' public defenders, attesting that, to the best of his knowledge and recollection, the list from Hayes' trial had not been made public.

[8] In both his memorandum in opposition to the intervenors' motion to vacate the sealing order and his subsequent motion for reconsideration, the defendant clearly asserted a claim that the witness list was not a judicial document, as defined by this court in *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 292 Conn. 1, 46–47, 970 A.2d 656, cert. denied sub nom. *Bridgeport Roman Catholic Diocesan Corp.* v. *New York Times Co.*, U.S. , 130 S. Ct. 500, 175 L. Ed. 2d 348 (2009). Specifically, in support of that claim, he asserted that "[t]he list is ministerial in nature created by a party to the proceeding to help identify those venire persons who might know someone associated with this case. The [c]ourt took no role in the creation of the parties' respective lists beyond attaching the state's [list] to [the defendant's] and making photocopies for distribution to venire panels." We therefore assume that the trial court's statement was intended to indicate that the defendant had not claimed that e-mailing the witness list to the court clerk, rather than formally filing the document, had any bearing on

whether the list was "filed with the court" under Practice Book § 42-49A. We note that, in his brief to this court, the defendant does appear to make such a claim. It is well settled, however, that, with limited exceptions not applicable to the present case, an appellant is not entitled to review of a claim that was not raised before the trial court. *Remillard* v. *Remillard*, 297 Conn. 345, 351, 999 A.2d 713 (2010).

[9] In its memorandum of decision vacating the sealing order, the trial court explained that, "[g]iven the press of immediate business, there was no opportunity to consider the merits of the request at the time it was made."

[10] "Under [the standard for modifying an order sealing court documents], the *moving* party bears the burden of demonstrating that appropriate grounds exist for modifying sealing orders. These grounds include: the original basis for the sealing orders no longer exists; the sealing orders were granted improvidently; or the interests protected by sealing the information no longer outweigh the public's right to access." (Emphasis added.) *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, 292 Conn. 66.

[11] Practice Book § 42-49A provides in relevant part: "(a) Except as otherwise provided by law, there shall be a presumption that documents filed with the court shall be available to the public. . . .

"(c) Upon written motion of the prosecuting authority or of the defendant, or upon its own motion, the judicial authority may order that files, affidavits, documents, or other materials on file or lodged with the court or in connection with a court proceeding be sealed or their disclosure limited only if the judicial authority concludes that such order is necessary to preserve an interest which is determined to override the public's interest in viewing such materials. The judicial authority shall first consider reasonable alternatives to any such order and any such order shall be no broader than necessary to protect such overriding interest. An agreement of the parties to seal or limit the disclosure of documents on file with the court or filed in connection with a court proceeding shall not constitute a sufficient basis for the issuance of such an order.

"(d) In connection with any order issued pursuant to subsection (c) of this section, the judicial authority shall articulate the overriding interest being protected and shall specify its findings underlying such order and the duration of such order. If any finding would reveal information entitled to remain confidential, those findings may be set forth in a sealed portion of the record. . . .

"(e) Except as otherwise ordered by the judicial authority, a motion to seal or limit the disclosure of affidavits, documents, or other materials on file or lodged with the court or in connection with a court proceeding shall be calendared so that notice to the public is given of the time and place of the hearing on the motion and to afford the public an opportunity to be heard on the motion under consideration. . . .

"(f) . . . (2) The judicial authority may issue an order sealing the contents of an entire court file only upon a finding that there is not available a more narrowly tailored method of protecting the overriding interest, such as redaction or sealing a portion of the file. The judicial authority shall state in its decision or order each of the more narrowly tailored methods that was considered and the reason each such method was unavailable or inadequate. . . ."

[12] The presumption of access also has constitutional underpinnings. "The Supreme Court has . . . firmly established that the public has a [f]irst [a]mendment right of access to criminal trials. *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980). This right rests in part on the fact that the criminal trial historically has been open to the press and general public and in part on the fact that public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government. *Globe Newspaper Co.* v. *Superior Court*, [supra, 605–606] . . . . The court has . . . declared that the [f]irst [a]mendment right of access extends to the voir dire of prospective jurors. *Press-Enterprise Co.* v. [*Superior Court*, 464 U.S. 501, 508–10], 104 S. Ct. 819, 79 L. Ed. 2d 629 (1984)." (Internal quotation marks omitted.) *In re Globe Newspaper Co.*, 729 F.2d 47, 51 (1st Cir. 1984).

Although, in the present case, the intervenors cite a first amendment right of access, they analyze that concern under the same rubric as their common-law right of access. The federal courts appear to apply a heightened threshold to determine whether a "qualified" first amendment right to access exists. *Lugosch* v. *Pyramid Co. of Onondaga-Ga.*, 435 F.3d 110, 120 (2d Cir. 2006).

Once that right arises, however, essentially the same balancing test for limiting access under the common law appears to apply. See id. ("A court's conclusion that a qualified [f]irst [a]mendment right of access to certain judicial documents exists does not end the inquiry. [D]ocuments may be sealed if specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest." [Internal quotation marks omitted.]). Therefore, our conclusion with regard to the intervenors' common-law right of access also disposes of their first amendment claim.

[13] The defendant submitted telephone surveys conducted by Steven Penrod, a professor of psychology at John Jay College of Criminal Justice, reflecting the highest level of case recognition that Penrod ever had seen, ranging from 97 percent in Stamford-Norwalk to 99.5 percent in New Haven. *State* v. *Komisarjevsky*, supra, Superior Court, Docket No. CR-07-241860.

[14] Although the articles regarding this incident were discussed in the defendant's memorandum in opposition to the intervenors' motion to vacate the sealing order, not in Donovan's supporting affidavit, the intervenors' are the source of these articles and they do not contest the accuracy of the information therein.

[15] We underscore that it is both the nonessential nature of the information to the public's understanding of the voir dire proceeding and the imminent disclosure that diminishes the public's right of access in the present case. We do not conclude that delayed disclosure as a general matter satisfies the public's right of access to judicial proceedings. See *In re Charlotte Observer*, 882 F.2d 850, 856 (4th Cir. 1989) (The court explained that a magistrate judge's undervaluation of a first amendment interest "is most directly reflected in his perception that public disclosure, immediately after a jury is selected, of the basis for his earlier change of venue ruling and of the proceedings themselves necessarily would protect the right of access asserted by representatives of the press and public. In the magistrate's expressed view, the only effect of his closure order, as so shaped, was a 'minimal delay' in access to the materials upon which a judicial decision was made and to the judicial reasoning behind the decision. This unduly minimizes, if it does not entirely overlook, the value of 'openness' itself, a value which is threatened whenever immediate access to ongoing proceedings is denied, whatever provision is made for later public disclosure.").