IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1301

GANNETT CO., INC., *Petitioner,*

v.

HON. DANIEL A. DePASQUALE, County Court Judge of Seneca County, New York, et al., *Respondents.*

BRIEF AMICI CURIAE OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AND AMERICAN SOCIETY OF NEWSPAPER EDITORS

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PRELIMINARY STATEMENT

The American Newspaper Publishers Association and American Society of Newspaper Editors submit this brief *amici curiae* in support of Petitioner, Gannett Co., Inc. All parties to this suit have given their written consent to the filing of this brief. Copies of such consents have been filed with the Clerk of this Court.

INTEREST OF THE AMICI CURIAE

The American Newspaper Publishers Association ("ANPA") is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1290 newspapers constituting over ninety percent of the total daily and Sunday newspaper circulation and a significant portion of the weekly newspaper circulation in the United States. Twenty daily or weekly newspapers owned by Gannett Co., Inc., as well as forty-five other newspapers in the State of New York, hold membership in ANPA. In representing its membership, one of ANPA's principal functions is to speak out on issues and cases that may adversely affect the primary role of newspapers, which is the gathering of information and its dissemination to the public, particularly information concerning the criminal justice system and other governmental activities.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 800 persons holding positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded more than 50 years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, preamble), and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

In light of their concern with preserving "a broadly defined freedom of the press [which] assures the maintenance of our political system and an open

society." *Time, Inc.* v. *Hill,* 385 U.S. 374, 389 (1967), ANPA and ASNE are greatly disturbed over the majority opinion of the New York Court of Appeals below. That opinion may serve as precedent for the routine use of secret pretrial proceedings in the State of New York, in utter disregard of the fact that "[c]ommentary and reporting on the criminal justice system is at the core of First Amendment values . . . ." *Nebraska Press Ass'n.* v. *Stewart,* 427 U.S. 539, 587 (Brennan, J., concurring opinion).

QUESTIONS PRESENTED, CONSTITUTIONAL PROVISIONS INVOLVED AND STATEMENT OF THE CASE

Your *amici* adopt the questions presented, constitutional provisions involved and the statement of the case, as set forth in the brief of Gannett Co., Inc.

CLOSURE OF PRE-TRIAL JUDICIAL PROCEEDINGS STRIKES AT THE HEART OF THE FUNDAMENTAL RIGHT OF THE PUBLIC TO RECEIVE, AND OF THE PRESS TO GATHER AND DISSEMINATE, NEWS CONCERNING THE CONDUCT OF GOVERNMENT

In the interest of safeguarding defendants' Sixth Amendment right to a fair trial, Judge DePasquale barred the press and public from attending a pretrial *Huntley* hearing, upon his finding that "[c]ertain evidentiary matters may come up in the testimony of the People's witnesses that may be prejudicial to the defendants . . . ." This order barring attendance at a judicial proceeding by the press and public raises a serious "confrontation between prior restraint imposed to protect one vital constitutional guarantee [i.e., the Sixth Amendment guarantee of trial before an impartial jury] and the explicit command of [the First Amendment] that the freedom to speak and

publish shall not be abridged," *Nebraska Press Ass'n* v. *Stuart, supra,* at 570, and "the problems presented by this [confrontation] are almost as old as the Republic." *Id.* at 547.

Although "the right to speak and publish does not carry with it the unrestrained right to gather information," *Zemel* v. *Rusk,* 381 U.S. 1, 17 (1965), the right of the public and news media to attend criminal proceedings is clearly embraced within the protections of the First and Sixth Amendments and may be overborne only in the most exigent circumstances. Broadly speaking, First Amendment considerations apply to the closure of judicial proceedings because "a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills* v. *Alabama,* 384 U.S. 214, 218 (1966). There exists a "paramount public interest in a free flow of information to the people concerning public officials," *Garrison* v. *Louisiana,* 379 U.S. 64, 77 (1964), and governmental processes. Beyond that, the right to observe and report to the public on criminal judicial proceedings also serves to improve the quality of testimony and provide "an effective restraint on possible abuse of judicial power." *In re Oliver,* 333 U.S. 257, 270 (1948).

The improvement of testimony resulting from contemporaneous public scrutiny of judicial proceedings is achieved "by producing in a witness' mind a disinclination to falsify and . . . by securing the presence of other non-parties who may be able to furnish testimony to contradict falsifiers." *United States* v. *American Radiator and Standard San. Corp.,* 274 F.

Supp. 790, 794 (W.D.Pa. 1967), *aff'd* 388 F.2d 201 (3rd Cir. 1967), *cert. denied,* 390 U.S. 922 (1968).[1]

In terms of its protection against the abuse of judicial power, the press "guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Sheppard* v. *Maxwell,* 384 U.S. 333, 350 (1966).

> "For example, disclosure of the circumstances surrounding the obtaining of an involuntary confession or the conduct of an illegal search resulting in incriminating fruits may be the necessary predicate for a movement to reform police methods, pass regulatory statutes, or remove judges who do not adequately oversee law enforcement activity; publication of facts surrounding particular plea-bargain proceedings or the practice of plea bargaining generally may provoke substantial public concern as to the operations of the judiciary or the fairness of prosecutorial decisions; reporting the details of the confession of one accused may reveal that it may implicate others as well, and the public may rightly demand to know what actions are being taken by law enforcement personnel to bring those other individuals to justice . . . ." *Nebraska Press Ass'n.* v. *Stuart, supra,* at 605-606 (Brennan, J., concurring opinion); see also, *In Re Oliver,* 333 U.S. 527, 267-270 (1948); *United States ex rel Bennett* v. *Rundle,* 419 F.2d 599, 606 (3rd Cir. 1969).

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[1] As stated by Blackstone in 1778:

"This open examination of the witnesses, 'viva voce', in the presence of all mankind, is much more conducive to the clearing up of truth than the private and secret examination taken down before an officer or his clerk, in the ecclesiastical courts and all others that have borrowed their practice from the civil law; where the witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal." Commentaries III, at 768.

Thus, "[t]he commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions * * * are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government." *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 492 (1975). It is for that reason, therefore, that except in the most exigent circumstance a court has no power to "suppress, edit or censor events which transpire in proceedings before it." *Craig* v. *Harney,* 331 U.S. 367, 374 (1947).

THE RIGHT TO OBSERVE JUDICIAL PROCEEDINGS, ARISING UNDER THE FIRST AMENDMENT AND COMMON LAW, MAY NOT BE OVERBORNE SIMPLY UPON A DEFENDANT'S WAIVER OF HIS SIXTH AMENDMENT RIGHT TO A PUBLIC TRIAL

Under the Sixth Amendment to the United States Constitution, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." This guarantee of a public trial in criminal prosecutions is a fundamental protection in our scheme of constitutional liberties.

> "This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage. The exact date of its origin is obscure, but it likely evolved long before the settlement of our land as an accompaniment of the ancient institution of jury trial. In this country the guarantee to an accused of the right to a public trial first appeared in state constitutions in 1776. Following the ratification in 1791 of the Federal Constitution's Sixth Amendment, . . . most of the original states and

> those subsequently admitted to the Union adopted similar constitutional provisions.
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> * * *
>
> Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In Re Oliver, supra,* at 267-268, 270.

Thus, the guarantee of a public trial found in the Sixth Amendment provision is a reflection of the notion, deeply rooted in the common law, that "justice must satisfy the appearance of justice," *Levine* v. *United States,* 362 U.S. 610, 616 (1960), quoting *Offutt* v. *United States,* 348 U.S. 11, 14 (1954). See also, *Maryland* v. *Baltimore Radio Show,* 338 U.S. 912, 920 (1950). Yet in the instant cause of action it is necessary to determine whether the provision for a public trial is merely a guarantee of an individual right, which therefore may be waived by the individual, or whether the societal interests served by the Sixth Amendment guarantee survive, and compel a public trial, in the face of an attempted waiver by the defendants.

There is no doubt that important societal goals are served by public trials. As already discussed, public trials improve the prospects of obtaining the truth by allowing witnesses unknown to the parties to come forward and testify, and by moving the court, parties and witness "more strongly . . . to a strict conscientiousness in the performance of duty." 6 J Wigmore,

Evidence in Trials at Common Law § 1834 at 438. The guarantee of a public trial also enables the public to learn about the operation of their government and acquire necessary trust and confidence in judicial determinations:

> "Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy." *Id.* (footnote omitted).

For conducting trials outside public view, even at a defendant's request, "might engender an apprehension and distrust of the legal system which would, in the end, destroy its ability to peacefully settle disputes." *United States* v. *Lopez,* 328 F.Supp. 1077, 1087 (E.D.N.Y. 1971) See also, *United States* v. *Mitchell,* 386 F.Supp. 639, 642-43 (D.D.C. 1975).

This notion of preserving public confidence in judicial decisions by requiring public trials does not rest on the paternalistic assumption that, in spite of a defendant's expressed desire to waive public trial in the fact of potentially prejudicial pretrial publicity, only public scrutiny can assure that defendant fair treatment before the court.

For

> "[i]t may be witnesses or non-parties whom the judge abuses, ... Or it may be the defendant himself who is the beneficiary of the misdeeds of a biased or corrupt judge: 'for a secret trial can result in favor to as well as unjust prosecution of a defendant.' *Lewis* v. *Payton,* 352 F.2d 791, 792 (4th Cir. 1965). Thus a defendant may have great incentive, to secure a secret hearing in hopes that a corrupt or incompetent judge

> might favor him secretly." *United States* v. *Cianfrani,* 573 F.2d 835, 853 (3rd Cir. 1978).

It therefore is evident that there exists a common law public policy in favor of open proceedings which is distinct from the Sixth Amendment right of the accused. In certain circumstances that policy, which is primarily designed to assure the effectiveness of the trial process, may actually be antagonistic to the wishes of a particular defendant.

> "The defendant may not be concerned with the same aspects of police conduct that concern the public, *or he may even seek to conceal police misdeeds favorable to his own case. It is thus important that the public's interest in learning of official conduct not be overlooked in accommodating the defendant's asserted interest in a closed proceeding." Id.* (emphasis added): c.f., *Stamicarbon, N.V.* v. *American Cyanimid Co.,* 506 F.2d 532, at 539 (2d Cir. 1974).

It is the particular balance struck by the lower courts in seeking to achieve this accommodation between the First and Sixth Amendment rights of the public and the news media and the Sixth Amendment rights of the defendant, which mandates reversal of their rulings by this Court on constitutional grounds.

THE STATED BASES FOR THE TRIAL COURT'S ORDER CLOSING THE PRE-TRIAL PROCEEDINGS, AND FOR THE NEW YORK COURT OF APPEALS' AFFIRMANCE THEREOF, ACCORD INSUFFICIENT WEIGHT TO THE FIRST AMENDMENT VALUES AT STAKE, AND SAID ORDER IS THEREFORE CLEARLY ERRONEOUS UNDER THE DECISIONAL AUTHORITIES OF THIS COURT

It has been said that "[t]he constitutional right to a public trial is not a limitless imperative." *Lacaze*

v. *United States,* 391 F.2d 416, at 521 (5th Cir. 1968), and that "it is clearly not an absolute right." *United States ex rel. Lloyd* v. *Vincent,* 520 F.2d 1272, 1274 (2nd Cir. 1975). In light of that view, the exclusion of the public—on occasion, even over the express objection of the defendant—has been found in certain circumstances to be constitutionally acceptable. See, *e.g., United States* v. *Bell,* 464 F.2d 667, (2nd Cir. 1972) *cert. denied,* 409 U.S. 991 (1972) (public temporarily excluded during discussion of airline's confidential "skyjack profiles"); *United States ex rel Bruno* v. *Herold,* 408 F.2d 125 (2nd Cir. 1969), *cert denied,* 397 U.S. 957 (1970) and *United States ex rel. Orlando* v. *Fay,* 350 F.2d 967, 971 (2nd Cir. 1965), *cert. denied sub nom Orlando* v. *Follette,* 384 U.S. 1008 (1965) (spectators removed to avoid intimidation and harassment of witnesses); *Geise* v. *United States,* 262 F.2d 151 (9th Cir. 1958), *cert. denied,* 361 U.S. 842 (1959) (spectators excluded from rape trial where their presence would inhibit the testimony of prosecutive and other witnesses of young age); *United States ex rel Lloyd* v. *Vincent, supra* and *People* v. *Hinton,* 31 N.Y. 2d 71, 75, 334 N.Y.S.2d 885, 889, 296 N.E.2d 265 (1972), *cert. denied,* 410 U.S. 911 (1973) (exclusion to protect against disclosure of identity of undercover police agents); *United States ex rel Smallwood* v. *Lavalle,* 377 F.Supp. 1148 (E.D.N.Y.), aff'd 508 F.2d 837 (2nd Cir. 1974), *cert. denied,* 412 U.S. 920 (1975) (exclusion to protect against emotional distress to witness, a young expectant mother). See generally, Annot., Exclusion of Public During Criminal Trial, 156 A.L.R. 265 (1945); *id.,* 48 A.L.R.2d 1436

(1956). Nevertheless, these cases do not serve as precedent or authority for the automatic closure of proceedings at the behest of a criminal defendant. Although the right of defendants Greathouse and Jones to a fair trial before an impartial jury—"a basic requirement of due process," *In re Murchison,* 349 U.S. 133, 136 (1955)—is at least as precious as the interests served by exclusion of the public in the foregoing cases, Respondent DePasquale and the New York State Court of Appeals have misconstrued the showing of practical and compelling necessity required to justify such a procedure.

It is a general proposition of constitutional law that governmental activity which limits the traditional exercise of First Amendment freedoms "cannot be justified upon a mere showing of a legitimate state interest. The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest." *Elrod* v. *Burns,* 427 U.S. 347, 362 (1976); see also, *Thomas* v. *Collins,* 323 U.S. 516, 530 (1945). Any judicial order restricting the press and public in their right to "report fully and accurately the proceedings of government . . . and to bring to bear the benefits of public scrutiny upon the administration of justice," *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 492 (1975) therefore faces a very high burden of justification. Specifically, an order foreclosing both public and press attendance at presumptively open judicial proceedings may issue only upon: 1) a showing that public and press attendance will result in the dissemination of information which will pose a "serious and imminent threat of interference with a fair trial," *Chicago Council of Lawyers* v. *Bauer,*

522 F.2d 242, 255 (7th Cir. 1975), *cert. denied,* 427 U.S. 912 (1976), or a "clear and present danger to the fairness of a trial," ABA Adjunct Committee on Fair Trial/Free Press, *Standards Relating to Fair Trial and Free Press* § 3.2 (Approved Draft, February, 1978); 2) a substantial and specific factual showing thereof, i.e., evidence with "the requisite degree of certainty to justify restraint," *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. at 568-570 (1976); and 3) a similarly explicit showing that the "judicial effect of such information on potential jurors cannot be avoided by alternative means [including] (a) voluntary agreement with representatives of the news media; (b) continuance; (c) severance; (d) change of venue; (e) change of venire; (f) voir dire; (g) additional peremptory challenges; (h) sequestration of the jury; and (i) admonition to the jury." ABA *Standards Relating to Fair Trial and Free Press, supra;* see also, *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966); *Nebraska Press Ass'n* v. *Stuart, supra.* And finally, even if an exclusion order is permissible, it "must extend no further than the circumstances strictly warrant in order to meet the asserted justification for closure. *United States* v. *Ruiz-Estrella,* 481 F.2d 723, 725 (2nd Cir. 1973)." *United States* v. *Cianfrani,* 573 F.2d 835, 854 (3rd Cir. 1978).

Respondents have sought to obviate these standards by arguing a) that "[t]his case does not concern the right of the press to publish" but rather the lesser "right of press access to information," Brief for Respondents in Opposition to petition for Writ of Certiorari, at 8; b) that First Amendment values notwithstanding, "[t]he court maintains its inherent power to protect the rights of parties and witnesses

. . . ." *id.* at 9; and c) that Judge DePasquale was "not presiding over a trial on the merits." Petition for Writ of Ceritorari at 8a. None of these factors, we respectfully submit, justify either the trial court's failure to proceed on the basis of an explicit factual showing of a clear and present danger to a fair trial, or its failure to address diligently the adequacy of alternative, less drastic remedial measures.

Information gathering is clearly entitled to variable degrees of constitutional protection. See, *e.g., Branzburg* v. *Hayes,* 408 U.S. 665, 681 (1972); *Pell* v. *Procunier,* 417 U.S. 817, 833 (1974). This protection necessarily complements that protection accorded the public under the First Amendment to receive information and ideas. See, *e.g., Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U.S. 748, 756 (1976); *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85 (1977); *N. Y. Times Co.* v. *Sullivan,* 376 U.S. 254, 266-270 (1964); *Stanley* v. *Georgia,* 394 U.S. 557 (1969).[2]

It very logically has been stated that "[w]ithout the opportunity to gather and obtain the news, the

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[2] It cannot be said that the issue of press access to presumptively open judicial proceedings is resolved by the majority holding in *Houchens* v. *KQED, Inc.,* 46 U.S.L.W. 4830 (1978). Petitioners do not claim "a right of access to all sources of information within governmental control," 46 U.S.L.W. at 4832, nor do "[t]hey argue for an implied special right of access," *id.* at 4831, over and above that of the public. Moreover, neither criminal trials nor "pretrial" evidentiary suppression hearings constitute "occasions when governmental activity may properly be carried on in complete secrecy," 46 U.S.L.W. 4838 (Stevens, J. dissenting opinion), as in the case of "grand jury proceedings, [this court's] own conferences [and] the meetings of other official bodies gathering in executive session. . . ." *Branzburg* v. *Hayes,* 408 U.S. at 684.

right to publish or to comment upon it would be of little value." *Kovach* v. *Maddux,* 238 F.Supp. 835, 839 (M.D. Tenn. 1965). Although the precise extent of the public's right to receive information, and of the media's right to gather information, has not been defined, it is apparent that these two rights, when coupled with the common law Sixth Amendment right of the public to open judicial proceedings, are fundamental in nature and raise a very high barrier to affirmance of an order excluding all the public and news media from the entire proceeding in a pre-trial *Huntley* hearing.[3]

The artificiality of distinguishing in this context between restrictions on publication (*i.e.,* "gag" orders) and restrictions on access is underscored, not rebutted, by the fact that the strict standards approved in *Nebraska Press Ass'n* applied to prior restraints on publication. For the harmful impact of an order barring the attendance at criminal proceedings of both press and public, insofar as it forecloses the practical exercise of our First Amendment right to gather, disseminate and receive information about the conduct of public affairs, is even greater than that of a narrowly circumscribed order restraining publica-

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[3] Nor can such a barrier be overcome merely by the court's undertaking to supply to the public or media at a later date a transcript of the proceedings.

> "[A] transcript of a proceding is a sterile substitute for observing the actual conduct of a hearing, as reviewing courts are well aware. Actual observation of the demeanor, voice, and gestures of the participants in a hearing must be as informative to the press and public as those same matters are to jurors during trials." *State ex rel. Dayton Newspaper, Inc.* v. *Phillips,* 46 Ohio St. 2d 457, 451 N.E.2d 127, 136 (1976) (Stern, J. concurring).

tion. In the case of closure, *no information* concerning what transpired in the proceedings—whether it "may be prejudicial to the defendant"[4] or not—can be disseminated. A closure order therefore may be more restrictive of available information than a gag order. Thus, it is sophistry to characterize a closure order as a lesser, indirect restraint vis-a-vis a gag order. By directly and completely restraining attendance at pre-trial proceedings, knowledgeable publication as to what transpired at such proceedings also is restrained, *in toto.* Therefore the strict standards for the imposition of a gag order, as formulated in *Nebraska Press Ass'n, supra,* at 562-567, 571, apply with at least equal force to the closure order below.

"It must be realized that the use of closed proceedings has the capacity to subvert [by circumvention] the entire effect"[5] of decisions barring or limiting the imposition of gag orders. And decisions such as that of the New York Court of Appeals below can only serve as a signal to judges who do not understand or agree with the rationale and restrictions of *Nebraska Press Ass'n,* that different means may be utilized to achieve the same ends. See, *e.g., Philadelphia Newspapers* v. *Jerome,* —— A.2d ——, 3 Med. L. Rptr. 1751 (Pa. 1978); *New York* v. *Berkowitz,* 406 N.Y.S.2d 699, 3 Med. L. Rptr. 2309 (1978).

Nor may constitutional protections be nullified merely because a court, in ordering closure of proceedings, may be exercising its "implied and inher-

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[4] Exclusionary Order of Seneca County Court, dated November 4, 1976, at Petition for Writ of Certiorari, p. 31a.

[5] *New Jersey* v. *Allen,* 73 N.J. 132, 373 A.2d 377 (1977).

ent" powers. See generally, *Green* v. *United States,* 356 U.S. 165, 193-194 (1958) (Black, J., dissenting opinion); *Gompers* v. *Bucks Stove & Range Co.,* 221 U.S. 418, 451 (1911); "Protective Orders Against the Press and the Inherent Power of the Courts," 87 Yale Law Journal, 342 (Dec. 1977). As noted by the California Court of Appeals:

> "The necessity for [implied and inherent] powers is well recognized . . . . At the same time, we must recognize that the concept of implied and inherent powers poses great dangers when, of necessity, their definition and application is in the hands of those who wield them . . . . If, through lack of restraint and by attempting to increase their powers unnecessarily, they lose the respect which makes them effective, they may soon find that, as a practicable matter, even powers that are now conceded to them, are unenforceable." *Younger* v. *Smith,* 30 Cal. App. 3d 138, 156, 106 Cal. Rptr. 224, 237 (1973).[6]

Thus, although dictum in *Branzburg* v. *Hayes, supra,* suggests that a defendant's Sixth Amendment right to a fair trial before an impartial jury may in certain circumstances be a sufficient basis for the closure of trial or pretrial proceedings, the public's common law and constitutional right to attend and to receive information from the press about judicial hearings clearly may not be overborne, even in the exercise of a court's "inherent powers," without a sufficient

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[6] In discussing a trial court's inherent power to cite contempt by publication, this Court has held:

> "There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire . . . before it." *Craig* v. *Harney,* 331 U.S. 367, 374 (1947).

showing of necessity. The question herein is not one of judicial authority, but rather whether the procedures and conditions under which a closure order may *properly be issued* have been met in the proceedings below.

It is impermissible, therefore, to conduct the entire pretrial suppression hearing *in camera* merely upon the fear, unsubstantiated by an adequate evidentiary record, that not to do so "would threaten the impaneling of a constitutionally impartial jury in the county of venue." Petition for Writ of Certiorari at 10a. As stated in another First Amendment context "*undifferentiated fear or apprehension* of disturbance [or of juror prejudice, or other substantive evil] *is not enough to overcome the right to freedom of expression.*" *Tinker* v. *Des Moines Indept. Community School District,* 393 U.S. 503, 508 (1969) (emphasis added). Thus, "any claim of practical justification for a departure from the constitutional requirement of a public trial must be tested by a standard of strict and inescapable necessity." *United States ex rel. Bennett* v. *Rundle,* 419 F.2d 599, 607 (3rd Cir. 1969) (en banc).

Even assuming that, in its review of the validity of a trial court's order barring public attendance at a pretrial hearing, this Court may not only consider the character and volume of evidence actually presented by the defense, prosecution, or news media, but also the trial court's personal knowledge "based on common human experience," *Nebraska Press Ass'n, supra* at 563, it is apparent that the lower court's ruling was clearly erroneous.

> "[P]retrial publicity, even if persuasive and concentrated, cannot be regarded as leading auto-

> matically . . . to an unfair trial." *Nebraska Press Ass'n* v. *Stuart, supra,* at 554.

Moreover, this Court's holdings in *Irvin* v. *Dowd,* 366 U.S. 717 (1961), *Rideau* v. *Louisiana,* 373 U.S. 723 (1963), *Estes* v. *Texas,* 381 U.S. 532 (1965), and *Sheppard* v. *Maxwell, supra,*

> "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior conviction or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process." *Murphy* v. *Florida,* 421 U.S. 794, 799 (1975).[7]

At the time of closure in the instant case, it already was known what the purpose of the *Huntley* hearing was—to suppress inculpatory prejudicial statements (i.e., admissions or confessions) made by the defendants. Moreover, there was no evidence proferred to demonstrate that the detailed contents of the incriminatory statements would be revealed at the hearing, see *U.S.* v. *Cianfrani, supra* at 39-40, or that such contents would necessarily have been published. See, *Nebraska Press Ass'n, supra,* at 612-613

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[7] The so-called "federal supervisory standard" for impermissible "inherent prejudice" developed in *Marshall* v. *United States,* 360 U.S. 310, 313 (1959) does not apply in state cases. See *Murphy* v. *Florida, supra,* at 804. And at least one federal court has held that standard to be inapplicable to federal cases involving pretrial, as opposed to during-trial, publicity. See, *United States* v. *Haldeman,* 559 F.2d 31 (D.C. Cir. 1976), *cert. denied,* 53 L.Ed.2d 250 (1977). This Court's holdings in *Sheppard* v. *Maxwell, supra,* and *Estes* v. *Texas, supra,* are inapposite, for those cases involved both massive, nationwide publicity and demonstrable havoc (a "carnival atmosphere", *Sheppard, supra* at 618) created by the press' presence in the courtroom.

(Brennan, J., concurring opinion). Nor did the evidence establish "that further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a jury verdict exclusively on the evidence presented in open court." *Nebraska Press Ass'n, supra,* at 569. It simply cannot be said—particularly since there weren't any findings made by the trial court in this regard—that alternatives to closure "would not have sufficiently mitigated the adverse effects of pretrial publicity." *Id.*,[8] see also, *New York Times Co.* v. *Stackey,* 380 N.Y.S.2d 239 (1976). Mere judicial conclusions as to these questions do not suffice. See e.g., *Nebraska Press Ass'n, supra,* at 563, 565, 693; *Wood* v. *Georgia,* 370 U.S. 375, 386, 388 (1962).

Finally, it is specious to suggest that, because Petitioner and other members of the public were excluded from a pretrial evidentiary hearing rather than a full-fledged trial, a lesser and tolerable in-

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[8] It simply is bad law to say, as respondents do, that "no defendant should have to request continuances until the prejudice . . . can, perhaps, be dissipated" or "be forced to incur the expense, inconvenience, and perhaps loss of witness that a three hundred mile change of venue would entail." Brief for Respondents In Opposition [To Petition for Writ of Certiorari], at 11. These are precisely the "less drastic measures" which, if efficacious in reducing the immediate threat of juror prejudice, must be utilized in preference to judicial orders "gagging" the press or closing judicial proceedings to the public. See, *Sheppard* v. *Maxwell, supra,* at 363; *Estes* v. *Texas, supra,* at 550-551; *Nebraska Press Ass'n, supra,* at 563-564, 572-573; *State ex rel. Dayton Newspapers, Inc.* v. *Phillips,* 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976); ABA Adjunct Committee on Fair Trial and Free Press § 3.2 (Approved Draft, February, 1978).

fringement of First Amendment freedoms occurred.[9] A very substantial number of criminal proceedings, including that against Jones and Greathouse, are resolved on the basis of the court's rulings in suppression hearings and thereby terminate short of trial.[10] Thus, a suppression hearing is, in a sense, "adjudicative," and although it ordinarily is preliminary to the trial, it is not merely procedural nor is it peripheral to the outcome of the criminal case. It

> "differs strongly from those incidental or collateral discussions outside the presence of the jury which occur during a trial, at which it has been held the public may be excluded, such as a discussion regarding the appointment of counsel for an indigent defendant, or a side-bar conference regarding a question of law or motions for severance and bail, or conferences in chambers or other matters not properly for the jury.
>
> A [suppression of evidence] hearing has more of the characteristics of a testimonial hearing, which is the essence of a trial proceeding, than does the selection of a jury, which we held in *United States* v. *Kobli,* 172 F.2d 919 (3rd Cir. 1949) to be part of a public trial . . . . Such a hearing, with conflicting credibility in issue and factual findings of the judge the ultimate outcome, is in every respect equivalent to a trial proceeding, except that the jury necessarily is excluded from

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[9] "[W]e know of no authority for the proposition that First Amendment standards may be 'tempered' according to the degree of the restraint imposed." *United States* v. *CBS, Inc.,* 497 F.2d 102, 105 (3rd Cir. 1974).

[10] See, *e.g., United States* v. *Clark,* 475 F.2d 240, 247 (2nd Cir. 1973).

it . . . ." *United States ex rel. Bennett* v. *Rundle, supra.*[11]

Thus,

> "because of the importance of providing an opportunity for the public to observe judicial proceedings at which the conduct of enforcement officials is questioned, the right of a public trial should extend to suppression hearings rather than permit such crucial steps in the criminal process to become associated with secrecy." *United tSates* v. *Clark,* 475 F.2d 240, 247 (2d Cir. 1973) (citations omitted).

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[11] Aside from the functional and procedural similarities between a suppression hearing and a criminal trial, the same fundamental public policies served by the Sixth Amendment requirement of a public trial are also served by conducting suppression hearings in public:

> "The policy aspects of the constitutional guarantee have significant application in the unique situation presented by a *Jackson* v. *Denno* hearing. It is especially important to have public knowledge of claims of police coercion or disregard of the constitutional rights to silence and to the assistance of counsel. It is equally important that the testimony of police officers regarding police conduct which usually occurs more or less in private within an environment which the police themselves create and in which they reign, should not be given in secret. Thus the desirability of the public exposure of the claims and denials of coerced confessions, the policy that judicial proceedings be under the scrutiny of the general public in order to avoid judicial oppression [or favoritism] and to discourage perjury, and the provision for the possibility that one who has valuable information might stray into the courtroom as a spectator and hear the proceeding, all are relevant to a *Jackson* v. *Denno* hearing as to a full trial. From the conclusion it follows that such a hearing falls within the constitutional requirement that in criminal prosecutions all trials should be public." *U.S. ex rel. Bennett, supra,* at 606.

CONCLUSION

There may be instances when a judicial order barring public attendance at portions of trial or pre-trial proceedings is permissible. Yet the Constitutional hurdles to the entry of such an order, even when closure is requested by a criminal defendant, are formidable. The trial court, in the exercise below of its authority in this area, clearly ignored the required substantive and procedural safeguards set forth by this Court in *Nebraska Press Association* v. *Stuart,* 427 U.S. 539 (1976). If upheld, Respondent DePasquale's order could lead to the routine and automatic closure of judicial proceedings whenever there is a mere assertion of potential prejudice to juror impartiality resulting from the public's knowledge of or exposure to the evidence and testimony adduced in such proceedings. This could erect a shield for judicial or prosecutorial favoritism and corruption; moreover, it could provide a basis for revival of the abuses formerly associated with the *Star Chamber* and recently displayed in the Soviet trials of Russian dissidents such as Anatoli Shcharansky and Alexander Ginzburg. The mere spec-

tre of such abuse demands scrupulous judicial restraint in this regard and mandates reversal of the New York State Court of Appeals.

Respectfully submitted,

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