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.*

ON WRIT OF CERTIORARI TO THE
STATE OF NEW YORK COURT OF APPEALS

BRIEF FOR THE RESPONDENTS

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United States ex rel. Bruno v. Herald, 408 F.2d 125 (2d Cir. 1969), cert. denied 397 U.S. 957 (1970)	17
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United States ex rel. Lloyd v. Vincent, 520 F.2d 1272, cert. denied 423 U.S. 937 (1975)	17
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United States ex rel. Smallwood v. LaValle, 377 F.Supp. 1148 (E.D. N.Y. 1974) aff'd 508 F.2d 837 (2d Cir. 1974), cert. den. 412 U.S. 920 (1975)	17
United States v. Gurney, 558 F.2d 1202 (5th Cir. 1977), cert. denied sub nom. Miami Herald Publishing Co. v. Krentzman, 98 S.Ct. 1606 (1978)	36

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United States v. Jackson, 390 U.S. 570 (1968)	21
United States v. Sorrentino, 175 F.2d 721 (3d Cir. 1949)	19
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ABA Standards Relating to the Administration of Criminal Justice, Pretrial Hearings, (Approved Draft 1974) 23

Ayer Directory of Publications (1977) 30,31

Cooley, Constitutional Limitations (8th Ed. 1927) 9,14

Douglas, The Public Trial and The Free Press 33 Rocky Mt. L. Rev. 1 (1960) 14

Emerson, Legal Foundations of the Right to Know, Wash. U.L.Q. 1 (1976) 26

Emerson, The Doctrine of Prior Restraint, 20 Law and Contemp. Prob. 648 (1955) 38

Fahringer, Charting a Course From The Free Press to a Fair Trial, 12 Suffolk Univ. L. Rev. 1 (1978) 32,34

Fair Trial Free Press Principles and Guidelines For The State of New York (1976) 22

Fair Trial/Free Press: The Court's Dilemma, 17 Washburn L.J. 125 (1977) 34

Friendly and Goldfarb, Crime and Publicity (1967) 22

Heller, The Sixth Amendment to the Constitution of the United States (1969) 11

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Kaplan, Free Press/Fair Trial Rights in Conflict: Freedom of the Press and the Rights of the Individual, 29 Okla. L. Rev. 363 (1976) 27

Litwack, The Doctrine of Prior Restraint, 12 Harv. Civil Rights-Civil Liberties L.R. 519 (1977) 38

Powell, The Right to a Fair Trial, 51 ABAJ 534 (1965) 10,11

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Raichle, If There Is to be An Abridgment of Pretrial Communication, Should it be Coupled With An Expansion of Trial Coverage By Radio and Television, 42 Notre Dame Lawyer 915 (1967) 39

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HON. DANIEL A. DePASQUALE, as Judge of the Seneca County Court, KYLE EDWIN GREATHOUSE, DAVID RAY JONES and STUART O. MILLER, as District Attorney of Seneca County,

Respondents.

On Writ of Certiorari to the State of New York Court of Appeals

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BRIEF FOR THE RESPONDENTS

Questions Presented

1. Is it permissible to exclude the public and press from a pretrial hearing on a motion to suppress statements made by the defendant and physical evidence seized from him where the defendant requests the exclusionary order in an effort to minimize publicity prior to jury selection?

2. Was it permissible for the Seneca County Court judge to issue such an exclusionary order where: (a) the defendants were out-of-state transients accused of the murder and robbery of a local area resident who is a former police officer with substantial roots in the community; (b) there were no eyewitnesses to the alleged crime; (c) the alleged deceased's body had never been recovered; (d) the defendants, having fled the jurisdiction, were arrested in Michigan under sensational circumstances and returned to the County; (e) one of the defendants is sixteen years of age; (f) the case had continuously generated extensive publicity throughout the County as well as the surrounding counties; and (g) Seneca County has a population of approximately 36,000?

3. Does the court's affordance of "an opportunity to be heard, not in the context of a full evidentiary hearing, but in a preliminary proceeding adequate to determine the magnitude of any genuine public interest" which "may be found to outweigh the risks of premature disclosures," comply with the public's due process right to access to suppression hearings? (Cert. 11a).

4. Does the court's affordance to "the media access to transcripts redacted to exclude matters ruled inadmissible during the closed suppression hearing" and complete transcripts

"when the defendants' interests were not longer in jeopardy" satisfy "any true public interest...consonant with constitutional free press guarantees"? (Cert. 11a).

CONSTITUTIONAL PROVISIONS INVOLVED

Except for the Sixth Amendment, the Constitutional provisions involved are adequately set forth in the Petition.

The Sixth Amendment to the United States Constitution provides, in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...."

STATEMENT OF THE CASE

In mid-July, 1976, former police officer Wayne Clapp was seen leaving a lakeside marina accompanied by two unidentified youths. His boat was later found, laced with bullet holes. His pickup truck and pistol, along with the two strangers, had vanished. Despite a search by divers, Clapp's body was never recovered.

On July 22, 1976 a nationwide police alert for Clapp's truck proved successful when it was spotted by Michigan police. After surrounding a motel and then giving chase for three hours using helicopters and tracking dogs, the defendants were arrested.

Both defendants made statements and Greathouse led Michigan police to the place where he had buried Clapp's gun. They waived extradition proceedings and were returned to New York.

All these facts were reported by the press which serves Seneca County, the scene of the murder.*

The Newspaper Accounts:

Petitioner concedes that the charges and the events preceding the indictments of respondents Kyle Edwin Greathouse and David Ray Jones "were the subject of great public interest" (A23). Petitioner also concedes that "the criminal investigation and the criminal case were the subject of numerous articles and reports by news media other than those of petitioner" (A23).

A "sample" of these "numerous articles and reports" was selected by petitioner and constitutes a portion of the record (A23; 32-51).

The "sample" refers to certain unique legal problems that appeared in the case, i.e. the extradition of Greathouse, a juvenile under Michigan law, and the prospect of prosecuting the indictment without Clapp's body, which has never been recovered (A32-43).

It was reported that State police were in Michigan to interview "suspects in an effort to learn the motive for the apparent slaying" and that "Michigan authorities said Greathouse told them he was afraid he would be shot [by police] (A34)". According to these news articles, defendant Greathouse was "on probation in San Antonio, but officers didn't know details of his

*(A33-35, 37, 41, 45).

criminal record" (A38); the defendants were arrested after Clapp's stolen truck was found (A40); Greathouse led police to Clapp's gun and ammunition was found in his motel (A38-9): a pretrial hearing was scheduled "to determine whether certain evidence, including statements, may be admissible as evidence in the defendant's pending trial" (A51); and that the district attorney "argued...strongly that for the defendant's sake the judge was obliged to close the suppression hearing to protect their right to a fair trial" (A51).

The Motion and the Hearing:

The respondents Greathouse and Jones' motion to suppress statements and physical evidence came on for a hearing before respondent Judge DePasquale. Both defendants moved the court to exclude the public and press prior to taking any testimony. Defendants argued that "we are going to take evidentiary matters into consideration here that may or may not be brought forth at a trial" and that "the dilatorious (sic) effects [of the publication of such evidence] far outweigh the constitutional rights [to a public trial]." Neither the respondent district attorney, nor the reporters and other members of the public who were present objected. The court granted the motion and proceeded in camera (A4-6, 25).

The next day, petitioner's reporter wrote Judge DePasquale requesting either that the suppression hearing "be postponed" so that petitioner could argue its right to be present or "[i]f the hearing has been completed" that petitioner "be given access to the transcript" (A7). Judge DePasquale informed petitioner that the hearing had been concluded, that he had "reserved decision," and that "[u]nder no circumstances ...

will a transcript be made available to you before I have rendered my decision" (A8).

Petitioner then requested that Judge DePasquale vacate nunc pro tunc his decision to hold an in camera suppression hearing and provide "access to the transcript of said hearing immediately upon completion of said transcript" (A1, 11) The court agreed that petitioner had "a right to be heard" and permitted "arguments on the merits to be made." After argument the court rejected petitioner's claim (A9, 26).

Judge DePasquale stated as his reasons for adhering to his initial determination:

> The motion...was granted by the Court on [3] the theory that under the special and unusual circumstances...there was a reasonable probability of of (sic) prejudice to the defendants [had the press and public not been excluded].... (A14)*
>
> I want to very carefully balance the rights of the public to know and the defendant's rights to a fair trial.... (A16).
>
> [T]o say, "Well, let's put the burden on these defendants to show on a factual basis where they are going to be prejudiced," is being unreasonable.... The motion was made... on behalf of the defendants who were facing very serious charges, [9] and as counsel stated, it was a sensitive hearing. With...everything being taken into consideration...the Court ...ruled on the motion, and the basis for its ruling being that there was a reasonable probability of prejudice to the defendants. (A 17).

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* See similarly A17, 18.

The Appellate Division:

The Appellate Division reversed Judge DePasquale stating that:

> The exclusionary order entered here infringed petitioner's First Amendment rights in that it constituted a violation of the right of the press to publish free from unlawful governmental interference. (Cert. 25a).

The Court of Appeals:

The Court of Appeals reversed the Appellate Division and held that Judge DePasquale had the power to exclude the public and press from the pretrial evidentiary suppression hearing and that his exercise of that power had not constituted an abuse of discretion (Cert. 10a,11a).

The Court noted that the public has "general interest in the assurance of fair as well as effective enforcement of its laws." Both the defendant and the public have an interest "in an adversary system which consistently dispenses our penal laws impartially... free from needless prejudicial publicity...." However, "where a fair trial may hang suspended in the balances, the Constitution should not be considered as a substitute for a sunshine law.... The public trial concept has therefore 'never been viewed as imposing a rigid, inflexible straitjacket on the courts. It has uniformly been held to be subject to the inherent power of the court to...protect the rights of parties and witnesses, and generally to further the administration of justice'...."

In all cases where public access is limited, "the remedy-legislative or judicial has called for 'a sensitive and wise balancing of the rights of the individual defendant and the interests of the public'...."

"Having imposed on the Trial Judge an affirmative obligation to ensure this balance..., it would be anomalous indeed to withhold the discretionary power necessary to achieve it." (Cert. 6a-8a).

SUMMARY OF ARGUMENT

This case is not concerned with the use of the drastic power of injunction to restrain press publication, nor with the court's contempt power. It concerns the right of criminal defendants to be tried by a jury which has not been told outside of court about evidence which is inadmissible inside the courtroom.

Respondents Greathouse and Jones moved to exclude the public, including several media representatives, from their pretrial evidentiary suppression hearing on the grounds that the destructive effect of the publication of such evidence far outweighed their constitutional rights to a public trial (A5). The respondent district attorney had no objection and would later argue in behalf of the accused that "the judge was obliged to close the suppression hearing to protect their right to a fair trial" (A51). Respondent Judge DePasquale granted the motion stating later, after full argument on the merits, that "[w]ith ... everything being taken into consideration" (A17) the court "believes that there was a reasonable probability of prejudice to those defendants had the press and public not been excluded" (A15).

This Court has made clear that "our system of law has always endeavored to prevent even the probability of unfairness" (In re Murchison, 349 U.S. 133, 136 (1955)) and has noted that "[p]retrial [publicity] ... may be more harmful than publicity during trial for it may well set the

community opinion as to guilt or innocence." (Estes v. Texas, 381 U.S. 532, 536 (1965)). Accordingly, this Court has reversed tainted convictions, but has emphasized that "reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception." (Sheppard v. Maxwell, 384 U.S. 333, 363 (1966)).

Petitioner claims that, where a Judge denies to the prospective jury (the public) their right to know in advance of trial potentially inadmissible evidence, the "protections afforded First Amendment interests by Nebraska Press should apply." (P.B. 27) Respondents show in Point One that "[t]he requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned" (Cooley, Constitutional Limitations (8th Ed. 1927) at 647); in Point Two that the closing of pretrial proceedings with the consent of the defendant is a "workable compromise, between individual rights 'and the preservation of public rights to Government information'" (Department of Air Force v. Rose, 425 U.S. 352, 381 (1976)); in Point Three that Judge DePasquale's ruling was overwhelmingly justified in the instant case; and in Point Four that petitioner's argument on behalf of the prospective's jury's right to know fails to distinguish restraint of publication from denial of access, and fails to adequately safeguard the right to a fair trial. Respondents conclude that with speech unrestrained and an accused protected from probable harm, the administration of justice has been furthered and the decision of New York Court of Appeals should be affirmed.

POINT ONE

THE RIGHT TO A FAIR TRIAL MUST NOT BE DENIED

A. The Ultimate Concern is the Right to a Fair Trial

In The Right to a Fair Trial, Justice Powell, then President of the American Bar Association, noted that:

> ...we must avoid being confused by generalizations and slogans.... some persons have talked about a "public right to know" as if it were a constitutional right. These generalizations miss the point.... We must bear in mind that the primary purpose of a public trial and of the media's right as part of the public to attend and report what occurs there is to protect the accused.... The ultimate public concern is not the satisfaction of curiosity or an abstract "right to know." Rather it is the assurance that trials are in fact fair and according to law. [fn.1]

To assure "that trials are in fact fair and according to law" this Court has always insisted that "the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." Patterson v.

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1. Powell, The Right to a Fair Trial, 51 ABAJ 534, 538 (1965).

Colorado, 205 U.S. 454, 462 (1907). To assure that only reliable evidence is presented to the jury, this Court has formulated rules of evidence and procedures "to exclude information that is untrustworthy, irrelevant or unfairly obtained." [fn. 2] See Miranda v. Arizona, 384 U.S. 436 (1966); Jackson v. Denno, 378 U.S. 368 (1964); Mapp v. Ohio, 367 U.S. 643 (1961).

Specifically guaranteed to "the accused" by the Sixth Amendment, is "the right to a... trial, by an impartial jury of the State and district wherein the crime shall have been committed." [fn. 3] Accordingly in In re Murchison, 349 U.S. 133, 136 (1955) this Court noted that:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.*** [T]o perform its high function in the best way "justice must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 14.

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2. Ibid. at 534.

3. The foundation for the inclusion of this language in the Sixth Amendment was appropriately New York's proposal to James Madison that the Bill of Rights contain a provision that: "such trial should be speedy, public, and by an impartial jury of the county where the crime was committed." Heller, The Sixth Amendment to the Constitution of the United States, 29 (1969).

Without this specific guarantee of "an impartial jury," all other rights granted by the Fourth, Fifth and Sixth Amendments would be rendered useless.

In Counselman v. Hitchcock, 142 U.S. 547, 563 (1892), this Court clearly stated that the guarantees of the Sixth Amendment are distinctly intended for the protection of "a person who is accused and who is to be tried by petit jury." The guarantee is that a person, accused of a crime but presumed innocent, will receive "due process of law" prior to being "deprived of life, liberty, or property." [fn.4] More specifically, the State cannot lawfully convict any person who has been deprived of his right to an impartial jury. In this regard it is irrelevant "who" actually caused the prejudice. Whether it be done by an agent of the State or a private person, the conviction cannot stand. Turner v. Louisiana, 379 U.S. 466 (1965), Marshall v. United States, 360 U.S. 310 (1959).

However, "reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception." Sheppard v. Maxwell, 384 U.S. 333, 363 (1966). The State itself has the obligation to prevent its own processes from being used by outsiders to deny an impartial jury. And this Court has agreed that the "[c]ourts must have power to protect the interests of prisoners and litigants before them from unseemly efforts to pervert judicial action." Pennekamp v. Florida, 328 U.S. 331, 347 (1946).

In recognition of this State obligation to the accused, the legislative branch has specifically permitted the prosecutor to deny public access to any information that would "deprive a person of a right to a fair trial or an impartial

4. Fifth Amendment, U.S. Constitution.

adjudication." [fn.5]. This principle was recognized by this Court when it stated that "the trial court might well have proscribed extra-judicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as ... any statement made [by the accused] to officials." Sheppard v. Maxwell, supra at 361. Just as the Court has recognized that jurors must be insulated from inadmissible evidence, so it has recognized that potential veniremen must also be protected. This is because:

> Pretrial [publicity] can create a major problem for the defendant in a criminal case. Indeed, it may be more harmful than publicity during trial for it may well set the community opinion as to guilt or innocence. Estes v. Texas, 381 U.S. 532, 536 (1965).

The accused need not wait until his right to an "impartial jury of the State and district" has already been severely damaged by prejudicial pretrial publicity before he may request the court to control its own process, the source of this prejudicial information. The Sheppard judge erred when he held that he "lacked power to control the publicity about the trial" [fn.6].

"While maximum freedom must be allowed the press in carrying on [its] important function in a democratic society its exercise must necessarily be subject to the maintenance of absolute fairness

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5. 5 U.S.C.A. §552 b(c)(7)(B) (West Supp. 1977). See Similarly N.Y. Pub. Offic. Law §87 (2)(e)(ii) (McKinney 1978).
6. Sheppard v. Maxwell, supra at 357.

in the judicial process...." "[T]he life or liberty of any individual in this land should not be put in jeopardy because of the actions of any news media...." Estes v. Texas, supra at 539, 540. As this Court has "stressed..., the presence of the press at judicial proceedings must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged." Sheppard v. Maxwell, supra at 358.

B. The Accused's Right to a Fair Trial is Paramount to the Public's Right to a Public Trial

Included within the accused's Sixth Amendment rights is that of a "public trial." This "guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution." In re Oliver, 333 U.S. 257, 270 (1948). Accordingly, in Oliver [fn.7] this Court quoted favorably that:

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions *** Cooley, Constitutional Limitations (8th Ed. 1927) at 647.

This guarantee of a public trial is "for the benefit of the accused, not the press." Douglas, The Public Trial and the Free Press, 33 Rocky Mt. L. Rev. 1,5 (1960). Professor Radin, for example, expressly stated that "the Constitution certainly

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7. In re Oliver, supra at 270.

does not mention a public trial as the privilege of the public, but expressly as that of the accused." Radin, The Right to Public Trial, 6 Temple L.Q. 381, 392 (1931). Now "[p]etitioners are seeking to convert what is essentially the right of the particular accused into a privilege for every citizen." United Press Assoc. v. Valente, 308 N.Y. 71, 81, 123 N.E.2d 777, 781 (1954).

The public has its own interest in keeping its courts open and New York, as well as the rest of the States, recognizes this societal interest. Therefore, it is the law of New York that "... sittings of every court within this state shall be public, and every citizen may freely attend the same." [fn.8]

Accordingly in the instant case the Court of Appeals stated that "[c]riminal trials are presumptively open to the public, including the press" (Cert. 5a). Petitioner concedes that the "Constitutional phrase which guarantees a public trial to 'the accused' reflects a concern for the rights of the individual, and an understanding that the interests of a defendant in a fair trial and those of the public in a public trial will generally coincide." (P.B. 36). What petitioner does not concede is that "when the two rights conflict, the accused's right should be paramount." The Right to a Public Trial in Criminal Cases, 41 N.Y.U.L. Rev. 1138, 1152 (1966).

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8. N.Y. Judiciary Law §4 (McKinney 1978).

A number of States, including New York, have recognized this potential conflict and have specifically allowed exceptions to the general rule for the benefit of the accused. [fn.9]

Further, "the public trial concept has... never been viewed as imposing a rigid, inflexible straitjacket on the courts. It has been uniformly held to be subject to the inherent power of the court to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses, and generally to further the administration of justice." People v. Jelke, 308 N.Y. 56,

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9. E.g. Concerning preliminary hearings, N.Y. Crim. Proc. Law §180.60 (9) (McKinney 1978) provides that: "The court may, upon application of the defendant, exclude the public from the hearing and direct that no disclosure be made of the proceedings." Also see: Geise v. United States, 265 F.2d 659 (9th Cir. 1959); 17 Ariz. Rev. S. Rules of Crim. Proc. Rule 9.3 (b) (1977); 4a Ark. S. Crim. Proc. and Rules, §43-615 (1977); Cal. Penal Code §868 (1978); Stapelton v. District Court, 179 Col. Rpts. 187, 499 P.2d 310 (1972); (en banc); 4 Idaho Code, Crim. Proc. §19-811 (1978); Iowa Code §813.2, Rule 2(4)(d) (1978); Commonwealth v. Jackson, ___Mass.____, 327 N.E.2d 912 (1975); Minn. Rules of Crim. Proc., Rule 25.01 (1978); 8 Mont. Rev. S. §95-1202(c) (1977); State v. Simmants, 194 Neb. 783, 236 N.W.2d 794 (1975); 6 Nev. Rev. S. §171.204 (1977); 5a N.D. Cent. Code §29-07-14 (1977); Penn. Rules of Crim. Proc., Rule 323(f) (1978); 8 Utah Code, Crim. Proc. §77-15-13 (1977).

63, 123 N.E.2d 769, 772 (1954); accord United States ex rel. Lloyd v. Vincent, 520 F.2d 1272, 1274 (2d Cir. 1975), cert. denied 423 U.S. 937 (1975). Pretrial hearings and portions of trials have been closed to the public and at times such closure has occurred despite the accused's objection that his Sixth Amendment right to a public trial has been infringed. [fn.10]

Petitioner incorrectly asserts that these limited closures have occurred solely "for reasons unrelated to a defendant's right to a fair trial" (P.B. 43). See for example, Kirstowsky v. Superior Court, 143 Cal. App.2d 745, 300 P.2d 163 (Ct. App.

10. See e.g. United States ex rel. Lloyd v. Vincent, supra (to protect disclosure of undercover officer); United States v. Bell, 464 F.2d 667 (2d Cir. 1972), cert. denied 409 U.S. 991 (1972) (skyjack profile testimony); United States ex rel. Bruno v. Herald, 408 F.2d 125 (2d Cir. 1969), cert. denied 397 U.S. 957 (1970); United States ex rel. Orlando v. Fay, 350 F.2d 967 (2d Cir. 1965), cert. denied sub nom Orlando v. Follette, 384 U.S. 1008 (1965) (to protect threatened witness); United States ex rel. Smallwood v. LaValle, 377 F. Supp. 1148 (E.D.N.Y. 1974), aff'd 508 F.2d 837 (2d Cir. 1974), cert. denied, 412 U.S. 920 (1975) (to protect emotional and physical health of pregnant witness); People v. Hinton, 31 N.Y.2d 71, 334 N.Y.S.2d 885, 296 N.E.2d 265 (1972), cert. denied, 410 U.S. 911 (1973) (to protect disclosure of undercover officer). N.Y.Judiciary Law §4 (McKinney 1978).

1956), where the court approved of a limited exclusion of the public and press from a trial where it appeared that the accused would not be able to testify freely otherwise. It agreed that the trial court's acceptance of the waiver of a public trial could be "a proper exercise of discretion in order to accord the defendant a fair trial." Kirstowsky, supra at 168. In Oxnard Publishing Co. v. Superior Court, 68 Cal. Rptr. 83 (Ct. App. 1968), the court noted that "...if the specific text of a confession to a particularly brutal murder had to be discussed in testimony prior to its admission in evidence, the publication of the text might be sufficiently prejudicial to the interest of the defendant to require some sacrifice of the other interests in a public trial by receiving evidence discussing its text in closed proceedings." Oxnard, supra at 93, n. 4.

The "public trial," therefore, is not an absolute right of the public nor of the accused. Courts and legislatures have often exercised their discretion and have balanced the rights of the public, parties and witnesses. Since the general rule is that trials are open, whenever closings have occurred they have been both necessary and of limited duration.

It would be the height of irony if this Court permitted the public to use the accused's constitutional right to a public trial, his personal "safeguard against any attempt to employ our courts as instruments of persecution," [fn.11] to nullify his Constitutional guarantee of a "trial, by an

11. In re Oliver, supra at 270.

impartial jury of the State and District wherein the crime shall have been committed." "To deny the right of waiver [of a public trial] would be 'to convert a privilege into an imperative requirement' to the disadvantage of the accused." United States v. Sorrentino, 175 F.2d 721, 723 (3d Cir. 1949). As this Court said with reference to the Fifth Amendment in Boyd v. United States, 116 U.S. 616, 635 (1886):

> It may be that it is the obnoxious thing in its mildest and least obnoxious form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.

POINT TWO

EXCLUSION OF THE PUBLIC FROM PRETRIAL SUPPRESSION HEARINGS IS CONSTITUTIONALLY PERMISSIBLE

A. Pretrial publication of alleged confessions can endanger the right to a fair trial.

The Court has long recognized that media publicity can irreparably damage an accused's right to a fair trial. See Groppi v. Wisconsin, 400 U.S. 505 (1971); Sheppard v. Maxwell, supra; Estes v. Texas, supra; Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961); Marshall v. United States, supra; Janko v. United States, 366 U.S. 716 (1961); Shepherd v. Florida, 341 U.S. 50 (1951) (concurring opinion); Stroble v. California, 343 U.S. 181, 199 (1952) (Frankfurter dissenting); Moore v. Dempsey, 261 U.S. 86, 88 (1923). Pretrial publicity can undoubtedly inflict irreparable damage upon an accused's right to an impartial jury in the county of venue. See Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976); Groppi v. Wisconsin, supra; Estes v. Texas, supra; Rideau v. Louisiana, supra.

This Court has also recognized the inherent prejudice involved in media dissemination of confessions untested by constitutional standards as to reliability and admissibility. Rideau v. Louisiana, supra. In Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 254-55 (7th Cir. 1975), cert. denied 427 U.S. 912 (1976), the court after discussing the dissemination of purported confessions concluded "that there is no overriding purpose in allowing such comment and that it could be identified as a presumptively prohibited subject." Cf. Mares v. United States, 383 F.2d 805 (10 Cir. 1967).

In New York the accused must make a motion to suppress a coerced confession or else he has waived his right to a judicial determination of his contention. N.Y. Crim. Proc. Law §710.70(3). Cf. Wainwright v. Sykes 433 U.S. 72 (1977). The hearing on this motion, if it is truly to serve its purpose, must be uninhibited by any extraneous concern that the inadmissible evidence will reach the ultimate trier of fact. Knowing that this hearing will be extensively covered by the media:

> A defendant may feel compelled to give up this right out of fear that inculpatory evidence might become public knowledge before or during trial. Such pressure to forego a constitutional right denies due process. E.g., United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1209 (1968).... Even a defendant who chooses to risk such disclosure might be reluctant to testify or present favorable witnesses out of a similar fear of disclosure.
> Philadelphia Newspaper v. Jerome, __Pa.__, 3 Med. L. Rptr. 2185, 2193 (1978).
> Cf. Maryland v. Baltimore Radio Show, 193 Md. 300, 67 A.2d 497, 516-17 (dissenting opinion), cert. denied 338 U.S. 912 (1950).

B. Exclusion is an Effective Prophylactic Measure.

In recognition of the severe damage that pretrial publicity of inadmissible evidence can cause to both an accused and the true administration of justice this Court has specifically endorsed various methods of preventing "the prejudice at its inception." [fn.12] They are: (1) voluntary agreements between the court and the press not to publish

12. Sheppard v. Maxwell, supra at 363.

the potentially inadmissible evidence; (2) requiring that court officers and personnel refrain from extra-judicial comments; and (3) prior restraints on the publication of this prejudicial information. The principle defect in voluntary agreements is that "there is no enforcement procedure." [fn.13] Additionally, as even the press concedes, both the dynamics of their business and their institutional viewpoint oppose any delay in the publication of any information:

> Conditioned as he is by that tradition [to publish], the editor finds it hard to believe that his acts have injured or will injure defendants in general or any defendant in particular.... Friendly and Goldfarb, Crime and Publicity, 200 (1967).

Abstention from extra-judicial comment by court officers and personnel is irrelevant when pretrial testimony itself is the source of the prejudicial information. A prior restraint on publication, which is presumed to be unconstitutional, would also be ineffectual as "once a public hearing had been held, what transpired there could not be subject to prior restraint." Nebraska Press Assn. v. Stuart, supra at 568.

However, this Court has noted an additional prophylactic "tending to blunt the impact of pretrial publicity," namely the "[c]losing of pretrial proceedings with the consent of the defendant." Nebraska Press Assn. v. Stuart, supra at 564. See also Times-Picayune Publishing Corp. v. Schulingkamp, 419 U.S. 1301,

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13. Fair Trial Free Press Principles and Guidelines For the State of New York, (1976) Appendix, Complaint Procedure (emphasis in original).

1308 (1974). Cf. Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977). This alternative, which has been endorsed in a number of states, [fn.14] has also been approved in the ABA Standards Relating to the Administration of Criminal Justice, Pretrial Hearings, §3.1, (Approved Draft 1974) which states in part:

> In any...pretrial hearing...including a motion to suppress evidence, the defendant may move that...the hearing be...closed to the public, including representatives of the news media, on the ground that dissemination of evidence or argument adduced at the hearing may disclose matters that will be inadmissible in evidence at the trial and is therefore likely to interfere with his right to a fair trial by an impartial jury. The motion shall be granted unless the presiding officer determines that there is no substantial likelihood of such interference.... Whenever under this rule all or part of any pretrial hearing is held in chambers or otherwise closed to the public, a complete record of the proceedings shall be kept and shall be made available to the public following completion of trial or disposition of the case without trial.

This alternative was adopted by the New York Court of Appeals. The accused's waiver and the court's finding overcome the presumption that the "sittings of every court within this state shall be public" [fn.15] and in turn create a presumption

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14. See n. 9, supra.
15. N.Y. Judiciary Law §4 (McKinney 1977).

in favor of closure. The burden of going forward then shifts to the public to show that the public interest "outweigh[s] the risk of premature disclosures" (Cert. 11a). If this burden is met, the hearing remains open; if not, then so long as the defendant is in jeopardy the media is granted "access to transcripts redacted to exclude matters ruled inadmissible" (Cert. 12a). Complete transcripts are made available when the defendants' interests are no longer "in jeopardy" (Cert. 12a).

C. Exclusion Is a Workable Compromise Between Individual and Public Rights

A similar balancing procedure has been adopted by the Congress and by the New York State Legislature [fn.16] in a related situation. The Freedom of Information Act [fn.17] begins with the presumption that public confidence, trust and understanding of government require that the government conduct its business in the open. However, this presumption is not absolute. The Act, of necessity, balances the need for openness with the needs for personal privacy and administrative efficiency. In addition, all information that "would...deprive a person of a right to a fair trial" is specifically declared exempt from disclosure [fn.18]. The government thereby recognized that whatever openness was in its own interest or the public's, "[o]f primary consideration is the public's interest in avoiding any developments that would threaten to truncate a defendant's right to a fair trial" (Cert. 11a).

The Act also provides for the closing of meetings to the public. In this regard, it is noteworthy "that deliberations concerning closure or the public announcement of a meeting are by

16. N.Y. Pub. Office Law §§85-90 (McKinney 1978).
17. 5 U.S.C. §552 b (West Supp. 1977).
18. 5 U.S.C.A. §552 b (c)(7)(B) (West Supp. 1977). See also n. 5, supra.

express provision not considered 'meetings' and are therefore not subject to the open meeting requirement of subsection (b)." [fn.19] (This would be similar to an in chambers conference at which the accused could make known his intention to request closure and make whatever offer of proof or argument [fn.20] necessary for the court to decide the motion.) "If the public interest so requires the meeting must be open." [fn.21] Cf. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 492 (1971).

The Act requires that "[f]or each meeting or portion of a meeting which is closed to the public, the agency must maintain a verbatim transcript or electronic recording of the proceeding." [fn.22] "Material which falls within an exemption may be deleted from the record, prior to public disclosure" and "[t]he record, minus exemptible material, must be made available promptly and must be easily accessible to the public." [fn.23].

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19. The Government in the Sunshine Act-An Overview, Duke L.J. 565, 584 (1977).
20. In this regard the ABA Standards also reflect the awareness that the accused's argument could itself disclosure the inadmissible evidence. If the accused were to state explicitly in open court all of his reasons for requesting closure it could well defeat the purpose of the motion. Cf. Hoffman v. United States, 341 U.S. 479, 486 (1951) "if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee."
21. See n. 20, supra at 567, n. 11.
22. See n. 20, supra at 585, citing 5 U.S.C.A. §552 b(f)(1). (West Supp. 1977).
23. See n. 20, supra at 586, citing 5 U.S.C.A. §552 b(f)(2). (West Supp. 1977). Cf. Senate Report 31.

The considerations underlying this requirement are that "verbatim transcripts...assure the public a meaningful remedy if the meeting was improperly closed" and since "certain matters may remain sensitive only temporarily; keeping a verbatim record permits an agency to make the record available once the matters are no longer sensitive." [fn.24].

According to Professor Emerson, who expressed approval of the Freedom of Information Act, exceptions to the public's right to know must be formulated. "Many would exist only for a limited time." "Criminal investigations and uncompleted litigation" could well be acceptable categories of such exceptions. [fn.25] This Court has accepted and applied the Act's balancing test, as a "workable compromise, between individual rights 'and the preservation of public rights to Government information.'" Department of Air Force v. Rose, 425 U.S. 352, 381 (1976).

The New York Court of Appeals has adopted a similar "workable compromise" for balancing the accused's right to a fair trial and the public's right to know. Its solution recognizes, as this Court has, that pretrial publicity can irremediably damage an accused's right to an impartial jury in the county of venue. "Without a proper method for dealing with extensive publicity concerning a crime, a judicial system runs the serious risk that the jury will reach its verdict based on evidence from sources outside of the courtroom, contrary to the demands of due process." Philadelphia Newspapers v. Jerome, supra at 2192.

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24. See n. 20, supra at 587, citing 5 U.S.C.A. §552b (h)(1) (West Supp. 1977).
25. Emerson, Legal Foundations of the Right to Know, Wash. U.L.Q. 1, 16-17 (1976).

See similarly State v. Allen, 73 N.J. 132, 373 A.2d 377, 395 (Schreiber concurring) (1977). [fn.26].

Balanced against the immediate and severe threat to an accused's right to a fair trial in the county of venue is the right of the public, including potential jurors, to have immediate access to all evidence whether or not it is admissible at trial. In some cases, the public may "have an overwhelming interest in keeping all proceedings open" (Cert. 11a). Where no such interest exists, however, the accused's right to "a constitutionally impartial jury in the county of venue" must take precedence (Cert. 10a).

The limitation on public access to pretrial evidentiary suppression hearings is posited upon the accused's initial request for protection of his Sixth Amendment rights. [fn.27]. The court

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26. Commentators have noted that: "An exclusionary order would appear to be most beneficial as to hearings on the admisibility of evidence. The dangers of inadmissible evidence finding its way to a prospective juror would seem to be a sufficient threat to a fair trial to justify the incidental restriction on the access of the media to the information.... This is especially crucial where the evidence in question is an inculpatory statement." Right of Accused To Have Press or Other Media Representatives Excluded From Criminal Trial, 49 ALR 3d 1007, 1014 (1973). Also that Courts "have an obligation to prevent information from reaching [the press], as part of a balance." Kaplan, Free Press/Fair Trial Rights in Conflict: Freedom of The Press and The Rights of the Individual, 29 Okla. L. Rev. 361, 363 (1976).

27. cf. United States ex rel. Bennett v. Rundle, 419 F.2d 599 (3d Cir. 1969) (en banc). Court's sua sponte closure of suppression hearing violated accused's right to a public trial. In this context it may be noted that Aaron Burr never requested John Marshall to exclude the public from any pretrial proceeding involving him.

then independently verifies the need for the limitation. The public's right to know is protected by the release of transcripts containing whatever evidence has been found admissible and complete transcripts are made available when the accused is no longer in jeopardy.

D. Exclusion Advances The Public Interest In a Fair and Prompt Criminal Trial.

The closing of pretrial suppression hearings to protect the accused's right to an impartial jury, and the judicial balancing that it entails, is not some newly designed means "to achieve the restriction of publication which the Court faced in Nebraska Press, without complying with the standards set forth in that case" (P.B. 19). See e.g. United States v. American Radiator and Standard San. Corp., 274 F. Supp. 790 (W.D. Pa. 1967). Petitioner erroneously alleges that it is now the routine and automatic procedure in the State of New York. Significantly, petitioner offers no proof in support thereof. On the contrary, this is a procedure which in certain cases can be of great value both to the accused and society. Not only does it protect the accused's right to an impartial jury in the county of venue, but it also protects his right to a speedy trial. As this Court stated in Groppi v. Wisconsin, supra at 510, repeated continuances "work against the important values implicit in the constitutional guarantee of a speedy trial." This procedure also protects the public's interest in effective law enforcement.

> Prejudicial publicity from pretrial suppression hearings injures the Commonwealth as well as the accused. Prejudicial disclosures may taint or require a trial court to delay trial until publicity subsides. Neither

> delayed trials nor retrials present as favorable opportunities for establishing truth as timely first trials. By precluding prejudicial disclosures arising from pretrial suppression hearings, the Rules promote the speedy and effective enforcement of criminal laws, ensure swift convictions deterring crime...and avoid unnecessary expenditures of public funds and judicial resources. Philadelphia Newspapers v. Jerome, supra at 2193.

Further, repeated reversals could well tend to undermine public confidence in the administration of justice, especially if the prejudicial confession is so widely publicized that there is no county that can offer an impartial jury and any trial is thereby rendered impossible. See Irvin v. Dowd, supra.

POINT THREE

EXCLUSION WAS OVERWHELMINGLY JUSTIFIED IN THIS CASE

It is undisputed that there was intensive media publicity concerning the case of People v. Greathouse and Jones (A23). The Appellate Division agreed that the case was "unique" and presented "unusual circumstances" (Cert. 22a). The public was intrigued with runaways from out-of-state, lake draggings, helicopters, tracking dogs, motels surrounded by police, and a murder case where the body of the victim was never found. Here was everything that makes a sensational story and attracts a large reading and television audience. The local news media immediately took full advantage of the opportunity to report this sensational story. At least five of petitioner's self-selected news samples appeared as front page stories (A34, 37, 39, 41, 48).

Petitioner concedes that the criminal prosecution was the "subject of numerous articles and reports by news media other than those of petitioner," but it claims that its two Rochester papers have a "virtually insignificant circulation" in Seneca County (P.B. 29) (Note A21-23). Interestingly, petitioner does not state its Ithaca [fn.28] paper's circulation in Seneca County, nor the number of homes in Seneca County that receive its television broadcasts. "The Geneva Times," a daily paper with a circulation of 17,906 [fn.29] also had a reporter in the courtroom and is published approximately ten miles from the Seneca

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28. Ithaca is located less than fifteen miles from Seneca County.

29. Circulation figures are from the 1977 Ayer Directory of Publications (Ayer Press 1977) at p. 602.

County courthouse (A50, 51). The only newspaper published in Seneca County itself is the weekly "Seneca Falls-Waterloo Reveille," circulation 4,172. [fn.30] Other newspapers that are generally circulated in Seneca County are the "Syracuse Post-Standard" and "Syracuse Herald-American," circulation 245,507 and 85,574 respectively [fn.31]; the "Auburn Citizen-Advertiser", circulation 18,387 [fn.32]; and the "Ithaca Journal," circulation 20,218. [fn.33]. These papers were also intensively following the case of People v. Greathouse and Jones. [fn.34].

Throughout Seneca County pseudo-evidentiary facts and theories about the crime and about respondents Greathouse and Jones' guilt had been highly publicized. Petitioner persists in characterizing these unproven, untested, unreliable facts, rumors, and opinions, issued by police agencies and accepted by it without question, as "factual and objective" (P.B. 8). There is a grave danger that potential jurors may also blindly accept these stories as "factual and objective."

The New York practice is to defer the hearing of the "appropriate pretrial suppression motions to the very eve of trial and upon determination immediate commencement of trial." [fn. 35] With trial imminent and the evidentiary suppression hearings about to commence, the media once again

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30. Ibid. at p. 662.
31. Ibid. at p. 664.
32. Ibid. at p. 591.
33. Ibid. at p. 607.
34. See e.g., "Syracuse Post Standard" December 15, 1976.
35. N.Y. Crim. Proc. Law §710.40 (Bellacosa, McKinney Supplementary Practice Commentaries 1977 at p. 137).

resumed its publicity of the case [fn.36] (see e.g. A48-51). Several newspapers assigned reporters to cover the suppression hearings (A25). They waited expectantly to hear what the defendants had given the police as their "motive for the apparent slaying" (A 34). They would then report these perhaps coerced confessions to their readers and listeners in Seneca County and in the surrounding counties. If petitioner had not yet broadcast any "confession" (P.B. 28), it was only because it had not yet been given access to the confessions.

This hearing was of overwhelming importance to the two accused. [fn.37] Respondent Greathouse had powerful arguments in support of his suppression motion. When he was taken into custody, the Michigan police already knew that an arrest warrant charging him with murder had been issued and that Greathouse "was afraid he would be shot." (A34, 36) He was a juvenile under Michigan law, far from family and friends. (A36, 38) Yet, the police claimed that almost immediately upon his capture, which was accomplished only after the use of dogs and helicopters, he voluntarily, knowingly and intelligently waived his constitutional right to consult an attorney and his Fifth Amendment privilege against self-incrimination. Greathouse not only "volunteered" a full confession but even led the Michigan police to the murder weapon. The next day he waived his right to oppose extradition.

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36. "Although the impact of bad publicity wanes with the passage of time, the memory is easily revived when the trial takes place." Fahringer, Charting a Course From The Free Press To a Fair Trial, 12 Suffolk Univ. L. Rev. 1, 9 (1978).

37. Unless all the "factual and objective" stories that petitioner had circulated were found by the jury to be unproven and unreliable, it is uncertain that "the case undoubtedly would have been dismissed had the defendant's confessions been suppressed" (P.B.15).

Respondent Greathouse later charged that his confession was coerced and moved that it be suppressed. This Court has held that jury consideration of a coerced confession can never be considered "harmless error," Chapman v. California, 386 U.S. 18, 23, (1967); Payne v. Arkansas, 356 U.S. 560, 567-568 (1958). To prevent the jury from hearing this confession during the trial, knowing that they have read or heard of it before trial, is to make a mockery of the claim that "our system of law has always endeavored to prevent even the probability of unfairness." In re Murchison, 349 U.S. 133, 136 (1955).

Judge DePasquale was certainly aware of all the necessary factors when he considered the defendant's motion for closure. He knew the sensational facts of the case and he observed the numerous reporters present in the courtroom. Extensive media publicity had already been generated in relatively small Seneca County (population approximately 36,000). He knew the composition of the County and the cross-section of people who were generally drawn for jury duty (Judge DePasquale is Surrogate, Family Court and County Court Judge of Seneca County (A8)). The public defender argued that the accused would be unable to select an impartial jury if the inadmissible evidence were disseminated by the media, and the district attorney concurred. After full argument on the merits, Judge DePasquale agreed with both the public defender and the district attorney and accordingly adhered to his finding that "[t]here was a reasonable probability of prejudice to those defendants had the press and the public not been excluded" (A15). The considered opinion of the Court, the People, and the public defender, that public awareness of this inadmissible evidence would probably deprive respondents Greathouse and Jones of their constitutional rights cannot be lightly disregarded. Cf. Singer v. United States, 380 U.S. 24, 34-35 (1965).

Even petitioner cannot dispute that the exclusionary order effectively operated here to prevent the threatened harm. All of the other remedies described by this Court in Sheppard v. Maxwell, supra, would only have, perhaps, mitigated the probable damage to these presumptively innocent defendants' constitutional rights. To have allowed this probable damage to occur in the hope that it could, perhaps, be mitigated would have been to involve the court itself in an injustice. Additionally, it must be noted that the effectiveness of the Sheppard remedies has been seriously questioned. [fn. 38] Voir dire is often frustrated by a lack of candor [fn. 39] and it also increases the jurors' exposure to prejudicial statements. Change of venue presumes a demonstrated, unquestioned failure of the voir dire. Instructions and sequestration are of limited value in offsetting the effects of prejudicial pretrial publicity. Reversals, as well as requiring a substantial showing of prejudice, cannot be considered an acceptable alternative.

Judge DePasquale considered these alternatives, but found them to be ineffective under the circumstances of this particular case. He therefore granted the defendants' motion for closure (A16). This exercise of the broad discretion of a trial judge should not be disturbed absent a clear showing of abuse. Cf. Ehrlichman v. Sirica, 419 U.S. 1310 (1974).

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38. See e.g. Fahringer, supra at 9-12; Fair Trial/Free Press; The Court's Dilemma, 17 Washburn L.J. 125 (1977).
39. Irvin v. Dowd, supra at 728.

POINT FOUR

EXCLUSION SHOULD BE GRANTED UPON A FINDING THAT PRESS COMMENTARY WOULD THREATEN THE IMPANELLING OF AN IMPARTIAL JURY IN THE COUNTY OF VENUE

Petitioner claims that "there are no alternatives to attendance which can sustain the flow of information to the public" (P.B. 20). Petitioner states that "where a courtroom is closed in an effort to restrict 'press commentary,' protections afforded First Amendment interests by Nebraska Press should apply" (P.B. 27) and petitioner concludes, that any denial of access on less than such a showing" interfere[s] with First Amendment rights" (P.B. 27).

The Nebraska Press criteria should not be applied in this case. They are appropriate where publication of information is restrained, but not where access to information is denied. There is no constitutional obligation to disclose information.

The public and the press have long been excluded from certain judicial and other proceedings, and have been denied access to certain information in the exclusive control of public agencies. The Freedom of Information Acts and Open Meeting Laws discussed supra are examples.

This Court has also rejected claims of a "right to know" under the First Amendment when it has conflicted with Executive Department decisions [fn. 40]. In dictum the claim has been rejected as to grand jury proceedings and Supreme Court

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40. Kleindienst v. Mandel, 408 U.S. 753 (1972); Zemel v. Rusk, 381 U.S. 1 (1965).

conferences [fn. 41]. State courts and legislatures have provided for denial of access to court proceedings, both with and without the defendant's consent [fn. 42]. This Court has specifically recognized that the withholding of information is not only permissible, but may well be the most effective means to achieve a legitimate governmental purpose [fn. 43].

Nebraska Press Assn dealt with prior restraints on press publication. The press had already gained access to the prejudicial information and desired to publish it. The court "found only a clear and present danger that pretrial publicity could impinge upon the defendant's right to a fair trial." Nebraska Press Assn, supra at 563 (emphasis in original), and enjoined publication. This was impermissible; "the facts [did not] justify the use of the drastic power of injunction," Carroll v. Princess Anne, 393 U.S. 175, 183 (1968). However, in this case the whole question of prior restraint is irrelevant. In closure there is no restraint by the court on the right of the press to publish any prejudicial information that its editors acquire and decide to publish.

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41. Branzburg v. Hayes, 408 U.S. 665, 684 (1972). Cf. United States v. Gurney, 558 F.2d 1202 (5th Cir. 1977), cert. denied sub. nom. Miami Herald Publishing Co. v. Krentzman, 98 S.Ct. 1606 (1978).
42. See n. 9 and 10, supra. Additionally juvenile court proceedings, adoptions, filiation proceedings etc. are generally closed to the public.
43. Landmark Communications, Inc. v. Virginia, 98 S.Ct. 1535 (1978); Cox Broadcasting Corporation v. Cohn, 420 U.S. 469, 496 (1975); cf. Time Inc. v. Firestone, 424 U.S. 448, 454, 457 (1976).

As Justice Frankfurter noted:

> The phrase "prior restraint" is not a self-wielding sword. Nor can it serve as a talismanic test. [There is] [t]he duty of a closer analysis and critical judgment.... Kingsley Books, Inc. v. Brown, 354 U.S. 436, 341 (1967).

Closure orders, except for the overruled Fourth Department decision in this case, have never been held to constitute a prior restraint on publication. [fn. 44] Philadelphia Newspapers v. Jerome, supra; State v. Allen, supra (Schreiber

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44. State ex rel. Dayton Newspapers, Inc. v. Phillips, 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976) is not to the contrary. Although there is dictum in the majority and various dissenting opinions concerning "prior restraints," the case actually turned on an Ohio procedural rule. Where a defendant moves for a change of venue prior to making his suppression motion he has "waived his right to be tried in the locale where the crime was committed ... [and] cannot be heard to complain if his motion is granted." 351 N.E.2d at 133. No such waiver, of course, occurred in the instant case. United States v. Cianfrani, 573 F.2d 835, 858 n. 11 (1977) (3d Cir. 1978) specifically did "not consider whether there might be circumstances where a defendant's Sixth Amendment rights to a fair trial could be so jeopardized by pre-trial disclosure of such information as to permit some limitations on disclosure."

concurring); cf. Oklahoma Publishing Company v. District Court, supra. [fn. 45]

Certainly this Court has never intimated that closure of a courtroom is to be tested by the awesome standard necessary to justify a prior restraint on publication. We agree with Judge Wachtler's comment that this argument "presents a challenge to a fundamental precept of judicial administration - the courts' inherent power to control their own process" (Cert. 5a).

It would indeed be anomalous for this Court to have rejected First Amendment "right to know" claims in other governmental and judicial settings, but allow this same claim where access to possibly inadmissible evidence destructive to a defendant's right to a fair trial is concerned.

This Court has agreed that a judge can draw reasonable conclusions concerning prejudicial pretrial publicity "based on common human experience," as well as that "[h]is conclusion as to the impact of such publicity on prospective jurors [is] of necessity speculative, dealing as he [is] with factors unknown and unknowable." Nebraska Press Assn v. Stuart, supra at 563. However, petitioner demands that this presumably innocent defendant, in an adversarial evidentiary showing in open court (note P.B. 46), establish (among other things) that media publicity of his coerced confession presents a clear and present danger to

45. Note also Litwack, The Doctrine of Prior Restraint, 12 Harv. Civil Rights-Civil Liberties, L.R. 519 (1977); Emerson, The Doctrine of Prior Restraint, 20 Law and Contemp. Prob. 648 (1955), wherein the authors do not refer to courtroom closure in their discussion of prior restraint.

his right to an impartial jury in the county of venue. [fn. 46] However, care must be taken, lest in discussing the closure motion, the evidence which may be suppressed is described in such detail that the motion is self-defeating. Where the substance of statements or the circumstances of questioning or seizures must be considered, the court should hear this testimony in camera.

The concern is expressed that defense counsel will "frequently request" closure "to protect themselves against charges of inadequate representation" (P.B. 23). The New York Court of Appeals responded adequately to that argument almost twenty-five years ago when it said: "The defense may, it is true, sometimes be inept, but for that there are other remedies than delegating, to persons not directly concerned, the authority to control the course of the proceedings." United Press Assoc. v. Valente, supra at 81.

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46. One commentator has remarked that the news media "seem to suggest that surveys should be made by ringing doorbells and asking housewives and others whether they would be prejudiced as jurors if they heard that a defendant in a given case ... had confessed to the crime for which he was being tried." Raichle, If There is an Abridgment of Pretrial Communication, Should it be Coupled with an Expansion of Trial Coverage by Radio and Television, 42 Notre Dame Lawyer, 915, 916 (1967). Such surveys, even if these indigent defendants could have afforded them, and they would have been accepted by the media as "qualified", would only further publicize the precise facts that the accused is seeking to keep temporarily from the community.

Finally, petitioner argues that closure will be rendered ineffective because the media is "nevertheless free to speculate ..., thus perhaps generating rumors which 'could well be more damaging than reasonably accurate news accounts'.... Closure orders cannot prevent editorials or inaccurate articles concerning the testimony adduced...." (P.B. 30).

We submit that the question of the existence of a right of access to information is independent of any inability of the press to avoid inaccurate reporting. Since no absolute right of access does exist, the efficacy of closure as a prophylactic measure must be evaluated in each case by the trial court. The possibility of other avenues for prejudicial publicity should not deny the court the option of a closure order. These pessimistic and cynical predictions are themselves speculative, and, in any event, the choice of risks should be left to the accused.

The press' right to publish free from governmental interference is not at stake in this case. Rather, it is the accused's constitutional right to trial by an impartial jury in the county of venue. This right should not be sacrificed in favor of the desire of the public (prospective jurors) to know in advance of trial possibly inadmissible evidence.

CONCLUSION

Justice Black said, "[f]ree speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them." Bridges v. California, 314 U.S. 252, 260 (1941). Fortunately, this case does not require the choice. Here, speech is unrestrained by court order while the accused's right to an impartial jury in the county of venue has been protected from probable harm. A wise balance has been reached. The administration of justice has been furthered. The decision of the New York Court of Appeals should be affirmed.

Respectfully submitted,

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