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 OF THE NEW YORK TIMES COMPANY AS AMICUS CURIAE

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This brief is submitted by The New York Times Company ("the *Times*"), as *amicus curiae*, in support of the position of petitioner Gannett Co., Inc.

Interest of the *Amicus**

The *Times* publishes, *inter alia*, *The New York Times* and thirteen newspapers in Florida and North Carolina.

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* The *Times* adopts so much of the brief of petitioner as sets forth the opinions below, jurisdiction, questions presented, constitutional provisions involved and statement of the case. All the parties to this litigation, by their attorneys, have consented to the filing of this brief. Their consents are on file with the Clerk of this Court.

Subsequent to the ruling of the New York Court of Appeals in this case, the *Times* has been effectively—and almost routinely—precluded from attending, and thus reporting about, a number of significant pretrial hearings which have transpired in the New York courts. At one of those hearings the *Times* sought permission from the Court to attend, urging on the Court, *inter alia*, that a confession of the defendant had already been widely disseminated by law enforcement authorities and thereafter published in the press and that the case was one of significant public interest in determining whether defendants of diverse backgrounds received equal treatment under the law.* Notwithstanding those facts, the Court barred the press from attending the hearing, concluding—under the standards set forth in the *Gannett* case—that there was no "genuine public interest" in the case that would outweigh the alleged risks of public disclosure of what occurred at the pretrial hearing. New York Times, May 9, 1978, at 40, col. 1.

The Times believes that the *Gannett* decision unnecessarily and unconstitutionally deprives the public of information which is of central import with respect to the functioning of the entire criminal justice system. It submits this brief to join with Gannett in seeking reversal and to add certain material to that contained in Gannett's submission.

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* In fact, in an article published in the *Times* prior to trial, the author observed,

> "Had this murder involved, say, lovers from the lesser neighborhoods of Westchester, it would not have been front-page news, nor would the trial be of interest. We read about such killings as if, given those circumstances and those people, violence is predictable. The murder of Bonnie Garland was not predictable. It was not only the first nonpolice homicide in Scarsdale history, it was the first killing that involved members of the Yale community as victim and perpetrator. As such, it had a powerful impact on the lives of many people who had never confronted the reality of violence in their daily lives." Kornbluth, "A Fatal Romance at Yale," New York Times, May 7, 1978, § 6 (Magazine), at 45, 86.

ARGUMENT

The Gannett brief sets forth at length the salient legal principles which govern this appeal. The summary rejection by the Court of Appeals of the less restrictive alternatives as set forth by this Court in *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976),* the similar rejection by it of the views set forth in the current draft of the Committee of the American Bar Association** which has considered this subject, and the decision by it to distinguish "mere curiosity" of the public as opposed to "legitimate public concern," *** provide ample bases for reversal by this Court. To those arguments and others in the Gannett brief, we add the following:

1. *The Central Significance of Pretrial Hearings*

Much of the decision of the New York Court of Appeals appears to be based upon a distinction drawn by the Court between pretrial hearings and trials. The press and public, the Court emphasizes, was not excluded from "a trial on the merits" or "from a highly sensationalized murder trial" but merely from a pretrial suppression hearing. (Pet. 8a, 9a.)

What this part of the Court's analysis ignores is precisely what the recent ruling of the Court of Appeals for the Third Circuit in *United States* v. *Cianfrani*, 573 F.2d 835, 850 (3d Cir. 1978), recognizes: that "decisions crucial

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* "Continuance, extensive *voir dire* examinations, limiting instructions, or venue changes may prove paltry protection for precious rights. . . ." Pet. 10a.

** American Bar Association, Standing Committee on Association Standards for Criminal Justice, Fair Trial and Free Press, Standard 8-3.2 (2d ed. Tentative Draft, 1978).

*** Pet. 11a. *See, e.g., FCC* v. *Pacifica Foundation*, 46 U.S.L.W. 5018, 5027 (U.S. July 3, 1978) (Powell, J., concurring).

to the outcome of the entire criminal case" are commonly made at just such hearings.* It is at pretrial suppression hearings that the government, failing to meet its burden of proof, may well be forced to drop its entire case. It is at pretrial suppression hearings that a defendant, failing to persuade a court to suppress, may choose to enter a guilty plea. Moreover, it is at pretrial suppression hearings that suspiciously close relationships between prosecutors and defendants—or even judge and defendants—may often be detected. *United States* v. *Cianfrani, supra,* 573 F.2d at 850, 853; *State ex rel. Dayton Newspapers, Inc.* v. *Phillips,* 46 Ohio St.2d 457, 466-67, 351 N.E.2d 127, 133-34 (Ohio 1976).

The *Dayton* case is a particularly persuasive precedent in this area. There the Supreme Court of Ohio overruled an order of a trial court which closed the courtroom, excluded the public, and barred the press from publishing any news report about what transpired in the courtroom hearing on defendant's pretrial motions to suppress evidence. The defendant was indicted for kidnapping, extortion, and aggravated murder. There was extensive media coverage of the crime, arrest, and indictment. The defendant moved for a change of venue and filed motions to suppress evidence and a motion which resulted in the trial court's closure order. The trial court, like the New York Court of Appeals in the case at bar, gave little consideration to a change of venue. 46 Ohio St.2d at 464, 351 N.E.2d at 132.

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* *Accord, United States* v. *Lopez,* 328 F.Supp. 1077, 1087 (E.D. N.Y. 1971) (observing that the suppression hearing is "often the crucial stage" of a criminal proceeding). *See also United States* v. *Clark,* 475 F.2d 240, 247 (2d Cir. 1973):

> "In many criminal prosecutions the disposition of the motion to suppress is as important as the trial itself, since granting of the motion may require entry of a judgment of acquittal for lack of other proof sufficient to convict."

The Ohio Supreme Court held that the trial court's closure order violated the First Amendment and the Ohio Constitution, that the First Amendment and Ohio Constitution required the court to hold a public hearing on the motions to suppress, and that after the completion of the suppression hearing, the trial court was to rule on the defendant's motion for change of venue. 46 Ohio St.2d at 461, 351 N.E.2d at 130-31. The court's rationale is instructive and one which we urge on this Court:

> "A hearing on a motion to suppress evidence is a sensitive and extremely important proceeding. The issues in such a hearing are often the competence, efficiency, judgment, courage and behavior of the police, the prosecutor, the defense counsel, the court employees and the judge. Because of corruption or malice, a secret judicial proceeding may be and has been used to railroad accused persons charged with crime. Secret proceedings may be used to cover up for incompetent and corrupt police, prosecutors and judges, and the influence of corrupt politicians on the judicial system. The public and the victims of crime are entitled to know what is going on. The public is entitled to know what is happening to the accused. There is no other way the busy ordinary citizen can evaluate how the judicial system is administering justice except through the media he reads, hears or watches. A free press is the only guarantee a citizen has of his right to know what is going on in his government." 46 Ohio St.2d at 466-67, 351 N.E.2d at 133-34.

See also State v. *Allen,* 73 N.J. 132, 373 A.2d 377 (1977).

The critical role of pretrial procedures is reflected in the actual disposition of criminal cases in state and Federal courts. Of course, most cases are never tried. For example,

in 1976 there were 19,812 dispositions of defendant-indictments* in the New York State Supreme Court in New York City. Only 10.3% of these dispositions were by trial. In comparison, 64.1% of the dispositions were guilty pleas (10,960 felony pleas;** 1,741 misdemeanor pleas). Furthermore, 5,069, or 25.6%, of the dispositions were dismissals. State of New York, *Twenty-Second Annual Report of the Judicial Conference,* at 23, 51, 52 (1977) (hereinafter *"Twenty-Second Annual Report"*).

Similarly, in 1976 dispositions of defendant-indictments in the Supreme Court and County Courts of New York State outside New York City, totaled 17,850. Of these 13,305, or 74.5%, were by guilty pleas and 3,371, or 18.9%, were by dismissals of indictments by the Courts. Only 1,174, or 6.6%, were by trial. *Twenty-Second Annual Report,* at 24, 55, 56. In Seneca County itself, 31 of a total of 37*** dispositions for the period January 5, 1976 through January 2, 1977 were by guilty pleas. The remainder were by dismissals of indictments by the court.† There were no trials. *Id.* at 54-55.

The dispositions of criminal defendants in the Federal District Courts reveal the same pattern. For example, for

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* Each defendant is considered separately for each indictment with which he or she is charged. State of New York, *Twenty-Second Annual Report of the Judicial Conference,* at 23 (1977).

** Felony pleas represented 86.3% of all pleas. State of New York, *Twenty-Second Annual Report of the Judicial Conference,* at 52 (1977).

*** This figure includes indictments disposed of in cases initiated prior to the period January 5, 1976 through January 2, 1977. *Twenty-Second Annual Report,* at 54-55.

† This figure includes, among others, those indictments dismissed against defendants sentenced on another indictment or disposed of by consolidation, those in which the defendants were civilly committed to the Commissioner of Mental Hygiene or to the Office of Drug Abuse Services, and those abated by the death of the defendant. *Twenty-Second Annual Report,* at 54-55.

the twelve month period ended June 30, 1977, a total of 53,189 criminal defendants were disposed of in the United States District Courts.* Of these defendants 35,336 were disposed of by pleas of guilty or *nolo contendere,* and 9,941** were disposed of by dismissals. *Annual Report of the Director of the Administrative Office of the United States Courts,* at 255, 357, 370-73 (1977).

2. *The Nature of Pretrial Hearings*

Apart from the central significance of pretrial hearings, the fact remains that their nature virtually parallels that of a trial itself.

A pretrial suppression hearing has the "characteristics of a testimonial hearing, which is the essence of a trial proceeding." *United States* v. *Cianfrani, supra,* 573 F.2d at 850. Witnesses are sworn and are subject to cross examination. Pressure is exerted on both sides—on the government's witnesses to justify their procedures and on the defendant to suppress the evidence. Credibility is in issue, and the final determination depends on the findings of the trier of fact. Thus, the hearing is "in form the equivalent of a full trial." *Id.* ***

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* This figure includes all offenses and represents non-duplicated dispositions. A defendant who is involved in more than one case is only counted once, in order to obtain a count of defendants disposed of, rather than of cases in which defendants were terminated. *Annual Report of the Director of the Administrative Office of the United States Courts,* at 255, 357 (1977).

** This figure includes defendants who were committed pursuant to Title 28 U.S.C. 2902 of the Narcotic Addict Rehabilitation Act of 1966. *Annual Report of the Director of the Administrative Office of the United States Courts,* at 373 (1977).

*** In *United States* v. *Cianfrani,* the Court of Appeals for the Third Circuit relied extensively on its opinion in *United States ex rel. Bennett* v. *Rundle,* 419 F.2d 599 (3d Cir. 1969). There the Court held that a *Jackson* v. *Denno* hearing on the admissibility

Moreover, a pretrial suppression hearing is within the ambit of the Sixth Amendment's guarantee of a public trial. *See, e.g., United States* v. *Clark, supra,* 475 F.2d at 246-47; *United States* v. *Cianfrani, supra,* 573 F.2d at 850; *United States* v. *Lopez, supra,* 328 F.Supp. at 1087.

The Sixth Amendment guarantees to a public trial "has always been recognized as . . . an effective restraint on possible abuse of judicial power." *In re Oliver,* 333 U.S. 257, 270 (1948). It is, as well, a deterrent to possible perjury by witnesses who know that their testimony is exposed to public knowledge, a means to bring the proceedings to the attention of unknown parties who may have important testimony, and an opportunity for the public to learn about their government and acquire confidence in their judicial remedies. *Id.* at 270 n. 24. *Accord, United States* v. *Cianfrani, supra,* 573 F.2d at 847; *United States ex rel. Bennett* v. *Rundle, supra,* 419 F.2d at 606; *United States* v. *Lopez, supra,* 328 F.Supp. at 1087. *See also People* v. *Hinton,* 31 N.Y.2d 71, 73, 286 N.E.2d 265, 266, 334 N.Y.S.2d 885, 887 (1972), *cert. denied,* 410 U.S. 911 (1973).

The policies behind the Sixth Amendment's guarantee to a public trial clearly apply to a suppression hearing. *United States* v. *Cianfrani, supra,* 573 F.2d at 850; *United States* v. *Clark, supra,* 475 F.2d at 247. Moreover, since a pretrial suppression hearing may be the only time at which

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of a defendant's confession, which is held as part of the trial and after the jury is sequestered, is within the Sixth Amendment guarantee to a public trial. *Id.* at 606. In *Bennett* the Court reasoned that a *Jackson* v. *Denno* hearing has characteristics of a testimonial hearing and is thus equivalent to a trial proceeding, *id.* at 605, and that the policies behind the Sixth Amendment "have significant application" in such a proceeding, *id.* at 606.

In *Cianfrani* the Court noted that its reasoning in *Bennett* should not be confined to the facts of that case, since it is applicable to cases involving pretrial suppression hearings. *United States* v. *Cianfrani, supra,* 573 F.2d at 849.

police conduct is publicly scrutinized, these policies assume a unique importance at the pretrial stage of a criminal proceeding:

> "[B]ecause 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 to public trial should extend to suppression hearings rather than permit such crucial steps in the criminal process to become associated with secrecy. See United States ex rel. Bennett v. Rundle, *supra,* at 606; United States v. Lopez, *supra,* 328 F. Supp. at 1087." *United States* v. *Clark, supra,* 475 F.2d at 246-47.

See also United States v. *Cianfrani, supra,* 573 F.2d at 850; *State ex rel. Dayton Newspapers, Inc.* v. *Phillips, supra,* 46 Ohio St.2d at 466-67, 351 N.E.2d at 133-34.

The guarantee to a public trial is a right conferred on both the defendant and the public. *United States* v. *Cianfrani, supra,* 573 F.2d at 852-54; *United States* v. *Kobli,* 172 F.2d 919, 924 (3d Cir. 1949); *United States* v. *Lopez, supra,* 328 F.Supp. at 1087; *People* v. *Hinton, supra,* 31 N.Y.2d at 73, 286 N.E.2d at 266, 334 N.Y.S.2d at 887.

Sixth Amendment rights have thus often been vindicated in actions commenced by the press, as well as by a threatened defendant. *See, e.g., Oliver* v. *Postel,* 30 N.Y.2d 171, 282 N.E.2d 306, 331 N.Y.S.2d 407 (1972); *E.W. Scripps Co.* v. *Fulton,* 100 Ohio App. 157, 125 N.E.2d 896, *appeal dismissed,* 164 Ohio St. 261, 130 N.E.2d 701 (1955); *Phoenix Newspapers, Inc.* v. *Superior Court,* 101 Ariz. 257, 418 P.2d 594 (1966); *Phoenix Newspapers, Inc.* v. *Jennings,* 107 Ariz. 557, 490 P.2d 563 (1971); *Johnson* v. *Simpson,* 433 S.W.2d 644 (Ky. 1968). And in numerous other cases, the public's right to a public trial has been held to govern

over a defendant's desire for a less open trial. *See, e.g., State* v. *Allen, supra; Lyles* v. *State,* 330 P.2d 734 (Okla. Crim. App. 1958); *Cox* v. *State,* 3 Md. App. 136, 238 A.2d 157 (Spec. App. 1968); *People* v. *Holder,* 70 Misc.2d 31, 332 N.Y.S.2d 933 (Sup.Ct. Queens Co. 1972). *See also In re Oliver, supra.* As summarized by the Court in *Oxnard Pub. Co.* v. *Superior Court,* 68 Cal. Rptr. 83, 91-92 (Ct. App. 1968):

> "A properly-conducted public trial, in addition to serving the interest of the accused and his connections and the interest of the victim and his connections, maintains the confidence of the community in the honesty of its institutions, in the competence of its public officers, in the impartiality of its judges, and in the capacity of its criminal law to do justice. Public trial has been a basic tenet of our legal heritage, at least since the abolition of the Star Chamber three hundred years ago. Secrecy, on the other hand, is the antithesis of the orderly operation of a public institution, breeding either suspicion, distrust, rumor, and outrage, or apathy, indifference, and neglect. Suppose a charge of bribery against a state senator, tax assessor, or member of Congress; suppose a charge of conflict of interest against a councilman, supervisor, or commissioner; suppose the prosecution of the spouse of a judge or the relative of a prominent politician. In each of these cases public confidence in the administration of justice is directly served by the procedure of an open trial which exposes to the scrutiny of the public the conduct of the case and the actions of public officers, police, prosecutors, and trial judge in the performance of their duties. By following the course of events the public is able to evaluate the competence and fairness with which the case is handled. At the conclusion of such a trial deficiencies or ex-

> cesses in the conduct of public affairs have been exposed for remedial action, and, normally, the public is satisfied that the matter has received an equitable and proper disposition."

Precisely the same consideration suggest the desirability of public pretrial proceedings.

3. *The First Amendment Factors*

In addition to the other factors set forth in this brief, there remain the significant First Amendment factors set forth in Judge Gibbons' concurring opinion in *Cianfrani.* There, after quoting from this Court's opinion in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 495 (1975), Judge Gibbons observed:

> "The *Cox Broadcasting* case does not, of course, tell us what records or proceedings *must* be open. It does suggest, however, that the public's right to be informed about the conduct of judicial proceedings rests upon the broader constitutional foundation of the first amendment and is therefore equally applicable to civil and to criminal proceedings. Nothing in either *Pell* v. *Procunier,* 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974), or *Branzburg* v. *Hayes,* 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), suggests a contrary interpretation of the first amendment. Both recognize that the press enjoys no greater right of access to information than does the public generally. Neither, however, suggests that there is no constitutionally protected right of public access, at least to the extent we have in this case recognized it, to information about how one of the three great political branches of our government conducts its business. A decision by Congress or a state legislature to conduct all its business in secret would, I think, run afoul of

> the first amendment. Similarly, a decision by the judiciary to conduct all its business in secret would not be immune from first amendment scrutiny. Applying that scrutiny in this case, for the policy reasons set forth in Chief Judge Seitz's opinion, I agree fully with the disposition he has arrived at." 573 F.2d at 862-63.

Nothing, we believe, in this Court's recent opinion in *Houchins* v. *KQED, Inc.*, 46 U.S.L.W. 4830 (U.S. June 26, 1978), detracts from the force of Judge Gibbons' observations. In this case, the Court is not faced with any of the "problems" associated with "prison administration". *Id.*, at 4832 (Burger, C.J.). Nor is there present here any basis for the concerns set forth in Justice Stevens' opinion with respect to quite different contexts—*e.g.* confidentiality of the decision making process of government. *Id.*, at 4838-39 (Stevens, J., dissenting).

Indeed, this case well illustrates the differences between prisons and courtrooms. Prisons are, of course, generally closed, courtrooms generally open; to say that because the press and public may be barred from one, they may also be barred from the other suggests, at the very least, a disturbing insensitivity to the different societal roles played by the two.

CONCLUSION

Neither Gannett in its brief, nor the *Times* in this brief, has taken the position that courtrooms may never be closed —at or before trial—consistently with the First Amendment. There are long-recognized exceptions to the principle of open courtrooms that are simply not at issue here.*

What is at issue is whether the closing of pretrial courtroom hearings in criminal cases is to become the national norm and not the exception, whether there is to be a strong legal presumption in favor of such action or against it. In New York, as a result of this case, courtrooms are now all but routinely closed at the request of defendants during their pretrial stages. We do not believe the Constitution permits such a result.

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* Recognized purposes which may be served by the exclusion of certain members of the public are preserving courtroom order, *United States* v. *Kobli, supra,* 172 F.2d at 922; *United States ex rel. Orlando* v. *Fay,* 350 F.2d 967, 971 (2d Cir. 1965), *cert. denied,* 384 U.S. 1008 (1966); *Davis* v. *United States,* 247 F. 394, 395 (8th Cir. 1917); insuring the safety of the witness and parties, *United States ex rel. Smallwood* v. *LaValle,* 377 F.Supp. 1148 (E.D.N.Y.), *aff'd,* 508 F.2d 837 (2d Cir. 1974), *cert. denied,* 421 U.S. 920 (1975); *People* v. *Devine,* 80 Misc.2d 641, 364 N.Y.S.2d 71 (Sup.Ct. Kings Co. 1974); *People* v. *Hinton, supra,* 31 N.Y.2d at 73-76, 286 N.E.2d at 266-67, 334 N.Y.S.2d at 887-89; *People* v. *Hagan,* 24 N.Y.2d 395, 397-99, 248 N.E.2d 588, 590, 300 N.Y.S.2d 835, 837-38, *cert. denied,* 396 U.S. 886 (1969); *United States ex rel. Bruno* v. *Herold,* 408 F.2d 125, 127 (2d Cir. 1969), *cert. denied,* 397 U.S. 957 (1970); and protecting the morals of the public, *United States* v. *Kobli, supra. See also United States* v. *Lopez, supra,* 328 F.Supp. at 1087-88. These exceptions, however, are carefully defined and must be sparingly applied. As the Court of Appeals for the Third Circuit has concluded:

> "It has always been recognized that 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, supra,* 419 F.2d at 607.

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