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.*

PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF NEW YORK COURT OF APPEALS

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MISCELLANEOUS:

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No.

GANNETT CO., INC.,

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Respondents.

Petition for a Writ of Certiorari to the State of New York Court of Appeals

The petitioner Gannett Co., Inc. ("Gannett") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the State of New York Court of Appeals entered in this proceeding on December 19, 1977. Respondents are Hon. Daniel A. DePasquale, County Court Judge of Seneca County, New York; Kyle E. Greathouse; David R. Jones; and Stuart O. Miller, District Attorney of Seneca County, New York. Mr. Miller, at the time of the events pertinent to this proceeding, was the Public Defender representing David R. Jones but was thereafter elected District Attorney. He is substituted as a party pursuant to Rule 48(3) of the Court.

Opinions Below

The opinions of the New York Court of Appeals dated December 19, 1977 are set forth in the Appendix at 2a[1] and are reported at 43 NY2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756. The opinion of the Supreme Court of the State of New York, Appellate Division, Fourth Department dated December 17, 1976 is set forth at 21a and is reported at 55 AD2d 107, 389 N.Y.S.2d 719. The orders of the trial court dated November 4, 1976 and November 17, 1976, excluding the public and press from a pre-trial suppression hearing and denying access to the transcript thereof, are set forth at 29a and 33a and are unreported.

Jurisdiction

The judgment of the State of New York Court of Appeals was entered on December 19, 1977. A timely motion for reargument was denied on January 12, 1978, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

Questions Presented

1. May the press and public, consistently with the First, Sixth and Fourteenth Amendments to the United States Constitution, be ejected from a traditionally public pre-trial suppression hearing when a trial judge believes that publication by the press of truthful statements concerning the hearing might threaten the right of a defendant to an impartial jury?

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[1]References to "___a" are to the pagination of the Appendix to this Petition; references " r" are to the pagination of the Record in the New York Court of Appeals.

2. Does an order excluding the press and public from a pretrial suppression hearing, issued without notice, hearing or findings of fact, deprive the press and public of their First and Sixth Amendment rights without due process of law?

Constitutional Provisions Involved

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

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

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

> "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, by an impartial jury . . ."

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

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

Statement of the Case

The Factual Background

In mid-July, 1976, Wayne Clapp, formerly a policeman in a suburb of Rochester, New York, disappeared. On July 21, 1976, Kyle E. Greathouse and David R. Jones were arrested in Michigan and charged with Clapp's murder (26-27r). Following their extradition to New York, Greathouse and Jones were indicted for Second Degree Murder in Seneca County, New York, approximately forty miles from Rochester and the site of the homicide.

Gannett is the owner of two daily Rochester newspapers, whose circulation extends to Seneca County. Gannett reporters were assigned to observe and to report upon both the murder investigation and the post-arrest criminal proceedings, which the District Attorney and defense attorneys had described as "novel" and "complex" (26-28, 61r) because the corpse of the victim had never been found.

On November 4, 1976, an evidentiary suppression hearing was scheduled to take place before Seneca County Court Judge DePasquale. At the commencement of the hearing, the defendants moved to exclude both the press and the public from the courtroom, asserting only that "we are going to take evidentiary matters into consideration here that may or may not be brought forth subsequently at a trial . . ." (30a). The prosecutor acquiesced in the request, and the court, with no further inquiry, granted it, stating:

> ". . . these matters are in the nature of a Huntley hearing and suppression of physical evidence, and it is not the trial of the matter. Certain evidentiary matters may come up in the testimony of the People's witnesses that may be prejudicial to the defendant, and for those reasons the Court is going to grant both motions" (31a).[2]

No evidence and no other explanations were offered in support of the closure. The courtroom was cleared, and the hearing commenced.

During the hearing a Gannett reporter, who had been ejected, submitted a written request to the Court seeking a postponement of the proceeding to enable attorneys to argue against the closure (73r). The request was denied and the hearing concluded on that Friday afternoon.

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[2]The entire colloquy among the parties at the time of the exclusion is set forth at 30-31a.

How Federal Questions Were Presented

On Monday morning, November 8, 1976, Gannett attorneys moved, by order to show cause, to vacate *nunc pro tunc* the closure order and to gain access to the stenographic transcript of the hearing, on the grounds that the court's order (1) had abridged First and Sixth Amendment rights of the press and public to attend and to disseminate news of the hearing, and (2) had been issued in a procedurally improper manner (42a). The trial court refused to permit argument on the merits of the Gannett motion until November 16, 1976 when it adhered to its earlier order, declaring there were no "authorities that make it incumbent upon the defendant, or defendants in this case, to present a factual basis for the exclusion of the public and press" (37a). In addition, the court denied access to the hearing transcript in perpetuity (34a at ¶3).

The Proceedings in the Courts Below

The following day, an original proceeding in the nature of prohibition and mandamus, challenging the closure orders on First, Sixth and Fourteenth Amendment grounds, was commenced by Gannett in the Supreme Court of the State of New York, Appellate Division, Fourth Department. On December 17, 1976 that Court unanimously held that the exclusionary orders transgressed the public's "vital interest in open judicial proceedings, especially criminal proceedings" (23a) and further constituted an unjustified prior restraint on publication which violated the First Amendment. It accordingly vacated the trial court's orders.

Prior to the decision of the Appellate Division, both defendants had pleaded guilty to lesser crimes in satisfaction of the indictments pending against them (5a).

On appeal, the New York Court of Appeals dismissed the case as technically moot. However, describing the critical importance of the matter to both the courts and the news media, it retained jurisdiction and, in a 4-2 opinion, upheld the ejection of the public and press from the courtroom.

Relying upon the judiciary's "inherent power to limit public access" (7a), and noting the reservation of the question by this Court in *Nebraska Press Assn. v. Stuart,* 427 U.S. 539, 564 n. 8 (1976) (10a), the majority declared:

> ". . . Knowing . . . that widespread knowledge even of inadmissible evidence could nonetheless predetermine guilt . . . we require the Trial Judge to ensure that tainted evidence never see the light of day . . ." (8a).
>
> "To allow public disclosure of potentially tainted evidence, which the trial court has the constitutional obligation to exclude, is to involve the court itself in the illegality. This potential taint of its own process can neither be condoned nor countenanced . . . . At the point where press commentary on those hearings would threaten the impaneling of a constitutionally impartial jury in the county of venue, pretrial evidentiary hearings in this State are presumptively to be closed to the public.
>
> . . .
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> ". . . To safeguard the integrity of its process, the court was required at the outset to distinguish mere curiosity from legitimate public interest.
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> . . .
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> ". . . Th[e] level of legitimate public concern was not reached in this case. Widespread public awareness kindled by media saturation does not legitimize mere curiosity . . ." (10-11a).

Two judges dissented, concluding that placing the burden of proof upon the press to justify openness of a proceeding would lead to closure in virtually every newsworthy case. Rather, the dissenters would sanction closure only in cases of compelling necessity where other means of preserving a fair trial had been proven ineffective:

> ". . . Mere threatened prejudice cannot be a basis for the court's indulgence in a self-executing order which prevents the free flow of vital information to a willing public when the interests of the defendant in a fair trial, untainted by a juror's knowledge of inadmissible evidence, can be preserved through the traditional means of detecting, identifying and dispelling prejudice through mechanisms which the law has created and which do not impede the flow of information. Unless the party demanding the invocation of the extraordinary practice of excluding the public at large can demonstrate that the effective employment of the time-tested methods-venire, continuance, instructions, admonitions to witnesses, and parties and counsel, sequestration of the jury, or change of venue—would be to no avail in the neutralization of potential sources of prejudice, the courts should not deprive the public of the vital function of the press nor abridge the fundamental interests protected by the First Amendment" (19a) (citations omitted).

Reasons for Granting the Writ

1. Introduction

In *Nebraska Press Assn. v. Stuart,* 427 U.S. 539 (1976), this Court set forth severe strictures against the issuance by trial judges of orders restraining the press from publishing information in its possession.[3] In response to *Ne-*

[3]Doubt has been expressed that such orders can ever be sustained in the criminal trial context. *Id.* at 570 (White, J., concurring); *cf., id.* at 572-73 (Brennan, J., concurring); *id.* at 617 (Stevens, J., concurring).

braska Press, a number of courts have resorted to a different and even more drastic device to limit pre-trial publicity: they have ordered the press, and the general public as well, ejected from courtrooms entirely. In this representative case, a majority of the New York Court of Appeals, specifically relying upon the reservation of the exclusion issue in *Nebraska Press,*[4] has sanctioned holding secret pre-trial proceedings simply at the request of criminal defendants. The decision effectively permits the destruction, based upon plain speculation, of values secured to the press and public both by the First Amendment and the Public Trial clause of the Sixth Amendment.

The confusion evidenced by conflicting lower court decisions concerning the question presented by this case, the fundamental societal interests at stake, the increasing frequency with which exclusionary orders are issued, as well as the plain error in the opinion below, fully warrant review and clarification by this Court.

2. The Interests of the Press and Public

The presence of the press and public at trials serves a vital purpose protected by the First Amendment:

> "Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal

[4] *Id.* at 564 n. 8; *id.* at 576 n. 3, 584 n. 11 (Brennan, J., concurring).

> justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability." *Nebraska Press Assn. v. Stuart, supra,* 427 U.S. at 587 (Brennan, J., concurring).

The right of the press and public to attend criminal proceedings is also guaranteed by the Public Trial clause of the Sixth Amendment, and is derived from an abiding distrust of secret tribunals. Public accessibility directly affects the trial process itself, as "an effective restraint on possible abuse of judicial power." *In re Oliver,* 333 U.S. 257, 270 (1948). Beyond the general public, the press has always been regarded as the "handmaiden of effective judicial administration" since it "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). The significance of the effect of public attendance upon the trial process[5] has led the Court to declare that a trial is a "public event. What transpires in the courtroom is public property . . . ." *Craig v. Harney,* 331 U.S. 367, 374 (1947).

While under certain circumstances the normally coinciding interests of the accused and the public in a public trial may appear to diverge, the seeming conflict does not inherently require that the public interest yield and the courtroom be closed. Closure may mask a collusion among the participants harmful to the defendant, and of which he is personally unaware. Alternatively, a closed

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[5]Specific benefits attributed to the public nature of trials include the enhancement of truthful testimony, the recruitment of unknown witnesses, and greater conscientiousness of participants. *United States v. American Radiator & Standard San. Corp.,* 274 F. Supp. 790, 794 (W.D. Pa.), *aff'd* 388 F.2d 201 (3d Cir. 1967), *cert. denied,* 390 U.S. 922 (1968).

proceeding may unduly benefit a criminal defendant to the detriment of the public interest. Thus, "although a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial." *Singer v. United States,* 380 U.S. 24, 35 (1965). The principle is clear that "justice cannot survive behind walls of silence . . ." *Sheppard v. Maxwell, supra,* 384 U.S. at 349.

The dual function of the press in the criminal justice system—"to report fully and accurately the proceedings of government" and "to guarantee the fairness of trials" (*Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 492 [1975]) is in many ways more critical during the pretrial hearing stage of the criminal process than at the trial on the merits. The overwhelming majority of criminal prosecutions consist solely of "pre-trial" proceedings followed by dismissals or, as here, pleas of guilty.[6] Moreover, the issues pertinent to suppression hearings specifically concern the propriety of the conduct of law enforcement officials,[7] concerning which there is a "paramount public interest in a free flow of information to the people. . . ." *Garrison v. Louisiana,* 379 U.S. 64, 77 (1964).

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[6]For example, in New York City during 1976, 89.7% (17,770) of all dispositions of felony indictments were made prior to trial. In the remainder of New York State, 93.4% (16.676) of such dispositions in 1976 were made prior to trial, and during that some period in Seneca County, *100%* of all felony dispositions (37 indictments) took place without trial. State of New York, *Twenty-Second Annual Report of the Judicial Conference (1977),* 52-55.

[7]A criminal defendant in New York is entitled to a suppression hearing only when he submits affidavits setting forth facts which demonstrate an unlawful search and seizure, unlawful eavesdropping, involuntarily obtained confession, or tainted identification proceeding. N.Y. Crim. Pro. Law §§ 710.20, 710.60.

An order excluding the public and press from a suppression hearing at the request of a criminal defendant thus has profound constitutional significance, since it at once deprives the public and press of their right to a public trial, infringes upon the right to gather news,[8] and restrains the press from observing and commenting upon public institutions. Finally, it interferes with the right of the public to receive information critical to self-governance. *Cf., Va. Pharmacy Bd. v. Va. Consumer Council,* 425 U.S. 748, 757 (1976).

3. The Opinion of the Court Below is Erroneous

The preservation of a defendant's right to an impartial jury is essential, yet the task of the judiciary must be to seek an accommodation when it is suggested that that right is threatened by press commentary, for:

> "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker,* 364 U.S. 479, 488 (1960).

Here, of course, there were available to the trial court a number of measures, short of exclusion, which do not

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[8] *See e.g., Branzburg v. Hayes,* 408 U.S. 665, 681, 707 (1972); *id.* at 727-28 (Stewart, J., dissenting). The issue in this case involves the right of *both* the press *and* public to attend pre-trial evidentiary hearings which are traditionally open to the public in New York State. Hence, there is neither an assertion of an "unrestrained" right to gather information (*cf. Zemel v. Rusk,* 381 U.S. 1, 17 [1951]), nor is there an assertion of a right of access on behalf of the press which exceeds that of the public. *Cf., Pell v. Procunier,* 417 U.S. 817 (1974). Moreover, unlike the prison regulations upheld in *Pell,* the exclusionary orders here were specifically aimed at restricting the reporting of a pre-trial hearing, and effectively foreclosed any observation of that event. *Cf. id.* at 830.

infringe upon the rights of the press and public yet which have repeatedly been recognized by this Court, either alone or in combination, as effective means of eliminating the detrimental impact of pre-trial publicity. *See, e. g., Nebraska Press Assn. v. Stuart, supra,* 427 U.S. at 563-65; *Sheppard v. Maxwell, supra,* 384 U.S. at 357-62. Accordingly, this Court has not sanctioned closure of pre-trial proceedings, for it has "been unwilling to place any direct limitations on the freedom traditionally exercised by the news media . . ." (*id.* at 350).

The Court of Appeals, however, did not agree. Disregarding the precept that the:

> "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, supra,* 420 U.S. at 492),

it characterized the public interest as "mere curiosity" which had not reached the "level of legitimate public concern." (11a). Further, it repudiated the publicity-mitigating measures which have been endorsed by this Court, on the conclusory basis that "[c]ontinuance, extensive *voir dire* examinations, limiting instructions or venue changes *may* prove paltry protection"[9] (emphasis supplied) (10a) for the rights of a defendant. Thus, by simply brushing aside the importance of open judicial

[9]The Court of Appeals eliminated change of venue as a remedy even though the population of Seneca County was 35,083; that of counties contiguous to Seneca County was 349,324; and that of the Judicial Department in which Seneca County is located was 3,915,433 (*1975 New York Legislative Manual,* 1292-93)—certainly a "substantial pool of prospective jurors" (*Nebraska Press Assn. v. Stuart, supra,* 427 U.S. at 563 n. 7) from which an impartial panel could undoubtedly have been selected.

proceedings, the Court of Appeals unnecessarily permitted closure as a remedy of the first instance—to the immediate and certain detriment of the rights of the press and public.

The majority opinion erred further by effectively authorizing closure of pre-trial hearings simply on request in every newsworthy case. As this Court has observed, "pre-trial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial" (*Nebraska Press Assn. v. Stuart, supra,* 427 U.S. at 554) and "undifferentiated fear or apprehension" is not sufficient to overcome First Amendment rights (*Tinker v. Des Moines School Dist.,* 393 U.S. 503, 508 [1969]). Yet the Court of Appeals has declared that pre-trial hearings in New York are presumptively to be closed when an impartial jury is merely threatened by press commentary. It is clear that such a threshhold—and hence the presumption—will be established in every case in which the public shows a specific interest.

Moreover, the presumption of closure established by the New York Court is triggered by the publication of news. Thus, reluctant to provoke ejection, the press is "likely to feel some inhibition" at disseminating information concerning trials—an effect equally violative of the First Amendment. *Lamont v. Postmaster General,* 381 U.S. 301, 307 (1965). Somewhat ironically, the ultimate impact of the opinion below will be for the press simply to submit to "gag" orders. By monitoring pre-trial proceedings, albeit mutely, the press will at least be able to observe, in a timely manner, demeanor, inflection and "atmosphere" of the proceeding—all of which are often critical to comprehension of the event, yet incapable of being captured in a sterile transcript. The holding of *Nebraska Press* will indeed be an empty one if it may so readily be circumvented by an unrestricted, albeit creative, interference with access to traditionally public news sources.

Finally, the Court of Appeals, by "presuming" closure, has placed the burden of proof upon the press to justify its presence in the courtroom by demonstrating to the trial court a "legitimate public interest"[10] or an "overwhelming interest in keeping all proceedings open." (11a). Placing the burden on the press is "contrary to where . . . the presumption must lie in the area of First Amendment freedoms." *Estes v. Texas,* 381 U.S. 532, 615 (1965) (Stewart, J., dissenting); *Speiser v. Randall,* 357 U.S. 513, 525-26 (1958). Besides the more obvious financial and logistical considerations in such an allocation, it is one which the press is not in a position to sustain. Non-parties in general have no ready access to information relevant to a proceeding.[11] That principle is particularly true here, where the very purpose of closure is to *maintain* public ignorance of the substance of pre-trial hearings. The dilemma established by the Court of Appeals is apparent and virtually insurmountable.

4. There is a Practical Need for Clarification

The need for this Court to review this limited yet profound issue is emphasized by the clear conflict in appellate opinions both in this case and in others. While the court below has deemed closings to be a remedy of

[10]The Court has doubted the wisdom of "committing . . . to the conscience of judges" decisions as to what are "issues of 'general or public interest' " and which are not. *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 346 (1974).

[11]"The [allocation of the production burden of proof] has primarily a procedural consequence when evidence is available to both parties on the issue in question; it simply determines the order in which they shall put it in. Where, however, no evidence is available to a party on an issue, then the allocation to him of the production burden will mean that he loses upon that issue, and often upon the whole case." F. James, *Civil Procedure,* 254 (1965).

first resort,[12] other courts have held that the availability of a venue change is itself sufficient to defeat every request, based upon the threat of adverse publicity, to close a suppression hearing. *State ex rel. Dayton Newspapers, Inc. v. Phillips,* 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976). Still others have held that the press and public may be excluded from such a proceeding only if the party moving for an order of closure demonstrates a "substantial likelihood" that information prejudicial to the accused will reach potential jurors *and* its detrimental effect "cannot be avoided by alternative means " *Keene Publishing Corp. v. Keene District Court,* ..... N.H. ....., 380 A.2d 261 (1977).[13]

A similar conflict has developed among groups studying the issue. While the court below relied upon an early analysis sanctioning closure essentially on request (ABA Standards, Fair Trial and Free Press § 3.1 [1968]), the ABA Adjunct Committee on Fair Trial/Free Press has, since the decision in *Nebraska Press,* developed a standard which successfully accommodates the rights of the

[12]*See, also, Philadelphia Newspapers Inc. v. Jerome,* ..... U.S. (No. 77-308 January 9, 1978) (statute permitting closure of suppression hearing on request); *cf., United States v. Gurney,* 558 F.2d 1202, 1211 (5th Cir. 1977), *petition for cert. filed sub nom. Miami Herald Publishing Company v. Krentzman,* 46 U.S. L.W. 3471 (U.S. January 16, 1978) (No. 77-1010).

[13]*See, also, United States v. Cianfrani,* Crim. No. 77-142 (E.D. Pa., November 16, 1977) (Becker, J.) (presumption of media access to suppression hearing can be overcome if standards of *Nebraska Press* are met); *State v. Allen,* 73 N.J. 132, 373 A.2d 377 (1977) (closure arguably is a prior restraint and hearing may be held in camera only if "serious and imminent threat to the integrity of the trial" is demonstrated and alternatives are shown to be not "feasible or proper") (dictum); *State ex rel. Gore Newspaper Company v. Tyson,* 313 So. 2d 777 (Fla. App. 1975), *rev'd on other grounds, English v. McCrary,* 348 So. 2d 293 (Fla. 1977).

press and public with those of a defendant.[14] ABA Adjunct Committee on Fair Trial/Free Press, *Standards Relating to Fair Trial and Free Press* §3.2 (Approved Draft, February, 1978); *see, also*, Staff of Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess., Report on Free Press—Fair Trial, 21-22 (Comm. Print 1976).

Finally, even if it can be assumed that a decision of New York's highest court will not be followed in other jurisdictions, the impact of the Court of Appeals opinion will be striking.[15] The circulation of the 78 daily newspapers in New York State approaches 7,000,000, larger than in any other state and almost 11.5% of the daily circulation nationwide. There are, moreover, 404 weekly newspapers in New York,[16] which the decision below will perhaps most dramatically affect, since it is unlikely that they will be able to expend the resources required to assert their interest in opposition to closure. *Cf., Nebraska Press Assn. v. Stuart, supra*, 427 U.S. at 610 n. 40 (Brennan, J., concurring). The nature and extent of the injury potentially to be inflicted by the opinion below, unless corrected, is thus enormous.

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[14]"Except as provided below, the pre-trial hearing and its record shall be open to the public including representatives of the news media. . . . The presiding officer may close a . . . pre-trial hearing . . . only if: (1) the dissemination of information from the pre-trial hearing and its record would create a clear and present danger to the fairness of a trial; and (2) the prejudicial 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."

[15]See *supra*, n. 6.

[16]Editor & Publisher Co., Inc., *1977 International Yearbook*, 21, 285-87 (1977).

5. The Procedure Under Which the Orders Were Issued is Improper

Exclusionary orders were issued by the trial court without advance warning, and the hearing concluded before attorneys for the press could be heard in opposition. The appellate courts below agreed that a hearing in such situations should be afforded (11a, 27a), but due process requires more.

Adequate notice of an impending exclusion and an opportunity to be heard are necessary. *Carroll v. Princess Anne,* 393 U.S. 175 (1968). Particular findings of fact, based upon evidence adduced at the hearing, must be made which support the order and which demonstrate why alternative measures, less drastic than closure of a courtroom, would not cure the perceived injury. *Nebraska Press Assn. v. Stuart, supra,* 427 U.S. at 563. Finally, such orders should be stayed, if at all possible, pending an opportunity to seek expedited appellate review. *Cf., National Socialist Party v. Skokie,* 432 U.S. 43, 44 (1977); Note, *Ungagging the Press: Expedited Relief From Prior Restraints on News Coverage of Criminal Proceedings,* 65 Georgetown L.J. 81 (1976).

6. The Case is Not Moot

Following the suppression hearing, but prior to the decision of the Appellate Division, the defendants pleaded guilty and the transcript of the suppression hearing was released (5a). Although the Court of Appeals ultimately dismissed the proceeding as technically moot (12a), it nevertheless retained jurisdiction to decide the merits of "far from an ordinary appeal [which] crystallizes a recurring and delicate issue of concrete significance both to

the courts and the news media" and which concerns matters that "typically evade review" (5a).[17]

For the reasons set forth by the Court of Appeals, and for those articulated in *Nebraska Press Assn. v. Stuart, supra,* 427 U.S. at 546-47, the case is not moot and should be resolved by the Court.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the State of New York Court of Appeals.

Respectfully submitted,

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March 15, 1978

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[17]The Court is not bound by the mootness determination of the Court of Appeals. *Liner v. Jafco, Inc.,* 375 U.S. 301 304 (1964).