IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 79-243

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER and KEVIN McCARTHY, *Appellants,*

v.

COMMONWEALTH OF VIRGINIA, *Appellee.*

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN McCARTHY, *Appellants,*

v.

RICHARD H.C. TAYLOR, *Appellee.*

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER and KEVIN McCARTHY, *Appellants,*

v.

RICHARD H.C. TAYLOR, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

BRIEF AND APPENDIX FOR *AMICUS CURIAE,* STATE OF NEW JERSEY

JOHN J. DEGNAN
Attorney General of
New Jersey
Of Counsel and on the Brief

JOHN DE CICCO
ANTHONY J. PARRILLO
DEBRA L. STONE
Deputy Attorneys General
On the Brief

JOHN J. DEGNAN
Attorney General of
New Jersey
Attorney for Amicus Curiae
State of New Jersey
State House Annex
Trenton, New Jersey 08625

INDEX TO BRIEF

Cases Cited

United States Constitution Cited

New Jersey Constitution Cited

Statutes Cited

PAGE

Other Authorities Cited

INDEX TO APPENDIX

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On Appeal from the Supreme Court of the Commonwealth of Virginia

BRIEF FOR *AMICUS CURIAE*, STATE OF NEW JERSEY

Statement of the Matter Involved

In the case now before this Court, a trial judge has, without any justification, ordered that a criminal trial be held in secret. Both the media and the public were absolutely barred from attending any portion of the guilt determination phase of the criminal proceeding. The First Amendment right of the media to gather information and to disseminate it to the public was totally thwarted far beyond the effect of any prior restraint. Moreover, the Sixth Amendment right of the public to have access to criminal trials was completely ignored. Secret judicial criminal proceedings, especially involving the guilt determinative process, are totally repugnant to the concept of open government and cannot be tolerated. The State of New Jersey appears in the role of *amicus curiae* to urge this Court to hold that the media and the public have a presumptive right to attend and to report on criminal trials.

Appellants in this matter, Richmond Newspapers, Inc. and two of its reporters, Timothy B. Wheeler, and Kevin McCarthy, challenged a closure order issued by a State trial court excluding all members of the media and public from the entirety of a two-day murder trial held on September 11 and 12, 1978 in Hanover County, Virginia. At the start of trial on September 11, the attorney for defendant John Paul Stevenson moved to have the press and public excluded from the courtroom for the duration of the criminal proceeding. The prosecutor did not object, noting that such a motion was in the discretion of the Court. The trial judge, relying on *Va. Code* sec. 19.2-266, ordered that the courtroom be kept clear of all parties except the witnesses when they testify (Pa8). The Court made no finding that such action was necessary to protect defendant's rights to a fair trial and never considered

whether any alternative measures could have been employed to protect the defendant's rights.

Appellants were afforded a hearing on their motion to vacate the court's closure order. Advancing no reason, the court ordered the reporters out of the courtroom and heard counsel *in camera*. Counsel for appellants argued that the action of the court violated the First, Sixth and Fourteenth Amendments by not first determining that a fair trial would be jeopardized by the presence of the public and that no other alternative measures could adequately protect defendant's rights (Pa11-14). Defense counsel asserted that given the fact that this was a small community, no other methods could protect the defendant's right to a fair and impartial trial (Pa15).

After hearing these arguments the trial court refused to reopen the proceeding opining that the presence of people in the courtroom is distracting to the jury and noting that this was defendant's fourth trial on these charges.[1]

Appellants filed a notice of appeal to the Virginia Supreme Court on September 28, 1978. On November 8, 1978 appellants filed a petition for appeal, a petition for mandamus to enjoin the trial judge from denying them access to any future proceeding and a writ of prohibition for the same purposes. The Virginia Supreme Court, ap-

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[1] Defendant's first conviction was reversed and remanded for a new trial because of the admission of inadmissible evidence. *Stevenson* v. *Commonwealth,* 218 Va. 462, 237 S.E. 2d 779 (1977). His second trial in October of 1978 ended in a mistrial when a juror asked to be excused after trial commenced and no alternate was available. (Pb9 n. 6). The third trial also ended in a mistrial, evidently because a prospective juror had read about Stevenson's trial and told other prospective jurors about the case before the start of the trial. *Id.*

parently relying exclusively on this Court's decision in *Gannett* v. *DePasquale,* —— U.S. ——, 99 S.Ct. 2898 (1979), denied the petition for appeal and dismissed the petition for writs of mandamus and prohibition on July 9, 1979 (PaA, B and C).

Appellants filed a timely Notice of Appeal from those judgments to this Court on August 13, 1979, invoking jurisdiction under 28 U.S.C. sec. 1257(2) (Pa14). On October 9, 1979, this Court granted review of this matter and postponed consideration of jurisdiction. Because of the fundamental public importance of the questions presented by their appeal, and the impact of these issues upon this State, the State of New Jersey appears as *amicus curiae.*[2]

Question Presented

Do the First, Sixth, and Fourteenth Amendments as interperted by this Court's holding in *Gannett* v. *DePasquale,* —— U.S. ——, 99 S.Ct. 2688 (1979), permit a trial judge to exclude the media and the public from the entire trial of a criminal defendant.

[2] The interest of the State of New Jersey in this matter is not insignificant since the New Jersey Constitution contains provisions virtually identical to the First and Sixth Amendments to the United States Constitution. See *N.J. Const.*, Art. I, sec. 6 and Art. I, sec. 10.

POINT I

The First, Sixth and Fourteenth Amendments mandate a holding that *Gannett* v. *DePasquale* does not authorize the total exclusion of the media and public from the entire trial of a criminal defendant.

A. The need for clarification and limitation of *Gannett* v. *DePasquale*.

This case presents issues of vital public importance which have, in part, been spawned by this Court's decision in *Gannett Co. Inc.* v. *DePasquale*, —— U.S. ——, 99 S.Ct. 2898 (1979). Succinctly stated, the question is whether and under what circumstances a trial court, consistent with constitutional considerations, may order the wholesale exclusion of the media and the public from the entire trial of a criminal defendant. It is the position of the State of New Jersey that, absent extraordinary circumstances, criminal trials may not be closed without offending the constitutional guarantees embodied in both the First and Sixth Amendments.

Gannett held that the Sixth Amendment's public trial guarantee does not give the press or the public a right of access to a pretrial suppression hearing that was closed by the trial court with the agreement of both the prosecution and the defense. Writing for a splintered five man majority, Mr. Justice Stewart expressed the view that "[t]he Constitution nowhere mentions any right of access to a criminal trial on the part of the public; its guarantee . . . is personal to the accused . . . we hold that members of the public have no constitutional right . . . to attend criminal trials." 99 S.Ct. at 2905. The majority reserved on the First Amendment issue.

In our view, despite the broad language found in the majority opinion, *Gannett* must be limited to the precise confines of the question there presented. Thus, this Court only held that the public and the press may be excluded from pretrial proceedings without offending the Sixth Amendment. *Id.* at 2913. (Burger C.J. concurring). Nevertheless, while it appears that the decision only affects certain proceedings, it has been construed to permit the closure of actual trials. Indeed, even a member of this Court has construed *Gannett* in this fashion. Thus, the observation of Mr. Justice Rehnquist in his *Gannett* concurrence remains an actual and worrisome possibility: that if, as this Court held, the public has no constitutional right to attend a criminal trial, "it necessarily follows that if the parties agree on a closed proceeding, the trial court is not required by the Sixth Amendment to advance any reason whatsoever for declining to open a pretrial hearing or trial to the public." *Id.* at 2918 (Rehnquist, J., concurring). Justice Rehnquist's assessment has already been the subject of much controversy. Since *Gannett* there have been a number of cases in which trials were closed to the press and to the public premised on a liberal reading of this Court's opinion therein.[3]

As a result of *Gannett,* in rare instances the existence of compelling and extraordinary reasons may result in a court ordering the closing of certain pretrial hearings. While New Jersey will not concede the desirability of such a practice, this drastic alternative has been held by this Court not to offend the Constitution. Yet, excluding all members of the press and public from the courtroom

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[3] See Survey of the National Reporters Committee for the Freedom of the Press (Aa1-4). In fact, in one case the trial judge excluded the press but allowed members of the public to remain. *State* v. *Woomer,* No. 79-65-26-203 (S.C. Cir. Ct. 1979).

during an actual trial is a far different matter and, we submit is constitutionally suspect. Once the preliminary evidential issues have been resolved and the actual guilt determinative process begun, there is, we submit, no apparent possibility of prejudice to the accused in making public that which is simultaneously disclosed to the ultimate trier of fact. The public's right to know demands no less a standard.

The closure order entered in this case is abhorrent to the tradition of open trials which is deeply rooted in American history and common law. Although the majority in *Gannett* failed to ascribe constitutional validity to this tradition in the context of pretrial proceedings, we submit that the public trial concept embodied in the First and Sixth Amendments ensures against the type of order here in issue. Apart from its constitutional underpinning, the tradition of open trials is grounded in strong policy reasons closely associated with the criminal justice system itself. Thus, the four justices who dissented in *Gannett* aptly observed that the Sixth Amendment right of the public to scrutinize public trials guards against prosecutorial, judicial and police abuse; informs the public about a criminal justice system that may protect or menace them; monitors the performance of individuals within the system and instills public confidence in judicial remedies, processes and deliberations. 99 S.Ct. at 2940.

The strong policy reasons for opening trials to the public are also related to many of the same concerns which underlie the First Amendment. From the standpoint of the press, the *in camera* procedure, while not a direct restraint, arguably achieves the same result by more subtle means and becomes in effect a prior restraint on its newsgathering ability. Indeed, Justice Powell conceded that the ruling in *Gannett* "denies access" to an im-

portant source of information, namely the courtroom, if judge and litigants agree to close it. *Id.* at 2915. While this Court has, on a previous occasion, recognized the media's right to publish what has transpired during a public hearing, *Nebraska Press Assn.* v. *Stuart,* 427 U.S. 539 (1976), this right in our view will have little meaning if the ability to gather information in the first instance is frustrated by providing for the ability to completely close such proceedings.

The instant matter thus affords an opportunity for this Court to clarify its opinion in *Gannett* and to provide urgently needed guidance for trial courts throughout the country. Without further clarification from this Court, *Gannett* will be repeatedly misapplied depriving the public, and the media, as the representatives of the public, of their presumptive right to observe the conduct of criminal proceedings.

B. Access to criminal trials by the media and the public is a fundamental constitutional right.

The constitutional right of the public and the press, as representatives of the public, to attend criminal trials derives from the First, Sixth and Fourteenth Amendments, and is deeply ingrained in our history. Each of these constitutional provisions reflects our belief that secret judicial proceedings are anathema to a free society. *In re Oliver,* 333 U.S. 257 (1948). This Court in referring to criminal trials has repeatedly emphasized the importance of open proceedings to ensure their fairness. See *e.g. Shepard* v. *Maxwell,* 384 U.S. 333, 359 (1966); *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 492 (1975). Unquestionably, "the public has the right to be informed as to what occurs in its courts." *Estes* v. *Texas,* 381 U.S. 532,

541 (1965). See also *Craig* v. *Harney,* 331 U.S. 367, 374 (1947). The presence of the public at trial is the judicial institution's most potent force supporting the impartial administration of justice. It is not without significance that the people are a party in *all* criminal proceedings; they unquestionably have a right of access to information regarding those proceedings. See 49 A.L.R. 3d 1007, 1013 (1972); Comment, 47 *Univ. Cin. L. Rev.* 444, 462 (1978); Note, "The Gag Order, Exclusion and the Press's Right to Information," 39 Alb.L.Rev. 317, 322 (1975). The public is an integral part of every trial, not only as represented by the jury, and the prosecutor, but through its own presence.

The origins of the public trial and its basis in the Sixth Amendment as applied to the States through the Fourteenth Amendment has been ably and thoroughly chronicled by Justice Blackmun in his concurring and dissenting opinion in *Gannett* and will not be repeated here at length. 99 S.Ct. at 2919-2941. 3 *Blackstone, Commentaries* 372 (1968); 1 B. Schwartz, *The Bill of Rights: A Documentary History* 129, 140, 271 (1971). As noted by Justice Blackmun, the Sixth Amendment embodies an unbroken history of open trials designed not only to protect the defendant by preserving the integrity and impartiality of the trial process but also to serve society as a whole by enabling it to scrutinize the performance of those involved within the criminal justice system. 99 S.Ct. at 2927-2933. Furthermore, there is no basis in constitutional law for finding any "right to a private proceeding or a power to compel a private proceeding arising out of the ability to waive the grant of a public one," and this Court has persistently refused to find such a right. 99 S.Ct. at 2907, n. 11 and 2930. See also *Singer* v. *United States,* 380 U.S. 24, 35 (1965) (dictum).

The First and Fourteenth Amendment basis for public access to criminal trials has also been enunciated in a number of opinions by this Court. See *e.g., Nebraska Press Assn.* v. *Stuart,* 427 U.S. 539 (1976); *Gannett Co. Inc.* v. *DePasquale, supra,* 99 S.Ct. at 2914 (Powell, J. concurring). The First Amendment basis for this right of access is so crucial to the matter before this Court that it must be explored in greater detail.

Unquestionably, a public trial involves a societal interest that is distinct from that of the parties involved. A courtroom is not only an institution in which public and private disputes are peacefully resolved, it also functions as a public forum for the purpose of allowing the public to be informed of the operations of the judicial system. Note, "Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings," 91 Harv.L.Rev. 1899, 1901 (1978); Comment, 47 Univ.Cin.L.Rev. 444, 460 (1978). Thus, it is vital that the public have access to information regarding the operation of the criminal justice system.

It has long been recognized that the core objective of the First Amendment is the preservation of a full and free flow of information to the general public. *Houchins* v. *KQED, Inc.,* —— U.S. ——, 98 S.Ct. 2588, 2605 (1978) (Stevens J. dissenting); *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U.S. 748, 761-765 (1976); *Garrison* v. *Louisiana,* 379 U.S. 64, 77 (1974). This Court has held that the First Amendment protects not only the dissemination but also the receipt of information and ideas.[4] Thus, the First Amendment right of access to ju-

[4] See *e.g., Virginia Pharmacy Board* v. *Virginia Consumer Council, supra* at 756; *Procunier* v. *Martinez,* 416 U.S. 396, 408-409 (1974); *Kleindist* v. *Mandel,* 408 U.S. 753, 762-763 (1972); *Red Lion Broadcasting, Inc.* v. *F.C.C.,* 395 U.S. 367, 396-97 (1969). See generally, L. Tribe, *American Constitutional Law,* sec. 12-19 (1978); Note, "The Constitutional Right to Know," 4 *Hastings Const. L. Q.* 109 (1977); Note, "The Rights of the Public and Press to Gather Information," 87 *Harv.L.Rev.* 1505, 1506-10 (1974).

dicial proceedings is based upon the protection of the free flow of information. This Court has explicitly recognized the need to ensure access to newsworthy information:

> Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated. [*Branzburg* v. *Hayes,* 408 U.S. 665, 681 (1972)]

See also *Pell* v. *Procunier,* 417 U.S. 817, 833 (1974).

Obviously not all interested members of the public can physically attend every criminal trial. Instead, the public at large heavily relies upon the members of the press, as their representatives, to report on the workings of the criminal justice system. A newsman on assignment acquires news "not . . . [only] for his own edification" but also to serve the needs of society. *Houchins* v. *KQED, Inc.,* 438 U.S. 1, 17 (1978) (Stewart J., concurring). This function of the press has long been recognized and protected by this Court.

> A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. . . . The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. [*Shepard* v. *Maxwell,* 384 U.S. 333 (1966)].

In short, the most effective tool for assuring the public's right to observe trials is through the presence of representatives of the media. Thus, to limit or exclude the press is, in effect, to limit the public's right to be in-

formed. As noted earlier, in order to fully protect the ability of the press to disseminate vital information, some protection of its ability to gather news is indispensable. *Branzburg* v. *Hayes,* 408 U.S. 665, 681 (1972). See also *Pell* v. *Procunier,* 417 U.S. 817, 833 (1974).

In the cases dealing with prior restraints on publication, this Court has vigorously stressed that such restraints seriously infringe upon First Amendment rights. See *e.g., Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539 (1976). A prior restraint operates as an immediate and irreversible sanction, it "freezes" speech at least for a period of time. 427 U.S. at 559. Although closure orders and gag orders differ in form, both operate to deny information to the public regarding the operation of the judicial system and to deny the press the right to publish. See Comment, 47 *Geo. Wash. L. Rev.* 319, 335 (1978). Thus, the closure of courtrooms undercuts First Amendment freedoms by affording the courts a mechanism for avoiding the heavy presumption against prior restraints while accomplishing the same effect.

Given the diverse opinions expressed by this Court in *Gannett,* amicus recognizes the difficulty in identifying a constitutional right of public access to criminal trials as exclusively falling under either the First or Sixth Amendment. While either amendment, as noted previously, could be viewed as forming a basis for such a right, this Court should find that a right of access emanates from a reading of both the First and Sixth Amendments in conjunction with the Ninth Amendment and applying them through the Fourteenth Amendment.[5] Using the penumbra analysis

[5] Such an approach has been suggested by at least two commentators. See A. Howard and S. Newman, A Background Report on Fair Trial and Free Expression Prepared for the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 94th cong., 2d Sess. 26-27 (1976); Note, "The Right to a Public Trial in Criminal Cases," 41 *N.Y.U.L.Rev.* 1138, 1156-57 (1966).

of *Griswold* v. *Connecticut,* 381 U.S. 479, 492 (1965),[6] this approach places a right of free access within the penumbras of the rights of freedom of speech and press and the right of a public trial in order to fully protect the exercise of those rights.

As this Court has recognized, the "specific guarantees in the Bill of Rights have penumbras, formed by emanations of those guarantees that help give them life and substance." *Griswold* v. *Connecticut, supra,* 381 U.S. at 484. Thus, for example, the rights of freedom of speech and press have been interpreted to include not only the right to utter or to print, but also the right to distribute, the right to receive information, the right to read, and freedom of inquiry, freedom of thought and freedom to teach. *Griswold* v. *Connecticut, supra,* at 482 and cases cited therein.[7] These peripheral rights, not specifically mentioned in the Constitution were found to exist because without them the specific rights would be less secure. *Griswold* v. *Connecticut, supra* at 482-483.

Support for this expansive reading of the First and Sixth Amendments may be found in the Ninth Amendment. This Court has noted that the Ninth Amendment

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[6] In *Griswold,* this Court found a right of marital privacy emanating from penumbras of the First, Third, Fourth, Fifth and Ninth Amendments.

[7] See also, *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U.S. 748, 756 (1976); *Procunier* v. *Martinez,* 416 U.S. 396, 408-409 (1974); *Kleindist* v. *Mandel,* 408 U.S. 753, 762-763 (1972); *Red Lion Broadcasting, Inc.* v. *F.C.C.,* 395 U.S. 367, 396-97 (1969). See generally, L. Tribe, *American Constitutional Law,* sec. 12-19 (1978); Note, "The Constitutional Right to Know," 4 *Hastings Const. L. Q.* 109 (1977); Note, "The Rights of the Public and Press to Gather Information," 87 *Harv.L.Rev.* 1505, 1506-10 (1974).

reflects the belief of the framers of the Constitution that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive. *Griswold* v. *Connecticut, supra* at 484, 381 U.S. at 488-494 (Goldberg, J. concurring).

With respect to the constitutional status of the right in question, amicus would urge that public access to criminal trials is necessary to properly secure and protect the values and rights of public trial and freedom of speech and press provided by the Sixth and First Amendments. It is respectfully submitted that without a right of access to criminal trials, the public's rights to receive and disseminate information will be severely limited by virtue of the shutting off of the flow of information regarding an integral part of our society.

Moreover, as noted in both the majority opinion and in Justice Blackmun's dissenting opinion in *Gannett,* criminal trials have historically been open to the public in order to ensure not only a fair trial for the defendant, but also to ensure an informed citizenry which is essential to the functioning of any democracy. *Gannett* v. *DePasquale, supra,* 99 S.Ct. at 2906-2907; 99 S.Ct. at 2922-2932. The widespread recognition of societal interests in conducting open judicial proceedings and the long historical tradition of open trials both here and in England suggest that public access to criminal trials is one of the fundamental rights retained by the people even though not specifically enumerated by the Constitution. Whatever its precise textual source, the existence of a constitutional right of the members of the media and the public to attend criminal trials cannot be doubted.

The record in the case now before this Court is utterly devoid of any evidence that the presence of the public, and

the press as the representatives of the public, would in any way have harmed the defendant.[8] Even if such evidence did exist it is virtually impossible to imagine any circumstances in which the exclusion of the press and the public from the entire criminal trial could be tolerated. The situation in a jury trial, which is indisputably a public event, is far different from that of a pretrial proceeding. Given the wide variety of alternative methods of preserving a defendant's right to a fair trial, such as sequestration of the jury, side bar conference, and forceful instructions, it requires the most fertile imagination to conjure a situation where complete exclusion of the press and public would be tolerable.

Even assuming, while not conceding, that such circumstances might occur, such a drastic limitation on the public's right of access could only be ordered pursuant to clear need and accompanying specific criteria. It could not occur, as it did in this case, at the unbridled discretion of the trial court. See *Cox* v. *Louisiana,* 379 U.S. 536, 557-558 (1965). Complete closure of a public trial, should it occur, would only be upon a showing that there is a clear and present danger to the fairness of the trial and that such drastic action is strictly and inescapably necessary to protect the defendant's fair trial guarantee in that all other reasonable alternative means would be ineffective. *Gannett* v. *DePasquale,* 99 S. Ct. at 2940 (Blackmun, J. concurring in part and dissenting in part). See also American Bar Association, Standards Relating

[8] The fact that the particular trial involved in this appeal has ended in no way moots this appeal. The order closing a criminal trial is too short in its duration to permit full review and the circumstances are clearly capable of repetition. *Gannett* v. *DePasquale,* 99 S.Ct. at 2904. See also *Nebraska Press Ass'n.* v. *Stuart,* 427 U.S. at 547 (1976).

to the Administration of Criminal Justice, Fair Trial and Free Press, sec. 8-32 at 16 (Approved Draft 1978). In the instant matter, the trial court made no effort to "determine whether there [were] alternative means available by which the fairness of the trial might be preserved without interfering substantially with the public's interest in a prompt access to information concerning the administration of justice." 99 S.Ct. at 2916 (Powell, J., concurring).

Amicus submits that the closure in this case on the basis of *Va. Code* sec. 89.2-266, indicates that the Virginia court sanctioned the concept of secret trials, a practice which is plainly unconstitutional and abhorrent to our system of public administration of justice. From the standpoint of both the press and the public, the closure of trials is nothing more than a prior restraint on the newsgathering ability of the press and plainly unconstitutional. See *Branzburg* v. *Hayes,* 408 U.S. at 707. *Cf. Nebraska Press Assn.* v. *Stuart,* 427 U.S. 539 (1976).

C. The public's right to a fair and just trial may outweigh its right to access in extraordinary cases.

Amicus has previously demonstrated that *Gannett* cannot be construed as permitting the exclusion of the media and the public from an entire criminal trial. The First and Sixth Amendments require no less. However, we have also recognized that upon a showing by the defendant of a clear and present danger to the fairness of the trial, closure may be temporarily ordered. Such drastic action may be taken only when it is shown to be inescapably necessary to protect the defendant's right to a fair trial and no other alternative means are available. The inquiry does not end here, however. The necessity for

closure of portions of criminal trials has been recognized in situations other than those threatening the defendant's right to a fair trial. On rare occasions certain proceedings have been temporarily and partially closed in order to ensure a fair trial and to preserve the integrity of the criminal justice system. Such instances most frequently occur as a necessary means of eliciting truthful and accurate testimony which will in turn result in judgments or verdicts which enhance the integrity of the judicial system. In short, closure of proceedings in such instances may occur only when the public's right to access is outweighed by the public's right to an orderly and just system of criminal justice.

Like other constitutionally protected guarantees, the right of public access to trials is not absolute. There are a number of competing interests that may conflict with the right of public access thus requiring a balancing and reconciliation of the countervailing concerns. In certain situations, however, there has never been any doubt about shielding criminal proceedings from public view. Thus, our criminal justice system has as integral components secret grand and petit jury deliberations. In such instances, the absolute necessity for closure is evident. Any other result would subvert the truthfinding functions of the grand and petit juries and result in miscarriages of justice. The Constitution was not drafted to encompass such proceedings within the First and Sixth Amendment rights of public access.

Where the conflict is not susceptible to such an easy and broad balancing, there must be a weighing, in each instance, of the derivative benefit in effectuating the opposing interest and the incidental burden imposed thereby on the public's right of access. Relatively minor gains in the former should not justify major impairments of

the latter. For reasons previously mentioned, all appropriate deference should be given to the presumption of openness. When in irremediable conflict, the countervailing interest should take precedence only when insistence on unlimited public access would seriously and imminently threaten the orderly administration of justice, including the government's interest in obtaining a fair conviction, and there is no less restrictive way to achieve the same end. In this event, the means chosen must be directly related to the end sought and must extend no further than the circumstances strictly warrant.

In the past, courts on both the state and federal levels have identified four general but distinct competing interests other than fair trial which may, depending on the circumstances, justify overriding unlimited public access: protection of witnesses, privacy, decorum and preservation of state secrets.[9] The concern voiced is that full public exposure and the concomitant publicity may jeopardize any one of these legitimate and important opposing interests and thereby endanger the integrity of the criminal process. For instance, it may appear that hold-

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[9] It has long been recognized that the right of public access is not absolute and that the trial court has the inherent power under exceptional circumstances and in the interests of an orderly administration of justice, to regulate admission into the courtroom and to temporarily bar the public, even when it is the accused who objects to the exclusion of the public or a portion thereof. See, *e.g., United States* v. *Nixon,* 418 U.S. 683 (1974); *Dennis* v. *United States,* 384 U.S. 855 (1966); *Palermo* v. *United States,* 360 U.S. 343 (1959); *Roviaro* v. *United States,* 353 U.S. 53 (1957); *United States* v. *Arroyo-Angulo,* 580 F.2d 1137 (2 Cir. 1978), *cert.* den. —— U.S. ——, 99 S.Ct. 285 (1978); *Stamicarbon, N.V.* v. *American Cyanamid,* 506 F.2d 532, 542 (2 Cir. 1974); *United States* v. *Bell,* 464 F.2d 667 (2 Cir. 1972), *cert.* den. 409 U.S. 991 (1972); *Kleinbart* v. *United States,* 388 A.2d 878, 882 (D.C.App. 1978).

ing certain portions of the trial in the open will inhibit a witness from speaking frankly in public, or jeopardize the safety and wellbeing of a prosecution informant, or threaten the ability of the government to preserve sensitive state secrets relevant to issues contested in the trial. There may also be a need to exclude unruly spectators, limit the number of spectators or place restrictions on the access of the electronic media to ensure that the testimony is easily heard and that the jury and witnesses are not distracted.

The conditions and circumstances under which closures have occurred are well documented and, as noted, generally involve preservation of order and decorum,[10] protection of witnesses from harassment or injury[11] or severe emotional distress,[12] protection of defendant's ability to testify,[13] preservation of the confidentiality of certain in-

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[10] *Estes* v. *Texas,* 381 U.S. 532 (1965); *United States ex rel. Orlando* v. *Foy,* 350 F.2d 967 (2 Cir. 1965), *cer.* den. 384 U.S. 1008 (1966).

[11] *United States ex rel. Smallwood* v. *LaValle,* 377 F.Supp. 1142 (E.A.N.Y. 1974), aff'd 508 F.2d 837 (2 Cir. 1974), *cert.* den. 421 U.S. 920 (1975); *United States ex rel. Bruno* v. *Herald,* 408 F.2d 125 (2 Cir. 1969), *cert.* den. 397 U.S. 957 (1970); *People* v. *Hagan,* 24 N.Y.2d 395, 248 N.Y.2d 588 (Ct.App. 1979).

[12] *United States ex rel. Latimore* v. *Sielaff,* 561 F.2d 691 (7 Cir. 1977), *cert.* den. 434 U.S. 1076 (1978); *Greise* v. *United States,* 252 F.2d 151 (9 Cir. 1958), *cert.* den. 361 U.S. 842 (1954); *United States* v. *Kobli,* 172 F.2d 919 (1949); *Commonwealth* v. *Wright,* —— Pa. Super. ——, 388 A.2d 878 (Pa.Super. 1978); *Commonwealth* v. *Stevens,* 237 Pa.Super. 457, 352 A.2d 504 (Pa. 1975); *State* v. *Purvis,* 157 Conn. 198, 251 A.2d 178 (Conn. 1965), *cert.* den. 395 U.S. 928 (1969).

[13] *Shepard* v. *Maxwell,* 384 U.S. 333 (1966); *Kirstowsky* v. *Superior Court,* 143 Cal.App. 745, 300 P.2d 163 (Dist.Ct. 1956).

formation[14] or the identity of undercover agents.[15] Such decisions illustrate that courts have been willing in extraordinary cases to permit limited exceptions to the principle of openness where necessary to protect some other interest. We submit however that the public interest in maintaining open courts requires that any exception to the rule be narrowly drawn. If closure is allowed it should only be because the collision of competing interests in any given case will most probably give rise to a recurring conflict in which insistence on unrestricted public access would mean that the government would be unable to obtain convictions in a whole class of cases. Stated somewhat differently, if refusing to allow closure will result in a pattern of repeated dismissals against the government and pose a recurrent threat to conviction for some genre of cases, then such a concern should take precedence over the public right of access to trials. The governmental interest at stake is not convicting a particular defendant but rather preventing the wholesale immunization of certain types of criminals from prosecution and ensuring the orderly administration of justice.

Most obvious are those classes of cases characterized by the use of juvenile witnesses or victims of sexual offenses. The justification for closure, when requested, in rape cases lies not solely in the peculiar circumstances of the particular witness, but more importantly in generalized notions of personal dignity.[16] Mere embarrass-

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[14] *Stamicarbon, N.V.* v. *American Cyanamid, supra,* 506 F.2d at 539-40; *United States* v. *Lopez,* 328 F.Supp. 1077 (E.D.N.Y. 1971).

[15] *United States ex rel. Lloyd* v. *Vincent,* 520 F.2d 1272 (2 Cir. 1975); *People* v. *Hinton,* 31 N.Y.2d 71, 286 N.E. 2d 265 (Ct.App. 1972).

[16] *United States ex rel. Latimore* v. *Sielaff, supra,* 561 F.2d 691, 694.

ment of witnesses with no showing that this difficulty represents a recurring problem, should not override the public's right of access to trials. Where, however, the choice is between public access and the public interest in fair convictions under the law, the latter should prevail. Were it otherwise, the fair and orderly administration of justice would be seriously and imminently impeded.

Once the countervailing interest has been identified, there must be every attempt to accommodate it by means least restrictive to public access. Inevitably, however, there will be situations in which no less drastic measure than exclusion is available to facilitate the orderly administration of justice. In the case of presenting sensitive testimony or details of a highly revolting nature, especially, it may be that the conflicting interests can never be accommodated. The reluctance of the witness, after all, stems from the very presence of the public. Similarly, there is inherent difficulty in reconciling the need of the government to present certain confidential evidence in secret with the right of the public to observe the proceedings. When, in such cases, the opposing interests stand in irremediable conflict, narrowly drawn restrictions on public access ought to be allowed.

A different situation is presented in the area of publicity during an ongoing trial. There is a substantial likelihood here of accommodating public access with the orderly administration of justice. A trial court has a number of available options to deal with the problem. The *Gannett* dissent listed eight such devices: (1) continuance, (2) severance, (3) change of venue, (4) change of venire, (5) *voir dire,* (6) peremptory challenges, (7) sequestration and (8) admonition of the jury.[17] As the dissenters noted:

[17] See also, *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539, 563-564 (1976); *Shepard* v. *Maxwell,* 384 U.S. 333, 354 n. 9, 358-362 (1966).

"One or more of these alternatives may adequately protect the accused's interests and relieve the court of any need to close the proceeding in advance."[18]

Finally, while exclusion of the public in order to further the administration of justice may be proper, the exclusion may be for no longer and of no greater scope than that necessary to serve the legitimate countervailing interest. Closure orders, if proper, must extend no farther than the circumstances strictly warrant and apply only to portions of the proceeding strictly and inescapably necessary to protect the interests advanced by the defendant or the government.[19] For example, if closure is requested and deemed appropriate in a rape case, it must be limited to that period of time during which the reluctant complainant testifies. In the case of prejudicial publicity, "it might well be possible to exclude the public from only those portions of the proceeding at which the prejudicial information would be disclosed, while admitting to other portions where the information the accused seeks to suppress would not be revealed."[20] During the actual trial this may entail excluding the public whenever the jury is excused as when legal argument on the admissibility of certain evidence is made outside the presence of the jurors. Once evidence has been screened for its admissibility and reliability, however, there would be no justification on this ground for barring the public during its presentation to the jury, no matter how fatally prejudicial.

Unlike the wholesale closure of an entire criminal trial which occurred in this instance, narrowly drawn restric-

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[18] *Gannett* v. *DePasquale, supra.*

[19] *Cf. United States* v. *Cianfrani,* 573 F.2d 835, 845 (3 Cir. 1978).

[20] *Id.* at 854, cited in *Gannett* v. *DePasquale, supra.*

tions as to time and scope may be unavoidably necessary for the trial itself to proceed to a fair and just result and more generally, to ensure an efficient and continuous process of criminal justice. The resultant gains to the system when compared to the relatively minor interruption on access rights occasioned by brief and temporary closures, no doubt provide ample justification for their use.

Whatever the circumstances under which an exclusionary order may be appropriate, its application on the facts of this case is particularly distressing. The order in issue, calling for wholesale exclusion during an entire criminal trial, was issued without benefit of any showing that open proceedings would threaten any significant interest. Even assuming that the right to a fair trial was in some way implicated, there was no indication that this interest presented a recurring concern as opposed to being merely peculiar to the particular circumstances of that trial.[21] In any event, no demonstration was made that the interest allegedly implicated stood in irremediable conflict with the right of public access and certainly no effort was undertaken at accommodation. In this respect, the trial court made no attempt to determine if alternative measures less drastic than complete closure could have effectively protected the right to a fair trial. Without analysis of alternative measures, a procedure which at least indirectly infringes on First Amendment freedoms is unconstitutional. Moreover, the order, unqualified by time or scope limitations, was unresponsive to the countervailing interests at

[21] The only consideration adduced by the court in favor of closing the trial was that given the courtroom's "layout", "having people in the Courtroom is distracting to the jury." Since the physical dimensions of the courtroom apparently had posed no problems in the past concerning public access and the accused's right to a fair trial, we could only assume the absence of a recurrent conflict.

play. In extending much farther than the circumstances and conditions could possibly demand, the challenged closure suffered from unconstitutional overbreadth.

In sum, the trial court in this case engaged in no balancing whatsoever of the competing interests involved. The court failed to make the minimal factual inquiry required even for a temporary closure. This total disregard of the constitutionally protected rights of the press and the public to trial access mandates reversal.

CONCLUSION

Amicus respectfully submits that the actions of the trial court in this matter are an unconstitutional violation of the public's right of access to criminal trials, and an unwarranted extension of this Court's recent decision in *Gannett*. For the foregoing reasons, the judgments of the courts below should be reversed.

Respectfully submitted,

JOHN J. DEGNAN,
Attorney General of New Jersey,
Attorney for Amicus Curiae,
State of New Jersey.

JOHN J. DEGNAN,
Of Counsel and
On the Brief.

JOHN DECICCO,
ANTHONY J. PARRILLO,
DEBRA L. STONE,
Deputy Attorneys General,
On the Brief.