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Newspaper Wins Court Access but Loses by a Qualifying Margin

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CASENOTES

NEWSPAPER WINS COURT ACCESS BUT LOSES BY A QUALIFYING MARGIN

Extra! Extra! Read all about it! High court grants newspaper right of access to preliminary criminal proceedings. Wins but loses.

These headlines could have been shouted by a street-corner newsboy after the United States Supreme Court held recently that the public has a *qualified* First Amendment right of access to preliminary criminal hearings as they are conducted in California. Access to such proceedings has been a concern of the press and media for some time. In *Press-Enterprise Co. v. Superior Court*[1] (*"Press-Enterprise"*), the newspaper, The Press-Enterprise, ("newspaper") challenged the California Superior Court's denial of access to the transcript from a preliminary hearing. The Court granted certiorari and made a seemingly favorable ruling, but because it held this right was qualified, the newspaper may not have received the result for which it had hoped.

FACTS: THE INSIDE STORY

Robert Diaz, a nurse, was charged with the murder of twelve patients by administering massive doses of the heart drug, lidocaine. The State of California sought the death penalty in a complaint filed on December 23, 1981, in the Riverside Municipal Court. Diaz moved to exclude the public from the preliminary hearing scheduled for July 6, 1982, citing California Penal Code section 868,[2] which requires the proceedings

1. __U.S.__, 106 S. Ct. 2735 (1986).

2. CAL. PENAL CODE § 868 (West 1985). This section, as amended in 1982, provides in full:

> The examination shall be open and public. However, upon the request of the defendant and a finding by the magistrate that exclusion of the public is necessary in order to protect the defendant's rights to a fair and impartial trial, the magistrate shall exclude from the examination every person except the clerk, court reporter and bailiff, the prosecutor and his or her counsel, the Attorney General, the district attorney of the county, the investigating officer, the officer having custody of a prisoner witness while the witness is testifying, the defendant in custody and a person chosen by the prosecuting witness who is not himself or herself a witness but who is present to provide the prosecuting witness with moral support, provided that the person so chosen shall not discuss prior to or during the preliminary examination the testimony of the prosecuting witness with any person, other than the prosecuting witness, who

to be open unless closure is necessary to protect the defendant's right to a fair and impartial trial. The court granted the unopposed motion because the case had attracted national publicity and the court felt closure was necessary to prevent the possibility of one-sided reporting by the media. Upon the conclusion of the preliminary hearing, which lasted forty-one days,[3] the newspaper requested the release of the transcript of the proceedings. The court denied this request and sealed the record.

On January 21, 1983, the State moved in superior court[4] to have the transcripts of the preliminary hearing released to the public. The newspaper joined the State in support of this motion. Diaz opposed the motion claiming that prejudicial pretrial publicity would result if the transcripts were released. The superior court denied the motion finding that there was a "reasonable likelihood that release of all or any part of the transcript might prejudice defendant's right to a fair and impartial trial."[5]

The newspaper then filed a preemptory writ of mandate with the California Court of Appeal. The writ was originally denied, but was later set for hearing upon order by the California Supreme Court.[6] In the interim, Diaz waived his right to a jury trial and the superior court released the transcript. The court of appeal, after holding the controversy was not moot, denied the writ of mandate.[7]

The California Supreme Court also denied the newspaper its preemptory writ of mandate, holding that the First Amendment does not provide a general right of public access to preliminary hearings. The court based its holding on two grounds. First, the court concluded that the right of access to criminal proceedings was limited to actual criminal trials and not preliminary hearings. Second, the court recognized the

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is a witness in the examination. Nothing in this section shall affect the right to exclude witnesses as provided in Section 687 of the Penal Code.

Id.

3. *Press-Enterprise*, 106 S. Ct. at 2738. The State presented testimony and evidence at the preliminary hearing which was primarily medical and scientific. The remaining evidence was comprised of testimony by the defendant's co-workers who had worked with him during the shifts when the twelve patients died. Although defense counsel vigorously cross-examined most of the witnesses, no evidence was introduced on behalf of the defendant and he was held to answer on all charges. *Id.*

4. In California, criminal charges are filed in municipal court and the preliminary hearing is held there. If sufficient evidence is presented to warrant a trial, then the prosecution will move to superior court for purposes of trial.

5. *Press-Enterprise*, 106 S. Ct. at 2739.

6. *Press-Enterprise*, 106 S. Ct. 2735 (1986). A peremptory writ of mandate, if issued by the court as requested, would effectively order the superior court to release the transcript to the newspaper. *Id.*

7. *Id.* at 2739.

defendant's right to a fair and impartial trial by an unbiased jury, uninfluenced by information obtained through news accounts of the proceedings.[8]

After finding that the public had no general First Amendment right of access to preliminary hearings, the California Supreme Court considered those circumstances in which closure would be proper under the California access statute, California Penal Code section 868.[9] The court concluded that, under this statute, if the defendant is able to establish a reasonable likelihood of substantial prejudice, the burden shifts to the prosecution or the media to show by a preponderance of the evidence that there is no reasonable probability that the defendant's rights will be prejudiced.[10]

The newspaper appealed to the United States Supreme Court which granted certiorari to consider the issue of whether the superior court erred in failing to release the transcript of the preliminary hearing upon the newspaper's original request for these transcripts.[11] The newspaper pursued the appeal even though they had already obtained the sought after transcipts. The newspaper wanted its rights determined because of the likelihood of similar closure situations arising in the future. For this reason, the Court concluded that the issue of access was not moot and addressed the merits of the case.[12]

THE COURT'S REASONING

The United States Supreme Court reversed the decision of the California Supreme Court, holding that the standard applied by the California court failed to consider the First Amendment right of access to criminal proceedings. The California Supreme Court had concluded that the magistrate must close the preliminary hearing upon finding a "reasonable likelihood of substantial prejudice which would impinge upon

8. *Id. Accord* Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

9. CAL. PENAL CODE § 868 (West 1985).

10. *Press-Enterprise*, 106 S. Ct. at 2739.

11. *Id.*

12. *Id.* The United States Supreme Court was willing to hear this appeal even though the issue was effectively moot since the transcript of the preliminary hearing had been released to the newspaper. Under an exception to the general mootness rule, an appellant will have standing to appeal if the Court recognizes that this controvery is "capable of repetition, yet evading review." Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603 (1982); Gannett Co. v. DePasquale, 443 U.S. 368, 377 (1979). In *Press-Enterprise*, the Court found that it is reasonable to assume that the newspaper will be subjected to a similar closure order which is likely to evade review because criminal proceedings are typically of short duration. *Id.*

the right to a fair trial."[13] Further, the court had found that Penal Code section 868 clearly indicates that the primary right is that of a fair trial and that the public's right of access must yield when these rights are in conflict.[14]

The Court found it difficult to disagree with the California Supreme Court's analysis, which balanced Diaz's right to a fair trial against the public's right of access to the proceeding. However, the Court hastened to assert that these rights are not necessarily inconsistent. The Court reasoned that Diaz, or any criminal defendant, does have a right to a fair and impartial trial. However, the Court has also recognized on numerous occasions that having the proceedings open to neutral observers is an important aspect of assuring that the defendant receives a fair and impartial proceeding.[15] In addition, the right to an open proceeding is shared between the accused and the public since each has a common concern in assuring fairness in the process.[16] The Court concluded that there is a presumption favoring open criminal proceedings.[17]

The newpaper asserted that the right of the public to attend criminal hearings is implicit in the First Amendment. The California Supreme Court concluded that the First Amendment was not applicable here because the proceeding was a preliminary hearing and not an actual trial.[18] The United States Supreme Court found that the First Amendment issue cannot be resolved merely by looking at the name given to the event, especially because the preliminary hearing in a criminal proceeding operates much like a full scale trial.[19]

The Court noted that cases dealing with the First Amendment right of access to criminal proceedings emphasized two complementary considerations.[20] First, courts have considered whether the place and process have historically been open to the press and general public.[21] Second, the courts have considered whether public access plays a significant positive role in the functioning of the particular process in question.[22] These criteria have been referred to as experience and logic,

13. *Press-Enterprise,* 106 S. Ct. at 2739.

14. *Id.*

15. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Gannett Co. v. DePasquale, 443 U.S. 368 (1979).

16. *Press-Enterprise,* 106 S. Ct. at 2740.

17. *Id.*

18. Press-Enterprise Co. v. Superior Court, 37 Cal. 3d 772, 776, 209 Cal. Rptr. 360, 362, 691 P.2d 1026, 1028 (1984).

19. *Press-Enterprise,* 106 S. Ct. at 2741.

20. *Id.* at 2740.

21. *Id. See, e.g.*, Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605 (1982).

22. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982).

respectively. If the particular proceeding in question satisfies these two criteria, then a qualified First Amendment right of public access attaches.[23]

The Court cautioned that although open proceedings give assurances of fairness to the accused and public, there are some limited circumstances in which the accused's right of a fair and impartial trial may be compromised by publicity.[24] Under such circumstances, the trial court must determine if the rights of the accused outweigh the qualified First Amendment right of access. The presumption of an open proceeding is only overcome "by an overriding interest based on finding that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[25] Furthermore, it is essential that the trial court sufficiently articulate this interest along with specific findings such that a reviewing court is able to determine whether the closure order was properly entered under those particular circumstances.

The Court noted further that if the interest asserted by the moving party is the right of the accused to a fair trial, the preliminary hearing shall be closed only on the demonstration of the following specific findings. First, it must be shown that there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity which closure would prevent. Second, there must not be any reasonable alternatives to closure which could adequately protect the defendant's right to a fair trial.[26]

The Court observed that the California Supreme Court required the magistrate to close the preliminary hearing upon finding a reasonable likelihood of substantial prejudice.[27] This "reasonable likelihood" standard places a lesser burden on the defendant than did the "substantial probability" test which the Court held is required by the First Amendment.[28] In addition, the California Supreme Court failed to consider any alternatives other than complete closure, which could have protected the defendant's rights.[29]

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23. *Press-Enterprise,* 106 S. Ct. at 2740.

24. *Id.* at 2741. Closure may be justified where interests other than that of the accused are present. For example, victims of sex crimes, likely to be subjected to trauma and embarrassment, may be protected by closure. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

25. *Press-Enterprise,* 106 S. Ct. at 2741. *See, e.g.*, Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984).

26. *Press-Enterprise,* 106 S. Ct. at 2743.

27. *Id.*

28. *Id.*

29. *Id.*

The Court asserted that closure of an entire forty-one day proceeding would rarely be warranted. This is because the First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of the right to a fair trial. Any limitation must be narrowly drawn to serve the particular interest involved.[30] The complete closure of such a lengthy proceeding would arguably not be considered narrowly drawn because all portions of the proceeding are eliminated rather than just those portions which will affect the defendant's rights to a fair trial.

The United States Supreme Court applied the two criteria set forth above, experience and logic, and concluded that a right of public access applies to preliminary hearings as conducted in California.[31] First, in analyzing the historical perspective, the Court found that there has been a tradition of accessibility to the preliminary hearings as conducted in California.[32]

Second, the Court addressed the question of whether public access to preliminary hearings as conducted in California plays a particularly significant role in the actual functioning of the process. The Court concluded that public access to criminal trials, as well as the selection of the jury, is essential to the proper functioning of the California criminal justice system. In addition, the Court found that preliminary hearings in California are sufficiently similar to a trial to justify the same conclusion.[33] The Court noted further that because of the extensive scope of the preliminary hearing, it is often the final and most important step in the criminal process.[34] In many cases, the preliminary hearing may provide the only occasion for the public to observe the criminal justice system.[35]

The Court concluded further that because the jury is absent in a preliminary hearing, this underscores the importance of public attend-

30. *Id.* at 2744.

31. *Id.* at 2741.

32. *Id.* Grand jury proceedings have traditionally been closed to the public and the accused. However, the near uniform practice of state and federal courts has been to conduct preliminary hearings in open court. *Id.*

33. *Id.* at 2742. The accused has an absolute right to an elaborate preliminary hearing before a neutral magistrate. He has the right to personally appear at the proceeding, to be represented by an attorney, to cross-examine hostile witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence. If the magistrate finds that probable cause exists, the accused is bound over for trial. *See also* CAL. PENAL CODE §§ 859-66 (West 1985), § 1538.5 (West 1982).

34. Often plea bargaining takes place which eliminates the defendant from going through with the full trial.

35. *Press-Enterprise,* 106 S. Ct. at 2743.

ance.[36] The jury has long been recognized as an important safeguard against the corrupt or overzealous prosecutor and a possibly biased or eccentric judge, thus making the importance of public access even more significant.[37]

Further benefits from open proceedings noted by the Court were termed the "community therapeutic value of openness."[38] The Court explained that criminal acts, especially violent crimes, provoke public concern, outrage and hostility. The public's access to criminal proceedings provides an outlet for reactions and emotions when the public actually sees the law enforced through the operation of our criminal justice system.[39] In addition, the fact that anyone can attend provides assurance that established procedures are being followed and any deviation from these standards will be revealed. Furthermore, people not attending can be confident that standards of fairness are being followed, which are essential to public confidence in the system overall.[40]

HISTORICAL PERSPECTIVE

Open Court Proceedings

The origin of criminal proceedings and their traditional openness has a strong and lengthy historical background.[41] Prior to the Norman Conquest, cases in England were usually brought before "moots" which were attended by the freemen of the community.[42] This was somewhat comparable to modern jury duty. Attendance by the freemen at these meetings was mandatory since they were called upon to render judgment.[43] As the jury system gradually evolved, the mandatory duty for freemen to be present at the trial and render decisions became more lenient, but there is no indication that criminal proceedings did not remain public.[44]

There have been many changes in the courts and their procedures through the years, but the public aspect of the trial which decided guilt or innocence remained unaffected. Sir Thomas Smith, writing in 1565

36. *Id.*

37. *Id. See, e.g.*, Duncan v. Lousiana, 391 U.S. 145, 156 (1986).

38. *Press-Enterprise,* 106 S. Ct. at 2743.

39. *Id. See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 570 (1980).

40. *Press-Enterprise,* 106 S. Ct. at 2743. *See, e.g., Richmond Newspapers,* 448 U.S. at 572.

41. *Richmond Newspapers,* 448 U.S. at 564.

42. *Id.* at 565. *See, e.g.*, F. POLLOCK, ENGLISH LAW BEFORE THE NORMAN CONQUEST IN 1 SELECT ESSAYS IN ANGLO AMERICAN LEGAL HISTORY 88, 89 (1907).

43. BLACK'S LAW DICTIONARY 599 (5th ed. 1979). A freeman is defined as "a person not in slavery or serfdom; one who possessed the rights or privileges of a citizen." *Id.*

44. *Id. See, e.g.*, W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 12 (1927).

about definitive proceedings in criminal matters, stressed that although the indictment was put in writing, the rest was done openly in the presence of the judges, the accused, and all others that could come to hear all depositions and testifying witnesses.[45]

One of the most prominent characteristics of the English judicial system existing as a rule throughout its history, is that all judicial trials are held in open court with the public having unrestricted access.[46] In addition, there are no indications that openness was not carried over as a characteristic of the colonial American judicial system. Records from early criminal trials in Virginia indicate that they were open to the public. In addition, in the mid-1600's, when the Virginia Assembly felt a lack of respect and decorum for the courts by those in attendance, they promulgated rules prescribing certain conduct rather than limit public access.[47]

In the 1677 Concessions and Agreements of West New Jersey, public access to courts in criminal proceedings was explicitly recognized as a fundamental law of the Colony.[48] In addition, the Pennsylvania Frame of Government of 1682 provided for courts open to the public which was reaffirmed in section 26 of the Pennsylvania Constitution adopted in 1776.[49] Such historical evidence conclusively demonstrates that at the time United States fundamental laws were adopted, criminal trials had long been deliberately opened to the public.[50]

Despite the fact that the history of open criminal trials goes back long before the Constitution was adopted, neither the Constitution, nor the Bill of Rights contains any specific language or provision which guarantees the public's right to attend criminal proceedings.[51] However, the United States Supreme Court has held repeatedly that there is an implicit First Amendment right of the public to attend criminal proceedings absent an overriding interest of the defendant articulated in the trial court's findings.[52] Without this right, exercised for centuries, important aspects of other rights, such as freedom of speech and of the press, could be

45. *Richmond Newspapers*, 448 U.S. at 566. *See, e.g.*, T. SMITH, DE REPUBLICA ANGLORUM 101 (Alston ed. 1972).

46. *Id. See, e.g.*, F. POLLOCK, THE EXPANSION OF THE COMMON LAW 31-32 (1904); E. JENKS, THE BOOK OF ENGLISH LAW 73-74 (6th ed. 1967).

47. *Richmond Newspapers*, 448 U.S. at 567.

48. *Id. See* REPRINTED IN SOURCES OF OUR LIBERTIES 188 (R. Perry ed. 1959); 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 129 (1971).

49. *Richmond Newspapers*, 448 U.S. at 568. *See, e.g.*, 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 271 (1971).

50. *Richmond Newspapers*, 448 U.S. at 569.

51. *Id.* at 575.

52. *Id.* at 580.

eviscerated.[53]

Open Pretrial Proceedings

There is substantial evidence indicating that there was no common law right of the public to attend pretrial proceedings.[54] By the time the Constitution was adopted, public trials were clearly associated with the protection of the defendant to obtain a fair trial. After the Star Chamber was abolished in 1641, criminal defendants began to acquire many of the rights presently enumerated in the Sixth Amendment.[55] These rights include the right to confront witnesses, to call witnesses on one's own behalf, and the right to a fair trial as it is presently known. It was during this time that the public trial became identified as a right of the accused which a defendant could demand. However, pretrial proceedings were never characterized with the same degree of openness as actual trials because of the concern for fairness.[56]

Under English common law, the public did not have the right to attend pretrial proceedings.[57] The courts were aware of the possible deleterious effects from the publication of information prior to either the indictment or the actual trial.[58]

Although the Framers could not anticipate contemporary pretrial proceedings such as motions to supress evidence, pretrial proceedings were not completely unknown at the time the Constitution was written. For example, written interrogatories were used in pretrial 18th century litigation, most notably in admiralty cases.[59] Thus, it appears that the drafters of the Sixth Amendment were aware that testimony could be recorded prior to the actual trial, but there was still no suggestion of the right of the public to be present at pretrial proceedings.[60]

Openness at pretrial hearings however was soon noted in history. In

53. *Id. See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 681 (1972).

54. Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 387 (1979).

55. *Id.* at 387 n.18. *See e.g.* BLACK'S LAW DICTIONARY 1261 (5th ed. 1979). The Star Chamber was a court which originally had jurisdiction over cases where judicial procedure was substantially obstructed by one party through writs, or strong influence so that the inferior courts could not have its process obeyed. In the reign of Henry VIII and his successors, the jurisdiction of the court was extended illegally to such an extent (notably in punishing those disobedient to the King's arbitrary proclamations) that it became repugnant to the nation and was abolished. *Id.*

56. *Gannett,* 443 U.S. at 387.

57. *Id.* at 389.

58. *Id.*

59. *Id.* at 396.

60. *Id.* In fact, until the trial, it was not known whether any pretrial or other evidence would be offered or received during the trial. *Id.*

1807, prior to the trial of Aaron Burr for treason, with Chief Justice Marshall sitting as trial judge, the probable cause hearing was held. We know that this was an open proceeding because reports note that the courtroom was allegedly too small to accomodate the crush of interested citizens.[61] In addition, the original New York Field Code of Criminal Procedure, adopted in 1850, provided that pretrial hearings should be closed to the public if requested by the defendant.[62] This was designed to protect the accused from prejudicial pretrial publicity. Eight states still have the explicit provision relating to closed pretrial hearings.[63] From the Burr trial until the present day, it has been the nearly uniform practice of state and federal courts to conduct preliminary hearings in open court.[64]

ANALYSIS: IS THIS WHAT THE NEWSPAPER WANTED?

Press-Enterprise Company pursued this action to the level of the United States Supreme Court even though it received the requested transcripts prior to the appeal. The newspaper was attempting to establish its rights in an effort to circumvent future problems likely to arise. The Court could have held that the issue was moot because the newpaper had already received the transcripts. However, it granted certiorari recognizing that there was a reasonable likelihood that the newspaper would be subjected to future closure orders.[65]

At first glance, it appears that the newspaper prevailed in its action since the Court reversed the California Supreme Court's decision and held that there was a First Amendment right of access applicable to preliminary hearings. However, the Court specifically stated that this right is qualified. More specifically, this right is not absolute and the court may be closed if the accused prevails in convincing the court that closure is necessary. Therefore, by qualifying this right, the newspaper has not actually prevailed, because it still must contest motions for closure, which it was trying to avoid. The newspaper arguably wanted a declaration of an absolute right in order to expeditiously thwart any closure attempts. This determination was not obtained.

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61. *Press-Enterprise v. Superior Court*, 106 S. Ct 2735, 2741 (1986).

62. *Gannett*, 443 U.S. at 403. *See, e.g.*, COMMISSIONS IN PRACTICE AND PLEADINGS, CODE OF CRIMINAL PROCEDURE, § 202 (Final Report 1850).

63. *Gannett*, 443 U.S. at 391 n.3. *See* ARIZ. RULE CRIM. PROC. 9.3; CAL. PENAL CODE § 868 (West 1970); IDAHO CODE § 19-811 (1979); IOWA CODE § 761.13 (1973); MONT. CODE ANN. § 46-10-201 (1978); NEV. REV. STAT. § 171.204 (1975); N.D. CENT. CODE § 29-07-14 (1974); UTAH CODE ANN. § 77-15-13 (1978).

64. *Press-Enterprise*, 106 S. Ct. at 2741.

65. *See supra* note 12 and accompanying text.

Another reason that the newspaper did not prevail was that this decision fails to directly address the issue which the newspaper presented to the court. This issue was whether the newspaper had a right to the transcipts in this particular case at the time they were first requested. In other words, whether the accused's rights outweigh the public's right of access in this case. The Court presented its criteria for balancing these interests but failed to apply it to the facts of this case.

The dissent recognized another version of the issue presented—whether the public has a First Amendment right to insist upon access to the transcript of a preliminary hearing prior to trial, even though the accused, the prosecutor and the trial judge have all agreed to seal the transcript in order to assure a fair trial.[66] The Supreme Court previously addressed this issue in *Gannett Co. v. DePasquale*.[67] In that case, the Court held that the Sixth Amendment confers the right to a public trial only upon the defendant, not to the press or public.[68] The Court in *Gannett* pointed out, however, that a reporter's interest in being present at the proceeding may still be protected by the First Amendment because he acts as an agent for the public.[69] The Court in *Press-Enterprise* noted that this consititutional protection is not absolute. It is limited by the defendant's right to a fair trial, as well as the needs of government to obtain properly adjudicated convictions and the need to preserve the confidentiality of sensitive information such as the identity of informants.[70]

The bottom line is that the Court's decision is problematic in that it fails to articulate parameters and provide examples of when such a qualified right would be overcome by some other compelling interest asserted by the defendant, the State or Federal Government, a witness or victim, or even possibly third parties who are not parties to a given action. Therefore, when confronted with such motions for closure, the newspaper will have to contest these motions just as it did prior to bringing their case before the United State Supreme Court. These issues will continue to be decided on a case by case basis, something the newspaper, no doubt, was hoping to avoid.

Another aspect of this case which the Court failed to examine fully was the conflict of rights between the accused who wanted closure, and the public wanting access, which is due to the inherent conflict between the Sixth and First Amendments. The Court evaded a Sixth Amendment

66. *Press-Enterprise*, 106 S. Ct. at 2744.
67. *Gannett*, 443 U.S. at 384.
68. *Id.* at 391.
69. *Id.* at 392.
70. *Press-Enterprise*, 106 S. Ct. 2735, 2743 (1986).

discussion, denying its applicability in this case by concluding that because the accused requested a closed hearing, he was not exercising his Sixth Amendment rights.[71]

The Court may have been inaccurate in concluding that the accused was not exercising his Sixth Amendment rights. This is because the Sixth Amendment guarantees other rights besides a public trial, such as the rights to notice, confrontation of witnesses and compulsory process.[72] It is doubtful that the defendant waived all of these rights just because he requested a closed hearing.

The conflict is apparent when the defendant fails to exercise all of his rights under the Sixth Amendment and the public is asserting its rights under the First Amendment. The Court has uniformly recognized the guarantee of a public trial as one created for the benefit of the accused.[73] However, the Court has also recognized that although the Sixth Amendment guarantees the defendant's right to a public trial in a criminal case, it does not guarantee the right to compel a private trial solely upon the accused's request.[74] It is because of this inherent conflict of rights under these Amendments that the Court set forth certain criteria to resolve the conflict by balancing the interests involved.

THE NINTH CIRCUIT FACES THIS RECURRING PROBLEM

The Ninth Circuit Court of Appeals has addressed similar issues regarding closure confirming earlier indications that these cases are likely to recur. For example, in *United States v. Brooklier*,[75] the court held that the First Amendment right to access applies to pretrial suppression hearings. The court recognized the occasional conflict between the public's First Amendment right of access and the defendant's Sixth Amendment right to a fair trial. Therefore, the court articulated its requirement that the party seeking closure of proceedings or sealing of documents must establish that the closure "is strictly necessary in order to protect the fair

71. *Id.* at 2740.

72. U.S. CONST. amend VI. The Sixth Amendment of the United States Constitution provides, in full that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id.

73. *Gannett*, 443 U.S. at 380.

74. *Id.* at 382.

75. 685 F.2d 1162 (9th Cir. 1982).

trial guarantee."[76]

To meet this burden, the court required satisfaction of three substantive tests. First, there must be a substantial probability that irreparable damage to the defendant's right to a fair trial will result without closure. Second, there must be a substantial probability that alternatives to closure will not adequately protect the defendant's right to a fair trial. Third, there must be a substantial probability that closure will effectively protect against the perceived harm.[77]

In addition, the court stated two procedural prerequisites to obtaining an order which closes a criminal proceeding to the public.[78] First, those excluded from the proceeding must be allowed a reasonable opportunity to have their objections be heard. Second, the reasons supporting closure must be articulated in the findings issued by the trial court.[79]

A second example of a closure case, *Associated Press v. United States District Court*, involved John DeLorean's indictment.[80] This case dealt with the district court's order that future filings of documents would be closed to the public's access until the court initially reviewed them. The court, acting sua sponte, wanted to protect DeLorean's Sixth Amendment right to a fair trial since the case was receiving substantial media attention.[81]

The Associated Press, the Los Angeles Herald Examiner and several other news organizations petitioned the Ninth Circuit Court of Appeals for a writ of mandamus directing the district court to vacate its order. The court of appeals issued the writ holding that the district court had failed to pass any of the substantive tests as required by *Brooklier*.[82] The court of appeals concluded that the district court issued this order without any notice or opportunity to be heard by either the parties involved, the media or the public.[83] In addition, the order was not based on any findings indicated by the district court.

CONCLUSION

Based on the foregoing, the newspaper in *Press-Enterprise* did not

76. *Id.* at 1167.
77. *Id.*
78. *Id.*
79. *Id.*
80. 705 F.2d 1143 (9th Cir. 1983).
81. *Id.* at 1145.
82. *Id.*
83. *Id.*

accomplish what it intended when it appealed its case to the United States Supreme Court. By qualifying the newspaper's right of access, the Court placed certain restrictions and conditions upon this right. This involves evaluating the defendant's right to a fair trial under the Sixth Amendment (or a witness' or victim's need to testify in a closed proceeding), and balancing these rights against the public or newspaper's right of access to criminal hearings under the First Amendment. Because the Court placed a stricter standard upon the moving party (or the court if it acts sua sponte), the newspaper may be more likely to prevail in a given action. However, closure orders will still be contested and due to the nature of the rights involved, the courts will have to make determinations regarding the rights of the parties involved on a case by case basis.

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