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Constitutional Law - Press Has No Constitutional Right to Attend a Pretrial Suppression Hearing

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CONSTITUTIONAL LAW — PRESS HAS NO CONSTITUTIONAL RIGHT TO ATTEND A PRETRIAL SUPPRESSION HEARING—*Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

INTRODUCTION

American courts have struggled continuously with balancing the defendant's right to a fair trial[1] with the reporter's right of freedom of the press.[2] The courts face a most difficult challenge when confronted with a highly publicized case because they may have to exclude the public and the press from any pretrial hearings to ensure defendant's right to a fair trial under the sixth amendment.[3] The Supreme Court of the United States considered the constitutional ramification of judicial pretrial closure orders[4] in *Gannett Co. v. DePasquale*.[5] In a five-four decision the Supreme Court held the sixth amendment's public trial guarantee did not give the press and public any right of access to pretrial suppression hearings since the public trial guarantee was for the benefit of the

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1. 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 defense.

U.S. CONST. amend. VI.

2. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I; Erickson, *Fair Trial and Free Press: The Practical Dilemma*, 29 STAN. L. REV. 485 (1977).

3. *Supra* note 1.

4. *See generally* J. NOWAK, HANDBOOK ON CONSTITUTIONAL LAW, 762-67 (1978); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-11 (1978).

5. 443 U.S. 368 (1979). The Supreme Court, Appellate Division, held the exclusionary order to be a violation of petitioner's first amendment rights due to an insufficient amount of potential prejudice. 55 A.D.2d 107, 389 N.Y.S.2d 719 (1976) (per curiam), vacated the order and appeal was taken. The Court of Appeals did not reverse but modified. Constitutional question was rendered moot. 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756 (1977), *cert. granted*, 435 U.S. 1006 (1978).

defendant alone.[6] The majority in *Gannett* stated that the protection of defendant's right to a fair trial by avoiding prejudicial pretrial publicity outweighed the press' right of access to pretrial proceeding and, as a result, concluded that closure of a suppression hearing did not violate any first amendment right of access by the press and the public.[7] The *Gannett* Court concluded that neither the sixth amendment nor the first amendment requires that the press and public be granted access to a pretrial suppression hearing.

THE CASE

Gannett Company, owner of two Rochester, New York, newspapers, published a series of articles of the alleged killing of an ex-policeman by two youths. The investigation and apprehension of the two defendants received extensive local publicity. Alleging that they had made confessions to the police, the two defendants moved to suppress these statements as involuntary confessions. In a state prosecution for murder, robbery and grand larceny, Judge DePasquale, at a pretrial hearing on the motion to suppress, granted defendants' request to exclude the public and the press. The unabated accumulation of adverse publicity had jeopardized defendants' ability to receive a fair trial. Both the district attorney and Gannett's reporters were present at the hearing, and neither objected to the exclusionary order.

Gannett Company commenced an original proceeding in the nature of prohibition and mandamus challenging the closure orders on first, sixth and fourteenth amendment grounds. The appellate division vacated the trial court's orders; the exclusionary order transgressed the public's vital interest in open judicial proceedings and constituted an unlawful prior restraint in violation of the first and fourteenth amendments.[8] The New York Court of Appeals modified this judgment by holding that the danger posed to defendants' ability to receive a fair trial overcame the presumption that criminal trials are open to the public.[9] The Court of Appeals upheld the exclusionary order. Noting the significant constitutional questions, the United States Supreme Court granted certiorari.[10]

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6. 443 U.S. 368, 379 (1979).
7. *Id.* at 392-93.
8. *Supra* note 5.
9. *Id.*
10. 435 U.S. 1006 (1978).

Mr. Justice Stewart, writing for the majority in *Gannett*, held that the public had no constitutional right under the sixth and fourteenth amendments to attend a criminal trial,[11] and any first and fourteenth amendment right of the press to attend a criminal trial was not violated.[12]

BACKGROUND

The United States Supreme Court traditionally has recognized that adverse publicity can endanger the ability of a defendant to receive a fair trial.[13] In *Sheppard v. Maxwell*[14] the Supreme Court held that the failure of a state trial judge in a murder prosecution to protect defendant from inherently prejudicial publicity which saturated the community deprived defendant of a fair trial consistent with due process. The trial judge had an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity.[15]

Numerous courts have attempted to prevent the dissemination of such prejudicial information by the use of "gag orders."[16] In *Nebraska Press Association v. Stuart*[17] a state trial judge, in a multi-

11. 443 U.S. 368, 391 (1979).

12. *Id.* at 393.

13. *See* Irvin v. Dowd, 366 U.S. 717 (1961) (trial did not meet constitutional standard of impartiality where the members of the jury on voir dire expressed their opinion as to defendant's guilt of a crime which had been extensively publicized by newspapers, radio and television); *cf.* Estes v. Texas, 381 U.S. 532 (1965) (defendant was deprived of his right to due process under the fourteenth amendment by the televising of his notorious, heavily publicized criminal trial).

14. 384 U.S. 333 (1966).

15. *Id.* at 363.

16. A "gag order" is an order placed on the press prohibiting publication of matters prejudicial to the defendant in the form of a prior restraint. *See* Times-Picayune Publishing Co. v. Schulingkamp, 419 U.S. 1301 (1974) (application granted for stay of an order of the Louisiana Criminal District Court restricting media coverage of the trials of two defendants accused of committing a highly publicized rape and murder). United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972) (hearing held for nonjury determination of whether or not elected state officials had "trumped-up" charges against individuals solely because of race and civil rights activities; the district court's order absolutely prohibiting two reporters from reporting any details of evidence violated their right of free press). *Cf.* United States v. Tijerina, 412 F.2d 661 (10th Cir. 1969), *cert. denied*, 396 U.S. 867 (1969) (order forbidding out-of-court discussion of case prior to defendant's trial for federal offenses did not violate defendant's rights of free speech guaranteed by first amendment).

17. 427 U.S. 539 (1976).

ple murder case which had attracted widespread news coverage, entered an order restraining the news media from publishing the accounts of confessions made by defendant to law-enforcement officers. The Supreme Court held that while the guarantee of freedom of expression is not an absolute right under all circumstances, the barriers to prior restraint remain high, and the presumption against its use continues intact.[18] Although *Nebraska Press* raised a presumption against gag orders,[19] it failed to address the issue of closure of pretrial suppression hearings.

The Supreme Court prior to *Gannett* had not defined clearly the precise constitutional restraints applicable to closure orders; however, the Supreme Court, along with various other appellate courts, had addressed three primary issues surrounding this area of law: (1) whether or not the sixth amendment guarantee to a public trial was merely for the defendant alone, (2) whether or not the defendant had an absolute right to compel a private trial and (3) whether or not the Constitution granted the press special access to information not shared by members of the public generally.

Whether or not the sixth amendment is personal to the accused was addressed in *In re Oliver*.[20] The Supreme Court recognized that an accused's guarantee of a "public trial" was a safeguard against any attempt to employ courts as instruments of persecution.[21] Knowledge that every criminal trial was subject to contemporaneous review in the form of public opinion was an effective restraint on possible abuse of judicial discretion.[22] Considering the same issue, the Supreme Court in *Estes v. Texas*[23] held that the televising of a notorious, heavily publicized criminal trial deprived defendant of his right to due process under the fourteenth amendment.[24] The Supreme Court felt that the purpose of the sixth amendment, applicable to states through the fourteenth, was to guarantee fair treatment to the accused.[25]

Both *Oliver* and *Estes* indicate that the constitutional guaran-

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18. *Id.* at 561.

19. Note, *The Gag Order, Exclusion and the Press's Right to Information*, 39 ALB. L. REV. 317 (1974-75); Comment, *Gagging the Press in Criminal Trials*, 10 HARV. CIV. RTS.—CIV. LIB. L. REV. 608 (1975).

20. 333 U.S. 257 (1948).

21. *Supra* note 1.

22. 333 U.S. 257, 271-72 (1948).

23. 381 U.S. 532 (1965).

24. *Id.* at 535.

25. *Id.* at 538-39.

tee of a public trial was for the benefit of the defendant alone. Despite the precedential value of these two cases, numerous appellate courts have held contra.[26] For example, the Second Circuit, on a motion to suppress drugs seized as part of an airport terminal check, held in *United States v. Clark*[27] that exclusion of the public from the entire hearing was an error of constitutional magnitude in violation of defendant's sixth amendment right.[28] The *Clark* court stressed the importance of providing the public an opportunity to observe judicial proceedings and to question the conduct of enforcement officials.[29]

Likewise, in considering the issue of whether or not the public trial guarantee was for the benefit of the defendant alone, the Supreme Court of North Carolina concluded in *In re Edens*[30] that the trial and disposition of criminal cases was the public's business and ought to be conducted publicly in open court.[31] The judge in *Edens* improperly precluded the district attorney from participating in the disposition of the criminal case. The disposition outside the courtroom when court was not in session had removed the proceeding improperly from the public domain.[32]

The Third Circuit considered the second issue of whether or not defendant had an absolute right to compel a private trial in *United States v. Cianfrani*[33] and found a presumption existed that all adjudicative proceedings are open to the public as part of the due process provision of the fifth amendment and the public trial provision of the sixth amendment. The *Cianfrani* Court said that the public trial provision reflected the traditional Anglo-American distrust for secret trials. Where decisions crucial to the outcome of the entire criminal case were made at pretrial suppression hearings, policies in support of an open trial requirement applied with full force: (1) the need to make trial accessible to unknown parties

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26. *See* United States v. Gurney, 558 F.2d 1202 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978) (held that a trial is a public event and members of the media thus are free to report whatever occurs in open court).

27. 475 F.2d 240 (2d Cir. 1973).

28. *Id.* at 246.

29. *Id.* at 246-47.

30. 290 N.C. 299, 226 S.E.2d 5 (1976).

31. *Id.* at 306, 226 S.E.2d 5, 9; *see* N.C. CONST. art. I, § 18. Raper v. Berrier, 246 N.C. 193, 195, 97 S.E.2d 782, 784 (1957) (the public and especially the parties are entitled to see and hear what happens in courts).

32. 290 N.C. 299, 266 S.E.2d 5, 10 (1976).

33. 573 F.2d 835 (3d Cir. 1978).

who have legal interest in the case, (2) the need to subject the judiciary to public scrutiny and (3) the need to provide the appearance of justice in order to foster confidence in the judicial system.[34] *Cianfrani* noted that, while defendant might waive his right to attack his conviction on grounds that he was denied a public trial, defendant had no absolute right to compel a private trial.[35]

The third related issue was whether or not the Constitution granted the press special access to information not shared by members of the public generally.[36] The Supreme Court in *Pell v. Procunier*[37] upheld a prison regulation under which media representatives, although able to interview inmates, were unable to select a particular inmate. The first and fourteenth amendments barred government interference with free press, but the Constitution did not require the government to accord press special access to information.[38]

Prior to *Gannett* a state's imposition of sanctions on the reporting of events transpiring in pretrial suppression hearings was clearly unconstitutional.[39] The courts began to close these hearings to ensure that the press and the public would not disseminate information prejudicial to the defendant before the trial.[40] Pretrial suppression hearings posed special risks of unfairness particularly when the proceedings involved involuntary confessions[41] as in *Gannett*. In *Jackson v. Denno*[42] the Supreme Court stated that basing a conviction, in whole or in part, on an involuntary confession deprived defendant in a criminal case of due process of law.[43] Defendant had a constitutional right to have a fair hearing and reliable determination on the issue of voluntariness.[44] The essence of pretrial suppression hearings was to ensure that unreliable or illegally obtained evidence did not become known to the jury.

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34. *Id.* at 850.

35. *Id.* at 852.

36. Comment, *Newsgathering: Second Class Right Among First Amendment Freedoms,* 53 TEX. L. REV. 1440 (1975); Comment, *The Right of the Press to Gather Information After Branzburg and Pell,* 124 U. PA. L. REV. 166 (1975).

37. 417 U.S. 817 (1974).

38. *Id.* at 834.

39. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-11 (1978).

40. *Id.*

41. Comment, *Fair Trial and Free Press: Preliminary Hearing—Gateway to Prejudice,* 1973 LAW AND SOC. ORD. 903.

42. 378 U.S. 368 (1964).

43. *Id.* at 376.

44. *Id.* at 376-77.

Whether or not closure of these proceedings may violate constitutional safeguards was the precise question that faced the Supreme Court in *Gannett*.

ANALYSIS

From this background the Supreme Court in *Gannett* held that the Constitution did not give Gannett Company an affirmative right of access to the pretrial proceeding when all the participants in the litigation agreed it should be closed to protect the fair-trial rights of the defendants.[45] To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity.[46] Because of the Constitution's concern for these due process rights, a trial judge may take protective measures even when they are not strictly and inescapably necessary.[47] The *Gannett* Court recognized the danger of publicity concerning pretrial suppression hearings which influences public opinion against a defendant and informs potential jurors of inculpatory information wholly inadmissible at trial.[48] The Court noted that the closure of pretrial proceedings is often one of the most effective methods that a trial judge can employ to attempt to ensure that the dissemination of unreliable information throughout the community will not jeopardize the fairness of a trial.[49]

The *Gannett* majority opinion reviewed the *Oliver*[50] and *Estes*[51] treatment of the sixth amendment's guarantee of a public trial and concluded that the public trial guarantee was solely for the benefit of defendant.[52] The Supreme Court, citing *Singer v. United States*,[53] held that while the sixth amendment guaranteed to a defendant in a criminal case the right to a public trial, it did not guarantee the right to compel a private trial. The court distinguished the defendant's right to a public trial from the real issue at hand: "whether members of the public have an enforceable right to a public trial that can be asserted independently of the parties in

45. 443 U.S. 368, 379 (1979).
46. 384 U.S. 333, 363 (1966).
47. 443 U.S. 368, 378 (1979).
48. *Id.* at 378-79.
49. *Id.*at 379.
50. *Supra* note 20.
51. *Supra* note 23.
52. 443 U.S. 368, 381 (1979).
53. 380 U.S. 24 (1965).

the litigation."[54] The majority recognized an independent public interest in the enforcement of the sixth amendment public trial guarantee. The adversary system of criminal justice is premised on the proposition that the participants in the litigation fully protect the public interest; however, the Supreme Court did not feel that this independent public interest should be interpreted to create a constitutional right on the part of the public.[55]

The Supreme Court turned to the history of the public trial guarantee and found that it ultimately revealed no more than the existence of a common-law rule of open civil and criminal proceedings. Even if the sixth and the fourteenth amendments properly could be viewed as embodying the common-law right of the public to attend criminal trials, no persuasive evidence existed that at common law members of the public had any right to attend pretrial proceedings; in fact, the Court found substantial evidence to the contrary:[56] by the time of the adoption of the Constitution, public trials clearly were associated with the protection of the defendant.[57]

Pretrial proceedings, precisely because of the same concern for a fair trial, were never characterized by the same degree of openness as were actual trials.[58] The Court noted that closed pretrial hearings were a familiar part of American judicial history. The original New York Code of Criminal Procedure published in 1850 provided that pretrial hearings should be closed to the public on request of defendant.[59] From this historical analysis, the majority concluded that members of the public have no constitutional right under the sixth and fourteenth amendments to attend criminal trials.[60]

The Court finally considered any right of access to pretrial hearings the petitioner might have had under the first and fourteenth amendments. The Court felt that the state *nisi prius* court appropriately deferred this putative right by finding that representatives of the press did have a right of access of constitutional dimension but holding, under the circumstances of this case, that the defendants' rights to a fair trial outweighed any first amend-

54. 443 U.S. 368, 383 (1979).
55. *Id.*
56. *Id.* at 387.
57. *Id.*
58. *Id.* at 387-88.
59. *Id.* at 390.
60. *Id.* at 391.

ment right of the press.[61] Thus the majority based the closure decision "on an assessment of competing societal interests rather than on any determination that first amendment freedoms were not implicated."[62]

Chief Justice Burger in his concurring opinion felt that the majority should have stressed the nature of the proceeding. A motion before trial to suppress evidence is not a trial but a pretrial hearing.[63] From a historical viewpoint, the draftsmen of the Constitution could not anticipate the twentieth-century pretrial proceedings to suppress evidence, but pretrial proceedings were not wholly unknown. Thus the drafters of the sixth amendment must have been aware that some testimony was likely to be recorded before trials took place. In Burger's opinion, a pretrial deposition did not become part of a "trial" for sixth amendment purposes until and unless the contents of the deposition were offered in evidence.[64]

Justice Powell in his concurring opinion stressed that the Supreme Court should identify for the guidance of trial courts the constitutional standard by which lower courts are to judge whether or not closure is justified and the minimal procedure by which this standard is to be applied.[65] Powell suggested that:

> The question for the trial court, therefore, in considering a motion to close a pretrial suppression hearing is whether a fair trial for the defendant is likely to be jeopardized by publicity, if members of the press and public are present and free to report prejudicial evidence that will not be presented to the jury.[66]

Contrary to Justice Rehnquist, Powell believes that lower courts cannot assume after the decision that they are free to determine for themselves the question whether to open or close the proceeding free from all constitutional constraint.[67]

Justice Rehnquist stated in his concurring opinion that the lower courts are under no constitutional constraint either to accept or reject the procedure employed by the trial court in this case or

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61. *Id.* at 393.

62. *Id.* (citing Saxbe v. Washington Post Co., 417 U.S. 843, 860 (1974), Powell, J., dissenting).

63. *Id.* at 394.

64. *Id.* at 396.

65. *Id.* at 398.

66. *Id.* at 400.

67. *Id.* at 398 n.2.

those advanced by Powell in order to avoid running afoul of the first amendment.[68] They remain free to determine for themselves the question whether to open or close the proceeding.[69]

Justices Blackmun, Brennan, White and Marshall joined in dissent. They felt that the *Gannett* decision ignored important precedents and significant developmental features of the sixth amendment.[70] The rule of the case as they saw it is that if the defense and the prosecution merely agree to have the public excluded from a suppression hearing, and the trial judge does not resist, closure shall take place; nothing in the sixth amendment prevents it.[71] The precise issue in the dissenting opinion was whether, or to what extent, the Constitution prohibits the states from excluding, at defendant's request, members of the public from such a hearing.[72] The dissent argued that the public trial guarantee of the sixth amendment ensures that not only judges but all participants in the criminal justice system are subjected to public scrutiny as they conduct the public's business of prosecuting crime.[73] The due process clause of the fourteenth amendment requires that in criminal cases the states act in conformity with the public trial provision of the sixth amendment.[74] Thus the fact that the sixth amendment casts the right to a public trial in terms of the right of the accused is not sufficient to permit the inference that the accused may compel a private proceeding simply by waiving that right.[75] Any such right to compel a private proceeding must have some independent basis in the sixth amendment, which may be determined by examining the common law and colonial antecedents of the public trial provision. The dissent, in its perception of the historical development of the sixth amendment, found no evidence of a right to a private proceeding or a power to compel a private trial arising out of the ability to waive the grant of a

68. *Id.* at 405.

69. *Id.* n.2. (Justice Powell was the only justice to recognize a first amendment right of access. The remaining justices making up the majority did not recognize either a sixth amendment or a first amendment right of access. The dissent recognized a sixth amendment but not a first amendment right of access.)

70. *Id.* at 406.

71. *Id.* at 406-07.

72. *Id.* at 411.

73. *Id.* at 412; *see* N.C. CONST. art. I, §§ 18, 24.

74. *Id.* at 414-15; *see* Duncan v. Louisiana, 391 U.S. 145, 148 (1968); Argersinger v. Hamlin, 407 U.S. 25, 28 (1972).

75. 443 U.S. 368, 418 (1979).

public one.[76] Thus, the dissent concluded that the due process clause of the fourteenth amendment, insofar as it incorporates the public trial provision of the sixth amendment, prohibits the states from excluding the public from a proceeding within the ambit of the sixth amendment's guarantee without affording full and fair consideration to the public's interests in maintaining an open proceeding.[77]

CONCLUSION

The Supreme Court in *Gannett* held that the press and the public have no independent constitutional right under the sixth amendment to access to a pretrial judicial proceeding, and any first amendment right of access by the press and public was deferred appropriately by the state *nisi prius* court. The *Gannett* Court, however, failed to give any specific standards to be followed when determining if a suppression hearing is to be closed. Instead, it left the decision whether or not to exclude the press and public to the discretion of the trial judges. The lower courts are to engage in a balancing test by weighing defendant's constitutional right to a fair trial against any first amendment rights of the press and the public. The trial judge has an affirmative constitutional duty to minimize prejudicial pretrial publicity, and he may take protective measures even when they are not strictly necessary. When the danger to defendant is no longer present, the judge shall not deny the press and the public access to the hearing.

Whether the trial judge's decision derived from the balancing test is free from any constitutional restraint was not addressed specifically in Stewart's majority opinion. Justice Powell and Justice Rehnquist expressed opposing viewpoints in their separate concurring opinions. Justice Powell stated that the lower courts are not free from constitutional restraint; whereas, Justice Rehnquist stated that they were. Thus the Supreme Court left this point to be decided at a later date.

Another point left in a state of confusion is whether or not the *Gannett* holding shall be limited to pretrial judicial proceedings. Justice Stewart, writing for the majority, stressed several times that the *Gannett* holding shall be limited as such, but one court has noted that *Gannett* is susceptible of several possible interpre-

76. *Id.* at 427.
77. *Id.* at 432-33.

tations.[78] The press argues that *Gannett's* effect will cripple its ability to report the news.[79] Developing case law will require the Court to provide a definitive answer to this question in the near future.

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78. *See* Keene Publishing Corp. v. Cheshire County Superior Court, —N.H.—, 406 A.2d 137 (1979) (New Hampshire State Supreme Court noted the existence of several possible interpretations of *Gannett*).

79. 94 NEWSWEEK, July 16, 1979, at 60; 114 TIME July 16, 1979, at 66.