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**Abstract**

In Gannett Co. v. DePasquale Justice Stewart framed the issue before the United States Supreme Court as follows: "[W]hether members of the public have an independent constitutional right [under the sixth amendment] to insist upon access to a pretrial judicial proceeding, even though the accused, the prosecutor and the trial judge all have agreed to the closure of that proceeding in order to assure a fair trial."

**KEYWORDS:** Closed Doors, Trials, Court

# When, If Ever, Should Trials Be Held Behind Closed Doors?

**The Honorable Justice Joseph A. Boyd, Jr.,***
**and**
**Paul A. Lehrman****

> "One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of justice is fair and right."[1] — Justice Felix Frankfurter

In *Gannett Co. v. DePasquale,*[2] Justice Stewart framed the issue before the United States Supreme Court as follows: "[W]hether members of the public have an independent constitutional right [under the sixth amendment] to insist upon access to a pretrial judicial proceeding, even though the accused, the prosecutor and the trial judge all have agreed to the closure of that proceeding in order to assure a fair trial."[3]

In its narrowest sense, *Gannett* dealt with the constitutionality of the closure of a pretrial suppression hearing. While attempting to limit its decision to the facts before it, the Court spoke no less than twelve times of a general public right of access to criminal *trials.*[4] For exam-

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1. Maryland v. Baltimore Radio Show, 338 U.S. 912, 920 (1950) (Frankfurter, J., dissenting from denial of cert.), cited in Richmond Newspapers, Inc. v. Virginia, _ U.S. _, 100 S.Ct. 2814, 2826 n.9 (1980).

2. 443 U.S. 368 (1979).

3. *Id.* at 370.

4. *See* Justice Blackmun's concurrence in *Richmond Newspapers,* _ U.S. at _, 100 S.Ct. at 2841.

ple, at one point Justice Stewart wrote: "The Constitution nowhere mentions any right of access to a criminal trial on the part of the public; [the sixth amendment] guarantee, like the others enumerated, is personal to the accused."[5]

The Court's frequent use of inconsistent language and Justice Rehnquist's concurrence, stating that the *first amendment* provided no enforceable right to open governmental proceedings,[6] led to considerable confusion among commentators and members of the media.[7] One headline appearing in a national legal newspaper summed up best the ambiguity surrounding the Court's holding—"Gannett Means What It Says; But Who Knows What It Says?"[8]

Faced with this muddle, the Supreme Court recently decided to reconsider *Gannett*. In *Richmond Newspapers, Inc. v. Virginia,*[9] the Court addressed the question of whether the first amendment,[10] as opposed to the sixth amendment, guaranteed the public and press the right to attend a criminal trial.[11]

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5. 443 U.S. at 380, quoting Justice Blackmun's dissent in Faretta v. California, 422 U.S. 806, 848 (1975).

6. "Despite the Court's seeming reservation of the question whether the First Amendment guarantees the public a right of access to pretrial proceedings, it is clear that this Court repeatedly has held that there is no First Amendment right of access in the public or the press to judicial or other governmental proceedings." 443 U.S. at 404 (Rehnquist, J., concurring) (citations omitted). *See also* Richmond Newspapers, Inc. v. Virginia, _ U.S. _, 100 S.Ct. 2814, 2843 (Rehnquist, J., dissenting).

7. The Birmingham Post-Herald, Aug. 14, 1979, at A-4, termed the decision "cloudy." The Chicago Sun-Times, Sept. 20, 1979, at 5 (cartoon), labeled the *Gannett* decision "confused." *See also* Note, *Freedom of Expression and the Media,* 7 HAST. CONST. L.Q. 338 (Winter 1980).

8. Nat'l L. J., October 15, 1979, at 20.

9. _ U.S. _, 100 S. Ct. 2814 (1980).

10. One distinguished litigator stated that *Richmond Newspapers* is "one of the two or three most important decisions in the whole history of the First Amendment." *Richmond Decision Seen as Having Major Effect,* 6 MED. L. REP. 11 (July 15, 1980), quoting Dan Paul.

11. *Compare* Mr. Justice White's concurring opinion in *Richmond Newspapers, Inc. v. Virginia,* "This case would have been unnecessary had *Gannett Co. v. DePasquale,* 443 U.S. 368 (1979), construed the Sixth Amendment to forbid excluding the public from criminal proceedings except in narrowly defined circumstances." _ U.S. at _, 100 S. Ct. at 2830, *with* Mr. Justice Rehnquist's concurring opinion in *Gannett,* note 6 *supra,* and Mr. Justice Rehnquist's dissent in *Richmond Newspapers, Inc. v. Virginia,* "I do not believe that either the First or Sixth Amendments, as made applica-

The facts of the *Richmond Newspapers* case are simple. Upon the unopposed motion of defense counsel to close to the public the fourth murder trial of the defendant, the judge barred the public and press from the courtroom.[12]

Later that same day, appellants, two reporters for appellant Richmond Newspapers, sought a hearing on a motion to vacate the closure order. They maintained that the Constitution prohibited such an order absent a finding that closure was the only way to preserve the fair trial rights of the defendant. The court disagreed, and the Supreme Court of Virginia, finding no reversible error, denied Richmond Newspapers' petition for appeal from the closure order.

In reviewing the case,[13] the Supreme Court recognized that the

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ble to the States by the Fourteenth, require that a State's reasons for denying public access to a trial, where both the prosecuting attorney and the defendant have consented to an order of closure approved by the judge, are subject to any additional constitutional review at our hands." _ U.S. at _, 100 S. Ct. at 2843. Justice Blackmun continues to maintain the right to a public trial is found in the sixth amendment. _ U.S. at _, 100 S. Ct. at 2842. Nevertheless, he accepted the ultimate ruling in *Richmond Newspapers,* although he pointed out the Court erred in its analysis of *Gannett.* _ U.S. at _, 100 S. Ct. at 2842 n. 3.

12. In March 11, 1976, the defendant, Mr. Stevenson, was indicted for murder. Stevenson was subsequently found guilty. On appeal, the Virginia Supreme Court reversed the conviction based upon the introduction of inadmissable evidence. Stevenson's second and third trials ended in mistrials. In the second trial, a juror was excused after trial had begun and no alternative juror was available. In the third trial, it was alleged that a prospective juror had read newspaper accounts of Stevenson's previous trials and had told other prospective jurors of the events surrounding the previous cases. Prior to Stevenson's fourth trial in the same court, his counsel moved to close the courtroom to the public. The prosecution offered no objection. The trial judge granted the motion, citing to a Virginia statute (VA. CODE § 19.2-266) that a court "may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the rights of the accused to a public trial shall not be violated." *See* _ U.S. at _, 100 S.Ct. at 2818; Nat'l L. J., Sept. 26, 1980, at 26.

13. In deciding to hear the case, the Supreme Court determined that the question of jurisdiction would be postponed until hearing the case on the merits. 444 U.S. 89 (1979). At oral argument, the State of Virginia contended that because the Virginia statute authorizing closure had not been ruled on by the Virginia State Supreme Court, the Supreme Court lacked appellate or certiorari jurisdiction. In opposition, Richmond Newspapers, represented by constitutional law professor Laurence Tribe, asserted that the Virginia closure statute was invalid "as construed and enforced, and this is enough for jurisdiction." 48 U.S.L.W. 3550 (Feb. 26, 1980). From this, the Court treated the

conflict between publicity and the due process guarantees of the defendant is "almost as old as the Republic."[14] The Court's analysis began at once with the following treatment of *Gannett*:

> *In Gannett Co., Inc. v. DePasquale,* the Court was not required to decide whether a right of access to *trials,* as distinguished from hearings on *pre* trial motions, was constitutionally guaranteed. The Court held that the Sixth Amendment's guarantee to the accused of a public trial gave neither the public nor press an enforceable right of access to a *pre* trial suppression hearing.[15]

After reviewing abundant historical evidence showing criminal trials both here and in England were presumptively open and considering the first amendment interest in the public's right to know, the Court concluded: "Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."[16]

The majority based its conclusion on a number of persuasive reasons, all interrelated with one central theme; that is, open justice secures public confidence in the judicial system.

The decision in *Richmond Newspapers* is important for two reasons. First, the Court's attempt to distinguish *Gannett* on its facts should resolve some of the uncertainty clouding that opinion's true meaning. Second, a natural extension of the underlying rationale enunciated in *Richmond Newspapers* could and should persuade courts to open the doors to pretrial activity to the press and public.

Justice Brennan in *Richmond Newspapers* offered an additional explanation why public access to criminal proceedings deserves constitutional protection. In his concurring opinion, Justice Brennan noted:

> Publicity serves to advance several of the particular purposes of the trial (and, indeed, the judicial) process. Open trials play a fundamental role

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filed papers as a petition for a writ of certiorari, which was granted. _ U.S. _, 100 S.Ct. 2814, 2820.

14. _ U.S. at _, 100 S. Ct. at 2821, quoting Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 547 (1976).

15. _ U.S. at _, 100 S. Ct. at 2821.

16. *Id.* at _, 100 S. Ct. at 2830. Justice Burger's opinion, joined by Justices White and Stevens, went on to observe the right of access is not absolute. Reasonable time, place and manner restraints are permissible. *Id.* at _, 100 S. Ct. at 2830 n.18.

> in furthering the efforts of our judicial system to assure the criminal defendant a fair and accurate adjudication of guilt or innocence.[17]

Publicity during pretrial activity in criminal cases also would promote these objectives.[18] The same analysis should apply as well in civil litigation.[19] A defendant's fate so often depends upon what goes on inside preliminary hearings. The presence of the public at these proceedings would insure that justice is administered from the day the judicial process begins.[20]

Just how will *Gannett* and *Richmond Newspapers* influence the judicial process in Florida? Decisions dealing with the subject long ago

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17. *Id.* at _, 100 S. Ct. at 2937 (Brennan, J., concurring).

18. "Without publicity, all other checks are insufficient: in comparison to publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance." J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827), cited in _ U.S. at _, 100 S. Ct. 2824 (Brennan, J., concurring).

19. One commentator cites well-respected N.Y. Times columnist Anthony Lewis as suggesting that the *Richmond Newspaper* doctrine regarding open criminal trials also applies to civil proceedings. Winter, *Richmond Case Widens Access, Spawns Doubts,* 66 A.B.A. J. 946 (Aug. 1980). The Supreme Court in *Richmond Newspapers* did not directly address this issue. *See* _ U.S. at _, 100 S. Ct. at 2829 n. 17, 2830 n. 18. In contrast, Florida courts have dealt with the issue, determining that the nature of the proceeding is immaterial. In State *ex rel* Gore Newspaper Co. v. Tyson, 313 So. 2d 777 (Fla. Dist. Ct. App. 1975), *rev'd on other grounds,* 348 So. 2d 293 (Fla. 1977), the Fourth District Court of Appeal asserted in a civil proceeding that "there is no distinction between a criminal or a civil action insofar as it pertains to the exercise of the court's inherent power to control the conduct of the proceeding before it; but, whether it be a criminal or a civil proceeding this power must be exercised cautiously and only for the most cogent reasons." 313 So. 2d at 783. *See, e.g.,* English v. McCrary, 348 So. 2d 293, 300, 301 (Fla. 1977) (England, J., dissenting).

20. First, it is suggested that public access to criminal and civil proceedings improves the quality of evidence by promoting a disinclination for witnesses to falsify their testimony. Furthermore, public attendance may encourage public officials, including judges, lawyers, and police officers, to be more conscientious in the performance of their respective duties. Finally, public access builds confidence in the fairness of the judicial process. *See* 6 WIGMORE, EVIDENCE 1834 (1976). Such public access, however, could jeopardize a witness' personal safety. *See, e.g.,* Palm Beach Newspapers, Inc. v. State, 378 So. 2d 862 (Fla. Dist. Ct. App. 1980), in which two convicts' fear of retaliation for testifying about a prison murder was deemed insufficient cause to exclude the press.

recognized that in our state the conduct of a trial is a public matter.[21] And, as the United States Supreme Court has noted:

> A trial is a public event. What transpires in the courtroom is public property. . . . Those who see and hear what transpired may report it with impunity. There is no special prerequisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.[22]

Even though jurisdictions agree on the general desirability of open judicial proceedings, situations like that in *Gannett* create a "civil libertarians' nightmare"[23] of conflicting constitutional liberties.

But Florida case law, even pre-*Gannett,* has dealt in a logical manner with the conflict. Courts in the state have developed a balancing of interests test, applicable to both criminal and civil cases, that seeks a satisfactory compromise between the two interests. Such treatment is still valid today in a post-*Gannett* era and can provide a measure of protection for both rights when they conflict.

*State ex rel Gore Newspaper Co. v. Tyson*[24] provides an excellent example of how one district court of appeal coped with the problem of public access versus a fair trial of the defendant. In the majority opinion, Judge Mager of the Fourth District Court of Appeal first reiterated the basic proposition that a court has inherent power to control the conduct of the proceedings before it.[25] He then proposed that before a judge be permitted to close a part of a trial, he must examine the particular factual circumstances of each case and measure these factors against the various interests affected. If "*cogent reasons*"[26] exist to suspect the right to a fair trial may be jeopardized, the press must be excluded.

Judge Mager went on to list a number of situations which would

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21. State *ex rel.* Miami Herald Publishing Co. v. McIntosh, 340 So. 2d 904 (Fla. 1976).

22. Craig v. Harney, 331 U.S. 367, 374 (1947).

23. United States v. Dickinson, 365 F.2d 496, 499 (5th Cir. 1972).

24. 313 So. 2d 777 (Fla. Dist. Ct. App. 1975), *rev'd on other grounds,* 348 So. 2d 293 (Fla. 1977).

25. *Id.* at 781.

26. *Id.* at 782.

justify a private trial. For example,

> [w]here the testimony of the defendant or witnesses was of such a nature that it could not be freely and completely presented to the public without serious detrimental effects to the 'fair trial' concept . . . [or] where the nature of the testimony was such as to be offensive to younger persons . . . [or] where the lives and safety of the witnesses were involved . . . ,"[27] a trial may be conducted behind closed doors.

Not content with mere abstractions, Judge Mager concluded by defining the proper role of the court in and the appropriate tests for weighing these competing interests. The following guidelines apply even though the litigants, like those in *Richmond Newspapers*, prefer that the proceedings be conducted in secret. Judge Mager wrote:[28]

> 1. A court's action in excluding access to the courts by the public and press is subject to review by prohibition;
> 2. A newspaper corporation, a newspaper reporter or a member of the public have the standing to maintain a prohibition proceeding for the purpose of enforcing the right of public access to the courts;
> 3. The court has inherent power to control the conduct of its own proceedings;
> 4. The court, under its inherent power, may for cogent reasons exclude the public and press from any judicial proceeding to protect the rights of the litigants and to otherwise further the administration of justice;
> 5. In determining the restrictions to be placed upon access to judicial proceedings, the court must balance the rights and interests of the parties to the litigation with those of the public and press;
> 6. The type of civil proceeding,[29] the nature of the subject matter and the status of the participants are factors to be considered when evaluating the cogent reasons for excluding the public and press from access to the courts;
> 7. Persons involved in civil litigation are not entitled to exclude the public and press merely because they request a closed hearing;
> 8. The public and press have a fundamental right of access to all judicial proceedings;
> 9. The court's exclusion of the public and press (and the sealing of

27. *Id.*
28. *Id.* at 787.
29. *See* note 19 and accompanying text *supra.*

> court records) based solely upon the wishes of the parties to the litigation, absent cogent reasons for conducting a private trial, constitutes an act in excess of the power of the court.

While closing hearings from public scrutiny is not new in this state,[30] it is clear that a fair trial is preferred over an open hearing if the two are incompatible: "We have always held that the atmosphere essential to the preservation of a fair trial — the most fundamental of all freedoms — must be maintained at all costs."[31]

Moreover, as the decisions in *Gannett* and *Richmond Newspapers* make clear, constitutional considerations mandate closure in criminal cases where the right to a fair trial may be infringed.[32] But the limitation on the public's right to know must go only so far as to protect the right to a fair trial *and no further.* In many cases, the mere sequestration of a jury or change of venue may be sufficient to protect the defendant.[33] As the Supreme Court of Florida stated in pre-*Gannett* days:

> The inconvenience suffered by jurors who are sequestered to prevent exposure to excluded evidence which may be published in the press is a small price to pay for the public's right to timely knowledge of trial proceedings guaranteed by freedom of the press. It is argued that a temporary withholding of news from the public may aid in assuring a fair trial

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30. State *ex rel.* English v. McCrary, 328 So.2d 257 (Fla. Dist. Ct. App. 1976), *approved,* 348 So. 2d 293 (Fla. 1977); *see also* Sentinel Star Co. v. Booth, 372 So. 2d 100 (Fla. Dist. Ct. App. 1979). Miami Herald Publishing Co. v. Lewis, 383 So. 2d 236 (Fla. Dist. Ct. App. 1980).

31. Estes v. Texas, 381 U.S. 532, 540 (1965), quoted in State *ex rel.* Miami Herald Publishing Co. v. McIntosh, 340 So. 2d 904, 909 (Fla. 1977).

32. *Richmond Newspapers* held that a courtroom may be closed provided there is "an overriding interest articulated in findings." _ U.S. at _, 100 S. Ct. at 2830. Although Chief Justice Burger's opinion does not define "overriding interest," it is clear that such a test will not prevail where alternative methods - such as sequestration - protect a defendant's fair trial rights. However, because Justice Burger was joined only by Justice Stevens and to a limited degree by Justice White, there was no agreement as to the test for determining when closure is appropriate. *See, e.g.,* Justice Brennan's opinion, joined by Justice Marshall: "What countervailing interests might be sufficient to reverse this presumption of openness need not concern us now. . . ." *Id.* at 2839 (footnote omitted). *See also* Goodale, *The Three-part Open Door Test in Richmond Newspapers Case,* Nat'l L. J., Sept. 26, 1980, at 26.

33. Shepard v. Maxwell, 384 U.S. 333 (1968).

> and that if the State and the defendant agree to muzzling the press no one else has a right to object. We firmly reject any suppression of news in a criminal trial except in those rare instances such as national security or where a news report would obviously deny a fair trial. . . .[34]

When synthesizing these cases and harmonizing them with *Gannett* and *Richmond Newspapers,* one should apply the following thoughts and principles to any case involving a question of public access to the courtroom:

1) A presumption that all aspects of the trial are open to public scrutiny should govern.
2) In rare instances, the first amendment right of public access will conflict with the sixth amendment right to a fair trial.
3) In such cases, the trial judge should examine the circumstances of the case. Specifically, he or she should consider the type of case, the nature and sensitivity of the evidence, the probability of extensive press coverage, the size of the potential jury pool, and all other "cogent" factors.
4) The desire of the litigants to hold the proceedings in private should have no impact on the judge's decision.
5) If the judge decides that access should be limited, such limitation should be exercised only to the extent necessary to provide a fair trial.
6) Accordingly, any limitation imposed must go only so far as to protect the right to a fair trial and no further.
7) Only in the most extreme circumstances, in which there are no less restrictive alternatives, should access of the public be limited.
8) A jury should be sequestered before a decision to limit access is made. If sequestration does not prove to be sufficient, the trial judge must weigh the impact of an open trial upon the possibility of conducting a hearing that lacks fairness.

With such guidelines in effect, the rights of the litigants and the rights of the public would be best served.

As the Supreme Court of Florida noted:

> Freedom of the press . . . is a cherished and almost sacred right of each citizen to be informed about current events on a timely basis so each can exercise his discretion in determining the destiny and security of himself,

34. 340 So. 2d at 910.

> other people, and the Nation. News delayed is news denied. To be useful to the public, news events must be reported when they occur. Whatever happens in any courtroom directly or indirectly affects all the public. To prevent star chamber injustice, the public should generally have unrestricted access to all proceedings.[35]

In summary, the impact of *Gannett* and its progeny will be limited in this state. Florida has recognized for many years, especially with the advent of the electronic media,[36] that conflicts between a free dissemination of information and a fair trial will inevitably arise. Fortunately, a body of well-reasoned case law exists for perplexed judges to follow. With the two federal decisions of *Gannett* and *Richmond Newspapers* to guide the exercise of judicial power, the delicate business of balancing two of our most precious constitutional freedoms can be performed in such a way as to benefit both litigants and the public.

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35. *Id.*

36. *See* Chandler v. Florida, 366 So. 2d 64 (Fla. Dist. Ct. App. 1979), *cert. denied,* 376 So.2d 76 (Fla. 1979), *prob. jur. noted,* 48 U.S.L.W. 3673 (April 22, 1980). *See* Smith, *Fair Trial - Free Press: The Camera in the Courtroom Dilemma Continues,* 3 NOVA L. J. 11 (1979); *See also* Hoyt, *Prohibiting Courtroom Photography: It's Up To The Judge In Florida and Wisconsin,* 63 JUDICATURE 290-95 (Jan. 1980). Netteburg, *Does Research Support The Estes Ban On Cameras In The Courtroom,* 63 JUDICATURE 466-75 (May 1975).