Montana Law Review

Volume 45
Issue 2 *Summer 1984*

Article 7

July 1985

Fair Trial and Free Press: The Courtroom Door Swings Open

Steve Carey
University of Montana School of Law

FAIR TRIAL AND FREE PRESS: THE COURTROOM DOOR SWINGS OPEN

Steve Carey

I. INTRODUCTION

> [F]ree speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them.[1]

The Supreme Court has declined to establish a fixed priority with regard to free speech and fair trial rights, but it has defined their boundaries to a considerable extent. In a recent case, *Press-Enterprise Co. v. Superior Court*,[2] Chief Justice Burger wrote for a unanimous United States Supreme Court that judges generally may not bar the press from jury selection. This decision, coupled with other United States and Montana Supreme Court decisions,[3] makes it clear that criminal trials, including voir dire, must remain open to the public, absent overriding interests articulated in findings by the trial court.

This comment will endeavor to provide an analysis of the steps required by the United States and Montana Constitutions before the various phases of criminal trials can be closed to the press and the public.

II. RIGHT OF ACCESS V. DEFENDANT'S RIGHT TO A FAIR TRIAL

A. *Issues at Stake*

The fair trial-free press conflict reflects the tension between the first[4] and sixth[5] amendments. It is fundamental that a defendant in a criminal trial has a right to an impartial jury in order to ensure fair treatment of his or her case. The defendant's interest is in avoiding a jury that is hostile or predisposed to rendering a

---

1. Bridges v. California, 314 U.S. 252, 260 (1941).
2. 104 S. Ct. 819 (1984).
3. 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); State *ex rel.* Smith v. Dist. Court, ___ Mont. ___, 654 P.2d 982 (1982); Great Falls Tribune v. Dist. Court, 186 Mont. 433, 608 P.2d 116 (1980).
4. U.S. CONST. amend. I provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."
5. U.S. CONST. amend. VI provides: "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 . . . ."

guilty verdict based on information received from outside the trial process.

The public, however, has an interest in gaining access to and information about public trials. This interest includes a concern for justice in the individual defendant's case. There is also a broader interest in maintaining the integrity of the judicial system. When a system operates secretly, it faces the potential loss of public confidence.[6] Consequently, the decision to close part or all of a criminal trial depends on more than just the defendant's willingness to waive the right to a public trial.

B. *Case Law Controlling Access to Criminal Proceedings*

Prior to *Press-Enterprise*, the United States Supreme Court considered the right of the public to attend criminal proceedings in *Gannett Co. v. DePasquale*,[7] *Richmond Newspapers, Inc. v. Virginia*,[8] and *Globe Newspaper Co. v. Superior Court*.[9]

In *Gannett*, the Supreme Court upheld the constitutionality of a lower court decision that excluded the public and press[10] from a pretrial suppression hearing.[11] Holding that the right to a public trial is a personal right of the accused, the Court concluded that the public and press do not have a sixth amendment right to an open pretrial hearing.[12] If the defendant, prosecutor, and trial judge agreed that an open hearing would jeopardize the defendant's right to a fair trial, the proceeding could be closed.[13]

This decision was considered a serious blow to freedom of the press, but it failed to provide sufficient guidance to courts and attorneys because the various justices failed to agree on a standard for closure. Justice Rehnquist found 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."[14] In contrast, Justice Powell concluded that the trial judge should hold a hearing and consider alternatives prior to closing.[15]

---

6. These themes are developed in various degrees in the cases cited *supra* note 3.
7. 443 U.S. 368 (1979).
8. 448 U.S. 555 (1980).
9. 457 U.S. 596 (1982).
10. The press has no greater right of access than the public. *See* Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974).
11. 443 U.S. at 394.
12. *Id.* at 391.
13. *Id.* at 383-84.
14. *Id.* at 404 (Rehnquist, J., concurring).
15. *Id.* at 401 (Powell, J., concurring).

The Court clarified much of the confusion generated by the *Gannett* decision in *Richmond Newspapers*. In that case, the defendant made a motion to close his fourth trial on a murder charge and the trial judge granted the motion. Upon review, seven justices recognized that the press and the public have a constitutional right of access to criminal trials based on the first amendment as applied to the states through the fourteenth amendment.[16] This right was found to be necessary to allow an informed discussion of governmental affairs and to maintain the integrity of the judicial system. According to Justice Brennan, "[o]pen trials assure the public that procedural rights are respected, and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law."[17]

In *Globe Newspaper*, the Court expanded upon the standard to be used prior to trial closure. The Court held that a Massachusetts law requiring mandatory closure of sex-offense trials when a minor victim testified was unconstitutional. The Court concluded that the state could not summarily deny access under such circumstances unless "the denial is necessitated by a compelling governmental interest, and is narrowly tailored to meet that interest."[18]

Consequently, by the time the Court decided *Press-Enterprise*, the value of open criminal trials had been "recognized in both logic and experience."[19]

III. Press-Enterprise: The Test for Closure of Voir Dire

A. *The Facts*

Press-Enterprise involved a case where a defendant was accused of an interracial sexual attack and murder.[20] Prior to the voir dire examination of possible jurors, Press-Enterprise Co. requested that the voir dire be open to the public and press. The state opposed the newspaper's motion and the trial judge admitted attendance of the public at only the general voir dire. The general voir dire consisted of about three days out of a total six weeks of questioning.[21]

The defendant was eventually convicted and sentenced to

16. There were seven separate opinions filed with only Justice Rehnquist dissenting. Justice Powell took no part in consideration of the case.

17. 448 U.S. at 595 (Brennan, J., concurring).

18. 457 U.S. at 607.

19. *Id.* at 606.

20. 104 S. Ct. at 830.

21. *Id.* at 821.

death, and Press-Enterprise applied for release of the transcript of the case. The trial judge, citing juror privacy, denied the request for the transcript, as did subsequent California courts. The United States Supreme Court granted certiorari and reversed the California court.[22]

The *Press-Enterprise* opinion follows the Court's rationale in *Richmond Newspapers* regarding the presumption of openness of criminal trials, but raises a new issue regarding juror privacy.

B. *Discussion*

The opinion in *Press-Enterprise* emphasizes at length two features of the criminal justice system that explain the right of access to criminal trials.[23] First, criminal trials have been historically open in both America and England.[24] The tradition of accessibility has been so substantial that at the time of the Court's decision in *In re Oliver*,[25] the presumption was so solidly grounded that the Court was "unable to find a single instance of a criminal trial conducted *in camera* in any federal, state, or municipal court during the history of this country."[26] In the *Press-Enterprise* decision, Chief Justice Burger determined that public jury selection was the norm in England in the sixteenth century, and was the common practice in the United States when the Constitution was adopted.[27]

The second feature is that the right to open criminal trials plays a significant role in the functioning of the judicial process. The Court had previously determined that public access strengthens the judicial process by enhancing the quality and safeguarding the integrity of the fact-finding process by fostering an appearance of fairness, thereby heightening public respect, and by permitting the public to participate in and serve as a check upon the judicial process.[28] In addition, openness can have a "community therapeutic value"[29] in that public proceedings can "vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected."[30]

---

22. *Id.*
23. The opinions in *Richmond Newspapers* and *Globe Newspaper* also focus on these two factors.
24. 104 S. Ct. at 822.
25. 333 U.S. 257 (1948).
26. *Id.* at 266.
27. 104 S. Ct. at 823.
28. *Globe Newspaper*, 457 U.S. at 606.
29. *Press-Enterprise*, 104 S. Ct. at 822.
30. *Id.* at 824.

Once the Court had established the presumption of openness in criminal trials, including the voir dire,[31] the Court's analysis switched to the standard by which closure may be warranted. The Court determined, in line with *Richmond Newspapers* and *Globe Newspaper*, that

> [t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.[32]

In *Press-Enterprise*, the trial court had asserted the right to privacy of the prospective jurors, in addition to the right of the defendant to a fair trial, in support of its closure order.[33] The right to privacy of the prospective jurors is a new twist on the right to access in criminal trials. The Court's decision offers some protection for this privacy interest: "The jury selection process may, in some circumstances, give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters that a person has legitimate reasons for keeping out of the public domain."[34]

Justices Blackmun[35] and Marshall[36] wrote concurring opinions stressing that they did not understand the Court to be deciding that a juror has a legitimate expectation, rising to the status of a privacy right, that he will not have to reveal certain matters during voir dire. Justice Blackmun stated that "it is difficult to believe that when a prospective juror receives notice that he is called to serve, he has an expectation, either actual or reasonable, that what he says in court will be kept private."[37]

Consequently, it is not clear whether prospective jurors have a legitimate expectation of privacy arising to the level of a constitutional right during voir dire questioning. It is certain, however, that when the issue arises in a trial context, the Court must take some steps to protect jurors' privacy.[38]

---

31. In comparing the defendant's right to a fair trial with the right of the press and public to attend such trial, Chief Justice Burger indicated that the right of the public to attend a voir dire is interwoven with the accused's right to a fair trial. *Id.* at 823.
32. *Id.* at 824.
33. *Id.*
34. *Id.* at 825.
35. *Id.* at 826 (Blackmun, J., concurring).
36. *Id.* at 829 (Marshall, J., concurring).
37. *Id.* at 826 n.1.
38. *Id.* at 825.

A trial judge is to inform prospective jurors that if certain sensitive questioning will prove damaging to them, they are to make an affirmative request to present the problem to the judge *in camera* with counsel and a court reporter present.[39] If limited closure is ordered, a transcript of the closed proceedings is to be made available within a reasonable time if disclosure can be accomplished while protecting the jurors' privacy interests.[40] Further, the transcript should only be sealed to the extent that it preserves the anonymity of the individuals sought to be protected.[41] The Supreme Court reversed the California trial court's decision to close voir dire because the state court failed to articulate findings for its decision, in addition to failing to consider alternatives to closure.[42]

While it is clear that the right of access to criminal trials has substantial constitutional underpinnings, it is equally clear that this right is not absolute.[43] Closure of any proceedings, however, "must be rare and only for cause shown that outweighs the value of the openness."[44]

IV. The Montana Standard

A. *The Right of Access and the Right to Know*

The Montana Supreme Court has decided two cases within the past four years relating to the right of access to various phases of criminal trials. In *Great Falls Tribune v. District Court*,[45] the court considered the propriety of excluding the press and public from the individual voir dire examinations of prospective jurors. In *State ex rel. Smith v. District Court*,[46] the court established the standard by which the press and public can be excluded from a pretrial suppression hearing in order to assure a defendant's right to a fair trial.

In both cases, the court kept the particular phase of the trial in question open, basing its decisions in part on federal constitutional law but also to a significant extent on the "right to know" provision of the Montana Constitution.[47]

---

39. *Id.*
40. *Id.*
41. *Id.* at 826.
42. *Id.*
43. *See Globe Newspaper*, 457 U.S. at 606; *Richmond Newspapers*, 448 U.S. at 581 n.18; Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976).
44. *Press-Enterprise*, 104 S. Ct. at 824.
45. 186 Mont. 433, 608 P.2d 116 (1980).
46. ___ Mont. ___, 654 P.2d 982 (1982).
47. Mont. Const. art. II, § 9 provides: "No person shall be deprived of the right to

There is no similar provision in the United States Constitution. As the court said in *Great Falls Tribune*, "[i]t is apparent that the Montana Constitution imposes a stricter standard in order to authorize closure."[48] The court issued a writ of supervisory control and vacated the closure of the voir dire examination in *Great Falls Tribune* accordingly.

The case arose out of the criminal prosecution of *State v. Austad*,[49] a sensational crime involving the rape and murder of an elderly woman and a subsequent high speed chase in which the defendant crashed into nine parked automobiles and was severely injured. There were ninety-two exhibits relating to press coverage of the incident, but that still did not justify closure. The court reasoned:

> Open public proceedings have long been recognized as a cornerstone in preserving the quality and integrity of the judicial process. Closure of judicial proceedings brings suspicion and mistrust in the minds of the public and representatives of the media. Such closure is simply censorship at the source—the denial of the right to know.[50]

The court concluded its opinion by holding that "[n]othing short of strict and irreparable necessity to insure defendant's right to a fair trial should suffice"[51] to close any part of a trial.

B. *The Test for Closure: A Clear and Present Danger*

The decision in *State ex rel. Smith* further defined what the fair trial closure standard is in Montana. Rather than develop the *Great Falls Tribune* test of "strict and irreparable necessity, the court adopted Standard 8-3.2 of the American Bar Association Standards for Criminal Justice.[52]

---

examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosures."

48. 186 Mont. at 440, 608 P.2d at 120.

49. ___ Mont. ___, 641 P.2d 1373 (1982).

50. *Great Falls Tribune*, 186 Mont. at 438, 608 P.2d at 119.

51. *Id.* at 441, 608 P.2d at 121.

52. *State ex rel. Smith*, ___ Mont. at ___, 654 P.2d at 987. STANDARDS FOR CRIMINAL JUSTICE § 8-3.2 (2d ed. 1978 & Supp. 1982) provides:

> Except as provided below, pretrial proceedings and their record shall be open to the public, including representatives of the news media. If at the pretrial proceeding testimony or evidence is adduced that is likely to threaten the fairness of a trial, the presiding officer shall advise those present of the danger and shall seek the voluntary cooperation of the news media in delaying dissemination of potentially prejudicial information by means of public communication until the impaneling of the jury or until an earlier time consistent with the fair administration of

According to *State ex rel. Smith*, the first step trial judges are to take when confronted with a motion to close trial proceedings is to seek the voluntary cooperation of news media, who are encouraged to "exercise prudent judgment" about the dissemination of any information that "would create a clear and present danger to the fairness of defendant's trial."[53] If a suitable arrangement cannot be reached between press, counsel, and the court, "the trial court must then proceed to hearing."[54]

The trial judge must make certain findings of fact and conclusions of law to support a closure order.[55] The supreme court suggested that the findings include evidence regarding the number of listeners and readers in the general population, statistics regarding the percentage of media listeners/readers who follow criminal news reports, and expert psychological testimony concerning the ability of people to disregard pretrial publicity. The evidence gathered at the hearing is then to be scrutinized to see if it presents a "clear and present danger" to trial fairness. That such danger exists is exceedingly difficult to show.

The standard was developed to a significant extent in a landmark prior restraint case, *Nebraska Press Association v. Stewart*.[56] In that case, the United States Supreme Court held a judge could not prevent the press from reporting information gathered from public records or court proceedings that stemmed from the brutal murder of six persons in a small Nebraska town. There was evidence of necrophilia and the crime had attracted immediate widespread publicity, including incriminating statements by the accused. Chief Justice Burger, writing for the majority, found that

---

justice. The presiding officer may close a preliminary hearing, bail hearing, or any other pretrial proceeding, including a motion to suppress, and may seal the record only if:

(a) the dissemination of information from the pretrial proceeding and its record would create a clear and present danger to the fairness of the trial, and

(b) the prejudicial effect of such information on trial fairness cannot be avoided by any reasonable alternative means.

The defendant may move that all or part of the proceeding be closed to the public (including representatives of the news media), or, with the consent of the defendant, the presiding officer may take such action sua sponte or at the suggestion of the prosecution. Whenever under this rule all or part of any pretrial proceeding is held in chambers or otherwise closed to the public, a complete record shall be kept and made available to the public following the completion of trial or earlier if consistent with trial fairness.

53. ___ Mont. at ___, 654 P.2d at 987.

54. *Id.* at ___, 654 P.2d at 988.

55. *Id.*

56. 427 U.S. 539 (1976).

Nebraska had failed to meet the "heavy burden imposed as a condition to securing the prior restraint."[57] In his concurring opinion, Justice Brennan stated:

> [J]udges have at their disposal a broad spectrum of devices for ensuring that fundamental fairness is accorded the accused without necessitating so drastic an incursion on the equally fundamental and salutary constitutional mandate that discussion of public affairs in free society cannot depend on the preliminary grace of judicial censors.[58]

That comment capsulizes the United States Supreme Court's reluctance to close public proceedings without first attempting other methods to protect the rights of the parties. It reflects, along with Standard 8-3.2, the fact that we live in an informed society that has frequent access to comprehensive coverage of newsworthy events. Furthermore, analysis of empirical studies on pretrial publicity indicates that for the most part juries base their decisions on the evidence rather than on extraneous information from outside the record.[59]

The Chief Justice in *Nebraska Press Association* noted that the trial judge was correct in concluding that there was intense pretrial publicity surrounding the case, but found that the further "conclusion as to the impact of such publicity on prospective jurors was of necessity speculative, dealing as he was in factors unknown and unknowable."[60] If the situation in *Nebraska Press Association* did not present a clear and present danger to defendant's fair trial rights, one is hard-pressed to imagine a case that would. That statement, however, must be understood in the context of the many alternatives available to insure trial fairness.

Under the Montana decision in *State ex rel. Smith*, if the evidence gathered at the hearing indicates that there might be a clear and present danger to trial fairness, the trial court must "then hear evidence and argument as to whether less restrictive alternatives would suffice to ensure a fair trial."[61]

The commentary to Standard 8-3.2 indicates several alternatives should be considered, including: (1) continuance, (2) severance, (3) change of venue, (4) change of venire, (5) intensive voir dire, (6) additional preemptory challenges, (7) sequestration of the

---

57. *Id.* at 570.

58. *Id.* at 572 (Brennan, J., concurring).

59. Simon, *Does the Court's Decision in Nebraska Press Association Fit the Research Evidence on the Impact on Jurors of News Coverage?*, 29 STAN. L. REV. 431, 450 (1977).

60. 427 U.S. at 563.

61. ___ Mont. at ___, 654 P.2d at 988.

jury, and (8) admonitory instructions to the jury.[62] If any of these alternatives would adequately protect a defendant's right to a fair trial, then they should be used and the trial proceedings are to remain open. "Only if the trial court finds there is a 'clear and present danger' and that less restrictive alternatives, including a protective order, cannot protect a defendant's right to a fair trial, should closure be ordered."[63]

V. CONCLUSION

There is a strong presumption under the United States Constitution and the right to know provision of the Montana Constitution in favor of open judicial proceedings in criminal trials.

In Montana, to overcome this presumption in closed criminal proceedings, the trial judges must satisfy the exacting criteria of the ABA Standards for Criminal Justice. First, the news media must be given notice that a closure motion is before the court. The media can comply with the court's request to limit information dissemination or it can object that such a limitation is unnecessary.

Second, if there is an objection, the court must make certain findings of fact which indicate there is a "clear and present danger" to trial fairness. That is difficult to demonstrate, but if the evidence as a whole indicates such a finding, the trial court then must hear evidence and argument concerning less restrictive alternatives to closure. If the court affirmatively concludes that no alternative would sufficiently protect defendant's right to a fair trial, and that trial closure would effectively protect that right, then the trial proceedings can be closed to the extent necessary to protect trial fairness.

The United States Supreme Court has developed nearly the same standards for criminal trials, including voir dire, in *Press-Enterprise*, *Richmond Newspapers*, *Globe Newspaper*, and *Nebraska Press Association*. Whether it will apply these standards to pretrial suppression hearings, as did the Montana Supreme Court, remains to be seen.[64] Several federal appellate courts have held that the first amendment extends some degree of public access to pretrial suppression hearings.[65]

---

62. *Id.*

63. *Id.*

64. The Supreme Court has yet to authoritatively frame a standard for closure of pretrial suppression hearings that incorporates the rigorous first amendment standards in the cases discussed *supra*.

65. *See, e.g.*, Herald Co. v. Klepfer, No. 83-7984 (2d Cir. 1984); U.S. v. Brooklier, 685 F.2d 1162 (9th Cir. 1982); U.S. v. Criden, 675 F.2d 550 (3rd Cir. 1982).

It is clear that trial judges have their work cut out for them before they close any part of a criminal proceeding. After the *Press-Enterprise* decision, it appears that trial judges must now be concerned with the right of privacy as it relates to prospective jurors' keeping certain sensitive information confidential. Fortunately, the standard to be applied in protecting jury privacy parallels the defendant's right to a fair trial. The trial judge will need to make explicit findings of fact and conclusions of law as to why closure is necessary to protect jurors' privacy rights or defendants' fair trial rights. In either case, the burden of sustaining a closure order is difficult, since "the primacy of the accused's right is difficult to separate from the right of everyone in the community to attend . . . ."[66]

66. *Press-Enterprise*, 104 S. Ct. at 823.