CRC 1.1.26

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No._____

IN RE: THE GREENSBORO NEWS COMPANY, et al.,

ON PETITION FOR WRIT OF MANDAMUS TO
THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

RESPONSE OF THE UNITED STATES IN OPPOSITION TO THE PETITION

For the reasons set forth below, the United States requests this Court to deny the petition for a writ of mandamus.

ISSUE PRESENTED

Whether the First Amendment to the United States Constitution prohibits a district court from temporarily denying the public access to that portion of voir dire directed to jurors individually where the court has found (1) a "substantial probability that irreparable damage to defendants' fair trial right will result from conducting" all voir dire in public, (2) "substantial probability that alternatives to closure will not protect adequately" the fair trial right and (3) "substantial probability that closure will be effective in protecting against the perceived harm."

STATEMENT

A. Procedural history

On April 21, 1983, nine persons were indicted by a grand

jury in the Middle District of North Carolina for conspiring to violate, and violating, the rights of several persons, including members of the "Workers Viewpoint Organization," by attacking them because of their race and because they were participating in an anti-Klan demonstration (Govt. Ex. A at 2-3). Five of the nine defendants in this federal prosecution had been tried in state court for murder and rioting in 1980, and the state trial, as well as the events which gave rise to the state charges, were extensively reported in the news media. Before the federal trial, the district court took, and proposed to take, a number of steps (described in Order of January 5, 1984, Pet. Ex. C) to reduce the effect of pre-trial publicity which might prejudice the selection of an impartial jury to try the case. Included in these steps is one which gave rise to this petition.[1/]

The district court said it intended to conduct the individual portion of the voir dire examination of potential jurors in camera (Order of January 5, 1984, Pet. Ex. C, at 4).[2/] On January 9, 1984, the case was called and the jury selection process began in open court (Pet. Ex. D; Govt. Ex. B, Affidavit of Norajean Flanagan).

1/ One of these steps -- requiring witnesses and those connected with the case not to discuss the case with the press -- is the subject of another mandamus proceeding in this Court brought by certain witnesses in which responsive briefs are to be filed by January 17, 1984. No. 84-1018.

2/ The court noted that petitioners were aware of the court's order which was quoted in the Winston-Salem Journal on January 8, 1984, p. A3 (Order January 12, 1984 at 2, n. 2). The Winston-Salem Journal is one of the petitioners.

The court first addressed a group of approximately 25-30 potential jurors who were assembled in the open courtroom. They were told what the case was about generally, that they would be individually interrogated outside the presence of the other jurors, and were asked whether they knew any of the defendants or any of the attorneys personally and whether they had heard anything about the case. Most jurors raised their hands in response to being asked whether they had heard of the case (Pet. Ex. D; Govt. Ex. B).

The court then had the courtroom cleared of all except court personnel, the attorneys and the defendants. Thereafter, each member of the group was brought into the courtroom individually where he or she was questioned by the judge. These questions were designed to elicit each juror's knowledge of the incident, whether there was any bias which resulted from this knowledge and whether the jurors had any bias based upon possible attitudes toward the organizations involved in this case (Govt. Ex. B.).

This procedure was repeated on January 10 and 12, 1984. Jurors who appeared on the 10th and 12th had not been in court on the previous days (ibid.). On January 10, 1984, petitioners moved the district court to hold individual voir dire in open court. On January 11, 1984, a hearing was held on this motion, and on January 12, 1984 the district court denied the motion (Memorandum Order, January 12, 1984).

On January 12, 1984, petitioners filed their petition for a writ of mandamus, and the Court directed responses by 9:00 a.m. January 16, 1984.[3/]

B. The district court opinion

The district court first pointed out that the scope of First Amendment rights of the public and the press to attend all phases of trials and pre-trial proceedings is not clear. Although Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), held that the public has a right to attend trials, that right may be curtailed by an "overriding interest articulated in findings." Id. at 581. Because Richmond Newspapers dealt with an entire trial rather than voir dire of jurors, it was not clear that the standards for closure were applicable here. (Memorandum Order, January 12, 1984, at 2-3). However, the court believed the safest course was to apply the "strictest test adopted by the Courts that have considered the matter" (id. at 4), and it then adopted the test suggested by Justice Blackmun dissenting in Gannett Co. v. DePasquale, 443 U.S. 368, 440-442 (1979). The court said this test would require a court, before closing a part of a criminal proceeding to the public, to find (January 12, 1984 order at 4):

3/ Petitioners ask (Pet. 1) that their petition be treated alternatively as a notice of appeal. Central South Carolina Chapter of Professional Journalists v. United States District Court, 551 F.2d 559 (4th Cir. 1977); 556 F.2d 706 (4th Cir. 1977), cert. denied, 434 U.S. 1022 (1978), holds that mandamus is the proper procedure in a case such as this.

1. A substantial probability that irreparable damage to defendants' fair-trial right will result from conducting the proceeding in public;

2. A substantial probability that alternatives to closure will not protect adequately his right to fair trial;

3. A substantial probability that closure will be effective in protecting against the perceived harm.

The court said (Memorandum Order at 4): "The magnitude of publicity that this case has generated may be unprecedented in this area." The court said, however, that it has the duty to select a jury which will consider the case impartially on the basis of the evidence without regard to what they may have previously heard or read. In order to select such a jury, the court believed it "necessary to question individual jurors outside of the presence of other potential jurors" (id. at 5). The rationale for such individual interrogation, as described in Coppedge v. United States, 272 F.2d 504, 508 (D.C. Cir. 1959), is to promote candor on the part of the jurors in answering voir dire questions and to avoid influencing other jurors. If the press were allowed to observe and report these questions and answers, other jurors who read them "would be irreparably tainted" (Memorandum Order at 5). Some jurors' responses may be less trustworthy if they thought "that the public would look askance at someone too easily influenced by the press" (ibid.).

In addition, the court noted that this case involves organizations which evoke strong opinions and which some people

may believe are prone to violence (id. at 6). If some potential jurors believe this, they might be reluctant to give honest responses publicly (ibid.).

Next, the court considered alternatives to private questioning of jurors and found that none would "adequately protect the defendants' right to a fair trial" (id. at 7). The court observed that 1500 potential jurors were summoned, and well over half remained after excusals for hardships. Such a number could not be sequestered. No alternatives were suggested by petitioners. Moreover, the restriction on access is limited in duration, since a record is being kept which will be made public, and the public will have access to actual jury selection and to the trial (id. at 6 & n. 5).

The court then found that the procedure would "protect against the perceived harms" (id. at 7).

In conclusion, the court said it was concerned for the right of the press to report the trial and for the right of the public to receive reports. But, the court said, it must be concerned with the Sixth Amendment right to a fair trial, and to open the voir dire in its entirety to the public "would thwart the goal of these parties[,] as well as the public, to have this case heard by an impartial jury" (ibid.).

SUMMARY OF ARGUMENT

Appellate courts which have considered challenges to closure of pre-trial criminal proceedings or parts of criminal trials have required a balancing of the First Amendment right of the public to access to criminal proceedings and the Sixth Amendment right of defendants to trial by an impartial jury. The results of this balancing must be expressed in findings meeting variously expressed standards, but which have the common features of requiring identification of a possible impingement of Sixth Amendment rights by open proceedings, consideration of alternatives to closure and consideration of the effectiveness of closure in protecting Sixth Amendment interests.

Here, the district court applied the strictest expression of the test for closure thus far articulated and found that it was met in this case. Publication of individual voir dire would be available to other potential jurors, and it has long been recognized that potential jurors waiting to be questioned, as well as those earlier questioned and accepted, could be tainted by knowing of these questions and answers. This makes selection of impartial jurors extremely difficult.

Both the American Bar Association and the Judicial Conference of the United States have explicitly recognized the need for individual voir dire in certain cases and have recommended the use of in camera questioning of the sort challenged here in appropriate

cases. Bench examination of potential jurors is a common phenomenon in federal criminal trials. Here the size of the venire and the separate representation of the nine defendants combine to render the usual bench examination impractical.

No alternative for insulating the venire from individual voir dire was suggested by petitioners. The court found that sequestration of the entire venire would be impractical; and it appears that instructions to disregard forthcoming news coverage would be ineffective where directed to such a large group not fully under the control of the court. Moreover, the restriction on public access does not apply to actual jury selection by the parties from a qualified panel, nor does it apply to the trial as a whole. A transcript of the in camera proceedings is being kept and will be made available when the need for closure no longer exists.

Finally, it is clear that in camera voir dire of individual potential jurors would be effective in preserving each juror's impartiality and candor, which would be prejudiced if individual potential jurors learned of the voir dire of other potential jurors.

ARGUMENT

The district court in this case has taken steps to ensure that questions put to potential jurors and the jurors' responses are not heard by, or communicated to, other jurors who will be asked the same or similar questions. The questions are designed to elicit whether the jurors harbor any bias for or against the

defendants in this case. The trial judge has found that this procedure is required to preserve the defendants' Sixth Amendment right to a trial by an impartial jury.

Petitioners assert that, in addition to observing and reporting on all aspects of the trial and on the actual selection of the jury yet to come, and on the initial questioning of the jury panel as a whole, they have a right to hear and publish contemporaneously the questions asked and answers evoked in voir dire. The government believes that the circumstances of this case and the district court findings are sufficient to override petitioners' interests in immediate access to this part of the proceedings.

Petitioners do not argue, nor can they argue, that their right to access to all phases of criminal proceedings is absolute. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). Rather, they urge (Pet. 6-7) that the district court failed to make findings and follow procedures required by cases such as United States v. Brooklier, 685 F.2d 1162 (9th Cir. 1982); United States v. Criden, 675 F.2d 550 (3d Cir. 1982); and In re United States ex rel. Pulitzer Publishing Co., 635 F.2d 676 (8th Cir. 1980), in balancing the right of the public to access to criminal trials with defendants' Sixth Amendment rights. In Brooklier, supra, 685 F.2d at 1168-1169, for example, the court said:

> Since the purpose of the findings is to enable the appellate court to determine whether the closure order was properly entered, the findings

> must be sufficiently specific, to show that the three substantive prerequisites to closure have been satisfied -- that there is a substantial probability (1) that public proceedings would result in irreparable damage to defendant's right to a fair trial, (2) that no alternative to closure would adequately protect this right, and (3) that closure would effectively protect it.

This test for closure appears identical to that used by the district court here. However, the Ninth Circuit had also held that "[a] court faced with a closure motion must give those present a chance to object, consider less intrusive alternatives, articulate its reasons for closure in findings, determine that the defendant's right to a fair trial will be prejudiced by public access, and make the exclusion as narrow as possible." Sacramento Bee v. United States District Court, 656 F.2d 477, 482 (9th Cir. 1981), cert. denied, 456 U.S. 983 (1982).

This holding was based on an amalgam of the plurality opinion in Richmond Newspapers, supra, which held that closing an entire trial to the public violated the First Amendment because the trial judge made no findings supporting a need for closure and made no inquiry into less intrusive alternatives, and the opinions in Gannett Co. v. DePasquale, 443 U.S. 368 (1979), which basically agreed that there was some right in the public to attend pre-trial or trial proceedings.

The district court in Sacramento Bee had closed two hearings during trial after learning that a juror had read a news article

which contained inadmissible information about a defendant. Upon objection by counsel for the newspaper, the judge explained that he had considered and rejected sequestration of the jury, and he had found that admonishing the jury not to read news articles had not been effective. Sacramento Bee, supra, 656 F.2d at 479-480. On petition for mandamus, the court of appeals held (id. at 482) that the district court "gave careful and adequate consideration to less intrusive alternatives, although he did not consider all possible ones, and made sufficient findings to support his rejection of them."[4/]

While each court which has examined the requirements for closing a part of criminal proceedings has concluded that the findings must contain the elements of impingement on Sixth Amendment rights by open proceedings, lack of satisfactory alternatives to closure and the effectiveness of closure in protecting Sixth Amendment rights, there is a variation among these decisions in the degree of certainty that must be present in what are essentially district court prophesies. The Ninth Circuit, in Brooklier, supra, 685 F.2d at 1167,

4/ The court of appeals was "puzzled * * * that representatives of the press failed to suggest a logical and workable alternative to solve the court's dilemma. An easy solution would have been to acknowledge that immediate publication was unnecessary and that the Bee would await later developments in the trial until the material withheld from the jury might be printed without prejudice to any defendant and without inconveniencing the jury." Sacramento Bee, supra, 656 F.2d at 482.

required a finding of "irreparable damage." Other circuits are less exacting; in United States v. Chagra, 701 F.2d 354, 365 (5th Cir. 1983), the Fifth Circuit held that closure of a pre-trial bond reduction hearing must be accompained by showing that fair trial rights "will likely be prejudiced," that alternatives "cannot adequately protect" these rights and that closure "will probably be effective." The Eighth Circuit held that in-chambers voir dire of prospective jurors is "inappropriate in the absence of an inquiry as to alternative solutions; in the absence of a recognition of any right under the Constitution for the public or press to attend the voir dire examination proceedings; and most importantly, in the absence in the record of any articulated reasons for and balancing of the interest of the public in access to an open court against the rights of the parties to a fair trial." In re United States ex rel. Pulitzer Publishing Co., supra, 635 F.2d at 679.

The Third Circuit exercised its supervisory powers in United States v. Criden, supra, 675 F.2d at 561-562, to require "that, before closing a pretrial criminal proceeding, the district court must in a timely manner state its reasons on the record for rejecting alternatives to closure. * * * The district court must make specific findings to support its conclusion that other means will be insufficient to preserve the defendant's rights

and that closure is necessary to protect effectively against the perceived harm."

Petitioners cite no Fourth Circuit cases on this issue and we are aware of none.

The common feature of decisions reversing orders for closing pre-trial proceedings, or parts of trials, has been the inadequacy -- indeed, absence -- of findings demonstrating a considered balancing of First Amendment and Sixth Amendment values. See Richmond Newspapers, supra, 448 U.S. at 580-581 (opinion of Burger, C.J.); Criden, supra, 675 F.2d at 560; Pulitzer Publishing, supra, 635 F.2d at 678; Brooklier, supra, 685 F.2d at 1169. On the other hand, the courts of appeals have uniformly affirmed closure orders where the district courts heard parties seeking access to the portion of a trial or pre-trial proceeding proposed to be closed and made a record demonstrating the measures requisite to ensure impartial fact-findings. Sacramento Bee v. United States District Court, supra; United States v. Chagra, supra.

The district court here gave petitioners ample opportunity to argue for a fully open voir dire, selected the most stringent test thus far articulated, and, in a detailed explanation of its ruling, demonstrated that the restriction on the press and public is minimal and that the peculiar circumstances of this case make this minimal limitation on public access necessary

to protect the rights of the defendants to a fair and impartial jury. The peculiar features of this trial are:

1. Potential jurors would have an opportunity to read and be influenced by the answers of other potential jurors given the previous day. The selection of a jury panel from which to strike requires examination of more jurors than can be processed in a single day and more than can be accommodated in the courtroom at the same time. Experience has shown that detailed press reports will be made of jury voir dire questions if the press is allowed to observe (Pet. Ex. A and B).[5/]

It is well recognized that the difficulties of selecting an impartial jury in a highly publicized criminal case are magnified where potential jurors being questioned are heard by other jurors waiting to be questioned or who have been accepted. Candor is limited because there is a natural tendency to guess at what the "right" answer is, based upon the results of other answers. Indeed, the American Bar Association Standards for Criminal Justice, Fair Trial and Free Press, Standard 8-3.5, "Selecting the Jury," states:

5/ Petitioners' assertion (Pet. 8) that open jury selection in the state trial produced an impartial jury ignores the publicity which that trial itself generated and which is an additional force with potential for prejudice to impartiality. The fact of a previous trial and its potential for influence is another matter which must be explored in voir dire as well as that publicity which was generated by federal investigation, indictment and pre-trial matters. Some of these news reports are attached (Govt. Ex. C.)

> If there is a substantial possibility that individual jurors will be ineligible to serve because of exposure to potentially prejudicial material, the examinination of each juror with respect to exposure shall take place outside the presence of other chosen and prospective jurors. An accurate record of this examination shall be kept by court reporter or tape recording whenever possible. The questioning shall be conducted for the purpose of determining what the prospective juror has read and heard about the case and how any exposure has affected that person's attitude toward the trial, not to convince the prospective juror that an inability to cast aside any preconceptions would be a dereliction of duty.

The difficulty of achieving candor and avoiding multiplication of pre-trial exposure to a case in an open setting is well recognized. United States v. Colabella, 448 F.2d 1299 (2d Cir. 1971), cert. denied, 405 U.S. 929 (1972); Coppedge v. United States, 272 F.2d 504, 508 (D.C. Cir. 1959). See also Revised Free Press-Fair Trial Guidelines of the Judicial Conference of the United States - 1980, 87 F.R.D. 525, 532-533.[6/] Here, the trial judge had to consider not only the effect of extensive pre-trial publicity, but the involvement in the case of several organizations about which negative opinions and emotions -- including fear of violent reprisal -- may be strongly and widely held. The district court concluded that the privacy

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6/ The subpart cited is entitled "More Liberal Use of Traditional Techniques for Insuring an Impartial jury (Continuance, Change of Venue, Sequestration of Jurors and Witnesses, Voir Dire, Cautionary Instructions to Jurors, Sidebar Conferences)," and says, in part: "The suggested use of individual voir dire of jurors in sensitive and widely publicized cases is similar to the view expressed in Standard 8-3.5(a) of the ABA "Standards Relating to the Administration of Justice: Free Press and Fair Trial * * *. These objectives may be satisfied by conducting the questioning of each juror in turn at the bench or sidebar, in a separate courtroom, or in the judge's chambers." 87 F.R.D. at 533.

afforded by closing the proceeding will promote candor here.

In this case, limitation on the access to the proceedings is minimal. Petitioners and the public will be able to observe and report the trial proceedings and the selection of jurors. In addition, a verbatim record is being kept of the in camera proceedings and will be made public when there is no longer a need for closure. This procedure does not impinge upon the public features of a criminal trial which promote accurate factfinding and public scrutiny of the criminal process itself. See Richmond Newspapers, supra, 448 U.S. at 593-597 (Brennan, J., concurring).

2. There are no other alternatives which will insulate the venire from previous questions and answers. The potential jurors for each day's examination are summoned to court on that day. Until they enter the courtroom and are sworn to answer questions truthfully, there is no way to control what they read in print or see and hear on television or radio. As the district court noted (Memorandum Order at 6), sequestration of so many potential jurors is a practical impossibility.

Moreover, these circumstances suggest that attempting to assemble them in one place large enough to accommodate the entire service and instruct them en masse to disregard news reports is impractical. Nor would it be effective. Petitioners' suggestion

(Pet. 7) that general instructions to disregard news reports of voir dire are an effective alternative to closure blinks reality. While it may be effective to tell twelve people selected as a jury not to read news accounts of the trial they are about to see, or tell even a large group to disregard what they have heard or read in the past since they are about to have first-hand evidence of the events in question, it is not realistic to expect all of a large group not to read news reports which will be available the next day concerning matters which they should not hear or see.

3. There is no doubt that the procedures the district court is following will be effective. A postponement of access to voir dire of those not involved in the trial of the questions and answers of jurors will ensure that this additional prejudicial information will not come to the attention of those jurors who are ultimately selected.

The district court has carefully balanced the rights of the public, the rights of the litigants and the privacy interests of the jurors.[7/] Review of this careful and thoughtful process does not reveal an abuse of discretion.

7/ Jurors are entitled to some limitations on their exposure to public scrutiny in performing their duty. Cf. United States v. Harrelson, 713 F.2d 1114 (5th Cir. 1983), petition for cert. filed sub nom. El Paso Times, Inc. v. United States District Court, 52 U.S.L.W. 3400 (U.S. Nov. 5, 1983) (No. 83-767) (affirming an order limiting post-trial contacts by the press with jurors). The court below considered the possible rights of jurors for privacy as a factor in promoting candor in questioning. We do not

(continued)

CONCLUSION

For the foregoing reasons, the petition for a writ of mandamus should be denied.

Respectively submitted,

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7/ (continued)
argue that a juror's desire for privacy should alone override the public's First Amendment rights in access to the jury selection process. However, we note that jurors are not without cognizable privacy interests.

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 1984, I served copies of the foregoing Response of the United States in Opposition to the Petition and the attached exhibits on each of the attorneys of record in this case present in the United States Courthouse, Charlotte, N.C., on that day by hand-delivering copies to them. I further certify that those attorneys not present were served copies by first-class mail postage paid.

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