IN THE CRIMINAL COURT FOR KNOX COUNTY, TENNESSEE
DIVISION I

STATE OF TENNESSEE	)	
Plaintiff	)	
vs.	)	**No. 86216 A** **CAPITAL CASE**
LETALVIS D. COBBINS	)	
Defendant	)	
STATE OF TENNESSEE	)	
Plaintiff	)	
vs.	)	**No. 86216 C** **CAPITAL CASE**
GEORGE THOMAS	)	
Defendant	)	

MEMORANDUM, CITATIONS OF AUTHORITY AND ARGUMENT IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AND OPPOSE TWO ORDERS SEEKING RESTRICTIONS UPON MEDIA PUBLICATION

In support of its Motion, the Intervenor submits this its Memorandum of Law, Citations of Authority and Argument.

SECTION ONE:

RECOGNITION OF THE RIGHT OF ACCESS

A. Recognition of the Common Law Right of Access to Judicial Records:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, . . . Every free man has an undoubted right to lay what sentiments he wishes before the public; to forbid this, is to destroy the freedom of the press; . . . IV Blackstone's Commentaries, 151, 152.

There has always been a presumed right of the public and the press to have access to criminal trials in this country, and such right in fact predates the United States Constitution. See United States v. Mitchell, 551 F.2d 1252, 1266 (D.C. Cir. 1976) (*rev'd on other grounds sub nom.*) Indeed, the public right of access to criminal trials is so clearly entrenched in our judicial system that, in 1948, the U. S. Supreme Court said the right was so secure 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." In re Oliver, 333 U.S. 257, 268, 68 S. Ct. 499, 504 92 L. Ed. 682 (1948) (footnote omitted). In fact, the U.S. Supreme Court has recognized an absolute right of the press to report on matters transpiring in an open court setting. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975).

Although for literally hundreds of years U.S. courts have recognized a common law right to inspect judicial records, that right was not

clearly defined until the U.S. Supreme Court case of Nixon v. Warner Communications Inc., et al, 435 U.S. 589, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978). Nixon involved the tape recordings of conversations made in former President Richard Nixon's White House office and in the Executive Office Building. 435 U.S at 593, 98 S. Ct. at 1309. The tapes were played to the jury in the criminal trial of certain of the President's former advisors on charges of, among other things, obstruction of justice. Id. The tapes were also played to the public in the courtroom, and were admitted into evidence. 435 U. S at 594, 98 S. Ct. at 1310. Transcripts of the tapes were furnished to the public by the District Court. Id. During the trial, broadcasters petitioned for immediate access to the actual tapes. Id. The district court denied the petition, holding that the rights of the defendants would be prejudiced if the petitions were granted, and that since the contents of the tapes had already been widely disseminated, the public's right to know did not overcome the need to safeguard the defendants' rights on appeal. 435 U.S at 595, 98 S. Ct. at 1311. The Court of Appeals reversed, holding that the possibility of prejudice did not outweigh the public's right of access, and that the common law right of access to judicial records required the district court to release the tapes in its custody. 435 U. S at 596, 98 S. Ct. at 1311.

The U.S. Supreme Court reversed, holding that the actual release of the physical tapes was not required when alternative means of public access were already available under the Presidential Recordings and Materials Preservation Act. 435 U.S at 605-06, 98 S. Ct. at 1316.

Nixon is significant, not for the court's refusal to release the actual tapes, but for its recognition of the common law right of access to those tapes. First, it established unequivocally that there is a presumptive common law right of access to copy and inspect judicial records. 435 US at 597, 98 S. Ct. at 1312.[1] Second, it recognized that such a right is not absolute, especially where access might become a vehicle for an improper purpose. 435 US at 598, 98 S. Ct. at 1312. Nixon established a common law starting point for access - there is a general right to inspect and copy judicial records and documents unless access could become a vehicle for improper purposes. 435 US at 598, 98 S. Ct. at 1312.

Shortly after Nixon was decided, three circuit courts of appeal applied the common law right of access involving the inspection and copying of evidentiary videotapes in the so called "Abscam" trials.[2] In the first case, the Second Circuit recognized a strong presumption in favor of public access to judicial records by affirming the district court's decision allowing access to the tapes. United States v. Myers (In re National Broadcasting Co.), 635 F.2d 945 (2d Cir. 1980). The court stated that the strong presumption of openness to our courts outweighed any fear of violating the rights to a fair trial of other Abscam defendants who were not yet on trial. Id. at 952-54. The Third Circuit

[1] There had been earlier U. S. decisions recognizing a common law right of access to criminal trials. See In re Oliver, supra. See also State v. Hensley, 75 Ohio St. 255, 257, 79 N.E. 462, 463-64 (1906) ("[T]he people have the right to know what is being done in their courts"); E. W. Scripps Co. v. Fulton, 100 Ohio App. 157, 162, 125 N.E.2d 896, 900 (1955) ("It can never be claimed that in a democratic society the public has no interest in or does not have the right to observe the administration of justice.")

[2] "Abscam" was the name given an undercover FBI operation where federal agents and a paid informant exposed certain public officials accepting bribes. Agents recorded the officials taking bribes on audio and video tapes, which were later played into evidence during criminal trials. Members of the media requested the right to copy the tapes for public broadcast. See United States v. Myers (In re Nat'l Broadcasting Co.), 635 F.2d 945 (2d Cir. 1980).

also ruled that broadcasters should be allowed to copy the tapes, and said the proper standard of review was to rebalance the appropriate interests of the parties as opposed to an abuse of discretion standard. United States v. Criden (In re National Broadcasting Co.), 648 F.2d 814, 817-19 (3d Cir. 1981). Finally, in United States v. Jenrette (In re National Broadcasting Co.), the Court of Appeals for the District of Columbia applied a balancing test weighing the right of public access against the defendants' rights to a fair trial in a potential re-trial. 653 F.2d 609, 614-17 (D.C. Cir. 1981). The court ruled in favor of the broadcasters and reversed the district court's decision to refuse public access to the tapes. Id. at 620-21.

The important aspect of the Abscam decisions is that all three courts applied a balancing test, and granted the press access even though the defendants' argued three different ways in which their rights could be prejudiced. Although not reaching the issue, the Supreme Court in Nixon said that it "normally would be faced with the task of weighing the interests advanced by the parties in light of the public interest and the duty of the courts." 435 U.S. at 602. The task of weighing of the interests was done in the Abscam cases, and, as shown by the results, the weight of the importance of public access was more than the possible threat of an unfair trial advanced by the defendants.[3]

Although not a criminal case, soon after the Abscam decisions, the Sixth Circuit discussed the limited nature of exceptions to the common law

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[3] The balancing test for closing records and proceedings is discussed further in Section Two of this Brief.

right of access in Brown &-Williamson Tobacco Corp. v. Federal Trade Commission, 710 F.2d 1165 (6th Cir. 1983). Brown &-Williamson involved the appeal of a cigarette makers suit against the FTC in a preenforcement challenge to proposed changes affecting cigarettes. Id. at 1168.

In discussing the common law right of access, the court noted only two areas where there is not an absolute right of access. First, in similarity with time, place and manner restrictions on speech, the courts may limit access to keep order and dignity in the courtroom. Id. at 1179. Second, the common law recognizes exceptions to the right of access to protect competing interests, such as the right to a fair trial.[4] Id.

Obviously, content-based limitations are the most serious impingements upon the right of access, and the court noted hardest to overcome, as there is a "strong common law presumption in favor of public access to court proceedings and records." Id. Applying the balancing test of weighing the public's common law right of access against a competing interest advanced by a party, the court rejected Brown & Williamson's argument that release of the information would harm the company's reputation. Id. Such a harm was not sufficient to overcome the presumption of complete public access to court proceedings. Id.

[4] The argument that press access would harm a defendant's right to a fair trial is one almost universally made by those seeking to limit the Press' access. This argument, however, is somewhat misleading. Certainly, the right to a fair trial and freedom of the press are important constitutional concerns. As Justice Black observed, "free 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." Bridges v. California, 314 U.S. 252, 260 (1941). But it is the prosecution's burden to provide a fair trial, not the accused. Sheppard v. Maxwell, 384 U.S. 333 (1966).

As shown by Brown & Williamson, the common law right of access is not one specifically bestowed upon the press. The common law right of access belongs to the public, and, unlike the First Amendment right discussed infra, the common law right of access of the press stems from being members of the public. Indeed, the common law right of access is afforded to every member of the public, including the accused in a criminal case. "The right to a fair trial is a shared right of the accused and the public, the common concern being the assurance of fairness." Press-Enterprise Co. v. Superior Court of Cal. (Press Enterprise II), 478 U.S. 1, 7, 106 S. Ct. 2735, 2739, 92 L. Ed. 2d 1 (1986). In In re Special Grand Jury (for Anchorage Alaska), the subjects of a special grand jury investigation petitioned for access to certain court records regularly maintained for the grand jury. 674 F.2d 778, 779 (9th Cir. 1982). The District Court denied the motion on the theory that, because they had not been indicted, the movants lacked standing to raise issues concerning the grand jury. Id. The Ninth Circuit reversed, citing the common law right of access to public records. Id. at 780. The court stressed the openness of access to records by any member of the public:

> The importance of public access to judicial records and documents cannot be belittled. We therefore hold that, as members of the public, the appellants have a right, subject to the rule of grand jury secrecy, of access to the ministerial records in the files of the district court having jurisdiction of the grand jury. Absent specific and substantial reasons for a refusal, such access should not be denied.

Id. at 781.

Although -- as recognized by Nixon -- the common law right of access had been assumed yet not frequently discussed by the courts, various federal and state courts have applied the right in later decisions. In Newman v. Graddick, the Eleventh Circuit found that there was no reason to prevent a newspaper from publishing lists of prisoners thought to be the least deserving of further incarceration given the historic common law right to access of judicial records. 696 F.2d 796 (11`" Cir. 1983). Likewise, the Connecticut Supreme Court refused to deny a newspaper access to a transcript of a criminal trial still pending appeal. State v. Ross, 208 Conn. 156, 543 A.2d 284, 15 Media L. R 1993 (1988) ("Once a transcript becomes part of a court file, it becomes a court record to which the public and hence the press undoubtedly have a right of access."). Similar results have been reached by many other state and federal courts. See generally Gannett River States Pub. Co. v. Hand, 571 So. 2d 941, 18 Media L. R. 1516 (Miss. 1990); In re Application by John Hancock Mut. Life Ins. Co., 81 Misc. 2d 269, 366 N.Y.S.2d 93 (1975).

As shown by the preceding cases, the common law has always recognized the right of public access to judicial proceedings and records, and has always viewed the openness of criminal trials as being an essential element of our judicial system. Courts must apply a balancing test when a party seeks to limit access: the strong tradition of public openness versus the reason advanced by the party attempting to limit access. And as also shown by the preceding cases, the weight afforded the public's right to access can only be overcome by a stronger competing interest in closure.

B. The First Amendment Right to Access

In addition to the common law right of access as discussed in Nixon and its progeny, the courts have also recognized the inherent right specifically afforded the media by the First Amendment. In fact, arguably the courts have recognized an additional constitutional right of access afforded the press which derives from and expands upon the public's common law right of access.

The leading case recognizing the First Amendment right of the press to access to criminal trials is Richmond Newspapers, Inc. v. Virginia, 448 U.S. 570, 100 S. Ct. 2814 (1980). Richmond Newspapers concerned the action of a Virginia court of closing a murder trial on the motion of the defendant, despite the lack of a reason cited therefor.

The Supreme Court began its analysis with a lengthy recitation of the history of open trials in the United States and England, dating back to the days before the Norman Conquest. 448 U.S. 564-65, 100 S. Ct. at 2821. The court concluded that "the historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open." 448 U.S. at 69 100 S. Ct. at 2823. The court further commented on the need of open trials and the effect they have on society in general:

> Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural, yearning to see justice done - or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis

> can occur if justice is "done in a corner (or) in any covert manner." . . . It is not enough to say that results alone will satiate the natural community desire for "satisfaction." A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society's criminal process "satisfy the appearance of justice," . . . and the appearance of justice can best be provided by allowing people to observe it.

448 U.S. at 571-72, 100 S. Ct. at 2824 (citations omitted). The court went on to observe that, as time progressed, the media assumed the role of reporting information concerning trials when the majority of society was no longer able to acquire that information through firsthand observation or word of mouth. 448 U.S. at 572-73, 100 S. Ct. at 2825.

Even though there is a long tradition of openness of criminal trials, the State of Virginia had argued that there was no provision guaranteeing the public's right to attend criminal trials in either the Constitution or the Bill of Rights. 448 U.S. at 575, 100 S. Ct. at 2826. The Supreme Court disagreed.

The First Amendment "prohibits governments from `abridging the freedom of speech, or of the press.'" Id. Recognizing that criminal trials have always been open to the public, the court held that the First Amendment prohibits the government from denying that right. Id. While the First Amendment does not, by itself, grant a new right of access, it guarantees the existing right that had always been in place:

> What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily

> closing courtroom doors which had long been open to the public at the time that Amendment was adopted.
>
> The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily.

448 U.S. at 576-77, 100 S. Ct. at 2827.

Given that the First Amendment right of access is prefaced on the common law right, the limitations on the common law right also apply under the First Amendment. See Globe Newspaper Co. v. Superior Court for the County of Norfolk, 457 U.S. 596, 102 S. Ct. 2613, 2622, 73 L. Ed. 2d 248 (1982) (citing Richmond Newspapers).[5] However, the circumstances under which the press can be denied access are extremely limited:

> [T]he State's justification in denying access must be a weighty one. Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling government interest, and is narrowly tailored to serve that interest.[6]

Id. 2620 (citations omitted). The court, in Globe Newspaper, found a provision of a Massachusetts statute providing exclusion of the public from trials of specified sexual offenses involving minors to be a violation of the First Amendment as being overly broad and running "contrary to the very foundation of the right of access recognized in Richmond Newspapers: namely,

[5] For example, the U. S. Supreme Court has held that disclosure of transcripts of a grand jury should only occur in those cases where the need for disclosure outweighs the public interest in keeping such proceedings secret. Douglas Oil Co. of Cal., et al v. Petrol Stops Northwest, et al, 441 U.S. 211, 99 S.Ct. 1667, 60 L.Ed. 156 (1979).

[6] The similarity to the test recognized by Nixon of weighing competing interests, with the recognition of the importance of free, unrestricted public access should be noted.

'that a presumption of openness inheres in the very nature of a criminal trial under our system of justice."' Id. at 2622 (citations omitted).

The openness of criminal trials extends beyond the mere accessibility of the courtroom to the public, but, importantly, to access to court documents filed in connection therewith. See Press-Enterprise Co. v. Superior Court of Cal., 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986). In Press-Enterprise, the petitioner, a newspaper, sought access to the transcript of a preliminary hearing in a criminal case. The defendant, a nurse charged with 12 counts of murder, argued that the release of the transcript would result in prejudicial pretrial publicity which would inhibit his right to a fair trial. 478 U.S. at 4-5, 106 S. Ct. at 2738. The court stated that when the right to a fair trial is asserted by the accused as the basis for denying access, there must be a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure "cannot adequately protect the defendant's fair trial rights." 478 U.S. at 15, 106 S. Ct. at 2743 (emphasis added). As shown by the Supreme Court in Press Enterprise (and also by the Courts of Appeal in the Abscam decisions), the importance of the right to a fair trial can only outweigh the importance of the public's interest in access to criminal judicial proceedings when the defendant can prove that his rights will be adversely affected. A mere allegation of the potential for such act is insufficient.[7]

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[7] See n. 4. supra.

There have been a myriad of federal and state cases both interpreting and expanding upon the First Amendment right of access. The Sixth Circuit, for example, has found that the First Amendment right of access applies to issues not germane to the underlying criminal trial, such as disqualification proceedings involving a judge. United States v. Presser, 828 F.2d 340 (6th Cir. 1987). The Ninth Circuit has held that the First Amendment right of access applies to pretrial release documents. Seattle Times Co. v. United States Dist. Court for Western Dist. of Washington, 845 F.2d 1513 (9th Cir. 1988). Likewise, the right of access has been held to apply to findings of a district court in regard to a defendant's motion for a reduction of sentence. CBS, Inc. v. United States District Court for the Cent. Dist. of California, 765 F.2d 823 (9thCir. 1985). Federal courts have also vacated orders excluding the public and media from the voir dire of prospective jurors. United States v. Peters, 754 F.2d 753 (7th Cir. 1985).[8]

[8] The prohibition of prior restraints upon the press is illustrative of both the importance of a free press, and the overall theme of this Brief – courts are increasingly expanding the level of public access to judicial records. For example, theSixth Circuit recently upheld the sanctity of the First Amendment principle that the press cannot be subjected to a prior restraint by a trial court "absent the most compelling circumstances." Proctor & Gamble Co. v. Bankers Trust Co., et al, 78 F.3d 219, 221 (6th Cir. 1996). In that case, Proctor & Gamble filed a complaint against Bankers Trust claiming a loss of more than $100 million due to alleged fraud. Id. at 222. Amid widespread interest in the case by the press, the parties could designate certain discovery documents as "confidential" and file them under seal. Id. Business Week Magazine obtained some of the documents that were filed under seal. Id. Without notice to Business Week, the district court entered an Order prohibiting the magazine from publishing the documents without the consent of the court. Id. The Sixth Circuit overturned the District Court's orders. Id. at 225. The Court began its analysis by pointing out the heavy burden the Appellees had to overcome. "[W]e ask whether Business Week's planned publication of these particular documents posed such a grave threat to a critical government interest or to a constitutional right as to justify the District Court's three injunctive orders." Id. The Court also commented on the protective order entered by the Court, saying that the discretion to issue a protective order under Fed. R. Civ. P. 26(c) must be limited and "is circumscribed by a long-established legal tradition which values public access to court proceedings." Id. at 227 (citing Brown & Williamson at 1177). "Rule 26(c) allows the sealing of court papers only 'for good cause shown' to the court that the particular documents justify court-imposed screcy." Id. at 227.

A judge of the United States District Court for the Southern District of New York entered an order forbidding the publication of information concerning the names of jurors in a criminal trial even though the jurors' names had been publicly revealed in open court. The Second Circuit United States Court of Appeals, in overturning and holding unconstitutional that ruling, stated that the order violated two basic First Amendment protections. The first was the right against prior restraints on speech and the second was the right to report freely on events that transpire in open court.[9]

In *Quattrone,* the court provided an excellent summary of the law as it relates to prior restraint.

> A prior restraint on speech is a law, regulation or judicial order that suppresses speech -- or provides for its suppression at the discretion of government officials -- on the basis of the speech's content and in advance of its actual expression. *Alexander v. United States*, 509 U.S. 544, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993); *Hobbs v. County of Westchester*, 397 F.3d 133 (2nd Cir. 2005); *Metro Opera Ass'n, Inc. v. Local 100 Hotel Employees and Rest. Employees Int'l Union*, 239 F.3d 172 (2nd Cir. 2001); *Quattrone, supra*, at 309.
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> It has long been established that such restraints constitute the most serious and least tolerable infringement on our freedoms of speech and press. *Quattrone, supra,* at 309; *Nebraska Press Ass'n v. Stewart*, 427 U.S. 539, 96 S. Ct. 2791, 49 L.Ed.2d 683 (1976); *Tunick v. Safir*, 209 F.3d 67 (2nd Cir. 2000). Our Supreme Court has described the elimination of prior restraints as the chief purpose of the First Amendment. *Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979). The main purpose of the First Amendment is to prevent all such previous restraints upon publications as had been practiced by other governments. *Id.* at 310.

[9] *United States v. Quattrone*, 402 F.3d 304, 33 M.L.R. 1423 (2nd Cir. 2005).

> Any imposition of a prior restraint, therefore, bears a heavy presumption against its constitutional validity. *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963). Moreover, because a responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field, the protection against prior restraint carries particular force in the reporting of criminal proceedings. *Shepherd v. Maxwell,* 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); *Id.* at 310. A prior restraint is not constitutionally inoffensive merely because it is temporary. Government action constitutes prior restraint when it is directed to suppressing speech because of its content before the speech is communicated. *Alexander v. United States,* 504 U.S. 544, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993); *Id.* at 310.

As the Supreme Court explained in *Southeastern Promotions Ltd. v. Conrad*[10]:

> The presumption against prior restraints is heavier -- and the degree of protection broader -- than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.

The First Amendment right of access is not a remedy exclusive to the federal courts. The Alabama Supreme Court applied the same reasoning as the federal courts in ruling that the First Amendment provides a right of access

[10] 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975).

to pretrial proceedings in criminal actions in Ex parte Consolidated Pub. Co., Inc., 601 So. 2d 423 (Ala. 1992).[11]

The cases cited concerning the First Amendment show two things: 1) just as under the common law right, access to court proceedings by the press is a strong public interest that cannot be overcome without the showing of the probability of substantial harm to the party seeking closure; and 2) courts are expanding the type of access afforded to the press to all phases of and documents connected with criminal and civil proceedings.

SECTION TWO:

THE BURDEN OF PROOF IS ON THE PARTY SEEKING CLOSURE

Although the right of public access to criminal and civil trials (and to records associated with those trials) is presumed, and, as evident from the cases discussed in Section One of this Brief, ever expanding, there are some limited reasons recognized for closing all or a portion of court proceedings and records. However, the party arguing for closure has a heavy burden to overcome. Courts must apply a balancing test, weighing the public's right to

[11] The issue of the openness of pretrial proceedings in criminal cases has been extensively litigated, and almost universally held open. See Sacramento Bee v. United States District Court, 656 F.2d 477 (9th Cir. 1981), cert. den. 456 U.S. 983, 102 S.Ct. 2257, 72 L.Ed.2d 861 (1982); Phoenix Newspapers, Inc. v. Jennings, 107 Ariz. 557, 490 P.2d 563 (Ariz. 1971); Shiras v. Britt, 267 Ark. 97, 589 S.W.2d 18 (Ark. 1980); Star Journal Pub. Corp. v. County Court, 197 Colo. 234, 591 P.2d 1028 (Colo. 1978); State v. Burak, 37 Conn. Sup. 627, 431 A.2d 1246 (Conn. Sup. 1981); United States v. Edwards, 430 A.2d 1321 (D.C. App. 1981); Miami Herald Pub. Co. v. Lewis, 383 So.2d 236 (Fla. App. 1980); R. W. Page Corp. v. Lumpkin, 249 Ga. 576, 292 S.E.2d 815 (Ga. 1982); Gannett Pacific Corp. v. Richardson, 59 Hawaii 224, 580 P.2d 49 (1978); State v. Porter Superior Court, 274 Ind. 408, 412 N.E.2d 748 (Ind. 1981); Ashland Publications Co. v. Asbury, 612 S.W.2d 749 (Ky. App. 1980); Patuxent Pub. Corp. v. State, 48 Md. App. 689, 429 A.2d 554 (Md. Sp. App. 1981); Keene Pub. Corp. v. Cheshire County Superior Court, 119 N.H. 710, 406 A.2d 137 (N.H. 1979); State ex rel. Dayton Newspapers, Inc. v. Phillips, 46 Ohio St.2d 457, 351 N.E.2d 127 (Ohio 1976); Commonwealth v. Hayes, 489 Pa. 419, 414 A.2d 318 (Pa. 1980); Rapid City Journal v. Circuit Court, 283 N.W.2d 563 (S.D. 1979); Herald Ass'n, Inc. v. Ellison, 138 Vt. 529, 419 A.2d 323 (Vt. 1980); Federated Publications v. Kurtz, 94 Wash.2d 51, 615 P.2d 440 (Wash. 1980); State ex rel. Herald Mail Co. v. Hamilton, 165 W.Va. 103, 267 S.E.2d 544 (W. Va. 1980); Williams v. Stafford, 589 P.2d 322 (Wyo. 1979).

access against the proferred reason of the party seeking closure. The burden in overcoming the right of access is heavy. The most common reason cited for closure is the defendant's right to a fair trial. That argument is discussed at length below.

As shown by the U. S. Supreme Court in discussing the common law right of access,[12] by the Supreme Court in discussing the First Amendment right of access,[13] and by the Second Circuit in United States v. Suarez, courts balance the interests of a free press, public access to judicial records, and a defendant's right to a fair trial. Obviously, this is a difficult job, as recognized by the Supreme Court in Bridges v. California, when it stated that "free [press] and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them." 314 U.S. 252, 260 (1940). However, while the right of access may not be absolute, any denial of that right must be "necessitated by a compelling government interest," and "narrowly tailored to serve that interest." Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07, 102 S.Ct. 2613, 2620-21, 73 L.Ed.2d 248 (1982). Closed proceedings must be rare. Press-Enterprise Co. v. Superior Court (Press-Enterprise I), 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed. 629 (1984).

As discussed by the U. S. Supreme Court, when the interest asserted by the defendant in a criminal trial is the right of the accused to a fair trial, there must be a substantial probability that the right will be prejudiced by the publicity, and that reasonable alternatives will not adequately protect

[12] See Nixon v. Warner Communications, Inc. and cases cited in Section 1A of this Brief.
[13] See Richmond Newspapers and cases cited in Section 1B of this Brief.

that right. Press-Enterprise Co. v. Superior Court, (Press-Enterprise II) 478 U.S. 1, 14-15, 106 S.Ct. 2735, 2743 (1986). Allowing public access does not automatically destroy a defendant's right to a fair trial, because there are adequate judicial procedures designed to protect that right. Sheppard v. Maxwell, 384 U.S. 333, 357-362, 86 S.Ct. 1507 (1966). It is not enough to make mere allegations that a defendant will be prejudiced. It must be shown that "closure is essential to preserve higher values and is narrowly tailored to serve that interest." Press-Enterprise I, 464 U.S. at 510, 104 S.Ct. at 824. The risk of prejudice "does not automatically justify refusing public access to hearings on every motion to suppress." Press-Enterprise II, 478 U.S. at 15, 106 S.Ct. at 2743. For example, in an analogous situation, the Supreme Court, in Nebraska Press Association v. Stuart, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976) rejected a Nebraska court's order restraining the media from reporting allegedly prejudicial information. The court said:

> We have therefore examined this record to determine the probable efficacy of the measures short of prior restraint on the press and speech. There is no finding that alternative measures would not have protected [the defendant's] rights, and the Nebraska Supreme Court did no more than imply that such measures might not be adequate. Moreover, the record is lacking in evidence to support such a finding.

427 U.S. at 565, 96 S.Ct. at 2806.

The Abscam cases are excellent examples of the high burden that a defendant must meet in order to have access denied. In the Second Circuit's Abscam decision, the court ruled that the public's right to access outweighed the potential threat to other defendants who had not yet been tried in separate

trials. United States v. Myers, 635 F.2d at 952-954. Similarly, in the D.C. Circuit's decision, the court found the right of access superior to the potential threat against the defendant's right to a potential re-trial. United States v. Jenrette, 653 F.2d at 609. Both decisions show that the substantial harm the defendant's claim must be proven to be a substantial harm to them in the instant case, not the threat of harm in future proceedings.

Tennessee courts have placed the same high burden and applied the same type of balancing tests as other federal and state courts. In State v. James, the Tennessee Supreme Court, in a juvenile case, said:

> The nature and purpose of juvenile proceedings are different from those involved in criminal proceedings. Despite such differences, we believe that an approach that balances the public's interests in open judicial proceedings and the litigants' right to a fair trial should be applied in deciding whether the close juvenile proceedings.

902 S.W.2d 911, 913 (Tenn. 1995). The court set forth five rules a court is to apply in order to balance the parties' respective interest:

> 1) The party seeking to close the hearing shall have the burden of proof;
>
> 2) The juvenile court shall not close proceedings to any extent unless it determines that failure to do so would result in particularized prejudice to the party seeking closure that would override the public's compelling interest in open proceedings;
>
> 3) Any order of closure must be no broader than necessary to protect the determined interests of the party seeking closure;
>
> 4) The juvenile court must consider reasonable alternatives to closure of proceedings; and

> 5) The juvenile court must make adequate written findings to support any order of closure.

Id. at 914. It is significant to note that the court placed the same high burden on the party seeking closure in James despite the fact that it was a juvenile proceeding, which, as discussed in Section One of this Brief, is typically considered a more sensitive type case and, therefore, more prone to closure. The Tennessee Supreme Court later discussed the burden in Ballard v. Herzke, 924 S.W.2d 651 (Tenn. 1996). In Ballard, the court, in dealing with a motion to rescind a protective order, stated that the party seeking closure must establish "good cause." Id. at 658. The court squarely put the burden on the party seeking closure. "Mere conclusory allegations are insufficient. The burden of justifying the confidentiality of each and every document sought to be covered by the protective order is on the party seeking the order." Id. (citing Cippolone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3d Cir. 1986)). The court then went on to stress the importance of the trial court's balancing "one party's need for information against the injury that would allegedly result if disclosure is compelled." Id.[14]

> The First Amendment rights of the press are always of great public interest and are of vital importance to the administration of justice in this state. As a result, the appellate courts of this state have zealously guarded the First Amendment rights of the print and electronic media. State v. Montgomery, 929 S.W.2d 409, 414 (Tenn. Cr. App. 1996).

[14] See also *Knoxville News Sentinel v. Huskey*, 982 S.W.2d 359 (Tenn. App. 1998).

SECTION THREE:

EXAMPLES OF RESTRICTIONS VIOLATING FIRST AMENDMENT PROHIBITIONS AGAINST PRIOR RESTRAINT

In Menendez v. Fox Broadcasting Co., 22 M.L.R. 1702 (1994), an attempt by accused killers Lyle and Erik Menendez to restrain the broadcast of a "docudrama" entitled "Honor Thy Father and Mother: The True Story of the Menendez Brothers" was denied. Even though the brothers were awaiting trial for murder, the United States District Court found "none of the three factors required by the Supreme Court in Nebraska press before such a prior restraint on the media may be constitutionally upheld are present here."[15]

The name of an attorney who was the subject of a grand jury investigation which had not been concluded and which was inadvertently revealed was obtained by newspapers and its publication became imminent. An injunction issued in the United States District Court for the District of South Carolina enjoining publication of the name of the attorney. This injunction was challenged on appeal after the reporters were advised they would be held in contempt of court if they published in their respective newspapers the name of the attorney.[16] Part of the allegations in support of the prior restraint was the threat of denying the individual, if indicted later, a fair trial and concern over the confidentiality of grand jury proceedings. The court noted:

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[15] 22 M.L.R. 1702

[16] In Re The Charlotte Observer (a Division of the Knight Publishing Co. and Harold Publishing Co.), petitioner. 921 F.2d 47, 18 M.L.R. 1365 (CCA 4th, 1990).

> The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights . . .
>
> A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time.[17]

The court further noted that "the cat was out of the bag" with respect to the name of the attorney. In that regard, its observation is equally relevant to the present situation.[18]

In Shelby County in 1996, a criminal court proceeding was preparing to be conducted. The names of nine prosecution witnesses were identified. It was alleged that the prosecution had attempted to contact additional witnesses who had fled due to fear. It was alleged that the publishing of a particular name of a particular potential witness might frighten other witnesses and keep them from testifying. The Court of Criminal Appeals for the Western Section dismissed the arguments and refused to sustain a prior restraint, forbidding the publication of the name of the witness.[19]

> The First Amendment rights of the press are always . . . of vital importance to the administration of justice . . .[20]

In 1987, Joe Hunt filed a complaint in the Supreme Court for Los Angeles County requesting a temporary restraining order and preliminary

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[17] Id. at 49.
[18] Id. at 50.
[19] State v. Montgomery, 929 S.W.2d 409, 24 M.L.R. 2172 (Tenn. Crim. App. 1996).
[20] Id. at 414.

injunction against NBC. Mr. Hunt sought the restraint of the broadcast of a program called "Billionaire Boys Club" which was a "docudrama" allegedly portraying Hunt in planning and committing a murder for which he was yet to be tried, establishing his motive, depicting his personality, activities, business affairs and other factors that further connected him to the murder, established a criminal motive, depicted planning and execution of a previous murder, and bragging to his friends about the deed which he called a "perfect crime." Predictably, Mr. Hunt averred that the docudrama would impair his right to a fair trial and, therefore, the prior restraint he sought was appropriate.[21]

The court further observed that there was no finding how the restraining order would effectively operate to prevent the threatened danger and, therefore, the denial of the prior restraint was proper.[22]

Inventor and entrepreneur John Z. DeLorean was, in 1983, awaiting trial on drug trafficking charges in the State of California. On October 22, 1983, DeLorean filed an ex parte application for a restraining order seeking to restrain CBS from "disseminating and/or broadcasting any portion of any and all government surveillance tapes generated in the investigation and prosecution of the matter entitled United States of America v. John Z. DeLorean." The District Court in which the prosecution was pending issued the restraining order. From that issuance a challenge was made. It was noted in the context of the decision that the court found the dissemination of the tapes would irreparably harm the defendant's Sixth Amendment rights to a fair

[21] Hunt v. National Broadcasting Co., Inc., 872 F.2d 289, 16 M.L.R. 1434 (CA 9th (Cal.) 1989).
[22] Id. at 294.

trial and, after permitting counsel for CBS to argue the case by telephone, issued the restraining order.[23]

In Columbia Broadcasting Systems, Inc. v. U. S. Dist. for the Cent. Dist. of California, the Ninth Circuit Court of Appeals noted at page 1177:

> The First Amendment informs us that the damage resulting from a prior restraint – even a prior restraint of the shortest duration – is extraordinarily grave . . . the burden on the [party seeking the restraint] is not reduced by the temporary nature of the restraint . . . The loss of the First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.

The court further noted that the proper review of an order challenging or restricting right of expression under the First Amendment was de novo, observing:

> A question is reviewed de novo when 'the inquiry involved . . . goes well beyond the facts of the case and requires consideration of the abstract legal principles that inform constitutional jurisprudence.'[24]

Even though it appeared in Columbia Broadcasting Systems, Inc. v. U. S. Dist. Court for the Cent. Dist. of California that the DeLorean tapes were prepared by investigating officers and furnished to the prosecution and had apparently been obtained by the defendant and then leaked to the media through some manner not in the record, there was not sufficient basis existing to restrain their publication.

> In light of these pronouncements, there may be no reason for courts ever to conclude that traditional

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[23] Columbia Broadcasting Systems, Inc. v. U. S. Dist. Court for the Cent. Dist. of California, 729 F.2d 1174, 10 M.L.R. 1529 (CA 9th (Cal.) 1984).
[24] Id. at 1179.

methods are inadequate and that the extraordinary remedy of prohibiting expression is required.[25]

The court further observes and concludes:

> We conclude by noting that under our constitutional system prior restraints, if permissible at all, are permissible only in the most extraordinary circumstances. In New York Times Company v. United States, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971), the government sought to restrain the publication of 'material whose disclosure would pose a grave and immediate danger to the security of the United States.' Id. at 741, 91 S.Ct. at 2155 (Marshall, J., concurring) (quoting Brief for the United States at 7.) Yet, the Supreme Court found that the government had failed to carry the 'heavy burden of showing justification for such a restraint.' Id. at 714, 91 S.Ct. at 2141 (Organization for a Better Austin v. Keefe, 402 U.S. 415, 419, 91 S.Ct. 1575, 1577, 29 L.Ed.2d 1 (1971)). Writing separately, Justice Brennan stated that 'only government allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to the imperiling of safety of a transport already at sea can support even the issuance of an interim restraining order.' Id. at 726-27, 91 S.Ct. at 2148 (Brennan, J., concurring). Whether a prior restraint on the reporting of a judicial proceeding will ever be able to satisfy this extraordinary standard remains to be seen. It is clear, however, that this case does not.[26]

In Gardner v. Bradenton Herald, Inc., 413 So.2d 10, 8 M.L.R. 1251 (Fla. 1982), the issue was the constitutional validity of a Florida statute making it a third degree felony for a person to publish or broadcast the name of an individual who is a party to an interception of a wire or oral communication – in other words, a wiretap. The Bradenton Herald had obtained the names of

[25] Id. at 1183.
[26] Id. at 1183, 1184.

persons who were subject to a wiretap and challenged the constitutionality of the Florida statute. The Court observed:

> In our opinion, the statute, in its present format, is an unconstitutional restraint upon the freedom of the press guaranteed by the First and Fourteenth Amendments to the United States Constitution . . . Whether we view the statute as a prior restraint or as a penal sanction for publishing lawfully obtained, truthful information is not dispositive because even the latter action requires the highest form of state interest to sustain its validity.[27]

The court further observed:

> We do not minimize the asserted state interest which could be affected by the contemplated publication.

However, the court concluded:

> Clearly, there is no meaningful way under the statute to balance the asserted overriding governmental interests allegedly inherent in the confidentiality sought here with the restraint on the First Amendment rights of the appellee newspaper. The statute as written is thus clearly unconstitutional.[28]

It is respectfully submitted that the statute in Florida is very much akin to the orders sought in this case. Both presume certain evil consequences will flow from publication. Neither have as their basis any provable, demonstrable, valid and persuasive evidentiary basis for restraint on the First Amendment.

> The First Amendment tells the government that it may not prevent the press (or other news media) from publishing the product of their investigation and reporting. These rights do not hurl the individual into conflict with the press. These rights simply limit the

[27] Id. at 11.
[28] Id. at 12.

> reach of government power over both the individual and the press . . .
>
> . . . There is no conflict between the Sixth Amendment right to a fair trial and the First Amendment right to publish information. Both constitutional rights are limitations upon government, not upon citizens.[29]

A United States District Court, upon application by a party in November, 1985, after a hearing at which both parties were present and argued, issued a temporary restraining order purporting to bar the publication of certain information obtained by a newspaper regarding the contents of F.B.I. surveillance activity pertaining to one of the individuals. The temporary restraining order was issued, but, before a hearing on the issue of whether the order should be vacated, the newspaper published a story containing information subject to the restraining order. Thereafter, the newspaper and an individual were convicted of criminal contempt and ordered to pay $100,000.00 in fines and the individual to serve 200 hours of public service. The case was appealed to the First Circuit United States Court of Appeals which struck down the contempt punishment and set forth the basis for judging conduct of this sort in the future.[30]

After an analysis of the facts, the court noted:

> . . . When, as here, the prior restraint impinges upon the rights of the press to communicate news and involves expression in the form of pure speech – speech not connected with any conduct – the presumption of unconstitutionality is virtually insurmountable.

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[29] Columbia Broadcasting Systems, Inc. v. U. S. Dist. Court for the Cent. Dist. of California, 729 F.2d 1174, 1184.
[30] Matter of Providence Journal Co., 820 F.2d 1342 (1st Cir. 1986).

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> In its nearly two centuries of existence, the Supreme Court has never upheld a prior restraint on pure speech . . . (A) prior restraint upon publication was improper absent proof that the publication will surely result in direct, immediate and irreparable damage to our Nation or its people.[31]

In Providence Journal, the court articulated a test necessary to be met before any court could even consider any type of restraint of pure speech such as the restraint sought to be imposed upon the media in this particular case. That test is:

(1) the nature and extent of the pre-trial publicity would impair the defendant's right to a fair trial; (2) there were no alternative measures which could mitigate the effects of the publicity; and (3) a prior restraint would effectively prevent the harm.[32]

> . . . a party seeking a prior restraint against the press must show not only that publication will result in damage to a near sacred right, but also that the prior restraint will be effective and that no less extreme measures are available.
>
> ***
>
> Absent the most compelling circumstances, when that approach results in a prior restraint on pure speech by the press, it is not allowed.
>
> It must be said, it is misleading in the context of daily newspaper publishing to argue that a temporary restraining order merely preserves the status quo. The status quo of daily newspapers is to publish news promptly that editors decide to publish. A restraining

[31] Id. at 1348, 1349.
[32] Id. at 1349.

> order disturbs the status quo and impinges on the exercise of editorial discretion.
>
> ***
>
> When, as here, the court order is a transparently invalid prior restraint on pure speech, the delay and expense of an appeal is unnecessary. Prior restraints on pure speech represent an unusual class of orders because they are presumptively unconstitutional.[33] (emphasis supplied)

A similar result was reached in a Sixth Circuit United States Court of Appeals decision decided in March, 1996.[34] In that litigation, Business Week Magazine had obtained information relating to the contents of documents placed under seal in litigation between Proctor & Gamble and Bankers Trust Company.[35] Speaking through Chief Judge Merritt, the Court of Appeals addressed the issue of the temporary restraining order which had been entered by the district court against Business Week. Following the precedent of Providence Journal, the court observed:

> . . . Where the freedom of the press is concerned, however, the status quo is to publish the news promptly that editors decide to publish. A restraining order disturbs the status quo and impinges on the exercise of editorial discretion . . . Rather than having no effect, a prior restraint, by . . . definition, has an immediate and irreversible sanction.[36]

The court then next addressed the nature of the inquiry which any trial court must conduct before considering a restrictive order.

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[33] Id. at 1351, 1352, 1353.
[34] Proctor & Gamble Co. v. Bankers Trust Co., 78 F.3d 219 (6th Cir. 1996).
[35] Id. at 221.
[36] Id. at 226.

> . . . In the case of prior restraint on pure speech, the hurdle is substantially higher: *publication must threaten an interest more fundamental than the First Amendment itself.* Indeed, the Supreme Court has never upheld a prior restraint, even faced with the competing interest of national security or the Sixth Amendment right to a fair trial. (emphasis supplied)[37]

As Mr. Justice Black observed in New York Times Co. v. United States,[38] any system of prior restraints comes to the court bearing a heavy presumption against constitutional validity.[39] This case involved the now famous Pentagon Papers issue which further involved the publication by the newspaper of allegedly classified information obtained by the newspaper involving interests of national security and foreign policy. Newspapers had been enjoined by the trial court at the request of the United States. The Supreme Court struck down the restraining orders and vacated them and, speaking through Mr. Justice Black, observed:

> Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.
>
> The press was to serve the governed, not the governors. The government's power to censor the press was abolished so that the press would remain forever free to censure the government. The press was protected so that it could bare the secrets of government and inform the people.
>
> No one can read the history of the adoption of the First Amendment without being convinced beyond any doubt that it was injunctions like those sought here

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[37] Id. at 226, 227.
[38] 403 U.S. 714, 91 S.Ct. 2140 (1971).
[39] Id., 91 S.Ct. 2140, 2141.

> that Madison and his collaborators intended to outlaw in this nation for all time.[40]

Mr. Justice Brennan, supporting the decision of the court, after careful consideration of the issues noted:

> The error that has pervaded these cases from the outset was the granting of any injunctive relief whatsoever, interim or otherwise . . . But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result.[41]

SECTION FOUR:

DEVELOPMENT OF THE LAW FORBIDDING PRIOR RESTRAINTS BY PROVIDING SPECIFIC EXAMPLES

Several cases from the continuing succession of opinions of the United States Supreme Court which followed New York Times Company v. United States are examined because they provide guidance to courts and parties in determining the treatment that will be given by the courts to restrictive orders and statutes in certain specific situations analogous to the one at bar.

A Georgia statute forbidding identification of a rape victim by publication or broadcast provided a basis for an attempted lawsuit against a broadcasting station which, apparently in violation of the statute, broadcast the name of a rape victim during the trial of one of the alleged perpetrators.[42] The identity of the rape victim was made known to the reporter as a result of

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[40] Id., 91 S.Ct. at 2142, 2143, 2144.
[41] Id., 91 S.Ct. at 2147-2148.
[42] Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 43 L.Ed.2d 328, 95 S.Ct. 1029 (1975).

an examination of indictments which were available in the courtroom during the trial. The issue before the court was articulated as being:

> . . . whether the state may impose sanctions on the accurate publication of the name of a rape victim obtained from public records.[43]

The court observed that, without information provided by the press, most persons would be unable to vote intelligently or to form opinions on the administration of the government generally, and specifically with regard to judicial proceedings, the court noted:

> . . . the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.[44]

Under the circumstances of that case, the court found that the protection of the freedom of the press provided by the First and Fourteenth Amendments barred any imposition of liability upon the broadcaster as a result of the application of the Georgia statute.

A pre-trial order was entered in Oklahoma state court enjoining members of the news media from publishing, broadcasting or disseminating in any manner the name or picture of a minor child in connection with a juvenile proceeding in which the child was accused of fatally shooting an adult. The Supreme Court, in a per curiam opinion, found the order to be in violation of the protections of the First and Fourteenth Amendments afforded the press.[45]

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[43] 95 S.Ct. 1029, 1044.
[44] 95 S.Ct. 1029, 1044, 1045.
[45] Okl. Pub. Co. v. Dist. Court In & For Oklahoma Cty., 480 U.S. 308, 51 L.Ed.2d 355, 97 S.Ct. 1045 (1977).

In 1979, the Supreme Court of the United States granted certiorari to consider whether a West Virginia statute making it a crime for a newspaper to publish, without written approval of a juvenile court, the name of any youth charged as a juvenile offender was in violation of the First and Fourteenth Amendments to the United States Constitution. The statute provided that "the name of any child in connection with any proceedings under this chapter should not be published in any newspaper without a written order of the court."[46]

The Daily Mail, a West Virginia newspaper, as a result of monitoring police radio frequencies and a crime scene investigation which was a junior high school, determined the name of the alleged juvenile claimed to have murdered a fellow juvenile at the school. The newspaper, knowing the existence of the statute forbidding the publication of the juvenile's name without a court order, published an article identifying the juvenile defendant. The newspaper was indicted for violating the statute. The Daily Mail, in its petition for certiorari to the United States Supreme Court, argued that the statutory requirement that the court approve the publication of the juvenile's name prior to publication was a prior restraint and, as such, unconstitutional.[47]

Speaking through Chief Justice Burger, the United States Supreme Court observed:

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[46] Smith v. Daily Mail Publishing Co., 443 U.S. 97, 61 L.Ed.2d 399, 99 S.Ct. 2667, 2668 (1979).
[47] 99 S.Ct. 2667, 2669.

> Whether we view the statute as a prior restraint or as a penal sanction for publishing lawfully obtained, truthful information is not dispositive because even the latter action requires the highest form of state interest to sustain its validity. Prior restraints have been accorded the most exacting scrutiny in previous cases.
>
> Here respondents relied upon routine newspaper reporting techniques to ascertain the identity of the alleged assailant. A free press cannot be made to rely solely upon the sufferance of government to supply it with information . . . If the information is lawfully obtained, as it was here, the state may not punish its publication except when necessary to further an interest more substantial than is present here.[48]

A Florida statute made it unlawful to print, publish or broadcast, in any instrument of mass communication, the name of a victim of a sexual offense. The Florida Star was a weekly newspaper published in Jacksonville, Florida. A regular feature in the paper was a section entitled "Police Reports." An individual reported to police in routine form that she had been robbed and sexually assaulted. The incident report identified her by name and was then placed in the press room of the sheriff's department. A reporter went to the press room and copied the report verbatim including the victim's name.

The article, under the "Police Reports" section, described the crime and named the victim. In a civil action, based upon the statutory violation considered to be negligence per se in Florida at that time, the court directed a verdict against the newspaper on liability and damages. In reversing the judgment, the Florida Supreme Court observed that where information is entrusted to the government, a less drastic means than punishing truthful

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[48] 99 S.Ct. 2667, 2670, 2671.

publication almost always exists for guarding against the dissemination of private facts.

> A third and final consideration is the "timidity and self censorship" which may result from allowing the media to be punished for broadcasting certain truthful information . . . Cox Broadcasting noted this concern with over-deterrence in the context of information made public through official records, but the fear of excessive media self-suppression is applicable as well to other information released, without qualification, by the government.[49]

The court further noted that where the government has made certain information publicly available, it is highly anomalous to sanction persons other than the source of the release. As observed in United States v. Noriega:

> Notwithstanding the district court's broad discretion to balance First Amendment interests with a criminal defendant's Sixth Amendment right to a fair trial, a conclusory representation that publicity might hamper a defendant's right to a fair trial is insufficient to overcome the protections of the First Amendment . . . Before a prior restraint may be imposed by a judge, even in the interest of assuring a fair trial, there must be 'an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.[50]

An order enjoining the identification of a juvenile who was subject to criminal prosecution in juvenile court was found to violate the First and Fourteenth Amendments in KGTV Channel 10 v. Superior Court, 26 Cal.App. 4th 1673, 32 Cal.Rptr.2d 181 (1994).

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[49] The Florida Star v. B.J.F., 491 U.S. 524, 105 L.Ed.2d 443, 109 S.Ct. 2603 (1989).
[50] 917 F.2d 1543, 1549 (C.A. 11th) (Fla. 1990).

A candidate for public office alleged that their federal civil rights and privacy were violated by a newspaper which allegedly engaged in the outrageous conduct of disseminating by publication information about a previous criminal proceeding to which the candidate was a party, but which had previously been ordered expunged.[51]

The Tennessee Court of Appeals, Western Section, in Fann, observed:

> Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts . . .
>
> We hold that *The Review Appeal*'s receipt of the information, including the expunged material, was not unlawful. As will be addressed more thoroughly in a separate part of this opinion, Tennessee also has not taken steps to proscribe the 'receipt' of this type of information. Tennessee's expungement statute speaks only in terms of its 'release.' We further hold that the newspaper articles clearly concerned 'a matter of public significance' as the truthful information concerned a candidate for public office. Nor do we find a need to further a state interest of the highest order by sanctioning *The Review Appeal* for its receipt and subsequent publication of this information. As held in *Florida Star*, any punishment imposed on a newspaper for publishing truthful information lawfully obtained must be narrowly tailored to a state interest of the highest order . . . where the government fails to police itself in disseminating information, the imposition of damages against the press for the subsequent publication is not a narrowly tailored means of safeguarding anonymity.[52]

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[51] Fann v. City of Fairview, 905 S.W.2d 167, 172 (Tenn. App. 1994).
[52] Id. at 172.

SECTION FIVE:

CONSIDERATION OF TENNESSEE CONSTITUTIONAL AND JUDICIAL PRECEDENT OPPOSING THE ORDERS OF THE COURT RESTRICTING CAMERAS, VIDEOTAPING AND PHOTOGRAPHING THE DEFENDANTS

Three Tennessee constitutional provisions arguably bear on the issue of the right or propriety of the broadcasting and photographing of judicial proceedings.

No person in Tennessee shall be deprived of any liberties or privileges except pursuant to the law of the land.[53]

All courts in Tennessee shall be open and every person shall have remedy by due course of law and right and justice administered without denial or delay.[54]

> That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, right, and print on any subject, being responsible for the abuse of that liberty . . .[55]

In 1985, the Tennessee Supreme Court recognized a presumption of openness in criminal proceedings.[56] Following the language of the United States Supreme Court in Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 104 S.Ct. 819 (1984), the Tennessee Supreme Court noted that any party seeking to close a trial must demonstrate the following:

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[53] Tenn. CONST., Art. I, §8.
[54] Tenn. CONST., Art. I, §17.
[55] Tenn. CONST., Art. I, §19.
[56] State v. Drake, 701 S.W.2d 604 (1985).

1. an overriding interest likely to be prejudiced;

2. the closure must be no broader than necessary to protect that interest;

3. the trial court must consider reasonable alternatives to closure; and

4. the trial court must make findings adequate to support that closure.[57]

Before a motion for closure can be granted, it must be made in writing, given an expedited hearing by the judge, be on file for a period of at least three days before the hearing, and interested members of the public and media may intervene and be heard in opposition to it.[58]

The recognition of a presumptive right of openness in judicial proceedings lends credence to an argument that where the public has a right to go, the media has a right to follow, photograph and broadcast.

Attorney General Charles W. Burson considered an ordinance proposed by the City of Bells, Tennessee, which would have made it unlawful for anyone to bring video or photographic equipment into an official meeting of the mayor and board of aldermen or from taking photographs of anyone in the room during such a meeting. After first deciding that the ordinance and its prohibitions against the use of cameras in the meetings was valid,[59] the Attorney General revised and reconsidered his opinion, finding that the blanket ban contained in the proposed ordinance on bringing video or photographic equipment into official meetings as well as the prohibition against taking

[57] State v. Drake, 701 S.W.2d 604, 608.
[58] State v. Drake, supra, at 608; see also State v. James, 902 S.W.2d 911 (1995).
[59] Opinion No. 95-101, October 2, 1995.

photographs of anyone at the meetings, violated Article I, §19 of the Tennessee Constitution and T.C.A. §8-44-101, et seq., because the breadth of the proposed total ban extended well beyond that which is reasonably related to the city's legitimate interests.[60]

Prior to January 1, 1996, broadcasting, televising and recording or photographing court proceedings were authorized in Tennessee on at least a limited basis.[61] The Supreme Court, in adopting Rule 10, authorized broadcasting, televising and recording of proceedings before it and further allowed appellate and trial courts to permit, "in the exercise of sound discretion," the broadcasting, televising, recording or taking of photographs in a courtroom during judicial hearings or trials so long as those activities were conducted pursuant to guidelines containing safeguards ensuring that broadcasting, photographing, recording or televising shall not detract from the dignity of the court proceedings or otherwise interfere with a fair and impartial hearing.[62]

Requests for media coverage were required to be made by media representatives in writing to the presiding judge at least seven working days before the scheduled beginning of the trial or other proceeding.[63] Before any broadcasting, televising or photographing of criminal proceedings could take

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[60] Opinion No. 95-126, December 28, 1995.
[61] Rule 10, Rules of the Supreme Court, Canon 3(7)(A).
[62] Rule 10, Canon 3(7)(B)(C).
[63] Rule 10, Rules of Supreme Court, Canon 3, proposed media guidelines A(2).

place, however, the accused individual was required to have given written consent to such activities.[64]

The trial judge was also required to notify witnesses, jurors, parties and attorneys that they had a right to object to media coverage and the court was required to terminate any such coverage whenever a witness or the parent or guardian of a minor witness or a juror, party or attorney expressly objected to the coverage. Objections by a juror or a witness served only to suspend the coverage as to that individual.[65]

On December 14, 1995, an order was filed by the Supreme Court of Tennessee relating to Rule 30 regarding media coverage. The order provided that Rule 30 would "generally authorize media coverage including television."[66] In its order, the Supreme Court noted that comments it had received from the public at large, members of the bar, the media and the judiciary indicated differences of opinion about the desirability of a general authorization of coverage. The court noted that those who opposed the proposed rule argued that television coverage was disruptive, had a negative impact upon participants, and jeopardized the fair administration of justice. The court also noted that those arguing in favor of the Rule argued that criticisms were shown to be unfounded in the light of experimentation or actual experience and that 47 other states had rules similar to the one being proposed for Tennessee. The

[64] Rule 10, Canon 3(7)(C)(ii).
[65] Rule 10, Canon 3(7)(C)(iii).
[66] In re: Media Coverage – Supreme Court Rule 30, Order of December 14, 1995.

court also noted that coverage of actual court proceedings is arguably vital to a citizen's understanding and the accountability of the justice system.

> This court is convinced that it is in the best interests of the public to be fully and accurately informed of the operation of the judicial system, and that this interest can be compatible with the fair administration of justice. We are cognizant of the successful experience of other states with media coverage rules similar to what we have proposed. We have, however, determined that this proposed rule should be tested through actual experience in Tennessee.[67]

Accordingly, Rule 30 was adopted for a trial period beginning January 1, 1996, and ending December 31, 1996.[68]

Rule 30 differs significantly from Rule 10 which it supplanted. Under Rule 30, media coverage of public judicial proceedings in appellate and trial courts "shall be allowed" subject to the authority of the presiding judge to control the conduct of the proceedings; maintain decorum and prevent distractions; guarantee the safety of a party, witness or juror; and ensure the fair and impartial administration of justice.[69] Rule 30 is now a permanent fixture of the Rules of the Supreme Court of Tennessee and has been frequently invoked to permit media coverage of trials.[70]

To date, research has disclosed five appellate court decisions relating to the application and applicability of Rule 30. The first decision was that of State v. Morrow, 1996 WL 170679 (Tenn. Crim. App.). The Morrow case

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[67] Order of Supreme Court, December 14, 1995, p. 2.
[68] Order of Supreme Court, December 14, 1995, p. 2.
[69] Supreme Court, Rule 30A(1).
[70] Supreme Court, Rule 30, December 14, 1995; amended by Order entered December 30, 1996; amended by Order entered December 6, 1999.

involved the trial of three individuals accused of shooting another amid allegations of provocation by the display of a Confederate battle flag. The defendants were African American. The victim was white. The focus of the Rule 30 appeal was upon an order of the trial judge permitting still photographs in the courtroom during the trial, but excluding television cameras from the courtroom during the trial. The order was entered without an evidentiary hearing.[71] No evidence was introduced by any participant in the proceedings indicating that the presence of television cameras would distract participants, create a disturbance or compromise anyone's safety.[72]

The court found that the order of the trial court violated Rule 30.[73]

> . . . We are persuaded, as noted earlier, that Tennessee Supreme Court Rule 30 creates a presumption in favor of in-court media coverage, including the presence of television cameras, in accordance with the procedures set forth in the Rule . . . Given the presumption in favor of media coverage of judicial proceedings, any finding that such coverage should be denied, limited, suspended, or terminated must be supported by *substantial* evidence that at least one of the four interests in Rules 30A(1) and 30D(2) is of concern in the case before the court and that the order excluding or limiting, etc., is necessary to adequately reach an accommodation of the interest involved.
>
> The evidence should be produced at an evidentiary hearing, if such a hearing will not disrupt or delay the principle proceedings before the court. In the event that an evidentiary hearing is not possible, affidavits may be used. The burden of proof in producing this evidence is on the party seeking limits on media coverage . . . The presiding judge may take into

[71] State v. Morrow, supra, p. 4.
[72] State v. Morrow, supra, p. 5.
[73] State v. Morrow, supra, pp. 8, 9.

account matters that are properly the subject of judicial notice.[74]

In State v. Morrow, the court, following arguments by the attorneys for the participants, was of the opinion that, because of the emotionally charged nature of the case and intense pre-trial publicity, the presence of television cameras in the courtroom might compromise the safety of witnesses, defendants, family members of the victim, and attorneys, and also expressed a concern that testimony might be affected by the presence of the television cameras. This was the rationale of the court for the entry of the order which the Court of Criminal Appeals held to be a violation of Rule 30. Citing with approval the case of State ex rel. Cosmos Broadcasting v. Brown, 471 N.E.2d 874, 882 (Ohio App. 1984), the court observed:

> A judge's personal experience with in-court media coverage, extensive publicity surrounding the case, or a conclusory finding that in-court media coverage might interfere with a defendant's right to a fair trial, are not sufficient reasons to support a decision to exclude media coverage from the courtroom.[75]

Referring to the Florida case of State v. Palm Beach Newspapers, Inc., 395 So.2d 544 (Fla. 1981), the court observed:

> In any event, general effects resulting from public notoriety of a case are insufficient to warrant exclusion of the media, including the electronic media, from the courtroom.[76]

The Morrow Court concluded by observing:

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[74] State v. Morrow, supra, pp. 13, 14.
[75] State v. Morrow, supra, p. 4.
[76] State v. Morrow, supra, p. 4.

> In the present case, the record before this court reflects only general statements of counsel and the trial judge about the presence of television cameras in the courtroom. There is no evidence to substantiate the fears expressed concerning the safety of witnesses in the case, nor is there any proof that television cameras would result in unacceptable distractions. It therefore appears that the trial court abused its discretion in excluding television cameras from the criminal trial in this matter.[77]

The Court of Criminal Appeals subsequently reviewed another order of a trial court restricting media coverage of a capital criminal trial in a case known as the "Taco Bell" murders. In this case, the defendant was charged with four counts of murder. The defendant had objected to cameras, whether television or still, in the courtroom. An evidentiary hearing was held where the defendant presented witnesses. However, the court entered an order permitting television cameras with restrictions and approved the plan submitted by print and electronic media regarding camera use behind a screen including still cameras. The orders of the court were affirmed despite continued objections by the criminal defendant.[78] The court rejected the defense argument that Rule 30 by implication excluded capital cases from its provision and recognized that the trial court understood the thrust of Rule 30 presumptively entitling the media to in-court camera coverage:

> The defendant argues that Rule 30 implicitly contains an exclusion of capital cases from its provisions. We decline to read Rule 30 in such a manner. It is obvious that such cases carry with them the highest degree of public and media interest and are thus likely

[77] State v. Morrow, supra, p. 5.
[78] State v. Matthews, 1996 WL, 269465 (Tenn. Crim. App.)

> to be the very proceedings for which Rule 30 will most often be invoked . . .
>
> We find that the court was cognizant of *Morrow's* holding that Rule 30 presumptively entitles the media to in-court camera coverage.[79]

The issue of cameras in the courtroom and trial coverage by television media was raised as a grounds for reversal of the criminal capital murder conviction of Christa Gail Pike in 1998. The Supreme Court of Tennessee, in its opinion handed down on October 5th of that year, observed:

> Although the defendant in this case contends that the media coverage 'arguably affected the witness testimony and was generally disruptive of the proceedings,' she does not cite to any specific portion of the record, nor offer specific reasons as to the ways in which the testimony was affected or the proceedings disrupted. . . . Clearly, a presiding judge's decision to deny a motion to preclude or limit media coverage is not error in the absence of proof that media coverage will compromise one of the important interests set forth in Sections (A)(1) and (D)(2) of Rule 30. . . . Moreover, the defendant has failed to demonstrate that the media coverage of the pre-trial and trial proceedings in this case impinged upon her right to a fair trial. . . . claim would have failed because he had not demonstrated either that the presence of cameras impaired the jurors' ability to decide the case on the evidence alone, or that the trial was adversely affected by the impact of the media coverage on one or more of the participants. (citing State v. Harries, 657 S.W.2d 414 (Tenn. 1983).[80]

More recently, Rule 30 came into focus during the appeal by a criminal defendant of his convictions for first degree felony murder and

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[79] State v. Matthews, supra, p. 2.
[80] State v. Pike, 978 S.W.2d 904, 917 (Tenn. 1998).

conspiracy to commit aggravated robbery.[81] The allegations of the defendant included contentions that the trial court erred in allowing members of the television media to broadcast a video of the defendant trying on a jacket allegedly used in the commission of the crime and thereafter failing to sequester the jury when requested to do so. The jury had not been initially sequestered in the case. At the beginning of trial, the defendant objected to the presence of television cameras in the courtroom. The court held that a lack of sequestration was not a sufficient reason to deny video access under Rule 30 and the court provided specific instructions to the jury about not watching local television news broadcasts. These instructions were repeated at the close of each day's proceedings.[82]

The defendant Cooper, apparently without counsel's prior knowledge, picked up and put on the jacket which had been previously introduced as an exhibit while television cameras were running. When counsel realized this had occurred, he moved to suppress the video or, in the alternative, to sequester the jury. The trial court denied the motion to suppress and, at the end of each day, again instructed jurors not to watch local newscasts or read local newspapers.[83]

The court, in Cooper, addressed the contention by the defendant that the televising of the jacket incident influenced the jury in the following language:

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[81] State v. Cooper. 1998 WL 573409 (Tenn. Crim. App.).
[82] State v. Cooper, supra, p. 3.
[83] State v. Cooper, supra, p. 3.

> . . . defendant has not shown either actual impropriety or any prejudice. There is no proof in this record that the videotape of the defendant's action was ever broadcast publicly. Statements of an attorney do not constitute testimony, and no independent proof of broadcasts was offered. Additionally, the judge properly questioned the jurors about media exposure as soon as the issue was raised at trial. He received a negative response from each juror. He instructed them properly about their obligations. Absent evidence to the contrary, a jury is presumed to have followed the judge's instructions. . . . This issue is without merit.[84]

The United States Supreme Court has noted that, historically, both civil and criminal trials have been presumptively open. In order for any proceeding to be closed, the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced. This has not been shown with any degree of particularity in this case.[85]

In Jowers, the Supreme Court ruled that Memphis Publishing Company was entitled to the transcript of the voir dire examination and voir dire proceedings of a civil jury selection in a Shelby County Circuit Court trial wherein the family of Dr. Martin Luther King, Jr. was seeking damages from some of those persons allegedly responsible for his murder.

From the foregoing examination of the development of the law concerning media access pursuant to Rule 30 in Tennessee, it is abundantly clear that conclusory allegations, vague concerns, generalized statements, and blanket derogation of the media generally is not sufficient, as a matter of law, to justify any prior restraint.

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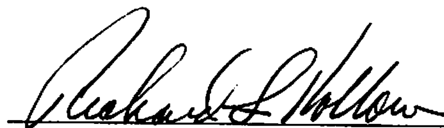
[84] State v. Cooper, supra, p. 4.
[85] King v. Jowers, 12 S.W.3d 410 (S. Ct. Tenn. 1999).

> It has long been established that what occurs in a public courtroom constitutes public property. Equally well-established is that a court does not have special rights which enables it, as distinguished from other institutions of democratic government, to suppress . . . or censor events which transpire [in public] proceedings before it. Thus, those who see and hear what transpired in open court can report it with impunity. . . . The United States Supreme Court has reiterated what it said in Craig on numerous occasions; when there is an open, public trial, the media has an absolute right to publish any information that is disseminated during the course of the trial.[86]

CONCLUSION

As the authorities discussed amply demonstrate, there exists no basis in law or fact to justify the sweeping breadth of the Orders sought by the two pending Motions. To grant the same would result in the Court exceeding all permissible constitutional authority.

Respectfully submitted, this the 27th day of February, 2009.



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[86] State v. Montgomery, 929 S.W.2d 409, 412 (Tenn. Crim. App. 1996).

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing Memorandum, Citations of Authority and Argument in Support of Motion for Leave to Intervene and Oppose Two Orders Seeking Restrictions Upon Media Publication has been served upon all parties of record, through counsel, by hand delivery, this 27th day of February, 2009.

Richard L. Hollow