ORIGINAL

In the

Supreme Court of the United States

Nebraska Press Association, Et Al.,

Petitioners,

v.

Hugh Stuart, Judge, District Court
Of Lincoln County, Nebraska, Et Al.,

Respondents.

No. 75-817 C/1

Washington, D. C.
April 19, 1976

Pages 1 thru 72

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IN THE SUPREME COURT OF THE UNITED STATES

NEBRASKA PRESS ASSOCIATION, ET AL., Petitioners,	:	
v.	:	No. 75-817
HUGH STUART, JUDGE, DISTRICT COURT OF LINCOLN COUNTY, NEBRASKA, ET AL., Respondents.	:	

Washington, D. C.,

Monday, April 19, 1976.

The above-entitled matter came on for argument at 1:00 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

E. BARRETT PRETTYMAN, JR., ESQ., Hogan & Hartson, 815 Connecticut Avenue, N. W., Washington, D. C.; on behalf of Petitioners.

FLOYD ABRAMS, ESQ., Cahill, Gordon & Reindel, 80 Pine Street, New York, N. Y. 10005; on behalf of NBC, et al., as amici curiae.

APPEARANCES (continued):

HAROLD MOSHER, ESQ., Assistant Attorney General, State of Nebraska, 2115 State Capitol, Lincoln, Nebraska 68509; on behalf of Respondent Stuart.

MILTON R. LARSON, ESQ., Lincoln County Attorney, North Platte, Nebraska 69101; on behalf of Respondent State of Nebraska.

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-817, Nebraska Press Association v. Stuart.

Mr. Prettyman, you may proceed whenever you are ready.

ORAL ARGUMENT OF E. BARRETT PRETTYMAN, JR., ESQ.,
ON BEHALF OF PETITIONERS

MR. PRETTYMAN: Thank you, Mr. Chief Justice, and may it please the Court: I am E. Barrett Prettyman, Jr., and I represent a group of newspapers, press and broadcasting associations, UP, AP, Sigma Delta Chi Chapter, and several individual journalists. Mr. Floyd Abrams, who is with me, representing certain amici, will also argue for a reversal of this case.

The basic question before the Court is whether it is permissible under the First Amendment for a court to issue a direct prior restraint against the press, prohibiting in advance of publication the reporting of information revealed in public court proceedings, in public court records and from other sources about pending judicial proceedings.

The case arose out of multiple murders.

QUESTION: Was it at the time prior to the case you are arguing, Mr. Prettyman?

MR. PRETTYMAN: I certainly think that under any definition, Your Honor, it applies here, and that is in this

case at least, it is an order not to print certain information in advance of that information being printed.

This case, as I said, arose out of multiple murders in Lincoln County, Nebraska back in October of '75. The suspect, Erwin Simants, was arrested the following morning, which was a Sunday, and on Monday and Tuesday, as would be normally expected, a number of stories, factual in nature, appeared in the local media. They told about his arrest, they mentioned that the Lincoln County Attorney had said that Mr. Simants had made a statement, that the Lincoln County Attorney had said that he had a theory about the motive which would be brought out when the autopsy was completed, and it was also reported that one person had said that Simants' father had told him that Simants had told the father that he had committed the killings.

QUESTION: What are the local media in Lincoln County?

MR. PRETTYMAN: Actually, there is no newspaper in Sutherland, a small town of 800, where it occurred. The North Platte Telegraph is the nearest newspaper. There are a number of other newspapers, from Omaha and Denver and so forth, which permeat, which come into the state. There are a number of radio stations, and there are also several television stations. I think you can assume for present purposes that all the media were into the state.

QUESTION: But in Lincoln County there is no local media right in --

MR. PRETTYMAN: Not in Sutherland.

QUESTION: -- in this town?

MR. PRETTYMAN: In North Platte there is a newspaper.

QUESTION: And is North Platte the county seat?

MR. PRETTYMAN: Yes, and it is not very far away.

QUESTION: And there there is a television station --

MR. PRETTYMAN: The North Platte Telegraph.

QUESTION: -- a newspaper, and two or three radio stations?

MR. PRETTYMAN: That is my understanding, yes, sir.

On the Tuesday evening, the prosecutor, in advance of a preliminary hearing that was expected the next day, moved for a prior restraint in the county court. No evidence was admitted to back it up. The county court entered an order the following day in which it said that, because of the reasonable likelihood of prejudicial news that would make it difficult if not impossible to empanel an impartial jury, he was entering the order.

Well, it is a pretty broad order. It prohibited not only any evidence that would come forward at the preliminary hearing, but any evidence apart from the preliminary hearing except as would be allowed in certain voluntary press bar guidelines that were then in effect in Nebraska. That order

would have remained in effect even after trial.

As a result of that order, which the press chose to obey, the press could not report the following day what happened at the preliminary hearing, even though it was an open preliminary hearing. The public was there, the press was there, anybody who wanted to be could be there and could leave and go out and tell anybody he wanted to what had happened, but the press was prohibited from reporting what had occurred.

QUESTION: Under Nebraska law, Mr. Prettyman, could that have been a closed hearing, with the consent of the defendant?

MR. PRETTYMAN: We are in a strange situation as regards closed hearings there, because you have a statute which says that it has to be open, but the Nebraska Supreme Court in this case seems to interpret it in a way that seems to allow it to have been closed. Certainly the judge at the time thought that that hearing had to be open. I would argue with you in a different case that it had to be open constitutionally, but that isn't this case. There is nothing before you in regard to the closed hearing problem.

Since the Simants case was actually --

QUESTION: Well, would you agree, Mr. Prettyman, that to entertain the arguments you advance we must explore all of the alternatives to what you characterize as prior

restraint?

MR. PRETTYMAN: I think you must say that there are certainly -- I would certainly argue that there are many alternatives available. I would certainly hope that you would bank on the Sheppard type alternatives and not on closed hearings. I think a closed hearing is the handmaiden to the prior restraint. And certainly when they are used either alternatively or, even worse, hand in glove with each other, then you have really effectively stopped the complete flow of news.

QUESTION: Well, would you take the same view of an order directed at the prosecutor and the defense counsel, that they would be held in contempt if they discussed the case publicly?

MR. PRETTYMAN: Well, again, Your Honor, that is not this case and I want to stress it --

QUESTION: Yes.

MR. PRETTYMAN: -- because there is no such --

QUESTION: It is an alternative that you must rely on --

MR. PRETTYMAN: It is an alternative that was suggested in Sheppard. In a different case, I might be before you arguing that that is impermissible, but, again, it is not this case. I certainly agree that it was an alternative suggested in Sheppard.

QUESTION: Well, would it be a prior restraint if

he ordered the prosecutor not to discuss the case?

MR. PRETTYMAN: Well, it would be a prior restraint on the prosecutor. It would --

QUESTION: So would the same constitutional principles apply or not?

MR. PRETTYMAN: Oh, absolutely not, Your Honor. I should say not.

QUESTION: So just the fact that it is a prior restraint is not controlling?

MR. PRETTYMAN: In the prior restraint on the prosecutor, you have a free speech problem for the prosecutor, but you don't have the direct prior restraint on the press that you have here.

QUESTION: What I am trying to figure out is how important is the label "prior restraint"?

MR. PRETTYMAN: Well, I think insofar as this case is important, I don't know that the label means very much, but what actually occurred is of extreme importance, that is you have directly prohibited the press from publishing certain information. Now, whether you want that label or some other, that is the issue here, whether you can do that under the First Amendment.

QUESTION: Well, I take it though you would distinguish it between the prosecutor and the press --

MR. PRETTYMAN: Absolutely.

QUESTION: -- and what is a prior restraint -- what would be an illegal prior restraint for the press may not be with respect to the prosecutor may not be?

MR. PRETTYMAN: That's correct, in the next case you may have to decide that. But certainly if you are going to have prior restraints, the one that is worse, the one that affects the public the most, the most onerous one is the one that is the direct prior restraint on the press, as this Court has recognized in New York Times, Minnesota and other cases.

QUESTION: To give an example, to a degree the rules of evidence and the rules of procedure are a restraint on the lawyers who are appearing in the court room?

MR. PRETTYMAN: Sure.

QUESTION: And so --

MR. PRETTYMAN: Just as you can restrict the press in a court room, too, by not sitting inside the bar and from doing a number of things, taking pictures and from doing a number of things.

QUESTION: Or having sound equipment.

MR. PRETTYMAN: Absolutely. There is no question but that you can impose some restrictions on the press. The Court has always distinguished between those incidental restrictions and the direct prior restraint forbidding a newspaper not to publish.

QUESTION: And you say that the prior -- the case is

saying that prior restraint comes here with a heavy presumption against it, at least, at their core, they are limited to cases involving the press rather than to individuals?

MR. PRETTYMAN: Yes, I would say that, Your Honor. I don't think that you have directly applied the same standards heretofore.

QUESTION: You interpret it broadly?

MR. PRETTYMAN: Yes.

QUESTION: Interpreted broadly for the press?

MR. PRETTYMAN: Yes. I want to emphasize that the order that I have just described is not the order before you. I am going through the four orders simply to give you a feeling of the difficulty of this area because there are four orders that have been entered in this case and they are all different.

Because the trial was going to be in the District Court, the petitioners here went to the District Court and asked for him to strike the County Court order, and the District Court entered its own order, and its grounds was because of the nature of the crimes charged. He said that there was a clear and present danger that the pretrial publicity could impinge on the defendant's right to a fair trial. He also included those guidelines as part of his order, but he changed a number of items and said, for example, that we could not report the identity of persons sexually assaulted in connection with these murders. That order would have remained in effect until

after the jury was sworn.

After a number of procedural problems with which the Court is fully familiar, and it doesn't involve us now so I won't go through them, Mr. Justice Blackmun entered an order granting in part and staying in part the District Court's order. He eliminated the guidelines as being too broad and vague, and he did allow certain information to be published, but he also prohibited the publication of other items, including facts strongly implicative of the accused or facts highly prejudicial to the accused. That order was then succeeded by the fourth order, which is the one that is before you, and that order is the one of the Nebraska Supreme Court, entered on December 1, 1975. It too eliminated the guidelines, but it prohibited the publication of the existence of content of confessions or admissions against interest made by the accused to law enforcement officers or to third parties, except the press. And it also prohibited, and I quote, "other information strongly implicative of the accused as the perpetrator of the slayings," whatever that means, and we are not sure. That applied interestingly only to petitioners and not to all the other media, and it was effective only as to events which had occurred prior to the entry of the order.

As a result of all four of these orders, the press was prohibited from publishing information, most of it coming from public records and public hearings, for over eleven weeks.

The trial followed and Mr. Simants was found guilty.

Now, insofar as this Nebraska Supreme Court order prohibited the publication of news developed in an open court hearing or from open court records, I just don't think there can be any question, and I submit to you it is very clear that that is blatantly unconstitutional under Craig v. Harney and Estes v. Texas and Cox Broadcasting.

QUESTION: Mr. Prettyman, just a question of information. Mr. Simants has been convicted, has he not?

MR. PRETTYMAN: Yes, sir.

QUESTION: Has he been sentenced to death, do you know?

MR. PRETTYMAN: Yes, sir.

QUESTION: Is there an appeal in that case in the Nebrasks Supreme Court?

MR. PRETTYMAN: Yes, sir.

QUESTION: Has it been heard?

MR. PRETTYMAN: No, that is my understand, it has not.

QUESTION: So that there is a possibility that there might -- that could be heard, he might win a reversal and would have a new trial?

MR. PRETTYMAN: Correct. In which case I would assume the same order would be entered again, if this Court allowed it to do so.

QUESTION: I suppose the first trial, once the jury

was empaneled and sworn, it was sequestered?

MR. PRETTYMAN: It was.

QUESTION: The first trial, I suppose, was fully reported by the news media, was it not?

MR. PRETTYMAN: That is correct.

QUESTION: So if there is a new trial, the community has been apprised of everything at least that came out in open court?

MR. PRETTYMAN: As a matter of fact, in this small community, that community was apprised of everything about this event, with or without the media. The gossip and rumors are clearly indicated in the newspapers and in the record.

QUESTION: Why is this a live case, Mr. Prettyman? The orders have expired?

MR. PRETTYMAN: It has expired. I would assume that you have already made the decision that this is not a moot case, because if you recall we moved the Court prior to the expiration of the order for an expedited hearing, we offered to have briefs to you in typewritten form the next day, and --

QUESTION: I am accepting your offer now.

MR. PRETTYMAN: Sir, that issue, I assume, you have already passed on, because --

QUESTION: Well, just briefly, why do you think in a nutshell this is still a live case?

MR. PRETTYMAN: I think it is a live case because, not

only for the reason mentioned by Mr. Blackmun that this order could be entered again in regards to this very person, but that orders are coming down from all over the country. We have had eleven of them in the last six months, and this is a problem which is typically under your decisions of such short duration that unless you are going to take these and face these and rule on them now, they are just going to continue and they will expire before you can take one that is alive. I think it is not only capable of repetition but it is being repeated every day. We just had one the other day in Nebraska.

QUESTION: Well, I think in Size Nine and Weinstein v. Bradford, which was a per curiam that came down a couple of months ago, we made it rather clear that they are capable of repetition but evading review standard applied to these particular litigants, not just to the issue in general.

MR. PRETTYMAN: Well, I think you have done that, Your Honor, and in response to that I would simply say that in Carroll, that case was moot, and in Jarbone, in the Third Circuit, that case was moot, and yet the Court nevertheless took it and decided it, and I would assume it did so on two grounds -- and Judge Gesell, incidentally, also did it after the firing of Mr. Cox -- and it did it on two grounds. One was that it could actually apply to the parties in the same sense that Mr. Justice Blackmun just pointed out, but also that the issue was of such moment and was occurring again in other situations and

was otherwise so incapable of being decided quickly that it was necessary for the Court to hear it.

QUESTION: Just kind of an exception to Article III then?

MR. PRETTYMAN: It is a kind of exception, yes, sir.

QUESTION: Mr. Prettyman, suppose hypothetically -- and I emphasize hypothetically -- it was possible that the case might come here and be reversed with the Sheppard case treatment --

MR. PRETTYMAN: Yes.

QUESTION: -- even after we decided this case?

MR. PRETTYMAN: I'm sorry, I didn't get the purport of the question.

QUESTION: Even after we've decided this case, suppose we decided it in your favor --

MR. PRETTYMAN: Yes, you decide that prior restraint is impermissible.

QUESTION: -- and then his case comes up here, hypothetically and theoretically we could reverse on the ground that there was excessive publicity.

MR. PRETTYMAN: You certainly could, but I would be very surprised because I don't see how the publicity in this case could conceivably be called excessive. It was very factual and it was limited, but it is perfectly possible that you could take the case and reverse it on that ground, yes, sir.

QUESTION: Well, the bottom line is that if we hold that he might be retried, that is enough to keep it alive, you don't have to push the other point, do you?

MR. PRETTYMAN: That's right, sure. I emphasize that insofar as the order prohibited what occurred in open court, it seems to me you have already ruled on it and you have said that is impermissible. But this order went further, as I have said, and would keep us from talking to people and finding out things about this judicial proceeding, and therefore I have to go further. And I think in order to make the point, let me give you a hypothetical, because it seems to me that the fact that this is the press somehow is giving the courts a strange impression that you can enter these orders that they wouldn't do under other circumstances.

Let us just suppose for a moment that every minister, priest and rabbi in Lincoln County had gotten -- every one of them had gotten together a couple of weeks before this gentleman's trial and they had decided that Mr. Simants was the embodiment of the devil and that they were going to have to do something about him, were going to make him a symbol, and that they were going to get together on Sunday and Saturday in their pulpits and they were going to reveal his confession, they were going to reveal the sexual nature of his crimes, they were going to condemn him as guilty, and they were going to ask for the death penalty.

And in order for me to make my point, if you will assume with me that all of the overwhelming majority of the people in Lincoln County went to their churches and synagogues that next Sunday, is there any question but that this Court would sanction a prior restraint on the giving of those sermons? I don't think any judge would say that you can enjoin those people from getting up in their pulpits and talking about his confession. And it somehow doesn't seem so bad to the courts, at least that is what is going on around the country, when they do it in regard to the press. And yet, as you pointed out, Mr. Justice Stewart, in your Yale speech, the press is the one private organization that is carged out and mentioned specifically as entitled to protection under the First Amendment.

QUESTION: What if the president of the Lincoln County Bar Association had done what your hypothetical calls for the priests, rabbis and pastors doing, had a meeting of the Lincoln County Bar Association?

MR. PRETTYMAN: I think that then they might possibly have been held in contempt after the event. They certainly would have been called up under the canons of ethics, but that no prior restraint could possibly have been entered.

QUESTION: Mr. Prettyman, what if your ministers had also agreed that they would advocate lynching the man, could a prior restraint be permitted then?

MR. PRETTYMAN: I do not believe so, no, sir.

QUESTION: Well, how is the president of the Lincoln County Bar Association any better off if he is called up on contempt and fined $500 than if he is preliminarily enjoined, cited for contempted when he makes the speech and fined $500 for civil contempt?

MR. PRETTYMAN: Well, Your Honor, the difference between prior restraint and a contempt after the event has just been made so clear through all of your opinions. The prior restraint, in the first place, people tend to obey them and therefore it directly prohibits the doing of the event. In the second place, if he is going to be held for contempt, he can contest the order itself. He can even get a jury trial. He can contest the contempt order. But in a prior restraint, you can't do it. If the prior restraint is entered, you then must obey it under the law as it now stands until it is reversed on appeal. And if you go in and try to attack the order, the only defense is that you didn't violate it, that you can't attack the order itself. So there is a great difference between the two situations, certainly in terms of impact.

We say that the assumption that someone who hears about a case, even an alleged confession, the fact that he can't be impartial or, if he is partial, that he can't be weeded out during the voir dire is simply unsupported. In fact, it is directly refuted by statutes in Nebraska and

elsewhere which we have cited in our reply brief which allow jurors to sit even if they have formed opinions of guilt from reading newspapers, so long as the judge is satisfied that that jury is impartial. The courts have made it clear, from United States v. Burr in 1807 all down through Irvin v. Dowd and Reynolds and Murphy v. Florida, that a juror can give an impartial verdict even if he has some preconceived notion as to guilt. And if we need any examl es of that, we have certainly had them recently with Cally, Chapin, Mitchell, Connally, Liddy, all of whom stand, it seems to me, as irrefutable proof that even all pervasive publicity does not necessarily result in an unfair trial.

We trust our juries in so many ways. We sit there and tell them, look, don't listen to the confession given by your co-defendant, it doesn't apply to you, and we give them these instructions and we trust them and we expect them to do their job, and Nebraska is not willing to conceive that with proper voir dire and proper constructions that you can't find twelve people who are going to try to give this man an impartial and fair verdict.

There are ample ways short of prior restraint to deal with adverse publicity. Sheppard -- I counted twelve of them in Sheppard, and I don't need to go through them because you are certainly aware of them, but certainly two of them, change of venue and continuance, neither of which were given here,

would obviously be --

QUESTION: There was a request for a change of venue that was denied?

MR. PRETTYMAN: This is not in the record, but the fact is --

QUESTION: Well, I thought I read it in the brief somewhere.

MR. PRETTYMAN: -- that there was a request for a change of venue, which was denied. There was not a request for a continuance and the judge did not grant one sua sponte.

QUESTION: And under Nebraska law, the change of venue could be only to an adjacent county, is that correct?

MR. PRETTYMAN: Yes, that is correct. And our response to that is two-fold. First of all, even if you put the surrounding counties together, you've got over 80,000 people, so you are certainly going to be able to find twelve jurors. But, secondly, under the Groppi case and Irvin v. Dowd, I think that that provision would be unconstitutional if it in effect prevented him from getting twelve impartial jurors.

QUESTION: If the trial judge entered an order, a protective order along the lines you have intimated as an alternative, namely a written directive or a directive on the record to the prosecutor that he is not to talk to anyone, specifically including media, and the defense counsel the same, to the witnesses, would the media representatives be in

violation if they importuned these people to violate the order?

MR. PRETTYMAN: I don't believe so, Your Honor.

QUESTION: Could an order appropriately be entered that they should not importune the prosecutor to violate the order?

MR. PRETTYMAN: That would be an order prohibiting access. It would be an order in effect stopping them from seeking out news, and I think it would have many of the same constitutional infirmities that this one had. It would not be as direct, but I think that it would be close to it.

QUESTION: But you think it is all right to put the order on the attorneys?

MR. PRETTYMAN: I have said I do not concede the constitutionality of that. I have simply said that it is not involved here and that I recognize that Sheppard cited it as one alternative.

QUESTION: When you suggest -- what are the alternatives that you think would survive constitutional scrutiny?

MR. PRETTYMAN: Well, I think certainly that a continuance would. I think certainly the change of venue would. I think when you get to trial, certainly sequestation would. I think that you can even bring in a foreign jury, if necessary, if it came down to that bad a case. But I want to emphasize to you that somehow the assumption is that simply because you have a danger that a jury might hear some bad things, that you

are not going to have a trial.

Suppose Jack Ruby had shot Oswald on television and every single person in the United States saw it? You wouldn't say that Ruby wouldn't be tried, that he could go free. You would get him a trial as best you could. You would give him a continuance maybe for a long time. You would have the most extensive voir dire you could possibly have. You would have strong jury instructions. But you wouldn't say go free.

QUESTION: Well, is that the issue really, Mr. Prettyman, or is the issue that a defendant has a constitutional right to be protected from influences that will impair a fair trial?

MR. PRETTYMAN: That is what Sheppard is all about. That is what Sheppard gives him. It gives him a number of ways that he can protect himself short of prior restraint. It is very instructive that in Sheppard, despite all of these ways that were listed, the Court three times made clear that it was not talking about prior restraint on the press, and therefore you don't have this conflict that everyone seems to assume you have. We have ways of protecting jurors, and that is the point I want to make most strongly, that you can protect them and that you have a constitutional jury, as I say, even if you have people who have read the newspapers and who come to the jury room first with some kind of preconceived notion. As I say, they even have a statute in Nebraska which makes certain that

a juror is not stricken just because he has read a newspaper and has heard some bad publicity. The judges have the right to determine for themselves whether that man is impartial.

I want to save a little bit of time for rebuttal, so can I just simply say that it seems to me that, at this point in time, after two-hundred years, when we have let our press print what it is able to get, to subject them now to a prior restraint, after all of this time, is to take away one of the great liberties that we have. I don't think we have to look very far around the world, and I don't think we have to look very far outside of this country to understand the extraordinary importance of allowing the press, the only really free press probably left in the world, to publish what it has gotten hold of so that the public can be contemporaneously informed of all of that.

If one of those Watergate people had broken in and had immediately confessed that he had broken into the Democratic Headquarters at the direction of the White House, could we restrain for six months from trial time the fact that that had happened? That is what you are going to get into. You are going to get into decisions as to, well, some of these confessions may be, ought to be in the public interest, we will get them out and some of them we shouldn't -- don't put the courts into that position. They are not equipped to handle it, and the values are too great.

Thank you.

QUESTION: Mr. Prettyman, let me interject the moment of lightness in all this seriousness. You represent the Omaha World-Herald.

MR. PRETTYMAN: Yes, sir.

QUESTION: The judge of the Eighth Circuit sent me this very brief clipping from the Omaha World-Herald, your client. I read it in its entirety, as illustrative of "a responsible press":

"Three Justices of the Nebraska Supreme Court and Judge Donald Lay, of the Eighth Circuit Court of Appeals in St. Louis, will take part next week in a seminar on appellate practice in Nebraska. Anyone having information that leads to the arrest and conviction of the person or persons responsible are asked to contact Joe Smith."

[Laughter]

MR. PRETTYMAN: I think Jefferson would have enjoyed that clipping.

QUESTION: I indicated that it was a moment of lightness. I am not being critical.

MR. CHIEF JUSTICE BURGER: Mr. Abrams.

ORAL ARGUMENT OF FLOYD ABRAMS, ESQ.,

ON BEHALF OF NBC, AS AMICI CURIAE

MR. ABRAMS: Mr. Chief Justice and may it please the Court:

Mr. Prettyman represents, as he has advised you, large elements of the Nebraska press. I appear here today on behalf of a variety of publishers, broadcasters and journalists from around the country to join with that press and to urge upon you today a ruling which would be unthinkable in any nation in the world except ours and unlikely in the rest, that it is in our view entirely consistent with American history makes it no less remarkable but simply points to the remarkable nature of that history, for what we would ask of you is nothing less than a renunciation of power, the conclusion by this Court that the Judiciary should not and indeed may not tell the press in advance what news it may print, save only in that rare national security situation, in that rare national security case adverted to by this Court in Near v. Minnesota, in the Pentagon Papers case, and what we urge upon you in that denunciation that occurred two-hundred years ago, that it has been reaffirmed by this Court since its formation and that you should reaffirm it today.

Mr. Justice Stevens asked earlier whether the label prior restraint was important here and what the relevance of it is, and I would like to devote the bulk of my remarks to that question.

I would like to start historically, because I think it is important to note that until very recently it was accepted by one and all that whatever else could be done to the

press with respect to pretrial publicity, the one thing that could not be done was any kind of prior restraint. Twenty years ago this month, if I can be personal for a moment, I was on a college debating team and we used to talk about this subject and debate this subject full-time for a year. I know all the remedies that people proposed to control what was then thought sometimes to be an irresponsible press. No one even suggested in the scholarly works or in our debates the idea of prior restraint. So understood was it that, while there could be some area perhaps for contempt of court after trials were over, that there could be no prior restraints in the area. And we were not alone.

The cases supported us, as they existed then. Our brief, submitted on behalf of amici curiae that I represent, indicate that in our effort to survey all the cases in this area in American history, we come upon only five prior to the Sheppard case in which there is any reports at all of any attempt to obtain prior restraints against the press, and that in each of those cases it was easily and summarily reversed. There have, of course, been many cases since Sheppard -- and, while it is true that nearly all of them have been reversed, all but one or two or three at the most, it is also true that prior restraints on the press around the country are becoming common place.

Within the last year, New York has had its first,

New Jersey has had its first and its second, and Nebraska has had its first and second and third. And I think it is a fair question to ask what is new or what has changed to lead to the start of a process by which prior restraints are now being issued in almost common place fashion. But I would urge on you, it is not that the press has been more irresponsible, by anyone's judgment, within the last few years than in the years preceding it. The days of the front page are over, if they ever existed, and even the Patty Hearst trial bore no resemblance to that of Sam Sheppard or Bruno Hauptmann.

It is not that guilty defendants are walking free on the streets because of the press and because of the sometimes perhaps excessive pretrial publicity, and it is not that innocent men, so far as we can tell, are in jail because of irresponsible press coverage of trials. And it is not, I would urge on you, that we now have reason to think that juries are less trustworthy than we ever thought they were. Indeed, as Mr. Prettyman indicated, I can hardly think of a time in our history when juries have proved their mettle in a more strong basis than they have within the last few years. Nor is it that studies of scholars, of judges, of lawyers and of journalists have concluded within the last few years that anything has changed and that we should retreat from abhorrence of prior restraint in this area.

QUESTION: Mr. Abrams, neither you so far nor Mr.

Prettyman have referred to the trial judge's post-trial inquiry of the jury. I hope at some point before you sit down you will give us your comments on that.

MR. ABRAMS: Surely, Your Honor. In fact, I will turn to that right now, after just observing that there are five separate studies in this area by bar association groups and the like, and each of those conclude that prior restraints are constitutionally impermissible or unwise with both of them.

With respect to the post-trial study, I would have a few comments to make. First, it is really devoid of the record of this case. Mr. Prettyman, in his brief, urged upon you that if you cared to take account of that post-trial study, that the petitioners before you should be permitted to put in a post-trial study of their own, which is a poll taken by the North Platte Newspaper of the jurors as to what they meant when the judge asked them those questions after the trial. I suspect you will not be interested in that poll, but I think it is first a rather unreliable study. I think the phraseology of the study is, to say the least, slanted. And I am struck by the fact, as Mr. Prettyman's brief argues to you, that one would believe jurors at the post-trial moment, when they are asked that question, and not believe them when they are asked if they could give a fair trial in the voir dire time prior to a trial beginning.

It seems to me a good part of what is involved in

this case involves just that question of whether we can trust jurors or not. As I have urged upon you, we think there is no time in our history when jurors have better indicated their ability to decide cases and to decide them without reliance on outside factors, which might have been indicated and which others might have thought might have affected them.

Now, we have urged upon you the Sheppard case. We have urged it again and again, and it is for you to decide whether our interpretation of Sheppard and our reading of Sheppard is correct. It is supported, we urge on you, by the higher courts of New York and California and by the Court of Appeals for the Firth Circuit. And I can think of only one other reason, apart from what I believe, to be a misinterpretation by many lower courts of the Sheppard decision, for the amount of gag orders or restrictive orders that have been issued in recent years.

I detect, for what it may be worth to you, a profound and growing sense of judicial concern at what is sometimes viewed to be irresponsibility on the part of the press and its coverage of courts and of other matters. I have been confronted, when I have argued before other courts than this, with a number of questions relating to just those matters, relating essentially to matters of responsibility. And I could do no more with respect to that than to urge on you the language in the CBS case of the Chief Justice and the full majority of the

Court that the risks of abuse of the First Amendment were well known to the framers, who accepted the reality that risks of those abuse were evils for which there was no acceptable remedy other than the spirit of moderation and a sense of responsibility and civility on the part of those who exercise the guarantee of the freedom of expression.

I wish to be clear. We may be back some day, I suspect some of us will, representing clients, some of our brethren representing clients will be back, urging on you the proposition that the power to hold the press in contempt is very narrow, that the power to punish the press for what it prints is narrower still, but historically the power to ban the press in advance from deciding what to print is narrowest still, and that is this case.

QUESTION: Mr. Abrams, before you proceed, I think perhaps I missed something. You were telling us of the demonstrable see-change in judicial attitude in recent years, and then you told us why it was not attributable to this and not attributable to that and not attributable to the other thing. What I missed I think was your "O Henry" ending. What is it attributable to?

MR. ABRAMS: Mr. Justice Stewart, what I meant to convey and perhaps got lost in conveying was that I think it is attributable to two separate things. One is a misreading, as we view it, of the Sheppard case by lower courts around the

country. And second is what I described as what I view at least or what I see at least as a continuing sense of judicial concern at the nature of the reporting which occurs with respect to the judicial process. Those are the two things that I think it is. It is also, I think, and we have urged upon you in our amici brief, a misreading of those cases of this Court which deal with the heavy burden on prior restraints. I did not understand the concept of heavy burden on prior restraints to be an invitation to enter prior restraints when on some basis or another it was thought useful to do so.

We believe that the nature of the prior restraint idea as set forth in Southeastern Promotions case by Justice Blackmun, and that you must take into account in deciding whether there can be prior restraints at all whether historically there has been a category established here of prior restraints which are acceptable in this area and an exception to what the Court in Southeastern Promotions referred to as the prohibition against prior restraints.

QUESTION: Mr. Abrams, let me just ask a specific question. What do you do about the problem of the inadmissible confession? Say for some reason a confession is very dramatic but yet it would be rather clear that it would not be admissible to trial. Is that just something we have to live with, there is no way of curtailing the publication of that kind of information?

MR. ABRAMS: Well, I think you have to live with it, Mr. Justice Stevens, and one of the ways that you live with it is by giving jury instructions, by appropriate voir dires, by all of the Sheppard methods. But to take your question at its narrowest, yes, it is our view that there are such things as we do have to live with, if it finally comes to that, be it confessions or something else.

I would close with this observation: We well appreciate that there are cases in which this Court must sit as a drawer of very hard to draw lines on an ad hoc basis, on a case by case basis. There are, of course, areas in which it may properly be said, as Justice Holmes did, that the power to tax is not the power to destroy while this Court sits.

We believe the power to make prior restraints on news reporting is the power to destroy, and we urge this Court not to permit the birth or growth of such a rule of law.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Abrams.

Mr. Mosher.

ORAL ARGUMENT OF HAROLD MOSHER, ESQ.,

ON BEHALF OF RESPONDENT STUART

MR. MOSHER: Mr. Chief Justice and may it please the Court:

I am Harold Mosher, Assistant Attorney General of the State of Nebraska, representing the Honorable Hugh Stuart,

Judge of Lincoln County. Mr. Milton Larson, Lincoln County Attorney, is also with me here today and will argue certain aspects of the case.

Let me, if I may, take this case from the top: 8:00 p.m., October 18, 1975, KNOP, the only television station in North Platte, began transmitting the NBC Saturday Night Movie, "The Deadly Tower," a dramatization of the 1966 massacre of 16 persons and the wounding of 31 others by a sniper atop the tower at the University of Texas, in Austin.

By an uncanny coincidence, the movie provided the electric background for another grotesque mass murder. About 18 minutes into the movie, a KNOP newsman answered a telephone call from the sheriff's office which requested the television station to put a warning on the air that there had been a killing at nearby Sutherland, Nebraska, and that everyone should lock their doors and windows.

The case at bar was born. It is therefore proper that certain events be reviewed and placed in their proper perspective. The town of Sutherland is located in western Nebraska between the North and South Platte Rivers. It is cattle country, cattle country at its very best. The town of Sutherland has 1970 population of approximately 800 persons. The population today is somewhat larger due to a number of transient workers who are employed in the construction of a huge electrical generating facility nearby.

Following the television announcement, law enforcement officers in the Sutherland area continued their investigation of the crime. And early the next morning, on a tip by a reliable informer, they arrested the respondent, Erwin Charles Simants, near the scene of the crime.

QUESTION: Mr. Mosher, suppose that after the restrictive order challenged here as prior restraint had gone into effect that the local television station decided to rerun the dramatization of the Texas sniper killings and both the defense and the prosecution came to the court and said this was going to stir up all kinds of passion and prejudice and impede a fair trial and we want a restraining order to restrain the showing of the dramatization of the Texas city affair, do you think that would be an appropriate matter for the trial court to consider?

MR. MOSHER: I doubt it very much, Your Honor. I doubt it very much.

QUESTION: Do you think it would have a tendency to provoke passions and prejudices?

MR. MOSHER: I doubt it, I really do. That, of course, is not the issue in this case, but I really doubt it very much. When it is all said and done -- and I will get to it, with your permission, in a few moments -- the so-called restraining order here by the Supreme Court of Nebraska is purely a very narrow one, and the court was simply not called

upon to go any further, and it certainly did not. But just because of the particular aspect like this, I doubt it. I doubt it, because there are so many other variables in the world in which we live. Movies nearby may be showing certain types of film which in and of themselves one might argue could lead to this kind of thing. But I seriously doubt that one could perhaps, in a given case one might make a showing. I am at a loss, however, to suggest what that showing might be.

QUESTION: Could I just question your characterization of the order as a narrow one. It does include, as I understand the way it has been narrowed down, the prohibition against publishing any information strongly implicative of the accused as the perpetrator of the slain. Do you regard that as a narrow prohibition?

MR. MOSHER: Certainly. May I get to it in a moment?

QUESTION: Yes, certainly. I don't want to take you out of order.

MR. MOSHER: Certainly. Let me continue though with some facts, if I may, because I think they are important. Following his arrest, in fact the same day, October 19th, Erwin Charles Simants was charged with six counts of murder in the first degree by a complaint filed by the County Attorney, and thereafter that same day Simants was arraigned and a preliminary hearing was scheduled for October 27, 1975.

The statement on page five of the brief of the

respondents -- pardon me, the petitioners -- that, "On October 20, the Lincoln County Attorney told the press that Simants had given authorities 'a statement'" exemplifies the need in cases such as this for the trial courts to be able to restrict the media in certain cases. Specifically, the quote on page five of the petitioners brief refers the reader to page 88 of the joint appendix, and there, sure enough, is a copy of a newspaper, and the quote, "Lincoln County Attorney Milton Larson said Monday that Simants has given authorities a statement."

Putting aside for a moment how the repetition of quotations such as that could influence a community where a jury will ultimately be chosen is the naked fact that the statement is false. Indeed, the writer, who is the bureau chief of one of the Nation's largest wire services, has now admitted that hearsay of an ambulance driver's husband was falsely attributed to the County Attorney, thus the petitioners themselves have demonstrated in this Court at this time the need for restrictive orders in cases such as this. It is therefore not --

QUESTION: Would that mean, Mr. Mosher, just an order restricting them from making false statements or making any statements?

MR. MOSHER: I think it means, Your Honor, that, first of all, before they are going to get to a question like

this, before they would ever get to it again, is whether or not this Court is going to allow the Supreme Court of Nebraska to implement section 3.1 of the Guidelines of the American Bar Association's Fair Trial--Free Press.

If you allow the Supreme Court of Nebraska to implement that particular section, the section provides that defense counsel may move, timely move, at any time prior to trial, to close the hearing, close the hearing, and thereby insure that matters of this will not be made public prior to the actual trial.

As you know today, defense counsel has a myriad of tools at his disposal to discover the government's case against the individual. And any defense counsel worth his salt can certainly learn whether or not there is a confession. He can also at that time also make adequate presentation to the court that not only should the preliminary hearing be closed, but that the prosecution in and of itself is not to make public statements about the nature of a confession.

By &ing this in this manner, this type of an error simply will not repeat itself.

The same day that this quote appeared in the morning newspaper, the County Attorney filed a motion for a restrictive order, which requested the county court to restrict publication of testimony to be set at the preliminary hearing. The hearing was had on that motion the same evening. The attorneys

representing the state, the defendant, and the news media were present.

The defendant's attorney advised the court that Simants joined the state's motion to restrict publication of testimony from the preliminary hearing. He even went a step further and asked that the restrictive order be broadened to close the preliminary hearing. The motions of the defense counsel were overruled. The motion of the state was sustained.

The next day --

QUESTION: Mr. Mosher, you have, I gather, two hearings in Nebraska prior to the trial, at least two. One is an arraignment and the other is the preliminary hearing.

MR. MOSHER: That is correct.

QUESTION: And which comes first?

MR. MOSHER: The arraignment is first.

QUESTION: And what is the function and purpose of an arraignment?

MR. MOSHER: Primarily the only function of it is to set a time for a preliminary hearing. It serves a second function, to determine whether or not the accused has sufficient funds to secure the services of an attorney. That is all the so-called arraignment does.

QUESTION: There is no evidence at an arraignment hearing?

MR. MOSHER: None whatsoever. The court just simply

at that stage of the game merely makes inquiry if the defendant desires an attorney, if he has the funds to secure one, and if not an application at that time is made, counsel is appointed and the date for preliminary hearing is set.

QUESTION: There is no pleading at the arraignment hearing?

MR. MOSHER: None whatsoever, absolutely none.

QUESTION: But there may be a waiver of the preliminary hearing, might there?

MR. MOSHER: Yes, it can be waived.

QUESTION: I mean then.

MR. MOSHER: I doubt it. I doubt it. It probably could at that time if the defendant was represented by counsel. But for the defendant in and of himself to waive it at that time, I don't know if the court would allow it.

QUESTION: That's fine.

MR. MOSHER: They have never had that precise question that I know of in the history of the state.

QUESTION: At the preliminary hearing, does he plead at that time?

MR. MOSHER: At the preliminary hearing?

QUESTION: Yes.

MR. MOSHER: Very rarely.

QUESTION: Generally, the purpose of the preliminary hearing is to see whether or not there is a prima facie case

and whether or not to bind him over, is that it?

MR. MOSHER: That is correct. The purpose of the preliminary hearing does two things: It puts the burden on the government to prove to the examining magistrate, one, that a crime has been committed; and, two, that the probable cause -- not proof beyond a reasonable doubt -- but the probable cause to believe that the accused committed the crime charged. If there is, it goes to the District Court where the trial is held on the merits.

QUESTION: Well, then, when does he plead? When does he plead?

MR. MOSHER: In the District Court.

QUESTION: Not until then?

MR. MOSHER: That is correct.

QUESTION: He doesn't do it at the arraignment and doesn't do it at the preliminary hearing?

MR. MOSHER: No, absolutely not.

QUESTION: And generally the defendant doesn't adduce any evidence at the preliminary hearing, does he?

MR. MOSHER: Well, he may in a given case. In a given case, counsel may very well feel that the evidence adduced by the government is so weak that it can be exploited at that level. Weaknesses can be shown through testimony, I have seen cases in which that is exactly the case, in which case, even though one might argue that on its face the

government presented a prima facie case, the fact remains that the trial judge, or the magistrate, if you will, is the credibility, is the trier of facts, it is upon him to make the determination, what witnesses are to him to be believed and whether or not the bind over is to follow.

QUESTION: And the preliminary hearing is normally open to the public?

MR. MOSHER: Normally it is open to the public, yes, Your Honor.

QUESTION: The statute that was construed by the Supreme Court of Nebraska is the one that requires a public hearing but only at the trial itself, as the court has construed it?

MR. MOSHER: I do not understand your question, if you would give it to me again.

QUESTION: Does the Nebraska statute, as presently construed, require that the preliminary hearing be open to the public?

MR. MOSHER: Certainly.

QUESTION: It does?

MR. MOSHER: The statute, in and of itself, says that you cannot close it except for certain reasons. Now, the Supreme Court of Nebraska, in its December 1 opinion in this case, has said that, by implementing section 3.1, the American Bar Association Standards, that preliminary hearing can be

closed under certain circumstances, and those circumstances are the ones which are enumerated in section 3.1.

The next day, the preliminary hearing was held on the amended complaint which charged murder in the first degree, and further charges that one or more of the murders was committed in the perpetration of one or more sexual assaults.

After testimony from several witnesses and the introduction of other evidence, Simants was bound over to the District Court for trial. The very next day, October 23rd, attorneys representing the media in the aforesaid criminal case filed a motion requesting that argument be heard on a challenge of the constitutionality of this restrictive order. The District Court granted the motion to intervene and four days later, on October 27th, the District Court terminated the County Court's order and imposed one of its own.

Late in the afternoon of Friday, October 31, 1975, the petitioners sought relief in the Supreme Court of Nebraska on two procedural rights; filed an appeal from the District Court's order and at the same time they filed a petition in the Supreme Court of Nebraska for leave to file an original action in the nature of a writ of mandamus.

Obviously, the Supreme Court of Nebraska could not have been expected to order the parties to write briefs and drive over 200 miles to Lincoln and to give oral argument on these two cases the same day in which they were docketed, late

Friday afternoon, October 31, 1975; nor could the Supreme Court of Nebraska be expected to hear the cases the following week, and that it had previously called more than fifty cases for oral argument that week. In order to hear argument on that many cases, the Supreme Court of Nebraska divided itself into two divisions, and it brought in several district judges to help with the caseload.

Thus, the statement on page 20 of the reply brief of the petitioners, and I quote, that "the Nebraska Supreme Court refused to act expeditiously in this case" is simply unfair and contrary to fact.

To compound the problem, the Supreme Court of Nebraska learned that while the two cases were pending in its court, the petitioners had previously contacted Mr. Justice Blackmun of this Court, as the Justice assigned to the Eighth Circuit, and asked him to stay the order entered by the District Court of Nebraska. The Supreme Court of Nebraska immediately issued a memorandum opinion in which it noted that the petitioners were seeking concurrent relief in both this Court and the Supreme Court of Nebraska, and consequently declined to take action so long as the position of the exercising of parallel jurisdiction of the Supreme Court of the United States could not be determined. It did, however, continue the action until this Court made known whether or not it would accept jurisdiction.

On November 13th, Mr. Justice Blackmun, in his

capacity as Circuit Judge, issued a chambers opinion in which he noted the desire to refrain from issuing or denying a stay until the Nebraska Supreme Court had an opportunity to act.

The very next day, November 14th, the Supreme Court of Nebraska set the original action in the writ of mandamus as well as the appeal for oral argument on November 25th. It notified counsel to file typewritten briefs to expedite the hearing. And thus I again submit to you that any statement attributed to the Supreme Court of Nebraska that it failed to act expeditiously in this matter simply is contrary to fact.

On November 20th, Mr. Justice Blackmun --

QUESTION: Mr. Mosher, isn't eleven days a pretty long time under the circumstances?

MR. MOSHER: Not really, Your Honor.

QUESTION: The excuse given, as I remember, was that they had some kind of a seminar to attend.

MR. MOSHER: I am not privy to that information, so that I can't answer. I can tell you, though, that the court in that period of time, and when it was first docketed, on Friday, October 31st, the following week, through Monday and Tuesday of the second week, heard fifty-some cases, I believe, as a matter of fact, it was 53, and that is a terrible case-load for any court to carry.

QUESTION: Well, Mr. Attorney General, that doesn't help us in this case, does it?

MR. MOSHER: It does not help you in this case at all. All that it really does though is set the background as to how this case came here and under what circumstances, because I do not want to leave you with the impression, nor do I want anyone else to leave you with the impression that somehow or another the courts in Nebraska were derelict in this matter. They simply were not.

QUESTION: Mr. Attorney General, don't we have to decide whether it was the routine case or an exceptional case? And which is your position?

MR. MOSHER: Well, I think this was an exceptional case.

QUESTION: Well, then, should not the Supreme Court of Nebraska have expedited it?

MR. MOSHER: They did.

QUESTION: Well, then, what is the relevance of these 27 or 30 other cases on the docket?

MR. MOSHER: Well, Your Honor, when you have called fifty cases for oral argument, there is just no way to stop it.

QUESTION: In other words, it is fairly exceptional but not extremely exceptional?

MR. MOSHER: Well, there is no way to stop it. If you have got 53 cases coming in for argument the next day, and these attorneys are coming in from all over the state, at a minimum, that is 106 lawyers, there is just no way to stop it.

Each of these lawyers believes he too has the exceptional case.

QUESTION: Well, I would suggest that maybe they just had to replace one case on the docket and heard this one first.

MR. MOSHER: Perhaps that could have been done, but perhaps also, Your Honor, there was a need for time to brief the matter.

QUESTION: Well, Mr. Attorney General, let's put it another way. If there were 500 cases, would it have made any difference?

MR. MOSHER: 500 cases would have --

QUESTION: What do the numbers have to do with the point we've got before us?

MR. MOSHER: Only to the point, as I have said, Your Honors, to try to impress upon you that the fact that the Supreme Court of Nebraska was not derelict. But let's turn to the first issue --

QUESTION: Let me just interrupt once more. Aren't you demonstrating that one of the vices in these orders is that inevitably they will remain in effect for some period of time until the judicial process can face up to the question of whether to remove them, that that is an inevitable part of the procedure, if you once enter the order?

MR. MOSHER: Well, there is always a certain time lag, Your Honor, there has to be. That is just part of the

system. But to say that ten or eleven days is unreasonable, I don't consider it to be. Someone else can very well argue that it is unreasonable. I just know that what the court was up against, I just know that they heard arguments for nine days and for them to say then that they took eleven days before this was set down, at the same time giving the attorneys the proper time to brief the matter, I don't consider it to be unreasonable.

There are, though, several issues, and I would like to address myself to them. First is the first very basic issue, and that is whether or not the courts have the power and under what circumstances to enter a valid protective order. The answer seems to me unequivocal -- the courts do have the power.

There are a few basic considerations, it seems to me, make this conclusion absolutely necessary. One, the pure administration of justice is one of the most essential functions of government. Every other right, including the right of a free press, may well depend upon the ability to get a judicial hearing as dispassionate, as impartial as the weakness inherent in men will permit.

Two, the media has the power, whether lawful or not, to destroy the right to a fair trial. Not only does it have this power, but it has been exercised, as demonstrated in the case of Sheppard v. Maxwell.

Three, no government can long endure if it can permit private persons or persons to prevent the discharge of one of its essential functions. The press has taken the position that the courts have no power, save national security, to issue a restrictive order. That position, I submit to you, finds no support whatever in the Constitution of the United States, nor does it find any support in the teachings of this Court.

Two dangerous impressions, moreover, are left in the position that the petitioners have taken in this case. One is that the press is above the law, and the other is that the people and the government are antagonistic and thus the press will somehow protect the people from the government. We submit to you that these impressions are based upon misconceptions.

The fundamental principles of American law and from Anglo-American law for at least 700 years is that no one is above the law, and certainly neither the Constitution nor the people has conferred upon private corporations, whether engaged in the publishing, in the broadcasting business, or any other business -- not even the President of the United States -- all are under the law and none have the right and the sole discretion to prevent the judicial branch or any other branch of the government from carrying out its assigned functions.

Secondly, America's greatest claim to its place in history is its government of the people, by the people, and for the people. It is the government who is at the control of the

people. The people want and they need a news media to assist them in this process, but only under the law and not above it. Freedom of the press simply is not absolute. Indeed, absolute discretion is not granted, is granted to no one under the Constitution. Ours is a government of laws, it is not a government of men.

Thus, it cannot seriously be doubted that the courts have the power to render broad protective orders. The critical issue is under what circumstances can a restrictive order be entered and what should be its scope. The issue here is delicate, it is a delicate balancing of the interests between the First and Sixth Amendments. This is where the courts must give careful consideration to the important functions the media performs.

Perhaps a good place to start is preliminary hearings and since it is a likely source of most restrictive orders. As I have previously alluded to you, under Nebraska law, one who believes he has been unjustly charge with a criminal offense has a right to a prompt preliminary hearing before a magistrate. At that particular hearing, the government does have the burden of proving, one, whether or not a crime has been committed; and, two, whether or not the person charged committed the crime.

The dissemination of public information at that stage of the trial can in a proper case create havoc in providing the

defendant with a fair trial, because frequently at such hearings there is testimony relating to confessions. And I call your attention to several empirical studies, empirical studies which are cited on pages 10 and 11 of the brief of Respondent Stuart, which demonstrate how the publication of a confession or the fact that one has been given can in a particular case deny that criminal defendant a fair trial.

In the case of Estes v. Texas, this Court itself observed that a pretrial can create a major problem for the defendant in a criminal case. Indeed, the Court went on to state that pretrial publicity may be more harmful than publicity during the trial, for it may well set the community opinion as to guilt or innocence.

QUESTION: Mr. Mosher, a minute ago you said that frequently at pretrial hearings there would be an offer of a confession.

MR. MOSHER: That is correct.

QUESTION: Is that typical in Nebraska of felony pretrials, that more often than not if there has been a confession, the state will seek to offer it?

MR. MOSHER: I don't know if I can give you a yes or no answer, Your Honor. It will depend an awful lot on the facts in the particular case. In this particular case that you have before you, no eyewitnesses survived, and so if the government was going to make much of a case, certainly a

confession was a way of doing it. There were simply no eye-witnesses to this heinous crime.

QUESTION: Was the confession in fact offered at the pretrial?

MR. MOSHER: It was -- pardon me -- it was.

To cope with the procebelia prejudice in a case at bar, the Supreme Court of Nebraska restricted the petitioners from publishing confessions and admissions. The Supreme Court of Nebraska did not restrict the petitioners from publishing that six persons had been slain in their homes. It did not restrict the news media from investigating any portion of the crime, it did not restrict the news media from publishing the names of the victims, their age, or their six, that Erwin Charles Simants had been arrested.

QUESTION: What was the purpose of the newspapers investigating if they can't publish?

MR. MOSHER: Oh, they could publish immediately, of course, Your Honor, under the terms of this particular restricting order, just as soon as the jury was empaneled.

QUESTION: So they would investigate and then wait around until that time?

MR. MOSHER: Certainly.

QUESTION: What is the difference between everybody else going out and talking about what happened in the preliminary hearing except the press?

MR. MOSHER: I think it is probably one of degree. I think it is one of degree. The newspapers in this Nation really do enjoy a tremendous sense of credibility.

QUESTION: Well, then, it wasn't a public hearing, was it?

MR. MOSHER: What's that?

QUESTION: What?

MR. MOSHER: What wasn't a public hearing?

QUESTION: The preliminary hearing, it couldn't be public if it couldn't be published.

MR. MOSHER: But there is no requirement under the Constitution that a preliminary hearing be a public hearing.

QUESTION: But it is --

MR. MOSHER: The Sixth Amendment only goes to a public trial.

QUESTION: I thought you said it was the law of Nebraska.

MR. MOSHER: The law of Nebraska --

QUESTION: Well, at any rate, it was a public hearing here, wasn't it, or not? It was public except for the press?

MR. MOSHER: Well, even the press, the way the case was developed, was entitled to attend.

QUESTION: They could hear it but they couldn't publish it.

MR. MOSHER: That's correct.

QUESTION: Well, I don't know how any newspaper can exist if all it does is hear.

MR. MOSHER: But, Your Honor, it was not a total restriction, it was merely a restriction until the jury was empaneled and placed in the box. At that stage of the game, the press was free to let it all hang out. There was nothing to restrict them after the jury was in the box. It was simply an attempt, a very sincere attempt to balance the First Amendment and Sixth Amendment.

QUESTION: Mr. Mosher, your theory of why this is a narrow order then goes to the fact that it was a limited period of time, rather than the scope of the prohibition?

MR. MOSHER: That is one thing. The other thing I think why it is very narrow is what they restricted the publication on.

QUESTION: Well, what about that third clause that I asked you about before, isn't that rather broad?

MR. MOSHER: No, I don't believe so at all. I think all the court was really saying here is that, one, you cannot publish before this matter goes to -- before the jury is empaneled -- one, admissions against interest or confessions, and, two, you cannot publish the fact that the man has had prior criminal conduct. This is all the --

QUESTION: How about information tending to prove guilt, isn't that part of the order?

MR. MOSHER: Precisely.

QUESTION: And isn't that the thing the newspaper people would probably most like to publish if they have their own reporters out digging around for facts?

MR. MOSHER: I don't think so, Your Honor, because the second one, for example, let the media publish anything that --

QUESTION: Would you think this order would have been appropriate in the Watergate background, would it have been a narrow order?

MR. MOSHER: I don't know the scope of your question, because Watergate --

QUESTION: Any information tending to prove guilt of any of the crimes under discussion.

MR. MOSHER: Well, of course, Watergate involved a tremendous amount of investigation by the media before the government acted. In fact, probably Watergate is the media's finest hour, it certainly is one of its finest hours, because here is some investigation that went on by the media before the government acted to set the criminal process in action. This was not the case here. The government had set it in action. The government had arrested a person --

QUESTION: Well, I am really just directing my attention -- directing your attention to the scope of the order, the prohibition of information tending to prove guilt. Do you

think that is a narrow order?

MR. MOSHER: That is a narrow order.

QUESTION: Are the terms of the order tending to prove guilt of the accused or just tending to prove guilt, period?

MR. MOSHER: The terms of the order prohibit the media from publishing before the jury is empaneled, from publishing the fact that this man had confessed. It also prohibited the media from publishing such other matters excepting those statements that they might get from the accused. Now, if the accused was willing to talk to the media, they were perfectly free to publish it.

QUESTION: Well, what if an investigative reporter, after this order was entered but before Simants' trial, came upon some leads that led him to think that X rather than Simants was guilty, would he have been free to publish that?

MR. MOSHER: Oh, I think he probably could, certainly.

QUESTION: Didn't the order contain words such as "seriously implicating"?

MR. MOSHER: It did, which of course would go to the prior criminal conduct of the accused.

QUESTION: That to me assumes a little more narrower than Mr. Justice Stevens' description of "tending to prove guilt."

MR. MOSHER: Yes, I think so.

QUESTION: Yes, and it is also limited to the accused, as Mr. Justice Rehnquist points out, the information strongly implicative of the accused as the perpetrator of the slayings, so (a) it has to be strong, and (b) it has to relate to the particular accused.

MR. MOSHER: Yes.

QUESTION: And that is what narrows it, I guess.

MR. MOSHER: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Larson.

ORAL ARGUMENT OF MILTON R. LARSON, ESQ.

ON BEHALF OF RESPONDENT STATE OF NEBRASKA

MR. LARSON: Mr. Chief Justice, Your Honors, may it please the Court: My name is Milt Larson, and I am the prosecutor in this action, here representing the State of Nebraska.

I believe that insofar as the factual background, Mr. Mosher has done a very good job in setting forth the situation. The one thing that he did not mention in terms of whether the state may have overreacted to some publicity, I was called to Sutherland on the evening of October 18th, assisted in the criminal investigation, the bodies were in the house from approximately 10 o'clock, when I got there, until 4:30 the next morning, everything left just as it was for the purpose of getting the criminal investigation underway and completed, and before the bodies were removed, there was an NBC helicopter

from Denver, that had arrived. There were news media representatives from the wire services, AP, UPI, Omaha World-Herald, all of the local radio stations, television. It was very apparent very early that I was going to be faced with a good deal of publicity.

In this regard, I would like to narrow the issues here a little bit. We have -- I think that we need to say that we are talking here only about the very exceptional case in the criminal arena, the sensational case, the highly publicized case. However, we are also talking therefore about the major cases, the ones that the public are presumably going to be the most interested in.

Certainly this case, involving the mass murder of six people, involving sexual assaults on children and an elderly woman after -- both before and after death, must fall within the realm of an exceptional case. You have to couple that, unlike the Watergate situations that happened in a metropolitan area, where everyone is not terribly concerned about it, here we have a situation in a town of 800 where virtually everyone knows everyone, the people in the community knew both the accused and all of the victims, they were very vitally interested in it, they were going to learn all that they could, and rightfully so, they would want to learn all that they could, but that adds to the prosecution's burden of protecting the individual's right to a fair trial. I don't mean to sound as

a defense attorney, but as an officer of the court I felt that it was the burden of the prosecution as well, and I think that is clearly indicated in Sheppard, to take reasonable steps that I thought were necessary to protect the individual's right to a fair trial.

I do also wish to reemphasize the fact that I did not at any time state that the defendant had made a statement, and I am very happy to report that it would have been highly embarrassing had I done that. I was misquoted on that.

Then with regard to the pervasiveness of the County Court's order, he simply said you shall not report what happens at the preliminary hearing, period, except as in compliance with the bar press guidelines. You have to take that into account in terms of the circumstances there.

Nebraska has a statute requiring that if a man is held without bond, that he shall be entitled to a preliminary hearing within four days. That isn't very much time. By the time we got even organized -- I have a four-man staff -- by the time I even got organized to consider the procedural problems of due process and fair trial under the Sixth Amendment, it was Monday. I had to have the preliminary hearing Tuesday. And so I asked -- I simply put a motion on and said, "Your Honor, I request that the Court enter whatever order it deems necessary to protect this individual's right to a fair trial." And the judge looked at it and he said, "My, gosh, I see the

problem." In the meantime I have received calls from the Chicago Tribune, the L.A. Sun-Times, the London Sunday Times, NBC, ABC, everyone, and I was very much appalled at what was going to transpire.

So the judge said obviously this needs to be considered, obviously I had not much time, "Call all of the media that are here and that are represented, ask them to come to the Court this evening and we are going to talk this over." And we came in and he ultimately decided that he wasn't going to be able to make any extensive study of the law in the area, and he said, "You are going to be able to get a review from the District Court, and I am just going to shut it down and you can get your review there."

The following morning we had our preliminary hearing. The following evening we had a hearing as to the -- we had a review of the County Court's order, and the District Judge also said, "The order is over-broad, but I don't know how over-broad it is, because I am not right up to date on everything with regard to free press and fair trial, so I want to postpone this matter until October 27th -- that was four days -- request that counsel give me some guidelines, give me their thoughts as to what ought to go into the order, and if there ought not to be an order, what the bases for that is," and on October 27th he modified the order, which was five days after the original order had been entered, and I think, under the circumstances,

he got it on a Wednesday, gave Thursday and Friday for the people involved to get their information together as to what they wanted to put before the judge, and then on October 27th he had another hearing at which he entered his order and heard arguments as to its validity and what ought to be in it and what not to be in it, and decided to go with the bar press guidelines. And Justice Blackmun I think correctly stated that they are over-broad because they are not specific enough in all areas. If you are going to be charged with contempt, you certainly ought to know what you are being charged with, and I couldn't agree more. That is absolutely correct.

So, it was limited to confessions, confessions made to law enforcement people, confessions made to others, and to those facts strongly implicative of this defendant. Now, in addressing Justice Stevens' questions, that would on its face appear to be rather pervasive, but I would submit that it is not when applied to the facts of the case itself.

Basically, at the time of the preliminary hearing, all we had was the confession of the defendant. All of the physical evidence that was to later corroborate the confession, the fibers that were found from his coat that were found on the body of the defendants, et cetera, this was all being packaged and being sent to the FBI Laboratory in Washington, here in Washington, D. C.

We had nothing at the time of the preliminary hearing

to secure a probable cause for the bind-over of this defendant except -- nothing inculpatory except his confession, which is sufficient for establishing probable cause to bind him over. But with regard to the questions that are involved here, the -- I think what comes into conflict are the two rules of law, one, that that which transpires in the open court room may be published with impunity, and, two, that where there is a reasonable likelihood of prejudical news coverage, that the judge shall take those steps that are required to protect the right to a fair trial.

Clearly, none of the cases have indicated that there is any indication toward prior restraint that that is at all desirable. But I would submit that in exceptional cases, where locale and circumstance combined are such that pervasive publicity, extensive publicity and prejudicial publicity would create a clear and present danger to the empaneling of a fair and impartial jury, that that must necessarily -- that the judge must necessarily have the authority to enter any appropriate order --

QUESTION: Doesn't that cut another way -- in a place with 800 people, were the whole 800 people talking about anything else but the --

MR. LARSON: No, Your Honor. I presume what you are getting to now is the rumor and innuendo that goes in the absence of reporting, is that correct?

QUESTION: Well, you can't stop that.

MR. LARSON: No. And my answer to that -- and it is only a feeling, but I think that it is correct -- that that which Mrs. Jones tells me, I am willing to be more easily convinced to put aside than if I have read in the papers in the headlines evidence established at a preliminary hearing shows that a confession was made. I think that once it is given the sanction of the judicial proceeding, once it is given the sanction of the written word in the paper, recorded under judicial proceedings, that it is much more devastating to the rights of the criminal defendant for a fair trial.

QUESTION: In a small town of 800?

MR. LARSON: Yes, Your Honor. First of all, with regard to that, as a practical matter, anyone who was from Sutherland was removed for cause without opposition by the prosecution, because of that very --

QUESTION: Have you ever participated in the game of telling your friend on your right and it goes all around the house until it gets back to you?

MR. LARSON: Yes, Your Honor.

QUESTION: Well, in a town of 800, I don't know how you are going to stop that.

MR. LARSON: We can't stop it, Your Honor, but I do think that it is not going to be as prejudicial as what comes out in the paper that the judicial proceedings have indicated

that a confession was made.

In regard to the confession itself, I would submit to the Court that a confession in an exceptional case such as we have before us uniquely lends itself to a restriction in the pretrial proceeding. I think it is also important to remember that we are talking about pretrial here. I can't conceive of any basis during the trial of precluding publicity, because obviously the jury can be sequestered at that time, they don't need to have access to that information. But we are talking about pretrial and we don't know who the prospective jurors are going to be. We do know, though, what type of information they are going to have at their disposal.

I would submit, Your Honors, that in light of the four-day requirement, in light of the fact that we of necessity had to introduce the confession at the preliminary hearing in order to get a bind-over. It can hardly be said, as the petitioners would have you believe, that we volunteered that information for dissemination to the public. As a matter of prosecution, as a matter of getting my job done, I had no alternative but to introduce that confession. So when you --

QUESTION: Before a confession is introduced at a preliminary hearing, is there any test of its voluntariness?

MR. LARSON: No, Your Honor, that was the next point that I was going to raise. Due process before the admission of a confession into the trial portion requires a due process

hearing outside the presence of the jury as to the relationship of voluntariness. That was held. But I would submit to you that that would be of very little moment if the confession had already been published and the jurors already have knowledge of it, because I would submit that what would go through the mind of the juror, if they went through the trial and no confession was introduced, was not that there must not have been a confession but, rather, that, well, the prosecutor didn't introduce the confession but I know it was made. And I think that that type of prejudice simply cannot be overcome.

And I think that the issue, the basic issue here is that in the exceptional case who shall govern, who shall have ultimate authority to protect the due process requirements with relationship to a fair trial, shall it be the courts, shall it be the judiciary, or shall it be the editor? I would submit that before public dissemination of information relative to the existence of the confession can be or should be disseminated, that the question of voluntariness should first be determined in the first instance by the judiciary and not by editorial comment. And again I am talking about exceptional cases, highly publicized cases. I am talking about this case, gentlemen, where in a small rural community we had a mass murder of the scope that was unprecedented in Nebraska since the Starkweather case in 1957.

It would seem to me that if ever there was a situation where there could be a limited prior restraint -- and again we must say limited, I feel that, as I think is clearly the law, it can be no more pervasive than is absolutely necessary to insure the judicial process and the orderly administration of justice, and that is really what we are talking about, is the ultimate power of the courts to control their own processes to insure that due process of the law is met. I think that should talk about the Estes case, the Rideau case, the Sheppard case, which indicate that due process -- that actual prejudice need not be shown where due process demands a reversal because of the prejudicial publicity.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Larson.

Mr. Prettyman, you have I think eight minutes left.

ORAL ARGUMENT OF E. BARRETT PRETTYMAN, JR., ESQ.,

ON BEHALF OF PETITIONERS -- REBUTTAL

MR. PRETTYMAN: I don't think I will take it all, Your Honor.

I just want to say that I would be making my argument even if prior restraints worked. They don't work, at least in the sense of guaranteeing a fair trial or benefitting the public. They result, as you have just pointed out, Mr. Justice Marshall, in rumor and gossip and speculation that is often far more dangerous to a defendant than factual reporting in a newspaper. They result in the cover-up of occasional

corruption and abuse of power and of pressures that elected judges are sometimes put under. They --

QUESTION: Do you have to go that far, Mr. Prettyman? If the press are permitted to be present and have access to the entire record, you have a rather hard time covering it up.

MR. PRETTYMAN: Yes, but --

QUESTION: It would be delayed reporting, but you couldn't cover it up, could you?

MR. PRETTY: The problem, of course, is what is actually going on, and that is that you are having a combination of closed hearings and prior restraints, and what we are having more and more now, what is developing at an accelerated rate is the fact that the press is being cut off entirely.

Now, you sort of assume that the publication of a confession must be a bad thing, it is going to harm the defendant. In fact, people confess to things all the time that they didn't do, and the publication of confessions can result in freeing people. There was an incident the other day in Britain where a young man was charged with a crime and he got on television and said "I didn't do it," and the youngster who had been at the scene saw it and said, "That man was not there," and he told his father and they got the police and the fellow got off. Now, the same thing would have happened if he had actually confessed on television, if he said "I did do it," and that young boy said, "I was there and he didn't do it at all."

That could have gotten that man off.

You can't just assume that --

QUESTION: Are you suggesting that our decision in the Rideau case was erroneous?

MR. PRETTYMAN: No, but I would point out, Your Honor, that in that case you are talking about the effect at trial, and that you reversed, you didn't enter a prior restraint. And I think Rideau is a very good example because you didn't order that man to go free, you sent him back for a new trial, and you assumed that, despite those 50,000 people or however many it was who saw that television program, that somehow, with the Sheppard help, that man was going to get a fair trial the next time around.

QUESTION: Well, the narrow issue there was whether or not he was constitutionally entitled to a change of venue, for which he had made a motion.

MR. PRETTYMAN: That's true.

QUESTION: Mr. Prettyman, I suppose your position, if you prevail here, will be to increase the number of closed hearings. Now, you said a while ago that that is another case and --

MR. PRETTYMAN: Yes, sir.

QUESTION: -- you would be arguing against this. But is this a privilege for the press to assert or for the defense to assert?

MR. PRETTYMAN: Well, of course, we would contend -- and the Nebraska Supreme Court doesn't agree with us -- that the press is entitled to intervene here, that it represents not only its own rights but the public's rights. One very strange aspect of this case is that the Nebraska Supreme Court said that we never should have been allowed to intervene in the first place and that therefore we could have disobeyed the County Court order with impunity, even though it was entered against us.

Now, you've got a strange situation. Do we have rights or don't we? Is the public going to be represented or isn't it? I think what is going to happen if you allow these things is this: Defendants, as a matter of course, are going to ask for a prior restraint both to prevent themselves from being charged with ineffective assistance of counsel and also because it is obviously in their client's interest not to have any publicity about this. So that is going to become the normal thing.

Then prosecutors, what is their attitude going to be? Sure, give it to them, let's don't take a chance on reversal later if we disagree to it, and then you are sitting there with the judge, both the parties agreeing to something, pushing him toward it, you don't have the press present in Nebraska because they don't have a right to intervene, and so the judge naturally, who also doesn't want to be reversed, is going to

grant it.

I assure you, no matter how narrow an order you attempt to fashion, you are going to see a flood of litigation if this happens, and --

QUESTION: Well, in your federal system, your grand jury is certainly closed.

MR. PRETTYMAN: That's right.

QUESTION: In the federal system, your grand jury is certainly closed. You are not suggesting that the press can open up the grand jury?

MR. PRETTYMAN: No, absolutely not. We are not talking here about our right to get information. We are not saying that the courts can't keep some information secret or that everything has to be made public. We are not talking about it in that sense.

QUESTION: But I thought you were saying that the State of Nebraska is constitutionally obligated to open up its preliminary hearing?

MR. PRETTYMAN: No, I wasn't arguing that now. I said I might argue in the next case that it was, but that isn't this case. In this case, they chose to have a public hearing and they nevertheless refused to give us the information that was at the public hearing. And I think he mentioned a few moments ago that, well, it is just for a short duration, it is just between the preliminary hearing and the trial, those two and a

half months. You prevented this information for two and a half months from coming out. And I just don't think that, no matter what kind of an order you try to fashion, you are going to see the beginning of something that is not only a great departure from our constitutional system as we've known it, but you are going to see a flood of litigation that is going to result in more and more orders, and I simply implore the Court not to start down that path.

QUESTION: Mr. Prettyman, you don't base your argument on the matter of why is it essential that it be published tomorrow morning as distinguished from at a later point?

MR. PRETTYMAN: Your Honor --

QUESTION: Assuming that there is no barrier whatever to the subsequent publication.

MR. PRETTYMAN: Your Honor, I think that if the Court is really going to attempt to decide in each case whether a little bit of time is too much or too little, you are really in trouble. Let's say, for example, that on the morning of an election a Congressman is indicted and confesses and an unconstitutional order -- unconstitutional or not -- is entered immediately after the press, but it stays in effect only until 7:00 o'clock that night, that man is reelected. Is seven hours too little or too late? Are you going to put the courts into the position of saying, well, in that case, that seven hours was too long, but in some other case maybe a week is all right,

or a month is all right.

QUESTION: Has there ever been such a case?

MR. PRETTYMAN: Well, I can only say this, that this Court has said on several occasions that it is the contemporaneous -- In Re Oliver was one, and I think there have been several others -- has emphasized that it is the contemporaneous publishing of news, the public's right immediately to news, because you cannot judge the impact that news is going to have. In the Joan Little case, for example, the fact that women's rights were immediately able to generate support for us, was extremely important. And in the Schulenkamp case, the immediate putting out of the news resulted in the whole juvenile system being redone, and all of that could have been lost if there had been a delay. There is a momentum to these things. There is a momentum to news, and I think Watergate, of course, is the great example, the fact that news coming out now of something is of vital importance to the public in a suit.

As soon as you start saying, no, let's just keep it from them for a little while, you put yourself in very serious trouble.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you gentlemen. The case is submitted.

[Whereupon, at 2:33 o'clock p.m., the above-entitled case was submitted.]