ORIGINAL

In the

Supreme Court of the United States

GANNETT CO., INC.,	)	
	)	
PETITIONER,	)	
	)	
V.	)	
	)	No. 77-1301
DANIEL A. DePASQUALE, ETC., ET AL.,	)	
	)	
RESPONDENTS.	)	
	)	

Washington, D. C.
November 7, 1978

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IN THE SUPREME COURT OF THE UNITED STATES

GANNETT CO., INC., Petitioner,	:	
v.	:	No. 77-1301
DANIEL A. DePASQUALE, ETC., ET AL., Respondents	:	

Washington, D.C.
Tuesday, November 7, 1978

The above-entitled matter came on for argument at 10:04 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, 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:

ROBERT C. BERNIUS, ESQ., Nixon, Hargrave, Devans & Doyle, Lincoln First Tower, Rochester, New York 14603; on behalf of the Petitioner.

BERNARD KOBROFF, ESQ., Criminal Justice Appellate Reference Service, 80 Centre Street, New York, New York 10013 ; on behalf of the Respondents

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 1301, Gannett Company against DePasquale.

Mr. Bernius, you may proceed whenever you're ready.

ORAL ARGUMENT OF ROBERT C. BERNIUS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BERNIUS: Thank you, Your Honor.

Mr. Chief Justice, and may it please the Court:

I represent petitioner, Gannett Company, Incorporated, which seeks reversal of the New York State court of appeals.

The question presented by this case is what restrictions do the First and Sixth Amendments place upon a trial judge who rejects the public and press from a traditionally public suppression hearing in order to prevent press publication concerning that hearing.

QUESTION: Do you place your argument principally on one amendment as against the other?

MR. BERNIUS: Your Honor, I believe our argument is based, first, on the First Amendment; secondly, on the public trial clause of the Sixth Amendment. They are two separate grounds.

QUESTION: Which do you prefer?

MR. BERNIUS: I prefer neither, Your Honor. I think they're both equally important. I think the damages in the

First Amendment aspect are clear, as are they in the Sixth Amendment.

The facts in this case are very brief. The case arises out of the disappearance in mid-July, 1976, of a Rochester man while fishing on the Finger Lakes in New York state.

Respondents Greathouse and Jones were subsequently arrested for his murder. In November, 1976, a suppression hearing in the case was commenced before Judge DePasquale in the Seneca County court, located approximately forty miles from Rochester.

At the beginning of the hearing, the defense attorneys requested that the public and press be ejected, and that evidence which might or might not be admitted into trial would be heard at the hearing.

Judge DePasquale, with no inquiry or argument, and without hearing any evidence whatsoever or making any findings of fact, ejected the public, ejected the press --

QUESTION: Incidentally, is there a transcript of what happened?

MR. BERNIUS: Yes, Your Honor. At pages 4 through 6 of the Appendix is the transcript of that ejection.

QUESTION: Then was there a transcript made of the -- after the ejection, of the proceedings following?

MR. BERNIUS: I believe so, Your Honor, yes.

QUESTION: That transcript's not here?

MR. BERNIUS: It is not in the record before this Court, Your Honor. It was released after the defendants pleaded guilty, which was subsequent to the time that this initial proceeding, prohibition of mandamus, was commenced.

QUESTION: Did the trial judge at the time of his original order indicate that the transcript would or would not be available when the case was terminated?

MR. BERNIUS: Your Honor, at the initial ejection, there was no colloquy at all concerning the availability of the transcript in the future.

During the hearing, the reporter, the Rochester newspaper reporter who had been excluded asked for a postponement in order that attorneys might appear and argue. That postponement was denied, and the hearing finished in secret on Friday afternoon.

On Monday morning, attorneys appeared for Gannett, sought vacator of the court order of closure. And at that point since the hearing was over, we asked for access to the transcript.

Judge DePasquale heard argument on our motion, but denied vacator of the order, and also denied us access to the transcript in perpetuity.

After the plea of guilty, he had a change of heart

and released the transcript to the public, which was --

QUESTION: Has it been lodged with us, Mr. Bernius?

MR. BERNIUS: No, it has not, Your Honor.

QUESTION: Your entire record has not been lodged here?

MR. BERNIUS: Your Honor, the entire record is in the appendix. The transcript of the suppression hearing was not part of the record in the appellate division or in the court of appeals.

This is a separate proceeding distinct from the criminal proceeding. There was a separate proceeding --

QUESTION: What we're after is to know the entire record isn't here?

MR. BERNIUS: The record of the criminal case is not before this Court.

QUESTION: The record of the trial.

MR. BERNIUS: Of the -- well. The suppression hearing is not --

QUESTION: He entered a plea. .A trial at some stage began. I'm trying to separate the pre-trial from what he decided to do finally, which was to plead guilty, wasn't it?

MR. BERNIUS: Yes, Your Honor. There was no trial.

QUESTION: Pre-trial covers all of the things you've been telling us about on the exclusion of the public.

MR. BERNIUS: Yes.

QUESTION: When you say that this was a separate proceeding, you mean that Gannett's proceeding to obtain a release of, or access to, the suppression motion was in, under New York law, a separate proceeding from the criminal?

MR. BERNIUS: Yes, Your Honor. What happened was essentially two things. We were notified about this situation immediately -- or shortly before the suppression hearing in the criminal case. And that was on a Friday afternoon, and this was an outlying county.

On Monday morning, I essentially appeared as an interested party, or as an amicus, in the criminal case. I went back to Judge DePasquale to ask him if he would change his mind. He did not, and he denied our motion.

The next day we started a separate, distinct civil proceeding on prohibition in mandamus in the appellate division. So this is an appeal from --

QUESTION: And the case we have here, Gannett -- the plaintiff in this case is Gannett.

MR. BERNIUS: That's right, Your Honor. It's Gannett against the --

QUESTION: It's not the criminal case.

MR. BERNIUS: It's a civil case in the nature of prhibition in mandamus challenging the orders in a criminal case.

QUESTION: What did you make part of the record in

that application?

MR. BERNIUS: The -- we -- this case started, Your Honor, with the petition which is -- appears at page 21 -- page 19 of the appendix. And the petition challenges the orders in the criminal case, which were issued by Judge DePasquale.

QUESTION: And attached to it are the exhibits --

MR. BERNIUS: Well, yes, the orders and the transcripts of the criminal proceeding were attached as exhibits in the writ of prohibition.

QUESTION: Incidentally, I take it this was a stenographic transcript, not a tape recording.

MR. BERNIUS: That's right, Your Honor.

QUESTION: The proceedings start at 13 on your case. That's all we have on proceedings, right?

MR. BERNIUS: Well, what is happening with this appendix, Your Honor, is that things have been put in a chronological order. The transcripts of the --

QUESTION: Is there anything -- what happened with the motion other than on page 13?

MR. BERNIUS: No. At the time we started this, that was still secret and it was sealed.

When Gannett commenced the separate civil proceeding in mandamus in the appellate division, next to those papers were the newspaper articles which had appeared prior to the closure.

Now those articles are irrelevant to justify the closure. Because they were not before Judge DePasquale. He did not consider them. And indeed, no reference was ever made by any of the respondents to those articles.

But I would submit that those articles are directly relevant to the issue before this Court, because they demonstrate and put into a factual context the opinion of the court of appeals.

The articles appeared before a course of approximately two and a half weeks, from the time of the disappearance of this man, until the time the defendants were arraigned on the murder indictment.

They appeared on seven days out of that eighteen day period, and they appeared contemporaneously with the major events in the criminal investigation.

There were articles in morning and evening papers when this man disappeared. There were other articles when the defendants were arrested, when they were indicted, arraigned, and so on.

The last articles to appear were at the time of the defendant's arraignment, which was 91 days before the commencement of the suppression hearing. There was no further publicity in that interim period.

QUESTION: Suppose in the criminal trial, Mr. Bernius, the -- either the prosecution or the defense wants to take a

deposition of an absent witness, either out of the United States, or situated in some way where attendance, personal attendance can't be compelled.

Would you think the Sixth Amendment and the other arguments would require that the taking of testimony of that witness be a public, open hearing?

MR. BERNIUS: A criminal trial, Your Honor? Yes, I do. And I think --

QUESTION: No, not a criminal trial. I very carefully said, before trial, pre-trial.

MR. BERNIUS: In a criminal proceeding, yes, it would Your Honor.

QUESTION: What if it's never offered in evidence?

MR. BERNIUS: Well that is, I think, irrelevant. At the time of the proceeding, if that deposition has all the characteristics of a criminal trial, I would assume that a witness is going to testify, the parties are present, there is an oath, there is cross-examination, the defendant has a right to be present. All the characteristics of the criminal trial itself, the post-jury criminal trial.

QUESTION: Is it not common that in pre-trial depositions, both in civil and in criminal cases, particulary if no judge is present -- and that's usually the case -- that there are many questions which are asked and answered with the reserve right to challenge their admissibility at the --

when, as and if the position is offered; is that not so?

MR. BERNIUS: Yes.

QUESTION: Then how is it part of the trial until it is offered in evidence?

MR. BERNIUS: Well, Your Honor, it is an important stage in the process, and there is a development -- an adversary proceeding to develop the factual record upon which a subsequent determination be made.

QUESTION: Well, will a subsequent determination be made if it's never offered?

MR. BERNIUS: Yes.

QUESTION: What will there be for a court to rule on?

MR. BERNIUS: Well, it won't be made based on that. But there is no guarantee -- and I think the analogy to a suppression hearing is clear, that at the time of the suppression hearing, there is no guarantee at all, or no -- that the evidence will in fact be admitted at trial. In fact, there's no guarantee that there will be a trial.

But nevertheless, that could well be the critical stage in the process. But if the testimony, if the suppression hearing transcript, is not to be offered, or if the evidence that is given at a hearing is not to be offered at the trial, the reason for that is that a judge makes a determination that that evidence is not admissible.

QUESTION: Is that the only circumstance? What if

the party who has -- called for the deposition just decides it isn't needed, and therefore doesn't offer it?

MR. BERNIUS: Well, I think --

QUESTION: The prosecution -- the prosecution takes this pre-trial testimony in an abundance of caution, and then when they put their case in they found they proved -- established the same facts by other witnesses, and they never bother to put the deposition in evidence. Is it part of the trial then?

MR. BERNIUS: Not, in a strict sense, but in a generic sense, yes, Your Honor. I don't think that the fact that a jury is selected is a mystical concept that precludes the public's right to attend and observe and be aware of the entire gamut of the proceedings, where there is testimony, where there is cross-examination, where there is an attempt to establish either the prosecution's point or the defense's point.

QUESTION: Well, does the Sixth Amendment speak in terms of proceedings or does it speak in terms of trial?

MR. BERNIUS: Well, Your Honor, it speaks in terms, obviously, of a trial. But it's our position that a suppression hearing is clearly, for constitutional purposes, part of the trial. In fact, the statistics are that 90 percent of all criminal cases, and 100 percent of criminal cases in Seneca County for 2-1/2 years, were completed at the pre-trial stage.

QUESTION: Well, counsel, what if the statistics showed that 90 percent of the complaints of the prosecuting attorney were never even prosecuted by information or indictment by him? Would that make the prosecuting attorney's conference among his colleagues part of the trial, because that was the way so many cases were disposed of?

MR. BERNIUS: Well, Your Honor, there is a distinction obviously between that situation and the situation where there is a formal proceeding, an adversary proceeding; witnesses are sworn; and a judge is going to make a determination based on that testimony, a determination of fact.

I think that really the answer to the question of when did the trial commence is to be found in the purposes that are served by the public trial clause.

One of those purposes, obviously, is to protect the defendant; to see that his interests are not abused by the prosecuting authorities. But it goes beyond that.

There are interests in the public, specifically, third parties may have a direct interest in the case. But the interst of the public in seeing that --

QUESTION: Why did the framers, then, case the language of the Sixth Amendment in saying, the accused shall enjoy the right of a public trial? Why didn't they say the press shall have access to the trial?

MR. BERNIUS: Your Honor, I think that, based on the

the prior history, and -- which is developed to a certain extent in our brief, but in the amicus brief of the National Association of Broadcasters more extensively, there was really no indication that in common law the right of a public trial accrued to the defendant at all. There were broader purposes behind it.

But the codification in the constitution, I think, recognizes that the defendant should specifically be guaranteed a fair trial, a public trial, but the -- inherent in that clause, the public trial clause, is a recognition, I would submit that the public has an equal interest.

I think that the purposes that are served by the clause mean that it should not be read literally.

QUESTION: Well the framers certainly -- the framers here took an odd way of expressing it, if they meant to adopt your view.

MR. BERNIUS: Your Honor, I don't think so. Because, again, inherent in that phrase, public trial, is the notion, the concept that the public has an interest in it; and based on the prior history of common law, and based on the purposes served by the public trial clause --

QUESTION: Well, how can you tell what the purposes served are except by reading the clause?

MR. BERNIUS: I think, Your Honor, by looking at the history and really analyzing it in the terms of the

essential nature of the guarantee and what it does.

The overwhelming purpose served is, as far as I can tell, the insurance of the confidence of the public in the judicial system, in the criminal justice system. The public nature of trials is, in effect, necessary to the vitality of that system, and its viability.

I don't think that our criminal justice system would long last if proceedings of this nature were held in secret. And I think --

QUESTION: Mr. Bernius, you argue anyway, don't you, that independently of the Sixth Amendment public trial, that the press, at least, has a First Amendment right to be present?

MR. BERNIUS: Absolutely, Your Honor.

QUESTION: Now, before you get into that -- I now you're going to argue it, I hope -- but what -- does the public also have a First Amendment right?

MR. BERNIUS: I think so, Your Honor, yes. I do --

QUESTION: You don't claim anymore for the press than for the public?

MR. BERNIUS: Absolutely not. We think that the public right is equivalent to the press' right.

QUESTION: And this is First Amendment and not Sixth Amendment?

MR. BERNIUS: That's right. The --

QUESTION: When you get to that, do you have any cases from this Court that, under the First Amendment, guarantees access to information?

MR. BERNIUS: Your Honor, the -- I believe I have an analogous case history. First, that there was -- there's no question in this case that the public and the press had a right to be present prior to the motion to exclude them. The court of appeals indicated that in its opinion; the respondents concede that.

It's -- the right to be present, I think, derives primarily from the right to gather information, which was recognized in this Court in Branzburg. And I know that the right to gather information is not without limits.

But I would submit that if there is any sort of right to gather information, it must exist at trial, it must exist in the streets, and other public forums.

And I think that for the purposes of the right to gather information, the public forum test, which was developed and most specifically articulated in the Granid case gives very pertinent guidance.

QUESTION: Will you take that so far as to have the right to be present at a conference of members of an appellate court?

MR. BERNIUS: No, Your Honor.

QUESTION: Why not?

MR. BERNIUS: Because the presence of the public or the press at conferences of this Court or any other court would be basically incompatible with the primary function of the -- of that -- of the public institution at that time.

QUESTION: Except I thought you based your approach a little while ago on the right to gather information.

MR. BERNIUS: That's right, but it's not -- it's clearly not unlimited, Your Honor.

And I think that the Court has answered that in some of the prison cases, it's answered that to a certain extent in the public forum cases, Marsh against Alabama, Adderley against Florida, the cases where there's an asserted right to be present to exercise First Amendment freedom.

QUESTION: Mr. Bernius, what is the primary purpose of suppression here?

MR. BERNIUS: The primary function of the suppression is to determine, Your Honor, whether a jury should hear specific evidence, whether it is sufficiently reliable.

QUESTION: And if the court determines it should not be heard, and if the press has heard that evidence, is there any restriction on the press publishing it so that it will come to the attention of the jury?

MR. BERNIUS: The -- no.

QUESTION: So how could the primary function of the suppression hearing be performed if you're correct?

MR. BERNIUS: Well, Your Honor, that is really, I believe, one of the principal faults in the court of appeals opinion. The assumption that publication by definition means A, that the jury will be affected by this information. The orders in this case were aimed directly at publication. They're aimed at keeping the public ignorant of the fact of this hearing. And they're -- the basis for the orders is public ignorance with the hope that somehow an indirect benefit will filter back to the trial.

QUESTION: What if the judge modified his orders and expressly said that at the termination of the trial the transcript of the suppression hearing will be made available to anyone who wants it? Then is there any suppression of information?

MR. BERNIUS: Yes, there is, Your Honor. I think that this Court in Nebraska Press very much dealt at length with the problems in delaying publication of news concerning the criminal justice system.

Secondly, the --

QUESTION: There, you're dealing with the trial, not the pre-trial, weren't you?

MR. BERNIUS: Nebrask Press is a pre-trial situation, Your Honor. The -- the delay in this case is just as serious.

Secondly, the order in this case is in a sense more

dramatic than in Nebraska Press. Because not only is there a delay, but there is an absolute denial of the public's knowledge of what went on in the suppression hearing. As an appellate court, this Court is well aware of the inadequacies of the transcript. But the tones, inflections, gestures, everything that makes the presence of the trier of fact so necessary to a determination -- none of those things can be recaptured in a transcript.

And --

QUESTION: But if there's -- as Mr. Justice Stevens suggested, if the interests of justice and fairness require that the jury not hear a piece of evidence, how is that purpose served? I'm not sure you fully answered him. How is that purpose served if the jury hears it indirectly?

MR. BERNIUS: Your Honor, we make no argument at all that suppression hearings must be open under all circumstances. We simply say that the damage done both to First Amendment interests and to the public trial interests of the public are serious, and that if closure is to take place, it should take place only as a last resort.

What has happened in this case is that the court of appeals has said that closure, secret proceedings, are preferable to change of venue, to continuance, to an extended voir dire -- all those separate alternatives that this Court has repeatedly said would have been effective to mitigate the

effects of pre-trial publicity.

QUESTION: If you were in a federal court, you would have some difficulty using change of venue as an alternative if the defendant objected, wouldn't you?

MR. BERNIUS: Your Honor, I -- that is -- it's clear that when there's a continuance or change of venue or of voir dire, to some extent it's going to inconvenience a defendant.

QUESTION: Well what about the vicinage requirement?

MR. BERNIUS: The vicinage requirement, your Honor, deals with the source of the jury. It doesn't really deal with venue of a case. And I think that the history of the vicinage clause indicates that in the time of the enactment of the Sixth Amendment, there were -- the district -- the federal judicial district, were the equivalent of the states, with the exception of Massachusetts and Virginia, which each had two districts.

So I don't think that the vicinage clause is of any pertinence here since it's, number one, outdated, and number two, requires a jury essentially from the state.

QUESTION: Well, do you think the government could have said, if this case had been pending in federal court, don't worry about opening the suppression hearing to the court because we're going to move for a change of venue down to Tennessee?

MR. BERNIUS: Well, Your Honor, I think that at that point the defendants would have to make a choice. And the fact that venue may be laid in a certain area, the fact that continuance would somehow interfere with a speedy trial, those are considerations that all must be weighed.

But I don't think that in this situation where there are important First Amendment rights and press and public rights that any one guarantee can be deemed to be absolute.

What we're seeking here is an accommodation of all these essentially conflicting values. What -- there is, Your Honor, no conflict in this case. There was no showing that publication would in any sense have prejudiced the defendants' right to a fair trial. And there's also been no showing in this case that ejection or closure of this hearing would have helped to mitigate that prejudice.

In fact, I think--

QUESTION: Well, Mr. Bernius, both defense lawyers moved for the closure on the very ground that they thought it would be prejudiced.

Wasn't that the grounds, the reason it was closed?

MR. BERNIUS: They moved on the basis that evidence which may or may not be admissible at trial was to be admitted at the suppression hearing, and asked for it to be closed.

I don't really know what that is. I assume that they were concerned with the effects of pre-trial publicity. But

the concern is not enough, Your Honor. There must be some sort of showing to justify this unusual, and we submit, unconstitutional, procedure.

QUESTION: What sort of showing would they make in open court without revealing the very thing they wanted to conceal?

MR. BERNIUS: Well, Your Honor, first the most dramatic example always is a suppression of a confession.

QUESTION: Right.

MR. BERNIUS: In many cases that the confession is not admitted at a suppression hearing, it's not really the issue at a suppression hearing.

QUESTION: The fact that a confession had been made would have to be disclosed, wouldn't it?

MR. BERNIUS: That's right.

QUESTION: And would not that be prejudicial to the defendant if it were published in the press? And did you not assert the right to publish whatever you heard at the hearing?

MR. BERNIUS: We assert the right to publish whatever we heard, but we already knew that there was a confession, Your Honor. And we could have published that no matter what happened at the hearing. We could have said, and with full --

QUESTION: Well, maybe in this case. But in the normal -- in every case, it isn't true that the press would know whether there was a confession in advance, would it?

MR. BERNIUS: Well, the press would know, Your Honor, that there was an illegal search and seizure of evidence; that there was -- or there was a confession; or there was an illegal wiretap.

They would know generically what was going on at that hearing. And it seems to me, Your Honor, that the fact that a hearing was closed would not diminish the prejudicial impact of a case. It, in fact, would exaggerate it, that the public would assume the worst at a closed hearing.

QUESTION: You're really saying you're a better judge of what's good for the defendants at trial posture than their own counsel?

MR. BERNIUS: No, I'm not, Your Honor. But I think that the defendants' rights are not absolutely paramount if they're not -- if there's not a demonstration that they are in fact prejudiced.

QUESTION: Did you say we knew here what it was that the defense wanted to suppress?

MR. BERNIUS: We knew that it was a confession, Your Honor, and we knew that --

QUESTION: Anything else?

MR. BERNIUS: We knew that there was a gun that had been seized.

QUESTION: But do we know that the motion to suppress identified the -- it must have, I suppose -- the items that

were sought to be suppressed?

MR. BERNIUS: Not specifically.

QUESTION: We don't know. And there's nothing in this record to tell us?

MR. BERNIUS: No.

QUESTION: What I'm getting at is, didn't you -- I know the gun was found in Michigan, wasn't it?

MR. BERNIUS: Yes, Your Honor.

QUESTION: And hadn't the papers already published that before the suppression hearing?

MR. BERNIUS: Yes, Your Honor.

QUESTION: And you knew that there was a confession, but you had not printed that?

MR. BERNIUS: Absolutely. In fact, the day after --

QUESTION: Absolutely it was or was not published?

MR. BERNIUS: There was no reference in any of those articles to a confession, and that's an important point, Your Honor, that the press in this case was responsible. Even the article the day after the hearing was closed, the reporter did not refer to the confessions or gun; she said, she described it as evidence which might have been deemed admissible at trial.

QUESTION: Well, if you had had a hearing -- I gather one of your protests here is that you should have had a hearing before the order of closure issue; is that right?

MR. BERNIUS: Yes.

QUESTION: If you had, what would you have argued?

MR. BERNIUS: We would have argued that there was no basis for the closure, Your Honor.

QUESTION: Well, on the ground that whatever was the subject of the motion to suppress had already been published?

MR. BERNIUS: That's one aspect to it, that closure would be ineffective because it's not a gag order on the press; they could publish -- the single most prejudicial statement that could be made is that the defendants confessed; and we could have published that.

QUESTION: You said earlier, Mr. Bernius, in response to Mr. Justice Stevens, that the defendants' right was not paramount; I think those were your words.

You mean that defendants' right to a fair trial is not paramount?

MR. BERNIUS: What I meant to say, Your Honor, is that there must be an accommodation. If a situation arose where a defendant's right to a fair trial was on the line against the public's right, First Amendment and Sixth Amendment right, we do not say that the defendant's right should not be paramount. But it's important to require the New York State court of appeals and trial courts throughout the country not to abrogate the right to the press and public unless it's absolutely necessary,

and that a threat, an actual threat, danger, to a fair trial is shown, and there's a showing made that the ejection or closure would be effective, and finally and most importantly, there's a showing that the traditional shepherd alternatives would be ineffective to cure that same --

QUESTION: Well, suppose Mr. Bernius, in this case there had been a hearing, and it had -- the issue was a confession, and the judge says, I've read the suppression and if the newspapers and media would really do their job and get the word out, which they apparently want to do, there's going to be a lot of people hear about this, and it's going to make it very difficult to get a jury. ANd he makes a finding that there is a serious danger to the fair trial rights of the defendant.

I suppose you'd take that up on appeal, wouldn't you?

MR. BERNIUS: Your Honor, we would obviously have the option of commencing a special proceeding, if we did --

QUESTION: Well, I know. But you wouldn't lie still for that, I take it. I would just like to know what kind of findings by the trial judge you would accept.

MR. BERNIUS: Your Honor, it's the -- I would submit that the appropriate findings ;that have to bemade are the findings articulated in Nebraska Press. And the fact that --

QUESTION: Well, suppose he makes them all.

MR. BERNIUS: Certainly there's always the possibility that it could be challenged in a separate proceeding under the law of New York State, Your Honor. But I doubt very much, certainly --

QUESTION: Well, what kind of evidence and what kind of danger do you think would have to be present that wouldn't be present when there's a flat-out confession of a crime by the defendant and interested media? I take it you think that in this case at least it was news?

MR. BERNIUS: Yes.

QUESTION: Then you were interested in publishing what went on at the suppression hearing?

MR. BERNIUS: Absolutely, Your Honor.

QUESTION: So you were interested in publishing the confession if there was one?

MR. BERNIUS: Not necessarily.

QUESTION: Why didn't -- not necessarily. Were you going to suppress it or weren't you?

MR. BERNIUS: That would be an editorial judgment, Your Honor. But I think --

QUESTION: Well you wanted the right to publish it, anyway.

MR. BERNIUS: We want the right to make that decision.

QUESTION: You want the right to publish. So what

kind of evidence would be sufficient to warrant a judge's conclusions that there is a real danger to the --

MR. BERNIUS: A finding that -- and the basis for a finding -- that change of venue to an adjoining county would not have cured the prejudice. Here we had a circulation of 1,500 newspapers in a population of 36,000 in Seneca County. The adjoining counties had 350,000 people, and the judicial district had almost --

QUESTION: We are just talking about the newspapers, aren't we?

MR. BERNIUS: We are talking about the public --

QUESTION: We're talking about the media and we're talking about television.

MR. BERNIUS: That's right. -

QUESTION: Radio.

QUESTION: And so it doesn't do you any good to talk about 1,500 newspapers?

MR. BERNIUS: Well, that's what --

QUESTION: You have to talk about television, the reach of television coverage, don't you?

MR. BERNIUS: Certainly. And that's not relevant in this case because there's no evidence that there was any television or radio coverage in general --

QUESTION: Well, you don't suppose there wouldn't be, do you, if there was an open suppression hearing?

MR. BERNIUS: There's nothing to indicate that there was, Your Honor, or would have been.

QUESTION: You think they're just going to stay home?

MR. BERNIUS: In this case, yes. But in -- obviously, as in Rideau, television coverage is certainly relevant, and should be considered. But in this case it wasn't considered. And the effect of a continuance of voir dire should have been evaluated.

QUESTION: Mr. Bernius, may I ask you, whether with or without a prior hearing, there had been no closure order, and you had sat, and members of the public, however many there were, through the suppression hearing; and at the close of it, the judge had then issued an order that you not publish until at least after a jury had been chosen and sequestered, anything that you heard that day and similarly, direct such an order to the general public, whoever they are, present at the time.

You'd still be here, wouldn't you?

MR. BERNIUS: Yes, sir.

QUESTION: On what grounds then?

MR. BERNIUS: On the Nebraska Press test, Your Honor. But the fact --

QUESTION: The -- then Judge DePasquale apparently anticipated your answer to Mr. Justice Brennan, didn't he?

MR. BERNIUS: The colloquy among lawyers who were involved in this, Your Honor, is that this situation is a

direct result of the Nebraska Press decision. And it's our feeling that the mechanism -- even though the mechanism is ejectionrather than injunction, advantages are at least as great, and the standards of the Nebraska Press should be complied with.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Kobroff.

ORAL ARGUMENT OF BERNARD KOBROFF, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

The right to a public trial is neither an absolute right of the public nor of the press. Pre-trial hearings and portions of trials have been closed to the public, including the media, for such situations as: preventing the disclosure of a skyjack profile testimony; showing the emotional and physical health of a pregnant witness; protecting the identity of an undercover agent; permitting a prosecutrix to testify uninhibitedly at a trial.

Respondent submits that the need to preserve and infuse constitutional right to an impartial jury in a county of venue is as important as any of these other interests which have been held to justify closure of criminal proceedings.

Respondents called Edwin Greathouse and David Ray Jones to challenge the admissibility of confessions that they

had given to Michigan police, and physical proof that these confessions had led police to seize.

Respondent, Judge De Pasquale, was required to resolve that this evidence had not been obtained in violation of the accused's constitutional rights. The admission of this evidence, these full confessions to the alleged murder and robbery, would undoubtedly have been prejudicial to these defendants at their trial. And widespread dissemination of these confessions prior to trial could nonetheless have predetermined their guilt in Seneca County.

QUESTION: You wouldn't -- it would just be a timesaver or -- would there be anything other than saving if there was a hearing about why it was important to close the proceedings, and why some other mechanisms wouldn't suffice?

MR. KOBROFF: Well, the New York Court of Appeals has held that the press is certainly entitled to have their views known before the court.

QUESTION: Well, that isn't what the trial judge did, is it?

MR. KOBROFF: Well, the situation that was presented to Judge DePasquale was that this motion was made, there were at least three reporters, representing three different newspapers, in the courtroom. None of them mentioned their objections to it. The district attorney agreed, in effect, with the defendant --

QUESTION: No, but they made motions later.

MR. KOBROFF: Well, they did, in fact, make motions later, and Judge DePasquale did, in fact, hold a hearing and listened to their arguments. So they did have a hearing.

QUESTION: The -- did he make -- what kind of determinations did he make? He just denied the motions, didn't he?

MR. KOBROFF: No, no. I mean, Judge DePasquale heard this argument, heard both sides, and then determined that there would be a reasonable probability of prejudice to these defendants had the media gotten access to the confessions and disseminated them. This was his finding.

QUESTION: And did he indicate that some other mechanisms wouldn't be sufficient?

MR. KOBROFF: Well, the only reference to that is one of the defense lawyers in the transcript mentiones change of venue. That is the only alternative specifically mentioned in the --

QUESTION: Well, what does the court of appeals think should happen in the normal case?

MR. KOBROFF: Well --

QUESTION: Did they think something should happen in addition to what happened in the trial court?

MR. KOBROFF: Well, they obviously mentioned the alternatives mentioned by this Court in Sheppard, in the

opinion.

What you've got here, though, which makes it different I think than what these alternatives, these Sheppard alternatives, would do, is here the actual poison had not been put out into the community. We're not in a situation where we're negating damage that's already been done, that's already out.

We've got a situation where the damage isn't yet been done. It isn't widespread. And we have an opportunity to stop it at its inception.

QUESTION: But the gun is already out.

MR. KOBROFF: That's true. And to that we might well have -- this isn't the only alternative available to a court to deal with prejudicial publicity. I mean, we have in fact the Sheppard measures. They might also have to be used.

QUESTION: Must the exclusion, however, be the last alternative, or --

MR. KOBROFF: Well, the difficult of exclusion as the last alternative is that if you wait until the voir dire or if you wait until change of venue can be done, the hearing's already over; it's too late.

Exclusion is a prophylactic, and in a certain situation, unusual situation -- there is no denying this is an unusual case -- it is effective, and it should be available to a trial court.

It is a fundamental tenet of due process that the conclusions to be reached in a case will be induced only by evidence and arguments in open court, and not by any outside influence, whether of private talk or public print.

Judge DePasquale had the obligation to prevent suppressed evidence in determining the guilt of Greathouse and Jones, and certainly for determining their guilt prior to trial; to prevent the jury from learning of a coerced confession during trial; yet all the while needlessly making it available to them to read or hear of it before the trial, mocks the claim that our system of law has always endeavored to prevent even the probability of unfairness.

For Judge DePasquale to have allowed public disclosure of potentially tainted evidence which he had the constitutional duty to exclude would involve the court itself in this taint and illegality.

Respondents Greathouse and Jones were out-of-state transients. They were accused of a murder and robbery of a local area resident, Wayne Clapp, a former police officer with roots in the community. They had fled -- respondents Greathouse and Jones -- had fled Seneca County soon after Clapp's disappearance, and they were arrested in Michigan several days later. There they allegedly gave these confessions which is the object of this motion.

If they had prevailed at this hearing, they had a

tryable defense. The people's case would have been highly circumstantial. Three leave on a boat to return. Gunshots are heard, anchors are missing. But there's no body; there's no deceased, no corpse and no eyewitnesses to any crime.

QUESTION: But was the body ever found?

MR. KOBROFF: Never. Never found.

However, if they're unsuccessful at the suppression motion, their defense is almost hopeless. Full confessions to the crime, plus the murder weapon itself is in evidence.

This case had already generated extensive media publicity throughout Seneca County.

QUESTION: But when you make that statement, are you basing it on what's in the appendix?

MR. KOBROFF: I think we can accept that.

I think it can also --

QUESTION: This is far different from some of the other cases that have been decided here, isn't it? It doesn't strike you as rather routine reporting? Factual reporting?

MR. KOBROFF: Your Honor, they might have -- they claim them to be factual reports. But as a defense attorney trying the case, I mean, you would not want to accept that as factual reports. They're untested --

QUESTION: Well, I'm comparing that with the material in Murphy against Florida, for instance.

MR. KOBROFF: All right. The thing with Murphy is,

one there was no confession. That was confronting the -- or would possibly have been testified to, and it was reported in the press. I think that's a major distinction from what you had in Murphy.

On the day of the suppression motion, we had three reporters in the courtroom that we know of: petitioner's reporter, a reporter from the Geneva Times, and a reporter from the Syracuse Post. Together, these papers accounted for almost 85 percent of the daily newspaper circulation in Seneca County.

QUESTION: Is Geneva the county seat of Seneca County?

MR. KOBROFF: None of these papers are published in Seneca County. Geneva is in Ontario County a few miles away. The only newspaper actually published in Seneca County is a weekly newspaper.

QUESTION: Where was this court sitting in Seneca County?

MR. KOBROFF: Seneca County -- oh --

QUESTION: What town?

MR. KOBROFF: I believe Waterloo.

An additional six percent of the daily newspaper circulation of Seneca County is accounted for by petitioner's Ithaca Journal, a paper which it owns and is distributed there.

There can be no doubt that --

QUESTION: Well, are these statistics very important?

MR. KOBROFF: No, no. I just want to state them to make a point that in fact what would have occurred at this hearing would have been widely and immediately disseminated. I think that three newspapers will not put three reporters in Seneca County courthouse unless they feel there's a news story and unless they're going to use it. That's the only reason, and the fact that they do have a circulation in that county.

Greathouse and Jones moved to the exclusion of the media reporesentatives. They argued that the deleterious effects of disclosure, the evidence they sought to suppress, sought to be suppressed, would outweight their right to a public trial.

QUESTION: Well, can you identify what it was they wanted to suppress?

MR. KOBROFF: Well, yes, I know what it was, because I've seen the --

QUESTION: It's not in the record before us?

MR. KOBROFF: Well, they made a motion to suppress physical evidence. The motions were statements made to Michigan police and the fruits that these confessions had led --

QUESTION: Well, had there been any publication of what it was, the physical evidence was, found in Michigan?

MR. KOBROFF: Right. The -- it is clear that the gun was found, that Greathouse led the police to. That was

reported. And it was reported at the --

QUESTION: But you say the motion to suppress also was addressed to statements made to Michigan police?

MR. KOBROFF: Oh, yes. They had given statements and written confessions.

QUESTION: And there had been no publication that they had made such statements?

MR. KOBROFF: The publication dealt with the fact that New York police were -- they listed -- they gave one statement that Greathouse had made to the Michigan police when he was captured, that is that he was afraid he'd be shot.

QUESTION: I mean to the extent that all this had already been published, why --

MR. KOBROFF: Well, the substance of the confessions had not been published.

QUESTION: So is this down really to the substance of the confessions?

MR. KOBROFF: Well, no, the actual word itself confession, hadn't been used in admissible statements.

QUESTION: I understood your friend to say that even though the newspaper reporters knew of it, they had not published it as a matter of their own editorial judgment.

MR. KOBROFF: It would appear so. But nevertheless, the accused did not necessarily feel they had to run the risk. When they see three reporters in the courtroom, that

this might continue.

Up to now, they had not gotten the substance of the confessions. They knew, you know, it had been reported that police were in Michigan interviewing these suspects to learn the apparent motive to the slaying. So they knew that they had gotten something from their interviews, but they didn't know what.

And now, on the day of the suppression hearing, they were going to find out what the quote motives to the apparent slaying was.

QUESTION: But they also had published that he was probation from San Antonio.

MR. KOBROFF: Right. I would say that's not exactly a fact.

QUESTION: And that the state police, hoping to bring a pickup truck back, and they're still looking for the .357 magnum revolver which they later found.

MR. KOBROFF: I think you --

QUESTION: They had everything in there but the confession.

MR. KOBROFF: They had a lot of damaging evidence in there.

QUESTION: Well, what did they have -- other than the confession -- they didn't have, which they published here.

MR. KOBROFF: Uh --

QUESTION: And I'm not -- I'm just halfway through.

MR. KOBROFF: Right. It's the confession. That would be it.

QUESTION: That's the only thing then, isn't it?

MR. KOBROFF: Well, I think in this case, that's the difference perhaps between having a tryable defense and --

QUESTION: Well, Mr. Kobroff, would you be defending this closure if everything that was the subject of the motion to suppress had already been published?

MR. KOBROFF: Yes, I think that they could still make their motion, from --

QUESTION: Well, what justification would there have been for the closure of everything that was the subject of the motion to suppress if it had --

MR. KOBROFF: Well, I think the defense counsel could certainly make the motion. I mean, whether the --

QUESTION: I'm not talking about the defense counsel. I'm asking what justification would there have been for the order of closure in that circumstance?

MR. KOBROFF: The same. That it would threaten their rights to get an impartial jury in that county, the -- simply because the press has this information, simply because the press can publish it, doesn't mean that the defendant is therefore -- is to stop from trying to, you know --

QUESTION: I don't suggest he is. He can make the motion. I'm just asking why the judge would enter an order of closure, if everything subject to the motion had already been public knowledge?

MR. KOBROFF: He might well not. He might well not. He could well take this into consideration and say, well, given the situation I don't find a threat and I won't do it.

On the other hand, he might well say, well, yes, I'm going to do this and I'm going to then continue the case, and you've waived your right to speedy -- he might -- they might say the whole instance is a thing you could do even though the information is out.

I'm simply saying that shouldn't foreclose the defendant or the judge from having this power to -- this means of protecting the defendant's right.

QUESTION: Is it your position, is it solely the protection of the defendants' rights that is involved here? Supposing the New York State legislature passed a law saying that all trials -- all criminal trials -- in the state shall be closed unless otherwise required by the constitution of the United States. And both the defendant and the prosecutor agreed in this particular case that the trial should be closed; they both moved for it or stipulated to it.

Does that raise any constitutional issue?

MR. KOBROFF: Well, I would first of all say that I

think that's very unlikely.

QUESTION: It would be a rather strange statute. But let's suppose it was enacted.

MR. KOBROFF: I think that if that -- if such a statute were ever enacted by the state legislature, it might well raise constitutional problems.

QUESTION: What sort of constitutional problems?

MR. KOBROFF: The public is the ultimate sovereign. The public has a right to know --

QUESTION: Well, what about a rule of an appellate court, or the rule of the governor of New York that his cabinet meetings are going to be private, or the rule of the President of the United States that his cabinet meetings are going to be private?

MR. KOBROFF: I think that could -- I think you have -- that's a little different than perhaps a public trial. By definition, a public trial.

QUESTION: Well, why do you say, by definition, a public trial, if the New York State legislature said, it's not going to be a public trial?

MR. KOBROFF: Well, no, I just meant in comparison to an executive closure having the essence --

QUESTION: Yeah, but the public trial -- you're referring to the Sixth Amendment, I take it?

MR. KOBROFF: Yes.

QUESTION: I know, but you're argument is that that's a defendant's right.

MR. KOBROFF: Yes, it is. I would also say, though, that it's also the public policy of the state of New York and of every other state that there are other societal interests that are advanced by the right of a public trial independent of an accused's rights to a public trial. I think there are two sources.

QUESTION: I was trying to find the Jelke case in the New York court of appeals. Do you remember if that's cited in the briefs?

MR. KOBROFF: Yes, I believe that's cited in my brief.

QUESTION: You do, eh?

MR. KOBROFF: Yes, --

QUESTION: Did the judge in this case --

QUESTION: Give me the citation.

MR. KOBROFF: It's 308 N.Y. 56 123 NE 2nd 7-69.

QUESTION: 308 N.Y. 56 --

MR. KOBROFF: -- 123 NE 2nd 7-69.

QUESTION: Did the judge put any limitation on the prosecutor or others releasing statements about the condition --

MR. KOBROFF: No, Your Honor, the prosecutor didn't.

QUESTION: Does this record show how the media found about the existence of the gun?

MR. KOBROFF: I believe it was certain of the statements --

QUESTION: The motions made in open court? Were there references to the pistol in the motions in open court?

MR. KOBROFF: No, I believe -- the papers were filed that would have referred to the pistol rather -- and those were filed. So --

QUESTION: But those were public records, and they weren't sealed?

MR. KOBROFF: No, they were not sealed. I believe, to answer your question, I believe that most of the sources of news seemed to be the state police. A David Lufweiler was referred to in various of the articles, giving various quotes.

QUESTION: Do you think the threat to the fair trial rights of the defendant are as great from admissible evidence being published ahead of time as inadmissible, or not?

MR. KOBROFF: No. The situation isn't the same. I mean, if the evidence is admissible, there's no reason to insulate the jury from it; they're going to hear about it anyway.

QUESTION: Well, I know. But suppose on voir dire you ask the jury, have you read about this case? And they say, oh yeah, we've read all about it. What do you as a defense counsellor say next? Shrug your shoulders or not?

MR. KOBROFF: No, no. I ask a few more questions to see exactly what they've read and where they've read it, and how it might have affected them.

QUESTION: Well, suppose one of them says, I read a verbatim transcript published in the paper of a suppression hearing which turned out -- and the evidence was admissible.

MR. KOBROFF: Well, I don't think I have cause, but I might not want them anyway.

QUESTION: The -- do I understand correctly that the transcript of the suppression hearing is now available and is part of hte public record?

MR. KOBROFF: Yes.

QUESTION: But it's not -- it was not sent here.

MR. KOBROFF: Well, it wasn't part of -- this is a collateral proceeding --

QUESTION: Yes, I know.

MR. KOBROFF: -- to the --

QUESTION: Collateral, but perhaps of some interest.

MR. KOBROFF: Yes. But no, it was not sent here.

QUESTION: Could it be?

MR. KOBROFF: I suppose so. I tell you, what I do have with me, if Your Honors would want it, is a copy of Judge DePasquale's decision on the hearing. That much I have with me, if Your HOnors would want it.

Judge DePasquale could not close his eyes to the

obvious, needless prejudice to the accused's constitutional right that was about to occur. He had the duty to protect the respondents Greathouse and Jones' right to a trial by an impartial jury in the county of venue, and he did what any prudent judge would have done.

QUESTION: How about the -- do you see any constitutional problems at what -- Judge DePasquale did, say, well, the press may stay and the public may stay, and they heard the whole thing. And at the close of it, he said, this may be prejudicial, and he issues an order directed to the press and public present?

MR. KOBROFF: I don't think he could do that.

QUESTION: You don't think --

MR. KOBROFF: I think Nebraska Press pretty well decided that issue. That's just not available. I mean -- and in addition, I think this Court even held in Nebraska Press that what occurs at a public hearing may not be -- cannot be subject to a prior restraint.

So that option was never even available, insofar as that goes.

QUESTION: Would that fall within what I think Mr. Justice Frankfurter said: Once the cat is out of the bag, it's impossible to get it back in again?

MR. KOBROFF: That seems to be the rule.

QUESTION: What was the judge's decision in this

case on admissibility?

MR. KOBROFF: Certain confessions, certain segments, were suppressed; others were not. Apparently, certain statements were made, and then i n the presence of attorneys, more statements were made.

What is involved in this case is the constitutional right of an accused to a trial by an impartial jury in a county of venue, and the right of the public, including potential jurors and media representatives, to have immediate access to pre-trial evidentiary suppression hearings.

The case does not concern the right of the press to publish free from prior restraint. There were no restraints on press publication in this case; no injunctions restraining the press from publishing anything it wanted to; no contempt citations punishing the press for having published anything.

Petitioner's error is in equating a temporary denial of public access to potentially inadmissible evidence with a court-ordered direct restraint on publication.

The press was at all times free to publish anything it wanted to about the case of people v. Greathouse and Jones. If the press had learned what transpired at this in camera proceeding, their publicationof this evidence would have been unrestrained.

Petitioner nonetheless argues that the public, including prospective jurors', right to immediate access to this

this testimony, testimony untested by constitutional standards as to reliability, admissibility; testimony found to be probably destructive of an accused's constitutional right to an impartial jury.

If this right to immediate access is entitled to the same constitutional protection as the press' right to publish free from governmental censorship, respondent submits that there is no basis in law or reason for this equation.

This has never been the requirement, this has never been the standard, to deny -- in instances where courtrooms have been closed. In none of the instances to protect the identity of an undercover agent, to allow a witness to testify uninhibitedly; this has never been the standard used.

And such a standard would severely undermine an accused's constitutional right to an impartial jury. And without an impartial jury, any other right granted to an accused is meaningless.

An important value in our society, the value embodied in the constitution, is of a trial by an impartial jury in a county where the crime was allegedly committed. This requirement of a fair trial has been interpreted to mean not only the absence of actual bias, but even the absence of the probability of unfairness.

To further protect the rights of an accused, our society extends reasonable doubt and presumption of innocence

and other burdens in favor of an accused.

Before a confession can be offered in evidence against an accused, it must first have been determined by, at least a preponderance of the evidence, to have been knowingly, voluntarily and intelligently given.

If it is determined that a jury even considered a coerced confession, it is automatic reversal. It can never be harmless error.

Petitioner insists that before a court can exclude the public, including prospective jurors, from a hearing involving a coerced confession, that the accused must, in open court, in an adversarial proceeding, satisfy the awesome standard necessary to justify governmental censorship.

Respondents submit that this standard certainly gives an accused far less than he has the right to expect in our society and under the constitution.

Petitioner bases his argument on the public and potential jurors' right to immediate access to suppression hearing testimony on the fact that the flow of information to the public concerning pre-trial suppression hearings is vital to public understanding of the judicial system.

There is no claim here that the press' right to publish is being restrained.

QUESTION: Suppose, Mr. Kobroff, that there wasn't -- that -- there was a plea here, so it never came to trial.

Being a homicide case, would it have been a sequestered jury?

MR. KOBROFF: Perhaps.

QUESTION: And if it had been, would these restraints upon publication of the transcript of the suppression hearing have been operative?

MR. KOBROFF: I would think that they probably wouldn't have been necessary in that case. I mean --

QUESTION: And they could have been released? As soon as the jury was sequestered?

MR. KOBROFF: I would think that as soon as you have the jury, and you can insulate the jury, that the defendants' interests are just no longer in jeopardy.

I mean, the threat here is that you've got potential jurors, you've got the prospective jury sitting in the courtroom. And you've got to insulate them; I mean, you're required to.

And this is the means to do it.

QUESTION: But all the newspapers could publish would be the record, the transcript?

MR. KOBROFF: Yes, of course.

QUESTION: They couldn't draw any nuance or anything from having witnesses appear?

MR. KOBROFF: Well, I --

QUESTION: Yeah, they could. Okay. But they weren't there, obviously.

MR. KOBROFF: Well --

QUESTION: You don't think that's necessary?

MR. KOBROFF: I think if you have a record that runs a couple of hundred pages, you could simply by perhaps picking various --

QUESTION: It wouldn't be as good though, would it?

MR. KOBROFF: No.

QUESTION: Well, two is better than one.

MR. KOBROFF: It might not be the best --

QUESTION: Two is better than one, isn't it?

MR. KOBROFF: Right, right.

QUESTION: Well, the record plus the sight of the witness is two.

MR. KOBROFF: I agree.

I'm simply saying that it's still newsworthy. I mean this case is moot. It's been moot now for almost a year, and it's still newsworthy.

You're right. But it -- still --

QUESTION: That's too bad.

MR. KOBROFF: Well, I mean, you've got to -- it's not an easy decision for this Court. I'm not saying it is. I mean, you've got the balancing here. You've got serious rights that are affected. You've got --

QUESTION: How does a written news story convey the nuances that you've been discussing?

MR. KOBROFF: Well --

QUESTION: Any different -- any differently from the written transcript?

Television would be different. Radio, perhaps.

MR. KOBROFF: I tell you, I am not a newspaper reporter.

QUESTION: You read the newspaper every now and then, don't you?

MR. KOBROFF: Yes. I've also read some novels that, you know --

QUESTION: Well, then, how do you explain why they sent three reporters and didn't just wait for the transcript?

MR. KOBROFF: Well, I think they wanted it immediately?

QUESTION: They just wanted to spend their money.

MR. KOBROFF: Well, I think they thought this was a good news story and the next day it might make the --

QUESTION: They wanted to waste their money.

MR. KOBROFF: It's their business decision. I don't think the Gannett Newspapers does badly making business decisions.

The right to -- the right of access to this transcript has not been denied, and is not being denied. This transcript will enable the public to continue to monitor the criminal justice system. It will enable it to assure itself that the

accused is in fact being treated fairly; to assure itself that public officials are correctly performing their duties; to assure itself that no judicial or prosecutorial irregularities have occurred.

If there is any absolute in our constitutional system, it's that an accused must receive a fair trial before he can be lawfully convicted. Of primary consideration is the public's interest in avoiding anything that would truncate this right.

To maintain an accused's right to an impartial jury as the arbiter of guilt or innocence, the hearing judge must have the means to insure that prospective do not hear matters which by law they ought to be insulated from.

Respondent submits that the decision of the New York court of appeals reaches a wise balancing between the right of the press to publish free from governmental restraint and the right of an accused to an impartial jury in the county of venue.

Respondent submits that the decision of the New York court of appeals should be affirmed.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:08 o'clock, a.m., the case was submitted.]