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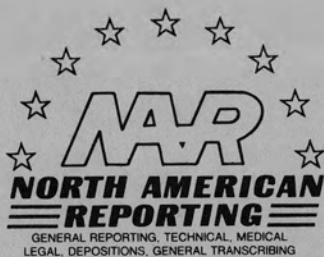
# Supreme Court of the United States

NOEL CHANDLER AND ROBERT GRANGER, )  
 )  
 APPELLANTS, )  
 )  
 V. ) No. 79-1260  
 )  
 STATE OF FLORIDA, )  
 )  
 APPELLEE. )

Washington, D.C.  
November 12, 1980

Pages 1 through 48

# ORIGINAL



1 IN THE SUPREME COURT OF THE UNITED STATES

2 ----- :  
 3 NOEL CHANDLER AND ROBERT GRANGER, :  
 4 Appellants, :  
 5 v. : No. 79-1260  
 6 STATE OF FLORIDA, :  
 7 Appellee. :  
 8 ----- :

9 Washington, D. C.  
 10 Wednesday, November 12, 1980  
 11

12 The above-entitled matter came on for oral ar-  
 13 gument before the Supreme Court of the United States at  
 14 10:03 o'clock a.m.

15 APPEARANCES:

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 18 the Appellants.

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 33128; on behalf of the Appellee.

21 CALVIN L. FOX, ESQ., Assistant Attorney General, State  
 22 of Florida, Suite 820, 401 Northwest 2nd Avenue,  
 23 Miami, Florida 33128; on behalf of the Appellee.  
 24  
 25

C O N T E N T S

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MILLERS FALLS  
ERASE  
COTTON CONTENT

P R O C E E D I N G S

1  
2 MR. CHIEF JUSTICE BURGER: We will hear arguments  
3 first this morning in the case of Chandler and Granger v.  
4 Florida.

5 Mr. Hirschhorn, you may proceed whenever you are  
6 ready.

7 ORAL ARGUMENT OF JOEL HIRSCHHORN, ESQ.,

8 ON BEHALF OF THE APPELLANTS

9 MR. HIRSCHHORN: Mr. Chief Justice, and may it  
10 please the Court:

11 This is a criminal conviction in which the only issue  
12 raised before this Court is whether the defendants were denied  
13 their rights to a fair trial and due process of law by virtue  
14 of the mere presence of cameras in the courtroom over their  
15 objection.

16 The appellants contend that --

17 QUESTION: This is any camera?

18 MR. HIRSCHHORN: Any camera in which an effort is  
19 made to broadcast or taperecord for later broadcast and still  
20 photographic equipment.

21 QUESTION: Does the record show that the trial was  
22 televised either live or taped?

23 MR. HIRSCHHORN: The record will reflect that por-  
24 tions of the trial were televised over the evening news in cer-  
25 tain spots. A total of two minutes and 55 seconds were

1 televised on the evening news of selected portions of the  
2 trial.

3 QUESTION: How about still photographs?

4 MR. HIRSCHHORN: The record will not reflect the  
5 presence of any still photographic camera present during the  
6 proceeding.

7 QUESTION: But this was both audio and visual?

8 MR. HIRSCHHORN: Yes, Mr. Chief Justice.

9 QUESTION: And the record reflects the location of  
10 the camera?

11 MR. HIRSCHHORN: Yes, as a matter of fact, in the  
12 Appendix to the appellees' reply brief at page A36, you have a  
13 picture of the courtroom in which the circle with the "x" in  
14 it reflects the presence of the television camera.

15 QUESTION: But the recording was made of the entire  
16 trial?

17 MR. HIRSCHHORN: No, Mr. Chief Justice. The tele-  
18 vision camera was present only for jury selection, only for  
19 the direct examination and portions of cross-examination of  
20 the State's main witness and for the rendition of the verdict.

21 QUESTION: How about the defense evidence?

22 MR. HIRSCHHORN: None whatsoever. There was no re-  
23 cordation of defense evidence by the television camera nor  
24 was it even present during presentation of defense evidence.

25 QUESTION: Was the jury sequestered?

1 MR. HIRSCHHORN: No, it was not, Mr. Justice  
2 Rehnquist. Motions were repeatedly made to sequester the jury  
3 and denied. The record will reflect that.

4 QUESTION: But the District Court of Appeal in  
5 Florida found against you on your claim of prejudice from  
6 the pretrial publicity?

7 MR. HIRSCHHORN: That is correct, and that is perhaps  
8 because I misperceived the issue in the District Court of  
9 Appeals when I argued it. This is not a pretrial publicity  
10 case like Gannett. This is not an effort to close the court-  
11 room like Gannett in pretrial matters. This is not an effort,  
12 as in Richmond Newspapers, to close the trial. This is not a  
13 closure case. The defendants here do not seek whatsoever to  
14 limit the normal investigative and normal methods of covering  
15 trials in progress. What is under attack here is the method  
16 by which television claims it has a right of access. And we  
17 contend, Mr. Justice Rehnquist, that the method is inherently  
18 prejudicial, just as in Estelle v. Williams this Court con-  
19 cluded that it was inherently prejudicial for a state to compel  
20 a prisoner to go to trial in prison garb without any showing of  
21 psychological studies.

22 QUESTION: Then you accept the finding of the Florida  
23 District Court of Appeal that there was no prejudice in fact  
24 in this case?

25 MR. HIRSCHHORN: I concede that the Florida District

1 Court of Appeal was correct in finding on the record there  
2 was no measurable prejudice. The issue we raised there and  
3 the issue we raise here is that human nature and our under-  
4 standing of human nature and common sense tells us that being  
5 on television is different than any other type of public trial  
6 and that although we may not be able to measure with specific-  
7 ity the prejudice, behavioral scientists tell us that people  
8 act differently, posture differently, pose differently when  
9 they know they're on TV.

10 QUESTION: Was this kind of evidence introduced in  
11 your record at some point?

12 MR. HIRSCHHORN: No, we were not permitted to intro-  
13 duce any evidence. We were never granted a de novo hearing  
14 on this.

15 QUESTION: Did you tender such evidence?

16 MR. HIRSCHHORN: No, Mr. Justice Rehnquist, what  
17 occurred was, we filed a motion to exclude cameras in the  
18 courtroom over the defendants' objection. The trial judge  
19 determined that he had no discretion; it was mandatory. He  
20 denied my motion, certified the question to the Florida  
21 Supreme Court. Without a hearing it was fully briefed, in-  
22 cluding psychological studies. After briefing on the certified  
23 question the Florida Supreme Court dismissed the certified  
24 question on the grounds that it was not dispositive of the  
25 issue.

1           When we went back to trial we were then placed in a  
2 posture where the judge said he had a mandate, he could not  
3 even ask whether it was mandatory or discretionary. There is  
4 no evidence that there was in fact prejudice per se because we  
5 were not afforded an evidentiary hearing, nor do I believe an  
6 evidentiary hearing would have been necessary.

7           An evidentiary hearing was not necessary in Estelle  
8 v. Williams, an evidentiary hearing was not necessary in Jack-  
9 son v. Denno when this Court determined that it is inherently  
10 prejudicial to a defendant for a jury to determine the volun-  
11 tariness of a confession.

12           QUESTION: You're saying in effect that we as pre-  
13 sumably not behavioral psychologists but as lay people in that  
14 field can determine on our own whether it's inherently preju-  
15 dicial that something be done?

16           MR. HIRSCHHORN: I am saying that, Mr. Justice  
17 Rehnquist, that your understanding of human nature, as you  
18 did in Tumey, Turner, Estes, it is not necessary to have an  
19 evidentiary hearing. Because we all know that timid people  
20 become more timid, nervous people become more nervous, people  
21 who are not used to being in a courtroom can only have their  
22 anxiety exacerbated by the presence of a television camera.

23           QUESTION: You're also saying, really, I think, that  
24 there's a bit of ham in all of us, including jurists.

25           MR. HIRSCHHORN: Mr. Justice Blackmun, I think that



1 that is accurate, but I'm not sure that ham is the issue.  
2 I know television will make a cocky witness more cocky. I cer-  
3 tainly know it will make a timid witness more timid.

4 QUESTION: Now, when you say you know these things,  
5 do you get them by osmosis or how do you -- I realize we all  
6 "know" certain things that we can't demonstrate, but when you  
7 say you know, this is from your own experience as a litigation  
8 lawyer?

9 MR. HIRSCHHORN: Mr. Chief Justice, I think we know  
10 that no judge would not be fair and impartial where he imposed  
11 a \$12 fine against somebody or his portion of the fine came to  
12 \$12. But this Court in Tumey said, that procedure is inher-  
13 ently prejudicial because it creates the possibility, the  
14 probability of a denial of a fair and an impartial trial.

15 Human nature is such that being on television is  
16 more important than not being on television.

17 QUESTION: Well, how do we know that without some  
18 sort of findings of fact or conclusions of law?

19 MR. HIRSCHHORN: Well, there's never been a hearing  
20 on the issue. There's never been a trial. There's never been  
21 an adversary hearing. When the Florida Supreme Court enacted  
22 this rule which made it mandatory and the defendant had no con-  
23 sent, it did it without the benefit of testimony.

24 QUESTION: Well, haven't the Florida courts rejected  
25 your position?

1 MR. HIRSCHHORN: Oh, yes.

2 QUESTION: And so we have a set of state courts say-  
3 ing that your submission is erroneous?

4 MR. HIRSCHHORN: We have a set of state courts say-  
5 ing that the public's -- the method of access is more important  
6 in the context of sunshine in the government than individuals'  
7 rights to a fair and impartial trial.

8 QUESTION: You mean, did the Florida courts say that,  
9 yes, there is some inherent prejudice to the defendant? They  
10 said there was none, didn't they?

11 MR. HIRSCHHORN: They said there was nothing demon-  
12 strated as applied.

13 QUESTION: So we'd have a set of findings against  
14 you?

15 MR. HIRSCHHORN: In that sense, yes, we do.

16 QUESTION: What did you tender before trial that  
17 would support what you now say you know? What did you tender  
18 to support that conclusion?

19 MR. HIRSCHHORN: Well, I tendered my faith in the  
20 system, I presume, but there was nothing to tender, Mr. Chief  
21 Justice. The Florida Supreme Court made it mandatory --

22 QUESTION: I mean at the trial court level, when  
23 you first were confronted with the problem, did you make an  
24 offer of proof to the court, or did the court deny you any  
25 opportunity to do that?

1 MR. HIRSCHHORN: No, and yes. I did not make an  
2 offer of proof, and the trial judge said, it won't make any  
3 difference if you do. The rule is mandatory, but I'll certify  
4 the question as one of great public import. Let the Florida  
5 Supreme Court hear it.

6 QUESTION: Well, then, to pursue Mr. Justice Rehnquist's  
7 question; and then several others, are we to rely,  
8 for example, on -- to take some current things -- a question  
9 and answer interview by George Ball in the current issue of  
10 Newsweek, something like that, and a column by a columnist in  
11 the Washington Post, Ellen Goodman, who said that television  
12 tends to distort the processes that it depicts? Is that the  
13 kind of thing we as a reviewing court can rely on?

14 MR. HIRSCHHORN: Well, when you review Jackson v.  
15 Denno and Estelle v. Williams, and Rideau and Turner, there  
16 were no evidentiary matters or psychological studies. This  
17 Court held that where the procedure employed is inherently pre-  
18 judicial, it wasn't necessary to discuss the facts of the case.

19 QUESTION: But how do we know here that it was  
20 inherently prejudicial?

21 MR. HIRSCHHORN: Since time began. Human nature  
22 hasn't changed, Mr. Justice Rehnquist.

23 QUESTION: Well, we didn't have television --

24 QUESTION: You mean, when time began.

25 MR. HIRSCHHORN: Nor did we have the Constitution.

QUESTION: Yes, I know.

1 QUESTION: Mr. Hirschhorn, do you rely on the Estes  
2 case at all?

3 MR. HIRSCHHORN: Yes, I do.

4 QUESTION: What was the evidence of actual prejudice  
5 in that case?

6 MR. HIRSCHHORN: None. No evidence whatsoever.

7 QUESTION: Didn't the Supreme Court just take judi-  
8 cial notice of everything, at least in Chief Justice Warren's  
9 opinion and in the majority opinion? They had no hearing on  
10 prejudice, did they?

11 MR. HIRSCHHORN: None whatsoever, and in fact, in  
12 the Estes case the only thing that was televised was the  
13 prosecutor's closing argument and the rendition of the verdict.  
14 And we suggest in this case that this is not a gag order  
15 case and this is not a First Amendment access case. The method  
16 of gathering news is at issue here because the method is  
17 inherently prejudicial. This Court, for example, would not  
18 hesitate to strike down any state statute which said the  
19 state has a right to compel a defendant who is a prisoner to  
20 appear in prison garb because, for the same reason, appearing  
21 in prison garb, human nature tells the jurors there's something  
22 different.

23 QUESTION: Mr. Hirschhorn, you referred me to page  
24 A36 and that diagram. Am I to infer that the word electric  
25 locates the camera? ~~is it for the camera?~~

1 MR. HIRSCHHORN: No, no.

2 QUESTION: Where is the camera?

3 MR. HIRSCHHORN: The camera is that circle with the  
4 "X" in it. "Electric" is so that the cameraman would know  
5 where to plug his cord in.

6 QUESTION: I see. But the camera is over in the pub-  
7 lic seats section, is that it?

8 MR. HIRSCHHORN: Yes. Right behind the bar.

9 QUESTION: What's the evidence that the participants  
10 in the trial and the jury knew that they were being televised?

11 MR. HIRSCHHORN: Well, the jury box is right next to  
12 it, and --

13 QUESTION: No, no. What is the evidence in the  
14 record that they knew the proceedings were being televised?

15 MR. HIRSCHHORN: The record will reflect that during  
16 jury selection I asked every -- not all, but most jurors whe-  
17 ther being on television would in one way or another affect --

18 QUESTION: Well, did anyone point out to them the  
19 camera located where it is?

20 MR. HIRSCHHORN: Oh, yes, and the record will so  
21 reflect. I think in one of my questions that's in my appendix  
22 to my original brief, I point out the question, "You see the cam-  
23 era over there?" And a little later on, during Mr. Sion's  
24 testimony I pointed out to the Court in an aside, "Your Honor,  
25 I want the record to reflect that cameras are present," and the

1 judge quickly corrected me that it was "a camera," the same  
2 camera.

3 QUESTION: Mr. Hirschhorn, I would almost conclude  
4 from your submission that you would urge that neither the  
5 defendant nor the prosecution, together, could stipulate to  
6 have cameras in the room?

7 MR. HIRSCHHORN: That is correct. And unlike  
8 Richmond Newspapers, where the prosecution and defense stipu-  
9 lated and the judge granted the stipulation, there was no  
10 discretion whatsoever. The judge had to do it --

11 QUESTION: Do you think there just ought to be a flat  
12 rule excluding them, no matter whether there's any objection  
13 by anybody or not?

14 MR. HIRSCHHORN: No. That would be asking for too  
15 much. I think that --

16 QUESTION: Well, who could -- whose objection must  
17 be waived before cameras can be -- just the defendant?

18 MR. HIRSCHHORN: Yes. In Richmond, if you'll permit  
19 me to explain my answer, in Richmond this Court said that  
20 closure places a very high burden on the defendant in an  
21 effort to protect the First Amendment and the public right to  
22 know. Down the scale a little bit, you said in Gannett, "Pre-  
23 trial closure places a high burden on the defendant; we  
24 need to protect the Sixth Amendment, the defendant's personal  
25 right."

1           We say that where a defendant objects to the presence  
2 of cameras in the courtroom, his objection is sufficient -- if  
3 a witness -- because the method of gathering news is in-  
4 herently prejudicial -- if a witness or a juror objects, then  
5 the judge -- the per se rule is where the defendant objects.  
6 If a witness or a juror objects, or a lawyer objects, then the  
7 judge has to do the balancing test. Which is more important  
8 at this point, the witness or juror's right of privacy, if  
9 there is one in a courtroom, and I don't think that there is,  
10 against the media's method of gathering news in this case.

11           QUESTION: You wouldn't say the defendant in that  
12 kind of a situation you were just describing would have any  
13 special right to demand that television be admitted?

14           MR. HIRSCHHORN: No, and in fact, in fact there are  
15 cases that, obviously, it's been used as a tool where a defen-  
16 dant has demanded that a camera come in the courtroom because  
17 he wanted to embarrass and humiliate the victim who was going  
18 to be testifying against him and the judges have exercised  
19 their discretion properly under the theory that the Sixth  
20 Amendment is not absolute, nor is the First. The Sixth Amend-  
21 ment yields to confidential informers, trade secrets, unruly  
22 people, embarrassment, Richmond. The First Amendment yields  
23 to Zurcher, yields to Branzburg, yields to libel and obscenity,  
24 yields to the clear and present danger doctrine, yields to  
25 Zemel, yields to Saxbe. The First Amendment has to yield too.

1 QUESTION: Yes, but this case is in quite a different  
2 posture from either De Pasquale or Richmond News-  
3 papers, in that the state has opted for television coverage.  
4 In those two cases the state opted against coverage. You make  
5 it sound as if the Constitution covers the entire 100 percent  
6 of the spectrum, without any state latitude.

7 MR. HIRSCHHORN: Mr. Justice Rehnquist, the state did  
8 not opt. The Florida Supreme Court enacted a rule without  
9 the consent of the governed.

10 QUESTION: Well, that's the state, for our purposes,  
11 when the Florida Supreme Court opts it for a rule.

12 MR. HIRSCHHORN: Well, Mr. Rehnquist, your views on  
13 state's rights are well known to me. I have read and reread  
14 your dissent, and I suggest to you that the state under state's  
15 rights could not enact a rule that said, Chandler, if you're a  
16 convicted felon or in prison, you appear in trial wearing  
17 Dade County Jail on your T-shirt, because that is inherently  
18 prejudicial.

19 QUESTION: Because it violates the Federal Consti-  
20 tution.

21 MR. HIRSCHHORN: And I suggest, Mr. Justice  
22 Rehnquist, that the presence of cameras in the courtroom, which  
23 is an unnecessary method of gathering news, violates the Sixth  
24 Amendment for the simple reason that Devitt and Blackmar,  
25 they are the landmark when it comes to standard jury



1 instructions, they -- every trial, federal and state, at the  
2 conclusion of a case the jury is instructed, you, the jury, are  
3 the sole judges of the credibility and believability of the  
4 witnesses. You, the jury, shall determine the demeanor of  
5 the witness and the witness's ability to know and remember  
6 the facts about which he testifies.

7           How do we know that the witness is sweating because  
8 on cross-examination the defense attorney finally hit a nerve  
9 center that causes the witness to wonder whether he's going to  
10 recant, or is he sweating because of the presence of cameras in  
11 the courtroom? We don't know that. But we certainly know, we  
12 certainly know that the greater the exposure -- and behavioral  
13 scientists have told us, and we know -- that as in Brown v.  
14 Board of Education and the Brandeis brief that was filed, that  
15 behavioral scientists tell us what human nature and common  
16 sense tells us.

17           QUESTION: Mr. Hirschhorn, obviously the behavioral  
18 scientists' views are relevant here. But if no courtrooms  
19 undertake to try this out, how will behavioral scientists or  
20 judges, or anyone else, accumulate some empirical data, if  
21 empirical data will ever be available on the consequences, in-  
22 stead of just what might be called speculation by behavioral  
23 scientists and judges?

24           MR. HIRSCHHORN: Well, that's what the dissenters in  
25 Estes left open. That day has come, and I think

1 Mr. Justice Stewart and Mr. Justice Harlan and those who  
2 joined were reluctant to close the doors on the grounds that we  
3 need this novel form of experimentation to see. Well, we've  
4 had this novel form of experimentation, an experiment without  
5 direction, an experiment without guidance, an experiment with-  
6 out controls. And I don't think anybody on this bench can  
7 stand here and say, when 23 percent of the jurors or 30 percent  
8 of the witnesses who finally responded to questionnaires which  
9 were subjective in and of themselves, admitted an awareness  
10 of cameras in the courtroom.

11 That's infecting the process by its very method.  
12 That gets right down to the whole purpose behind due process  
13 of law. That gets us back to In re: Murchison. That gets us  
14 back to why having a bailiff who is also a deputy sheriff and  
15 a witness, but who swears he didn't say anything to the jurors,  
16 in Turner v. Louisiana? Why this Court didn't hesitate to  
17 strike that down as being an inherently prejudicial aspect of  
18 a denial of due process is --

19 QUESTION: How many states have taken Florida's  
20 course?

21 MR. HIRSCHHORN: Ten. I'm sorry; there are 27 states  
22 that currently permit televising, including Maryland. However,  
23 ten require the consent of the defendant.

24 QUESTION: Of the defendant. So there are -- 18?

25 MR. HIRSCHHORN: Let's see. Ten do not require the

1 consent of the defendant. There are seventeen in addition who  
2 do require the consent of the defendant.

3 QUESTION: So, if you were in one of those 17 states  
4 you wouldn't be here?

5 MR. HIRSCHHORN: That's correct. I absolutely would  
6 not be here because of the waiver principles.

7 QUESTION: Under the Florida procedure can the com-  
8 plaining witness -- does the trial judge have discretion to  
9 exclude any pictures if the complaining witness is testifying?

10 MR. HIRSCHHORN: Yes, Mr. Chief Justice, at page 779  
11 of the Post-Newsweek decision, the last -- there's a paragraph  
12 that says, "The presiding judge may exclude the electronic media  
13 coverage of a particular participant only upon a showing that  
14 such coverage will have a substantial effect upon a particular  
15 individual which would be qualitatively different from the  
16 effect on members of the public in general, and such effect  
17 will be qualitatively different from coverage by other types of  
18 media."

19 However, two things occur. One is, it doesn't pre-  
20 clude coverage of the trial but just coverage of that particu-  
21 lar witness. And two, despite what that says, I don't know  
22 how a judge is going to apply it. I don't understand, and I  
23 don't think the bench and the bar and I don't think witnesses  
24 will know how to demonstrate the qualitative difference. And  
25 what that does is invite mini-trials during trials on

1 qualitative difference. Do we really have to have a behavior-  
2 al scientist tell us that when a juvenile or a woman is vic-  
3 timized by a sexual assault, she doesn't need to testify in  
4 front of a television camera to further and deepen her humil-  
5 ity? Do we need evidence in the record of that? I suggest  
6 not.

7 QUESTION: Mr. Hirschhorn, does the record tell us  
8 why the portions of the trial that were televised and no  
9 others? In other words, why the defense case was not tele-  
10 vised?

11 MR. HIRSCHHORN: Well, the record doesn't have to.  
12 The Constitution of the United States tells us. It's the  
13 First Amendment.

14 QUESTION: That doesn't explain it to me.

15 MR. HIRSCHHORN: Well, I didn't mean to be flip,  
16 Mr. Justice Stevens. I can't -- this Court has held in Cox  
17 Broadcasting and Tornillo that we can't compel -- not even  
18 this Court can compel --

19 QUESTION: Well, are you telling me that it was just  
20 a voluntary decision by the media that that's all they wanted  
21 to -- ?

22 MR. HIRSCHHORN: That's quite correct. The media  
23 selects what it wants to televise, just like it selects what  
24 it wants to put in the newspapers.

25 QUESTION: Does the record also tell us that -- as I

1 understand, there's one minicamera in the courtroom. Does it  
2 tell us what it picked up in the camera? Is it just focused  
3 on the witness, or is it on the whole courtroom, or how does  
4 it, what is the picture that is televised, do you know?

5 MR. HIRSCHHORN: Well, this record won't tell, be-  
6 cause I was busy trying the case. And I have to presume from  
7 the clips I saw on the evening news that they focused on  
8 Mr. Sion, the State's main witness, giving his key testimony.  
9 And they focused on jurors giving responses and they focused --

10 QUESTION: Is the cameraman in the courtroom who  
11 points the camera in different directions? It's not just a  
12 fixed camera is what I'm trying to say.

13 MR. HIRSCHHORN: It's a fixed camera on a tripod swi-  
14 vel, but I think they use a zoom lens so they don't move the  
15 camera per se.

16 QUESTION: But the camera can swivel around?

17 MR. HIRSCHHORN: I mean, I must say, I must confess  
18 that I --

19 QUESTION: In your colloquy with Mr. Justice Stevens  
20 were you suggesting that, do you support your argument in the  
21 fact that only snippets of what the camera picks up that  
22 actually are broadcast in the evening news?

23 MR. HIRSCHHORN: Yes.

24 QUESTION: And to what effect?

25 MR. HIRSCHHORN: Because, not in the sense of what

1 the public sees but the fact that the jury knows that the  
2 camera's present just for that portion of the State's direct  
3 examination, but is not present for any portion of cross or  
4 the defendant's case. And I suggest that behavioral scientists,  
5 common sense, and human nature tell us that if a television  
6 camera picks up one part of a trial but not another, it's be-  
7 cause someone has made a judgment that that part is more  
8 important than the other.

9 QUESTION: That has nothing to do with the defen-  
10 dant's rights, though, does it?

11 MR. HIRSCHHORN: Oh, yes, it does, with all due  
12 respect.

13 QUESTION: What the public sees is no part of this  
14 case.

15 MR. HIRSCHHORN: I'm sorry, I misunderstood your  
16 question. Of course. I was trying to draw that distinction.  
17 I don't care what the public sees in terms of the defendant's  
18 rights. It's what the jurors --

19 QUESTION: The jury was not sequestered here, was it?

20 MR. HIRSCHHORN: The jury was not sequestered.

21 QUESTION: I thought you were concerned about what  
22 the neighbors might say to the jurors or something like that --

23 MR. HIRSCHHORN: That is the only aspect.

24 QUESTION: Related to the selective televising of  
25 the prosecution's case and not the defense case.

1 MR. HIRSCHHORN: That is the only aspect. The mar-  
2 shal has advised me I have about six minutes. I'd like to re-  
3 serve that for rebuttal, if I might.

4 MR. CHIEF JUSTICE BURGER: Mr. Fox.

5 ORAL ARGUMENT OF CALVIN L. FOX, ESQ.,

6 ON BEHALF OF THE APPELLEE

7 MR. FOX: Mr. Chief Justice, and may it please the  
8 Court:

9 I will be arguing the case in chief here this morn-  
10 ing. The Attorney General of Florida will address broader  
11 policy considerations with respect to the 17 states and the  
12 conference of chief justices who have submitted amicus briefs  
13 in support of the State's position.

14 The State's position in this case is quite clear.  
15 The defendants received a fair trial. The defendants, on the  
16 other hand, Your Honor, we submit, seek to turn the Constitu-  
17 tion upside down. They make no effort whatsoever to discuss  
18 how Noel Chandler and Robert Granger did not receive a fair  
19 trial.

20 QUESTION: Mr. Fox, before you get through will you  
21 explain to me why the Estes decision is not squarely in point  
22 in this case?

23 MR. FOX: The Estes opinion, Your Honor, as I am  
24 sure you are well aware --

25 QUESTION: I'm talking about the holding in that case

1 based specifically on the one question the Court granted cer-  
2 tiorari to consider.

3 MR. FOX: It is a plurality opinion in which only  
4 four members of the Court joined in a rule, per se rule against  
5 judgment of the Court, however, reversing --

6 QUESTION: I'm talking about the judgment of the Court on  
7 the facts of the case. Why isn't that directly in point?  
8 In fact, why isn't that a stronger case because there the jury  
9 was sequestered?

10 MR. FOX: It is a stronger case, Your Honor. And  
11 that's precisely the point. The facts --

12 QUESTION: A stronger case for allowing the televi-  
13 sion.

14 MR. FOX: Pardon me, Your Honor?

15 QUESTION: I said, it's a stronger case for allowing  
16 television because the jury was sequestered.

17 MR. FOX: But on the other hand the extreme fact cir-  
18 cumstances in that case --

19 QUESTION: There were no extreme fact circumstances.  
20 I understand that all that was at a pre-trial hearing on whe-  
21 ther or not to allow television. At the trial itself they had  
22 a thing built up there so you couldn't notice the television  
23 cameras, and there was no disorder during the trial, if I  
24 understand the case correctly.

25 MR. FOX: Well, Mr. Justice -- well, Your Honor,



1 Mr. Justice Stevens, the court focused upon pre-trial hearings.  
2 The cables snaking all over the floor --

3 QUESTION: I asked you, why wasn't the holding spe-  
4 cifically in point here?

5 MR. FOX: It is not specifically on point, Your  
6 Honor, because of the fact circumstance there. The facts there  
7 do not remotely relate to --

8 QUESTION: In what respect? How are they different,  
9 other than the fact that the jury was sequestered there?

10 MR. FOX: The facts in that case, the --

11 QUESTION: I'm talking about the trial, too; not the  
12 pre-trial hearing.

13 MR. FOX: Your Honor, I would submit to you that the  
14 trial was a separate and distinctly serene proceeding. In  
15 fact, we would submit that the only televised portion of that  
16 trial was the prosecutor's opening and closing argument I  
17 believe.

18 QUESTION: It was selected portions here too, though.

19 MR. FOX: Yes, your're certainly correct, Your Honor.  
20 But I think the court was concerned with the infection that had  
21 preceded the trial; as, for example, in the Sheppard case,  
22 the infection that had preceded the trial --

23 QUESTION: The court declined to grant certiorari on  
24 that very question.

25 QUESTION: That's right.

1 MR. FOX: But, Your Honor, a reading of the Clark  
2 opinion, a reading of the Warren, Douglas, and Goldberg opin-  
3 ions, they concentrate entirely upon the pre-trial hearings,  
4 and the infection which preceded the trial. They do not dis-  
5 cuss the serenity which prevailed at the trial. They do not  
6 separate --

7 QUESTION: That's all that was actually an  
8 issue in the Court's judgment, and the Court, as a Court, not  
9 a plurality but a Court, five people reversed the conviction  
10 in the case because of the presence of television at the trial,  
11 per se.

12 MR. FOX: Your Honor, the --

13 QUESTION: So why isn't my brother Stevens exactly  
14 correct in his question?

15 MR. FOX: Most respectfully, by your leave,  
16 Mr. Justice Stewart, I'd submit to you that Mr. Justice Harlan  
17 would not have joined in a per se rule, and in fact he did not.  
18 And he states quite clearly in his opinion that he restricts  
19 his holding and his support of the majority opinion to the very  
20 fact of the Estes trial, the facts in that case, the extreme --

21 QUESTION: The fact that he relied on was the fact  
22 that it was a notorious case, not a run-of-the-mill case, and  
23 this was sufficiently notorious so that it justified 2-1/2  
24 minutes on the evening news. Do you rely on the distinction  
25 between a notorious case and a routine case?

1 MR. FOX: Yes, Your Honor, that becomes a question,  
2 then. What's a notorious case? I would submit to you the  
3 Estes case was a notorious case.

4 QUESTION: Well, do the Florida rules apply to all  
5 trials?

6 MR. FOX: Yes, Your Honor, it certainly does.  
7 I think if the Court wants --

8 QUESTION: Would it apply to a drunken driving case?

9 MR. FOX: Pardon me?

10 QUESTION: Would it apply to a drunken driving case?

11 MR. FOX: Yes, Your Honor. Any judicial proceedings.

12 QUESTION: And would it apply to a misdemeanor case?

13 MR. FOX: Yes, Your Honor, any trial. Or --

14 QUESTION: It would apply to a spitting-on-the-  
15 sidewalk case?

16 MR. FOX: Yes, Your Honor, that's correct.

17 QUESTION: Or to an Estes case?

18 MR. FOX: Or to an Estes case, or to a Zamora case.

19 QUESTION: The Estes case was a case involving a lot  
20 of financial records, if I remember the opinion, whereas this  
21 is a case involving a couple of police officers who allegedly  
22 robbed a popular restaurant.

23 MR. FOX: Yes, Your Honor, and I submit that three  
24 minutes on the evening news does not compare to the eleven  
25 volumes of publicity in the trial of the Estes case.

1 QUESTION: On the pre-trial publicity point that's  
2 certainly true, but that was not what was decided.

3 QUESTION: Do you think there'd be any tendency on  
4 the part of the local television station to televise a case  
5 involving an action to quiet title to real estate?

6 MR. FOX: Yes, Your Honor, as the Wisconsin brief  
7 notes, television cameras have been at zoning appeals, at  
8 traffic appeals, at any sort of civil proceedings --

9 QUESTION: The action to quiet title that I hypothe-  
10 sized. Do you think there'd be any interest in a television  
11 station or in any of the people who watch television to see that  
12 kind of a trial?

13 MR. FOX: Your Honor, I would submit to you that  
14 it is possible that a circumstance could arise where a quiet  
15 title case could be publicized.

16 QUESTION: Oh, I suppose -- I'm talking about the  
17 typical action to quiet title. I picked the least noticeable.  
18 If it were an action to quiet title on the State Capitol, I  
19 assume it would be quite news.

20 MR. FOX: Yes, that was the case I had in mind, Your  
21 Honor.

22 QUESTION: But to quiet title on an ordinary resi-  
23 dence, would television be interested in it?

24 MR. FOX: Your Honor, that's a question of editorial  
25 policy which I think this Court has not intruded into. It's a

1 matter of First Amendment freedoms. I think the editorial  
2 policy of the stations cannot be governed by this court or any  
3 court. It may be they don't have the time or the expense to  
4 put a camera in every courtroom and that type of case would  
5 probably certainly have a very low priority.

6 QUESTION: Let me ask you this hypothetical question  
7 since we have no empirical evidence in the record. Suppose in  
8 this particular case the television after showing whatever it  
9 was they showed, the opening statement and the closing argu-  
10 ments of the prosecution?

11 MR. FOX: In Estes, Your Honor?

12 QUESTION: No, this case.

13 MR. FOX: No, this case was a brief segment of the  
14 jury selection and a brief segment of the State's key witness.

15 QUESTION: Now, that's all the television viewers  
16 saw, was the witness?

17 MR. FOX: Yes, Your Honor.

18 QUESTION: Suppose that they then followed a recent  
19 example and said, call 993-1234 if you think this fellow is  
20 guilty, no toll charge. Call 111-4567 if you think he's not  
21 guilty, and we'll take a poll. Would the court under the Flor-  
22 ida rule have any authority to say, no, you can't do that?

23 MR. FOX: Yes, Your Honor, I think the Florida  
24 Supreme Court has clearly in the final paragraph of its  
25 opinion left a warning to the media that any abuses by the

1 media would result in a rescission of the rule. Now, this is  
2 a rule --

3 QUESTION: If they abuse the First Amendment, the  
4 Supreme Court's going to go after them?

5 MR. FOX: No, Your Honor --

6 QUESTION: Is that the way you read that rule?

7 MR. FOX: Pardon me?

8 QUESTION: Is that the way you read that rule?

9 MR. FOX: Your Honor, in the final paragraph of the  
10 opinion, the Court says that the past abuses of the press are  
11 in the past, and we believe that. That is what the Court  
12 states in its final paragraph of the Post-Newsweek opinion.  
13 And I think, quite clearly, the Florida Supreme Court has left  
14 it open for abuses by the press. And I think in the event that  
15 there are abuses by the press, in the event that the trust that  
16 the Court has extended in balancing the public policy of open  
17 trials and open government in Florida, I think that the Florida  
18 Supreme Court quite clearly could withdraw the rule.

19 QUESTION: What would be your view, if you care to  
20 express it, on whether that would be an abuse of the rules,  
21 the hypothetical I gave you, to take this instant ballot having  
22 heard only the prosecution's evidence?

23 MR. FOX: The basis in the rule for the rescission,  
24 Your Honor?

25 QUESTION: Could the Court have found them in

1 contempt for doing that?

2 MR. FOX: I think the judicial control which has been  
3 left in the Florida trial courts by the rule. It's quite clear  
4 in the rule that the judicial control and discretion, to con-  
5 trol the camera and the media and disputes among the media,  
6 is strictly restricted into the trial court.

7 QUESTION: Could they? Could the Court properly find  
8 them in contempt for having shown only the prosecution's case  
9 and then taken an instant poll on guilty or innocent?

10 MR. FOX: I think it's a very close question.  
11 I think the trial court probably would and then we could liti-  
12 gate it from there. I would submit to you, Your Honor, that  
13 the questions that the defendant raises and the questions,  
14 the concerns the Court has expressed will occur in any sort of  
15 highly publicized case, whether it's televised or not. They  
16 could run a poll in any sort of case, whether it's publicized  
17 or not. It makes no difference that the camera is there. The  
18 camera does not change the circumstances. The camera does not  
19 change the abuse by the press. If the press is going to abuse  
20 the circumstance they will abuse it, no matter what.

21 QUESTION: Mr. Fox, may I ask this question? Under  
22 the Florida rule, does the trial judge under any circumstances  
23 have the right to exclude cameras, including television cameras,  
24 from an entire trial?

25 MR. FOX: Yes, Your Honor, he certainly does.

1 QUESTION: Have they done so since the rule was adopted?

2 MR. FOX: Yes, Your Honor, they certainly have.

3 QUESTION: What considerations impel a court to make  
4 that ruling?

5 MR. FOX: Well, the rule itself states quite clearly  
6 the grounds relating to the difference in the effect upon the  
7 witness as opposed to the general public, and the difference  
8 relating to the type of media coverage. As, for example, the  
9 trial court may exclude the electronic media but not other  
10 types of media.

11 QUESTION: I would distinguish, of course, the  
12 printed press media. You have different authorities that con-  
13 trol that. But I understand your answer to be that the Court  
14 does have authority to exclude all cameras from the entire  
15 trial?

16 MR. FOX: Yes, Your Honor. There's a case, Palm  
17 Beach Newspapers case which is cited, I believe, in the CBS  
18 amicus brief, in which the cameras were excluded. And that  
19 issue has --

20 QUESTION: Why was it done in that case?

21 MR. FOX: In that case a prisoner had objected to  
22 being filmed because of the fact that he felt his life would  
23 be in jeopardy if he testified. And the trial court closed the  
24 trial. And the media appealed; the 4th District in that case  
25 reversed, stating that there needed to be an evidentiary



1 hearing on the issue, and that the motion showed a prima facie  
2 case but then there should be an evidentiary hearing. That  
3 case is currently on appeal to the Florida Supreme Court.

4 We're in a frontier area here, Your Honor. There  
5 have been very, very few cases with respect to closure or the  
6 media appealing a closure or the defendant appealing from an  
7 issue where closure was denied.

8 QUESTION: Have you had a case yet where a witness  
9 after being sworn but before taking the stand simply said to  
10 the judge, I've been camera-shy all my life, I just don't  
11 think I can possibly testify fairly and honestly with cameras  
12 on me?

13 MR. FOX: We have a case involving a defendant, Green  
14 v. State, cited in our brief, where the defendant stated  
15 a long winding motion about her background and her social up-  
16 bringing and so forth, and she stated that she was bothered  
17 with conferring with her counsel. In that case the trial  
18 court denied closure, but the 3rd District Court of Appeal re-  
19 versed that case and ordered an evidentiary hearing, stating  
20 that the defendant had made a prima facie case and the State --

21 QUESTION: You are saying, as I understand it, that  
22 the judge has full discretion to exclude cameras from the  
23 courtroom?

24 MR. FOX: Yes, Your Honor.

25 QUESTION: If a witness or a juror persuaded him that

1 it was in the best interests of justice?

2 MR. FOX: Yes, Your Honor. I think a full discretion  
3 should rest in the trial court.

4 QUESTION: Suppose you had a camera-shy lawyer?

5 MR. FOX: Well, Your Honor, that relates to another  
6 issue, I think, an issue which this Court has occasionally had  
7 a chance to address, Mr. Chief Justice, involving the quality  
8 of representation, the quality of trial court judges, and so  
9 forth. We submit that the exposure of the trial courts and  
10 the attorneys to public scrutiny I think will have an educa-  
11 tive effect upon the public. I think an incompetent attorney  
12 will clearly be demonstrated in front of the cameras. I think  
13 a trial judge who is not up on the law will clearly be demon-  
14 strated by the actual and real picture of what's going on.

15 QUESTION: I understood Mr. Justice Powell to be  
16 probing at the idea that even a competent lawyer might be less  
17 competent if he was allergic to cameras?

18 MR. FOX: Yes, Your Honor.

19 QUESTION: And therefore his performance might be  
20 negatively affected.

21 MR. FOX: That's correct.

22 QUESTION: What do you have to say about that?

23 MR. FOX: I would submit to you, the man, as the  
24 Colorado Supreme Court said in 1956, an attorney who is a  
25 strutter, an attorney who is a showoff, an attorney who's

1 incompetent, is going to be incompetent, a showoff, or a  
2 strutter, whether the cameras are there or not.

3 QUESTION: But that doesn't answer the question I put  
4 and that I thought Mr. Justice Powell was probing at. What if  
5 the very presence of the camera as with the camera-shy witness,  
6 impairs the functioning of a highly self-conscious lawyer, if  
7 you can hypothesize that?

8 MR. FOX: Mr. Chief Justice, I'd submit to you that  
9 that is precisely what we've argued in our brief. We should  
10 proceed on a case by case basis. In the event that is shown,  
11 in the event that a defendant files a 3.850 proceeding in  
12 Florida collaterally attacking the competency of his counsel,  
13 then we should proceed on a case-by-case basis. We should not  
14 predicate our decision in this case upon conjecture, but upon  
15 the demonstrable reality, as the Court stated in Beck v.  
16 Washington.

17 The Attorney General of Florida will address the  
18 Court now. Thank you.

19 MR. CHIEF JUSTICE BURGER: Mr. Attorney General.

20 ORAL ARGUMENT OF JIM SMITH, ESQ.,

21 ON BEHALF OF THE APPELLEE

22 MR. SMITH: Mr. Chief Justice, and may it please the  
23 Court:

24 In the 1965 Estes opinion Justice Harlan, which was  
25 the swing vote in the plurality decision in that case, echoed

1 the underlying philosophy and restricted scope of Justice  
2 Clark's opinion when he said, and I quote from that opinion  
3 briefly, "Finally, we should not be deterred from making the  
4 constitutional judgment which this case demands by the prospect  
5 that the day may come when television will have become so  
6 commonplace an affair in the daily life of the average person  
7 as to dissipate all reasonable likelihood that its use in  
8 courtrooms may disparage the judicial process. If and when  
9 that day arrives, the constitutional judgment called for now  
10 would of course be subject to reexamination."

11 QUESTION: Mr. Smith, do you suppose this Court  
12 would give very serious consideration to the claim of a lawyer  
13 who said he was used to practising in a courtroom that only  
14 seated 20 people, and was now trying a case that seated 300  
15 people, that he just wasn't used to practising before a large  
16 crowd and therefore all but 20 should be excluded?

17 MR. SMITH: Mr. Justice Rehnquist, I really don't think  
18 that that issue would ever be heard by this Court. It wouldn't  
19 rise to this level. Certainly, he would be expected to perform  
20 as an attorney in that courtroom whether there was one spectator  
21 or 300.

22 QUESTION: What if it was Yankee Stadium or the Gary  
23 Powers' trial?

24 MR. SMITH: This Court would not accommodate --

25 QUESTION: You wouldn't have to ask them to try it

1 first in Yankee Stadium?

2 MR. SMITH: No, sir. This Court, obviously, wouldn't  
3 accommodate --

4 QUESTION: That's about the only way you can get a  
5 public trial in New York, isn't it?

6 MR. SMITH: I'm sorry, Your Honor?

7 QUESTION: That's about the only way you could get a  
8 "public" trial in New York, would be a building twice the size  
9 of Yankee Stadium.

10 QUESTION: How do you differentiate this from Yankee  
11 Stadium? I suppose the audience is even larger here.

12 MR. SMITH: The courtroom size will accommodate the  
13 number of people that the particular courtroom designated can  
14 take.

15 QUESTION: In other words it can't apply to television.  
16 There are a lot more people watching.

17 MR. SMITH: Certainly, and the presence of the media  
18 in the courtroom and your recent judgment in the Richmond case  
19 recognized the surrogate responsibility that the media has and  
20 the function that they perform in bringing to the attention of  
21 the public any kind of trial that is newsworthy.

22 QUESTION: Well, Mr. Attorney General, I understand  
23 the argument that the televising has an educational, public  
24 good to it. And I understand that Florida is the Sunshine  
25 State in many ways. But does the televising in your

1 submission improve the quality of justice that's administered  
2 in a courtroom?

3 MR. SMITH: The experience that we have had to date  
4 in Florida, and we have certainly had our share of highly sen-  
5 sational publicized trials, has been that the presence of  
6 cameras in the courtroom has indeed improved that process.  
7 The fact is, in the Zamora trial, which was a very sensational,  
8 highly publicized capital case, was televised gavel-to-gavel  
9 in Florida, and portions of that trial were shown worldwide.  
10 The experience in that proceeding was that for the most part  
11 the media was down the hall or downstairs in a room watching  
12 the proceedings on the TV monitor, rather than going back and  
13 forth in the courtroom carrying messages to each other.  
14 The Bundy trial --

15 QUESTION: Well, Mr. Attorney General, unless Estes  
16 is overturned, wouldn't your rule be invalid in a rather large  
17 category of cases?

18 MR. SMITH: Mr. Justice White --

19 QUESTION: Such as the Zamora case?

20 MR. SMITH: We don't think that it's necessary to  
21 overturn the Estes opinion to uphold the Florida Supreme Court  
22 rule.

23 QUESTION: Why?

24 MR. SMITH: The Estes opinion did not say that tele-  
25 vision cameras per se were a violation of the defendant's

1 constitutional rights.

2 QUESTION: I know, but I just asked you about the  
3 category of trial such as Justice Harlan described in his  
4 opinion in that case. He thought there was a type of trial  
5 in which television would be per se prejudicial.

6 MR. SMITH: I would not --

7 QUESTION: Now, in that category of trial, wouldn't  
8 your rule be invalid in at least some cases under Estes?

9 MR. SMITH: Yes, Your Honor. The case could cer-  
10 tainly come back before this Court, where a trial judge did not  
11 exercise the proper control of the proceedings and let it --

12 QUESTION: That isn't Justice Harlan's holding, is  
13 it?

14 QUESTION: No, not at all.

15 QUESTION: That isn't what he held. That isn't what  
16 his opinion said, and it certainly isn't what the other four  
17 justices in the majority said.

18 MR. SMITH: Justice Harlan said that obviously he  
19 was not willing to go along with the four other justices and  
20 on a per se basis deny states the right.

21 QUESTION: He said, however, in the notorious trial  
22 there was a per se rule without the necessity of demonstrating  
23 any particular prejudice.

24 MR. SMITH: My reading of that opinion is he said,  
25 a sensational trial in 1962 under the facts in the Estes case.

1 QUESTION: Well, isn't that almost self-defining?  
2 Wouldn't any trial which television was interested in covering  
3 be by definition a notorious or sensational trial?

4 MR. SMITH: No, Your Honor, the experience in Florida  
5 is that every news station in our state has a courthouse beat  
6 and it is common in the TV news programs and in the newspapers  
7 in Florida that what is going on at the courthouse is reported.

8 QUESTION: What about the Zamora case?

9 MR. SMITH: Excuse me, Your Honor?

10 QUESTION: Do you think Justice Harlan would have  
11 thought that the Zamora case fell within his definition of a  
12 notorious trial?

13 MR. SMITH: I do not, Your Honor, and I would like --  
14 Judge Baker, who was the trial judge in that case, at the  
15 request of the Florida Supreme Court made a very detailed  
16 report of that proceeding, which was conducted during the  
17 experiment period of the Florida rule, and distinguished  
18 what took place at that trial from the Estes opinion. A full  
19 report of Judge Baker is in the appendix to our main brief,  
20 but I could point out, if I may, some of his conclusions.

21 QUESTION: Mr. Attorney General, let me get back to  
22 a point. You said that they'd be interested in covering every  
23 trial. What would they do in Los Angeles where they have  
24 200-and-some courts?

25 MR. SMITH: No, sir, I did not mean to imply that the



1 media covers every trial. I only -- the major newspapers in  
2 our state and TV stations have reporters on the courthouse  
3 beat, and that normally in the news segment there will be a  
4 minute or so every night for what is happening at the court-  
5 house. It will not be every case.

6 QUESTION: Well, it obviously can't be.

7 MR. SMITH: Absolutely. It would not be every case.

8 QUESTION: Are you telling us, Mr. Attorney General,  
9 that broadcasting two minutes and 52 seconds, was it, or 55  
10 seconds of the prosecution's case only, just one side of the  
11 case, has contributed something significant to the improvement  
12 of the administration of justice in Florida?

13 MR. SMITH: Mr. Chief Justice, in particularly a  
14 sensational type trial, the media will cover that event, it  
15 will be reported on television --

16 QUESTION: I'm just talking about television now, in  
17 broadcasting the live action, not the --

18 MR. SMITH: I submit that it is better for the  
19 citizens of our state in those situations to see the actual  
20 image and hear those portions of the testimony as it has hap-  
21 pened, rather than have to depend on the interpretation that  
22 a news commentator might like to give it.

23 QUESTION: Is there any possibility, significant  
24 possibility, that the listening audience having watched two  
25 minutes and 55 seconds of the prosecution's case only, and

1 later the jury finds the defendants in a particular case not  
2 guilty, that the jurors will be subject to criticism of their  
3 neighbors and their friends and their associates for a verdict  
4 of not guilty, when they have seen evidence only of guilt?  
5 Is that a possibility that the courts should take into account?

6 MR. SMITH: Mr. Chief Justice, that certainly is a  
7 possibility, but that possibility exists and does happen whe-  
8 ther cameras are present in the courtroom or not.

9 QUESTION: In any event, Mr. Attorney General, we  
10 don't need to, and we mustn't, decide whether or not this is a  
11 good idea. But the question is whether what Florida has done  
12 is constitutionally permissible.

13 MR. SMITH: That's correct. Whether or not there is  
14 inherent prejudice would rather put in their presence --

15 QUESTION: But the question of whether it has a  
16 deleterious effect on the administration of justice as a rule,  
17 is part of the total question before this Court, not whether  
18 it's a good idea for the television stations.

19 MR. SMITH: That's certainly --

20 QUESTION: Is there any provision in the Constitution  
21 that forbids a state from adopting a procedure that has a  
22 deleterious effect on the administration of justice, in haec  
23 verba?

24 QUESTION: Not in haec verba, but your friend  
25 suggested one about the defendant in prison garb, didn't he?

1 MR. SMITH: He did. And I don't like to be referee  
2 in what may be a disagreement between the Honorable Chief  
3 Justice and Justice Rehnquist -- the Constitution in the sense  
4 of the administration of justice, you know, within a state and  
5 what kind of rules a supreme court may adopt for that state, a  
6 state supreme court so long as they don't rise to a federal  
7 constitutional violation would have discretion to adopt what-  
8 ever rules they might deem proper.

9 The Florida rule authorizing the presence of the  
10 electronic media in the courtroom does that well within consti-  
11 tutional bounds and well within the encouragement this Court  
12 has given states to experiment with novel ideas. The experi-  
13 ment has proved successful in Florida. We have had literally  
14 hundreds of trials where the cameras have been present in the  
15 courtroom, reported generally very few situations where there's  
16 been an objection. And I submit the big reason for that is  
17 the government sunshine policies that we have in our state,  
18 the fact that in our state, when our citizens go to a county  
19 commission meeting or a city commission meeting, even our  
20 clemency meetings in capital cases, they see the television  
21 camera; the camera is present at all of those proceedings. So  
22 it is not in any way a novel experience for the citizens of our  
23 state to be around television equipment. It has become common-  
24 place in Florida, as the presence of cameras and television  
25 obviously have become commonplace in our daily lives.

1           The most recent Roper report tells us there are more  
2 than 90 million TV sets in this country, that that television  
3 in the average household is on some 6-1/2 hours a day.

4           If I could comment briefly on the experience in the  
5 Zamora trial which was a highly publicized trial, as I say,  
6 in this country and worldwide. Judge Baker took note of  
7 Justice Clark's concern about the red light on the camera.  
8 Obviously the state of art in cameras has changed. We don't  
9 have lights on the cameras in our courtrooms that indicate  
10 when they're on or off, and there is only one camera in the  
11 courtroom.

12           Another concern in the Estes case was the fact that  
13 the trial judge had to hold no less than five hearings about  
14 the pre-trial coverage to referee disputes between the media.  
15 Under the Florida rule the pooling arrangement as to who will  
16 operate the one camera that is present in the courtroom, those  
17 decisions are worked out among the media themselves. The court  
18 is not called upon to referee any disputes. If there are dis-  
19 putes in that regard, then cameras are not present in the  
20 courtroom.

21           QUESTION: Mr. Attorney General, is there anything  
22 in the record to the effect one way or the other that when  
23 television is present a larger venire is needed?

24           MR. SMITH: That has not -- there's nothing in the  
25 record that indicates that, Your Honor.

1           Some 28 states have experimented with cameras being  
2 present in their courtrooms. In eight states those proceed-  
3 ings may be televised without the consent of the defendant.  
4 In three states appellate proceedings are televised without  
5 the consent of the defendant's lawyer in that case. In the  
6 remaining states, some 16, television coverage is allowed  
7 with the defendant's consent. States have experimented in  
8 this area successfully. We urge this Court to uphold the  
9 Florida Supreme Court rule in the conviction below.

10           Thank you.

11           MR. CHIEF JUSTICE BURGER: Very well, Mr. Attorney  
12 General. Mr. Hirschhorn, do you have anything further?

13           ORAL ARGUMENT OF JOEL HIRSCHHORN, ESQ.,

14           ON BEHALF OF THE APPELLANTS -- REBUTTAL

15           MR. HIRSCHHORN: Mr. Chief Justice, and may it please  
16 the Court:

17           Being around television and watching television is  
18 different than being on television. I don't care how many  
19 television sets are in a person's home or how many hours a  
20 day my children watch TV, when that witness sits down and  
21 that camera's present, he sees it. In Zamora there was no  
22 objection to the presence of cameras in the courtroom. Zamora  
23 was a peculiar case because the defense in that case was that  
24 cameras made the defendant insane and the defendant invited  
25 cameras in the courtroom. So Zamora doesn't apply.

1           But Zamora's co-defendant is here, Your Honors.  
2 Agrella is here on cert. which this Court has been holding,  
3 unless it did something with it this past week. Agrella was  
4 a separate co-defendant who said, because his co-defendant  
5 didn't object, he couldn't get a fair trial. That's a collat-  
6 eral matter that has to be addressed.

7           Mr. Justice Harlan said, if every person in Yankee  
8 Stadium sat stonily silent, it's not the same as the decorum and  
9 the atmosphere of a courtroom. Showing two minutes and 55  
10 seconds, showing filmed highlights, is what precipitated,  
11 I suggest, and it has been argued in the brief, the disaster  
12 in Miami in the wake of what we call the McDuffie verdict.

13           In haec verba, the due process clause, Mr. Justice  
14 Rehnquist, I suggest to you prohibits the State of Florida  
15 from doing this, and I suggest that the Declaration of  
16 Independence, July 4, 1776, requires the consent of the  
17 governed.

18           QUESTION: Well, that's no part of the Constitution.

19           MR. HIRSCHHORN: Just its history. I agree.

20           The hypothetical quiet title case? If a television  
21 camera plunked its equipment -- and that's what we're seeking  
22 to exclude, equipment in a courtroom -- that quiet title case  
23 would become the most important quiet title case ever, because  
24 some TV producer had nothing else to do that night and decided  
25 to show that.

1 QUESTION: I don't imagine the ratings would have  
2 been too good on that show. Putting that to one side for a  
3 moment, one thing troubles me about your argument,  
4 Mr. Hirschhorn, on witnesses. If the television camera does  
5 adversely affect the witness's ability to testify in a per-  
6 suasive way, effective way, here they only showed prosecution  
7 witnesses, so whatever harm was done to this trial process  
8 presumably would have been prejudicial to the prosecution.

9 MR. HIRSCHHORN: Not necessarily. Because of the  
10 jury's impact. Perhaps this witness was not affected, some-  
11 how. But to the jury sitting back there in their jury room,  
12 they can be thinking and we can assume that they are correctly  
13 thinking about which witness's testimony was more important  
14 or more relevant. And I think they can say --

15 QUESTION: But does the jury know which part is  
16 being televised?

17 MR. HIRSCHHORN: Oh, yes. They know which --

18 QUESTION: Because, as I understand it, there's no  
19 red light anymore.

20 MR. HIRSCHHORN: The problem is -- and I now under-  
21 stand the question -- the camera wasn't present the whole time.  
22 I apologize, Mr. Justice Stevens.

23 QUESTION: Oh, I see. So that they didn't know  
24 whether -- ? I understand. All right.

25 MR. HIRSCHHORN: I'm sorry. The camera was only

1 present during jury selection, and the camera was only pre-  
2 sent during Mr. Sion's testimony. The camera was not present  
3 during other witness, during defense testimony, during closing  
4 argument. Palm Beach Newspapers -- I urge the Court to read  
5 Palm Beach Newspapers; that was cited by my opponent. Because  
6 Judge Scholts said that the state attorneys who labor  
7 every day with witnesses, that state attorney filed two affida-  
8 vits saying he got two witnesses who don't want to testify.  
9 They're in fear, they're in concern of their life. Judge  
10 Scholts excluded the cameras, not from the trial, but from  
11 televising those two witnesses; not from the trial. Because  
12 the rule does not permit blanket non-televising of the trial,  
13 just the successfully objecting participant.

14 And on appeal, the 4th District Court of Appeal said,  
15 Mr. trial judge, an affidavit's not enough because the media  
16 has to be given a chance to confront, cross-examine the affi-  
17 davit. That's an insufficient showing, just because two peo-  
18 ple claim that they believe they're going to get murdered if  
19 they testify against the defendant.

20 Why the State would want to have this kind of pro-  
21 cedure which infects its own witnesses? It's not easy for the  
22 State to get witnesses into court. People don't want to have  
23 their lives disrupted, and yet they persist.

24 The frailties of human nature are such that Devitt and  
25 Blackmar zeroed in in the standard jury instructions on why



1 the jury has this sole and exclusive province to evaluate the  
2 witness's testimony. The First Amendment has yielded in  
3 Zurcher to the search warrant. The First Amendment has yielded  
4 in Branzburg to the grand jury.

5 There is no battle here. It is just an effort to  
6 preserve the very nerve center of the factfinding process, the  
7 life-blood of the system, the defendants' right to a fair and  
8 impartial trial.

9 Both the First and the Sixth Amendment rights can be  
10 observed without violence to either. There is no harm what-  
11 soever if other traditional methods of gathering news, which  
12 were in effect when the Constitution was written, are used.

13 QUESTION: Is that the way you distinguish the writ-  
14 ten word from the television picture?

15 MR. HIRSCHHORN: No, I distinguish it --

16 QUESTION: That it was in effect at the time the  
17 Constitution was written?

18 QUESTION: I distinguish it by that old Chinese prov-  
19 erb's description; a picture is worth a thousand words. One  
20 political cartoon can wreak more damage than a thousand words.  
21 Hundreds of feet on TV can do even more.

22 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.  
23 the case is submitted.

24 (Whereupon, at 11:03 o'clock a.m., the case in the  
25 above-entitled matter was submitted.)

CERTIFICATE

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No. 79-1260

NOEL CHANDLER AND ROBERT GRANGER

v.

STATE OF FLORIDA

and that these pages constitute the original transcript of the proceedings for the records of the Court.

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