In the

ORIGINAL

Supreme Court of the United States

GLOBE NEWSPAPER COMPANY, Appellant,	:	
v.	:	No. 81-611
SUPERIOR COURT FOR THE COUNTY OF NORFOLK	:	

Washington, D. C.

Monday, March 29, 1982

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400 Virginia Avenue, S.W., Washington, D. C. 20024

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The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:45 o'clock p.m.

APPEARANCES:

JAMES F. McHUGH, III, ESQ., Boston, Massachusetts; on behalf of the Appellant.

MITCHELL J. SIKORA, JR., ESQ., Special Assistant Attorney General of Massachusetts, Boston, Massachusetts; on behalf of the Appellee.

C O N T E N T S

PROCEEDINGS

CHIEF JUSTICE BURGER: We will hear arguments next in Globe Newspaper Company against Superior Court.

Mr. McHugh, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF JAMES F. McHUGH, III, ESQ.,
ON BEHALF OF THE APPELLANT

MR. McHUGH: Mr. Chief Justice, and may it please the Court, the Appellant in this case is the Globe Newspaper Company, publisher of a newspaper called The Boston Globe, which is circulated in the city of Boston and elsewhere throughout New England. We are here today to seek reversal of a judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts holding that a Massachusetts statute, General Laws, Chapter 268, Section 16(A), on its face and as applied to the facts of this case constitutes a permissible method for regulating the trial of certain criminal cases.

In essence, the statute provides that at the trial of cases involving crimes of sex, the court is required to exclude the press and the public from the courtroom while the minor victim --

QUESTION: Do you mean, Mr. McHugh, by required, the fact it is mandated, that no matter what

the witnesses may desire, and what the parties may desire, the court must close the courtroom?

MR. McHUGH: Precisely, Mr. Justice. That is exactly what the statute says. That is exactly how the Supreme Judicial Court has construed it to read.

QUESTION: Then, I am a little puzzled when you reach the proposition you advance that you -- it is not only bad on its face but as applied.

MR. McHUGH: Well, if --

QUESTION: Now, as applied here, you say that even if the statute were discretionary, you would be here.

MR. McHUGH: We would be here on this record. Yes, Mr. Chief Justice.

QUESTION: I notice in your brief you suggest that there was no question raised by the complaining witness. Do you think that is quite an accurate characterization of the complaining witness?

MR. McHUGH: At the time the closure order was entered, there surely was no question raised by the complaining witness. At the time --

QUESTION: What was the complaining witness's position about the matter?

MR. McHUGH: It is unclear to me, Mr. Chief Justice, and I think that --

QUESTION: I thought it was pretty clear that if her privacy could be guaranteed, then she would have no objection. Now, could her privacy be guaranteed in any other way than what was done here?

MR. McHUGH: Well, I don't think her privacy could be guaranteed by what was done here if by privacy we mean disclosure of potentially embarrassing facts, because this statute doesn't reach the problem that is covered by that kind of a situation. Beyond that, I am not sure from what I described as an uninformative, and I think it is an uninformative colloquy that took place in chambers after these orders were entered, precisely what her concerns about privacy were.

After all, that colloquy dealt with the prosecutor's representation to the court concerning what the victim them had said to her, the prosecutor. Before that, at the time the hearing took place before a single justice, the representation was that the prosecutor had consulted fully with the victims, and that literally on their behalf the Commonwealth was waiving whatever rights it had under the statute.

At most, I would suggest, Mr. Chief Justice, that that colloquy and its dimensions illustrate the critical need for a hearing in cases like this, so that questions like the one you have just asked can be

answered on some kind of a factual record which lets people know precisely what is going on and what the precise concerns of the victim are.

QUESTION: Yes, but I understood, Mr. McHugh, in your answer to me, it would not -- what was the need for a hearing? As I understood it, the trial judge, under the statute, if he is to follow it, has absolutely no choice. He has to close the courtroom.

MR. McHUGH: I agree, and that --

QUESTION: I mean, he has to ask reporters, he has to ask the public, he has to ask everyone to get out except the parties. Isn't that right?

MR. McHUGH: That's correct, Mr. Justice, but -- and I am not quarreling with that -- with what the Supreme Judicial Court says. That is a reason in our judgment, and we suggest strongly to you that this statute is invalid, and in response to the Chief Justice's questions, I was suggesting that this kind of colloquy and the kinds of problems that are demonstrated by that kind of colloquy illustrate the need for a hearing before some kind of an order of closure can be entered.

QUESTION: This statute accordingly is unconstitutional because it makes no provision for such a hearing.

MR. McHUGH: That's correct.

QUESTION: Suppose he had held a hearing, and explored whatever anyone wanted to explore within reason, and then said, in case anyone thinks this statute is unconstitutional, as being overbroad, I now address the question of whether I would -- what I would do if I read the statute as giving me discretion, and under that discretion I would exclude all persons during this particular component, section of the trial. Would you still be here?

MR. McHUGH: I would if that is all we had, Mr. Chief Justice, because I think --

QUESTION: So even with discretion, you would challenge.

MR. McHUGH: On this record, I would challenge that. Yes, I would, and I think that the reason for challenging it is that, given the fact that there is, as this Court two terms ago said there was, a First Amendment right to attend, then something more than the desire of the victim, standing alone, or a private session has to be demonstrated before the presumptive right of the public to attend can be overborne. Any other view of the matter puts the extent of the press's and the public's First Amendment rights wholly in the hands of someone else, and it seems to me that that is

not what this Court has ever interpreted the First Amendment to do.

QUESTION: Well, in the case you are referring to, did we not suggest that the right is the right of the public, and the press included as a component of the public.

MR. McHUGH: Well, I'm not making any differentiation here between the right of the press and the right of the public. I am content to rest on the rights of the public, but surely the press as a member of the public has no fewer rights under the First Amendment than does the public.

QUESTION: As a practical matter, Mr. McHugh, if you are going to preserve the interests that the Commonwealth seeks to preserve here, isn't it either a flat rule or no rule --

MR. McHUGH: No, I don't --

QUESTION: -- because if you are going to obtain testimony from witnesses in situations like this, isn't the prosecutor going to have to offer them some assurance at the outset that their testimony will be not exposed to the public?

MR. McHUGH: Well, it seems to me, Mr. Justice Rehnquist, that you cannot simply achieve, if I understand what the statute is aimed at, a flat rule

that simply excludes the public from the courtroom during the victim's testimony. In order to achieve the interests that the Commonwealth apparently seeks to achieve, as I understand those interests, one would in effect have to have a uniform rule closing virtually the entirety of these trials, because if we look at what those interests are, at least as I understand them, it seems to me that the predominant interest is an interest in privacy of some kind.

Now, I question whether privacy really is a relevant concept when we are talking about this kind of a proceeding, a criminal proceeding, but assuming that it is, and if we further look at what is inherent in the notion of privacy, we come to the conclusion that what is involved, what the Commonwealth is attempting to protect, is some restriction on the dissemination of potentially embarrassing facts, and that is the element of privacy that we are talking about.

QUESTION: The facts that might not be given in evidence were it not for some sort of protection.

MR. McHUGH: But -- might not be given in evidence by the victim --

QUESTION: Right.

MR. McHUGH: -- conceivably, but surely even if given by the victim, are very likely also going to be

given by other witnesses during the course of the trial, and --

QUESTION: Do you think that is realistic, counsel, in crimes of rape of children or sexual abuse? They don't usually occur in the presence of other witnesses --

MR. McHUGH: No.

QUESTION: -- and the problem, of course, is trying to make sure that the state as a policy doesn't discourage victims of these crimes from coming forward in the first place and making a complaint simply because of the trauma that they will go through if forced to testify in public about it. Now, how do you balance those interests? I mean, as a practical matter, how do you balance those interests?

MR. McHUGH: Well, as a practical matter, it seems to me one has to start first with what the statute does and what it doesn't do, and if one looks at that distinction, one finds that this is a statute in which the names of the victims are part of the public record. They were in this case.

QUESTION: Right.

MR. McHUGH: In which the rest of the trial is presumptively open, so that any reports given by the victim to police officers, doctors, mothers, fathers

friends, and others, are going to be presumptively part of the public trial, in which a transcript is presumptively going to be available to the public at some point, assuming that a transcript some time is prepared.

QUESTION: You make a good bit of to do about encouraging victims to come forward. Is there any empirical evidence by way of study that supports that kind of a statement?

MR. McHUGH: That this statute encourages victims to come forward?

QUESTION: That in fact a statute of this kind does encourage victims to come forth. Has there been any empirical study to that effect?

MR. McHUGH: Not of which I am aware, and it seem to me that this is really a leap of faith.

QUESTION: How long has this statute been on the books, Mr. McHugh?

MR. McHUGH: It has been on the books, Mr. Justice, since 1931, in its present form.

QUESTION: That means that for this kind of crime, then, there has never been an open trial in Massachusetts?

MR. McHUGH: No, it does not. There are really -- There is not a sigificant amount of empirical

data, survey data, if you will, but we do have some clues. We have a clue -- One clue is a case called Commonwealth versus Blondin, which is cited in the briefs, and which was cited in a footnote in Mr. Justice Blackmun's dissent in Gannett, which was really the first case to construe this statute, in the mid-forties, and that was a statute -- that was a case which put the question whether this statute was constitutional, and in that case, while deciding that it was constitutional, A, because this Court had not yet decided that the Sixth Amendment applied to the states through the Fourteenth, and B, because there is no public trial guarantee in the Massachusetts constitution, the court was -- the Supreme Judicial Court observed that from the trial of that case the press had not been excluded, and went on to raise the question whether indeed the press could be excluded under any constitutional provisions that applied.

QUESTION: Of course, this applies only where there is a minor under 18 years of age who is the victim?

MR. McHUGH: That is correct.

QUESTION: So that there is at least that distinction.

MR. McHUGH: No, that --

QUESTION: Trials of victims over 18 are open to the public, are they?

MR. McHUGH: They are, unless everybody consents to a closure.

QUESTION: Like who, you mean the press?

MR. McHUGH: That has not been a question which has been tested.

QUESTION: Well, I know, but that is --

MR. McHUGH: But on its face --

QUESTION: So it really -- you are really saying that unles the defense and the prosecution and the judge agree.

MR. McHUGH: That's correct, on the face of the statute.

QUESTION: But neither the public nor the press would be consulted in that --

MR. McHUGH: Well, Mr. Justice, that statute is one which says that the judge may close the trial.

QUESTION: Yes.

MR. McHUGH: It does not, like this statute, require him to do so if everybody agrees.

QUESTION: I know. I know, but the judge could close it without consulting either the press or the public if prosecution and defense agreed.

MR. McHUGH: On the face of the statute, but I suggest to you that that would raise itself questions --

QUESTION: Well, it may, but the --

MR. McHUGH: -- but at least that's what the statute says.

QUESTION: Well, I expect in that circumstance if a reporter for the Globe was asked to leave the courtroom, we might have a test of that, might we not?

MR. McHUGH: I can't predict the future, Mr. Justice.

QUESTION: Mr. McHugh, maybe I missed it, but at this hearing you want, would the press be barred from that?

MR. McHUGH: I think that that would have to be a decision made on a case by case basis. In the main, I would think there would be --

QUESTION: I mean, I would think it would be like a voir dire hearing. It could be in the judge's chambers.

MR. McHUGH: Well, that's conceivable. On the other hand --

QUESTION: Well, would that hearing satisfy the First Amendent?

MR. McHUGH: Well, if it were held -- a blanket rule saying that all of these preliminary hearings were to be held in camera or in the chambers or out of the public view, it seems to me it would suffer from many of the defects that this present statute

suffers from.

QUESTION: Right.

MR. McHUGH: But I do not --

QUESTION: Well, in place of that the rule was that the judge can hold an in camera hearing from which the public is excluded.

MR. McHUGH: I am sorry. At the trial or at the preliminary hearing to decide whether the trial was to be open?

QUESTION: This is a voir dire that has nothing -- it will not be in the trial at all. It's just like any other voir dire. That is the purpose of it, not being in the trial.

MR. McHUGH: Well, that would have to -- I would have difficulty with a statute which said that in blanket fashion, for the same reasons that I think questions --

QUESTION: It's like a jurisdiction to determine whether you have jurisdiction.

MR. McHUGH: Must be held in public. I think that's right, and I see no problem with that, unless substantial reasons are advanced to support, just as we are suggesting here they should be asserted in particularized fashion to support closure of the criminal trial or a portion of it itself.

QUESTION: Mr. McHugh, if the procedure involved were one that were not mandatory, and a hearing would be conducted, would you concede that there are certain circumstances which would justify closing the testimony to the press and public of a minor victim in a sex crime?

MR. McHUGH: I would, Justice O'Connor, but I would suggest to you in the same breath that they would be circumstances in which some substantial concrete showing of tangible harm to that particular process, to that particular trial, would have to be made. We are not --

QUESTION: Such as what, that the victim feels she just can't testify?

MR. McHUGH: Yes, that's one of them. An inability, a demonstrated inability on the part of the victim to testify.

QUESTION: Subject to cross examination at the hearing by counsel for the newspaper or whoever was there?

MR. McHUGH: In the hearing to determine whether the trial is to be open?

QUESTION: Yes.

MR. McHUGH: Not necessarily. No. As a matter of fact, it seems to me that the vast majority of

these cases can be handled without even -- without ever getting to that particular problem which posed a particular concern, understandably, I think, for the Supreme Judicial Court, and it seems to me that the mode of proceeding with respect to these kinds of hearings could well take the form which only rarely, if ever, got to examination and cross examination of the victim by anybody.

It seems to me that a hearing of the type that would suffice in most cases would require, first of all, that somebody move for a concrete reason that the hearing be closed, rather than simply presuming from the outset that that is what is going to happen, and secondly, that somebody demonstrate and articulate some concrete reason, based on the evidence that is expected to be presented, type of crime that is involved, the age and maturity of the victim, the victim's prior ability to deal with --

QUESTION: Well, supposing the prosecutor comes in and moves just what you said, that this is a 15-year-old girl who is going to testify that she has been raped, and she is unwilling to testify unless there can be some exclusion of the public and the press at the time she testifies. What more would be required?

MR. McHUGH: Well, it seems to me that then,

those who oppose closure ought to have an opportunity to address some kinds of lesser restrictions --

QUESTION: Like gag orders, for example?

MR. McHUGH: No, Mr. Justice, like --

QUESTION: Well, allowing the public to be pressnt and the press to be present, but under some kind of restraint against disclosing in the next day's newspaper what happened.

MR. McHUGH: Well, I have great difficulty with assuming that in order to exercise one constitutional right, one should be required to enter into a prior restraint situation.

QUESTION: So you would not consider that, at least, as --

MR. McHUGH: No, but I would --

QUESTION: -- an acceptable lesser --

MR. McHUGH: What I would consider, I get back to the question you raised, and what might well have been done in this case, and indeed in most cases, is to address the concerns of the victim. What is it really that bothers the victim? Is it the part about where she is going to identify the perpetrator?

QUESTION: How would you get at that as a practical matter? Wouldn't you put the victim on the stand? I mean, you can't conduct it by a colloquy

between the prosecutor and the attorney for the Globe, certainly.

MR. McHUGH: You might well put the victim on the stand, and then the trial judge, depending on the victim's demeanor and ability to testify at that hearing, might, for example, put all the questions to the victim himself, or herself.

QUESTION: Who is present at this hearing --

MR. McHUGH: I would --

QUESTION: -- when this is happening?

MR. McHUGH: I would suggest that presumptively everybody would be present.

QUESTION: Is every one of the public in Boston entitled to have a lawyer there?

MR. McHUGH: Well, that's what I read the First Amendment rights articulated in Richmond to mean, at least in a hypothetical sense. Whether that is a practical problem or not --

QUESTION: It is a real practical problem, isn't it? On what basis would the Globe be there if every other citizen of Boston couldn't be there?

MR. McHUGH: I say it's a hypothetical problem, Mr. Chief Justice, because I think it highly unlikely that in any case of -- imaginable that the vast majority of the populace would be there with their

lawyers, and if that problem arises --

QUESTION: Maybe not the vast majority, but let's say 100 of them asked to come in.

MR. McHUGH: All right, let's even take a substantial group, Mr. Chief Justice. It seems to me that that problem, too, can be handled the way all kinds of class action problems are handled and other kinds of problems are handled. You appoint lead counsel, somebody to ask the questions to the judge which are going to be put to the victim.

We're not suggesting here, and I don't think we ever have suggested that this preliminary hearing is going to be a wide-open free-for-all in which everybody is going to be permitted to go out and get their own experts and their own examination and their own cross examination.

What we are suggesting is that the hearing has to take into account in some form of sensitive fashion the rights at issue, and if we come to a situation in what I think are going to be those rare situations in which we have a question of fact which has to be resolved in order to make the decision whether closure is appropriate, then it seems to me the trial judge in careful and sensitive fashion can handle that in a variety of ways, and one of those ways is to say to the

people who oppose closure, all right, tell me what you want me to ask this victim about her abuse. Tell me, and I will determine whether or not I am going to ask it to her.

Another way would be to have the victim actually examined out of the public view, but with a two-way communication system, so that people could hear what was going on.

Justice Powell, in his concurring opinion in Gannett, suggested that it is the responsibility of those who oppose closure to come up with alternatives if an impasse or a problem is reached, and I don't back away from that, but it seems to me both with some sensitivity and some creativity and the technology that exists we can come up with those kinds of alternatives to some kind of a free-for-all situation, and really that that ought not be the primary concern.

QUESTION: In this hearing, this preliminary hearing, would it be your view that the defense could cross examine the victim to determine whatever it was he was after, defense counsel?

MR. McHUGH: Well, it seems to me that the issue, the sole issue at this --

QUESTION: Now, this is all before trial.

MR. McHUGH: Yes, the sole issue at this

hearing, Mr. Chief Justice, would be, at least this hearing that I envision, would be to determine whether or not the public was going to be excluded from the ensuing trial, so that --

QUESTION: But you had said before the public would have to be present at that hearing.

MR. McHUGH: In my view, it would, presumptively. Presumptively. Nothing is --

QUESTION: What would be left of the privacy that presumptively was one of the factors underlying this statute in the first place?

MR. McHUGH: But I keep coming back to the problem that this statute closely examined, and the way that it's been interpreted doesn't in any meaningful sense preserve privacy in the first place, if by privacy what we mean is preventing the dissemination of potentially embarrassing facts, because those facts are going to get out in every case, presumptively. What it does, and all it does, and all it is supposed to do, and that is the bringing-forwardness that the statute has, if you will, all it is supposed to do is close the courtroom to a group of people while the victim is on the stand, not prevent anybody from discussing or otherwise disseminating what the victim says while she is on there, or he is on there.

QUESTION: Or publishing a transcript.

MR. McHUGH: Or publishing a transcript, if a transcript exists. In fact, in this case, I believe that there is no transcript, and in the normal case in situations at least in Massachusetts a transcript is not customarily prepared unless one of the parties requests one for purposes of appeal.

QUESTION: Is there some rule against the press buying a transcript?

MR. McHUGH: No, there isn't, but the --

QUESTION: Isn't a transcript made?

MR. McHUGH: Not in the ordinary course.

QUESTION: Is it recorded?

MR. McHUGH: It is stenographically recorded.

QUESTION: Well, couldn't you buy one if you wanted to? Is there a law against that?

MR. McHUGH: No, there is no law against --

QUESTION: Well, could you buy one?

MR. McHUGH: I believe that we could buy one.

QUESTION: Well, there's no law then against your buying one and publishing it.

MR. McHUGH: That's correct, Mr. Justice, but the problem is, in addition to the problem of instant availability, is what I should have said, that --

QUESTION: You certainly -- Well, I'll put it

as a question. Would you say that it is a reasonable proposition that in this type of case, particularly the rape case, that what happens as a practical matter is that the defense is an attack on the complaining witness, and the trial often becomes converted into a trial of the complaining witness, at least as much as of the defendant?

MR. McHUGH: No, I could not agree with that.

QUESTION: You would not agree with that?

MR. McHUGH: Not in Massachusetts, Your Honor, because we have addressed that problem in Massachusetts through the so-called rape shield laws, of a type which are burgeoning throughout the country, which are designed to head off that kind of scenario from taking place. The victim's prior sexual history and a whole host of details concerning her conduct with others at other times and even with the defendant himself at other times is, unless -- except in very narrow circumstances -- kept out.

QUESTION: Then Massachusetts follows the proposition from what you say that even a prostitute may be a rape victim --

MR. McHUGH: That's correct. That's correct.

QUESTION: -- and a complaining witness.

MR. McHUGH: Beyond that, it seems to me --

QUESTION: Well, this statute reaches more than indictments for rape, does it not?

MR. McHUGH: Well, it --

QUESTION: It is also non-support of an illegitimate child.

MR. McHUGH: Yes, it does, and --

QUESTION: Mr. McHugh, on the record point, the transcript, it doesn't have to be released. The judge can seal it.

MR. McHUGH: Well, he can, but according to the Supreme Judicial Court, Justice Marshal, the sealing decision or the -- the sealing decision, I guess, is really how properly to view it -- the sealing decision is to be based on the factors articulated in Richmond Newspapers.

QUESTION: Well, we had one from another state a couple of weeks ago where a grown man had sealed his record because he didn't want to be known as going before the grand jury, so I think if he can get it, I thought a child, but I realize that is state by state.

MR. McHUGH: We have difficult problems in that regard, too, because a whole host of criminal proceedings are sealed up and bound up forever once the criminal trial has concluded.

QUESTION: I see.

MR. McHUGH: So that it is not always a question of simply going to the courthouse and getting a copy of the transcript.

If Your Honor permits, I would like to reserve some time.

CHIEF JUSTICE BURGER: Very well.

Mr. Sikora.

ORAL ARGUMENT OF MITCHELL J. SIKORA, JR., ESQ.,

ON BEHALF OF THE APPELLEE

MR. SIKORA: Mr. Chief Justice, and may it please the Court, if I may, I would like to begin by addressing several questions put by the Justices to my brother.

Mr. Justice White asked about the availability of a transcript in this case, and indeed, the record shows that the Globe originally sought a transcript. Page 12 of the Joint Appendix contains the motion of the Globe that a transcript be made available in this case. The Globe did not follow up that request in the course of this proceeding.

Mr. Justice Blackmun asked whether there are any empirical data which show the effectiveness of the Massachusetts statute, and I agree with my brother that there are not conclusive data. On the other hand, by way of background, as we observe in our brief, rape is

the most underreported of all major crimes against the person in the United States, and it is estimated authoritatively that only two out of seven rapes are reported in the country.

Given that background, and given certain legislative history of this statute, we suggest that it serves an eminently rational and compelling purpose.

QUESTION: Well, suppose that is correct, that two out of seven are unreported. Does that mean that the greater percentage of burglaries are not reported?

MR. SIKORA: No, Your Honor. If I may, perhaps I misspoke. I meant that only two out of seven are reported. That is, only one out of three and a half.

QUESTION: Well, without using my figures, does that mean the same thing is not true with respect to other crimes, particularly in the inner city?

MR. SIKORA: According to data released annually by the Federal Bureau of Investigation, rape is the most underreported of all crimes, because of several of its inherent features, the profound embarrassment and inhibition on the part of the victim, and above all, her dread of her trial appearance.

QUESTION: Well, isn't the embarrassment just as great in a closed courtroom as in an open one? She is bound to be cross examined. There are, I assume, in

your courtrooms in Massachusetts a lot of unrelated to her persons in that courtroom. Isn't the reluctance just that of testifying at all, rather than testifying in an open court as distinguished from a closed courtroom?

MR. SIKORA: The suggestion of the empirical literature of the last 15 years is that there is a peculiar inhibition about testifying in front of a crowd. I would suggest also, Your Honor, that testifying in a courtroom in which the jury, court officers, the judge, and counsel are present nonetheless puts all of them within the enclosure of the bar, and under somewhat of a controlled setting, that is, a setting controlled by the trial judge. He can provide, I think, a more protective atmosphere for the appearance of the child.

QUESTION: Of course, some of those, in our cases, have talked a lot and have interfered with the judicial process on occasion. This morning we had a case about -- or alluded to, anyway, where bailiffs had misbehaved.

MR. SIKORA: That's correct, Your Honor. If one seeks perfection from the statute, some kind of airtight anonymity for the child, and some type of perfect laboratory condition for her testimony, we don't

purport to offer it through this statute. It is a reasonable enclave for the child at her most traumatic moment in the trial.

QUESTION: Mr. Sikora, is there any other state in the United States with a similar statute of mandatory exclusion?

MR. SIKORA: Your Honor, there are two other --

QUESTION: To your knowledge?

MR. SIKORA: No, Your Honor, not precisely of this kind. There are two other states which compel the closure of certain similar proceedings, I believe. Iowa requires the closure of paternity trials. West Virginia requires the closure of divorce trials. There are four states which permit the use of a videotaping device in lieu of the child's actual testimony at trial, and those, I believe, are Arizona, New Mexico, Montana, and Florida. And in addition, two other states permit --

QUESTION: How do those work, Mr. Sikora?

MR. SIKORA: Your Honor, there is -- the child essentially testifies in a closed setting --

QUESTION: In camera, in chambers or something, in like an interview with the judge, or what?

MR. SIKORA: No, Your Honor, she is subject to direct and cross examination.

QUESTION: She is.

MR. SIKORA: The videotape is preserved, and then shown to the jury.

QUESTION: But where is the child examined, in chambers or something?

MR. SIKORA: The statutes don't indicate the physical locus for examination. It would appear to us that it would be either in chambers or perhaps at the courthouse several weeks before trial.

QUESTION: Not just like a deposition, it could be in a lawyer's office?

MR. SIKORA: The statutes as they read would permit any kind of a location, so long as the essentials of direct and cross examination are preserved.

QUESTION: But does it exclude people from that examination?

MR. SIKORA: It does, Your Honor. It is a closed setting.

QUESTION: Would the judge be present?

MR. SIKORA: It appears that he would be present. Yes, Your Honor.

QUESTION: The judge and counsel, prosecutor and defense, and the accused.

MR. SIKORA: Correct.

QUESTION: That would be all.

MR. SIKORA: Yes.

QUESTION: In other words, it would be just like the trial, except it is before the formal trial actually opens.

MR. SIKORA: That's --

QUESTION: But then the videotape becomes part of the trial, does it?

MR. SIKORA: That's correct, Your Honor.

QUESTION: And that's public?

MR. SIKORA: Yes. It is literally transplanted or plugged into the trial.

In addition, two states permit the use of deposition testimony in lieu of the child's testimony alive at trial, and those are Virginia and South Carolina.

Mr. Justice Brennan, you asked about the peripheral offenses involved in the statute in particular. The statute in its original form covered trials regarding illegitimacy and non-support. We believe that the Supreme Judicial Court has now excluded those offenses.

QUESTION: I see.

MR. SIKORA: And I believe you will find at Page 98 of the record appendix, Footnote 11, a statement by the court that its holding is now limited only to the crimes involved in this case, and they were forcible

rape and forced unnatural rape, and indeed, the entire bulk of the court's reasoning rests for the most part on a body of empirical literature and observations of the past 15 years which center, again, on the crime of rape.

QUESTION: The opinion and decision, I gather, apply only to the crime of rape, but that doesn't mean the other categories have been written out of the statute, do they?

MR. SIKORA: We would -- we read the opinion in Globe II to that effect, Your Honor.

QUESTION: I see.

MR. SIKORA: We think it necessarily means that much because of the reasoning and the emphasis --

QUESTION: Yes.

MR. SIKORA: -- upon the crime of forcible rape.

QUESTION: Well, does that mean in effect that as applied to these other offenses, your court has in effect said the provision will be unconstitutional?

MR. SIKORA: One cannot find that square holding beyond the footnote, but the court does --

QUESTION: But the court couldn't write out of the statute these other categories.

MR. SIKORA: Well, I think --

QUESTION: Other than by declaring that the

statute is unconstitutional, could it?

MR. SIKORA: I believe the court has said in Globe II that insofar -- that trial judges will now be guided by Globe II, and by Richmond Newspapers, and that statement on Page 101 of the record in combination with the essential reasoning which emphasizes the role of rape and its peculiar physical and mental injury to the victim leave the statute in effect only as to rape, incest, or, I believe, carnal abuse. So it would be crimes of sexual assault as to which the statute remains constitutional and valid.

QUESTION: Constitutional. Yes.

QUESTION: May I ask a question about exactly what is before us? As I understand it, under the decision in Globe II, the trial court's order was an improper order, because it closed the entire trial.

MR. SIKORA: That's correct.

QUESTION: And so they say it should be, in effect, that more of the order should be set aside. I take it the part that remained valid is the part that excluded the public from the testimony of two or three of the victims, was it?

MR. SIKORA: All three were minors.

QUESTION: All three.

MR. SIKORA: Yes.

QUESTION: And do we have a transcript so we would know how much of the entire trial was therefore -- the public was denied access to --

MR. SIKORA: We do not --

QUESTION: -- under the order?

MR. SIKORA: We do not, Your Honor. The trial was an eight-day trial, and we do know that there were a number of witnesses, approximately 12 to 14 witnesses in the case, that the two main issues of the case were identification of the defendant and a certain amount of alibi testimony on the part of the defendant. There were six alibi witnesses, and that appeared to be a crucial --

QUESTION: So we should judge the case on the hypothesis that the order had permitted the press to attend all but two or three witnesses' testimony.

MR. SIKORA: That's correct, Your Honor.

QUESTION: That's kind of a strange appellate posture for a decision on this kind of an issue.

MR. SIKORA: It is, Your Honor, although it appears to have been unavoidable because of really the flow of constitutional doctrine. The trial took place in April of 1979, two months before Gannett.

QUESTION: But on the bottom line, we are reviewing a trial court order that has already been set

aside.

MR. SIKORA: That's correct, and I suppose you are determining whether its preservation of the core of this statute for the future, prospectively.

QUESTION: But even preserving the core of the statute doesn't preserve the trial court order that gave rise to this litigation.

MR. SIKORA: That's correct.

QUESTION: And the particular order that was entered will never recur again in Massachusetts.

MR. SIKORA: That's correct.

QUESTION: Did the defendant testify?

MR. SIKORA: I believe he did, Your Honor, yes.

QUESTION: And I suspect if it is something else, that these multiple witnesses were alibi witnesses and perhaps character witnesses for the defendant?

MR. SIKORA: They were, Your Honor. There were three witnesses who were waitresses, whom he called as alibi witnesses to put him at a particular restaurant during or about the time of the crime. There were two other witnesses who testified that one of those waitresses was with them and not at the restaurant, and the victim's father testified that he was at home that night. The victim himself testified and recounted the chronology of his doings that night.

QUESTION: So he was both at the restaurant and at home on the defendant's case.

MR. SIKORA: Well, at various times. He accounted for the duration of his evening, so that he would not have been present at the site of the crime.

QUESTION: Mr. McHugh, after your -- Mr. Sikora, sorry, forgive me. After your discussion with my brother Stevens, what order is actually before us?

MR. SIKORA: Well --

QUESTION: I mean, can you point -- tell me where it is in the appendix?

MR. SIKORA: Yes. I believe I can, Your Honor. I believe you will find it at Page 18.

QUESTION: You don't really care if we review it, do you?

MR. SIKORA: Well, after all this work, I would hope that the Court would render a decision.

QUESTION: Well, I know, but we review judgments, and I am just wondering what judgment are we reviewing.

MR. SIKORA: That's correct. Well, Your Honor --

QUESTION: We don't review opinions.

MR. SIKORA: We have treated -- the Supreme Judicial Court and the Globe and the Commonwealth have

treated the decision as -- or the events as capable of repetition yet evading review in light of --

QUESTION: With respect to the same newspaper.

MR. SIKORA: Yes.

QUESTION: So that that saves it from being moot.

MR. SIKORA: Yes.

QUESTION: It is not unlike Nebraska Press Association versus Stewart in that regard.

MR. SIKORA: I suppose it is not unlike that case, Your Honor, but I think it is more like Gannett and Richmond Newspapers. We have an acquittal here as in Richmond Newspapers --

QUESTION: Well, that still bothers me, Mr. Sikora. What do we affirm and what do we reverse?

MR. SIKORA: I think --

QUESTION: Look at Page 108a. Is that what we are here for? It says the judgement of June 30, 1981. Does that help you any?

QUESTION: Where is it?

MR. SIKORA: Literally, the --

QUESTION: On Page 108.

QUESTION: I know, but where is the judgment.

QUESTION: That's the trouble. Where is the "judgement of June 30. 1981?"

MR. SIKORA: Your Honor, I believe literally the judgment is a dismissal of the Globe's petition seeking extraordinary interlocutory review of the trial judge's entire order.

QUESTION: The only consequence -- suppose your friend prevailed. Would the only consequence be that the next time they have this precise kind of case, that it can't be closed without a hearing, at least? Is that it?

MR. SIKORA: That's correct, Your Honor. That's correct.

QUESTION: It might be closed out for hearing and it might not?

MR. SIKORA: That's correct. Essentially, the statute as it was preserved by the Supreme Judicial Court in both Globe I and Globe II is at stake here. In a very real sense, if the Court holds that the Supreme Judicial Court was mistaken, the statute goes down, there is no statute to this effect in the Commonwealth.

QUESTION: Well, is the non-discretionary, the mandatory aspect of this statute severable from the rest of the statute?

MR. SIKORA: No, Your Honor. The statute contains one main verb, and the main verb is imperative.

QUESTION: So it stands or falls altogether.

MR. SIKORA: That's correct.

QUESTION: But only with respect to the victim's testimony.

MR. SIKORA: That's correct.

QUESTION: You would anticipate that in another case there would be a closure order for the victim's testimony?

MR. SIKORA: That's correct. The rest of the trial will remain open.

QUESTION: But the closure order would be a matter of discretion.

MR. SIKORA: No, Your Honor, it's --

QUESTION: No, if the statute were stricken.

MR. SIKORA: Oh, I see.

QUESTION: If the statute --

MR. SIKORA: Yes.

QUESTION: Striking this statute as unconstitutional, you suggest that would have any effect on the inherent power of the court that has been intimated in some cases?

MR. SIKORA: No, there would remain an inherent common law power on the part of trial judges for good reasons, supported by findings, to close all or part of trials in accordance, I believe, with Richmond Newspapers and in accordance with what in Massachusetts

has been called a common law principle of publicity for criminal trials.

QUESTION: That would be basically up to the Supreme Court of Massachusetts, would it not, as to whether the statutes remaining or the common law powers of the Massachusetts courts extended to that? It is nothing this Court would have anything to say about.

MR. SIKORA: That's correct. It would be a matter of state law, Your Honor.

QUESTION: Do the common laws, Mr. Sikora, extend, say, to burglary trials?

MR. SIKORA: Hypothetically, if there were some compelling reason why, say, the testimony of perhaps a young witness to a burglary should be sheltered, a judge would hold a hearing, make that finding, and issue a reason and close it, could in his discretion if the circumstances were --

QUESTION: But as to these offenses under this statute, he doesn't have to go through that procedure.

MR. SIKORA: That's correct. As a matter of fact, he is mandated to close the testimony of children under 18.

QUESTION: Yes.

MR. SIKORA: With regard to state law, Mr. Justice, for some reason, John Adams did not include in

the Massachusetts constitution a provision for public trials, and perhaps that was because it was so settled in common law doctrine at that time. As a consequence, the principle of publicity for criminal trials in Massachusetts has always been a common law doctrine and a matter of state law enforced by the Supreme Judicial Court.

In the course of my brother's argument, I believe he took false aim at the main purpose of the statute. The main purpose of the statute is not to confer a generalized privacy upon the victim. Essentially the purpose is to give her some protection against the trauma of her testimony at trial. Further, through that kind of assurance by means of a mandatory statute, the legislature attempts to bring forward, to encourage the reporting and the prosecution of this particular category of crime.

Again, this particular category of crime is characterized by a reluctance of victims, especially young victims and their families, to come forward and to endure the process of the prosecution. A number of the students of this subject have suggested that the criminal justice system itself ironically imposes a second round of physical and psychological pain upon the victim.

Indeed, a number of the writers recount the ordeal of a victim, a young victim and her family as they approach the trial process itself. Typically, the victim will have to visit the police station, the district attorney's office, identification, go through identification procedures, and, of course, at the time of trial itself confront the alleged rapist and undergo cross examination.

Typically, too, the victim will experience a number of trial continuances, and this will protract her inhibition, her embarrassment, and very often it will cost the prosecution the value of her assistance.

QUESTION: Mr. Sikora, you said earlier that only two of seven are reported. How many of the two ever actually go to trial?

MR. SIKORA: That was not available in the data which we examined, Your Honor. We have derived our data from two main sources. One was the study of the Presidential Commission on Crime of 1967, and the other was annual Federal Bureau of Investigation reports on the incidence of crime in the United States.

QUESTION: But this also prohibits one who has no objection.

MR. SIKORA: That's correct, Your Honor. It does not --

QUESTION: That's my problem.

MR. SIKORA: Yes, and that is certainly the most difficult part of the case. We say that there are at least three reasons --

QUESTION: Well, under this statute, can the judge say that since this complainant witness does not object, her family does not object, the minister doesn't object, I am going to open it? Could he do that in Massachusetts?

MR. SIKORA: He could not. He could not, and the Supreme Judicial Court cited several reasons why he could not and should not. The first essentially is an assertion of parens patriae power of the state. The state is entitled to be wary of a family or a victim which feels confident enough to undergo cross examination or confrontation at a public --

QUESTION: Well, suppose the mother was a psychiatrist and the father was a college president.

MR. SIKORA: There would still be no right of waiver.

QUESTION: That's right.

MR. SIKORA: In that regard, Your Honor, we rely particularly upon several decisions of this Court, one of which is Prince versus Massachusetts, a 1944 decision in which the Court held that a child, even with

the accompaniment of a parent or guardian, and even though the child sincerely held the religious beliefs involved, could not participate in street pamphleting or prosyletizing in behalf of her religious views, and the Court used rather strong language as to permissibility of parents exposing their children to particular activities which they felt strong enough to endure themselves. The majority said, "Parents may be free to become martyrs themselves," even a psychiatrist or a college president, I would submit, "but it does not follow that they are free in identical circumstances to make martyrs of their children before they have reached the age of full and legal disecretion" --

QUESTION: Do you consider testifying at trial being a martyr?

MR. SIKORA: Testifying at a trial which is called to resolve the question whether you have been raped, if you are a child, eight, ten, or twelve years old, I think is analogous.

QUESTION: Well, my child from my hypothetical is 17 years, 350 days old. That is my hypothetical.

MR. SIKORA: And the answer, I think, is --

QUESTION: Attending one of the Ivy League Colleges.

MR. SIKORA: The answer, I think, Your Honor,

even for that --

QUESTION: It's hard. It's hard to answer.

MR. SIKORA: -- even for that extraordinary individual must be no, for several very practical reasons.

QUESTION: Are you going to retreat to the point that you have to draw a line some place, arent you?

MR. SIKORA: Well, naturally we would have to make that point.

QUESTION: Yes.

MR. SIKORA: And cite Justice Holmes, as always, for it, but in addition, this is not an experience, testifying at a trial of rape, even for a mature minor, even for an adult woman, which provides the victim with any realistic opportunity for preparation, for rehearsal, for prior experience. It is a traumatic event as much for the adult perhaps as for the child.

QUESTION: I agree.

MR. SIKORA: It is not one of those events that changes the quality radically as one passes from adolescence to adulthood, and again --

QUESTION: Suppose, counsel, that this pretrial exploration of the matter that we referred to before developed the fact that the defense was entirely

alibi, that he wasn't in Boston, he was in Philadelphia for a whole week before and after. Would a trial court be sustained in refusing to permit cross examination on any issue except identification? Is there any other issue in the case then except identification of the defendant?

MR. SIKORA: In that hypothetical, Your Honor, identification -- I am assuming that identification is the issue on which guilt or innocence would hinge, and apart, though, from the character of the crucial issue in the case, a minor would still under this statute be given sheltered testimony.

If I may, Justice Marshal, I would like to go back to your question and wrestle with it a little more.

QUESTION: Yes. It worries me, too.

MR. SIKORA: I think there is a second dimension to the reason why the state should not permit even the willing minor or her family to expose her to public testimony, and that is the interest of the government in the quality of her testimony. The government as an institution has a special interest in the accuracy, the reliability of her testimony.

QUESTION: Well, on the other hand, she could go to the newspaper, get a TV camera, sit down in front of them and testify, and there is nothing in the world

you could do to stop it.

MR. SIKORA: Absolutely, but at least that communication would take place outside the very special setting of a criminal trial to determine the guilt or innocence of the accused. It would take place out of the viewing of a jury. It is that precise circumstance of testifying in front of a jury with the guilt or innocence of a defendant at stake that makes her testimony very precious stuff, and makes us want as much as possible to assure its reliability and accuracy.

And incidentally, note that that concern about the quality of her testimony leads as much to exculpatory evidence as in this case, the victim was acquitted -- I'm sorry, the accused was acquitted -- as it does to inculpatory evidence that would lead to just convictions. It is a just result, acquittal or conviction, which is the special concern of the state, and the state, we say, may pre-empt the risk of even a mature minor who has abundant confidence in her ability to testify effectively, the state may pre-empt the risk of her appearance in front of a full courtroom containing members of the press in a situation in which she might succumb to stress or otherwise compromise her testimony, compromise the quality of that testimony.

There is perhaps one -- and a third dimension

to the answer on waiver, Your Honor, and that is very simply that even a waiver offer by the victim would require probably some kind of hearing on the part of a trial judge to assure himself that her waiver was knowing, voluntary, and wise or intelligent. In those circumstances, again, the victim is drawn into another preliminary hearing at which the issue is her capacity to testify and perhaps her psychological strength or stamina.

Again, there is a pulling and hauling over the psyche of the child victim even before the trial begins. This in particular persuaded the Supreme Judicial Court that preliminary hearings on waiver would themselves begin to defeat the purpose of the statute.

QUESTION: General, how does Massachusetts handle this problem in the trial of juveniles?

MR. SIKORA: I'm sorry, Your Honor. I missed the last word.

QUESTION: How does Massachusetts handle the problem we are discussing here today in criminal trials of juveniles?

MR. SIKORA: I see. They are entirely closed, Your Honor.

QUESTION: Mandatorily so?

MR. SIKORA: Yes, sir.

QUESTION: To what age?

MR. SIKORA: I believe the age is 14, and there is a period between 14 and 16 in which --

QUESTION: They may be tried as adults.

MR. SIKORA: That's correct.

QUESTION: That's fairly standard among the states, I think.

MR. SIKORA: I believe so.

QUESTION: So you could have a 16-year-old defendant and a 14-year-old victim, and these two statutes would interact with one another.

MR. SIKORA: That's correct, although I believe that the fact that the victim would be 14 would be conclusive as to her testimony.

QUESTION: Yes. Mandatory in that case.

MR. SIKORA: That's correct.

QUESTION: But you said it was mandatory up to 14 on the defendant?

MR. SIKORA: For the accused. Yes.

QUESTION: And discretionary from 14 to 16?

MR. SIKORA: That's correct.

If I may, I would like to stress just one more point, and that is a mode of analysis which Mr. Justice Brennan introduced in the Richmond Newspapers case, when he suggested that we should test statutes of this kind

by inspection as to whether they interfere seriously with the flow of information to citizens about their courts or about their political institutions more generally.

I believe that the Supreme Judicial Court has tried very hard to shrink this statute to fit its essential purpose. Indeed, if we examine the remainder of the trial open to the public, it is very considerable. All pre and post-trial proceedings remain open, presumptively open. Empanelment of the jury, opening remarks, testimony of all other witnesses, and typically there are five other categories of witnesses -- police, medical and scientific evidence, prosecution corroboration witnesses, defense evidence and defense corroboration and alibi witnesses -- in addition, summation to the jury, jury instructions, rendition of the verdict, all court papers, the appellate process, all of these elements of the judicial process remain open to the public.

My brother suggested that the statute might be self-defeating because it left so much of the proceeding open, but again, if one zeroes in on the very precise purpose of the statute, simply to give the child an enclave at the moment of testimony, I think one grasps the true purpose of the statute, and appreciates the

effort of the Supreme Judicial Court to leave the remainder of the trial and the judicial proceeding all but entirely open.

Just to sum up then, we suggest that on other occasions the press itself has recognized the social value of some confidentiality, particularly in cases or in legislation where it sought to shield the identity, for example, of reporters' sources, and argued that such confidentiality produced socially beneficial results.

Today, the government is arguing that some reasonable confidentiality for children, victim to crimes of sexual assault, serves equally important purposes. We believe that the Supreme Judicial Court decision below respects both values, both the purposes, the practical and humane purposes of the statute, and the First Amendment.

We urge the Court to affirm that judgment.

Thank you.

CHIEF JUSTICE BURGER: Mr. McHugh, do you have anything further? You have five minutes remaining.

ORAL ARGUMENT OF JAMES F. McHUGH, III, ESQ.,

ON BEHALF OF THE APPELLANT - REBUTTAL

MR. McHUGH: The suggestion, to begin with, that this statute preserves an enclave of privacy at the time of the victim's testimony, I suggest, simply misses

the point. Under Commonwealth and Marshall, the Supreme Judicial Court has ruled that the defendant is entitled to be in there with his family and his friends. Under prior decisions and under the statute itself, it is clear that the jury will be in there. The judge will be in there, and a host of other people, strangers all to the victim, are going to be inside --

QUESTION: Well, if the defendant is aged 12, is the statute mandatory on everyone?

MR. McHUGH: With respect to juvenile -- alleged juvenile delinquents?

QUESTION: Yes.

MR. McHUGH: Yes, it is.

QUESTION: He can't have his mother or father or his brother there?

MR. McHUGH: Oh, no, I'm sorry. It's mandatory in all cases but the same kinds of people are permitted in. That's correct. But I suggest that that serves a very different purpose, and is aimed at a very different purpose than is this statute.

QUESTION: Well, I'm not sure I've got your answer clear. It may or may not be important. A juvenile, aged 12 or 13, on trial, are his parents excluded?

MR. McHUGH: No, they are not. The language

in the juvenile statute is the same. Those with a direct interest in the case, quote, unquote, may attend. All of those people may attend as well. But the notion advanced by the Commonwealth this morning and in its brief is that the purpose of the statute is to create an enclave of privacy, and I am suggesting to you that it just doesn't work if one looks at the operation of the statute. There are going to be a host of people in there anyway, under all circumstances, even if the courtroom is mandatorily closed, and those people are going to be permitted to disseminate under the statute standing by itself whatever they hear in that courtroom, and in terms of protecting some notion of privacy, then, the statute simply is not going to work.

QUESTION: Well, let's say it's not so much privacy as it is just protection against the trauma, the trauma of testifying before the public.

MR. McHUGH: Well, from were does that trauma come, I would suggest is the relevant question, given the numbers of people who are already going to be in there, and --

QUESTION: Well, there's a jury, but there are certain -- besides the jury, there's not a host of people. I mean, the defendant can't have all of his friends from the neighborhood in there.

MR. McHUGH: But then I suggest to you that there is --

QUESTION: He has his parents. Who else? His lawyer. Who else?

MR. McHUGH: Parents, lawyer, and friends, is what the Supreme Judicial Court has said.

QUESTION: Friends?

MR. McHUGH: Friends.

QUESTION: You mean, all the friends he has?

MR. McHUGH: There has only been one case, and there was only one friend in that case. I don't know how far the Court would take that principle, but that's what they've said, parents, family, and friends, and, of course, lawyers.

QUESTION: Now you are talking about the juvenile?

MR. McHUGH: No, I am back to the adult, in this case, under 16(A), this statute, Mr. Chief Justice.

QUESTION: Even an adult --

MR. McHUGH: Prosecuted under --

QUESTION: -- defines offenses covered by this statute?

MR. McHUGH: That's correct, in one of these cases. Indeed, that was a statute --

QUESTION: So there's a minimum, in any event,

number of people, the jury, the judge, counsel, both sides, the accused, and his father, mother, brothers, sisters, and friends, whatever that means.

MR. McHUGH: And friends.

QUESTION: And court officials.

MR. McHUGH: And court officials.

QUESTION: Could the court under your theory of the case impose an order on them that they could not speak of the proceedings until after the verdict?

MR. McHUGH: Well, but even -- I don't believe that we need to reach that question. I think it raises --

QUESTION: Well, maybe we don't need to. I am just interested in your position.

MR. McHUGH: Well, it raises extraordinarily troublesome problems, I would suggest, because it is a kind of prior restraint, and in order to exercise -- really what it boils down to again is the kind of problem we are talking about with respect to imposing that kind of a restraint on the press. In order to exercise his public trial guarantee in some form, those members of the public whom the defendant has attend or who do attend have to consent to the imposition of a prior restraint.

QUESTION: Could I ask you just one more -- I

suppose if you prevailed in this you would certainly request to get into the videotaped deposition type of hearings.

MR. McHUGH: Not necessarily, because --

QUESTION: I know not necessarily, but what is the probability?

MR. McHUGH: I --

QUESTION: Well, you needn't answer that if you don't want to.

MR. McHUGH: No, I will be happy to tell you why I think those are different, because what we are asserting here is --

QUESTION: Well, if they differ, would you think it is probable you would try to get into those, too, or not? That's my question.

MR. McHUGH: Into the videotaped depositions?

QUESTION: Yes.

MR. McHUGH: I would think that we would not try to get into those, so long as the results of those were going to be available when the case came on for trial, and we could see what the jury could see.

QUESTION: Well, then, why wouldn't you be satisfied with a transcript of the entire trial after the verdict comes in?

MR. McHUGH: Because the transcript only

captures, I suggest to you, about 70 percent of the evidence that the victim --

QUESTION: Well, not only that, it is not instantaneous.

MR. McHUGH: And it's not instantaneous.

QUESTION: So that when you get that, it is not news, it is history.

MR. McHUGH: Well, it's not news, and it's history, and it's not all there, Mr. Justice. We don't see the demeanor of the witness. We don't see the kinds of things that historically have been used by juries to judge who is telling the truth.

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

(Whereupon, at 2:44 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

Globe Newspaper Company, Appellant, V. Superior Court for the County of Norfolk -- No. 81-611

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

BY Diane Hammond