ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-556

TITLE PRESS-ENTERPRISE COMPANY, Petitioner v.
SUPERIOR COURT OF CALIFORNIA, RIVERSIDE COUNTY

PLACE Washington, D. C.

DATE October 12, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

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PRESS-ENTERPRISE COMPANY, :

Petitioner, :

v. : No. 82-556

SUPERIOR COURT OF CALIFORNIA, :

RIVERSIDE COUNTY :

- -x

Washington, D.C.

Wednesday, October 12, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:01 o'clock p.m.

APPEARANCES:

JAMES D. WARD, ESQ., Riverside, California; on behalf of the Petitioner.

GLENN ROBERT SALTER, ESQ., Deputy County Counsel, Riverside, California; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Press-Enterprise Company against Superior Court of California, Riverside County.

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

ORAL ARGUMENT OF JAMES D. WARD, ESQ.,

ON BEHALF OF THE PETITIONER

MR. WARD: Mr. Chief Justice, and may it please the Court, this is a closure case involving specifically the issue of closure of the voir dire proceedings in a capital case. The questions presented here confront the Court with the rules involving access to the courtroom by the public and the press.

QUESTION: I want to be sure not to misunderstand you. You said in a capital case. Your presentation, your submission is not limited to capital cases, or is it?

MR. WARD: The case below was limited --

QUESTION: Yes.

MR. WARD: -- to a capital case, and the --

QUESTION: But --

MR. WARD: -- the trial court was -- and the courts below have been utilizing the authority of a case which dealt with the interrogation of the jury in a

capital case. The problem has only arisen thus far in capital cases. Obviously, we would be happy with the pronouncement that affected the voir dire in all sorts of criminal cases, Mr. Chief Justice.

We are in fact asking the Court to clarify that the right of access to establish that that right of access applies to the jury selection process generally. We are asking this Court to pronounce that the California Supreme Court case of Hovey versus Superior Court should be construed and applied consistent with the right of access.

QUESTION: Well, we can't actually do that for you, can we, Mr. Ward? We can't announce how the decision of the Supreme Court of California should be construed. The Supreme Court of California is the final authority on that.

MR. WARD: Justice Rehnquist, the Supreme Court of the state of California pronounced a rule in this case as to the method of selecting jurors in capital cases which has been, in our opinion, misinterpreted by the trial courts of our state in a way that has impacted upon our constitutional rights. It would be our position that this Court could most assuredly pronounce that the case should not be interpreted to impact upon our First Amendment rights.

QUESTION: We could certainly say that if it were so construed, it would have an impact on your rights, I suppose.

MR. WARD: I believe we are saying the same thing, Justice Rehnquist, in a different -- at least I am attempting to do so.

The defendant in the case below was found guilty and sentenced to death in connection with a rape and murder. During the trial, the court closed the proceedings during six weeks of voir dire proceedings. The transcript of the six weeks of voir dire was sealed by the court.

Three times the petitioner attempted to seek access to the proceedings. On the first occasion, in October of 1981, prior to the commencement of the jury selection process, petitioner made an oral and written motion to allow the public access to the voir dire proceedings.

We did so because we had faced this issue before in other departments of the same court. The courts in our county and indeed in the state of California had been closing the courtroom during the voir dire as a result of the case of Hovey versus Superior Court handed down by the California Supreme Court.

QUESTION: But doing it only in capital cases?

MR. WARD: To our knowledge, the problem only arose in capital cases. We have had a reference to the possibility of the use of the same procedures in other cases, but we have no knowledge of those instances, Justice Brennan.

The -- We contended then, as we contend now, that the case of Hovey versus Superior Court did not require closure in order to carry out the mandate of the California Supreme Court in this regard. We argued that to the court on October 19th, 1981, and at the conclusion of the hearing, the court made some comments which appear in the record and in the joint appendix. Those comments were generally to the effect that the court believed that the general voir dire should remain open, and that the death-qualifying voir dire should be closed.

However, the court went on thereafter, after the entreaties of the defense counsel, to indicate that there should be other portions of the voir dire that would possibly be closed. The court expanded its thoughts slightly and said that he would conduct individual voir dire with regard to death qualification and "any other special areas that counsel may feel some

problem with regard to."

The court went on to say that regarding individual voir dire, the court "reserved jurisdiction to permit something further than death qualification." The court then proceeded to the selection of the jury as indicated with three days, three days of open voir dire and six weeks of closed voir dire.

QUESTION: Is that fairly typical in capital cases in California?

MR. WARD: Unfortunately, Mr. Chief Justice, the length of time for selecting of juries has grown by leaps and bounds in California.

QUESTION: I take it California lets the lawyers do it.

MR. WARD: That is correct, Your Honor.

The fact of the matter is, counsel's -- respondent's brief referred to one case, a case in which we petitioned for cert to this Court, involving selection of a jury involving six months. That is the most extensive one that we know of. And I might add in that case the voir dire in its entirety was closed, in its entirety. However, in that case the transcript was released following the voir dire process.

At the conclusion of the jury selection in this case, petitioner again filed a written motion with

the court, this time requesting the transcript of the closed proceeding. At the hearing, the court admitted that the responses of the jurors were, to use the court's words, "of little moment." But then the court refers to some of the answers being "sensitive" so far as publication is concerned.

At the conclusion of the argument, the court verbalized that "the right of privacy of the jurors," t use the court's words, "should prevail, and that the public's right to know," to use the court's words, was limited. On that basis, petitioner's request for access to the transcript was again refused.

QUESTION: Neither of those rights are in the Constitution, are they, either of them, the juror's right to privacy or the public's right to now?

MR. WARD: I agree with that, Justice Rehnquist.

On the third occasion, on February 23rd, 1982, after the defendant had been tried, convicted, and sentenced to death --

QUESTION: Did you agree there is no right to know in the Constitution?

MR. WARD: I am sorry, Justice Stevens. That was -- I perhaps was a bit quick with my answer.

QUESTION: I think you might as well sit down

if you agree with that.

(General laughter.)

QUESTION: Will you read the passage that tells us that? Or cite it to us?

MR. WARD: I cannot, Justice -- Mr. Chief Justice, at this point in time, cite the passage from the Constitution. I think we are not, fortunately or unfortunately, concerned with the utilization or the use of the words "right to know." It was a passage utilized by the court during the explanation of its rationale for having closed the courtroom, and I was only referring to its utilization of terms which were perhaps inappropriate in the circumstances, for instance, calling upon a right of privacy, which separately is undefined, or at least ill-defined as it pertains to jurors at this point in time.

On the third occasion when we tried to secure access, we made an ex parte motion to get the release of the transcript, and once again, the court refused. At that time the court indicated that most of the information was "dull and boring," and some of the jurors had, to quote the court, "some special experiences in sensitive areas that do not appear to be appropriate for public discussion."

When the Court of Appeal in California and the

Supreme Court of California refused our petitions, we came to this Court on certiorari.

The voir dire proceedings is, of course, what we are concerned with here. The respondent in its briefs has conceded that the voir dire is a part of the trial. This acknowledgement by the respondent does not, of course, eliminate the issue. The trial courts in California have been closing the voir dire, as previously indicated, ignoring the admonitions of this Court regarding the right of access to public proceedings.

We feel that it is necessary for this Court to make a firm pronouncement that the principle set forth in Richmond Newspapers, reaffirmed in Gold Newspaper, apply to the proceedings in connection with the selection of the jury.

We would point to the fact that the voir dire, as with the evidence taking portion of the trial, has been historically an open process. We would --

QUESTION: You would think, I gather, that your First Amendment right would be satisfied even if you were excluded from the voir dire proceeding itself if a transcript of that proceeding were made available to you?

MR. WARD: No, Justice Brennan, we would not

be satisfied with exclusion from the proceedings itself. The transcript is, at best, a second best alternative.

Functionally, all of the reasoning of this Court that has been applied to the value of the open trial process applies specifically to the open voir dire process as well.

In order for the court below to close the courtroom in such circumstances, of course, the court should have articulated on the record findings that absent closure there was a substantial probability of irreparable harm to a compelling interest, that no less restrictive alternatives to closure were available when closure would effectively protect against the perceived harm.

Petitioner feels that the remarks of the court and the brief statement in the one written minute order were inadequate to constitute articulated findings in this regard. More particularly, it is our contention that there was no compelling interest which under any circumstances would justify closure in this case.

Respondents advance two rationales. One is the Hovey decision, and second, the rights of juror privacy. As to the Hovey decision, it is strongly our contention that the Hovey case does not call for closure. Hovey versus Superior Court was a decision of

the California Supreme Court which, so far as it pertains to these proceedings, involved the interrogation of prospective jurors in a capital case. The Hovey mandate was decided based upon a single study by an assistant professor of psychology of a group of some 67 persons who viewed films of simulated voir dire proceedings.

This was not a study of the impact of the public and the press upon the venire. There is no mention of that in the study nor in the opinion itself. It was a study of the impact of the answers of the venire persons one upon another. The study concluded that members of a venire in such a case were impacted by the procedures then in use in California, and there was a tendency to create a predisposition in those jurors towards capital punishment.

Accepting the findings of the psychological study as sound, the California Supreme Court mandated that all courts in the state during the death qualifying questioning of jurors should question those prospective jurors, to use the court's words, "individually and in sequestration."

The court, however, made a clear statement in the opinion that the ruling should not impact upon the openness of the trial. The public defender of the state

of California has filed an amicus brief in these proceedings. The public contender contends, as we do, that the Hovey decision does not require court closure. The public defender was, of course --

QUESTION: May I ask you, Mr. Ward, are you going to argue that there are no circumstances under which there may be closure of the voir dire?

MR. WARD: I would not espouse an absolute rule. I believe that one could perceive of circumstances where it would be necessary, and I believe this Court has so --

QUESTION: Well, how do you suggest there be an inquiry into those circumstances, whether or not there are such circumstances?

MR. WARD: I believe that a hearing would have to be held giving a reasonable right to the public and press to --

QUESTION: Initiated how?

MR. WARD: That's a problem of great difficulty that this Court has, I think, faced before. It is a matter of notice, and the right of the court to control its own process.

QUESTION: I mean, notice to whom? To the press?

MR. WARD: Notice to the public and press.

QUESTION: In general, what criteria do you have in mind?

MR. WARD: As to the notice?

QUESTION: No, not the notice, the substance of the inquiry.

MR. WARD: The substance of the inquiry, it would strike me as, it would be strictly as to the necessity and the application of the rules laid down by this Court as to closure, and the inquiry would go simply to the requirement of the court under the given circumstances to look to any closure.

QUESTION: Who would have the burden of proof?

MR. WARD: The burden would be on those seeking closure.

QUESTION: And by what standard of proof?

MR. WARD: I think that the --

QUESTION: Clear and convincing?

MR. WARD: I would believe that clear and convincing would be the appropriate standard, because we are dealing with the First Amendment right of access.

The -- As I say, the Court in Hovey indicated that --

QUESTION: I gather you would argue, Mr. Ward, that the presumption should be that the voir dire should

be open.

MR. WARD: Yes, most assuredly, Justice Brennan, and for a very elemental reason. When one looks at voir dire as, if you wish to distinguish voir dire from the evidence-taking portion of the trial, the voir dire is the time when the public is involved in the process directly. It is, after all, the time that the members of the public are chosen at random to serve on the jury and act as the triers of fact. It is indeed the most public part of the trial. The voir dire by its very nature is a public process.

Only until we were confronted with a ruling such as Hovey versus Superior Court was it anything else. It couldn't even be conceived of as being closed under the previous procedures, because the public came into the courtroom to select from the public who was going to be the trier of fact. So it is apparent to us --

QUESTION: You do have a problem that some states don't take six months to pick a jury.

MR. WARD: Well, that's quite true, Justice Marshall.

QUESTION: How would you accommodate that?

MR. WARD: I don't think, however, that the presence of the public is the reason for the six months

or for any lengthy interrogation.

QUESTION: I see.

MR. WARD: Perhaps it lies, although I hesitate to say so, with the fact that lawyers do the interrogation. Perhaps it lies with the decisions of the California Supreme Court in the breadth of questioning that they permit. But there is no suggestion or no rationale which would suggest it is because of the presence of the public.

QUESTION: It would make no difference to you whether it was ten minutes, a half an hour, or six months?

MR. WARD: It would make no difference whatsoever, Justice Marshall. Despite the clear statement --

QUESTION: Mr. Ward, can I ask this question? I haven't read the Hovey opinion. I have looked at it, but it is awfully long --

MR. WARD: I agree.

QUESTION: -- and I don't pretend to have even begun to have read it, but if the substance of what the California Supreme Court suggests, and as I say, I don't really know whether this is true or not, is that the public -- the conduct of the voir dire in public and press attention to the voir dire would somehow tend to

make the jury more prone to impose the death penalty than otherwise, if that is in essence what they are saying, would that be a valid reason for closure?

MR. WARD: Well, I can't go with the supposition in the first place, Justice Stevens. That isn't precisely what the court said. The court said that because of the impact of the venire persons observing the conduct of the other venire persons when they were interrogated on the death penalty, that there was a predisposition created by these circumstances, and therefore the court reasoned that it would be best if they be questioned individually.

Now, the unfortunate word usage was "and in sequestration," suggesting, we believe, and as the public defender believes, that you could -- you should have the questioning done individually, and one juror at a time, but there is no reason to take that outside the --

QUESTION: Let me take it a step further. I didn't mean to suggest that they in fact had so concluded, but say the legislature, let's say, had a series of hearings on whether -- what to do about the voir dire problem. They are too long. Should we close them or not? And they came up with a statute that had findings in it and said, we are persuaded by everything,

with all these studies and all the rest of it, on the facts, that the public conduct of a voir dire plus all the press attention given to the selection of a jury during this period in a capital case will tend to make the jury more willing to impose the death penalty.

Would that be an adequate basis for closure?

MR. WARD: One would have -- if one could follow all of those suppositions, I would assume that if we were convinced that the process created a predisposition towards the death penalty, one would have to consider it a compelling reason to consent to closure, but I can't agree, of course, with any of the --

QUESTION: As a matter of fact, you don't think such a showing has yet been made?

MR. WARD: Oh, absolutely not, Justice Stevens. The clear statement of the court was a problem -- rather, the clear statement of the court in the use of the word "sequestration" was a problem to the trial courts in California, and their interpretation of this was spotty and mixed. The courts below attempted at times to close only the death qualifying questions, at times close the entire voir dire, and at times did not close it at all.

The fault, perhaps, is in the --

QUESTION: Mr. Ward, do you think that

prospective jurors do have any rights concerning questions that may be of a very personal or private nature to have the process closed that have to be considered by the trial court?

MR. WARD: Assuming for the moment, Justice O'Connor, that there is some right of the juror to refrain from responding to a question for whatever reason similar to the ones that you may have posited there, the fact remains that I can conceive of no circumstance why it would be necessary to close the courtroom in order to solve that problem for the juror, because there are reasonable alternatives available to the court to avoid any damage to any perceived right of the juror in those circumstances.

QUESTION: Such as what alternatives?

MR. WARD: The most obvious being, of course, that the court could excuse the juror before invading any perceived right of privacy, because the defendant has the right to a fair and impartial juror and a fair and impartial jury, but not to a specific juror. It is a process of random selection in any event, and it is a matter, even as respondent's brief has pointed out, is a matter of chance as to whether one is called to the venire, or sits in the box.

I submit that a juror with a perceived privacy

problem is no different than a person who has an illness or for some particular reason, is going to have an operation the following week and cannot sit on the trial, or has some physical infirmity or disability. There is no reason to retain a juror whose rights would be potentially offended by the questioning, but the point remains that the process can remain open, because the defendant's Sixth Amendment desire to have a fair and impartial juror and a fair and impartial jury are the same rights espoused by the public and the press under what we believe their First Amendment right of access to be. They wish to see the process accomplished in the same way.

QUESTION: Mr. Ward, in some systems, as ycu no doubt know, a jury in a criminal case is put in the box and sworn within an hour, sometimes 30 minutes, sometimes 15 minutes. Now, generally, that is accomplished by way of rather comprehensive questionnaires filled out by the jurors in advance which are available to counsel on both sides, and of course to the court.

Would you say that questionnaire must be available to the press, since it is in effect part of the process that is at issue here?

MR. WARD: It would be my position, yes, that

the questionnaires, being part of the process, should be available to the press, but if I may elaborate on that, Mr. Chief Justice, I believe that the use of questionnaires is one of those less restrictive alternatives that could help us avoid the problem with the juror and yet permit the public access to the proceedings, because I submit that if we are dealing with a case, one of the more common sensitive areas with which we are concerned is, for instance, sexual preferences, and if the questionnaires were directed in such a way to elicit from jurors whether any of them harbored any feelings or had any problems in these areas, it could be resolved short of offending any juror's rights in that regard, and we believe that questionnaires is indeed one of the very viable, less restrictive alternatives that would be available to the court.

QUESTION: But if it is available, if, as you say, that questionnaire should be available to the media, then where is the protection of the privacy?

MR. WARD: The protection arrives, Your Honor, in connection with the use of careful questioning, and the judge at the trial level controlling the court can see to it that the questioning does not offend areas of potential privacy or sensitivity if they exist.

QUESTION: I take it, Mr. Ward, whether the system is of individual interrogation or of the venire as a group, all you are asking is that the press be allowed to be present.

MR. WARD: Absolutely, Justice Brennan. We believe that the public and press should be present during the procedure, and we see no reason why that should be inconsistent with Hovey.

QUESTION: Well, I can remember interrogating prospective jurors in chambers with just counsel present, and your suggestion would be there also ought to be present at least the press. You can't very well allow the -- accommodate to many of the general public.

MR. WARD: We would find inappropriate the interrogation of jurors in chambers.

QUESTION: Inappropriate?

MR. WARD: Yes, Justice Brennan. We believe it is part of the open process. The fact of the matter is that the --

QUESTION: Mr. Ward, would your supposed rights extend beyond voir dire and into, for example, the plea bargaining process between the prosecutor and defense counsel?

MR. WARD: We make that -- We do not make that suggestion at this time, Justice O'Connor.

QUESTION: You are saving that for tomorrow?

MR. WARD: Yes, Your Honor.

(General laughter.)

MR. WARD: I will be back. No, I -- we do not make such a suggestion at this time.

The fact is, though, that the Hovey decision potentially is being read by the courts as calling for closure, and in fact I would add parenthetically that the Supreme Court of the state of Kentucky so interpreted the case in a recent, very recent decision where it said that the defendants in the state of California have the right to a closed voir dire.

Now, if the case is read that way, it violates this Court's decision in Globe, because it is then a mandate requiring closure, and we submit that this case, Hovey versus Superior Court, is no different than a statute such as the type that you interpreted, the Massachusetts statute in the Globe case.

QUESTION: Of course, to say that Globe controls, you have to show that this is really part of the trial, don't you?

MR. WARD: We would contend fervently that it is a part of the trial, Justice Rehnquist.

QUESTION: Well, how do you define trial for that purpose?

MR. WARD: Well, the trial in the appellate courts of the state of California has been defined -- has been defined as commencing with the selection of the jury. We also are enamored with the reasoning of U.S. versus Brooklier in the Ninth Circuit, where they held specifically that the voir dire was a part of the trial process, but I would point out, if I may, that whether you define the trial as commencing with the beginning of the selection of the jurors or as of the time of the calling of the first witness, you look to the reasoning for openness, and the rationale for openness of Richmond, which applied to the evidence-taking of the trial, evidence-taking portion, we believe applies equally if not more forcefully in the voir dire.

QUESTION: Well, suppose in this case instead of it being voir dire, it had been a motion the day before it was set for trial for a continuance, at which both sides were going to present witnesses, and then the trial judge felt there was a fair amount of reason for closing that because the witnesses might touch on some sensitive matters.

Now, would you feel that under the principle that would be announced in the Globe case or in this case, you could claim that that was part of the trial?

MR. WARD: Not necessarily. We are not

dealing here, of course, with pretrial publicity as a problem. We are dealing here with, of course, the selection of the jury as a part of the process, which we contend that it is.

QUESTION: Well, would you say that a motion for a continuance the day before the jury was scheduled to be empaneled would also be what you call a "part of the process?"

MR. WARD: We are not prepared at this time to indicate that all of the proceedings which go on prior to the -- prior to the commencement of the jury selection are a part of the trial.

QUESTION: When you say, we are not prepared to do it at this time, it is sort of an unsatisfactory answer. What do you really think about it? It is not whether you are arguing it today. It is how do you analyze it.

MR. WARD: All right, Justice O'Connor, I am sorry. You are quite right. It is a very fair question and comment. My position would be that openness should prevail.

I would like to reserve --

QUESTION: We got into that in Gannett, didn't we?

MR. WARD: Pardon me, Justice Blackmun?

QUESTION: I say, in the Gannett case, we certainly got into pretrial material.

MR. WARD: Certainly, Justice Blackmun, you did get into it in the Gannett case, which -- it was approached from the Sixth Amendment analysis, and we are not, of course, in this case claiming any Sixth Amendment right of access. As you are well aware, in Gannett, you did not get to the First Amendment right of access at that time.

If I have any additional time, I would like to reserve it.

QUESTION: I suppose the whole case could go off just on whether this is part of the trial or not. If this is part of the trial, Richmond governs, and if --

MR. WARD: No, I think not, Justice White, because I think that the --

QUESTION: Well, you do submit it is part of the trial.

MR. WARD: I do submit that it is part? Oh, we definitely believe that under California law the voir dire --

QUESTION: If we agree with you, wouldn't Richmond control?

MR. WARD: Absolutely. Absolutely. But even

if anyone should be persuaded or convinced that it is better to think of the trial as commencing with the first witness, nonetheless --

QUESTION: Well, if it isn't part of the trial, then we have to consider the relationship of Gannett and Richmond.

MR. WARD: Yes, that's true, so let's keep it as part of the trial.

(General laughter.)

MR. WARD: Thank you.

QUESTION: In California, does the trial begin with the jury selection for all purposes, for example, double jeopardy? When does double jeopardy begin under that opinion?

MR. WARD: Double --

QUESTION: When does jeopardy attach, not double jeopardy?

MR. WARD: Jeopardy attaches with the commencement of the taking of testimony, but the test there, Mr. Chief Justice, is significantly different. You are dealing with the right of an individual, and when does jeopardy apply, and that could be rationalized to involve the --

QUESTION: Yes, I know, but your previous statement was that a trial commences with the selection

of the jury. It does for these purposes of this case.

MR. WARD: Yes.

QUESTION: That is your contention.

MR. WARD: That is correct.

If I have any additional time, I would like to reserve it.

CHIEF JUSTICE BURGER: Very well.

Mr. Salter.

ORAL ARGUMENT OF GLENN ROBERT SALTER, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. SALTER: Mr. Chief Justice, and may it please the Court, this case presents a situation which calls for the delicate balancing of three fundamental interests, the Sixth Amendment right of a defendant to a fair trial, the First Amendment right of the press to gather and report the news, and the First Amendment and penumbral rights of the prospective jurors to a right to privacy.

The issue as we perceive it is not whether there is a right of access by the public to voir dire proceedings. Rather, we see the fundamental issue to be the extent of the juror's right to privacy.

QUESTION: Are you talking, Mr. Salter, about a juror's right to privacy guaranteed by the federal Constitution?

MR. SALTER: Yes.

QUESTION: What provision of the United States Constitution do you think guarantees a juror's right to privacy?

MR. SALTER: The right to privacy is not specifically enumerated in either the Constitution or in the Bill of Rights. However, this Court has interpreted that there is a right to privacy that goes even beyond, has roots even deeper than the bill of rights, and we take that right to privacy and we say that an individual has an inherent right to privacy.

QUESTION: And what cases from this Court do you rely on for that proposition?

MR. SALTER: I think we cited several in the brief, for instance Griswald, the Griswald case.

QUESTION: Could a juror refuse to answer a judge's question on the voir dire on the grounds that it would violate his right of privacy?

MR. SALTER: I believe our position would be, yes, he would have that right.

QUESTION: And do you think a judge would -- do what?

MR. SALTER: We had a case in California that just went up on appeal. A decision came out about I'd say two to three months ago.

QUESTION: Would you raise your voice a little bit, counsel?

MR. SALTER: I am sorry.

The case was, I believe, Bobb versus Municipal Court, in which a prospective juror, an attorney, as it turned out, refused to answer a question, and she was held in contempt by the court, and the Court of Appeals determined that in her particular case, her refusal was appropriate.

QUESTION: What was it, Fifth Amendment?

MR. SALTER: No, she was --

QUESTION: I think we are too -- I am responsible for it, but I think we are too far afield, aren't we?

MR. SALTER: Well, I think the question is appropriate, though, because her response really was, you are asking the male jurors questions as -- you do not ask them what their spouse does, but you ask the female jurors what their husband's occupation is, and she says, that violates my rights, and I am going to refuse to answer, and the Court of Appeals held that she had that right.

QUESTION: You mean, you have the right of privacy not to tell your husband's work?

MR. SALTER: It was not a right to privacy

issue. The issue was --

QUESTION: I didn't think so.

MR. SALTER: -- the fact that she could refuse.

QUESTION: I am asking for the right of privacy point. Some juror says, under my right of privacy, you don't have a right to question me.

MR. SALTER: I believe -- I am unaware of any case which has supported that, but I believe that a juror would have that right.

QUESTION: I would hate to see somebody try. I mean, I don't understand how you get the juror's point into this as a First Amendment right. I don't -- it just --

MR. SALTER: Well, we start with the --

QUESTION: Suppose in the middle of a trial, we have a case here in this Court where a juror was drunk. Could that juror say, you can't question me because it would violate my right of privacy?

MR. SALTER: If the juror was drunk, he would probably be released on the grounds of being an incompetent juror.

QUESTION: I mean, could he say, you can't question me?

Don't you violate my privacy?

MR. SALTER: He would have to have some basis for it.

QUESTION: What?

MR. SALTER: He would have to have some basis for refusing to respond to the --

QUESTION: Other than privacy?

MR. SALTER: No.

QUESTION: He could say privacy, then.

MR. SALTER: Yes, I believe he could. He would, however, have to have some basis for that right to privacy. He could not simply say, I am not going to answer based on privacy unless --

QUESTION: Well, that's all you're telling me.

MR. SALTER: No, I don't believe so. What we are saying is, for instance --

QUESTION: Justice Rehnquist asked you, where was it in the Constitution.

MR. SALTER: Let me give you --

QUESTION: I am asking you, where is it any place?

MR. SALTER: Let me give you an example. Let's assume that the question, and it is a question which probably came up in the very case we are dealing with, how did you vote on a particular issue, that being

the death penalty issue. That issue has been on the ballot in the state of California. I think a defendant has a legitimate right in asking that question. I also think that a juror could legitimately say, I'm sorry, but the ballot box is secret, and you cannot compel me to answer that particular question.

QUESTION: So how do they decide that? Or is that why the voir dires take six months in California?

(General laughter.)

MR. SALTER: Part of the reason that voir dire has taken so long is because of the very recent case of People versus Williams. That case held that you may ask questions which legitimately could give you grounds to use your peremptory challenges, and so it allows you to go into areas that prior to that you could not -- were supposedly not allowed to go into in the state of California. You could really only ask questions dealing with -- going to the issue of cause.

But they expanded that and said very specifically, you can ask questions which are reasonably related to a peremptory challenge, and that would include issues dealing with sex, race, religion, politics, anything which was reasonably related to the particular case at hand, and that is in large part the reason that the one case that Mr. Ward referred to went

five months.

QUESTION: May I ask if the voir dire in this particular case is in the record before us? Is it available to us?

MR. SALTER: The voir dire was not made available.

QUESTION: Have you examined it?

MR. SALTER: No, I have not. I did not feel that was any of my business.

QUESTION: So you didn't participate in the trial then?

MR. SALTER: No, I did not.

QUESTION: Because I was just wondering if there is any way to find out what percentage of this massive inquiry really involved confidential matters, or privacy matters, however you want to describe them.

MR. SALTER: What occurred was that they held three days of general voir dire, asking the typical voir dire questions.

QUESTION: I understand. We are most interested in the rest of it.

MR. SALTER: But then, after that, issues which dealt with matters of privacy, sexual relations, race, religion, politics, those questions were then reserved for that part of the voir dire which was held

privately.

QUESTION: Are you suggesting that the entire off the record voir dire or whatever it is involved these matters that would not normally be conducted in open court? I had the impression that maybe 3 or 4 percent of the questions involved something fairly sensitive, but the rest of it was fairly routine. But are you telling me everything in this massive examination is sensitive?

MR. SALTER: Not having read it, I could not tell you. I can only tell you that the trial judge held those matters in private according to what's in the transcript, and so that those matters were dealt with.

QUESTION: Do you know of any case before this Court that we were denied the right to see what we were passing upon?

MR. SALTER: No, I am unaware, Your Honor --

QUESTION: Including the Pentagon Papers? But we can't see this?

MR. SALTER: Certainly, I am sure we can make that available. It is about 4,000 pages, and we can certainly make it available to the Court if the Court wishes to see it.

QUESTION: I don't wish to see it. I just want to know why it is -

QUESTION: Why you can't.

QUESTION: Yes, that's right.

MR. SALTER: No, it was -- when the appendix was put together --

QUESTION: So the answer is, we can see it.

MR. SALTER: -- it was the joint decision by counsel to include what was included. It was not intended in any way to deprive this Court of seeing any information that it thought was relevant or that it needed to see, and we would certainly be more than willing to make it available, sealed in the manner in which the trial court ordered that it was sealed.

QUESTION: Was it printed for the appeal to the California Court of Appeals?

MR. SALTER: A transcript was made of it, and it was under seal, and it was distributed to counsel who would deal with the matter on appeal, but any references to that transcript are, according to the trial court's order, to be done in a confidential manner, so if there is any question as far as the propriety of questions asked at the voir dire or in the selection of the jury, the defendant and the prosecutor would have the option and the ability to deal with that question.

QUESTION: Mr. Salter, were there any feasible alternatives to a permanent sealing of that record?

Could the actual sensitive responses have been deleted, or could numbers have been assigned so the identities weren't known? Were there any feasible alternatives? And should the Court consider feasible alternatives?

MR. SALTER: I think first it is important that the newspaper did not point out at the time of trial, either before the voir dire occurred or after it occurred, any possible alternatives, and the trial court did, I believe, choose an alternative, and I think probably the most appropriate alternative.

They did in their reply brief provide five suggested alternatives. I don't think that any one of those alternatives really serves the primary interest. If you --

QUESTION: Mr. Salter, I am sorry. I perhaps shouldn't interrupt you again, but I really am still -- I think maybe the Chief Justice is concerned, too, about the length of this voir dire and the significance of all these questions.

You said it is all the result of the case of People against Williams. Is that the case that involved the question of whether there could be peremptory challenges on racial grounds? And this is the matter of making a record to explain why peremptory challenges are made? Is it related to that problem?

MR. SALTER: It is related to the problem of peremptory challenges, yes. The initial case in California was the Edwards case, which limited your voir dire questions to areas that you could reasonably use for cause, in challenge for cause. However, the court found that that rule was honored more in its breach, and so it decided that appropriately you could inquire into areas dealing with the issue of laying bases for peremptory challenges.

QUESTION: What would otherwise have been just not -- You have to make a record, in other words, to justify peremptory challenges if they concentrate on one minority group or something like that?

MR. SALTER: Basically that's true. One of the cases that the Williams case cited dealt with the issue of a rape case, and could you inquire of the jurors whether they had had similar experiences, and the Supreme Court at the time that decision was handed down said, no, you couldn't, but it is quite clear now that under the Williams case, you can ask those questions in California. It is a legitimate area of inquiry. And it is a very private and sensitive area that many people would not, I believe, wish to respond to, whether they had been perhaps sexually abused or sexually assaulted.

QUESTION: In a capital case, how many

peremptory challenges does each party have?

MR. SALTER: I believe it is 26, although they are allowed to augment.

Speaking back to your question as to whether or not there are any alternatives, I don't believe the juror questionnaires solves that particular problem because, as Mr. Chief Justice Burger pointed out, the newspaper would want to have those made public, and so it would not make any difference therefore whether you --

QUESTION: Well, I suppose at least you could consider whether you could delete the identification of those responding.

MR. SALTER: I think the problem in a small community would be that if the public is allowed to come into the courtroom, even if a juror had, instead of a tag that said Juror on it, it said Number 18, someone in the audience may very well know who that person is, and so that person may very well say Juror Number 18, who happens to be someone next door to me, answered the question this way. There is no real right to privacy.

QUESTION: Well, but if we are dealing with a transcript, that wouldn't be the case.

MR. SALTER: I think some of the same problems arise, because it is the answers which you can begin to relate to certain individuals, and I think it's the

issue that people would be able to tell from either the types of questions or the responses given who those individuals might be. It is, I think, a bigger problem in a smaller community, but you can, and the newspapers are well known for their detective work, you can very well find out who the individuals are. It can be made public. You can know who those people might be.

And so I do not believe that the questionnaire really is a viable alternative, because in the long run the question still comes out.

They offered an alternative of screening questions. Once again, I think you have a similar problem with your questionnaires. If the question is, have you or anyone in your family ever been sexually abused, it is very difficult to either -- to screen that question or to rephrase that question in a way that does not require the prospective juror to provide the same basic information.

And so I do not believe that that provides any real alternative, because when you are talking about the issue of privacy, it is the nature, it is the answer which is more important than it is the question.

I also do not believe that excusing jurors who say -- or who describe -- or who refrain from describing intimate information is really, once again, a viable

alternative, especially if that is done in open court. It is not at all unusual for one juror to see another juror offer an excuse, and have the trial judge allow that juror to be let go.

A prospective juror who does not wish to serve will simply mimic that excuse, and so you have the problem of being able to effectively deal with the jury panel which is actually in the court itself, and to effectively ask each one questions and be certain that you are getting valid responses and that they will not offer you simply excuses to avoid their jury duty and their public duty.

MR. SALTER: Mr. Salter, I find that argument rather strange. You are implying that most members of the panel will give false excuses when under oath during a voir dire? Just because somebody ahead of them said they needed a babysitter, everybody else is going to make the same statement?

MR. SALTER: There have been several --

QUESTION: Should we not presume that the citizens will tell the truth before the --

MR. SALTER: I think we need to presume that they will tell the truth. Unfortunately, there is somewhat of a prevalent trend nowadays for people to either want to serve or not want to serve. It is very

difficult if you come to a case and the trial judge says, this case should probably take six weeks to try. It may take five months for voir dire questioning.

QUESTION: Well, I understand that --

MR. SALTER: To be willing to --

QUESTION: -- but that is an argument you are making in favor of closing the voir dire to the public?

MR. SALTER: I am not suggesting per se that the jurors would lie simply to get off a juror.

QUESTION: That's what I thought you said.

MR. SALTER: On the other hand, it presents a very difficult problem for a trial judge to deal with prospective jurors, because it opens up the opportunity to inflate what are otherwise legitimate reasons for perhaps asking to be released from jury duty, and that is, I think, a problem for a trial court judge.

QUESTION: Well, now, what is the reason for not letting a newspaper man hear that reason?

MR. SALTER: The areas which we are referring to -- We have no problems with that type of a question.

QUESTION: Well, what are you arguing it for?

MR. SALTER: The question --

QUESTION: Are you relying on it or not? That's all I'm asking.

MR. SALTER: The question is, we --

QUESTION: I think you were responding to a question.

MR. SALTER: The question as we saw it, was that a viable alternative, and we felt that from a practical standpoint, for the decent management of the trial court system, it did not offer a practical alternative.

We think that the real issue in this case is whether or not the trial court followed the Richmond standards which have been laid down by this Court. This Court basically set out three criteria, three questions to be asked. Did the trial court recognize the right of the public and press to attend the trial? Did the trial court consider alternatives? And finally, were there findings on the record to support the closure?

We think it is very clear that the trial court in this particular case did recognize the right. Number One, there was a motion brought by the newspaper which informed the court of that right. In statements made by the court, the court very specifically said, yes, there is a right for the public to know. And so on that first prong we believe the court very clearly satisfied that first prong.

Second thing, did the trial court consider alternatives? Once again, although the newspaper did

say there were alternatives, the newspaper never offered any alternatives, and we believe a newspaper does at least have a responsibility to at the time that they make their request initially offer some alternatives so that the trial court has the ability to consider them.

But we also feel that the trial court in this case did adopt an alternative, which is perhaps the most feasible in protecting everybody's rights, and that is, they allowed questions into areas which would be traditionally governed by the right of privacy. That assured that the defendant's Sixth Amendment rights would be protected.

QUESTION: But they allowed the questions, but they didn't allow the press to sit in on the questioning, did they?

MR. SALTER: That's correct.

QUESTION: Well, how is that an alternative?

MR. SALTER: It represents an alternative because we, Number One, believe that the right to privacy should not be invaded unless there is a compelling state interest. We are allowing that simply and solely for the very limited purpose of giving the defendant a fair trial. But there is no reason that that should be extended or expanded so that the press or the public can delve into those private areas of a

person's individual life.

And if it turns out that there are not areas, that the areas covered were not sensitive, the trial court could then release those questions. The trial court was asked in this case to do that. The trial court felt that the questions dealt with sensitive areas, invaded the right to privacy, and should not be released to the press.

That is very much an alternative to simply saying, no, it is a right to privacy, therefore you cannot ask that question. It allows us to give the defendant, the accused, his Sixth Amendment rights, but it protects the First Amendment rights of both the prospective juror and it does protect in the long run the First Amendment rights of the press.

Finally, the question is whether or not there were any findings on the record. We believe once again that there are sufficient findings on the record. The primary reason for requiring that, as we understand it, is that a reviewing court would have the opportunity of seeing whether or not the trial judge truly considered and balanced the various rights involved, and it is very clear through the arguments made in particular by both the district attorney and by the attorney representing the defendant that all of these arguments were made, the

balancing arguments, the privacy arguments, the need for, in this particular case, as to those issues that are sensitive, the need for closure, and that the trial judge then adopted those reasons and the bases for that, and in doing so at that point he decided to partially close. He very clearly stated when they asked to have the transcript released that there was a right to privacy, that it should not be invaded. He recognized the right of the press. He also recognized the rights of the prospective, and in this case the jurors.

We feel there are sufficient findings on the record. And as a result, once the trial court satisfied that three-pronged standard of Richmond, we feel the trial court did what he was required to do. The newspaper may not like the decision which was made by the trial court, but the trial court followed the very explicit standards laid down by this Court.

It is our feeling, very clearly, that any case of this nature must be dealt with on a case by case basis. We are not advocating that there be closure in every single case. We are not advocating that there be closure every time there is voir dire, or any time voir dire extends more than a day. The problem is that --

QUESTION: Do you think that the death-qualifying portion of the questioning as

envisioned by the Hovey case in California should require closure?

MR. SALTER: The Hovey case very specifically said --

QUESTION: To the press?

MR. SALTER: -- that it does not affect the open nature of the trial. In that sense, Hovey does not require closure. On the other hand --

QUESTION: Well, did some of these questions relate to the Hovey requirement in the death-qualifying portion?

MR. SALTER: Yes, they did.

QUESTION: So is there any reason why the transcript should be permanently sealed as to those questions?

MR. SALTER: The rationale -- Are you asking the question as to once -- now that the trial is over?

QUESTION: Yes.

MR. SALTER: I believe those questions could very well fall into the category of the right to privacy as to your political views. And I think that is probably where those questions in the mind of the trial judge went.

QUESTION: So you are backtracking, and you are now saying that that portion should be closed if it

meets the Hovey qualification --

MR. SALTER: The primary rationale of Hovey does not require closure per se, but when you deal with Hovey on a lengthy basis, you have a lengthy voir dire, I think at that particular point, during the time the voir dire is taking place, it is quite appropriate for the court to close it so that the questions, the responses, the issues which are dealt with do not become part of the record for prospective jurors who might not at that particular point be called.

Obviously, on a five-month voir dire it is quite possible that there are people out there who will not have been called at the time the case started but may very well read of the case and read of the responses. So at that point that is very crucial and very important.

I do not believe necessarily, but I think the trial court did, that it goes into an area dealing with perhaps the issue of political right to privacy and expressing your views, because obviously the death qualification issue is an emotional argument. It deals with how did you vote on a particular issue. It is very much intertwined with it. And so I think there is a very difficult problem in dealing with that.

It once again is going to be resolved on a

case by case basis. There may very well be cases where asking questions about death-qualifying issues will not invade that particular right, what you might call your garden variety capital case. But in a case of this nature, the publicity involved, the extent of it, the trial judge, I think correctly, found that it was all part of that whole concept of a right to privacy, of not having to disclose how you voted on a particular issue.

We feel, once again, that the trial court met the standards set forth by this Court in Richmond. We feel that that was what the trial court was obligated to do, and it performed it in the best manner that it could. For that reason, we feel that the decision of the trial court should be affirmed.

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

ORAL ARGUMENT OF JAMES D. WARD, ESQ.,

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. WARD: Yes, Mr. Chief Justice. This is a closure case. We do not believe it is an appropriate case for deciding right of juror privacy. Not only is it a case devoid of any record regarding the matter of juror privacy, but it is devoid of any juror claiming any right. All that we have are vague references by counsel and the court to the possibility of some

sensitivities of jurors. We have no evidence at this point and on this record that any juror objected to any question, or that there was indeed any invasion of any right, whether -- any concern, indeed, for a jural privacy whatsoever.

QUESTION: Somewhere in these papers or in the whole treatment in the discussion of less burdensome alternatives was the idea that if a juror had some confidential matter they wanted not to be interrogated about, they go to the judge in chambers or communicate with him and explain this and then ask to be excused. If that were done, would you think the media is entitled to know the reason why the judge excused the juror?

MR. WARD: I think, Your Honor, that the use of that sort of a process is one of the less restrictive alternatives which is available, because assuming for the moment that there is defined --

QUESTION: But you would waive any inquiry, any claim to a right to know what the reasons were?

MR. WARD: Yes, most assuredly, Mr. Chief Justice. We would have to. If ultimately it were determined that there were a protected area, we would have to avoid the disclosure of that area, but the point is that it is a closure case where the court closed it on the rationale of a California Supreme Court decision

and then only on a post hoc rationalization did it come forward with this rationale of juror privacy.

When we addressed the closure issue in the first instance, it was based upon Hovey versus Superior Court. After the case was closed, when we went to get the transcript --

CHIEF JUSTICE BURGER: Your time has expired now, Mr. Ward.

MR. WARD: I am sorry. Thank you.

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

(Whereupon, at 3:02 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:

PRESS-ENTERPRISE COMPANY, Petitioner v. SUPERIOR COURT OF CALIFORNIA RIVERSIDE COUNTY # 82-556

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

BY Diane Hansard

(REPORTER)