OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1560

TITLE PRESS-INTERPRISE COMPANY, ETC., Petitioner V. SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF RIVERSIDE

PLACE Washington, D. C.

DATE February 26, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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PRESS-ENTERPRISE COMPANY, ETC., :

Petitioner, :

V. : No. 84-1560

SUPERIOR COURT OF CALIFORNIA :

FOR THE COUNTY OF RIVERSIDE :

- -x

Washington, D.C.

Wednesday, February 26, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:01 o'clock a.m.

APPEARANCES:

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

MS. JOYCE ELLEN M. REIKES, ESQ., Deputy Counsel for County of Riverside, Riverside, California; on behalf of the respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Ward, I think you may proceed when 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 court closure case involving specifically the question of access to the preliminary hearing in a criminal case. We are asking this Court to pronounce that because of societal and structural values attached to openness, and the values attached to the preliminary hearing specifically, the constitutional right of access be declared to the courtroom during the preliminary hearing.

We further seek a determination by this Court that the standard set forth by the California Supreme Court for closure does not conform to the standards of this Court.

In the case below, Robert Diaz, a nurse, was charged with the murder of 12 hospital patients by administering massive doses of the heart drug, Lidocaine. At the time of the preliminary hearing representatives of the media were present. Mr. Diaz's motion under California Penal Code Section 868 brought an order from the Court for closure of the proceedings.

After the preliminary, which lasted for 41 days, and after which the defendant was held to answer --

QUESTION: Which preliminary hearing lasted 41 days?

MR. WARD: Yes, Mr. Chief Justice. This preliminary lasted 41 days. Preliminaries in California from time to time, not uncommonly now, assume rather lengthy proportions. One just completed lasted in excess of 14 months.

QUESTION: What do they have, magistrtes or judges sitting on those things?

MR. WARD: Perhaps, Justice Burger, it has to do with the importance that we attach to the preliminary hearing in California. The entire matter is litigated at that time. The defendant receives all of the rights accompanying a defendant in a trial of an action. The magistrate is given virtually the same powers that are given to the trial judge in connection with the action, and the matters are extensively litigated in many preliminary hearings in California.

QUESTION: Well, does the defendant take the opportunity to cross examine witnesses the way he would at a trial? My own experience in Arizona would indicate that they did not. You don't want -- let me ask you another -- does the defendant put on witnesses of his

own?

MR. WARD: The defendant has the right to put on witnesses, and it does occur. I cannot represent that it is a common occurrence. It does occur that the defense will put on a case, and most assuredly there is cross examination. I think it is fair to say that it is used as a time to test the prosecution's case, Justice Rehnquist.

QUESTION: But do you have grand juries in California?

MR. WARD: Yes, we do, Justice Powell.

QUESTION: And how do they function in relationship to the preliminary hearing?

MR. WARD: Grand juries in California are deemed by our Court to be nothing but extensions of the arm of the prosecution, and even though a grand jury may indict in a given case, the California Supreme Court has held that a defendant is entitled also to a preliminary hearing.

In all instances in a felony prosecution a defendant is entitled to a preliminary hearing in California.

QUESTION: What is the result of the preliminary hearing?

MR. WARD: The result of the preliminary

hearing, Justice Marshall, is simply to hold the defendant to answer or not hold the defendant to answer to the Superior Court for trial of the action.

QUESTION: Similar to the indictment?

MR. WARD: Yes, the --

QUESTION: It's just about duplicative of the indictment?

MR. WARD: It is duplicative --

QUESTION: No, no, except both sides can fill in?

MR. WARD: That is true.

QUESTION: Under this claim --

QUESTION: During the preliminary hearing, can motions to suppress be made?

MR. WARD: Yes, Justice Powell.

QUESTION: And ruled on?

MR. WARD: Yes, and frequently they are.

QUESTION: How about a motion to dismiss?

MR. WARD: A motion to dismiss on the basis of the furtherance of justice may be made. The magistrate has that power as well, and it does occur.

QUESTION: What is the difference between a preliminary hearing and a trial?

MR. WARD: Merely that in the trial there is a determination by the jury, if a jury is called for, for

the determination of guilt or innocence.

QUESTION: But the burden of proof is different?

MR. WARD: The burden of proof is the same.

QUESTION: Oh, really?

MR. WARD: The presentation on the part of the prosecution is literally identical in the proceedings. It's a test run, as it were, of the case.

QUESTION: Does the magistrate have to find probable cause beyond a reasonable doubt?

MR. WARD: No, I stand corrected on that. The magistrate does not have to find probable cause beyond a reasonable doubt, but so far as the evidence that may be presented and the test of the evidence, it is the same in a preliminary hearing.

QUESTION: Yes, but the prosecutor needn't put on more evidence than he thinks necessary to show probable cause?

MR. WARD: That's quite true, Justice White.

QUESTION: And often the defendant never puts on any evidence at all?

MR. WARD: Oh, that's quite true as well. Yes, certainly, it is often simply a prima facie showing on the part of the prosecution, but equally as often, I think, although there's no empirical data to establish

one way or another, the prosecution will put on its entire case, the reason being that in 90 percent -- the exact figure varies from year to year -- of cases there is no trial of the action and the evidence that is presented at the preliminary hearing is the case that is brought before the court for all purposes at that point.

QUESTION: You mean, then there's a guilty plea or something, a plea bargain?

MR. WARD: Yes, Justice O'Connor, that's precisely the point.

QUESTION: Mr. Ward, is there any other state to your knowledge in which a grand jury indictment must be followed by a preliminary hearing, as in California?

MR. WARD: I'm sorry --

QUESTION: I've not heard of another state.

MR. WARD: I'm sorry, Justice O'Connor. I don't know the answer to that. I'm not certain whether there are others.

QUESTION: Do you argue that the grand jury proceeding must be open to the press?

MR. WARD: No, we do not argue that at this point.

QUESTION: But you'll be back next year to argue?

MR. WARD: I think we had this exchange once

before, Justice O'Connor. No, indeed, there is no -- our position is very simply that we're dealing here with judicial proceedings. We are concerned here, of course, with a preliminary hearing.

QUESTION: Well, a grand jury proceeding can be characterized, many of the same attributes that you attribute to the preliminary hearing.

MR. WARD: Well, I suppose that is true in certain instances but so far as the scope of what we claim, Justice O'Connor, our position is that we're dealing with adjudicatory proceedings where we have adversaries or we have parties that are presenting differing views and a neutral magistrate is making decisions upon those views.

We believe that the net that would be cast out on a rule based upon our case which is a preliminary hearing case should incorporate adjudicatory proceedings where opposing counsel are present. That, granted, would take in most if not all of pretrial proceedings. But the reason why we so fervently believe that that is the case is because the logic that this Court has applied first to the trial in Richmond newspapers and later to the jury voir dire in the first Press Enterprise case, we thought Press Enterprise won, the logic that was applied in both of those cases is

overwhelmingly similar in the application to our preliminary hearing and we believe to pretrial proceedings in general, because the values of openness that this Court has found apply in those instances as well, and to some degree the argument can be advanced even to a greater degree in those instances.

QUESTION: Mr. Ward, to merely cut it, the grand jury in California and the preliminary hearing both accomplished the same results?

MR. WARD: Yes, to cause the defendant to be brought before the Superior Court, except that the preliminary hearing is paramount in that it is required for all defendants, Justice Marshall, yes.

QUESTION: Well, what if the grand jury brings up an indictment?

MR. WARD: If the Grand Jury --

QUESTION: I'm not trying to -- I'm trying to -- say you're entitled to go to one but not the other?

MR. WARD: I understand, but --

QUESTION: -- a one sentence reason, why you're entitled to go to the preliminary hearing but not to go before the grand jury.

MR. WARD: I understand the question, Justice Marshall, and I feel uncomfortable arguing foreclosure of any proceeding, but arguments could be advanced that

the grand jury proceeding is an investigatory process. We do not seek access to the police investigatory process.

QUESTION: But do you have to go as far as say it's not the judiciary --

MR. WARD: Yes, we suggest that that is a logical line to be drawn, dealing only here with adjudicatory proceedings where the parties -- where opposing parties are present to litigate the matter before a neutral magistrate.

QUESTION: Could there be, could there be some preliminary hearing in which the Court could be justified in the exercise of discretion to close it to the public?

MR. WARD: Yes, we believe so, Justice Burger. We think that our right is obvicusly a qualified right to access, as this Court has found, as it has found it in all other instances, and that qualified right requires definition, and frankly we seek nothing new in connection with the definition of the standard that we propose in connection with the preliminary and with pretrial proceedings.

We suggest that the standards that have been set by this Court in the cases that you have determined on access are adequate to define the standard for the

pretrial proceedings as well.

QUESTION: That, I take it, means that a hearing on closure or not?

MR. WARD: Yes, a hearing would be part of it, Justice Brennan, yes. We feel that hearing and notice to the parties is imperative. It is our position that the parties seeking closure must establish the necessity for closure. We feel that closure must -- any closure would have to be narrowly tailored to meet a specific governmental or societal interest. We feel that before any closure, that all less restrictive alternatives must be looked to for the purpose of seeing if they could solve the perceived problem, and finally --

QUESTION: Well, what, Mr. Ward, if the person seeking closure, the defendant, says, having this preliminary hearing in Riverside County is going to prejudice my chance of a fair trial in Riverside County. Would the Superior Court judge in Riverside County have to say, well, we could transfer it to Yolow County to try it.

Would you say he would have to go that far in order to -- he would have to accept that sort of an alternative rather than close the preliminary hearing?

MR. WARD: The use of change of venue, Justice Rehnquist, has always been one of the alternatives

available to the Court to avoid closure, and an alternative available to the Court to provide a fair trial to the defendant, and our answer is yes, that that would have to be considered by the Court as one of the alternatives that would be available before closure could be pronounced.

QUESTION: So, the defendant would have to be tried in a county in a different part of the state so that the Riverside County proceeding could be opened up to the press? That's what you're saying.

MR. WARD: We're dealing, of course --

QUESTION: That's what you're saying, isn't it?

MR. WARD: In the end if the only alternative to provide a fair trial is a motion for change of venue, and that contrasts with the right of access, our answer is yes, that the values attaching to access and open proceedings predominate and they must of necessity -- the proceedings must be open regardless of the possibility that a change of venue must be one of the alternatives that can --

QUESTION: Mr. Ward, I share Justice O'Connor's feeling that California must be the only state in which a preliminary hearing is a matter of right after an indictment. I don't think that kind of thing prevails elsewhere in these United States.

I suppose you wish the term were not "preliminary," period. It certainly is different from a preliminary hearing elsewhere, outside California, and you're swimming upstream with that term "preliminary hearing", as you refer to the Chief Justice's special writing in Gannett, for instance, where he emphasized the pre-nature of a pretrial or preliminary hearing.

MR. WARD: Respectfully, Justice Blackmun, I do not think we are swimming upstream. I think we are in the mainstream of this Court's --

QUESTION: All I am saying is, I think you must wish you had a different title for the procedure that you have in California.

MR. WARD: Well, I think the use of the title has presented a problem to us, and in some of your analysis in Gannett as well, looking to the history of the proceeding, I think it's important to consider what we're dealing with here by way of a preliminary hearing.

First, I would not want to say that the California preliminary is so unique that a rule that could come from this case should not be applied to other parts of the country. Preliminary hearings in other parts of the country are equally important, in our view. But secondly, we must look to the history of the proceedings for some guidance in this regard.

It isn't the final, infallible rule, but it is certainly a guide to it. The history which is set out in our amicus brief, which I hope the Court will be able to read, is a history which establishes that when the preliminary hearing, quote unquote, as it was referred to in ancient England, or we're referring to that proceeding from ancient England, transferred itself from an inquisitorial, investigatory process where the magistrate admittedly did it in secret, when that proceeding switched from that to a proceeding whereby it was a neutral fact finder with opposing counsel involved in the proceeding, it became an open process and logically so.

QUESTION: That history has been gone over in these other cases. I don't think we have to worry about it. I think we have it in mind.

MR. WARD: Well, I think --

QUESTION: Some of us do anyway.

MR. WARD: Thank you, Justice Blackmun, but I think one of the things that has come out of late is, in our investigation, was for instance the Aaron Bird trial was one of the more fascinating matters of investigation. That celebrated trial had involved in it two preliminary hearings, during the course of which the crowd that attended the preliminary hearing was so great

that they had to adjourn from the courtroom and move to another chamber in order to accomodate it, and Justice Marshall in handling that matter had to fashion a specific voir dire in order to in his mind overcome the elements of pretrial publicity that he believed existed.

QUESTION: Would you think, Mr. Warren, that one of the reasonable candidates for closure would be the motion to suppress evidence in the California procedure?

MR. WARD: I think that the circuit courts and some of the reasoning -- well, I will not refer to this Court but some of the circuit courts have found that the suppression hearing is not a candidate for closure. Indeed, it is so similar to the trial itself because it involves the presentation of trial evidence, that in fact it is a definite candidate --

QUESTION: Let me put the question another way. Is it within the discretion, sound judicial discretion of the trial judge, the person presiding, the person presiding over the preliminary hearing to say that if all the evidence which is sought to be suppressed is disclosed and is on the evening newspapers and television stations, it's going to impair the right of the defendant to a fair trial if the evidence is suppressed at the preliminary hearing?

MR. WARD: We suggest, Justice Burger, that the problem of prejudicial pretrial publicity is not real. We suggest, as this Court has held, that it is a manageable problem. We feel that the --

QUESTION: Let me get back to my question. Are you saying it is not within the discretion of the Court to close on that ground?

MR. WARD: We feel it should not be, simply on the discretion of the Court to close on that ground. That's correct. Our position regarding pretrial publicity is simply that it is a very manageable problem. There are a number of alternatives that are available.

This Court has weighed the problem in different contexts and has found, in fact, that prejudicial pretrial publicity is a rare instance. The statistical data available indicates that a miniscule number of cases were ever reversed on the basis of prejudicial pretrial publicity.

QUESTION: Mr. Ward, can I go back to one thing that troubles me. You've been arguing about access to the hearing and not access to the transcript, and I guess you really have both problems in this case, the hearing -- closing the hearing and originally denying access to the transcripts. And in the Court's

response they argue, you've got the wrong party here, it was the municipal court that closed the hearing and the Superior Court that denied access to the transcript.

What's your response to that, the appeal from the closure order itself, I mean, the review of it?

MR. WARD: Justice Stevens, our specific appeal is from the closure of the transcript.

QUESTION: Right.

MR. WARD: And that brings us to this Court today. But the reasoning is that we are of necessity engaging in, or the exchange that we are engaging in, involves the same process in connection with the closure of the preliminary hearing itself. The fact of the matter is that there's no real difference in consideration of the arguments on the case.

We have the right party in that it was a Superior Court judge who refused to grant us access to the transcript. Our first application for relief followed the completion of the preliminary, and all that there remained was the transcript.

QUESTION: So, what is specifically before us is the refusal to grant access to the transcript, when you say that in effect a fortiori if you were entitled to the transcript we should at least have to decide the other issue to decide that one, that's what you --

MR. WARD: Yes, I believe so, or actually saying it another way, that the right of access to the transcript of necessity litigates the issue of righkt of access to the preliminary hearing, because without access to the preliminary hearing there would not of necessity be any right of access to the transcript.

QUESTION: But at least it would be possible to hold that you were entitled to the transcript but you were not entitled to be physically present in the courtroom?

MR. WARD: Yes, thank you, Justice Stevens. That's precisely the point I made earlier, that I'm happy you see that point. I agree with that point, yes.

QUESTION: Well, you have another problem about the grand jury being a part of the judiciary hearing. In the regular hearings in most states you have a preliminary hearing and at the preliminary hearing they bind you over to the grand jury.

Well, as I understand, your rule is that the preliminary hearing is a part of the judicial procedure but the grand jury is not. That makes a hiatus between the two.

MR. WARD: Well, the rule --

QUESTION: Does that bother you?

MR. WARD: No, it does not, Justice Marshall,

for this reason: that the rule that we seek is a rule regarding access to judicial proceedings or adjudicatory proceedings involving a neutral magistrate or judge. Our position is that the values of openness attach to those types of proceedings.

Now, as Justice O'Connor observed, possibly another day will come when the argument will arrive regarding the grand jury proceedings, but we are dealing here with a judicial proceeding, an adjudicatory proceeding, and a rule derived from this, we do not believe would encompass necessarily --

QUESTION: But you consider the grand jury as sort of an exception to the rule?

MR. WARD: I would say -- the phraseology I would prefer to use is that it doesn't fall within the ambit of the rule in the first instance.

QUESTION: Because you know, sometimes in the preliminary hearing in both places, if certain cases like possession of cocaine, if you lose a suppression hearing you lose your case.

MR. WARD: That's quite true, Justice Marshall, and another thing regarding openness of pretrial suppression hearings is consideration of the fact that you're dealing there with the potential for government wrongdoing, and the observation of that

process is most important to the public and it is essential --

QUESTION: If you have the transcripts a little bit later on, is there any problem about that?

MR. WARD: Yes, I believe so, Justice Burger, because I think this Court has held that the transcript is only a second best alternative.

QUESTION: Second best?

MR. WARD: The first is to be there, and the --

QUESTION: But isn't there -- seriously, isn't the transcript going to be more accurate than what some person can take down in longhand when he's hearing testimony?

MR. WARD: Except, Justice Burger, to this degree, that timeliness is lost, and in so many of these instances we're dealing with the problem of timeliness of the proceedings, as in the instant case as cited -- as indicated in our briefs, we were involved in an allegation by one counsel regarding the alleged misconduct or statements that should not have been made by a trial judge. Changes in the life of that judge took place. He was elevated to another bench in the interim, and during a time when the proceedings were sealed.

The public lost access to the --

QUESTION: You want to print a picture of the defendant with his hands over his face, don't you?

MR. WARD: I'm sorry, Justice Rehnquist.

QUESTION: Don't you want to print a picture of the defendant with his hands over his face, trying to prevent being photographed?

MR. WARD: I think not, Jutice Rehnquist. That isn't precisely the point. But I think that you do raise an important point, that there -- at least your question raises a point that I think should be made, that the process of criminal justice in this country is replete with publicity. It begins from the moment of arrest until the final disposition of the case.

All that this Court and this rule would concern itself with would be the preliminary hearing which is but a small part of it.

QUESTION: Well, Mr. Ward, I don't suppose if you're worried -- not worried, but if you think an important part of your submission is that preliminary hearings really dispose of a very high percentage of all the cases, that literally isn't true, something has to happen after the preliminary hearing and when cases are disposed of later, or without a trial, something else has happened, there's been a plea bargain, and there's been bargaining, there's been a process going on.

I would think you'd be much more interested in that process which actually disposes of the case, than with the preliminary hearing.

MR. WARD: Justice White, consider for a moment in the context --

QUESTION: Well, wouldn't you think -- would you make some claim of access to the plea bargaining process?

MR. WARD: Only if it were an adjudicatory process.

QUESTION: Adjudicatory?

MR. WARD: That is, if the judge were hearing the matter before opposing counsel.

QUESTION: Do you know whether any judges in California sit in on plea bargaining negotiations?

MR. WARD: Yes, as a matter of fact, they do.

QUESTION: And there is the judge and there is where the meat may be cut -- I suppose your next claim would be to sit in on those?

MR. WARD: Well, just for clarification, we make no claim of access to the plea bargaining process from the --

QUESTION: I know you don't now, but as Justice O'Connor says, you may be here tomorrow on that?

MR. WARD: Well, but of course, we look to the

logic of what we're dealing with here. We're dealing with values of openness that this Court --

QUESTION: I think the logic of your argument would say, a fortiori we should get in on the real bargaining.

MR. WARD: Well, the question was, Justice White, whether there ever would be instances when the matter of plea bargaining would be cases where we would seek openness, and my response was, when it was an adjudicatory process.

The fact of the matter is that the people of the State of California through an initiative process limited plea bargaining in California. They specified in certain crimes that there were limits. They're interested in that process.

Consider further, in answer to your question, the McMartin pretrial case which went on with a preliminary hearing of some 14 months after which five of the defendants were dismissed. It was fortunately an open process, because if it had not been, consider the potential outrage of the community at having had a secret process going on for that length of time.

QUESTION: Well, of course, the community can remedy its outrage by requiring that the proceedings be open, if really the majority is outraged. Your

hypothesis is really, the majority has decided otherwise so you have to put it on a constitutional basis.

MR. WARD: We seek constitutional right of access, definitely; beyond that, the statutory right that is currently given to us.

QUESTION: What is it, counsel, that you said took 14 months, a moment ago?

MR. WARD: The McMartin preschool case.

QUESTION: The preliminary hearing took 14 months?

MR. WARD: Yes, Justice Burger, 14 months. And during that time a number of laws were enacted regarding child abuse. It was a celebrated child abuse case arising out of Los Angeles. Five of the defendants were dismissed after the completion of that proceeding.

We submit there is a need for the community catharsis, which has been said by the Court before.

If I could reserve my remaining time.

CHIEF JUSTICE BURGER: Ms. Reikes.

ORAL ARGUMENT OF JOYCE ELLEN MANULIS REIKES, ESQ.

ON BEHALF OF THE RESPONDENT

MS. REIKES: Mr. Chief Justice, and may it please the Court, rather than begin with an opening statement I would like to bring to this Court the difference between a preliminary hearing and a trial, in

terms of the incentive of the parties to prevail.

At a trial we are dealing with the issue of guilt or innocence of the defendant. It is in effect, in terms of society's goal, a search for truth, for what really happened, who committed this crime, and if guilt is found, punishment for the guilty.

At a preliminary hearing we are looking to determine probable cause, probable cause the crime was committed, and that this defendant committed it. Probable cause is sufficient --

QUESTION: What does the grand jury do before that in California? What do they determine?

MS. REIKES: The grand jury may also determine that this person should be indicted and charged with a crime.

QUESTION: Is that not a determination of probable cause in California?

MS. REIKES: I am not familiar with what burden the grand jury would consider, but I do know that, for instance, one who is indicted by the grand jury in California still has a right under the penal code and under Hawkins versus Superior Court it's virtually constitutional right under the California Constituion to a preliminary hearing if he wishes to have it.

To continue, the preliminary hearing, we do not have a situation as we do at trial. At trial both parties have an incentive to prevail. The District Attorney is going to pull out all of his stops. The defendant is going to do likewise. His life, his very liberty is at stake, and in a capital case, possibly his life.

However, at a preliminary hearing all they are determining, all that magistrate is determining, is whether he should be bound over to stand trial or whether this is an unwarranted prosecution and it should be cut off, if you will, at the pass, right here.

QUESTION: But then, why does it take 41 days?

MS. REIKES: It took 41 days in this case, I believe, and perhaps I'm speculating, because there was a good deal of very highly technical medical information. In this particular case, and I think this is exemplary of preliminary hearings in serious criminal cases generally in California, the prosecution put on some 25 witnesses. In the supplemental appendix in this case, first 30 or so pages, it contains a summary prepared by our district attorney who tried the case, of their testimony.

QUESTION: Was that because there were a number of alleged victims?

MS. REIKES: There were 12 victims. There were 12 counts, all with special circumstances, each of which carried the potential death penalty.

QUESTION: On the practical side of it, does that mean that the prosecutor is trying to make out such a strong case that there be a guilty plea without a trial?

MS. REIKES: I think the prosecutor here had a highly technical case, again because this is a killing that was alleged to have occurred through the use of Lidocaine. There was a good deal, I believe, of circumstantial evidence and this had to be shown, the effect of Lidocaine leaving the body and how it would affect the person's body after so many hours.

And I believe that if you look at the supplemental appendix that we filed in this case, you will see that a good deal of the testimony was not simply of the nurses and other personnel with whom Mr. Diaz, but physicians and chemists and so forth.

QUESTION: Ms. Reikes, do you think there are any differences at stake here in opening a hearing itself and giving access subsequently to the transcript of the preliminary hearing?

MS. REIKES: I think that is a decision, in the first instance, that must be made by the defendant

and his counsel. Does he want to have that hearing closed, is he, and does the inspector, of the pretrial publicity which will ultimately prejudice the --

QUESTION: I'm talking about for our purposes, and for purposes of determining what the Constitution requires.

MS. REIKES: I think the Constitution requires, and there is no question, the First and Fourteenth Amendments require that state trials be open. I think there is no question at this time that the Constitution does not require that preliminary hearings be open to the public.

In California we certainly have served -- our legislature has served the public interest, and it is an important interest, a passionate interest in openness by amending Section 868 to declare a statutory right. That first sentence of Penal Code Section 868, a statute which remained virtually stable for 130 years, it was hardly amended at all except to add some minor charges, that statute now reads since 1982, quote, "the examination shall be open and public."

The California Supreme Court as directed by the legislature, impliedly, has fashioned a standard. It's a workable standard, and we feel that this is all that is necessary, to take a defendant's Sixth Amendment

right which as Justice Burger said in Press Enterprises 1984 case, no right ranks higher. And to subject it to a competing constitutional right for which we can see no basis to declare is to in a sense dilute the defendant's right at that point, to place upon the defendant the burden of fulfilling a constitutional standard at a very early stage in the proceeding when he may not be able to do this, when the spectre of pretrial publicity may be looming before him but may not be concrete enough that he can show to the Court to fulfill a standard of an overriding governmental or a compelling --

QUESTION: In California may a preliminary hearing be closed over the objection of the defendant?

MS. REIKES: The preliminary hearing may be closed upon the request of the prosecutor, only to exclude a particular witness, and that is a statute which is due to expire, I believe January --

QUESTION: Well, what about -- do you agree that in order to sustain a statute like that, or a ruling like that, that the Sixth Amendment is involved, that the defendant says, "I don't want this hearing closed at all, any part of it, even for that witness, and I have a Sixth Amendment right to an open and public trial.

Now, do you agree that to that extent it's

covered by --

MS. REIKES: What you're really talking about is like the situation that occurred in Waller versus Georgia. I think there the defendant has certainly a Sixth Amendment concern if the closure will affect his right to trial.

QUESTION: Do you think that the result, in my example, should be the result that was reached in Waller?

MS. REIKES: Yes.

QUESTION: So, if a motion to suppress were made at the preliminary hearing in California and the defendant wanted the proceeding open, he would have that right under the Sixth Amendment?

QUESTION: Absent the findings?

MS. REIKES: I believe that he would, and again where --

QUESTION: But you would say the press does not have an equivalent?

MS. REIKES: The press in a suppression of evidence hearing under Waller, the way I read it, does have that First Amendment right.

QUESTION: So, to the extent that the preliminary hearing involves motions to suppress, there has to be a different result?

MS. REIKES: If a preliminary hearing

encompasses a motion to suppress, in other words, if one is made during the course of the preliminary hearing, certainly a motion can be made to open that portion. Because the suppression hearing unquestionably is different than the preliminary hearing itself. There, like a trial, both sides have the incentive to prevail.

I believe the Court pointed this out in Gannett. Both sides have the incentive to prevail, whereas at a preliminary hearing you do not have this two-sided presentation of evidence. There is not the two-sided, the bilateral incentive to prevail.

QUESTION: Well, yet, the defendant surely has an incentive to ask the magistrate to hold there is no probable cause to bind over.

MS. REIKES: Unquestionably that's true. However, this is an early stage of the proceedings where the district attorney -- the prosecutor may have taken some months in building his case to the point where he files a complaint, seeks an arrest and so forth, where the defendant is newly arrested.

A preliminary hearing in California may take place as early -- it doesn't often, but it may take place under the statute as early as two days after arraignment, at which time the defendant hasn't really had a chance to prepare his defense. And so, if the

defendant is sitting there at a preliminary hearing and he's pretty sure, or his counsel is, that he is going to be bound over, he is not going to, as Mr. Diaz did not, put on witnesses. Mr. Diaz did not put on, not one witness.

QUESTION: He may not go all out to do the best he can to prevent himself from being bound over but he will at least hold that the magistrate determines there is no probable cause, won't he? He wants that outcome.

MS. REIKES: Certainly. Interestingly, there was an article in the Riverside Press-Enterprise just last week. There is an elementary schoolteacher, a male teacher in Riverside right now, who has been accused by a complaint from the district attorney of child molestation of some 20 or so young children, and his attorney in speaking to the newspaper reporters told them that, "This time in the preliminary hearing we're going to do it differently. We're going to go for a dismissal. We're going to put on a full case."

So, apparently the putting on of the full case at the preliminary hearing is the exception rather than the rule, at least in our neighborhood.

QUESTION: I don't think defense counsel will agree with you at all. You are saying that they lay

down on the job?

MS. REIKES: No, Your Honor. I'm not saying that they lay down on the job, no.

QUESTION: I misunderstood you. You said that the prosecutor was out to do this, he did like -- but the defendant just went along?

MS. REIKES: The defendant does that, as I understand it, and as I understand it from real party in interest brief, as a matter of defense strategy, the purpose being to save his case for trial.

When he is in a situation --

QUESTION: You mean that if he has a chance of getting his man off at the preliminary he will not do it?

MS. REIKES: No. I would think -- I can't speak for defense counsel and I'm not a criminal lawyer, but I would think that if any counsel has a chance of getting his client off at the preliminary hearing he would go for it. I would.

QUESTION: In that connection, I think you told us earlier that there might be a preliminary hearing following an indictment if the accused wants it?

MS. REIKES: That's right.

QUESTION: Now, what happens if at the preliminary hearing he's told the action will be dismissed? What happens to the indictment?

MS. REIKES: I've never met the situation and I hesitate to answer because I -- if you will take it in the context that I am not sure, I would imagine the indictment would be quashed but I don't know for certain.

QUESTION: Are you saying you do not know of any case where the preliminary hearing resulted in negative for the prosecution?

MS. REIKES: I'm not personally familiar with one, Your Honor.

QUESTION: Then it would seem that the preliminary hearing has a limited utility?

MS. REIKES: I think it has a utility again, the same way it did at common law. I don't know what the statistics are as far as how many dismissals result from preliminary hearings and how many people are bound over, percentagewise, but I think it still has tremendous societal interest, in being a check on the prosecutor in terms of cutting off unwarranted prosecutions. It certainly is a discovery proceeding for the defendant in terms of seeing the demeanor of the district attorney's witnesses and so forth, and some of his case.

QUESTION: But if it has a tremendous societal interest, why shoulin't it be open?

MS. REIKES: Not every interest, Justice

Blackmun, is -- should be embellished, or worthy, or elevated to a constitutional right. We do not here see a basis for declaring a constitutional right, either in history or in the Constitution itself.

There are a number of interests in this country that are passionate interests in this society, that have never been elevated to a federal constitutional right. This Court in San Antonio versus Rodriguez in 1973 spoke of public education and found that it is not a right.

QUESTION: We're talking about the Bill of Rights here.

MS. REIKES: I realize we are, and perhaps it was a bad analogy.

QUESTION: That's what you have to face.

MS. REIKES: But I see in the Bill of Rights, I see no basis for implying in any way, certainly not expressed, the Bill of Rights nowhere discusses the preliminary hearing. Certainly the preliminary hearing was known in the early Colonies. It literally crossed the ocean, I think, with the colonists.

QUESTION: How widely was it used in those days, as opposed to grand jury indictments?

MS. REIKES: I cannot say which was used more or which was used less. The only thing I do know is

that it existed in the colonies, one, and number two, when the framers put together the Bill of Rights they did not include it.

They did, however, include it in the grand jury indictment in the Fifth Amendment. Additionally, what is even more interesting is that this Court through its doctrine of selective incorporation has never incorporated the grand jury right to the states through the Fourteenth Amendment. It is one of the very few provisions of the Bill of Rights or the first state amendments that has not been so incorporated.

QUESTION: Oh, it isn't very few. There are many others.

MS. REIKES: Forgive me, Justice Blackmun.

QUESTION: Does it often happen, or does it ever happen that the prosecution simply puts on no evidence at the preliminary hearing and simply stands on the grand jury indictment?

MS. REIKES: In terms of a grand jury indictment, I do not know, Chief Justice Burger. However, where it is an information filed by the prosecutor, in other words a criminal complaint, there are many instances, I am told by criminal lawyers, that that occurs.

This case is an example. Mr. Diaz submitted

some five exhibits. I'm not sure what they are. However, the record which the Court has of the preliminary hearings, some 4400 pages, I think, contains not one witness. He put on no witnesses.

QUESTION: Well, I think the Chief Justice's question as directed, whether the prosecutor -- unless I'm -- whether the prosecutor simply stood on an information or indictment if that's permissible without putting on witnesses. Is that permissible at all?

MS. REIKES: I do not see how he would meet his burden of probable cause if he did.

QUESTION: Especially when the defendant demands a preliminary hearing.

MS. REIKES: That's correct.

QUESTION: So, it has to be live witnesses at a preliminary hearing?

MS. REIKES: Insofar as I'm aware, plus exhibits. In other words, the same type of evidence that would be admissible at trial, in California we do not allow evidence that would be inadmissible at trial to be admitted at the preliminary hearing. Our evidence code deals with that specifically.

QUESTION: So that is a distinction, then, from the grand jury proceedings?

MS. REIKES: That's correct, yes.

QUESTION: What is -- what provision is there under California law for television access to trials?

MS. REIKES: I do know that we -- I don't know the specific code section. I believe there was an experimental pilot program under the Rules of Court in California.

QUESTION: You mean, there's no regular, ongoing procedure for televising criminal trials?

MS. REIKES: I believe there probably is, but I -- and I believe there may have been that in Mr. Diaz's trial because I believe -- and I'm not entirely sure, I believe I remember seeing parts of it on TV myself, but it's something that I am just not familiar with at this point. I do know that there were a number of requests in this case for press coverage of the trial, all of which were granted.

In this case, I think again and I cannot emphasize this strongly enough, that we must consider what happens when a pretrial hearing is open and there is significant pretrial publicity. We now have a defendant who is being tried before a pool of -- or of jurors taken from a pool who may or may not have unconscious or conscious prejudices. Certainly if they have conscious prejudices I would expect that they would reveal that on voir dire and they would be challenged

and removed.

However, do we really know what the effect of pretrial publicity is on anyone's mind? And I submit tht we cannot really know that. Certainly if we have a case in which there is an acquittal we may safely presume that the defendant was not adversely prejudiced. However, in a case where he is convicted, perhaps we can never be able to show that prejudice like we did in Rideaux versus Louisiana, to the level of a reversal or reversible error, but maybe it is still there and we have no way of ever discerning that.

I think, as this Court pointed out in Sheppard versus Maxwell, we have a number of palliatives. We have a number of things that may cure pretrial prejudice to that defendant in terms of what it has done to jury, or potential jury.

QUESTION: Why not close them all?

MS. REIKES: Because --

QUESTION: I mean, on the argument that you are now making?

MS. REIKES: Because, Chief Justice Marshall, I think -- excuse me, Justice Marshall -- I think it is again a decision that a defendant has to make to ask for it, because we do have a societal interest in openness. We do not stand here, Respondent Court does not stand

here today saying, "close everything."

We feel that proceedings should be open where possible.

QUESTION: What you recommend is not that the state close it but that the defendant close?

MS. REIKES: That the defendant requests that it be closed and that under the standards fashioned by the California Supreme Court in this case where the trial judge or the magistrate finds a reasonable likelihood of substantial prejudice --

QUESTION: What was the reasonable likelihood of prejudice in this case that this Court found?

MS. REIKES: In this particular case the magistrate indicated, and the record -- it was very spare, admittedly, but he said there has been national publicity. There was a concern there. He felt that there had been -- and he said that perhaps after the fact of the time he sealed the transcript at the end of the preliminary hearing --

QUESTION: I was asking -- my question was, the defendants had closed the trial. What reason did the judge give for closing the hearing?

MS. REIKES: The defendant's fair trial rights.

QUESTION: What was it?

MS. REIKES: The defendant's fair trial --

right to a fair trial, to protect him from that publicity, yes.

QUESTION: And that was the only reason given?

MS. REIKES: Yes, at that time. However, the standard remains, California has taken that public interest and embodied it in a statutory right. Petitioner in this case, and it's -- have indicated in one way or another in some of their briefs that their fear is that if we have merely a statutory right as opposed to a constitutional right, that what the legislature have given, if you will, the legislature may take away.

We have no reason to believe that in California. The legislature has given this right. California is a vocal state in terms of its citizenry as I'm sure this Court is aware. It is a rare election that we do not have a ballot proposition. We have changed our constitution, or I should say attempted to change it before Reichtman versus Molke in that state, via a ballot proposition.

I can see people being heard in the legislature, being heard at the ballot box, should that public interest in openness ever be attempted by the legislature to be quashed. I do not think it will be.

I think the fear is unrealistic. I think,

however, that the press's characterization of the problem of pretrial publicity in terms of its potential to prejudice a defendant's right to a fair trial, in the unusual case -- this is not in every case -- in the unusual circumstance, a case like the Diaz case, an unusual kind of crime that attracted nationwide interest, I think we have a situation there where that defendant must be protected.

California has protected his right to a fair trial. California has recognized the public interest. We feel that that is all that is warranted.

QUESTION: As I understand your argument, though, you are saying that there is no First Amendment right at all to access?

MS. REIKES: We see no basis for even declaring one.

QUESTION: Let's assume we disagree with you. I take it that your position is that the statute adequately protects any First Amendment right?

MS. REIKES: It does. However, the petitioner--

QUESTION: There has to be some findings, now, under yout '82 amendment?

MS. REIKES: The statute does not specifically require that the magistrate make findings. However, I

think that it is incumbent upon any judge to make findings so that a higher court will know what he has done.

QUESTION: Well, the higher -- the California Supreme Court said that the statutory requirement for closure was satisfied in this case?

MS. REIKES: Yes, they did.

QUESTION: Well, what if we disagree with you on the applicability of the First Amendment, or the existence of a First Amendment right to access? Should we remand?

After all, your Attorney General, doesn't your -- what's your Attorney General's position?

MS. REIKES: I'm not sure if the Attorney General in his amicus brief asked for a remand. I believe that the district attorney did.

QUESTION: Yes, he does. He says there's an error, the court erred in not finding a First Amendment right and says that the -- we should remand.

MS. REIKES: And the real party in interest also asks for that same remand. I would have no objection to a remand, were that to be found, but again our initial objection is that the right does not exist, has no basis for existing.

A statutory right, certainly. A right, the

Sixth Amendment right of that defendant, particularly at that early stage of the proceeding, must remain paramount. And California recognizes the interest but we feel in California that it has been adequately taken care of.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Ward?

MR. WARD: Yes, Mr. Chief Justice.

ORAL ARGUMENT OF JAMES D. WARD, ESQ.

ON BEHALF OF PETITIONER -- REBUTTAL

MR. WARD: Respondent refers to the right, and indicate that there is a statutory right but that it does not elevate itself to the level of a constitutional right.

I need not remind this Court, I think, of the values that this Court has attached to openness of a judicial proceeding, and those values certainly, in our opinion, must apply to the critical, the pivotal, the most important preliminary hearing in California, and that's --

QUESTION: That's the answer to my question. What happens to the indictment if there's -- if it's followed by a preliminary hearing and they dismiss it?

MR. WARD: The preliminary hearing is

paramount, Justice Brennan.

QUESTION: How is that done, by court decision?

MR. WARD: If the defendant is not held to answer, that's the disposition of the --

QUESTION: It just neutralizes and negates and overrules the indictment, then?

MR. WARD: That's correct, in my understanding. The point of the matter is, in our opinion, that these important values must be protected in some way. We cannot have secret hearings. We cannot have closed proceedings. And a California preliminary hearing must in our opinion be open.

We just extent the logic of that, we believe, to pretrial proceedings in general. Our position is --

QUESTION: Well, what's your standard, if we agree with you on the applicability of the First Amendment, which one of our cases do you think most narrowly states the standard that would have to be satisfied to justify closure?

MR. WARD: The last time that we appeared in Press Enterprise One, where the Court was considering the voir dire of the jury, the standard that was promulgated there was that the closure has to be narrowly tailored to satisfy an overriding governmental, societal interest and that reasonable alternatives must

be looked to.

QUESTION: Do you think this is very far from Waller?

MR. WARD: Waller used the reasoning, I believe totally, of Press Enterprise One in its decision.

QUESTION: If it stated some specific standards that had to be met, would you be satisfied with those?

MR. WARD: We have no quarrel with the language or the standards of this Court as they have been promulgated. What we quarrel with --

QUESTION: How about my specific question? How about the Waller standard? Would those satisfy you?

MR. WARD: The Waller standard, yes, because the Waller standard as we recall it referred specifically to the Press Enterprise One standard. What we quarrel with is the California Supreme Court standard which did not call for reasonable alternatives, which did not call that it be narrowly tailored, which did not call that there be an overriding interest, which did not require articulated findings.

The California standard has none of the constitutional underpinnings that this Court has found essential in connection with evaluating openness. The standards set by the California Supreme Court is, simply

put, constitutionally deficient. It doesn't have within it all of the safeguards which this Court has heretofore provided.

It is our opinion that the California Supreme Court in the standard that it has set has violated our constitutional rights and must be reversed. Three times this Court has called for openness of various judicial proceedings, at least three times. Twice the California Supreme Court since 1982 has not heeded that admonition at all but has instead found for closure of proceedings and provided an easy standard for closure which we believe will result in a denial of the rights of the citizens of the State of California to access to the proceedings, which they need to achieve the values which this Court has thus far recognized.

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

(Whereupon, at 11:52 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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

#84-1560 - PRESS-INTERPRISE COMPANY, ETC., Petitioner V.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF RIVERSIDE

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

BY Paul A. Richardson

(REPORTER)