The Burger Court Opinion Writing Database

Gannett Co. v. DePasquale

443 U.S. 368 (1979)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: MAY 8 1979

Recirculated: _____

No. 77-1301, Gannett Co. v. DePasquale

MR. CHIEF JUSTICE BURGER, dissenting

I agree with MR. JUSTICE STEWART's dissenting opinion. The issue posed by this case is best resolved, however, by placing greater emphasis upon the nature of the proceeding involved. It is a pretrial hearing. Unlike the Court, I believe that the time factor is critical -- if not dispositive.

The question in this case is how a judge is to evaluate a motion to exclude the public from a pretrial suppression hearing. As both the Court and MR. JUSTICE STEWART recognize, the Constitution does not provide a direct answer to that question. The Sixth Amendment affords some guidance. That Amendment provides, in part, that "the accused shall enjoy the right to a . . . public trial." But, the Sixth Amendment can resolve the trial judge's quandary only if the word "trial"

3.4.5

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

Recirculated: MAY 15 1979

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1301

Gannett Co., Inc., Petitioner, *v.* Daniel A. DePasquale, Etc., et al. | On Writ of Certiorari to the Court of Appeals of New York.

[May —, 1979]

MR. CHIEF JUSTICE BURGER, dissenting.

I agree with MR. JUSTICE STEWART's dissenting opinion. The issue posed by this case is best resolved, however, by placing greater emphasis upon the nature of the proceeding involved. It is a *pre*trial hearing. Unlike the Court, I believe that the time factor is critical—if not dispositive.

The question in this case is how a judge is to evaluate a motion to exclude the public from a *pre*trial suppression hearing. As both the Court and MR. JUSTICE STEWART recognize, the Constitution does not provide a direct answer to that question. The Sixth Amendment affords some guidance. That Amendment provides, in part, that "the accused shall enjoy the right to a . . . public trial." But, the Sixth Amendment can resolve the trial judge's quandary only if the word "trial" encompasses *pre*trial hearings. Resolution therefore depends upon further analysis, analysis which, because a constitutional provision is at issue, must begin with an investigation of the history of the provision. As the several opinions demonstrate, the common-law precedents do not permit a trial judge always to rule yea or nay when faced with an accused's motion to close a *pre*trial hearing. The search for guidance most often encounters gaps not precedents in the common law. History provides more analogies than bright lines. The question presented by the case, as the Court seems to concede, is whether a *pre*trial hearing is presumed to be public or presumed to be closed. By analogies and indeed by definition

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 1, 1979

Re: 77-1301 - Gannett Co., Inc. v. Daniel A. DePasquale, etc.

MEMORANDUM TO THE CONFERENCE:

In light of the most recent developments in this case, I am assigning it to Potter for a Court opinion.

Regards,

WEB/sa

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: JUN 14 1979

Recirculated: _____

No. 77-1301, Gannett Co., Inc. v. DePasquale

MR. CHIEF JUSTICE BURGER, concurring.

I join the opinion of the Court, but I write separately only to emphasize my view of the nature of the proceeding involved in today's decision. It is not a trial; it is a pretrial hearing. I believe that the time frame is critical to deciding the narrow question presented.

I approach this case within the narrow confines of the Sixth Amendment, which tells us that "in all criminal prosecutions, the accused shall enjoy the right to a . . . public trial." It is the practice in Western societies, and has been part of the common law tradition for centuries, that trials generally be public. This is an important prophylaxis of the system of justice which constitutes the adhesive element of our society. The

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

Recirculated: JUN 26 197_

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1301

Gannett Co., Inc., Petitioner, *v.* Daniel A. DePasquale, Etc., et al. | On Writ of Certiorari to the Court of Appeals of New York.

[June —, 1979]

MR. CHIEF JUSTICE BURGER, concurring.

I join the opinion of the Court, but I write separately only to emphasize my view of the nature of the proceeding involved in today's decision. It is not a *trial*; it is a *pre*trial hearing. I believe that the time frame is critical to deciding the narrow question presented.

I approach this case within the narrow confines of the Sixth Amendment, which tells us that "in all criminal prosecutions, the *accused* shall enjoy the right to a . . . public trial." It is the practice in Western societies, and has been part of the common-law tradition for centuries, that trials generally be public. This is an important prophylaxis of the system of justice which constitutes the adhesive element of our society. The public has an interest in observing the performance not only of the litigants and the witnesses, but also of the advocates and the presiding judge. Similarly, if the accused testifies, there is a proper public interest in that testimony. But interest alone does not create a constitutional right.

At common law there was a very different presumption for proceedings which preceded the trial. There was awareness of the untoward effects that could result from the publication of information before an indictment was returned or before a person was bound over for trial. For an example we need only consider the case of *Daubney* v. *Cooper*, 5 Manning & Ryland 314 (K. B. 1829), which involved a suit for trespass against a judge for forcing a person out of a courtroom. The

STYLISTIC CHANGES

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated:

Recirculated: JUN 21 1979

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1301

Gannett Co., Inc., Petitioner, v. Daniel A. DePasquale, Etc., et al. | On Writ of Certiorari to the Court of Appeals of New York.

[June —, 1979]

MR. CHIEF JUSTICE BURGER, concurring.

I join the opinion of the Court, but I write separately to emphasize my view of the nature of the proceeding involved in today's decision. It is not a *trial*; it is a *pre*trial hearing. I believe that the time frame is critical to deciding the narrow question presented.

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STYLISTIC CHANGES

To: Mr. [illegible]
Mr. [illegible]
Mr. Justice [illegible]
Mr. Justice [illegible]
Mr. Justice Blackmun
Mr. Justice [illegible]
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

3rd DRAFT

Recirculated: June 25, 1979

SUPREME COURT OF THE UNITED STATES

No. 77-1301

Gannett Co., Inc., Petitioner, *v.* Daniel A. DePasquale, Etc., et al. | On Writ of Certiorari to the Court of Appeals of New York.

[June —, 1979]

MR. CHIEF JUSTICE BURGER, concurring.

I join the opinion of the Court, but I write separately to emphasize my view of the nature of the proceeding involved in today's decision. It is not a *trial*; it is a *pre*trial hearing. ~~I believe that the time frame is critical to deciding the narrow question presented.~~

by definition a hearing on a motion before trial to suppress evidence

The Sixth Amendment tells us that "in all criminal prosecutions, the *accused* shall enjoy the right to a . . . public trial." It is the practice in Western societies, and has been part of the common-law tradition for centuries, that trials generally be public. This is an important prophylaxis of the system of justice that constitutes the adhesive element of our society. The public has an interest in observing the performance not only of the litigants and the witnesses, but also of the advocates and the presiding judge. Similarly, if the accused testifies, there is a proper public interest in that testimony. But interest alone does not create a constitutional right.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 5, 1979

RE: No. 77-1301 Gannett Co. v. DePasquale, et al.

Dear Harry:

With the few suggestions we discussed, I am delighted to join this particularly fine opinion.

Sincerely,

Bill

Mr. Justice Blackmun

cc: The Conference

77-1301

Supreme Court of the United States

Memorandum

20 June, 1979

Harry.

This is the N.Y. Court of Appeals opinion of last week on question of closing the trial during a witness' testimony. I don't think it bears very much on the Gannett case but you may find it interesting.

Bill

WJB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 21, 1979

RE: No. 77-1301 Gannett v. DePasquale

Dear Harry:

Please join me in your circulation of June 21 concurring in part and dissenting in part.

Sincerely,

Bill

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 5, 1979

Re: No. 77-1301, Gannett Co., Inc. v. DePasquale

Dear Harry,

I shall in due course circulate a dissenting opinion.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice
Mr. Justice
Mr.
Mr.

Fro

13 APR 197

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1301

Gannett Co., Inc., Petitioner, v. Daniel A. DePasquale, Etc., et al. | On Writ of Certiorari to the Court of Appeals of New York.

[April —, 1979]

MR. JUSTICE STEWART, dissenting.

The Sixth Amendment to the Constitution provides that "In all criminal prosecutions, *the accused* shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." (Emphasis added.) The question presented in this case is whether, under the Sixth and Fourteenth Amendments, members of *the public* have an independent constitutional right to insist upon access to a pretrial judicial proceeding, even though the accused, the prosecutor and the trial judge all have agreed to the closure of that proceeding in order to assure a fair trial.[1]

The trial court in this murder case excluded the public from a pretrial suppression hearing. This ruling was made after defense attorneys had argued that the unabated buildup of publicity about the murder had jeopardized the prospect of a fair trial for their clients. The prosecutor did not oppose the

[1] The question in this case is not, as the Court repeatedly suggests, *ante*, at 2, 13, 17–18, 20–21, 25–26, 28, 29, 30, 34, whether the Sixth and Fourteenth Amendments give a defendant the right to compel a secret trial. In this case the defendants, the prosecutor, and the judge all agreed that closure of the pretrial suppression hearing was necessary to protect the defendants' right to a fair trial. Moreover, a transcript of the proceedings was later made available to the public. Thus there is no need to decide the question framed by the Court. If that question were presented, I would agree that the defendant has no such right. See *Singer* v. *United States*, 380 U. S. 24, 35 ("[A]lthough a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial").

1, 4, 5, 13, 14, 15

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: _____

2nd DRAFT Recirculated: 20 Apr 79

SUPREME COURT OF THE UNITED STATES

No. 77-1301

Gannett Co., Inc., Petitioner, v. Daniel A. DePasquale, Etc., et al. | On Writ of Certiorari to the Court of Appeals of New York.

[April —, 1979]

MR. JUSTICE STEWART, with whom MR. JUSTICE STEVENS joins, dissenting.

The Sixth Amendment to the Constitution provides that "In all criminal prosecutions, *the accused* shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." (Emphasis added.) The question presented in this case is whether, under the Sixth and Fourteenth Amendments, members of *the public* have an independent constitutional right to insist upon access to a pretrial judicial proceeding, even though the accused, the prosecutor and the trial judge all have agreed to the closure of that proceeding in order to assure a fair trial.[1]

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: _____

Recirculated: 23 APR 1979

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1301

Gannett Co., Inc., Petitioner, *v.* Daniel A. DePasquale, Etc., et al.	On Writ of Certiorari to the Court of Appeals of New York.

[April —, 1979]

MR. JUSTICE STEWART, with whom MR. JUSTICE STEVENS joins, dissenting.

The Sixth Amendment to the Constitution provides that "In all criminal prosecutions, *the accused* shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." (Emphasis added.) The question presented in this case is whether, under the Sixth and Fourteenth Amendments, members of *the public* have an independent constitutional right to insist upon access to a pretrial judicial proceeding, even though the accused, the prosecutor and the trial judge all have agreed to the closure of that proceeding in order to assure a fair trial.[1]

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
The Clerk of Conference

From: Mr. Justice Stewart

Circulated: _____

Recirculated: 30 MAY 1979

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1301

Gannett Co., Inc., Petitioner, v. Daniel A. DePasquale, Etc., et al. } On Writ of Certiorari to the Court of Appeals of New York.

[April —, 1979]

MR. JUSTICE STEWART, with whom THE CHIEF JUSTICE, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS join, dissenting.

The question presented in this case is whether members of *the public* have an independent constitutional right to insist upon access to a pretrial judicial proceeding, even though the accused, the prosecutor and the trial judge all have agreed to the closure of that proceeding in order to assure a fair trial.[1]

The trial court in this murder case excluded the public from a pretrial suppression hearing. This ruling was made after defense attorneys had argued that the unabated buildup of publicity about the murder had jeopardized the prospect of a fair trial for their clients. The prosecutor did not oppose the motion to exclude the public. The motion was granted by the trial judge after finding that "there was a reasonable probability of prejudice to these defendants" that would endanger

[1] The question in this case is not, as the Court repeatedly suggests, *ante*, at 2, 13, 17–18, 20–21, 25–26, 28, 29, 30, 34, whether the Sixth and Fourteenth Amendments give a defendant the right to compel a secret trial. In this case the defendants, the prosecutor, and the judge all agreed that closure of the pretrial suppression hearing was necessary to protect the defendants' right to a fair trial. Moreover, a transcript of the proceedings was later made available to the public. Thus there is no need to decide the question framed by the Court. If that question were presented, I would agree that the defendant has no such right. See *Singer* v. *United States*, 380 U. S. 24, 35 ("[A]lthough a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial").

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 7, 1979

MEMORANDUM TO THE CONFERENCE

You will note that I have unabashedly plagiarized Harry Blackmun's statement of facts in Part I and discussion of mootness in Part II. I offer two excuses: (1) the pressure of time, and (2) more importantly, I could not have said it better.

P.S.

P.S.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: 7 JUN 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1301

Gannett Co., Inc., Petitioner, *v.* Daniel A. DePasquale, Etc., et al.	On Writ of Certiorari to the Court of Appeals of New York.

[June —, 1979]

MR. JUSTICE STEWART delivered the opinion of the Court.

The question presented in this case is whether members of the public have an independent constitutional right to insist upon access to a pretrial judicial proceeding, even though the accused, the prosecutor and the trial judge all have agreed to the closure of that proceeding in order to assure a fair trial.

I

Wayne Clapp, aged 42 and residing at Henrietta, a Rochester, N. Y., suburb, disappeared in July 1976. He was last seen on July 16 when, with two male companions, he went out on his boat to fish in Lake Seneca, about 40 miles from Rochester. The two companions returned in the boat the same day and drove away in Clapp's pickup truck. Clapp was not with them. When he failed to return home by July 19, his family reported his absence to the police. An examination of the boat, laced with bulletholes, seemed to indicate that Clapp had met a violent death aboard it. Police then began an intensive search for the two men. They also began lake dragging operations in an attempt to locate Clapp's body.

The petitioner, Gannett Co., Inc., publishes two Rochester newspapers, the morning Democrat & Chronicle and the eve-

9,22,23

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: _____

2nd DRAFT Recirculated: ~~12 JUN 1979~~

SUPREME COURT OF THE UNITED STATES

No. 77-1301

Gannett Co., Inc., Petitioner, v. Daniel A. DePasquale, Etc., et al. | On Writ of Certiorari to the Court of Appeals of New York.

[June —, 1979]

MR. JUSTICE STEWART delivered the opinion of the Court.

The question presented in this case is whether members of the public have an independent constitutional right to insist upon access to a pretrial judicial proceeding, even though the accused, the prosecutor and the trial judge all have agreed to the closure of that proceeding in order to assure a fair trial.

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The petitioner, Gannett Co., Inc., publishes two Rochester newspapers, the morning Democrat & Chronicle and the eve-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 20, 1979

MEMORANDUM TO THE CONFERENCE

Case being held for 77-1301 - Gannett v. DePasquale

No. 78-155 - Philadelphia Newspapers, Inc. v. Jerome

This is the only case held for Gannett. The case involves an unsuccessful attempt by the press and the public to gain access to pretrial suppression hearings in three highly publicized murder prosecutions. The defendant in each of the cases had moved, pursuant to a Pennsylvania Rule of Criminal Procedure, to close the suppression hearing and the prosecutor did not object. Appellants, all members of the press, then filed a petition for a writ of mandamus with the Pennsylvania Supreme Court that was denied without opinion. This Court then ordered a Krivda remand to determine whether the state court passed on appellants' constitutional claims or denied mandamus on an adequate and independent state ground. Mr. Justice Rehnquist and Mr. Justice Stevens dissented.

On remand, the Supreme Court of Pennsylvania, like the New York courts in Gannett, recognized a right of access but held that this right was outweighed by the defendants' constitutional right to a fair trial. The language of the opinion demonstrates that the court believed that access of the press and the public could be limited only in the narrowest of circumstances:

> "We believe that any limitation on access should be carefully drawn. First, the right of access to court proceedings should not be limited to any reason less than the compelling state obligation to protect constitutional rights of criminal defendants and the public interest in the fair orderly, prompt, and final disposition of criminal proceedings. Second, access should not be limited unless the threat posed to the protected interest is serious. Third, rules or orders limiting access should effectively prevent the harms at which they are aimed. Finally, the rules or orders should limit no more than is necessary to accomplish the end sought."

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 5, 1979

Re: No. 77-1301 - Gannett Co., Inc. v. DePasquale

Dear Harry,

I shall await the dissent in this case.

Sincerely yours,

Mr. Justice Blackmun

Copies to the Conference

cmc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 20, 1979

Re: 77-1301 Gannett Co. v. DePasquale

Dear Harry,

Please join me. The suggested additions to your draft are quite all right with me.

Sincerely yours,

Mr. Justice Blackmun
Copies to the Conference
cmc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 9, 1979

Re: No. 77-1301 - Gannett Co., Inc. v. Daniel A. DePasquale

Dear Harry:

Please join me.

Sincerely,

T.M.

Mr. Justice Blackmun

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: 4 APR 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1301

Gannett Co., Inc., Petitioner, v. Daniel A. DePasquale, Etc., et al. | On Writ of Certiorari to the Court of Appeals of New York.

[April —, 1979]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue whether, and to what extent, the First, Sixth, and Fourteenth Amendments[1] of the Con-

[1] The Court long ago held that the First Amendment's guaranty of the freedom of the press "is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action." *Near* v. *Minnesota*, 283 U. S. 697, 707 (1931).

The Sixth Amendment reads:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Many of the elements of the Sixth Amendment have been recognized as subsumed in the Fourteenth Amendment's guaranty of due process of law and, thus, as applicable to the States. *Powell* v. *Alabama*, 287 U. S. 45 (1932). Specifically, the Court has held that the States must adhere to the Sixth Amendment's requirements with respect to trial by jury and an impartial jury in a criminal prosecution, *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), *Irvin* v. *Dowd*, 366 U. S. 717 (1961), a speedy trial, *Klopfer* v. *North Carolina*, 386 U. S. 213 (1967), confrontation of witnesses, *Pointer* v. *Texas*, 380 U. S. 400 (1965), assistance of counsel, *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); compulsory process, *Washington* v. *Texas*, 388 U. S. 14 (1967); and notice of the charge, *In re Oliver*, 333 U. S. 257 (1948). The last cited case also demands of the State certain minimal aspects of a "public trial."

STYLISTIC CHANGES and p. 45

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: 5 APR 1979

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77–1301

Gannett Co., Inc., Petitioner, *v.* Daniel A. DePasquale, Etc., et al. | On Writ of Certiorari to the Court of Appeals of New York.

[April —, 1979]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

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The Sixth Amendment reads:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Many of the elements of the Sixth Amendment have been recognized as subsumed in the Fourteenth Amendment's guaranty of due process of law and, thus, as applicable to the States. *Powell* v. *Alabama*, 287 U. S. 45 (1932). Specifically, the Court has held that the States must adhere to the Sixth Amendment's requirements with respect to trial by jury and an impartial jury in a criminal prosecution, *Duncan* v. *Louisiana*, 391 U. S. 145 (1968); *Irvin* v. *Dowd*, 366 U. S. 717 (1961); a speedy trial, *Klopfer* v *North Carolina*, 386 U. S. 213 (1967); confrontation of witnesses, *Pointer* v. *Texas*, 380 U. S. 400 (1965); assistance of counsel, *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); compulsory process, *Washington* v. *Texas*, 388 U. S. 14 (1967); and notice of the charge, *In re Oliver*, 333 U. S. 257 (1948). The last cited case also demands of the State certain minimal aspects of a "public trial."

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 19, 1979

MEMORANDUM TO THE CONFERENCE

Re: No. 77-1301 - Gannett Co. v. DePasquale

The dissent merits a mild response. I shall circulate it later today.

HAB.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 19, 1979

MEMORANDUM TO THE CONFERENCE:

Re: No. 77-1301 - Gannett Co. v. DePasquale

Herewith are three additions we shall add to the proposed opinion in response to the dissent that has been circulated.

H.A.B.

TO BE ADDED AT PAGE 37, PRIOR TO START OF PART IV:

The dissent argues that, even assuming the Sixth and Fourteenth Amendments could be viewed as embodying a public right of access to trials, the Court's analysis is in error because there was no common law right in members of the public to attend preliminary proceedings.

But the Court does not say there was. It says, rather, that there was a right to attend trials. And it further says that, because of the critical importance of suppression hearings to our systems of criminal justice -- as well as because of the close similarity in form of a suppression hearing to a full trial -- for purposes of the Sixth Amendment the pretrial suppression hearing at issue in this case must be considered part of the trial.

It is significant that the sources upon which the dissent relies do not concern suppression hearings. They concern hearings to determine probable cause to bind a defendant over for trial. E.g., Indictable Offenses Act, 11 & 12 Vict., ch. 42, § 17 (1848). Such proceedings are not critical to the

TO BE ADDED TO PAGE 33, NOTE 17:

The dissent cites no cases where the public has been totally excluded from all of a trial or all of a pretrial suppression hearing. Indeed, in almost every case that the dissent cites no such exclusion was permitted: In Geise v. United States, 262 F.2d 151, 155 (CA 9 1958), for example, the press, members of the bar, relatives, and friends of the parties and the witnesses were allowed to remain. Similarly, in United States ex rel Orlando v. Fay, 350 F.2d 967, 970 (CA 2 1965), the press and members of the bar were admitted at all times. In State v. Croak, 167 La. 92, 94-95, 118 So. 703, 704 (1928), a fair-sized audience composed of members of the public was present at all times. The court in Beauchamp v. Cahill, 297 Ky. 505, 508, 180 S.W.2d 423, 424 (1944), though it recognized that the court could exclude certain limited classes of spectators in certain circumstances, held that the court could not exclude a "reasonable portion of the public" who wanted to attend. Only in State v. Callahan, 100 Minn. 63, 110 N.W. 342 (1907), can the dissent point to a case where a court

TO BE ADDED TO THE PARAGRAPH ENDING ON THE TOP OF PAGE 16 (AND TO REPLACE THE LAST SENTENCE OF THAT PARAGRAPH):

Even MR. JUSTICE STEWART, the author of the dissent here, stated in dissent in Estes, id., at 614-615: "The suggestion that there are limits upon the public's right to know what goes on in the courts causes me deep concern."

STYLISTIC CHANGES
4 pp. 16, 33-35, 39-41

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: 24 APR 1979

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1301

Gannett Co., Inc., Petitioner, v. Daniel A. DePasquale, Etc., et al. | On Writ of Certiorari to the Court of Appeals of New York.

[April —, 1979]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue whether, and to what extent, the First, Sixth, and Fourteenth Amendments[1] of the Con-

[1] The Court long ago held that the First Amendment's guaranty of the freedom of the press "is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action." *Near* v. *Minnesota*, 283 U. S. 697, 707 (1931).

The Sixth Amendment reads:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Many of the elements of the Sixth Amendment have been recognized as subsumed in the Fourteenth Amendment's guaranty of due process of law and, thus, as applicable to the States. *Powell* v. *Alabama*, 287 U. S. 45 (1932). Specifically, the Court has held that the States must adhere to the Sixth Amendment's requirements with respect to trial by jury and an impartial jury in a criminal prosecution, *Duncan* v. *Louisiana*, 391 U. S. 145 (1968); *Irvin* v. *Dowd*, 366 U. S. 717 (1961); a speedy trial, *Klopfer* v. *North Carolina*, 386 U. S. 213 (1967); confrontation of witnesses, *Pointer* v. *Texas*, 380 U. S. 400 (1965); assistance of counsel, *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); compulsory process, *Washington* v. *Texas*, 388 U. S. 14 (1967); and notice of the charge, *In re Oliver*, 333 U. S. 257 (1948). The last cited case also demands of the State certain minimal aspects of a "public trial."

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 20, 1979

Re: No. 77-1301 - Gannett Co., Inc. v. DePasquale

Dear Bill, Byron, and Thurgood:

You were kind enough to join me when I attempted an opinion for the Court. Please feel free to unhook, if you wish, in my conversion of that opinion to a concurrence in part and a dissent in part.

Sincerely,

H.A.B.

Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall

*First 5 pages in full
*Changes in pronouns, such as "we" to "I," etc., and in nouns where necessary
*Other changes as noted
*And stylistic changes

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: 21 JUN 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1301

Gannett Co., Inc., Petitioner, v. Daniel A. DePasquale, Etc., et al. | On Writ of Certiorari to the Court of Appeals of New York.

[June —, 1979]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL join, concurring in part and dissenting in part.

I concur in Part II of the Court's opinion but I dissent from that opinion's subsequent Parts. I also cannot join the Court's phrasing of the "question presented," *ante,* at 1, or its distress and concern with the publicity the Clapp murder received in the Seneca County, N. Y., area.

Today's decision, as I view it, is an unfortunate one. I fear that the Court surrenders to the temptation to overstate any overcolor the actual nature of the pre-August 7, 1976 publicity; that it reaches for a strict and flat result; and that in the process it ignores the important antecedents and significant developmental features of the Sixth Amendment. The result is an inflexible *per se* rule, as MR. JUSTICE REHNQUIST so appropriately observes in his separate concurrence, *ante,* at 1–2. That rule is to the effect that if the defense and the prosecution merely agree to have the public excluded from a suppression hearing, and the trial judge does not resist—as trial judges may be prone not to do, since nonresistance is easier than resistance—closure shall take place, and there is nothing in the Sixth Amendment that prevents that happily agreed-upon event. The result is that the important interests of the public and the press (as a part of that public) in open judicial proceedings are rejected and cast aside as of little value or significance.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 9, 1979

77-1301 Gannett v. DePasquale

Dear Harry:

At Conference, according to my notes, I expressed agreement with some of what was said by Potter, Byron and you. But there were differences. Indeed, I do not think a majority of the Court agreed as to exactly how the competing interests in this case should be resolved.

The more I have thought about the case, the more I am inclined to view it as being closer to presenting the classic First Amendment issue of fair trial/free press, although the Sixth Amendment also is implicated in light of a defendant's right to a public trial.

I agree with you that the accused has no constitutional right to close a trial or a pretrial suppression hearing. But, as I read your opinion, you would place a heavier burden upon the trial judge than I would to establish that cloture was necessary. Your opinion would create "a strong presumption in favor of open proceedings" for pretrial hearings. I am inclined to think that where both the defendant and the prosecution (representing the public) agree that cloture is necessary to protect the right of fair trial, the burden would be on the press or a representative of the public to satisfy the court that this is not necessary. Thus, just as you would, I would allow anyone in the courtroom the opportunity to be heard promptly and informally, and I think I would require the judge to state his reasons on the record for his decision. In addition, the transcript of the suppression hearing should be made available as soon as the jury is impaneled and sequestered.

The foregoing are quite tentative views. I find the case difficult, and your thorough consideration of it is impressive. Yet, until I can try to write something out, I cannot be sure where I will come down.

As I am behind on several cases, I hope you will bear with me for perhaps another week or ten days.

Sincerely,

L. Lewis

Mr. Justice Blackmun

lfp/ss

cc: The Confernce

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 31, 1979

77-1301 Gannett v. DePasquale

Dear Harry:

As you know from my letter of May 9, I was inclined to view this case as presenting primarily a First Amendment rather than a Sixth Amendment issue. This thinking goes back to my dissent in Saxbe, and to my join in John's dissent last year in Houchins.

Since writing you, I have gone through two or three drafts of a dissenting opinion, the most recent of which I had printed. I had become persuaded that my views as to the Sixth Amendment coincide substantially with those expressed by Potter, but that I would not rest the case on that Amendment alone.

Potter's most recent draft recognizes the possible relevance of the First Amendment claim, but would not reach it in this case. I therefore will join his opinion. As this apparently will give him a Court, I have changed my draft of a dissent into a concurring opinion - in which I address the First Amendment issue.

I know that you have devoted a great deal of time and thought to your scholarly opinion, and I am sorry to end up being the "swing vote". At Conference I voted to reverse. But upon a more careful examination of the facts, I have concluded that the trial court substantially did what in my view the First Amendment requires.

Sincerely

Lewis

Mr. Justice Blackmun
lfp/ss

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: 7 JUN 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1301

Gannett Co., Inc., Petitioner, v. Daniel A. DePasquale, Etc., et al. | On Writ of Certiorari to the Court of Appeals of New York.

[June —, 1979]

MR. JUSTICE POWELL, concurring.

Although I join the opinion of the Court, I would address the question that it reserves. Because of the importance of the public having accurate information concerning the operation of its criminal justice system, I would hold explicitly that petitioner's reporter had an interest protected by the First and Fourteenth Amendments in beng present at the pretrial suppression hearing.[1] As I have argued in *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 850 (1974) (POWELL, J.,

[1] In the present case, members of the press and public were excluded from a pretrial suppression hearing, rather than from the trial itself. In our criminal justice system as it has developed, suppression hearings often are as important as the trial which may follow. The government's case may turn upon the confession or other evidence that the defendant seeks to suppress, and the trial court's ruling on such evidence may determine the outcome of the case. Indeed, in this case there was no trial as, following the suppression hearing, plea bargaining occurred that resulted in guilty pleas. In view of the special significance of a suppression hearing, the public's interest in this proceeding often is comparable to its interest in the trial itself. It is to be emphasized, however, that not all of the incidents of pretrial and trial are comparable in terms of public interest to a formal hearing in which the question is whether critical, if not conclusive evidence, is to be admitted or excluded. There are numerous arguments and consultations, as well as depositions and interrogatories (in special situations), in the course of the criminal process that involve issues so peripheral that no First Amendment right is implicated. And, of course, grand jury proceedings traditionally have been held in strict confidence. See *Houchins* v. *KQED*, 438 U. S. 1, 34-35 (1978) (STEVENS, J., dissenting).

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

2nd DRAFT Circulated: _____

Recirculated: 12 JUN 1979

SUPREME COURT OF THE UNITED STATES

No. 77–1301

Gannett Co., Inc., Petitioner, v. Daniel A. DePasquale, Etc., et al. } On Writ of Certiorari to the Court of Appeals of New York.

[June —, 1979]

MR. JUSTICE POWELL, concurring.

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[1] In the present case, members of the press and public were excluded from a pretrial suppression hearing, rather than from the trial itself. In our criminal justice system as it has developed, suppression hearings often are as important as the trial which may follow. The government's case may turn upon the confession or other evidence that the defendant seeks to suppress, and the trial court's ruling on such evidence may determine the outcome of the case. Indeed, in this case there was no trial as, following the suppression hearing, plea bargaining occurred that resulted in guilty pleas. In view of the special significance of a suppression hearing, the public's interest in this proceeding often is comparable to its interest in the trial itself. It is to be emphasized, however, that not all of the incidents of pretrial and trial are comparable in terms of public interest to a formal hearing in which the question is whether critical, if not conclusive evidence, is to be admitted or excluded. In the criminal process, there are numerous arguments and consultations, as well as depositions and interrogatories, that are not central to the process and that implicate no First Amendment rights. And, of course, grand jury proceedings traditionally have been held in strict confidence. See *Houchins* v. *KQED*, 438 U. S. 1, 34–35 (1978) (STEVENS, J., dissenting).

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

3rd DRAFT

Recirculated: 20 JUN 1979

SUPREME COURT OF THE UNITED STATES

No. 77-1301

Gannett Co., Inc., Petitioner, *v.* Daniel A. DePasquale, Etc., et al. | On Writ of Certiorari to the Court of Appeals of New York.

[June —, 1979]

MR. JUSTICE POWELL, concurring.

Although I join the opinion of the Court, I would address the question that it reserves. Because of the importance of the public having accurate information concerning the operation of its criminal justice system, I would hold explicitly that petitioner's reporter had an interest protected by the First and Fourteenth Amendments in beng present at the pretrial suppression hearing.[1] As I have argued in *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 850 (1974) (POWELL, J.,

[1] In the present case, members of the press and public were excluded from a pretrial suppression hearing, rather than from the trial itself. In our criminal justice system as it has developed, suppression hearings often are as important as the trial which may follow. The government's case may turn upon the confession or other evidence that the defendant seeks to suppress, and the trial court's ruling on such evidence may determine the outcome of the case. Indeed, in this case there was no trial as, following the suppression hearing, plea bargaining occurred that resulted in guilty pleas. In view of the special significance of a suppression hearing, the public's interest in this proceeding often is comparable to its interest in the trial itself. It is to be emphasized, however, that not all of the incidents of pretrial and trial are comparable in terms of public interest and importance to a formal hearing in which the question is whether critical, if not conclusive evidence, is to be admitted or excluded. In the criminal process, there may be numerous arguments, consultations, and decisions, as well as depositions and interrogatories, that are not central to the process and that implicate no First Amendment rights. And, of course, grand jury proceedings traditionally have been held in strict confidence. See *Houchins* v. *KQED*, 438 U. S. 1, 34-35 (1978) (STEVENS, J., dissenting).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 23, 1979

Re: No. 77-1301 Gannett Co., Inc. v. DePasquale

Dear Potter:

Would you please join me in your dissent in this case. I might have a couple of suggestions, but your acceptance of them is not a condition of my joining your opinion as it is.

Sincerely,

WHR

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 12, 1979

Re: No. 77-1301 - Gannett v. DePasquale

Dear Potter:

Please join me in your opinion. I anticipate filing a short separate opinion concurring in your opinion and in the judgment of the Court which should circulate later today or tomorrow.

Sincerely,

Mr. Justice Stewart

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

Mr. Justice Rehnquist

12 JUN 79

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1301

Gannett Co., Inc., Petitioner, v. Daniel A. DePasquale, Etc., et al. | On Writ of Certiorari to the Court of Appeals of New York.

[June —, 1979]

MR. JUSTICE REHNQUIST, concurring.

While I concur in the opinion of the Court, I write separately to emphasize what should be apparent from the Court's Sixth Amendment holding and to address the First Amendment issue that the Court appears to reserve.

The Court today holds, without qualification, that "members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials." *Ante*, at 22. In this case, the trial judge closed the suppression hearing because he concluded that an open hearing might have posed a danger to the defendants' ability to receive a fair trial. *Id.*, at 6–7. But the Court's recitation of this fact and its discussion of the need to preserve the defendant's right to a fair trial, *id.*, at 8–9, should not be interpreted to mean that under the Sixth Amendment a trial court can close a pretrial hearing or trial only when there is a danger that prejudicial publicity will harm the defendant.* To the contrary, since the Court holds that the public does not have *any* Sixth Amendment right of access to such proceedings, it necessarily follows that if the parties agree on a closed proceeding,

*In fact, as both the Court and the dissent recognize, the instances in which pretrial publicity alone, even pervasive and adverse publicity, actually deprives a defendant of the ability to obtain a fair trial will be quite rare. *Ante*, at 9 n. 6; *post*, at —: see *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 551–555 (1976); *Murphy* v. *Florida*, 421 U. S. 794, 798–799 (1975); *Beck* v. *Washington*, 369 U. S. 541, 557 (1962); *Stroble* v. *California*, 343 U. S. 181, 191–194 (1952).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 25, 1979

Re: No. 77-1301 - Gannett Co. v. DePasquale

Dear Lewis:

I anticipate circulating sometime today a brief response to your jab at my concurrence which you circulated last week.

Sincerely,

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 25, 1979

Re: No. 77-1301 - Gannett v. DePasquale

Dear Lewis:

Attached is a footnote which I will insert on page 3 of my separate concurrence in this case.

Sincerely,

Mr. Justice Powell

Copies to the Conference

2/ My BROTHER POWELL suggests in his concurring opinion that I am wrong in so stating. Ante, at 2 n. 2. He believes that the four dissenters -- who expressly reject his First Amendment views, post, at 6, and who, instead, rely on a Sixth Amendment analysis that is repudiated by a majority of the Court today -- will join him in any subsequent case to impose constitutional limitations on the ability of a trial court to close judicial proceedings. I disagree with MR. JUSTICE POWELL for two reasons. First, in a matter so commonly arising in the regular administration of criminal justice, I do not so lightly as my BROTHER POWELL impute to the four dissenters in this case a willingness to ignore the doctrine of stare decisis and to join with him in some later decision to form what might fairly be called an "odd quintuplet," agreeing that the authority of trial courts to close judicial proceedings to the public is subject to limitations stemming from two different sources in the Constitution. But even if this were to occur, the very diversity of views that necessarily would be reflected in any such disposition would seem to me, as a practical matter, to place outside of any limits imposed by the United States Constitution all but the most bizarre orders closing judicial proceedings -- the sort of orders which have spawned the saying that "hard cases make bad law."

P3

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: 26 JUN

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1301

Gannett Co., Inc., Petitioner, v. Daniel A. DePasquale, Etc., et al. | On Writ of Certiorari to the Court of Appeals of New York.

[June —, 1979]

MR. JUSTICE REHNQUIST, concurring.

While I concur in the opinion of the Court, I write separately to emphasize what should be apparent from the Court's Sixth Amendment holding and to address the First Amendment issue that the Court appears to reserve.

The Court today holds, without qualification, that "members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials." *Ante*, at 22. In this case, the trial judge closed the suppression hearing because he concluded that an open hearing might have posed a danger to the defendants' ability to receive a fair trial. *Id.*, at 6–7. But the Court's recitation of this fact and its discussion of the need to preserve the defendant's right to a fair trial, *id.*, at 8–9, should not be interpreted to mean that under the Sixth Amendment a trial court can close a pretrial hearing or trial only when there is a danger that prejudicial publicity will harm the defendant.[1] To the contrary, since the Court holds that the public does not have *any* Sixth Amendment right of access to such proceedings, it necessarily follows that if the parties agree on a closed proceeding,

[1] In fact, as both the Court and the dissent recognize, the instances in which pretrial publicity alone, even pervasive and adverse publicity, actually deprives a defendant of the ability to obtain a fair trial will be quite rare. *Ante*, at 9 n. 6; *post*, at 38–39; see *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 551–555 (1976); *Murphy* v. *Florida*, 421 U. S. 794, 798–799 (1975); *Beck* v. *Washington*, 369 U. S. 541, 557 (1962); *Stroble* v. *California*, 343 U. S. 181, 191–194 (1952).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 5, 1979

Re: 77-1301 - Gannett Co. v. DePasquale

Dear Harry:

Although I agree with a good deal of what you say in your opinion--specifically, including your conclusion that the defendant does not have a right "to compel" a private proceeding--I shall await the dissent. I probably will adhere to my view that the public interest in open proceedings can be adequately vindicated by the combined efforts of the two adversaries and the trial judge, coupled with a right of access to a transcript promptly after the risk of prejudice has passed. I am fearful that your holding will tolerate prejudice that may not be serious enough to violate the defendant's constitutional rights but will nevertheless enhance his risk of conviction.

Respectfully,

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 18, 1979

Re: 77-1301 - Gannett v. DePasquale

Dear Potter:

Please join me in your dissent. I may add a paragraph of my own.

Respectfully,

Mr. Justice Stewart

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

77-1301 - Gannett v. DePasquale

From: Mr. Justice Stevens

Circulated: APR 19 79

Recirculated: _____

MR. JUSTICE STEVENS, dissenting.

Unless one assumes that the prosecutor, the defendant's lawyer, and the trial judge are parties to a conspiracy to conceal, the risks that the Court's new rule is intended to avoid are relatively unimportant. Ironically, in that class of cases the new rule may well be ineffective. For the right to object to a closure order is extended only to those persons who happen to be in the courtroom when a closure motion is made.*/ And in all but the most highly publicized cases--those in which closure is most apt to be justified by the danger of prejudice--conspirators could surely plan the timing of their motion in a way that would frustrate any meaningful objection. Moreover, if we put the notorious cases to one side, it is unlikely that appellate review could often be had in time to remedy an erroneous order.

*/ Although I recognize that theoretically the rule applies even when no potential objector is present, in practice the absence of an objection would vitiate the value of the rule.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: APR 20 '79

Printed

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1301

Gannett Co., Inc., Petitioner, v. Daniel A. DePasquale, Etc., et al. | On Writ of Certiorari to the Court of Appeals of New York.

[April —, 1979]

MR. JUSTICE STEVENS, dissenting.

Unless one assumes that the prosecutor, the defendant's lawyer, and the trial judge are parties to a conspiracy to conceal, the risks that the Court's new rule is intended to avoid are relatively unimportant. Ironically, in that class of cases the new rule may well be ineffective. For the right to object to a closure order is extended only to those persons who happen to be in the courtroom when a closure motion is made.* And in all but the most highly publicized cases—those in which closure is most apt to be justified by the danger of prejudice—conspirators could surely plan the timing of their motion in a way that would frustrate any meaningful objection. Moreover, if we put the notorious cases to one side, it is unlikely that appellate review could often be had in time to remedy an erroneous order.

These observations are not intended to demean the important interests at stake, but rather to highlight the difficulty of fashioning third-party rights and remedies to regulate judicial proceedings that historically have involved only the adversaries, the judge, and the jury. Like MR. JUSTICE STEWART—and like most trial judges, prosecutors, and defense counsel—I recognize the great value of public access to judicial proceedings, but I remain convinced that these values will continue to

*Although I recognize that theoretically the rule applies even when no potential objector is present, in practice the absence of an objection would vitiate the value of the rule.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: APR 23 '79

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1301

Gannett Co., Inc., Petitioner, *v.* Daniel A. DePasquale, Etc., et al.	On Writ of Certiorari to the Court of Appeals of New York.

[April —, 1979]

MR. JUSTICE STEVENS, dissenting.

Unless one assumes that the prosecutor, the defendant's lawyer, and the trial judge are parties to a conspiracy to conceal, the risks that the Court's new rule is intended to avoid are relatively unimportant. Ironically, in that class of cases the new rule may well be ineffective. For the right to object to a closure order is extended only to those persons who happen to be in the courtroom when a closure motion is made.[1] And in all but the most highly publicized cases—those in which closure is most apt to be justified by the danger of prejudice—conspirators could surely plan the timing of their motion in a way that would frustrate any meaningful objection. Moreover, if we put the notorious cases to one side, it is unlikely that appellate review could often be had in time to remedy an erroneous order.

These observations are not intended to demean the important interests at stake, but rather to highlight the difficulty of fashioning third-party rights and remedies to regulate judicial proceedings that historically have involved only the adversaries, the judge, and the jury. Like MR. JUSTICE STEWART—and like most trial judges, prosecutors, and defense counsel—I recognize the great value of public access to judicial proceedings,[2] but I remain convinced that these values will continue to

[1] Although I recognize that theoretically the rule applies even when no potential objector is present, in practice the absence of an objection would vitiate the value of the rule.

[2] Cf. *Houchins* v. *KQED, Inc.*, 438 U. S. 1, 36–38 (STEVENS, J., dissenting).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 15, 1979

RE: 77-1301 - Gannett Co., Inc. v. DePasquale

Dear Potter:

Just to clarify the record, this will confirm the fact that I have joined your opinion for the Court, and that I have withdrawn the short separate opinion that I circulated some time ago.

Respectfully,

Mr. Justice Stewart

Copies to the Conference