STATE OF MINNESOTA

IN SUPREME COURT

CX-89-1863

ORDER FOR HEARING TO CONSIDER PROPOSED AMENDMENTS TO THE GENERAL RULES OF PRACTICE

IT IS HEREBY ORDERED that a hearing be held before this Court in Courtroom 300 of the Minnesota Supreme Court, Minnesota Judicial Center, on July 1, 2008 at 2 p.m., to consider the report and recommendations of the Supreme Court Advisory Committee on the General Rules of Practice concerning cameras in the courtroom. A copy of the committee's report, which was filed on April 1, 2008, is annexed to this order.

IT IS FURTHER ORDERED that:

1. All persons, including members of the Bench and Bar, desiring to present written statements concerning the subject matter of this hearing, but who do not wish to make an oral presentation at the hearing, shall file 12 copies of such statement with Frederick Grittner, Clerk of Appellate Courts, 305 Judicial Center, 25 Rev. Dr. Martin Luther King Jr. Blvd, St. Paul, Minnesota 55155, on or before June 20, 2008, and

2. All persons desiring to make an oral presentation at the hearing shall file 12 copies of the material to be so presented with the Clerk of Appellate Courts together with 12 copies of a request to make an oral presentation. Such statements and requests shall be filed on or before June 20, 2008.

Dated: April 18th, 2008

BY THE COURT:

Russell A. Anderson
Chief Justice

CX-89-1863
STATE OF MINNESOTA
IN SUPREME COURT

In re:

Supreme Court Advisory Committee
on General Rules of Practice

Recommendations of Minnesota Supreme Court Advisory Committee on General Rules of Practice

Final Report
March 31, 2008

Hon. Elizabeth Anne Hayden
Chair

Hon. G. Barry Anderson
Liaison Justice

Hon. Steven J. Cahill, Moorhead
Hon. Joseph T. Carter, Hastings
R. Scott Davies, Minneapolis
Hon. Mel I. Dickstein, Minneapolis
Francis Eggert, Winsted
Jennifer L. Frisch, Minneapolis
Karen E. Sullivan Hook, Rochester
Hon. Lawrence R. Johnson, Anoka
Hon. Kurt J. Marben, Thief River Falls
Hon. Kathryn D. Messerich, Hastings
Hon. Rosanne Nathanson, Saint Paul
Dan C. O'Connell, Saint Paul
Linda M. Ojala, Edina
Paul Reuvers, Bloomington
Timothy Roberts, Foley
Daniel Rogan, Robbinsdale
Hon. Jon Stafsholt, Glenwood
Hon. Robert D. Walker, Fairmont

Michael B. Johnson, Saint Paul
Staff Attorney

David F. Herr, Minneapolis
Reporter

Introduction

The advisory committee met five times[1] during 2007 and 2008 to consider the Court's referral to it of the issues raised by the Petition of Minnesota Joint Media Committee, Minnesota Newspaper Association, Minnesota Broadcasters Association, and Society of Professional Journalists, Minnesota Chapter ("Joint Petition"). In addition to its own research and deliberations, the committee held three meetings that amounted to public hearings, hearing from witnesses, including judges, lawyers, and representatives of organizations with an interest in these issues.

The committee's recommendations are summarized below, but the primary recommendation is that the current rules not be substantially changed, other than to consolidate them into a single rule provision. A minority of the committee would favor a relaxation of the current rule, and allow a trial judge to permit electronic media access to the courtroom without requiring consent of all parties.

Summary of Recommendations

The committee's specific recommendations are briefly summarized as follows:

1. **Majority Report.** A significant majority of the committee recommends retention of the existing rules on the availability of cameras in Minnesota courtrooms, with one non-substantive exception: the committee believes that the existing substantive rule should be contained in one place, rather than divided between the rules of practice, the code of judicial conduct, and a series of orders of this Court from the 1980's that effectively amend the code of judicial conduct. Therefore, the committee recommends that the Minnesota General Rules of Practice be amended to include portions of existing Canon 3 of the code of judicial conduct and that the Minnesota Code of Judicial Conduct be similarly shortened to include only a cross-reference to the general rules provision. The various orders amending or suspending provisions of the code should be made part of the published rule.

[1] August 1, September 21 & October 24, 2007; January 11 & February 27, 2008.

2. **Minority Report.** A minority of the committee favors a more extensive relaxing of the current rule. As now written, the rules effectively require consent of all parties before a court proceeding can be covered by media using still, video, or audio recording; and since adoption in the early 1980s, very few proceedings have been open to the electronic media. The minority would favor a rule that commits the decision about media access to the discretion of the trial court, with specific limitations. Because of the majority's conclusion that the availability to courtrooms should remain substantially unchanged, a specific minority proposal is not set forth.

The majority comprised 16 of the advisory committee's 19 voting members; the minority included three voting members.

Subsumed within both of the foregoing recommendations is an implicit further recommendation: that the Joint Petition should not be granted. Even if the Court were to conclude that the current rules should be relaxed, the committee believes the proposals in the Joint Petition are overbroad and not appropriate for adoption as submitted.

Committee Process

The history of this Court's consideration of electronic media access to courtrooms is relatively extended. The most important historical artifact is its 1983 order that established a two-year experimental process to permit, but not require, trial judges to allow cameras into courtrooms upon the consent of all interested parties. *See In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct*, Order (Minn. Sup. Ct. April 18, 1983). That order was extended by subsequent orders and appears to govern this issue today. The current Joint Petition would dramatically change the rules, creating a presumption of media access without regard to consent of parties or witnesses, and would permit exceptions only in limited circumstances and with findings by the trial court.

The committee spent considerable time and energy in an effort to gain a full understanding of the issues raised in the Joint Petition. It reviewed the Joint Petition that the Court referred to the advisory committee and invited Petitioners and their counsel to an initial meeting of the committee. The committee actively sought information from

interested parties and the public. The committee sent to parties known to have an interest in these issues, and published the notice on the Minnesota Judicial Branch website, a request that specifically sought information as follows:

> The committee welcomes comments on any aspect of these issues, but is particularly interested in obtaining objective or anecdotal evidence that helps answer the following questions:
>
> 1. How do cameras in criminal proceedings impact the fair trial rights of criminal defendants or the state's interests?
>
> 2. How does the use of camera coverage of court proceedings assist, if it does, in the administration of justice or improving public access to information about the courts?
>
> 3. Does camera coverage either advance or hinder the rights of litigants, including crime victims, civil litigants, and others? If so, how should these interests be balanced?
>
> 4. How does camera coverage impact non-party witnesses?
>
> 5. How have advances in technology changed the impact cameras, microphones, and related recording equipment have on court proceedings? What limits are appropriate to minimize the negative effects of this equipment?
>
> 6. In those jurisdictions where video or audio coverage of court proceedings is allowed, what impact has that coverage had on the conduct of the attorneys, judges, witnesses, or others in those matters?
>
> 7. In those jurisdictions where video or audio coverage of court proceedings is allowed:
>
>   a. Are there groups other than television stations, radio stations, and newspapers that have requested and/or obtained either audio or video coverage of courtroom proceedings:
>
>   b. Who provides the necessary camera and/or audio equipment?
>
>   c. Does it lengthen, shorten, improve, or affect trials?
>
>   d. How much advance notice does the judge receive?
>
>   e. What constitutes good cause for not permitting use of cameras or audio recordings?
>
> 8. What different concerns are there, if any, for proceedings in Minnesota appellate courts (the Minnesota Court of Appeals and Minnesota Supreme Court)?

9. If the committee were to recommend the adoption of broader use of cameras in Minnesota court proceedings, what limitations or other protections should be adopted?

The committee received numerous responses to this request for information.

The committee also conducted research into, and collected, the rules of other states dealing with media access to court proceedings. These rules provided the committee with useful insights into the issues other states have addressed and the issues of media access.

The committee met with representatives of the Petitioners, and heard from witnesses produced by interested parties, as well as those responding to the committee's notices of hearings. The following witnesses addressed the committee in person; in addition the committee received written comments from these and other interested persons, including written comments addressing each of the foregoing nine questions from Chief Justice Thomas J. Moyer, Chief Justice of the Supreme Court of Ohio.

The committee heard live "testimony" or presentations from the following witnesses:

1. Mark Anfinson, Attorney for Petitioners
2. Rick Kupchella, KARE 11 Investigative Reporter, representative of MN Chapter of the Society of Professional Journalists
3. Hon. Patrick Grady, Sixth District Court, Cedar Rapids, IA
4. Hon. Norman Yackel, Circuit Court, Sawyer County, WI
5. Lolita Ulloa (Racial Fairness Committee)
6. Jeffrey Degree (MN Association of Criminal Defense Attorneys)
7. Marna Anderson (WATCH)
8. Hon. Michael Kirk (MN Seventh Judicial District)
9. Hon. Lucy Wieland (MN Fourth Judicial District)
10. James Backstrom (Dakota County Attorney)
11. Janelle Kendall (Stearns County Attorney)
12. Charles Glasrud (Stevens County Attorney)
13. John Stuart (State Public Defender)
14. Donna Dunn (MN Coalition Against Sexual Assault)
15. Charles T. Hvass, Jr. (attorney, civil practice, Minneapolis)

16. Tom Frost (former prosecutor and Executive Director, CornerHouse Interagency Child Abuse Evaluation and Training Center, Minneapolis)
17. Olga Trujillo (Casa de Esperanza)
18. Diana Villella (Centro Legal, Inc.)
19. Carla M. Ferrucci (MN Coalition for Battered Women)
20. Earl Maus (appointee MN Ninth Judicial District; Cass County Attorney at time of appearance)
21. Ann Gustafson (Victim-Witness Assistance Program, St. Croix County, WI)
22. Mark Biller (former county attorney, Polk County, WI)

The committee reviewed the approaches of other states and the federal courts to the issues surrounding cameras in the courtroom and did not find a lot of directly helpful information. Clearly, it is possible to draft rules that allow cameras to be used while still protecting against many of the problems that concern the committee; it is not possible to solve some of the problems by rule-drafting, however.

The committee found the following publications of some value to it in its deliberations:

- Wendy Brewer & Thomas W. Pogorzelski, *Cameras in Court: How Television News Media Use Courtroom Footage*, 91 JUDICATURE 124 (2007).
- AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT ON CAMERAS IN THE COURTROOM (March 2006).
- KNOWLEDGE AND INFORMATION SERVICES, NATIONAL CENTER FOR STATE COURTS, CAMERAS IN THE COURTS: SUMMARY OF STATE COURT RULES (2001).
- NATIONAL CENTER FOR STATE COURTS, USE OF CAMERAS IN TRIAL COURTS – 2007.

These studies do not, however, shed a lot of light on the issue the Court faces.

Reasons for Committee Recommendations

The committee members approached with open and inquiring minds the question of whether the rules on cameras in Minnesota courtrooms should be relaxed. The

committee received substantial information about the role cameras have played in Minnesota court proceedings following this Court's orders in the early 1980's and about how other states have dealt with these issues. Ultimately, the committee found that there was insufficient evidence to support relaxation of the current rules.

The evidence received by the committee was hardly unequivocal. Among the conclusions a majority of the committee would draw and that would militate in favor of relaxing the current rule are the following:

1. A significant majority of states have implemented more liberal access to camera and voice devices in courtrooms, and the judges and litigants from those states have not reported particular problems caused by cameras and media access. The committee did not hear about any of the problems feared by the opponents in Minnesota, such as victim and witness reticence, disruption of the pretrial process, or grandstanding by lawyers.
2. Other things being equal, greater access to courtrooms by electronic media would advance to some degree the interests of the public in having access to information about judicial proceedings. The importance of this factor is not always clear in many aspects of media coverage, however. The committee did not receive information suggesting that greater access yields greater coverage that really provides a realistic view of the administration of justice; the majority of the coverage is short in duration and skewed towards sensational stories and trials.
3. Technology has advanced in the past decades to permit cameras to be placed in courtrooms in ways that are not very obtrusive from a physical standpoint and court rules can effectively control issues of obtrusiveness and physical interference with proceedings.
4. Any relaxation of the current rules should be limited to prevent use of cameras in certain proceedings, including family law, juvenile, probate, and other categories of cases and in any case where depiction of child witnesses, jurors, or confidential sidebar or attorney-client communications would be shown.

Major concerns that militate in favor of retaining the procedural limitations of the current rule include:

1. The committee did not see any benefit to the core mission of the courts: the search for truth and the administration of justice. Cameras do not help the courts get cases tried fairly, and sometimes interfere with that goal.
2. Balanced against the absence of benefit is a clear cost of allowing camera access. Some judge time, some prosecutor time, and some defense counsel time is inevitably expended dealing with concerns about whether camera coverage should be allowed, hearing disputes over this issue, and monitoring media compliance with any court-imposed guidelines. A majority of the committee concludes that these costs outweigh any benefits of changing the current rule.
3. The committee heard from only one representative of the broader "public" suggesting that the current rules should be changed. That submission argued that family law matters should be opened to camera coverage in order to foster "more fact-based and child-centered decisions." The request for change comes most prominently from the organized news media.
4. The majority of the participants in the Minnesota court system opposed changing the current practice. This opposition transcended the predictable resistance to change, and came particularly strongly from the participants in the criminal justice system. Representatives of prosecutors, public defenders, and victim advocates fairly consistently opposed relaxation of the current rules.
5. The committee was concerned about the chilling effects cameras would have in several types of cases, including criminal, juvenile, family, and order-for-protection proceedings. Even if cameras were limited to prevent their use in particular categories of cases, the committee heard and credited the views of numerous participants in those proceedings that crime victims and witnesses, and other interested parties, would be deterred from reporting crimes or from agreeing to testify. This is a significant problem that cannot be readily mitigated; the mere fact that camera coverage of court proceedings is generally known to exist is, according to witnesses before the committee, likely to cause crime and domestic abuse victims and witnesses to decline to

report crimes and to refuse to come forward to testify. This chilling effect on victims and witnesses occurs even in types of cases where cameras are not likely to be allowed, as the victims or witnesses would have the impression that being in court subjects one to camera scrutiny.

6. The committee was not convinced that the vast majority of cases warrant coverage for the purpose of improving public understanding of the operation of the judiciary. There does not appear to be empirical evidence that supports the conclusion that relaxing the rules on media access would result in better public understanding. The committee did not hear of a single example from a state with greater media access where advancement of the public understanding of the judicial role was appreciably advanced.
7. The reality of media coverage in states that allow access "on request" is that the stories tend to be short "sound-bites" that focus on sensational cases involving famous or notorious litigants. The committee did not conclude that this type of coverage would generally foster greater public confidence in the judicial system. The cable channel "Court TV" has changed its name and no longer provides extensive coverage of trial court proceedings.
8. Some committee members are concerned about the use that may be made of images from courtroom coverage. In the modern age, images are susceptible to distortion and misuse, and this has particularly dire consequences for court proceedings. The committee is concerned that camera access will result in "trial by YouTube," and that neither the public interest nor that of litigants would be served in the process.
9. Although not a major factor, the committee also notes concern about who should have access if a relaxed rule were adopted. Given the proliferation of media channels and outlets, including a significant question of the status of web-logging (blogging), the committee has concerns about the feasibility of managing media access. *See generally* Jessi Hempel, *Are Bloggers Journalists?*, Business Week, *Mar. 7, 2005, available at http://www.businessweek.com/technology/content/mar2005/tc2005037_7877_*

tc024.htm (last visited March 2, 2008) (reporting on decision relating to question of whether journalist privilege applies to work of bloggers).

One of the concerns raised was the impact of expanded use of cameras on minorities. Ultimately, it was not something that the committee spent a great deal of time on, in part because the early consensus seemed to be that no change was recommended.

Another issue that was raised was the possibility of a pilot project. Several chief judges expressed to the committee an interest in participating in a pilot project, while other participants in those same districts uniformly opposed the concept.

The majority view represents a total of sixteen (16) committee members.[2] The minority view, set forth following the majority rule draft below, represents a total of three committee members.

Style of Report

The specific recommendations are reprinted in traditional legislative format, with new wording underscored and deleted words ~~struck through~~.

Respectfully submitted,

MINNESOTA SUPREME COURT ADVISORY COMMITTEE ON GENERAL RULES OF PRACTICE

[2] The committee liaison, reporter and staff are non-voting members.

RECOMMENDATIONS: **Retain the existing rules, but move the substantive provisions regulating cameras in courtrooms to a single place, in Rule 4 of the General Rules of Practice.**

The committee's only recommended rule amendment requires related changes to several existing rules provisions: Canon 3A(11) of the Minnesota Code of Judicial Conduct, this Court's series of orders modifying former Canon 3A(7) (later 3A(10) and now 3A(11)) of the Code of Judicial Conduct, and Rule 4 of the Minnesota General Rules of Practice. These changes should be made (or not made) together, as they are directly related and dependent on each other.

1. Amend Canon 3 of the Minnesota Code of Judicial Conduct as follows:

MINNESOTA CODE OF JUDICIAL CONDUCT

Canon 3A(11):

(11) ~~Except in the Supreme Court and the Court of Appeals, a~~ A judge shall prohibit broadcasting, televising, recording or taking photographs in the courtroom and areas immediately adjacent thereto ~~during sessions of court or recess between sessions. A judge may, however, authorize:~~ except as permitted by order or court rule adopted by the Minnesota Supreme Court.

~~(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record or for other purposes of judicial administration;~~

~~(b) the broadcasting, televising, recording or photographing of investitive, ceremonial or naturalization proceedings;~~

~~(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:~~

~~(i) the means of recording will not distract participants or impair the dignity of the proceedings;~~

~~(ii) the parties have consented, and the consent to be depicted or recorded has been obtained from each witness appearing in the recording and reproduction;~~

~~(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and~~

~~(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.~~

General Rules Advisory Committee Comment—2008

This rule is amended to delete the specific standards to be followed in considering whether electronic recording and transmission should be allowed of Minnesota court proceedings. The material deleted is adopted in part in Rule 4 of the Minnesota General Rules of Practice, applicable in all court proceedings other than appeals or similar proceedings in the Minnesota Court of Appeals and Minnesota Supreme Court. Rule 4 is modified, however, to incorporate salient provisions of a series of orders dealing with a multi-decade experiment to permit some recording or broadcast of court proceedings with the agreement of all parties. *See In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct*, Order re: Audio and Video Coverage of Trial Court Proceedings, No. C7-81-300 (Minn. Sup. Ct. April 18, 1983); *Order Permitting Audio and Video Coverage of Supreme Court Proceedings*, No. C6-78-47193 (Minn. Sup. Ct. April 20, 1983); *Amended Order Permitting Audio and Video Coverage of Appellate Court Proceedings*, No. C7-81-3000 (Minn. Sup. Ct. Sept. 28, 1983); *In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct to Conduct and Extend the Period of Experimental Audio and Video Coverage of Certain Trial Court Proceedings*, Order, C7-81-300 (Minn. Sup. Ct. Aug. 21, 1985); *In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct*, Order re: Audio and Video Coverage of Trial Court Proceedings (Minn. Sup. Ct. May 22, 1989); and *In re Modification of Canon 3A(10) of the Minnesota Code of Judicial Conduct*, Order, No. C7-81-3000 (Minn. Sup. Ct. Jan. 11, 1996)(reinstating April 18, 1983, program and extending until further order of Court).

The reason for amendment of Canon 3A(11) is to state in the Code of Judicial Conduct the simple requirement that judges adhere to the Minnesota Supreme Court's orders and rules relating to recording and broadcast of court proceedings, and that the actual substantive requirements be contained in a single place. Rule 4 of the Minnesota General Rules of Practice, adopted at the same time as the amendment of Canon 3A(11) now sets forth all the surviving portions of this canon and the intervening orders that have modified it. All of these provisions were updated to reflect current recording technologies.

2. Terminate the temporary suspension of the rules as established by a series of orders of this Court.

The Order adopting these recommended rule changes should end the "temporary" suspension of Canon 3A(7) (now Canon 3A(11)) as mandated by the following orders of this court:

1. *In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct,* Order re: Audio and Video Coverage of Trial Court Proceedings, No. C7-81-300 (Minn. Sup. Ct. April 18, 1983);
2. *Order Permitting Audio and Video Coverage of Supreme Court Proceedings*, No. C6-78-47193 (Minn. Sup. Ct. April 20, 1983);
3. *Amended Order Permitting Audio and Video Coverage of Appellate Court Proceedings*, No. C7-81-3000 (Minn. Sup. Ct. Sept. 28, 1983);
4. *In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct to Conduct and Extend the Period of Experimental Audio and Video Coverage of Certain Trial Court Proceedings*, Order, C7-81-300 (Minn. Sup. Ct. Aug. 21, 1985);
5. *In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct*, Order re: Audio and Video Coverage of Trial Court Proceedings (Minn. Sup. Ct. May 22, 1989); and
6. *In re Modification of Canon 3A(10) of the Minnesota Code of Judicial Conduct,* Order, No. C7-81-3000 (Minn. Sup. Ct. Jan. 11, 1996)(reinstating April 18, 1983, program and extending until further order of Court).

The subject matter of these orders, to the extent still relevant and necessary for inclusion in a rule of court, is incorporated into the recommended amendment of Rule 4 of the Minnesota General Rules of Practice, set forth in Recommendation 3, below.

3. Amend Rule 4 of the Minnesota General Rules of Practice as follows:

MINNESOTA GENERAL RULES OF PRACTICE

Rule 4. Pictures and Voice Recordings

Rule 4.01 General Rule. Except as set forth in this rule, ~~N~~no pictures or voice recordings, except the recording made as the official court record, shall be taken in any courtroom, area of a courthouse where courtrooms are located, or other area designated by order of the chief judge made available in the office of the court administrator in the county, during a trial or hearing of any case or special proceeding incident to a trial or

hearing, or in connection with any grand jury proceedings. This rule ~~shall~~ may be superseded by specific rules of the Minnesota Supreme Court relating to use of cameras in the courtroom for courtroom security purposes, for use of videotaped recording of proceedings to create the official recording of the case, or for interactive video hearings pursuant to rule or order of the supreme court. This Rule 4 does not supersede the provisions of the Minnesota Rules of Public Access to Records of the Judicial Branch.

Rule 4.02 Exceptions. A judge may, however, authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record or for other purposes of judicial administration;

(b) the broadcasting, televising, recording or photographing of investitive, ceremonial or naturalization proceedings;

(c) upon the consent of the trial judge and all parties in writing or made on the record prior to the commencement of the trial, the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) There shall be no audio or video coverage of jurors at any time during the trial, including *voir dire*.

(ii) There shall be no audio or video coverage of any witness who objects thereto in writing or on the record before testifying.

(iii) Audio or video coverage of judicial proceedings shall be limited to proceedings conducted within the courtroom, and shall not extend to activities or events substantially related to judicial proceedings ~~which~~ that occur in other areas of the court building.

(iv) There shall be no audio or video coverage within the courtroom during recesses or at any other time the trial judge is not present and presiding.

(v) During or preceding a jury trial, there shall be no audio or video coverage of hearings ~~which~~ that take place outside

the presence of the jury. Without limiting the generality of the foregoing sentence, such hearings would include those to determine the admissibility of evidence, and those to determine various motions, such as motions to suppress evidence, for judgment of acquittal, *in limine* and to dismiss.

(vi) There shall be no audio or video coverage in cases involving child custody, marriage dissolution, juvenile proceedings, child protection proceedings, paternity proceedings, petitions for orders for protection, motions to suppress evidence, police informants, relocated witnesses, sex crimes, trade secrets, ~~and~~ undercover agents, and proceedings that are not accessible to the public. No ruling of the trial court relating to the implementation or management ~~of this experimental program~~ of audio or video coverage under this rule shall be appealable until the trial has been completed, and then only by a party.

Rule 4.03. Technical Standards for Photography, Electronic and Broadcast Coverage of Judicial Proceedings. The trial court may regulate any aspect of the proceedings to ensure that the means of recording will not distract participants or impair the dignity of the proceedings. In the absence of specific order imposing additional or different conditions, the following provisions apply to all proceedings.

(a) Equipment and personnel.

(1) Not more than one portable television or movie camera ~~[film camera 16 mm sound on film (self blimped) or videotape electronic camera]~~, operated by not more than one person, shall be permitted in any trial court proceeding.

(2) Not more than one still photographer, utilizing not more than two still cameras with not more than two lenses for each camera and related equipment for print purposes, shall be permitted in any proceeding in any trial court.

(3) Not more than one audio system for radio broadcast purposes shall be permitted in any proceeding in any trial court. Audio pickup for all media purposes shall be accomplished from existing audio systems present in the court. If no technically suitable audio system exists in the court, microphones and related wiring essential for media purposes shall be unobtrusive and shall be located in places designated in advance of any proceeding by the trial judge.

(4) Any "pooling" arrangements among the media required by these limitations on equipment and personnel shall be the sole responsibility of the media without calling upon the trial judge to mediate any dispute as to the appropriate media representative or equipment authorized to cover a particular proceeding. In the absence of advance media agreement on disputed equipment or personnel issues, the trial judge shall exclude from a proceeding all media personnel who have contested the pooling arrangement.

(b) Sound and light.

(1) Only television photographic and audio equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. Excepting modifications and additions made pursuant to Paragraph (e) below, no artificial, mobile lighting device of any kind shall be employed with the television camera.

(2) Only still camera equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. Specifically, such still camera equipment shall produce no greater sound or light than a 35 mm Leica "M" Series Rangefinder camera, and no artificial lighting device of any kind shall be employed in connection with a still camera.

(3) ~~It shall be the affirmative duty of m~~Media personnel ~~to~~ must demonstrate to the trial judge adequately in advance of any proceeding that the equipment sought to be utilized meets the sound and light ~~criteria enunciated herein~~ requirements of this rule.

A failure to demonstrate that these criteria have been met for specific equipment shall preclude its use in any proceeding. ~~If these Guidelines should include a list of equipment approved for use, such equipment need not be the object of such a demonstration.~~

(c) Location of equipment and personnel.

(1) Television camera equipment shall be positioned in such location in the court as shall be designated by the trial judge. The area designated shall provide reasonable access to coverage. When areas ~~which~~ that permit reasonable access to coverage are provided, all television camera and audio equipment ~~shall~~ must be located in an area remote from the court.

(2) A still camera photographer shall position himself or herself in such location in the court as shall be designated by the trial judge. The area designated shall provide reasonable access to coverage. Still camera photographers shall assume a fixed position within the designated area and, once a photographer has established himself or herself in a shooting position, he or she shall act so as not to ~~call attention to himself or herself through~~ attract attention by distracting movement. Still camera photographers shall not be permitted to move about in order to obtain photographs of court proceedings.

(3) Broadcast media representatives shall not move about the court facility while proceedings are in session.

(d) Movement of equipment during proceedings. News media photographic or audio equipment shall not be placed in, or removed from, the court except ~~prior to~~ before commencement or after adjournment of proceedings each day, or during a recess. Microphones or taping equipment, once positioned as required by (a)(3) above, ~~shall~~ may not be moved from their position during the pendency of the proceeding. Neither television film magazines nor still camera film or lenses ~~shall~~ may be changed within a court except during a recess in the proceedings.

(e) **Courtroom light sources.** When necessary to allow news coverage to proceed, modifications and additions may be made in light sources existing in the facility, provided such modifications or additions do not produce distracting light and are installed and maintained without public expense. Such modifications or additions are to be presented to the trial judge for review prior to their implementation.

(f) **Conferences of counsel.** To protect the attorney-client privilege and the effective right to counsel, there shall be no video or audio pickup or broadcast of the conferences which occur in a court between attorneys and their client, co-counsel of a client, opposing counsel, or between counsel and the trial judge held at the bench. In addition, there shall be no video pickup or broadcast of work papers of such persons.

(g) **Impermissible use of media material.** None of the film, videotape, still photographs or audio reproductions developed during, or by virtue of, coverage of a judicial proceeding shall be admissible as evidence in the proceeding out of which it arose, any proceeding subsequent or collateral thereto, or upon any retrial or appeal of such proceedings.

Rule 4.04. Camera Access in Appellate Court Proceedings.

(a) Unless notice is waived by the Chief Justice of the Supreme Court or the Chief Judge of the Court of Appeals, notice of intent to cover appellate court proceedings by either audio or video means shall be given by the media to the Clerk of the Appellate Courts at least 24 hours prior to the time of the intended coverage.

(b) *Camera~~men~~ operators, technicians, and photographers covering a* proceeding ~~shall~~ must:

- avoid activity which might distract participants or impair the dignity of the proceedings;
- remain seated within the restricted areas designated by the Court;
- observe the customs of the Court;
- conduct themselves in keeping with courtroom decorum; and
- not dress in a manner ~~which~~ that sets them apart unduly from the participants in the proceeding.

(c) All broadcast and photographic coverage shall be on a pool basis, the arrangements for which must be made by the pooling parties in advance of the hearing.

Not more than one (1) electronic news gathering ("ENG") camera producing the single video pool-feed shall be permitted in the courtroom. Not more than two (2) still-photographic cameras shall be permitted in the courtroom at any one time. Motor-driven still cameras ~~shall~~ may not be used.

(d) Exact locations for all camera and audio equipment within the courtroom shall be determined by the Court. All equipment ~~shall~~ must be in place and tested 15 minutes in advance of the time the Court is called to order and ~~shall~~ must be unobtrusive. All wiring, until made permanent, ~~shall~~ must be safely and securely taped to the floor along the walls.

(e) Only existing courtroom lighting ~~shall~~ may be used.

Advisory Committee Comment—~~1994~~2008 Amendments

This rule ~~is~~was initially derived from the ~~current~~ local rules of three districts.

~~It appears that this rule is desired by the benches of three districts and it may be useful to have an articulated standard for the guidance of lawyers, litigants, the press, and the public.~~

The Supreme Court adopted rules allowing cameras in the courtrooms in limited circumstances, and it is inappropriate to have a written rule that does not accurately state the standards which lawyers are expected to follow. *See In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct*, No. C7-81-300 (Minn. Sup. Ct. May 22, 1989). The court has ordered an experimental program for videotaped recording of proceedings for the official record in the Third, Fifth and Seventh Judicial Districts. In re Videotaped Records of Court Proceedings in the Third, Fifth, and Seventh Judicial Districts, No. C4-89-2099 (Minn. Sup. Ct. Nov. 17, 1989) (order). The proposed local rule is intended to allow the local courts to comply with the broader provisions of the Supreme Court Orders, but to prevent unauthorized use of cameras in the courthouse where there is no right to access with cameras.

~~This rule is amended in 1994 to make it unnecessary for local courthouses to obtain Supreme Court approval.~~ The rule was amended in 2008 to add Rule 4.02, comprising provisions that theretofore were part of the Minnesota Rules of Judicial Conduct. This change is not intended to be substantive in nature, but the provisions are moved to the court rules so they are more likely to be known to litigants. Canon 3(A)(11) of the Minnesota Code of Judicial Conduct is amended to state the current obligation of judges to adhere to the rules relating to court access for cameras and other electronic reporting equipment.

The extensive amendment of Rule 4 in 2008 reflects decades of experience under a series of court orders dealing with the use of cameras in Minnesota courts. *See In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct*, Order re: Audio and Video Coverage of Trial Court Proceedings, No. C7-81-300 (Minn. Sup. Ct. April 18, 1983); *Order Permitting Audio and Video Coverage of Supreme Court Proceedings*, No. C6-78-47193 (Minn. Sup. Ct. April 20, 1983); *Amended Order Permitting Audio and Video Coverage of Appellate Court Proceedings*, No. C7-81-3000 (Minn. Sup. Ct. Sept. 28, 1983); *In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct to Conduct and Extend the Period of Experimental Audio and Video Coverage of Certain Trial Court Proceedings*, Order, C7-81-300 (Minn. Sup. Ct. Aug. 21, 1985); *In re Modification of Canon 3A(7) of the Minnesota*

Code of Judicial Conduct, Order re: Audio and Video Coverage of Trial Court Proceedings (Minn. Sup. Ct. May 22, 1989); and *In re Modification of Canon 3A(10) of the Minnesota Code of Judicial Conduct*, Order, No. C7-81-3000 (Minn. Sup. Ct. Jan. 11, 1996)(reinstating April 18, 1983, program and extending until further order of Court). The operative provisions of those orders, to the extent still applicable and appropriate for inclusion in a court rule, are now found in Rule 4.

Amended Rule 4.01 defines how this rule dovetails with other court rules that address issues of recording or display of recorded information. The primary thrust of Rule 4 is to define when media access is allowed for the recording or broadcast of court proceedings. Other rules establish limits on access to or use of court-generated recordings, such as court-reporter tapes and security tapes. *See, e.g.*, Minnesota Rules of Public Access to Records of the Judicial Branch.

Amended Rules 4.02(a) & (b) are drawn from Canon 3A(11)(a) & (b) of the Minnesota Code of Judicial Conduct prior to its amendment in 2008. Rule 4.02(c) and the following sections (i) through (vii) are taken directly from the Standards of Conduct and Technology Governing Still Photography, Electronic and Broadcast Coverage of Judicial Proceedings, Exhibit A to *In re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct*, Order re: Audio and Video Coverage of Trial Court Proceedings, No. C7-81-300 (Minn. Sup. Ct. April 18, 1983)

Amended Rule 4.04 establishes rules applicable to the appellate courts, and is drawn directly from *Amended Order Permitting Audio and Video Coverage of Appellate Court Proceedings*, No. C7-81-3000 (Minn. Sup. Ct. Sept. 28, 1983).

MINORITY REPORT AND RECOMMENDATION

The majority argues that the proponents of a more liberal rule regarding cameras in the courtroom (*i.e.*, permitting them in certain cases without the unanimous consent of the parties and the judge) have not met their burden of proving that doing so will improve the administration of justice. If that is the burden which must be met, they may be correct.

The minority, however, challenges the proposition that those proposing a more liberal rule have such a burden. We approach the problem with a frame of mind that a more liberal rule should be adopted unless it can be shown that doing so is likely to degrade the administration of justice by our trial courts. Approaching it from that perspective, we submit that opponents of a more liberal rule have failed to meet their burden of showing that such will degrade or detract from the quality of administration of justice in Minnesota's trial courts.

The First Amendment to the United States Constitution and Article I, Section 3 of the Minnesota Constitution guarantee freedom and liberty of the press. No one argues that the press, as representatives of the people in a sense, should not be allowed to observe trial court proceedings, report them, or to publish sketches of the participants. At the same time, no one argues that the courts cannot, at least for good cause, prohibit the use of cameras in the courtrooms. In the past many courts have done so, and some still do. The justifications for doing so have traditionally been to protect the privacy of some litigants, *e.g.*, juveniles, and to prevent disruption of court proceedings.

The rule which we propose, and which is essentially the rule that has been in effect in Minnesota since 1983, (minus the parties' veto power), prohibits camera coverage in every conceivable case where privacy is a concern, such as in juvenile and children in need of protection (CHIPS) cases, family law cases, domestic abuse and sexual abuse cases, and in certain other kinds of proceedings. *See* proposed Rule 4.02(c)(vi). It gives the trial judge discretion to prohibit photography of a witness who requests not to be photographed. It prohibits camera coverage of *voir dire*, and of the jury at any time. It gives the trial judge discretion to prohibit camera coverage entirely for good cause, on a case-by-case basis.

The minority's proposed rule would adopt the majority proposal with two substantively important, although not extensive, changes. The first change is in Rule 4.02(c), beginning on line 75 of the majority report (minority report changes are shown in ***bold italicized*** text compared to the majority report language):

(c) upon the consent of the trial judge ~~***and all parties***~~ in writing or made on the record prior to the commencement of the trial, the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

The second change is in Rule 4.02(c)(ii) beginning on line 81 of the majority report (minority report changes are shown in ***bold italicized*** text compared to the majority report language):

(ii) ***At the discretion of the trial judge, t***~~T~~here shall be no audio or video coverage of any witness who objects thereto in writing or on the record before testifying.

Disruption of proceedings and distraction are no longer an issue. Gone are the large, noisy cameras, still and motion picture, of days gone by. Today's cameras are small, quiet and unobtrusive.

We believe that since the courts do the public's business, the public should have as great an opportunity as possible to see and know of what their courts are doing. Certainly any member of the public can come down to the courthouse any time to personally observe most proceedings. Realistically, it is not possible or feasible for most people to do so. Most have to rely on the media to know what is going on in the courts.

The public is accustomed to getting, as an important part of its news, photographs and video as an aid to understanding the news – what is going on in the world and in their community. Photographs and video clips of courtroom scenes which are of interest to the

public will enhance their understanding of the proceedings and, we think, enhance their appreciation for what their courts are doing.

The committee received objections, oral and written, to a change in the rule from almost every conceivable quarter: prosecutors, public defenders, criminal defense lawyers, civil trial lawyers and victim's rights advocates. Many of those objections dealt with such things as protections for juveniles, sexual abuse victims and domestic abuse victims. Those concerns are met in the proposed rule. As for general objections to the basic concept of cameras, no evidence at all was provided to show that the presence of cameras in the courtroom is likely to be a distraction or that images broadcast by the media were likely to cause any harm to the courts or the litigants. The objectors offered nothing but unsubstantiated fear of change and fear of the unknown.

Were we to have employed a *Frye-Mack* test (*see State v. Mack*, 292 N.W.2d 764 (Minn. 1980) to those who spoke against a liberalization of the rule and warned of dire consequences, none would have been permitted to offer their opinions because none had any experience whatsoever with cameras in courtrooms; and clearly the proposition that cameras in courtrooms are undesirable has not gained general acceptance in the courts of the several states, since a large majority of the states permit cameras in their trial courts, and many have done so for many years.

Significantly, what the committee did *not* hear were comments from persons experienced with cameras in the courtroom who believed it was a bad idea, or who had experienced problems.

We are told that 35 states permit cameras in their courtrooms on a more liberal basis than does Minnesota. Our neighbors Wisconsin, Iowa and North Dakota routinely permit use of cameras in their courtrooms and have done so for many years. In March 2008 our last remaining camera-less neighbor, South Dakota, repealed a law that has prohibited radio and television broadcasting and the taking of photographs in trial-level courtrooms.

No judge from any state where cameras have been permitted in the trial courts addressed the committee, either in person or in writing, to express any reservations about the concept or to tell us of any problems encountered in their states.

No prosecutor or prosecutor's association, no public defender or criminal defense lawyer or association of them, no victim's rights advocate or victim's rights advocates group, no civil litigation attorneys or associations of them from any state which permits cameras in their courtrooms appeared before the committee to lend credence to the concerns expressed by Minnesota prosecutors, criminal defense lawyers, civil litigators or victim's rights advocates. If, indeed, problems are likely to arise in Minnesota as a result of the introduction of cameras in the courtrooms, one would expect that such problems would have arisen in other states and that those opposed to cameras would have arranged for the committee to be made aware of the existence of such problems.

The committee was addressed by the Hon. Norman Yackel of Sawyer County, Wisconsin, and the Hon. Patrick Grady of Cedar Rapids, Iowa, both trial court judges. Each told us that cameras have been allowed in the trial courts of their states for many years and that there have been no problems with them. In fact, they found it somewhat curious that Minnesota is engaged in a debate over the concept which has been so well accepted and considered to be mundane and routine in their court systems.

Judge Yackel presided over the trial of Chai Vang of Saint Paul, who was charged with the murder of six hunters in Wisconsin in 2004. There was considerable public and media interest in the Twin Cities. Twin Cities media covered the trial, held in Hayward, Wisconsin, and no doubt broadcast still photos and video footage of courtroom proceedings, since cameras are allowed in Wisconsin courtrooms. Judge Yackel told the committee that the presence of cameras during that trial created no problems whatsoever. No one brought to the attention of the committee any complaints or concerns with the way the Twin Cities television media reported on that trial.

Persons opposed to cameras in courtrooms typically cite the O.J. Simpson trial and the Florida judge in the Anna Nicole Smith case as examples of why cameras should be prohibited. When one considers the many thousands of trials and other courtroom proceedings which have likely been covered by media with cameras in the courtrooms in 35 states, and the fact that only two of them appear to have shown the court system in a bad light, it seems that the chances of anything of a similar nature happening in a Minnesota courtroom are slim, indeed.

The Rule adopted by the Minnesota Supreme Court on April 18, 1983, and appended to Canon 3 of the Code of Judicial Conduct was well thought out and is essentially the Rule which the Minority proposes with only one significant difference. The veto power of the parties and witnesses to the presence of cameras in the courtroom has been eliminated, and has been entrusted to the discretion of the trial judge. The many restrictions contained in the current rule are continued in the proposed rule.

The 1983 Rule was a good one, but unfortunately never used, insofar as we can tell. There have been no reports of any Minnesota trial proceedings at which cameras have been authorized since the rule was adopted, apparently because there has never been a case in which both sides agreed to it.

We urge the Court to adopt the Minority's proposed amendment to Rule 4, General Rules of Practice.

Respectfully submitted,

Hon. Steven J. Cahill
Hon. Elizabeth Anne Hayden
Linda M. Ojala

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27 May 2008

Frederick Grittner
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Re: ***HEARING TO CONSIDER PROPOSED AMENDMENTS TO THE GENERAL RULES OF PRACTICE***
Ct. File No. CX-89-1863

Dear Mr. Grittner;

This letter is to provide input to the Court for consideration in connection with Supreme Court hearing on the cameras in the courtroom report for July 1, 2008, at 2:00 p.m. in the Judicial Center in St. Paul. I am writing on Behalf of the Minnesota Association of Criminal Defense Lawyers (MACDL), as a member of our Board of Directors, and Chair of the Rules Committee. Please accept this letter as the written submission and request to make an oral presentation to the Court on the above issue on behalf of the MACDL.

The MACDL is the largest private criminal defense organization in the State of Minnesota, representing nearly 200 lawyers engaged in the practice of criminal defense. The members of the MACDL consist of both private practitioners and public defenders. The MACDL Rules Committee oversees proposed changes in various rules which affect the practice of criminal defense attorneys, and on behalf of MACDL membership responds to requests for input to committees and the courts in response to proposed rules changes.

The MACDL recognizes that this is an issue which needs to be reviewed and considered in light of many changes in technology and

newsgathering methods. We do not believe, however, that a change in the current prohibition on cameras is warranted or beneficial to any person or party involved in court proceedings in Minnesota. Having discussed our position with the State Public Defender and the Minnesota County Attorneys Association and we join in their submission and endorse their recommendations. Additionally, we submit the following observations for your consideration.

It is our position that the present rule strikes a fair balance between the needs of defendants, defense attorneys, prosecutors, victims and other persons in the court system with the interests of newsgathering. Allowing live coverage of certain moments in a courtroom will tend to highlight one portion of a lengthy event. The public, through the media, is treated to a 15 second blurb, but miss the mundane or normal aspects of legal proceedings. We fear that this fact will tend to take legal proceedings out of context, and lend to the "True Crime Stories" expectations of the public. It is our position that this will cut away at the dignity of legal proceedings and create an atmosphere that harms our client's interests. The end result is a situation that does not assist the administration of justice.

We have concerns with fairness to parties and participants, but also believe the proposed use of cameras does not improve public access. Providing daily highlights from inside the courtroom is not the equivalent of public access to the goings on in the courts. As discussed above, the preference to examine a highlight or segment of a case is not giving the public access to the events of a trial. The proposed rule change actually reduces public access by narrowing the view of court proceedings to a small segment of what actually occurs. Presently, reporters through traditional means of attending a trial and journaling the events are caused to report more broadly and accurately. This is because there is not a single moment that can be captured live replayed and overemphasized.

We dispute that technology changes are sufficient to limit negative impact on court proceedings. This issue can not be examined in the narrow context of flash bulbs and running cameras. We ask that you examine the impact that the mere knowledge and presence of cameras has on persons, especially witnesses, and casual viewers. It has been argued that judges, prosecutors, and attorneys will become numb to the presence over time. This assertion, though disputed, does not examine the entire picture. The mere fact that a witness is being filmed can cause differences in testimony

and presentation of facts. As a case-in-point we ask you to consider the testimony of Brian "Kato" Kaelin, an aspiring American actor who received considerable notoriety due to his peripheral involvement in events surrounding the 1994-95 O.J. Simpson murder case. His name has become something of a byword, as a textbook example of Andy Warhol's 15 minutes of fame. Yet in a trial with approximately 150 witnesses he is remembered because he took it upon himself to ape for the cameras, doing his testimony as a performance piece. We fear others will be so influenced though to a lesser degree. Regardless of the degree of influence imposed by the presence of cameras, we oppose them as we see any influence they will have on how people testify will decay the pursuit of truthful testimony.

We ask you to look to the recent Minnesota case, *State v. Harry Evans* (AKA The Officer Vick Murder Trial), and ask if you can imagine how the post trial proceedings on this weighty matter would have been impacted by the presence of cameras. We submit that the juror turned witness would be in a more difficult position to tell the truth about how they may have been influenced or acted during the course of the trial. We submit that that Cathy Arver, the former pull-tab worker at the Lucky Foxx bar who reported the slur, would be reluctant to report what she observed. Most importantly, we submit that there could be no benefit to the pubic, lawyers, judge, witnesses, victim's family or society as a whole if this were given greater sensationalism through live cameras in the courtroom.

For the above reasons we request that no changes be made to the current rules for cameras in the courtroom.

Yours truly,

Thomas C. Plunkett
MACDL, Rule Committee Chair

TCP/ao

No. CX–89–1863

State of Minnesota

In Supreme Court

In re:

Proposed Amendments to
Minnesota Code of Judicial Conduct
Canon 3A(11), and Minnesota
General Rule of Practice 4

PETITIONERS' MEMORANDUM AND APPENDIX TO SUPREME COURT IN SUPPORT OF RELIEF REQUESTED

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No. CX–89–1863

STATE OF MINNESOTA
IN SUPREME COURT

In Re:

Proposed Amendments to
Minnesota Code of Judicial Conduct Canon 3A(11),
and Minnesota General Rule of Practice 4

PETITIONERS' MEMORANDUM TO SUPREME COURT IN SUPPORT OF RELIEF REQUESTED

The life of the law has not been logic: It has been experience.

Oliver Wendell Holmes, *The Common Law* (1881), at 1

The strength of our persuasions is no evidence at all of their rectitude.

John Locke, *An Essay Concerning Human Understanding* (1690), Book IV, chapter 19

The foremost reason for making the judiciary more accessible is that all courts are the citizens' courts. It is the public's trust and confidence, not law books, that grant the courts the moral authority necessary to enforce the rule of law. But for many people, the court system is shrouded in mystery. Being able to see the court . . . dispels that perception and helps de-mystify the work of judges.

Chief Justice Thomas J. Moyer (Ohio)
in response to questions about electronic coverage posed by General Rules Advisory Committee, 9/07

Introduction

In the nearly 20 years since the Court last visited the issue of whether electronic coverage of Minnesota's trial courts should be permitted, a great deal has been learned about the impact of such coverage—not in Minnesota, but in the 35 or more states where the news media are now routinely allowed access for purposes of audio and video recording. Two decades ago, the potential effects of electronic coverage on the judicial system were not well understood, and much was therefore necessarily left to speculation and conjecture. But that is no longer the case. Experience has accumulated in some states for more than 30 years, and in many others for at least 20. The latter include three of Minnesota's close neighbors: Wisconsin, Iowa, and North Dakota.

The principal argument offered by Petitioners here is that this body of experience should constitute the Court's primary point of reference in ruling on the petition. The long tradition of the law has been that where probative evidence is available, it is to be preferred over speculative and conclusory allegations of injury. This is especially true where, as here, the available evidence strongly suggests that no serious harm will occur, and that in any event, the documented benefits of allowing expanded electronic coverage far outweigh possible adverse consequences.

Part of the function of the General Rules Advisory Committee in considering the petition was, of course, to perform an assessment of these detriments and benefits.

However, the recommendations of the Committee's majority against changing the electronic coverage rules in Minnesota are remarkably detached from the record developed by the Advisory Committee during the months it weighed that issue. It is not an exaggeration to state that virtually all of the real evidence presented during the Advisory Committee's deliberations—relevant oral and written submissions grounded in actual experience with electronic trial court coverage in other states—firmly suggests that such coverage produces many benefits and few problems. Indeed, there was almost *no* evidence (if that term is defined as it normally would be in legal proceedings) submitted to the Advisory Committee by the opponents of expanded electronic coverage. What they presented instead was a torrent of rhetoric, denunciation, and speculation about what they assume might occur in Minnesota should our rules be liberalized.

Petitioners readily agree that the concerns expressed by those opposing the petition (such as protecting victims and witnesses) are unquestionably important ones, and that they merit deference from this Court. Twenty years ago, conjectural argumentation of the sort now offered by the petition's opponents might well have been sufficient to tip the balance against electronic coverage, in the absence of wide-spread experience with such coverage. But it can no longer be considered adequate. This Court should—as it would in any other contested case—look at the actual evidence in terms of the diverse experience from many other states, recognize that

this evidence weighs heavily in favor of the conclusion that expanded access benefits both the court system and the public, and modify its rules regarding electronic coverage of trial court proceedings in Minnesota.

1. The Submissions Made to the Advisory Committee, to the Extent Based on Direct Experience with Electronic Trial Court Coverage, Overwhelmingly Support the *Petition*.

During the time that the Advisory Committee deliberated about the petition requesting broadened electronic coverage, it received many written submissions and heard from a number of witnesses. While some directly advocated for or opposed the relief requested, many simply sought to furnish information about how electronic coverage has worked in other states. For example:

- **Wisconsin Circuit Court Judge Norman Yackel.** Judge Yackel, a veteran trial judge in Sawyer County, appeared at the Advisory Committee's meeting on October 25, 2007. He noted that Wisconsin has long given trial judges discretion over electronic coverage, and that it is routinely permitted in the state. Judge Yackel said he had presided in a number of cases involving television coverage, including one of the most heavily followed criminal cases in recent regional history—the Chai Vang murder prosecution, in which a St. Paul resident was ultimately convicted of killing six deer hunters in a Wisconsin woods. Judge Yackel basically told the Committee that, even in cases like that one, he simply has not seen many discernible problems caused by electronic media coverage. He expressed genuine surprise to the Committee that Minnesota still prohibited it.

- **Iowa District Court Judge Patrick Grady.** Judge Grady (who sits in Cedar Rapids) appeared before the Committee on September 21, 2007. Like Judge Yackel, he is a long-time trial court judge, and told the Committee he had presided over many high-profile criminal cases heavily followed by the public

and media. Judge Grady said that prior to coming on the bench, he had worked as a public defender. He made clear to the Committee that in his many years as a trial court judge, he had experienced no serious problems with electronic media coverage in his courtroom, and that on balance, he thought that the benefits plainly outweighed the disadvantages.

- **Judge Michael Kirk.** Judge Kirk offered comments at the public hearing conducted by the Advisory Committee on January 11, 2008, as chief judge of Minnesota s Seventh Judicial District. He spoke strongly in favor of permitting expanded electronic coverage of Minnesota's trial courts, describing his experience with Fargo television stations from where he sits just across the Red River in Moorhead (North Dakota allows liberal electronic access). Among other things, Judge Kirk observed that considerably more television coverage seems to be devoted to video of what actually occurs inside North Dakota courtrooms as compared to Minnesota, where reports typically involved the journalists' secondhand versions of events, or interviews with attorneys.[1]

- **Mark Biller.** Biller served as Polk County (Wisconsin) district attorney and chief prosecutor for many years. In this capacity, he said that he was responsible for several high-profile criminal cases that attracted the attention of Twin Cities electronic media outlets. At the public hearing on January 11, 2008, he told the Committee that he had considerable familiarity with such coverage, and said that he had experienced no serious problems that it might have caused. In his view, procedures adopted in Wisconsin (such as the use of a media coordinator) worked very well, and observed that electronic coverage had been "a uniformly satisfying experience." Biller succinctly concluded his remarks to the Committee by stating, "We never met the boogie-man."

- **Chief Justice Thomas J. Moyer, Ohio Supreme Court.** Judge Moyer responded to several specific written questions submitted to him by the Advisory Committee about Ohio's experience with cameras in its courtrooms, where it has been permitted for more than two decades. In his answers, Justice Moyer was unequivocal in favoring electronic coverage. He noted a number of

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[1]It is also noteworthy that Judge Steven Cahill, the one member of the Advisory Committee itself who appeared to have direct experience with electronic coverage, was the principal author of the Advisory Committee's minority report, which urges the Court to adopt a somewhat more liberalized rule governing electronic coverage. Judge Cahill also sits in Moorhead and has had extensive opportunities, both as an attorney and as a trial judge, to compare coverage of North Dakota proceedings with those in Minnesota.

benefits that result from such coverage, stating expressly that "[i]ncreased public access to the courts benefits not only the citizens, but also the administration of justice." He identified no significant problems caused by electronic access. (Justice Moyer's answers to the Committee's questions are part of the Advisory Committee's record and appear at A–1 as well.)

- **Marna Anderson.** Ms. Anderson serves as the executive director of WATCH, an organization that monitors courts and advocates for victims of violence. She indicated that there might be several benefits that could result from electronic access. "Public access to the courts though recordings can de-mystify the justice system and promote greater understanding of its complexities, while fostering greater accountability and trust." She suggested that it is possible to have court rules that would provide greater opportunity for the public to learn about the court system while keeping it fair and unsensationalized. Such access could also better show how victims are empowered through impact statements, and the careful performance of attorneys and judges, demonstrating, among other things, how dramatically different the actual behavior of judges is from what the great majority of the public often sees—the antics of Judge Judy or grossly simplified and dramatized courtroom proceedings in prime-time television, such as "Law and Order." See also Ms. Anderson's published commentary, at A–3.

Thus, it can fairly be said that every jurist with extensive, direct experience of electronic coverage who appeared before the Committee, either in person or through written submissions, mentioned no material reservations of any kind about allowing audio and video access to the trial courts by the news media. Indeed, they firmly supported such access and thought that on balance, it was good for the court system and good for the public more generally. Wisconsin District Attorney Biller, and Iowa Judge Grady (when speaking of his time as a public defender before going on the bench), provided similar perspectives, as did Ms. Anderson as a victim advocate.

This evidence—most of it directly derived from long experience with electronic coverage in various states—stands in stark contrast to the sorts of arguments offered to the Advisory Committee by the opponents of the petition. Almost exclusively, those offerings were made by Minnesota-based practitioners and advocates with no apparent extended experience in the jurisdictions where cameras are routinely allowed.

Petitioners do not in any way diminish the sincerity of the concerns that were raised before the Advisory Committee (and will undoubtedly again be cited to this Court). As acknowledged earlier, those concerns relate to issues of the highest importance. Petitioners respectfully submit, however, that such conjectural anxieties having little evident basis in fact or experience are no longer sufficient in light of the overwhelming accumulation of experience showing that electronic coverage simply does not inflict any measurable harm, but that it does furnish real benefits.

2. Studies Based on the Experience Acquired in the Large Number of States that Authorize more Liberal Electronic Coverage Rebut nearly All of the Historical Objections to such Coverage.

Petitioners' characterization of the testimony presented to the Advisory Committee and summarized in the preceding section of this Memorandum is corroborated by a number of independent studies that have sought to assess the impact of electronic media coverage around the country. As noted, a large number of states

permit electronic coverage far more readily and routinely than does Minnesota.[2] Those states include three neighboring jurisdictions demographically similar to Minnesota— Wisconsin, Iowa, and North Dakota—where audio and video coverage of trial court proceedings is regularly conducted and has long been allowed.[3] While the rules governing electronic media coverage of trial court proceedings adopted by the various states are not identical, and thus some care must be employed when comparing them, certain conclusions are inescapable.

According to one credible survey—that of the Radio and Television News Directors Association (RTNDA), which summarizes the degree to which electronic coverage is permitted in all 50 states—Minnesota is in the most restrictive tier.[4] At least 35 states appear to allow such coverage more liberally than does Minnesota. Certainly a substantial majority leave the decision of whether such coverage should occur solely to the discretion of the presiding judge. The frequency with which such

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[2]As pointed out in the Petition, because Minnesota's current rules require the consent of all parties and the court, electronic coverage is effectively prohibited–such unanimity is virtually never obtainable. This is acknowledged in the Court's *1989 Order and Memorandum rejecting an earlier* request for expanded coverage.

[3]See Iowa Court Rules, Chapter 25 (adopted 1979); North Dakota S. Ct. Admin. R. 21 (adopted 1984); Wisconsin Supreme Court Rules, Chapter 61 (adopted 1979).

[4]See A–7, Petition.

discretion is exercised *in favor of* electronic coverage is one of many empirical indicators demonstrating that it causes few if any real problems.[5]

The steadily increasing number of states allowing electronic coverage and the passage of time have combined to produce a large body of real-world experience by which to assess the potential benefits and detriments associated with that coverage. The evidence distilled from this experience is remarkably one-sided. Overwhelmingly, it demonstrates that very few concrete problems can be identified, and that once some familiarity is developed with electronic coverage, it almost completely recedes as an issue for either the courts or practitioners.

This experience also shows that the sharpest rhetoric and most fervent hyperbole launched in opposition to electronic coverage simply fails the test of objective evidence. Indeed, it is not an exaggeration to state that the degree of serious concern about electronic coverage is inversely proportional to actual experience with it. Over and over across the country, a substantial majority of judges, attorneys, and trial participants who have been involved in litigation covered by the electronic media express no significant reservations.

The studies of electronic coverage that have been done in those states where it is permitted can be compendious, and even a comprehensive summary of them would

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[5]In California, for instance, where trial judges are accorded broad discretion over electronic coverage, a 2000 study concluded that 80% of all requests were approved, and that the percentage was even higher in Los Angeles County. See John D. Zelezny, *Communications Law* (5th ed., 2007), at 276.

expand the length of this Memorandum beyond reasonable boundaries. However, there have been at least two highly credible evaluations conducted of these various state studies, and the conclusions drawn from them plainly support broader electronic coverage.

For example, the New Hampshire Supreme Court recently decided to permit liberalized electronic coverage of the trial courts in that state, explaining its decision in an opinion that thoroughly surveys the arguments for and against audio and video devices. There the Court observed:

> Numerous States have conducted studies on the physical effects cameras and electronic media have on courtrooms, finding minimal, if any, physical disturbance to the trial process [citations omitted]. Additionally, these States have found that the psychological effect of cameras in the courtroom on trial participants is no greater than when reporters wait outside on the courthouse steps with cameras [citation omitted]. Finally, these States have found that instances of prejudice may arise, but they are unique to each individual case and cannot be decided by blanket rule. In contrast, these studies have found that the advent of cameras in the courtroom improves public perceptions of the judiciary and its processes, improves the trial process for all participants, and educates the public about the judicial branch of government.

In re WMUR Channel 9, 813 A.2d 455, 460 (N.H. 2002).

Another, widely cited examination of electronic media coverage was conducted in the early 1990s by the Federal Judicial Center in the wake of a pilot program that authorized electronic media coverage in six federal district courts (and two courts of

appeals).[6] The FJC's report on its evaluation of the pilot program, "Electronic Media Coverage of Federal Civil Proceedings" (1994) is among the most comprehensive that have been issued.[7]

The conclusions described in that report are decidedly favorable to electronic coverage. For example, the Summary of Findings (at 7), includes the following:

- Overall, attitudes of judges towards electronic media coverage of civil proceedings were initially neutral and became more favorable after experience under the pilot program.

- Judges and attorneys who had experience with electronic media coverage under the program generally reported observing small or no effects of camera presence on participants in the proceedings, courtroom decorum, or the administration of justice.

- Overall, judges and court staff report that members of the media were very cooperative and complied with the program guidelines and any other restrictions imposed.

Although the pilot program itself encompassed only federal civil proceedings, the FJC's evaluation included a survey of the views of district court judges and attorneys about electronic coverage for both criminal and civil actions. According to the FJC report,

> With respect to overall attitudes towards electronic media coverage of civil and criminal proceedings, district judges (including those who personally experienced coverage and those who did not experience coverage but

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[6]Electronic media coverage has long been prohibited in the federal trial courts, pursuant to Canon 3A(7) of the Code of Conduct for United States Judges, though even there, a process is now under way to reassess the restrictions.

[7]The report is available at <http://www.fjc.gov/library/fjc_catalog.nsf>

> presumably observed the effects of coverage on their colleagues and on the court as a whole) exhibited significantly more favorable attitudes towards electronic media coverage of civil proceedings in the follow-up questionnaire than they had in the initial questionnaire [and] district judges also indicated less opposition to coverage of criminal proceedings in the follow-up questionnaire.

Report, at 16. "The potential disadvantage of electronic media coverage most frequently mentioned by judges was the possibility of distorting or misrepresenting what goes on in court, although generally they did not feel this problem had occurred under the program." *Id.* at 24.[8]

As part of its evaluation, the FJC also examined several state studies that had been conducted "on the effects of electronic media on jurors and witnesses." *Id.* at 38. The FJC staffers reviewed studies done in 12 states (Arizona, California, Florida, Hawaii, Kansas, Maine, Massachusetts, Nevada, New Jersey, New York, Ohio, and Virginia); *id.*. In all of those states, electronic media coverage was allowed in criminal as well as civil cases, "and the majority of coverage was in fact in criminal cases." *Id.* As explained in the FJC report, these state studies revealed "that the majority of jurors and witnesses who experience electronic media coverage do not report negative consequences or concerns." *Id.*

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[8]*Judges who participated in the pilot program* were also asked whether, based on their experiences, they would recommend extending camera coverage to criminal proceedings. Seven answered yes, two said no, and three said they would favor expansion with some qualifications (such as *first using a pilot program or allowing parties the option of not being photographed*). *Id.* at 28.

The FJC report concluded its examination of the state studies with the following observations:

> The results summarized above are consistent with our findings from the judge and attorney surveys; that is, for each of several potential negative effects of electronic media on jurors and witnesses, the majority of respondents indicated the effect does not occur or occurs only to a slight extent, while a minority indicated the effects occur to more than a slight extent. The state court findings, to the extent they are credible, lend support to our findings and the recommendations made in our initial report.

Although indications from even a small number of participants that cameras have negative effects can be a cause for concern, widespread experience suggests that the discretion given to the trial judge to control the electronic media is more than adequate to offset potential problems. Furthermore, as the New Hampshire Supreme Court concluded in its *WMUR Channel 9* decision (discussed above), state studies have found that "instances of prejudice may arise, but they are unique to each individual case and cannot be decided by a blanket rule." 813 A.2d at 460.[9]

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[9]The one-time objection to electronic media coverage that focused on the distraction caused by the equipment used no longer seems viable: modern audio and video recording devices are marvels of miniaturization, often so small as to be virtually undetectable and, with the advent of digital technology, also extremely quiet. This evolution has been readily acknowledged in all recent examinations of the impact of electronic recording on court proceedings, and thus the old concerns prompted by fear that electronic devices would distract the participants and detract from courtroom decorum have largely been mooted. See, e.g., *WMUR Channel 9*, 813 A.2d 455, at 459:

> Advances in modern technology, however, have eliminated any basis for presuming that cameras are inherently intrusive. In fact, the increasingly sophisticated technology available to the broadcast and print media today allows court proceedings to be photographed and recorded in a dignified, unobtrusive manner, which allows the presiding justice to fairly and impartially conduct court proceedings.

Indeed, the most compelling evidence for this is the fact that Minnesota trial courts themselves have embraced the widespread use of such devices. For example, many courtrooms in both Hennepin

3. Given the Character of What Transpires in Minnesota's Trial Courtrooms, Electronic Media Coverage Should be Allowed Unless it can be Demonstrated that the Administration of Justice would be Harmed.

Petitioners have agreed from the outset that no governing principle of constitutional law controls the decision as to whether expanded electronic media coverage should be permitted or rejected. In other words, there is no currently identified First Amendment right to conduct such coverage, though it should be observed that there is no constitutional *prohibition* against it either. See *Chandler v. Florida*, 449 U.S. 560 (1981); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978).[10]

While there may be no constitutional mandate supporting electronic coverage, policy considerations associated with access to the court system under the First Amendment and common law precepts would seem to suggest that electronic coverage could also be beneficial. "'[W]hat transpires in the courtroom is public property.'" *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 202 (Minn. 1986), quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947). Furthermore, "'the

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and Ramsey Counties now have "CourtSmart" technology installed that allows an electronic record of the proceedings to be preserved when needed. See <www.courtsmart.com/htm/home.htm>. The cameras and microphones are barely noticeable.

[10]In Petitioners' view, the absence of a constitutional mandate offers some distinct advantages. By allowing the debate about electronic coverage to focus on facts and policy considerations, the prospects of achieving the best approach for Minnesota are increased, as is the likelihood that the decision will be broadly supported. Furthermore, it allows trial judges dealing with what might otherwise be difficult issues (such as how to define "journalists" and "news organizations") considerable discretionary leeway in deciding how coverage should occur.

open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion.'" *Schumacher*, 392 N.W.2d at 204, quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980). "'The crucial prophylactic aspects of the administration of justice [could not] function in the dark.'" *Schumacher, id.*, quoting *Richmond Newspapers, id.* (brackets in original).

Nonetheless, in its 1989 Order and Memorandum, this Court did not acknowledge that any such policy considerations might support expanded electronic access, and seemed to intimate that there might actually be a presumption against such coverage: "[W]e define the issue presented" as "whether the petitioners have sustained their burden of establishing that the expansion of audio-video coverage of trial court proceedings would contribute to the improvement in the administration and quality of justice in Minnesota." *In re Modification of Canon 3(a)(7) of the Minnesota Code of Judicial Conduct*, No. C7–81–300 (Minn. Sup. Ct., May 22, 1989).

For the reasons described above, Petitioners are confident that they can meet this burden. As noted, virtually every presentation to the Advisory Committee from those having direct experience with broader electronic coverage indicated not only that potential problems with such coverage are few and can be easily managed under the discretion given to the trial court, but that—as expressed by Chief Justice Moyer of Ohio—"[i]ncreased public access to the courts benefits not only the citizens, but also the administration of justice." As expressed in a *Star Tribune* column recently,

"Our justice system isn't something to hide from public view. It's the envy of those wo endure sham trials in less-free parts of th world. The openness is something to record for the ages and introduce our children to with pride." See A–11.

At the same time, Petitioners respectfully question whether the burden cited above in the 1989 Order is indeed the appropriate one to be applied in the present proceeding, given the policy considerations just summarized, and in light of the potential that expanded electronic coverage offers for increasing public appreciation for the court system. Petitioners submit that the standard expressed in the Advisory Committee's minority report would seem to better encompass the full range of considerations that are presented: "We approach the problem with the frame of mind that a more liberal rule should be adopted unless it can be shown that doing so is likely to degrade the administration of justice by our trial courts." Minority Report, at 20. Such a standard seems more congruent with the broad advantages of public access often cited by this Court.

4. Journalistic Coverage of Court Proceedings can be Enhanced by Permitting Modern Electronic Devices.

Journalists report on court proceedings, both as members of the public themselves, and in their surrogate capacity of collecting and conveying information about the judicial system that few members of the general public will typically have time or opportunity to observe directly. In doing so, they have traditionally employed simple

tools (such as notebooks, pencils, and sketchpads) to improve their reporting. However, these items are not, in concept, different from the devices that can be used for audio and video coverage. All function to help the journalist better describe what actually occurs in a courtroom.

It would be absurd to contend that a reporter should be barred from taking notes while covering a trial in open court; the ability to do so not only helps make public access more meaningful, but also improves the accuracy of what is recorded, analyzed, and reported. Devices used for electronic coverage can provide the same benefits—in certain instances, even greater ones—and thus there is no obvious reason related simply to their function that should cause them to be prohibited, any more than pencils or notebooks.

5. In Evaluating the Objections to Expanded Electronic Coverage, the Primary Focus must be on Factually Grounded Demonstrations rather than Speculation and Rhetoric.

In submitting the foregoing arguments, Petitioners do not mean to suggest that electronic media coverage affords unqualified advantages, and that no problems of any kind could possibly ensue. The experience across the country with such coverage would hardly support such a simplistic conclusion. That experience does, however, strongly reinforce Petitioners' view that the problems which may occur are well within the capacity of individual trial court judges to manage, and that therefore, they do not

come close to outweighing the many benefits to the public and the court system of allowing greater visibility of trial court proceedings.

Petitioners thus urge the Court to focus on empirical demonstrations—and acquired experience—in preference to speculation or assumption when addressing the issue of whether the rules governing electronic media coverage should be revised. The long-running debate in Minnesota about such coverage may at one time have required a greater degree of conjecture and extrapolation about the possible benefits and detriments, in the absence of good evidence and widespread experience.

That is no longer the case, however, and to permit mere assumptions about the possible negative effects of electronic coverage to take precedence over the large body of experience now available would conflict with one of the central principles of our jurisprudence, which is that where factual questions exist, all reasonable efforts should be made to identify the relevant evidence and then to ground whatever decision needs to be made on that evidence *Cf. In re Rahr Malting Co.*, 632 N.W.2d 572 (Minn. 2001) ("[c]onclusory allegations of harm do not support" the relief requested, nor is "'mere suspicion or apprehension of injury'" adequate).

Relying on such evidence, which has been distilled from experience, maximizes the prospects of reaching a decision that is good in the broadest sense. In short, Petitioners respectfully suggest that the same basic approach long used by the

courts to resolve disputes in litigation should also be employed in addressing the issues raised by the petition.

DATED: June 20, 2008

Respectfully submitted,

MINNESOTA JOINT MEDIA COMMITTEE, MINNESOTA NEWSPAPER ASSOCIATION, MINNESOTA BROADCASTERS ASSOCIATION, AND SOCIETY OF PROFESSIONAL JOURNALISTS, MINNESOTA CHAPTER

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APPENDIX*
TO PETITIONERS' MEMORANDUM TO SUPREME COURT

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*This Appendix is not intended to comprehensively reproduce materials submitted to the Advisory Committee or that have appeared in the news media relating to issues raised by the petition, but rather to provide a sampling of coverage and commentary that has occurred in recent months.

Thomas J. Moyer, Chief Justice
Supreme Court of Ohio
September 2007

RESPONSE TO QUESTIONS POSED BY THE MINNESOTA SUPREME COURT ADVISORY COMMITTEE ON GENERAL RULES OF PRACTICE

Question 1:
When cameras were first allowed in the courtroom many feared that it would lead to "grandstanding" by lawyers and possibly judges. More than two decades of camera access in Ohio suggest this is not the case. In fact, possibly, the opposite is true. Increased public access to the courts benefits not only the citizens, but also the administration of justice.

Question 2:
The foremost reason for making the judiciary more accessible is that all courts are the citizens' courts. It is the public's trust and confidence, not law books that grant the courts the moral authority necessary to enforce the rule of law. But for many people the court system is shrouded in mystery: men and women dressed in robes that date to the first millennium using a language that appears arcane. Being able to see the court over the Internet dispels that perception and helps de-mystify the work of judges.

The only contact many citizens have with the courts is not of their choosing: settling a traffic violation, ending a marriage or being party to a lawsuit. It is usually not a pleasant experience. The improved understanding of courts that should result from computer access to proceedings helps dissipate that uneasy feeling.

Being able to see the work of the court also should help citizens make better choices. A recent survey commissioned by the American Bar Association reveals that the more knowledge citizens have about state courts the higher their level of confidence in them.

Question 3:
The Ohio and United States constitutions both guarantee to criminal defendants a right to a public trial, and cameras in the courtroom are an important and necessary modern-day means of achieving this constitutional guarantee. However, there is a balance that must be achieved to ensure that a public trial, facilitated by the presence of cameras, does not compromise the integrity of the proceedings. In Ohio, this balance is achieved through our Rules of Superintendence for the Courts of Ohio, Rule 12, which grants ultimate authority to the presiding judge to decide.

Question 4:
At the Supreme Court of Ohio, our cameras are hardly noticeable (by design), and non-party witnesses generally would only appear in the background. We have not observed

any impact, positive or negative, to non-party witnesses of our proceedings from the presence of the cameras.

Question 5:
Advancing media technology certainly poses challenges for the future. For example, video-cell phones make it possible for individuals to surreptitiously record proceedings that should be off-limits (such as taping a child sex-abuse victim). To limit the impact of this technology, courts are justified in instituting any restrictions that achieve the balance embodied in our Rule 12: allowing adequate public access to proceedings while maintaining due process and decorum.

Question 6:
Please see answer to Question 1 above

Question 7:
a. Yes.
b. At the Supreme Court, we run our own cameras and provide the feed to anyone who requests it. At the trial court level, when access is granted, the equipment it provided by the requester.
c. We have no evidence to suggest that camera coverage has any substantial impact on the length of trials.
d. At the Supreme Court, we request (but do not always require) that requests be submitted by the close of business the day before the oral argument. Rule 12 does not specify a timeframe for other courts, but some local courts have set a timeframe by local rule.
e. Please see Rule 12 (attached).

Question 8: Not applicable.

Question 9: We are unable to answer this question with specificity not being familiar with the current rule in Minnesota and how it has operated. However, Ohio's Rule 12 has served us well and would be a reference point as you consider changes in Minnesota

Marna Anderson: Courtroom cameras can be beneficial

The right set of rules can protect the interests of victims, defendants and juries.

Marna Anderson

Published: October 19, 2007

Recent news coverage showed Shawn Hornbeck's parents making their victim impact statements at the sentencing of Michael Devlin, the man who pled guilty to kidnapping and sexually abusing their son. There were no theatrics or shouted threats. Shawn's parents simply shared with the judge the extreme pain the defendant had put them through with his crimes.

Courtroom observers see how a judge's words and demeanor can influence proceedings, how a victim can be empowered through an impact statement, and how attorneys painstakingly detail their arguments -- important, but not entertaining. Seldom does a judge sound like the barking Judge Judy of daytime TV or the courtroom resemble that of "Law and Order."

Public access to the courts is a fundamental part of a healthy democracy. Court monitoring groups around the country exercise this right daily. But for most people, recordings broadcast on the Internet and television are the closest they come to a real courtroom.

Minnesota is one of 15 states with restrictions so great that its courtrooms are, for all practical purposes, closed to cameras. An advisory committee of the Minnesota Supreme Court held a meeting in September to review a proposal to allow cameras into Minnesota's trial courts. The proposal excludes electronic media by the authority of the presiding judge and "where it is shown that the proceedings will be adversely affected."

In the 1990s, after the sensationalized coverage of the O.J. Simpson trial, the debate about whether cameras should be allowed in courtrooms was more polarized than it is now. Many of the fears about attorneys and judges pandering to cameras, creating a circus atmosphere, have subsided. Although every once in a while the public is subjected to the likes of Florida's Judge Larry Seidlin in the Anna Nicole Smith case, with his inappropriate one-liners and on-the-bench-sobbing, many members of the justice system do not believe that cameras impair courtroom operations.

Nevertheless, it can be argued that cameras can undermine a defendant's right to a fair trial and cause harm to victims, witnesses and jurors, all of whom may be reluctant to appear on TV or YouTube.

Though some states grant a great deal of authority to the chief judge or the presiding judge, as the Minnesota proposal would do, several states have restrictions in place to ensure a uniform system. These include but are not limited to prohibiting videotaping of juveniles; victims of domestic violence and sexual assault; jurors, and judges' communications with lawyers or undercover agents. Many states also regulate the number of cameras permitted and their placement.

As the Minnesota Supreme Court reexamines the rules, it is important to balance the public's right to access against the rights of defendants, victims and jurors. It is possible to have rules

that would provide greater opportunity for the public to learn about the court system while keeping it fair and un-sensationalized.

Public access to the courts through recordings can demystify the justice system and promote greater understanding of its complexities, while fostering greater accountability and trust.

Marna Anderson is executive director of WATCH, a court monitoring and research group focused on violence against women.

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IN STATE

Picture still fuzzy on cameras in state courtrooms

Committee defers decision until moredata can be gathered.

BY DAN HEILMAN
Minnesota Lawyer

A committee considering whether to open the state's courtrooms to cameras was supposed to make a recommendation this month, but, as it turns out, it's still a developing story.

The Supreme Court's Advisory Committee on the General Rules of Practice decided to compile more input from the general public and other states that have recently allowed court proceedings to be filmed and broadcast before making a recommendation to the high court.

The committee — which made the announcement after discussion at a meeting last Wednesday — has so far heard from judges in two neighboring states about the impact of cameras in the court. Last month, Patrick Grady, a trial judge in Iowa's 6th Judicial District, said Iowa has allowed cameras in its courts since the late 1970s, and problems have been few.

At last week's meeting, Norman Yackel, a circuit court judge in Sawyer County, Wis., presented the committee with a positive view of the impact — or lack of it — that cameras have had on his court.

"It's no big deal," said Yackel. "I was surprised to learn that Minnesota didn't allow them."

Yackel was invited to speak before the committee because he presided over one of the highest-profile criminal cases in Wisconsin's history — the 2005 Chai Vang murder trial, which was heavily covered by broadcast media in both Wisconsin and Minnesota.

"In that case, we had an attorney general who was running for re-election as the lead counsel, and some very high-profile attorneys from Milwaukee for the defense," said Yackel. "There was no playing to the cameras, and the audience and family members were cooperative and civil."

'It's about time'

Following Yackel's testimony, committee member and Clay County District Court Judge Steven Cahill made a motion to vote on the proposed rule change, which would eliminate the need for attorney or party consent for electronic recording devices in courts, leaving it to the discretion of judges. (Because of the difficulties in getting unanimity of consent, cameras hardly ever make their way into the courtroom under the current rule.)

Cahill's motion was swiftly defeated by committee members who were either against the rule change or ambivalent about it, leading to a lengthy discussion that revealed divided opinions on the issue.

Members of the Supreme Court's Advisory Committee on the General Rules of Practice discussed the issue of cameras in the courtroom last Wednesday. (Photo by Bill Klotz)

"I am wholeheartedly in support of this change," said Cahill. "It's about time Minnesota joined the rest of the world."

But Hennepin County District Court Judge Mel Dickstein encouraged the committee to take its time deciding, saying, "It seems to me we've only begun this process."

Some committee members said that their opposition to the change has softened, but that they still needed more time to consider the issue.

Minnesota Supreme Court Justice G. Barry Anderson had originally been opposed to the change, to the point of writing newspaper editorials against it. His thoughts on the issue have changed somewhat now, but there are still kinks in the proposal that need to be worked out, he said.

"The proponents [of the change] are highly sophisticated folks who are used to using the media," Anderson said. "Those who have concerns tend to be less sophisticated."

Others should be heard from

Opponents of the proposal include a number of prosecutors, criminal defense attorneys and victims' rights advocates. Their concerns include the possibility that cameras will encourage attorneys to grandstand in court; that cameras will discourage victims of sex crimes and domestic assaults from coming forward and testifying; and that limited airtime will create a tendency for media outlets to concentrate only on the most sensational and emotional parts of trials.

St. Paul civil litigator Dan O'Connell agreed with the idea that the committee should actively seek input from groups that would be directly affected by the rule change.

Cameras In Court *continued on page 11*

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Cameras In Court

Continued from page 2

"We should definitely hear what victims' rights groups have to say," he said.

Dakota County District Court Judge Joseph Carter added that the committee should also contact states that have changed their rules to allow cameras in the courtroom relatively recently.

Others on the committee recommended crafting a pilot program that would allow cameras, but would give the committee and the Supreme Court the latitude to make changes before officially adopting the change.

The restrictions that would most likely be attached to any rule change would involve cases in family, juvenile and possibly probate court; victims of sexual assault and domestic violence; and voir dire and other situations in which jury members might be depicted.

Others were opposed to the change, with or without modifications.

"We've actually heard very little on what's to be gained [by allowing cameras]," said Anoka County District Court Judge Lawrence Johnson.

PROPONENTS OF THE CHANGE SAID MANY OF THE FEARS BEING RAISED — ESPECIALLY THOSE OF TRIALS TURNING INTO MEDIA CIRCUSES — ARE UNFOUNDED.

Simpson-like trial unlikely here

The committee decided to solicit further commentary, and perhaps hold a series of public hearings on the issue, before revisiting it again in January.

"Rather than rely on whoever comes to us, we should be beating the bushes for people who can talk about this with some authority," said Anderson.

Proponents of the change said many of the fears being raised — especially those of trials turning into media circuses — are unfounded.

"People raise the O.J. Simpson trial all the time as an example of what will happen if cameras are allowed in court," said Cahill. "We all know that was an aberration that wouldn't happen here. Where's the evidence that the problems people are afraid of will come to pass? It's nonexistent."

Minneapolis litigator David Herr, who also had been ambivalent about the change, agreed that a refined version of the proposal would make sense.

"If the rules of public access allow members of the public and members of the print media, why can't [trials] be televised?" he said.

But those opposed to the change seemed prepared to dig in their heels until more evidence on its impact can be gathered.

"Every submission we've gotten from attorneys, judges — any stakeholder — are opposed," said assistant Olmstead County attorney Karen Sullivan Hook. "We don't have to follow what other states do."

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EDITORIAL: Cameras in the courtroom

By Melissa Sullivan
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It's a scene right from a 1940s courtroom drama movie: The jury delivers its verdict and the criminal arises, only to be stunned by the repeated flashes and pop! pop! pop! sounds of firing camera flashbulbs. Such images are the stuff of great film noir movies, but they bare little resemblance to today's courtroom reality. Across the United States, cameras in courtrooms and other electronic recording devices are highly regulated and hardly cause a stir.

In fact, they're invaluable tools to inform the public about what happens at a trial. Only a camera can truly convey the demeanor of a witness or judge. Only an audio recording can convey the immediacy of testimony.

Those are just a few reasons why we think cameras and other recording devices should be allowed in Minnesota courtrooms. An advisory committee of the Minnesota Supreme Court is conducting a series of meetings to consider the idea.

Among those to petition for the change is Mark Anfinson, attorney for the Minnesota Newspaper Association.

Guidelines for cameras suggested

According to Mr. Anfinson, the petition proposes that the current rule requiring consent of all parties be repealed, and replaced with a presumption that cameras and other electronic devices be permitted, subject only to restrictions in those specific instances in which the presiding judge finds "cause." Limits would likely be placed on showing jurors, certain kinds of witnesses, juveniles and the like.

Those types of guidelines seem reasonable to us. They're currently used by as many as 35 other states, including our neighbors, Iowa, Wisconsin and North Dakota.

For the record, cameras were allowed in courtrooms for many years, including in Minnesota. One of the most famous Minnesota newspaper pictures taken in a courtroom was snapped at the McLeod County Courthouse in Glencoe in 1950, when Laura Miller was acquitted of the charge that she had murdered attorney Gordon Jones in a downtown Hutchinson apartment.

As television became part of daily life in the 1950s and 1960s, cameras fell out of favor with judges and lawyers. In the early 1990s, they returned in many states, but Minnesota has held out.

Fears haven't played out

Mr. Anfinson contends fears about electronic devices in the courtroom have not been substantiated. Experience in other states shows that it is possible to permit the public to witness a trial — through audio, still images and live television — without causing a disruption. Even the U.S. Supreme Court ruled, in Chandler vs. Florida, that the mere presence of a camera in the courtroom does not deny a defendant the right to a fair trial.

According to the Washington State Broadcasters Association, studies show that:

- Witnesses and jurors behave the same whether or not there is a camera in the courtroom.
- Cameras tend to keep trials moving.
- Advances in technology have made cameras less intrusive.
- Guidelines such as media pool requirements can reduce the impact of cameras in the courtroom.

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Minnesota has already lost an invaluable chronicle of history-making courtroom situations because of an antiquated restriction. Imagine a visual or audio record of the testimony given at recent McLeod County murder trials. It's all been lost because state law doesn't allow it.

Try as we may, the Leader's own reporters cannot always fully capture the drama of a courtroom trial. Pictures taken in courtrooms, as elsewhere, have the opportunity to relay more power than a thousand words. They become the public's representative at a trial, giving oversight of the judicial system.

Editorials are written by Publisher Matt McMillan and Editor Doug Hanneman. They can be reached at mcmillan@hutchinsonleader.com [1], or hanneman@hutchinsonleader.com [2].

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A-8

It's time for more access to Minnesota's courts

The state ranks among the most restrictive when it comes to cameras and audio recordings.

By Kate Parry, Star Tribune Reader's Representative

In the long, hot summer of 1968 when I turned 12, my friends and I roamed freely, making our own fun with nightly flashlight tag, dog shows of motley local canine talent and odd made-up games.

About August we got bored. That's when my mom -- tired of being asked, "What can we do?" -- would buy some books and suggest we could read.

In an act of desperate boredom I picked up "A Pictorial History of the World's Great Trials." (Mom was into history and dad was a lawyer, which may explain why this book was lying around instead of a juicy Nancy Drew mystery.)

I flipped past engravings of the trials of Socrates and Galileo, glancing at paintings of the Salem Witch Trials. But I stopped at the 1925 trial of teacher John Thomas Scopes, accused in the "Monkey Trial" of teaching evolution in a Tennessee school.

It wasn't the words that hooked me. It was a photograph.

I could describe Scopes' sentencing, but there's something about his face in that instant that must be seen to understand the humiliation and betrayal this quiet schoolteacher felt as he was found guilty. It made reading about his trial so real.

I turned the pages and saw Haywood Patterson -- one of nine African-American "Scottsboro Boys" falsely accused of raping a white woman -- holding a horseshoe and rabbit's foot for good luck during his trial in a 1933 Alabama courtroom. There was Charles Lindbergh testifying in the trial of Bruno Hauptmann, accused in the Lindbergh baby kidnapping. I looked at 21 grim-faced Nazi defendants at the Nuremberg trials, confronted with their atrocities.

How sad that there will be no comparable record of Minnesota trials from this era.

That's because when it comes to allowing cameras and audio recording in courtrooms, our state that ranks so highly on so many measures is among the worst on access to trial courts. Ahead of it are 34 states, including Iowa, Wisconsin and North Dakota, where judges can allow cameras in most trials, according to data from the Radio-Television News Directors Association. Justice continues to be served in those states.

Minnesota is among just 16 states with the most extreme restrictions. It requires consent by all parties involved before cameras or audio recordings are allowed. That has the practical effect of a ban.

For Peter Koeleman, the Star Tribune's director of photography, this was a disappointing

surprise when he arrived in 1991 after working in California, where media freely film and record trials. Under the current rules, that's "virtually impossible" here, he said.

John Kostouros, communications director for the Minnesota Judicial Branch, notes that "Minnesota was the first state to open child protection hearings to the public, an action many other states have now followed." He also said cameras have been allowed in the Supreme Court and Court of Appeals, which also occasionally hold oral arguments at schools or out in the state.

But generally the only option for Minnesota photojournalists trying to provide a visual record of trials is to stake out the exits and hope that's where the defendant emerges.

That was the barrier KARE-TV anchor and reporter Rick Kupchella ran into last year as he attempted to show what happened to drunken drivers, from the moment of arrest through sentencing. "We couldn't get cameras into the courtroom. We had cases where the judge and defendant said come on in and the prosecutor said no. He [might not even be] an elected official, but he can shut down access to a public proceeding," Kupchella said.

In December, this past president of the Minnesota chapter of the Society of Professional Journalists (SPJ) decided to try to persuade the Minnesota Supreme Court to change the rules for the state's courts. He asked media organizations to sign a petition urging that judges alone decide what will happen in their courtrooms. This newspaper is among the many groups that signed on to that effort.

Kupchella also wants the court to remove from the Judicial Canon of Ethics a reference suggesting it's unethical for a judge to allow cameras in courtrooms. "It's an access issue, not an ethical issue," Kupchella said.

On Monday, a formal petition will be filed with the Supreme Court seeking the changes. This coincides with Sunshine Week, an annual effort by journalists to remind the public and their elected officials why we all have a stake in open government.

"Not everyone can pack into a courtroom," said Art Hughes, a Minnesota Public Radio reporter and president of Minnesota's SPJ. "A journalist in the courtroom is acting on the public's behalf." Hughes noted that judges would still be able to restrict all or particularly sensitive parts of trials from recordings and photos.

"I would use it very judiciously," Koeleman said of increased access. "We would never photograph rape victims or jurors -- not only because of the court's rules but because of our own standards."

Kupchella said he has been meeting with victim groups to hear their concerns and tell them how well this has worked in other states. "One of the things we're up against is fear of the unknown. These are antiquated arguments disproven in most states," he said.

"The argument can be made that the court more than other branches of government affects the individual life. This is why the public wants to have that access. News organizations make this appeal because they're the medium, the relay," he said.

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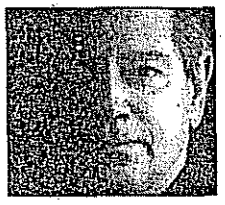
Plus, he added, "arguing against this is arguing against history."

Our justice system isn't something to hide from public view. It's the envy of those who endure sham trials in less-free parts of the world. The openness is something to record for the ages and introduce our children to with pride, the way that old book captivates me even now, its yellowing pages flipped open on my desk to the sad eyes of Julius and Ethel Rosenberg.

A-11

Let cameras show best and worst of American justice



RUBÉN ROSARIO

Imagine this: Osama bin Laden has been bagged alive and ultimately undergoes trial here on federal terrorism-related charges that include the Sept. 11, 2001, slaughter of almost 3,000 Americans.

Like a hotly contested World Series slugfest that reaches a pivotal Game 7, untold millions tune in to, TiVo or record the gavel-to-gavel testimony. The world witnesses, firsthand, American jurisprudence — which we proudly tout as the best and fairest in the world — in action.

OK, wake up, folks. Unless you are an elite member of the national media or a well-connected interested party, your chances of actually attending such a proceeding in person are about as good as hitting the Powerball the same day lightning strikes your house as you are shopping for a discontinued Betty Boop Halloween costume.

RUBÉN ROSARIO, 3B

FOR MORE INFORMATION

To read detailed insights on the issue of cameras in the courtroom from Minnesota's chief federal judge, James Rosenbaum, and veteran bench colleague Donovan Frank, go to **twincities.com**.

To read the proposed "Sunshine in the Courtroom Act of 2007," go to theorator.com/bills110/text/hr2128.html.

A-12

Rubén Rosario

(continued from Page 1B)

Sure, the media might do a decent job providing a good summary of what happened. But there is nothing quite like seeing it for yourself.

Right now, televising such a momentous and historic proceeding is prohibited. Only a select few — the media elite and high-profile interested parties, survivors or family members — would be allowed to occupy the precious few courtroom seats. Is that right, just or fair, given modern technology? The public has an inherent right by case law to attend public hearings. But what does that mean when we have the technological tools to allow untold members of the public to view such proceedings? You tell me.

"No can do" has been the mantra at the federal level since — well, since TV was invented way back when. Only two federal appellate courts — one covering San Francisco, the other New York City — allow televised proceedings. In contrast, most states — Minnesota notably not among them — have permitted some form of televised broadcasts.

This is antiquated thinking. It's time to make a federal case out of this ban if not lift it outright. Actually, some folks in Washington are trying to do exactly that.

The proposed Sunshine in the Courtroom Act of 2007 would give federal district and appellate court judges the discretion to allow or prohibit TV or still cameras in the courtroom. That includes the U.S. Supreme Court, which absolutely should be the first place TV cameras rightly belong. In fact, given the countrywide impact of decisions coming from the nation's highest court, maximum public access should have been mandatory and the law of the land at least a half-century ago.

A U.S. House of Representatives hearing on the proposed bill was held last week. I found it quite fitting and symbolic that a sitting Minnesota federal judge gave key testimony in strong opposition before the House Judiciary Committee. Minnesota has never allowed a televised court proceeding at any level. Thank a policy instituted more than 20 years ago that granted such TV access only if the judge, prosecution and defense all agreed. Might as well just declare a ban outright.

The presence of a TV camera, Minnesota federal Judge John Tunheim told legislators last week, can be "embarrassing, difficult and tough" for witnesses, litigants and jurors. Tunheim argues such access ultimately conflicts with the federal judiciary's "primary mission — to administer fair and impartial justice."

I don't really know if Tunheim was forced to carry water for the group he chairs, the Judicial Conference, whose rules prohibit judicial discretion over cameras, or if the position aligns with his own take on things.

But James Rosenbaum, one of Tunheim's notable peers and also Minnesota's chief federal judge, wholeheartedly agrees.

"I oppose installation of 'cameras in the courtroom,' " Rosenbaum said in an e-mail. "A courtroom may be educational, increase understanding or satisfy public interest. But courts are not educational institutions, nor are they intended to provide understanding or entertainment. Courts are designed to provide — in so far as humanly possible — justice."

One of his esteemed colleagues on the bench, Donovan Frank, has a different take on this issue.

"It is my view that, because we have a very fine and fair, if not perfect, civil and criminal justice system where the interests of justice and the public interest are well served every day with few exceptions, the more access the public has to federal trial proceedings, the more confidence and trust the public will have in the federal court system," Frank said.

"However, having said that, whether to allow television and other electronic coverage of federal court proceedings involves a very delicate balance between the benefits of greater public access and the adverse impact cameras have in the courtroom as it concerns witnesses, victims, litigants and jurors."

I believe TV cameras ultimately belong in state and federal courtrooms, warts and all. More studies than not have concluded they have not played significant roles in verdicts or led to reversals following appeals.

Most folks want to raise the O.J. Simpson case as a reason not to have them. But the cameras had nothing to do with the outcome of that case, as outraged as many of us feel about it.

In fact, the camera captured in a neutral way what happens when a high-priced defense team outwits the prosecutors on a relatively slam-dunk case in front of a judge who may have improperly allowed questionable testimony to cloud the issues in that celebrated murder trial.

If you think that doesn't happen in courtrooms where there are no cameras whatsoever, I have primo real estate for sale in the heart of the Everglades.

What do you think? Comment online or send me an e-mail. E-mails may be published at a later date.

MINNESOTA JUDICIAL BRANCH

FOURTH JUDICIAL DISTRICT

NEWS FROM YOUR COURT

Monthly Column from:
Lucy Wieland, Chief Judge, Fourth Judicial District (Hennepin Courts)
November 14, 2007

Are We Ready for Cameras in the Courtroom?

Here in Minnesota, we don't have any experience with televised courtrooms. But we all remember watching the OJ Simpson trial with its endless theatrics. More recently, we watched the Anna Nicole Smith case live from the courtroom of the Florida judge who started crying on the bench. Most of us don't want those kind of courtroom spectacles coming to our local television. Many attorneys and judges are concerned that cameras in the courtroom will threaten the dignity and formality of proceedings where the stakes are often very high. There's the belief that the media is only going to care about high profile criminal cases, where they'll videotape a ten-second sound bite of the most dramatic moment of a two week trial, leaving out most of what's important about the case. Finally, there's concern about the impact of cameras on jurors, victims, witnesses, and family members. This is one of the few areas where both the prosecutors and the defense attorneys are in agreement; they both think that cameras are a bad idea for the justice system. So why is the issue under consideration?

What many don't realize is that in 1983, the Minnesota Supreme Court approved an experimental program for audio and video coverage of trial court proceedings in Minnesota with certain limitations. Those limitations included no coverage of juvenile proceedings, child custody or marriage dissolution cases, sex crimes, trade secrets, cases involving undercover agents or police informants, or motions to suppress evidence. The order also precluded filming of jurors, witnesses who objected, hearings outside the presence of the jury and other kinds of limitations. The real kicker in the rule, however, was that both the judge and the parties had to agree to coverage. Over the last 24 years, there have been extremely few cases where the judge and parties agreed to media coverage. Because most of the media interest is in criminal cases, and because both prosecutors and defense attorneys routinely oppose cameras, the agreement of the judge has been beside the point, and it's never been necessary to consider the limitations that the Supreme Court put on coverage of trial court proceedings. In other words, the experimental program has been a failure.

A petition has now been brought by a group of media organizations asking the Supreme Court to once again consider allowing media coverage of trial court proceedings, and that request is being reviewed by a general rules committee. Many have spoken against expanding the rule, including the County Attorney's Association, public defenders, civil attorneys, and others. Hennepin County judges have also been discussing the proposal, and have heard from several judges from neighboring states about their experiences. What we've heard has been an eye opener for many of us.

What I, and many of my colleagues, didn't realize is that Wisconsin, Iowa, and North Dakota all allow audio and video coverage of trial court proceedings, and have allowed it for many years. Judges from these states all say that it's no big deal. When pressed, they have all said that everybody takes it for granted, and it has no effect on the trial or the participants. Those states also have a variety of limitations on the cameras. Only one or two cameras are allowed so it's not a disruption; judges have the authority to prohibit the recording of a participant upon request; jurors can't be videotaped; there's also a presumption that crime victims, informants, undercover agents, juveniles, divorce proceedings, and evidentiary suppression hearings should not be videotaped; and finally the trial judge has the ultimate authority to control media coverage as is necessary to a fair trial, and to end coverage if any rules are broken.

With all these potential limitations, why are so many opposed to cameras? I think it's fear. It's fear of the unknown first of all; then fear of exploitation, of media sensationalizing tragedy, of grandstanding attorneys or judges, of sacrificing justice for the sake of the 10pm news. But are those fears justified? The experience of our neighboring states says no; these states have not had these kinds of problems. One group that recently came out in support of cameras in the courtroom is the victim advocacy group Watch. Marna Anderson, the director of Watch, wrote a piece for the Star Tribune in which she supported allowing cameras in the courtrooms in the interest of public information.

Our justice system is a critical part of our democratic government. Every day, in small cases and big ones, we work hard to achieve a fair and just outcome. I feel confident that what those cameras will show is that Minnesota has a justice system that the public can trust.

- END -

STATE OF MINNESOTA
FOURTH JUDICIAL DISTRICT COURT

LUCY A WIELAND
CHIEF JUDGE
HENNEPIN COUNTY GOVERNMENT CENTER
MINNEAPOLIS, MINNESOTA 55487-0422
(612) 348-9808

STATE OF MINNESOTA

IN SUPREME COURT

CX-89-1863

STATEMENT OF LUCY WIELAND; CHIEF JUDGE, FOURTH JUDICIAL DISTRICT

The Fourth Judicial District Court has taken no position in connection with the Minnesota Supreme Court's Advisory Committee on the General Rules of Practice Report concerning cameras in the courtroom. This statement is submitted solely to inform the Court that while the issue of cameras in the court was being considered by the Rules Committee, the Fourth Judicial District Court passed a resolution stating that if the Court approved a revised pilot program, then the Fourth Judicial District wished to participate in such a pilot. Our agreement to participate in a pilot assumes that the pilot would be governed by the language in the Court's Order dated April 18, 1983, except that audio and video coverage would not require the consent of the parties. As so amended, paragraph III.2 of the Order would provide:

> Participation by the court ~~and the parties~~ in this experimental program shall be voluntary. Consequently, there shall be no audio or video coverage of any trial court proceeding without the consent of the trial judge ~~and all parties in writing or made on the record prior to the commencement of the trial~~.

Pursuant to an Order from this Court so amended, audio and video coverage would still be prohibited in cases involving child custody or marriage dissolution, juvenile proceedings, suppression motions, sex crimes, police informants, undercover agents and

trade secrets. Coverage of jurors would also be prohibited as would coverage of witnesses who object in writing.

It is especially important to the judges in the Fourth District that, in any pilot program, there be no presumption limiting a trial court's authority to deny a request for audio or video coverage when such coverage is otherwise permissible. A trial court judge should have the widest possible discretion in determining whether or not to allow audio or video coverage in any particular case.

In closing, it bears emphasizing that this statement is not an expression of support for any specific changes to the current Rules. This statement is submitted solely to inform the Court that, if the Court chooses to approve a pilot program, then the Fourth Judicial District Court wishes to participate in the pilot.

JANELLE P. KENDALL
Stearns County Attorney

June 19, 2008

OFFICE OF
APPELLATE COURTS

JUN 23 2008

FILED

Mr. Frederick Grittner
Clerk of the Appellate Courts
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Boulevard
St. Paul, MN 55155

Re: Request to Make an Oral Presentation Concerning Cameras in the Courtroom

Dear Mr. Grittner:

I respectfully submit this request to make an oral presentation at the Minnesota Supreme Court public hearing regarding cameras in the courtroom on July 1, 2008 for purposes of objecting to a previously suggested pilot project for the 7th Judicial District.

Nine of the ten elected County Attorneys in the 7th District as well as the Chief Public Defender of the 7th District strenuously oppose a pilot project on behalf of the victims, witnesses and criminal defendants thereby affected; the tenth county attorney is not able to take a position. I ask to briefly appear to orally present our opposition to this initiative.

Respectfully submitted,

Janelle Kendall

Janelle P. Kendall
Stearns County Attorney

JPK/lmk

Enclosures

Administration Center, RM 448 • 705 Courthouse Square • St. Cloud, MN 56303-4701
(320) 656-3880 • FAX (320) 656-6695
http://www.co.stearns.mn.us/1220.htm • e-mail: county.attorney@co.stearns.mn.us

JANELLE P. KENDALL
Stearns County Attorney

June 19, 2008

Minnesota Supreme Court Justices
Supplementary Comments to the Advisory Committee's Report on the General Rules of Practice

Re: Cameras in the Courtroom

Dear Supreme Court Justices:

I write to provide a career prosecutor's public safety perspective on the media proposal to require cameras in Minnesota's criminal courtrooms. In Minnesota, crime victims do have rights, and data practices laws do provide some degree of victim and witness privacy. Prosecutors and the media are both in the accountability business, but prosecutors are responsible for proof beyond a reasonable doubt in a court of law; the media operates in the court of public opinion. These are distinct audiences with different motivations.

Since 1989, Minnesota trial courts have had the authority to grant permission for cameras in courtrooms – if all parties and the judge agree. No, that almost never happens. If the process has been in place for that long and the participants seldom if ever agree to camera coverage, there must be good reason. This is the position of the Minnesota County Attorney's Association, which has been joined by many victim advocacy groups as well as the criminal defense bar.

The media's request for cameras in the courtroom is not about technology – technology has advanced to make cameras physically unnoticeable. It's not about getting the professional participants in the criminal justice system – attorneys, judges, law enforcement personnel, professional witnesses, even victims who want to talk to the media – on camera; there's already plenty of that. Further, it's not about public access to the courtrooms – that is full and complete. If you want to know what's going on here, come on down. The door's open.

What the media doesn't have is the picture of the innocent victim, the witness who happened to be there when the crime happened, the child who was involved, or the reaction of the juror selected for the case. These average citizens, in court through no fault or often choice of their own, are already reluctant to participate. That's understandable. Average persons do not wish to be victims of or witnesses to criminal activity. If they are placed in this unfortunate position, the idea that cameras await their eventual court testimony will not increase their comfort or decrease their concerns about participation. At this point,

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victims have the ability to decline camera coverage. In the name of victim rights alone, we must continue to protect this right.

This is disputed by media representatives quoting studies from other states claiming no "effect" of the addition of this type of media coverage. These studies undervalue the inability to measure what doesn't happen and ignore the daily experience of prosecutors attempting to acquire cooperation from people who do not, professionally, come to court. The media coverage associated with this request alone broadcasts to future victims and witnesses that their call for help to law enforcement may be a delayed notification to camera crews of the subject of their call. No study can measure the number of victims, especially of the types of crimes typically covered by the media, such as child sexual abuse, sexual assault, and domestic violence, who would not call for police help if that same call was a delayed alert to the media. Although not all calls for help end up in a public trial, all trials do begin with a call for help. Tom Frost, Executive Director of CornerHouse Child Protection Center as well as representatives of multiple victim advocacy agencies articulately presented this perspective to the Advisory Committee. Potential limitations once a matter reaches court cannot address the belief or understanding of victims and witnesses at the reporting stage of these events.

Prosecutors' offices statewide will tell you that gaining victim and witness cooperation is the hardest it's ever been. Due to the national media's handling of what's been referred to as the "circus" of the O.J. Simpson trial and other similar events, average, law abiding citizens are, at a minimum, hesitant and sometimes out rightly reluctant to participate in the criminal justice process. Additionally, although we may have a reason to believe our local or even statewide media would not violate judicial guidelines or standards of common decency, some members of the national media have not earned such trust. Innocent criminal justice participants don't want to bet their lives or privacy on media assertions that seldom, if ever, would victims, jurors and even undercover police be identified. The media has not earned this type of credibility with the criminal justice system.

Studies from other states also could not possibly contemplate the effect of Minnesota's very strong data practices and victim rights laws, providing at least some privacy rights to adult crime victims, all juvenile victims and witnesses, gang/drug trial witnesses, confidential informants, undercover law enforcement officers, and mandated reporters. Recent studies in Minnesota about expanding these privacy rights have been proposed, verses the partial elimination of such protections that requiring cameras would practically cause.

Ironically, this is one of the issues on which criminal defense attorneys and prosecutors agree. The very real fear and concern on the part of victims and witnesses for the state may extend to a chilling effect on the willingness of defense witnesses to testify as well. If not victim rights, perhaps defendant rights will rule the day.

Prosecutors seek to facilitate justice. Our job is to do that in a public court of law. To hold criminals accountable, prosecutors simply must have the participation and cooperation of victims, witnesses, sometimes children, and certainly jurors. Prosecutors agree that the media generally covers cases involving a deep impact on the community – usually defined as situations in which real people had intensely personal bad things happen to them. The voyeurism involved in watching those persons describe those events in the vivid detail required for criminal court on camera will simply make that task even more

difficult. And – if the victims, witnesses and jurors don't participate, the criminal goes free. That's not justice.

It was suggested by a judge in the Seventh District during the Advisory Committee's investigative process that a pilot project be attempted, to experiment with the suggested changes from St. Cloud to Moorhead. On behalf of the over 140,000 potential victims, witnesses, and even defendants I am elected to represent in Stearns County, I must strenuously object, as do all but one of my nine (9) Seventh District elected county attorney colleagues. The county attorney in the county from which the pilot suggestion originated is unable to take a position. In its place, please consider the strong opposition of Rex Tucker, Chief Public Defender in the Seventh District; all positions are consistent with other prosecutors and the criminal defense bar, public and private, statewide. If it's a bad idea, it's equally bad in and for the Seventh District.

In Minnesota, crime victims do have rights. The integrity of the process and respectful courtrooms for innocent victims and other non-voluntary citizen participants has thus far been protected. Unfortunately, this media request is not about accountability or public access to the criminal justice system, because that already exists. This is about media access to the only sources of information the media can't now reach: innocent and often non-voluntary participants required to make the criminal justice system work. If the public wants accountability – for crime – please don't allow further erosion of the prosecutor's ability to present a case by making the role victims, witnesses, children and jurors must play any more difficult than it is now. Ultimately, if even one victim does not call for help, or even one witness refuses to come forward because of their fear of what a media camera will do down the road, the price is too great.

Sincerely,

Janelle P. Kendall
Stearns County Attorney

JPK/lmk

AMERICAN ACADEMY OF MATRIMONIAL LAWYERS

Minnesota Chapter

"Protecting the family . . . improving the practice"

June 16, 2008

Mr. Frederick K. Grittner
Clerk of Appellate Courts
Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155

Re: Cameras in the courtroom

Dear Mr. Grittner,

The Minnesota Chapter of the American Academy of Matrimonial Lawyers (AAML-MN) has asked me to forward to you our position regarding cameras in the courtroom of Family Court. We oppose the use of cameras in Family Court.

Family matters are tried to the court in part to maximize their privacy. The issues heard in Family Court are sensitive and fraught with emotion. In over half the cases there are children. It would be hugely traumatic for these kids to have their parents' issues available to the public (and their friends) on the Big Screen. Divorce is tough enough.

Family Court hears domestic abuse matters. The possibility of publicity will make it even harder for abuse victims to come forward.

Family Court hears paternity cases as well. At present these cases are not open to the public. It would be a step backward to bring cameras into these cases.

Thank you for giving us the opportunity to address this important issue.

Sincerely yours,

Mary L. Davidson

Mary L. Davidson
Chair, Court Liaison Committee, AAML-MN

317 2nd Ave. S., Suite 200
Minneapolis, MN 55401
June 16, 2008

Mr. Frederick K. Grittner
Clerk of Appellate Courts
305 Minnesota Judicial Center
25 Martin Luther King Blvd.
St. Paul, MN 55155

Re: *In re* The Matter of the Proposed Amendments to the General Rules of Practice Concerning Cameras in the Courtroom
App. Ct. File No. CX-89-1863

Dear Mr. Grittner,

Enclosed are twelve copies of a statement in opposition to the proposal to amend the rules of general practice.

I do not request time for an oral presentation on July 1, 2008.

Sincerely,

Peter W. Gorman
License No. 3633X

CX-89-1863

STATE OF MINNESOTA

IN SUPREME COURT

In re The Matter of the Proposed Amendments to the General Rules of Practice Concerning Cameras in the Courtroom

STATEMENT IN OPPOSITION TO PROPOSED AMENDMENT

TO: THE SUPREME COURT OF THE STATE OF MINNESOTA

This statement is submitted pursuant to the Court's order of April 18, 2008. It is a conditional statement, because we do not know at the time of this writing if the petition of the Minnesota Joint Media Committee, *et. al.,* is being re-submitted to the Court in view of the March 31, 2008 final report of the Court's Advisory Committee.

We are career public defenders who have practiced in the adult, juvenile, and appellate courts of Minnesota and New York for sixty years. Between us, we have tried about 130 criminal cases before trial-court juries. We are speaking only for ourselves; we are not speaking for the Minnesota State Public Defender or the Minnesota State Board of Public Defense.

We write to oppose the petition of the Minnesota Joint Media Committee, *et. al.*, which would amend the General Rules of Practice concerning television cameras in the district courtrooms. We agree in virtually every respect with the majority view expressed in the Advisory Committee's March 31, 2008 final report.

Our interest lies in protecting the fair-trial rights which are accorded our clients under the federal and state constitutions. We are not interested in suppressing speech. We do not argue that criminal trials should be private, or closed; nor do we argue that media representatives, be they print or electronic, should be excluded from the courtroom or routinely subjected to "gag" orders. Rather, we believe that the present rules which limit television coverage of trial courtrooms are no more than "reasonable limitations on access to a trial" which the courts may adopt "in the interest of the fair administration of justice[.]" Richmond Newspapers, Inc. v. Commonwealth of Virginia, 448 U.S. 555, 581 n.18 (1980).

We agree with the Advisory Committee that routine television coverage of the vast majority of district court proceedings will not improve the public understanding of the operations of the judiciary. We further agree that relaxation of the current rule would certainly result in "sound bite" coverage of sensational cases and those involving notorious litigants.

Our experience tells us that television outlets are simply not interested in, and don't report on, the daily justices and injustices in our courts and the daily sufferings of litigants. Rather, television coverage of trial-court proceedings will, most likely, be limited to hysterical convulsions of crime victims and their relatives, and promenading lawyers, witnesses and trial judges. This kind of criminal-court broadcasting, which one can see any night of the week on numerous cable-television channels, compromises the integrity of the judicial system, judicial impartiality, and our clients' right to a fair trial. It further poses the problem of contamination of jury pools.

Although it has been over forty years since Estes v. Texas, 381 U.S. 532 (1965), the television industry's practices, adopted after some jurisdictions opened their trial courtrooms, do not alleviate our concerns about these problems.

Before closing, we wish to respond briefly to parts of the Advisory Committee's minority report. The minority report states that those who oppose the proposed amendment to the General Rules of Practice have offered "nothing but unsubstantiated fear of change and fear of the unknown." The minority report also states that none of the opponents to the proposed amendment have "any experience whatsoever with cameras

in courtrooms . . . ." Last, the minority states that opponents point to only two examples of inappropriate media coverage of the trial courtrooms.

The fact is, we don't fear the unknown. We *know* what television coverage of the trial courtrooms will be like, because we can view this coverage from the jurisdictions which allow it any night of the week on multiple cable- and court-news channels. And that includes the coverage of the Wisconsin trial referred to in the minority report. Moreover, we *do* have experience with television coverage of proceedings in which we have participated. Most public defenders, ourselves included, will not speak with television reporters who inquire about our proceedings because they not only fail to fairly report what we have told them, but also because they routinely take our statements out of context in the editing process. One of us in particular experienced this with coverage of a proceeding before the Supreme Court of the United States. Last, our concerns are not based entirely upon the O.J. Simpson and Anna Nicole Smith media coverage. Our fears are based upon numerous instances which are broadcast nearly every day in multiple jurisdictions—the Simpson and Smith matters are merely among the most notorious.

For these reasons, we ask the Court to accept the majority report of its Advisory Committee and to reject the proposal by the Minnesota Joint

Media Committee, *et. al.*, to amend the Rules of General Practice concerning cameras in the courtroom.

Respectfully submitted,

David Cohoes, Lic. 17760
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Peter W. Gorman, Lic. 3633X
317 2nd Ave. S., Suite 200
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June 15, 2008

cornerhouse

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June 13, 2008

Clerk of Appellate Courts
305 Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155

Dear Clerk:

Pursuant to the Order of the Supreme Court dated April 18, 2008, I am requesting the opportunity to make an oral presentation at the hearing on July 1, 2008, regarding cameras in the courtroom. Enclosed are twelve copies of my presentation and twelve copies of this request. Thank you for your assistance.

Sincerely,

Thomas H. Frost
Executive Director

Telephone: 612-813-8320
e-mail: thomas.frost@childrensmn.org

Cameras in the Courtroom
Hearing July 1, 2008

Thomas H. Frost
Executive Director, CornerHouse

By way of background, I am former prosecutor with the Hennepin and Ramsey County Attorneys' Offices. In the middle 1980s, I worked with other child abuse investigative professionals to create the interagency child abuse evaluation center that became CornerHouse. For the last two years I have been fortunate to serve as Executive Director at CornerHouse.

At CornerHouse skilled and trained professional interviewers meet with children suspected of having been abused. CornerHouse provides a safe place for the interviewers to meet with the children and allow them to disclose their experiences in a child friendly environment. We interview four hundred to five hundred children a year on behalf of child protection and law enforcement.

The need for a place like CornerHouse arises out of the general fear and reluctance of many crime victims to disclose. With children this fear is exacerbated and both rational and irrational reasons make it difficult for them to discuss what happened. Through the use of a non-suggestive protocol, our interviewers are often able to overcome these fears and enable the children to disclose.

Again, as with other crime victims, children often are reluctant to testify in court. In my experience patient and supportive preparation will allow child witnesses to overcome their fears of testifying.

Although I share other concerns addressed on the issue of televised trials, my specific concerns relate to child victims of crime. The fear of testifying can usually be dispelled through meeting and answering questions. But most children never report (Summit, R. C., The Child Abuse Accommodation Syndrome, *Child Abuse and Neglect*, 7, 177-193 (1983)). And if a child victim chooses not to report because of a fear that this will result in appearing television, there will never be a chance to dispel this fear – whether rational or irrational.

It is apparent that many individuals, both children and adults, elect not to report sexual assault abuse. Adults are in a better position to rationally weigh the pros and cons of this decision, but children may decide not to disclose based on irrational fear that this will lead to their having to testify on television. If in their experience real trials are televised, they may conclude that this is what happens whenever crimes are reported.

It has been suggested that to protect children and sexual assault victims, their testimony would be barred from being televised. While this may protect these individual victims, I do not believe that it addresses the issue of the child victim choosing not to disclose. Children may not be able to discern that certain categories of victims are never on TV.

No one will be able explain this or reassure them if fear of being on television becomes a reason for them to keep the abuse secret.

A child's failure to disclose will, tragically, lead to no intervention to protect the child or hold the offender accountable. Neither the safety of that child, nor the safety of the public will be addressed. Both that child and other children will be at risk for further abuse. Any child being abused, even once, is too great a price to pay.

I join with the other victim and public safety advocates in asking that the current rule on televised trials be retained.

MICHAEL L. KIRK
CHIEF JUDGE OF DISTRICT COURT

District Court of Minnesota

SEVENTH JUDICIAL DISTRICT

CLAY COUNTY COURTHOUSE
807 11TH STREET NORTH
MOORHEAD, MN 56561-0280
TELEPHONE (218) 299-5065
michael.kirk@courts.state.mn.us

June 16, 2008

Minnesota Supreme Court
c/o Frederick Grittner, Clerk of Appellate Courts
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

Dear Court and Mr. Grittner:

Please consider this letter as my request to make a statement at the 2:00 p.m., July 1, 2008 Minnesota Supreme Court hearing to consider the proposed amendments to the General Rules of Practice concerning cameras in the courtroom. I will have no presentation materials and wish only to make a statement.

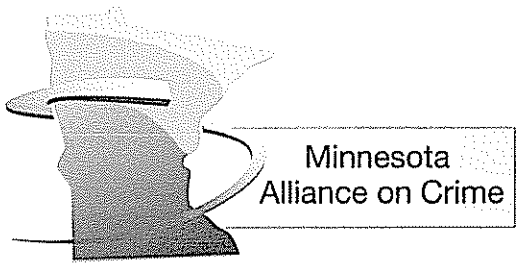
I have been working in the trial courts of Minnesota for 34 years and have seen a number of different pilot programs for cameras in the courtroom, none of which have lead to the kind of experience which would provide for a meaningful evaluation of whether Minnesota should adopt a more permissive policy. We should stop these meaningless pilots which create the impression that we allow cameras in the trial courts when we really don't and try a pilot either statewide or in one or more districts that would lead to a meaningful evaluation. The Judges of the Seventh Judicial District are willing to participate in a meaningful pilot program.

I would like to comment at the hearing about my 19 years of experience on the bench in a community where one side of town (Fargo) permits cameras in the courtroom and the other side of town (Moorhead) does not. I will also be able to comment on the general feeling of the Judges of the Seventh Judicial District regarding cameras in the courtroom, my experience with cameras in the courtroom and a number of requests for access that I have faced in "high profile cases".

Thank you for your consideration. I look forward to speaking at the July 1, 2008 hearing.

Very truly yours,

Michael L. Kirk
Chief Judge of the Seventh District



2332 Lexington Avenue North
Roseville, MN 55113
612.940.8090, 866.940.8090
www.mnallianceoncrime.org

June 18, 2008

Minnesota Supreme Court
25 Rev. Dr. Martin Luther King Blvd.
St. Paul, MN 55115

Dear Honorable Justices of the Minnesota Supreme Court:

I am writing on behalf of the Minnesota Alliance on Crime to urge you to rule against allowing cameras and other recording media devices into Minnesota courtrooms. Relaxing existing rules that prohibit such access re-traumatizes victims and witnesses making it more difficult for them to testify in cases such as gang and drug-related crimes, in which they might fear retribution. Cameras also pose obvious harm to those involved in more sensitive cases such as child abuse, criminal sexual conduct, domestic violence, homicide, and hate/bias crimes in which victims and witnesses already face many barriers while providing testimony. Further, cameras do not provide any benefit to the criminal justice system process other than to sensationalize what is, for many, a traumatic and intensely stressful event.

We concur with the majority recommendation of the Minnesota Supreme Court Advisory Committee of General Rules and Practice that electronic media access not be allowed in criminal proceedings. The committee found that cameras would not help cases to be tried more fairly and there is no empirical evidence to support that increased media access increases public understanding of the judicial process. They also found that such media access is not supported by prosecutors, defense attorneys nor victim advocates. We urge you to continue to protect victims and witnesses; do not relax the current laws prohibiting cameras, and other recording devices, during court proceedings.

The Minnesota Alliance on Crime is a nonprofit, grassroots, membership organization of crime victim advocates and other criminal justice professionals from across the state. Consistent with our vision, which is to put victims' rights at the forefront of the criminal justice system by changing Minnesota's response to crime, we oppose allowing cameras and other electronic media into courtrooms. Thank you for considering our position and please rule to protect crime victims and witnesses from what could be a devastating step backwards in victims' rights and safety in Minnesota.

Sincerely,

Leah K. Sweet
Executive Director
Minnesota Alliance on Crime

Our mission is to provide a statewide alliance for crime victim programs while promoting the advancement of services in Minnesota through education, resources, and legislation Our vision is to put victims' rights at the forefront of the criminal justice system by changing Minnesota's response to crime

OFFICE OF THE HENNEPIN COUNTY ATTORNEY

MICHAEL O. FREEMAN COUNTY ATTORNEY

June 6, 2008

Frederick Grittner
Clerk of Appellate Courts
305 Judicial Center
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

Re: Cameras in the Courtroom

Dear Mr. Grittner:

This letter serves as my request to make an oral statement to the Supreme Court on July 1, 2008 at 2:00 p.m. regarding the report and recommendations of the Supreme Court Advisory Committee on the General Rules of Practice concerning cameras in the courtroom.

Thank you for your attention to this matter.

Sincerely,

Lolita Ulloa
Managing Attorney
Hennepin County Attorney's Office

June 6, 2008

To The Minnesota Supreme Court

RE: Cameras in the Courtroom

My name is Lolita Ulloa, I am the Managing Attorney for the Hennepin County Attorney's Office, Victim Services Division. I supervise victim witness staff that coordinate victims and witnesses in criminal cases in Hennepin County. I am also a member of the Judicial Branch's Racial Fairness Committee.

I will start my remarks with a question. How do cameras in the courtroom promote justice to a victim and enhance the criminal process? I do no believe that it does.

One argument is that this will be an educational tool for the public about how our Courts work. It is unclear how this would happen. I would be surprised if the media would be interested in televising a story that did not involve victims, witnesses or defendants that are public or popular figures or with horrible, sensational, and sad case facts. How are you educating the public when there is no context to the pieces of the trial that will be shown by the media. If this were truly the case, then why not televise in an area that probably affects more members of the community on a daily bases, such as traffic court. I do not think the media would be interested. This is not a community education process, and to present it as such is disingenuous. This is about ratings.

Proponents of this proposal have no, little or no current experience in pulling cases together for trial and working with victims and witnesses directly. Difficulty in getting victims and witnesses in, is for us, a daily challenge. For those of us who work directly with victims and witness in Minnesota, we are in the best position to provide feedback on the barrier cameras may cause victims and witnesses to come forward.

There has also been much discussion about how the victims identity and testimony may be protected. There are concerns both if the victims testimony is not televised, and if it is. In both scenarios the victim loses. If the victim testifies and this is televised, this exposes the victim. If the victim has either partial testimony televised then the proceeding that is being televised, is out of context and incomplete. If the testimony is left out completely, then you are left with the defendant's version of the facts. None of these scenarios promotes justice or educates the public. Altering the way the case is presented to the public undermines the argument of accuracy and transparency.

There has also been discussion that cameras in the courtroom is "inevitable". This is not the history in Minnesota. I am proud of the fact that in so many areas, not only has Minnesota been a leader, but has also stood alone on important issues that affect our community. Victim's Rights and concerns has been one of those areas. Many States do not have the immense power of Victim Rights legislation or the support of so many citizens to ensure protection of those rights. Our State is known for prominent and loud advocacy for what is best and just. The proposal has come from the media, who's core business is not promoting justice, their business is promoting their news stations.

Out of state Judges, and commentary from other State experts, about their experience with cameras in their courtrooms, although perhaps valuable for them and informational for us, should not the benchmark for what we do here. Even in those comments that have been provided to your committee I do not believe one answered the question of promoting justice for the victim.

The concern expressed by Judge Brandsford and the Racial Fairness Committee about the impact on communities of color is a real one for me as a committee member and personally. Setting a procedure that in any way creates a chilling affect for underserved communities or communities of color participating in the criminal process, should not be allowed.

I reiterate her request and concerns in her letter to this Committee. Her concerns are a true scenario for those victims and witnesses who struggle with their legal status, their clan or reservation affiliation, those non English speaking individuals, those that dress in their religious clothes or their cultural norms and status being questioned. This is also an important consideration for those communities that have concerns about public exposure like the gay, lesbian, transgender or transsexual community. This is another area in which I believe Minnesota stands tall. The dedication and concern about how the Criminal process affects communities of color and underserved communities, is a priority here.

Comments have also been made that those that are not supporting this proposal are unsophisticated, and over dramatic about these concerns. These are the times when it is important to voice strong opposition to a rule change that has severe consequences to many community members and that would benefit a few. This is neither unsophisticated nor dramatic, it, I believe shows the strength of the advocacy by a community that has an investment in maintaining the integrity of the criminal justice system for all, the victims, witnesses and the defendants.

Finally, this committee has been asked where are the victims. Not long ago in Minnesota I was a victim of sexual assault. If I knew cameras where allowed in courtrooms in Minnesota I would not have reported my crime to the police. This rule change would have silenced me.

On behalf of the Hennepin County Attorney's Office and as a victim, I ask your committee to vote against cameras in the courtroom.

On behalf of the Racial Fairness Committee, I ask that your committee refrain from making a final recommendation until it fully considers the impact of the use of cameras in Minnesota courtrooms on communities of color.

Lolita Ulloa
Managing Attorney
Victim Services Division
Hennepin County Attorney's Office

STATE OF MINNESOTA
FOURTH JUDICIAL DISTRICT COURT

TANYA M. BRANSFORD
JUDGE
HENNEPIN COUNTY GOVERNMENT CENTER
MINNEAPOLIS, MINNESOTA 55487
(612) 348-3771
FAX (612) 348-2131

June 19, 2008

Fred Grittner, Clerk of Appellate Courts
Minnesota Court of Appeals
305 Judicial Center
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

RE: Cameras in the Courtroom

Dear Mr. Grittner:

This letter is submitted on behalf of the Judicial Branch's Racial Fairness Committee (The Committee) in response to the Order for Hearing to Consider Proposed Amendments to the General Rules of Practice dated April 18, 2008.

The Racial Fairness Committee strongly supports the position of the majority, that all parties must agree before any cameras are allowed in the courtroom. After considerable discussion in our committee meetings the Racial Fairness Committee unanimously agreed with the majority position on the basis of the reasons specified in the March 31, 2008 Final Report of the Minnesota Supreme Court Advisory Committee on General Rules of Practice. (The only members of the Committee who abstained were the members of the Supreme Court.)

Since its inception in 1993 the Racial Fairness Committee has led important statewide initiatives aimed at improving public trust and confidence in the judicial system. A continued priority for the Committee is to ensure that issues of racial fairness and justice are fully considered when rule changes are contemplated. The Committee raised concerns about the effect of cameras in the courtroom on Minnesota's communities of color at the January 11, 2008 public hearing.

The issues relevant to racial fairness and justice, such as the chilling effect cameras in the courtroom will have in urban communities and communities of color, and in particular, on witnesses, along with concerns that the goal of media presence is to sensationalize the work of the judicial branch and detract from the real issues of the case, all have the potential to diminish public trust and confidence in the judicial system. Since maintaining the status quo provides some measure of consideration for the negative impact of media presence on immigrants and other communities of color, the Committee recommends that the majority report be adopted.

The Racial Fairness Committee also requests that one of our members be permitted time to appear and comment on the cameras in the courtroom issue at the July 1, 2008 hearing as has been allowed in the past.

Very Truly Yours,

Tanya M. Bransford

Judge Tanya M. Bransford, Vice-Chair
Racial Fairness in the Courts Committee

The Honorable Michelle Larkin
Tenth Judicial District
Wright County Courthouse
10 2nd Street NW
Buffalo, MN 55313

June 20, 2008

Fred Grittner
Clerk of Appellate Courts
305 Judicial Center
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

RE: Minnesota Supreme Court Advisory Committee on the General Rules of Practice
Issue - Cameras in the Courtroom

Dear Mr. Grittner,

As Chair of the Juvenile Delinquency Rules Committee, I am writing to convey the Committee's position regarding the report and recommendations of the Supreme Court Advisory Committee on General Rules of Practice concerning cameras in the courtroom, which is scheduled for hearing on July 1, 2008.

The Juvenile Delinquency Rules Committee opposes any rules changes that would allow easier access for cameras in the courtroom in juvenile delinquency proceedings. Minn. Stat. § 260B.163, subd. 1(c) (2006) provides:

> Except as otherwise provided in this paragraph, *the court shall exclude the general public from hearings under this chapter and shall admit only those persons who, in the discretion of the court, have a direct interest in the case or in the work of the court.* The court shall permit the victim of a child's delinquent act to attend any related delinquency proceeding, except that the court may exclude the victim:
> (1) as a witness under the Rules of Criminal Procedure; and
> (2) from portions of a certification hearing to discuss psychological material or other evidence that would not be accessible to the public.
> The court shall open the hearings to the public in delinquency or extended jurisdiction juvenile proceedings where the child is alleged to have committed an offense or has been proven to have committed an offense that would be a felony if committed by an adult and the child was at least 16 years of age at the time of the offense, except that the court may exclude the public from portions of a certification hearing to discuss psychological material or other evidence that would not be accessible to the public in an adult proceeding.

(Emphasis added.) Thus, there is a body of juvenile delinquency cases from which the public must be excluded. Any change in the rules governing cameras in the courtroom that would allow public access to such juvenile delinquency cases would directly conflict with this statute.

Furthermore, while felony cases where the child was at least 16 at the time of the offense are open to the public, the Committee opposes any changes to the current rules, which would make it easier to have cameras in the courtroom. Under the current Minn. Code Jud. Conduct Canon 3A(11), photographic or electronic recording of court proceedings is permissible only if "the parties have consented, and the consent to be depicted or recorded has been obtained from each witness appearing in the recording and reproduction." Even if all parties agreed to allow photographic or electronic recording in a juvenile delinquency matter, Minn. R. Juv. Del. P. 2.02 provides:

> The court may temporarily exclude any person, except counsel and the guardian ad litem appointed in the delinquency proceeding, when it is in the best interests of the child to do so. The court shall note on the record the reasons a person is excluded. Counsel for the person excluded has the right to remain and participate if the person excluded had the right to participate in the proceeding. An unrepresented child can not be excluded on the grounds that it is in the best interests of the child to do so.

Under this rule, the district court has the authority to exclude anyone from any delinquency proceeding, except counsel and guardians ad litem, when it is in the best interests of the child to do so.

The media's proposed Minn. R. Gen. Pract. 4.01 provides that exclusion of electronic media "is permissible only where it is shown that the proceedings will be adversely affected." The proposed rule does not require the consent of the parties, and it conflicts with the existing juvenile delinquency rule by establishing a different standard for excluding individuals from the courtroom. Thus the Juvenile Delinquency Rules Committee agrees with the recommendation of the Minnesota Supreme Court Advisory Committee on General Rules of Practice that the media's petition should not be granted.

Furthermore, this Committee agrees with the majority report that the current rules governing cameras in the courtroom should not be relaxed. Minn. R. Gen. Pract. 4 and Minn. Code Jud. Conduct Canon 3A(11), in conjunction with the statutes and rules governing juvenile delinquency matters, provide a workable set of rules regarding public access to juvenile delinquency matters, and allow the district court to act in the best interests of the child. Other than a consolidation of these rules into the General Rules of Practice, the Juvenile Delinquency Rules Committee opposes any relaxation of the rules in this area.

Sincerely,

The Honorable Michelle Larkin, Chair
Juvenile Delinquency Rules Committee

STATE OF MINNESOTA
FOURTH JUDICIAL DISTRICT COURT

MARILYN JUSTMAN KAMAN
JUDGE
HENNEPIN COUNTY GOVERNMENT CENTER
MINNEAPOLIS, MINNESOTA 55487-0422
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marilyn.kaman@courts.state.mn.us

June 20, 2008

Mr. Frederick Grittner,
Clerk of Appellate Courts
305 Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, Mn. 55155

Re: Proposed Amendments to General Rules of Practice—Cameras in the Courtroom

Dear Mr. Grittner:

As Presiding Judge of Probate / Mental Health Court, I write on behalf of all judicial officers in the 4th judicial district (Hennepin County) who try cases brought under the Minnesota Commitment and Treatment Act and the Uniform Guardianship and Protective Proceedings Act. We understand that the Supreme Court Advisory Committee on the Rules of General Practice is considering amending the Minnesota General Rules of Practice to permit, in certain circumstances, cameras in the courtroom. As judicial officers hearing these cases, we urge the committee to exempt proceedings under the Minnesota Commitment and Treatment Act and the Uniform Guardianship and Protective Proceedings Act from any rules allowing cameras in the courtroom.

We believe allowing cameras in the courtroom during Commitment Act proceedings may violate a Respondent's statutory privilege under Minn. Stat. § 253B. 23 subd. 4. Under that statute, the privilege between a Respondent and his or her physician, psychologist, examiner, or social worker is waived for information provided pursuant to commitment proceedings. The extent of this waiver must be carefully guarded. Commitment hearings generally entail detailed testimony from treating psychiatrists, psychologists, and social workers. While such information is necessary for the Court in rendering a decision, whether such information may legally be disseminated to the general public via television or other means is another issue altogether.

Further, Respondents in Commitment Act cases are, understandably, often reluctant to discuss their condition with court examiners. This reluctance would only intensify if Respondents understood that their personal medical and psychiatric history would be broadcast to the general public. Similarly, Respondents with severe and persistent mental illnesses may suffer from

paranoia, often believing that spies are watching their every move. The presence of cameras in the courtroom would serve only to bolster that delusion and again impede the judicial process.

Another equally important consideration is that allowing cameras in the courtroom during Commitment Act proceedings would infringe the dignity of Respondents during those proceedings. We are all aware of the unfortunate stigma associated with mental illness, mental retardation/developmental disability, and chemical dependency. Respondents appearing in court, through no fault of their own, are at a very low point in their lives. They have not chosen to be in court. They are alleged to be incapable of caring for themselves and/or a danger to harm themselves or others. They are often accused of behavior of the most embarrassing nature. The manifestations of these persons' illnesses should not be made a public spectacle. It is the hope of all involved in this process, and especially of the Respondents, that they will be able to return to a "normal" life. Nothing could be more counterproductive to this than making the general public aware of their present plight.

We understand the proposed rules provide the parties and the Court with the ability to object to the use of cameras in the courtroom. While this arguably is sufficient protection for the Respondents in these proceedings, we nevertheless believe that it would be unfair to place the burden of continually objecting to the use of cameras in the courtroom on either the parties or the Court.

Much of the foregoing is relevant in guardianship and conservatorship cases. In addition, issues regarding public safety also arise. Thus, televising a guardianship or conservatorship proceeding may publicize the presence of a vacant house, for many of our wards and protected persons have been placed out of their homes. Broadcasting these hearings increases the number of people aware of the location of a vulnerable adult who may then be induced to make changes to a will or to give away tangible property. The purpose of the cameras is, after all, to increase the audience size.

Like commitment matters, guardianship and conservatorship cases likely will involve embarrassing details about children or other loved ones, for the court must make specific findings before appointing a guardian or conservator. People will be less likely to discuss the disabilities of a relative if those disabilities are broadcast. It is unlikely that many families will want to air the sexual, cognitive, emotional, and social disabilities of their loved ones. Further, broadcasting these things may well be therapeutically contraindicated.

Traditionally, guardianship and conservatorship matters were dealt with almost as family matters, under the *parens patriae* power of the court. There has been a shift in the way these matters are handled; they are now more traditional judicial proceedings. Although the weight given the competing values--privacy and the public's right to know--has shifted toward the latter, the reasons for discretion in these hearings are still relevant. No one argues for closing these

hearings but the privacy views formerly associated with these hearings still exist and they weigh against cameras recording them.

A rule excluding cameras from commitment and guardianship and conservatorship proceedings still allows anyone to attend the hearing in person. We acknowledge the public nature of these hearings and agree that they should remain public; however, that right should not be expanded to include broadcasting the proceedings beyond the confines of the courtroom.

We know that the committee will give this matter serious and careful consideration. If I can provide further information to assist the committee, please contact me.

Respectfully submitted,

Marilyn J. Kaman,
Presiding Judge, Probate /Mental Health Court

Referees:
Bruce Kruger
Patrick Meade
Anthony Schumacher
Richard Wolfson

MNCASA
Minnesota Coalition Against Sexual Assault

OFFICE OF
APPELLATE COURTS

JUN 19 2008

FILED

June 18, 2008

Fredrick Grittner
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

Re: Written Statement in Support of Supreme Court Advisory Committee on General Rules of Practice Majority Report Recommending Retention of the Existing Rules Governing the Availability of Cameras in Minnesota Courtrooms

Dear Mr. Grittner,

Enclosed are twelve (12) copies of the above-referenced document, submitted pursuant to court order, for the hearing scheduled July 1, 2008.

The Minnesota Coalition Against Sexual Assault is not requesting an opportunity to make an oral presentation.

Thank you for accepting this written statement. Please do not hesitate to contact me if you have any questions.

Sincerely,

Donna Dunn
Executive Director

161 St Anthony Avenue
Suite 1001
St Paul, MN 55103

Phone:: 651 209 9993
Toll Free:: 800 964 8847
Fax:: 651 209 0899
Email:: info@mncasa.org

No. CX-89-1863

STATE OF MINNESOTA
IN SUPREME COURT

In re:

Recommendations of Minnesota Supreme Court
Advisory Committee on General Rules of Practice

STATEMENT IN SUPPORT OF SUPREME COURT ADVISORY COMMITTEE ON GENERAL RULES OF PRACTICE MAJORITY REPORT RECOMMENDING RETENTION OF THE EXISTING RULES GOVERNING THE AVAILABILITY OF CAMERAS IN MINNESOTA COURTROOMS

Donna Dunn
Executive Director
Minnesota Coalition Against Sexual Assault
161 St. Anthony Ave. Suite 1001
St. Paul, MN 55103
(651) 209-9993

STATE OF MINNESOTA

IN SUPREME COURT

NO. CX-89-1863

In re:

Recommendations of Minnesota Supreme Court
Advisory Committee on General Rules of Practice

STATEMENT IN SUPPORT OF SUPREME COURT ADVISORY COMMITTEE ON GENERAL RULES OF PRACTICE MAJORITY REPORT RECOMMENDING RETENTION OF THE EXISTING RULES GOVERNING THE AVAILABILITY OF CAMERAS IN MINNESOTA COURTROOMS

TO THE HONORABLE JUSTICES OF THE MINNESOTA SUPREME COURT:

The undersigned Executive Director of the Minnesota Coalition Against Sexual Assault (hereinafter "MNCASA" or "the Coalition") submits this statement in support of the Supreme Court Advisory Committee on General Rules of Practice Majority Report recommending retention of the existing rules governing the availability of cameras in Minnesota courtrooms, specifically the conditioning of electronic coverage upon judge, party and witness consent.

MNCASA is a voice for victims/survivors, sexual assault programs, and allies committed to ending sexual violence. The Coalition represents over 70 community-based advocacy programs statewide. These programs are committed to ensuring that sexual assault victims find safety and justice in their communities. Advocates provide the support and understanding that helps women, men and children face one of the most challenging aspects of their experience as a sexual assault victim – sharing their stories with public agencies, including the courts, in the hope that the offender will be brought to justice. The advocacy programs represented by

MNCASA were polled about the issue before the Court and they overwhelmingly oppose the expanded use of cameras in Minnesota courtrooms.

Sexual violence is a serious and prevalent issue in Minnesota. According to the *Costs of Sexual Violence in Minnesota* report issued by the Minnesota Department of Health in 2007, more than 61,000 Minnesota residents were sexually assaulted during 2005. Four of every five people assaulted were female. On average, each person victimized was assaulted 1.26 times during the year, totaling more than 77,000 sexual assaults. There were 7,200 reports of "unwanted sexual intercourse" to police and of these 2,617 met the law enforcement definition of rape. According to the *Costs* report, sexual assault in Minnesota cost almost $8 billion in 2005, or $1,540 per resident. These costs include pain, suffering, and quality of life losses for victims and families, as well as medical and mental health care and costs to the system including courts, corrections, and treatment. The problem of sexual violence is widespread and impacts every aspect of Minnesotans' lives, either directly or indirectly.

Victims of sexual violence are among the most silent crime victims. Regardless of the best efforts of advocates to demystify sexual assault and rightly identify the perpetrator of sexual violence as the party solely responsible for the crime, society continues to focus blame on the victim. Victims are all too aware of this dynamic and the implications that they should have done something to avoid the most intimate assault on their being. For these and many other reasons the vast majority of victims choose not to report a sexual assault for investigation and prosecution. They remain silent, hoping they can find support and solace among friends, family members, advocates, and social service professionals.

This reality is well-supported by one of the most comprehensive studies of rape conducted in the United States: *Rape in America: A Report to the Nation*, issued in 1992 by the

National Victim Center and the Crime Victims Research and Treatment Center. While the rate of forcible rape in the lives of American women is very high – one out of every eight adult women has been the victim of forcible rape and many more have experienced attempted rape and other kinds of criminal sexual conduct that rise to felony level under Minnesota statute – the rate of reporting is abysmally low. This study cites that only 16% of victims ever report the assault against them. Fully 84% of the victims keep their stories to themselves and as a result our communities do not have an opportunity to hold untold numbers of sex offenders accountable for their crimes. The researchers discovered that fear of being identified as a rape victim in media coverage is the most critical issue that rape victims cite when addressing their hesitation to report assaults. According to the report, "Rape victims are extremely concerned about people finding out and finding reasons to blame them for the rape. If the stigma of rape was not still a very real concern in victims' eyes perhaps fewer rape victims would be concerned about invasion of their privacy and other disclosure issues."

Although *Rape in America* was issued in 1992, many of its findings hold true today especially in light of the high-profile sexual assault cases that garner headlines and significant public attention in the print and electronic media, as well as on the Internet. Victims often find their cases are tried in the court of public opinion before the gavel ever sounds in a real court room. Their lives are often laid bare in an unflattering light, and in some extreme situations, especially when the defendant is a well-known public figure, the victim may suffer from physical threats and character attacks. Minnesota's advocacy community reports that victims seeking support services frequently ask "Who will find out?" and "Who needs to know?" These questions are followed closely by "Would I have to testify?" The advocacy community without hesitation says that to have to answer the next question "Will cameras record my testimony?"

with a "yes" would have an even greater chilling effect on victims reporting the crime that has happened to them.

MNCASA recognizes that the Minority Report and Recommendation support prohibitions on camera coverage in cases where privacy is a concern, such as those involving sex crimes. Still, MNCASA is concerned that the Minority wants to remove consent from the parties and witnesses and leave the option of electronic media coverage in the courtroom to the discretion of the trial judge. While MNCASA trusts that the vast majority of judges will decide in the interests of justice that audio and visual coverage will have a negative impact on a trial, some judges will allow it and the boundaries inevitably will be pushed. The privacy rights of today could be considered fair game tomorrow. We cannot take the risk that someday sexual assault cases and other privacy-sensitive cases will be open to such media access. Further, there will be cases not contained within the prohibitions set forth in the current rules that may require the introduction of private information, including evidence of a sexual assault, and could lead to unwanted public dissemination through the media. It is virtually impossible to draw a bright line in the rules because there are so many opportunities for private information to be disclosed in the courtroom. Sexual harassment lawsuits, for example, are not enumerated in the prohibited cases set forth in the rules; nor are stalking or Harassment Restraining Order matters. Electronic media coverage in these instances, especially those cases involving high-powered public figures but also any others in which personal safety is at stake, could deter petitioners from seeking legal recourse. Further, electronic coverage could be used as a tool for stalkers and could be posted and manipulated on websites ranging from YouTube to MySpace. The parties and witnesses should retain power over whether their faces and voices will be seen on television and heard on the radio because of all of these risks.

While MNCASA agrees that an open and transparent justice system and an independent media monitoring government activities are central to a healthy democracy, we know that video presence in the courtrooms in which the details of sexual assault cases are laid out for scrutiny will work only to heighten a victim's lack of trust that the legal system is a safe and accessible place. We cannot state strongly enough that the unintended consequence of this move would be to increase barriers for sexual assault victims and decrease accountability for sex offenders. If indeed we lived in a society which did not place the burden of assault on victims, this might not be the outcome. Until that day, however, the sexual assault advocacy movement urges the Court to keep courtrooms as safe as possible for all victims, by denying the presence of image recording equipment and keeping decisions for coverage in the hands of the parties and witnesses – those who will be the most affected by cameras in the courtroom.

MNCASA believes that retaining the existing rules will best protect the significant interests of all parties and witnesses engaged in the legal system, particularly those who are the victims of sexual violence. MNCASA requests that the Court adopt the recommendations of the Supreme Court Advisory Committee on General Rules of Practice Majority Report.

June 18, 2008

Respectfully submitted,

Donna Dunn
Executive Director
Minnesota Coalition Against Sexual Assault
161 St. Anthony Ave. Suite 1001
St. Paul, MN 55103
(651) 209-9993

THE MINNESOTA

COUNTY ATTORNEYS

ASSOCIATION

June 10, 2008

Mr. Frederick Grittner
Clerk of the Appellate Courts
305 Judicial Center
25 Dr. Rev. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

RE: Request to Make an Oral Presentation Concerning Cameras in the Courtroom Hearing

Dear Mr. Grittner,

James Backstrom, Dakota County Attorney and President of the Minnesota County Attorneys Association (MCAA), respectfully submits this request to make an oral presentation at the Minnesota Supreme Court public hearing regarding cameras in the courtroom on July 1, 2008. The MCAA is the professional association for all 87 elected County Attorneys and their Assistants. His comments will draw on his extensive experience and reflect the views of the MCAA.

We appreciate the opportunity to appear before the Supreme Court and look forward to the hearing. Please contact me if you need any additional information. Thank you.

Sincerely,

John P. Kingrey
Executive Director

100 Empire Drive, Suite 200 • St. Paul, MN 55103 • 651-641-1600 • Fax: 651-641-1666
www.mcaa-mn.org

MINNESOTA JUDICIAL BRANCH

STATE COURT ADMINISTRATOR'S OFFICE

Michael B. Johnson
Senior Legal Counsel

Legal Counsel Division
25 Rev. Dr. Martin Luther King, Jr., Blvd.
St. Paul, MN 55155

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August 5, 2008

Representative Leon M. Lillie
State Office Building
100 Rev. Dr. Martin Luther King, Jr., Blvd.
St. Paul, MN 55155

Dear Representative Lillie:

We have received your July 25, 2008, letter commenting on cameras in the courtroom (Court File No. CX-89-1863). Although the deadline for submitting comments has expired, we have added your letter to the other written comments in the file pertaining to this matter. Thank you for your submission.

Sincerely yours,

Michael B. Johnson
Senior Legal Counsel

CC (w copy of 7/25 letter): Members of the Court
Fred Grittner, Clerk of the Appellate Courts
Hon. Elizabeth Hayden, Advisory Committee Chair
Mr. Mark Anfinson, Attorney for Petitioners

Leon M. Lillie

District 55A
Ramsey County
Maplewood and North St. Paul

Minnesota House of Representatives

COMMITTEES: **VICE-CHAIR**, COMMERCE AND LABOR
RULES AND LEGISLATIVE ADMINISTRATION
PUBLIC SAFETY FINANCE DIVISION
PUBLIC SAFETY AND CIVIL JUSTICE

July 25, 2008

Chief Justice Eric Magnuson
Minnesota Supreme Court
Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

Re: Cameras in Courtrooms
Court File No. CX–89–1863

Dear Chief Justice Magnuson:

I attended the Court's recent public hearing on expanding electronic trial coverage, mainly because I have also had an interest in this topic for some time from a legislative perspective. Indeed, I had considered pursuing legislation addressing the issue during the last legislative session, but, based on conversations with a number of people, concluded that it would be better to let the Court take the lead. Nonetheless, I hope you might entertain some of my thoughts about the proposal.

Having examined the pros and cons of allowing electronic coverage in Minnesota trial courtrooms, I have concluded that there are potentially many more advantages than disadvantages associated with such coverage, and that permitting access by cameras would benefit not only the citizens of the state, but the court system as well.

Though I did not feel it was appropriate for me to appear formally at the public hearing, I wanted to share with you some of the specific benefits that I have noted in my consideration of the topic (a number of which were also identified by presenters at the public hearing earlier this month):

- Permitting direct electronic coverage of the trial courts is very likely to improve public understanding of the court system and how it works. Though I'm not a lawyer, my sense (shared by many others) is that the trial courts in our state do a remarkably good job. Allowing this to be more vividly and clearly displayed can only improve public confidence in the court system, which would certainly tend to enhance its effectiveness.

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- In those states where cameras are routinely allowed in trial courtrooms, the coverage that appears on the evening news usually seems to be focused on the courtroom proceedings themselves, rather than on interviews with lawyers or family members. Especially in certain kinds of cases, this helps to more accurately convey what actually occurs in the courtroom—which, again, will I think nearly always reflect well on the court system.

- While I have also heard the criticism from opponents of expanded coverage that the media will mainly convey "sound bites," I believe this claim to be mostly inaccurate and misleading. The experience in other states quite clearly shows that television coverage is usually concentrated on cases of widespread public concern, typically relating to serious criminal behavior. In my view, even a brief video segment on the evening news showing a murderer being solemnly sentenced by a sober and distinguished judge, or a defense attorney passionately emphasizing the protections of the Constitution, sends a powerful message that justice is in fact being done, and that those crimes most troubling to the community are being satisfactorily addressed by the judicial system. Such images really aren't properly characterized as sound bites, but instead represent the sort of synthesis and distillation necessarily performed by the news media in covering lengthy and complex proceedings.

- I believe that (as I think Judge Patrick Grady mentioned at the public hearing), developing relationships between the courts and the news media through coordination of the electronic coverage rules may provide many collateral benefits for the court system, including more efficient and effective communication with the media, even when electronic coverage of a trial or hearing is not directly involved.

- The concern expressed about the possible negative impact on victims and witnesses is certainly an important one. But it remains difficult for me to believe that such an impact would not have been identified and documented in those states that allow expanded coverage, if it was in fact a significant problem. Also, I think the opponents who focus on this concern ignore an important countervailing consideration, which has been noted in other states, namely, that courtroom proceedings can prompt additional witnesses and victims to come forward, and can also reassure and even empower crime victims by showing that the judicial system is responsive to them.

- Though most of the time the court system does an extraordinary job under difficult conditions, there are of course occasional shortcomings. As I think Justice England pointed out during the public hearing, electronic coverage furnishes an avenue for identifying and addressing those sorts of situations, which may otherwise remain uncorrected.

- While many of the benefits mentioned above will be experienced by the general public as well as the court system, there is I think another potential advantage

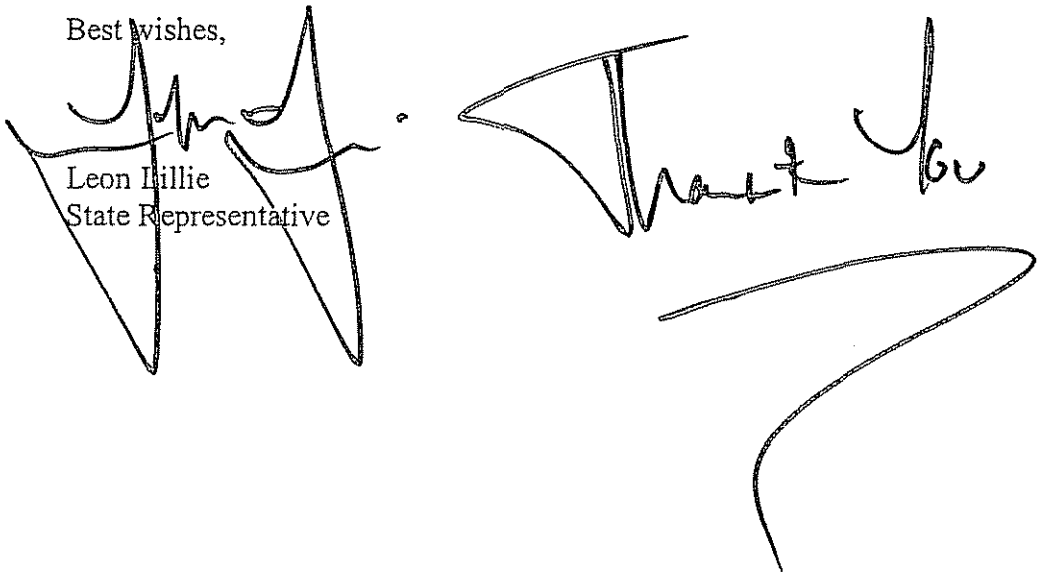
associated with electronic coverage that is especially relevant in a time when legislative funding for the court system has presented such a challenge. In my judgment, electronic coverage could significantly increase public appreciation for the work that judges do. This in turn could lead to a broader appreciation in the Legislature when it comes to setting budget priorities. It is not just citizens generally who often have little clear idea of what the courts actually do or how they do it, but many legislators as well.

I did find especially interesting some of the comments during the public hearing about whether one side or the other in this debate has the "burden of proof." I will say that I find that issue a bit perplexing, since I think the question of electronic coverage of the trial courts is a broader public policy matter that doesn't lend itself well to such a legalistic approach. It also seems to me common-sensical that the courts should generally be covered by the media as are the executive and legislative branches of our government, in the absence of clearly demonstrated problems caused by electronic coverage, given that all three branches ultimately depend on public accountability and approval.

Nonetheless, my focus has been on what I have identified as the specific benefits that will accrue to the people of Minnesota and its court system, if expanded coverage is permitted. Those benefits would seem to satisfy any burden of proof that might apply.

I do very much appreciate your consideration of my views.

Best wishes,



Leon Lillie
State Representative

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September 30, 2008

Arthur J. England, Jr.
Greenberg Traurig, P.A.
1221 Brickell Avenue
Miami, Florida 33131

Dear Mr. England:

We have received your September 24, 2008, letter and its accompanying symposium paper commenting on cameras in the courtroom (Court File No. CX-89-1863). Although the deadline for submitting comments has expired, we have added your letter and its accompanying paper to the other written comments in the file pertaining to this matter. Thank you for your submission.

Sincerely yours,

Michael B. Johnson
Senior Legal Counsel

CC (w copy of 9/24 letter and attached paper):

Members of the Court
Fred Grittner, Clerk of the Appellate Courts
Hon. Elizabeth Hayden, Advisory Committee Chair
Hon. Mel Dickstein, Advisory Committee Majority Position Presenter
Mr. Mark Anfinson, Attorney for Petitioners

Greenberg Traurig

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*Board Certified in Appellate Practice

September 24, 2008

The Honorable Eric J. Magnuson
Chief Justice
Minnesota Supreme Court
Minnesota Judicial Center
25 Rev. Martin Luther King Jr. Boulevard
St. Paul, Minnesota 55155

Dear ~~Chief Justice Ma~~Eric Magnesun:

I had previously advised the Court of a Symposium to be held on September 23 in St. Petersburg, Florida, to celebrate the 30th anniversary of the Florida Supreme Court's adoption of cameras in courts. In conjunction with the Symposium, where I am a panelist, I was sent the enclosed paper about cameras in courts. I enclose ten copies of the paper for possible consideration by the Justices in your pending cameras case.

Sincerely,

AJE/ct
Enclosures

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Florida at the Forefront:
Thirty Years of Cameras in the Courtroom

PART I

INTRODUCTION

The United States Supreme Court has never allowed cameras into its chambers.[1] When the Court ruled on a case that would shape America for decades to come, it did so virtually in private,[2] and November 27, 2000 marked another dark day in a line of many for the cameras in the courtroom movement at the federal level.[3] What began as a storybook opportunity for the Supreme Court to patch its long and stubborn history of rendering Americans blind to its proceedings ended in an all too familiar result: it prohibited television cameras from providing citizens with live coverage of the Bush v. Gore election case.

America had just voted on its first new president in eight years, but the outcome was in doubt thanks to Florida and its infamous vote-counting debacle. CNN and C-SPAN petitioned the Supreme Court to allow television broadcast of the arguments for this historic event.[4] Never before had Americans been this interested in the judicial process.[5] The High Court could have broadcast a real life civics lesson to every home in America, an engaged public hanging on every word. The Court balked at its opportunity to utilize broadcast technology to its fullest, and instead stubbornly stuck to its draconian position of banning electronic coverage, thus remaining virtually anonymous to the American public. The Supreme Court on that historical day closed its

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1 *See* Marjorie Cohn, *Let the Sun Shine on the Supreme Court*, 35 HASTINGS CONST. L.Q. 161-62 (2008).

2 *Id.*

3 Jennifer J. Miller, *Cameras in Courtrooms*: The Lens of the Public Eye on Our System of Justice, SOUTH CAROLINA LAWYER, March/April 2002, at 26.

4 Cohn, *supra* note 1.

5 Douglas Lee, Commentary, *Florida Election Case Proved Value of Cameras in the Courtroom*, FREEDOMFORUM.ORG, Dec. 26, 2000.

proceedings to all but the lucky 80 members of the public who were fortunate – or elite – enough to nab one of the chambers' sought-after spots.[6]

Florida Openness v. Supreme Court Secrecy

The antithesis to the Supreme Court of the United States in the cameras-in-the-courtroom arena, Florida courts have a tradition of allowing camera coverage of their proceedings. Prior to the High Court shutting its doors to one of the most important court cases in decades, each Florida court that heard one of the many election cases televised its proceedings, broadcasting live arguments over how the ballots were to be counted.[7] As a result, the public was able to view the unfolding legal drama from the comfort of their own homes.

The U.S. Supreme Court subsequently decided this influential case in a shroud of secrecy. The decision not to broadcast *Bush v. Gore* was no accident. Justice David Souter is oft-quoted for the position he offered in 1996 to a House appropriations subcommittee: "The day you see a camera come into our courtroom it's going to roll over my dead body."[8]

This statement is both hypocritical and paternalistic. It's hypocritical for a Supreme Court justice to be adverse to change, and the reference to "*our*" court is paternalistic. Nonetheless, the High Court was in position in late 2000 to modernize its stance on cameras in

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6 *See* Cohn, *supra* note 1; *Bush v. Gore*, 531 U.S. 98 (2000).

7 THE MEDIA INSTITUTE, *The First Amendment and the Media: Courts Deny Video Coverage of Two Highly Charged Events*, *available at* http://www.mediainstitute.org/ONLINE/FAM2002/Press_A.html (last visited July 20, 2008) [hereinafter MEDIA INSTITUTE] (citing *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000)); *Hearing Before the H. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Barbara Cochran, President, Radio-Television News Directors Association) [hereinafter Cochran Hearing]; Al Tompkins, *A Case for Cameras in the Courtroom*, POYNTERONLINE, Nov. 28, 2000, *available at* http://www.poynter.org/dg.lts/id.5132/content.content_view.htm.

8 Cohn, *supra* note 1, at 162 (quoting *Souter Won't Allow Cameras in High Court*, L.A. TIMES, Apr. 9, 1996, at A6).

the courtroom. C-SPAN chairman Brian Lamb had written to Chief Justice William Rehnquist requesting gavel-to-gavel television access to the election oral arguments: "The public interest in the Court and its role in our government would likely never be higher. We respectfully suggest that televised coverage of that role would be an immense public service and would help the country understand and accept the outcome of the election."[9]

Also urging the Chief Justice to allow broadcast of the Court's proceedings was Barbara Cochran, president of the Radio-Television News Directors Association:

> Video is our society's common language, and eliminating television coverage will significantly impact upon the content of the information conveyed about the unprecedented role the Supreme Court is taking in this year's presidential election. Certainly, there is no better time for the Supreme Court justices to suspend the ban on cameras in the court and to allow live coverage of these proceedings.[10]

Despite these eloquent pleas for access, Chief Justice Rehnquist continued the Court's unblemished record of prohibiting broadcast of these historic public events,[11] offering no explanation for his decision,[12] and overlooking the positions of his predecessors. "Every citizen should be able to satisfy himself with his own eyes," said Justice Oliver Wendell Holmes.[13] And Justice Warren Burger opined that allowing courtroom coverage "gives assurance that proceedings were conducted fairly to all concerned, and it discourages perjury, the misconduct of participants, and decisions based on secret bias or partiality."[14]

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9 MEDIA INSTITUTE, *supra* note 7.

10 *Id.*

11 *Id.*

12 Al Tompkins, *A Case for Cameras in the Courtroom*, POYNTERONLINE, Nov. 28, 2000, *available at* http://www poynter.org/dg.lts/id.5132/content.content_view.htm.

13 *Id.*

14 *Id.*

All was not lost, however. The Supreme Court, while banning cameras in *Bush v. Gore*, did provide open courtroom advocates with a surprising consolation prize. For the first time in its history, the high court immediately released the audiotapes of the December 1, 2000 arguments in this unprecedented and historical presidential election case.[15] As a result, television and radio networks were able to broadcast the entire proceedings to tens of millions of Americans soon after the proceedings concluded.[16]

Prior to *Bush v. Gore*, the court had not made these audiotapes available to the public for several months.[17] The Supreme Court further loosened its anti-camera stance six years later when it again made oral argument transcripts available the same day a case was argued.[18] The Court has continued to provide this same-day access in many high-profile cases, such as the 2003 affirmative action decisions[19] and the case which ruled on the rights of Guantanamo detainees and detained U.S. citizens.[20] Camera advocates hope this progression by the stubborn Supreme Court offers "a glimmer of hope" that cameras in federal courtrooms will be a reality in the near future.[21]

However, the Supreme Court has emphasized that this level of access will be allowed only in rare and compelling circumstances.[22] Regarding televised arguments, Chief Justice

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15 *See id.*

16 *Cameras in Court – Judge Wapner and the People's Court, "Raise Your Right Hand and Try to Look Natural": The Courtroom Camera Debate,* (2008) [hereinafter *Cameras in Court*] *available at* http://law.jrank.org/pages/4979/Cameras-in-Court.html (last visited July 20, 2008); Cohn *supra* note 1, at 162; Miller *supra* note 3.

17 Cohn, *supra* note 1, at 162.

18 *Id.*

19 *Id.* (*Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003)).

20 *Id.* (*Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)).

21 *See* Paula Canning, *Battles for Cameras in Courtrooms Continue, Supreme Court Releases Audio tape of Affirmative Action Arguments,* THE NEWS MEDIA AND THE LAW, Spring 2003, at 34.

22 *Cameras in Court, supra* note 16.

Rehnquist clarified the court's reluctance, saying "[A] majority [of the justices] are of the view that it would be unwise to depart from our current practice,"[23] and stating that no camera coverage would take place if even one justice was opposed.[24] Overall, the Court's feet are still stuck in the mud of yesterday, and it continues to publish bulletins which firmly prohibit cameras anywhere in the building.[25] In addition to the Supreme Court, almost all federal courts continue to ban electronic camera coverage of their proceedings.[26] By continuing to ban such coverage, federal judges seem to overlook that *every* branch of American government belongs to the people; they forget that the judiciary is not untouchable.[27]

PART II

FLORIDA PAVES THE WAY WITH A PRESUMPTION OF OPENNESS

Despite reluctance at the federal level to allow courtroom broadcasts, every state in the nation now allows some level of electronic coverage.[28] Florida has an established history of permitting liberal camera access to its courtrooms. On July 5, 1977, Florida began an experiment allowing television cameras in the state's courtrooms.[29] This experiment was conducted despite adverse positions to cameras in the courtroom by both the Supreme Court of the United States and the American Bar Association. First, in 1965, the U.S. Supreme Court

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23 *Id.*

24 *Id*

25 Audrey Maness, *Does the First Amendment's "Right of Access" Require Court Proceedings to be Televised? A Constitutional and Practical Discussion,* 34 PEPP. L. REV. 123, 126 (2006).

26 *See* discussion *infra* notes 186-89.

27 *See* Ruth Ann Strickland & Richter H. Moore Jr., *Cameras in State Courts: A Historical Perspective in* JUDICIAL POLITICS: READINGS FROM THE *JUDICATURE* 434 (Elliot E. Slotnick ed.) (Rowman & Littlefield 1999).

28 *Cameras in Court, supra* note 16; *see* discussion *infra* notes 147-52.

29 Mike Strand, *Cameras in the Courtroom: Will Illinois be Next?* (April 1981) *available at* http://www.lib.niu.edu/1981/ii810408.html (last visited July 20, 2008).

ruled in *Estes v. Texas* that there is no First Amendment right for cameras in courtrooms, and that cameras must be banned from courtrooms in many instances because of their adverse effects on the judicial process.[30] Second, most states in the 1970s still accepted as law Canon 35 of the American Bar Association's Canons of Judicial Ethics, which had banned camera coverage of courtrooms since 1937.[31]

However, Justice Harlan's concurrence in *Estes* permitted states to decide whether or not to allow broadcast coverage in their courtrooms by declining to enforce a blanket prohibition of television coverage in state courts.[32] It was in that spirit that Post-Newsweek Stations, Florida, Inc. on January 24, 1975 filed a petition for a change to the Florida Code of Judicial Conduct 3A(7), which, despite a few exceptions, generally prohibited the broadcast of trials.[33] The Florida Supreme Court in 1977 granted the portion of Post-Newsweek's petition which sought reexamination of the canon.[34] Thereafter Florida commenced a one-year, experimental cameras-in-the-courtroom project, wherein television and still cameras were allowed without the consent of trial participants.[35]

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30 *See* Rory K. Little, *That's Entertainment! The Continuing Debate Over Cameras in the Courtroom. No Cameras in the Courtroom*, 42-JUL FED. LAW. 28, 30 (1995).

31 Maness, *supra* note 25, at 142 (The American Bar Association readopted Canon 35 and its ban on television in 1972); Strand, *supra* note 29; Mary Kay Platte, *TV in the Courtroom: Right of Access? in* CENSORSHIP, SECRECY, ACCESS, AND OBSCENITY 157, 158 (Theodore R. Kupferman ed.) (Wm. S. Hein Publishing 1990) (The American Bar Association in 1972 replaced Canon 35 with Canon 3A(7) which, despite authorizing limited camera coverage, still adhered to the tenets of Canon 35).

32 Stephen D. Easton, *Cameras in Courtrooms: Contrasting Viewpoints. Whose Life is it Anyway?: A Proposal to Redistribute Some of the Economic Benefits of Cameras in the Courtroom from Broadcasters to Crime Victims*, 49 S.C. L. REV. 1, 11-12 (1997) (citing *Estes v. Texas*, 381 U.S. 532, 596 (1965)).

33 *See In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764, 766 (Fla. 1979).

34 *Id.*

35 *Id.*; Easton, *supra* note 32, at 12.

Florida was not the first state to experiment with electronic media presence in its courtrooms.[36] Sixteen states allowed televisions in their courtrooms by the time Florida employed its camera experiment.[37] In fact, even the ABA began to soften its firm stance against camera coverage during this same period.[38] With states being encouraged to experiment with camera pilot programs, the Conference of State Chief Justices – chaired by Chief Justice Ben F. Overton of Florida – voted 44-1 in 1978 to adopt a resolution that permitted each state to enact its own guidelines for electronic courtroom coverage.[39]

Beginning on July 1, 1977, the media were allowed to use cameras to cover judicial proceedings at all levels across the state of Florida.[40] The purpose of the experiment was to guide the Florida Supreme Court in its decision whether to modify Canon 3A(7).[41] It was a victory for camera advocates, and on May 1, 1979, Florida officially granted broadcast journalists access to its courtrooms.[42]

More than 2,750 people participated in the one-year experiment, either as judge, attorney, court attaché, juror, or witness.[43] Surveys by the Florida Conference of Circuit Judges conducted on judicial participants whose courtrooms were accessed by electronic media were exceedingly positive for access advocates. The surveys indicated, in part, that:

- "[t]he presence of electronic media disrupted the trial either not at all or only slightly;"

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36 Easton, *supra* note 32, at 13; Maness, *supra* note 23, at 137 (citing *Chandler v. Florida*, 449 U.S. 560, 565 (1981)).

37 Maness, *supra* note 25, at 137.

38 *See Cameras in Court, supra* note 16.

39 *Id.*; Platte, *supra* note 31, at 161.

40 *In re Petition of Post-Newsweek Stations*, 370 So.2d at 766.

41 *Id.* at 767.

42 Strand, *supra* note 29.

43 *In re Petition of Post-Newsweek Stations*, 370 So.2d at 767.

- "[t]he ability of the attorney and juror respondents to judge the truthfulness of witnesses was perceived to be affected not at all;"
- "[t]he ability of jurors to concentrate on the testimony" was not affected;
- "[t]he distracting effect of electronic media was deemed to range from almost not at all for jurors, to slightly for witnesses and attorneys;"
- "[t]he degree to which jurors and witnesses felt the urge to see or hear themselves on the media fell between not at all and slightly;" and
- "[c]ourt personnel and attorneys were of the attitude that the presence of electronic media affected the flamboyancy of witnesses to a degree between not at all and slightly."[44]

Additionally, surveys of circuit court judges who participated in the program were also positive.[45] Seventy-three of the 102 judges surveyed indicated either a positive or neutral reaction to the experience.[46] Those judges who reported a neutral reaction "generally made favorable comments such as 'I am neutral, but the press were professional, no disturbances, etc.'"[47]

The *Post-Newsweek* court in 1979 nullified the existing Florida Canon 3A(7), substituting in its place the new canon:

> *Subject at all times to the authority of the presiding judge* to (i) control the conduct of proceedings before the court, (ii) ensure decorum and prevent distractions, and (iii) ensure the fair administration of justice in the pending cause, *electronic media and still coverage of public judicial proceedings in the appellate*

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44 *Id.* at 768-69.

45 Interview with Talbot "Sandy" D'Alemberte, President Emeritus and Professor, Florida State University College of Law (Feb. 13, 2008) [hereinafter D'Alemberte Interview]. Professor D'Alemberte represented petitioner Post-Newsweek Stations, Florida, Inc. on behalf of Steel, Hector & Davis, Miami, in this case petitioning the Florida Supreme Court for change in the Code of Judicial Conduct relevant to courtroom electronic media access. D'Alemberte also helped file petition for certiorari to the Supreme Court to hear *Bush v. Gore*.

46 *In re Petition of Post-Newsweek Stations*, 370 So.2d at 769.

47 *Id.* at 769-70.

> *and trial courts of this state shall be allowed* in accordance with standards of conduct and technology promulgated by the Supreme Court of Florida.[48]

Thus, the decision to exclude cameras from the courtroom proceeding was now left to the discretion of the presiding judge.[49] Writing for the Court, Justice Alan Sandberg stated

> [t]he presiding judge may exclude electronic media coverage of a particular participant only upon a finding that electronic media coverage will have a will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media.[50]

Florida was the first state to create the presumption that cameras will be allowed into the courtroom – a presumption of openness.[51] The *Post-Newsweek* court opined simply that trials are public events and that what transpires in a courtroom is public property, ironically, conclusions previously enunciated by the U.S. Supreme Court.[52] "A democratic system of government is not the safest form of government, it is just the best man has devised to date, and it works when its citizens are informed about its workings."[53]

Chandler v. Florida

In the wake of the monumental *Post-Newsweek* decisions and amended court rule came the U.S. Supreme Court ruling access advocates craved. After undergoing drastic composition changes, the high court made its precedential decision on cameras in the courtroom only one year after Florida created a presumption of allowing cameras, ruling that courtroom access is a

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48 *Id.* at 781 (emphasis added).

49 *Id.* at 779.

50 *Id.*; *The Florida Times-Union v. State*, 747 So.2d 1030, 1031 (Fla. 1st DCA 1999).

51 D'Alemberte Interview, *supra* note 45.

52 *In re Petition of Post-Newsweek Stations*, 370 So.2d at 780; See e.g., *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *Craig v. Harney*, 331 U.S. 367 (1947).

53 *In re Petition of Post-Newsweek Stations*, 370 So.2d at 781.

constitutional right under the First Amendment.[54] While not explicitly creating a First Amendment right for the media to televise proceedings, the *Richmond* court condoned the practice.[55] Criminal trials in the United States and in England have always been presumptively open, wrote Chief Justice Warren Earl Burger, and "absent an overwhelming interest articulated in findings, the trial of a criminal case must be open to the public."[56] Burger was no advocate of journalism, either.[57] The camera movement had gained steam.

Just as Florida in 2000 was at the forefront of the debate to permit broadcast of Supreme Court arguments,[58] so it was in 1981 in the debate to allow camera coverage inside *any* courtroom in the country. Florida was one of only a handful of states that, by rule, permitted broadcast of a criminal trial over the defendant's objection.[59] The constitutionality of this Florida provision came to a head in front of the Supreme Court. On January 26, 1981 the Supreme Court ruled 8-0 that televising the highly-publicized burglary conspiracy trial of two Miami Beach police officers over their objections pursuant to this Florida pro-camera rule did not violate the Due Process Clause of the Fourteenth Amendment.[60]

This landmark decision affirmed the right of each state to allow electronic coverage of criminal trials without the consent of the defendant.[61] Writing for the Supreme Court in its landmark decision in *Chandler v. Florida*, Chief Justice Warren E. Burger opined that, despite

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54 *See* Maness, *supra* note 25, at 136-37 (citing *Richmond Newspapers Inc v. Virginia*, 448 U.S. 555 (1980)).

55 Maness, *supra* note 25, at 137.

56 *Id.* (citing *Richmond Newspapers*, 448 U.S. at 565-67); *Richmond Newspapers*, 448 U.S. at 581.

57 *See* Steven Brill, *Courtroom Cameras*, 72 NOTRE DAME L. REV. 1181, 1188 (1997).

58 *See* discussion *supra* notes 1-6; *see Bush v. Gore*, 531 U.S. 98 (2000).

59 Audrey Winograde, *Cameras in the Courtroom: Whose Right is it Anyway?* 4 SW. J. L. & TRADE AM. 23, 26.

60 Strand, *supra* note 29; *Chandler v. Florida*, 449 U.S. 560 (1981).

61 Platte, *supra* note 31, at 175.

the inevitable risk of juror prejudice by news coverage, the risk "does not justify an absolute ban on news coverage on trials by the printed media; so also the risk of such prejudice does not warrant an absolute constitutional ban on all broadcast coverage."[62]

The Court in *Chandler* – and to the present – has not held that the First Amendment confers to journalists an absolute right to bring camera into courtrooms.[63] Rather, any First Amendment right of access is qualified and must yield to the defendant's fundamental Sixth Amendment right to a fair trial.[64] With that said, the *Chandler* court shifted the burden from the media to the defendant to prove that cameras in the courtroom compromised a fair trial.[65] Absent a defendant coming forward with specific evidence of prejudice that would implicate a violation of his due process rights, the *Chandler* court held that camera presence is not unconstitutional, thus solidifying the media's right to bring cameras into courtrooms.[66]

Chief Justice Burger further opined in *Chandler*: "Dangers lurk in this, as in most experiments, but unless we were to conclude that television coverage under all conditions is prohibited by the Constitution, the states must be free to experiment."[67] And experiment they already were. At the time the Supreme Court ruled on *Chandler*, Florida had been one of twenty-nine states which had adopted at least experimental rules allowing some form of camera access.[68] Not only did the *Chandler* ruling pave the way for states to experiment, it also

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62 Elizabeth A. Stawicki, *The Future of Cameras in the Courts: Florida Sunshine or Judge Judy*, 8 U. PITT. J. TECH. L. & POL'Y 4, n.29 (citing *Chandler*, 449 U.S. at 575).

63 Gregory K. McCall, *Cameras in the Criminal Courtroom: A Sixth Amendment Analysis*, 85 COLUM. L. REV. 1546, 1560.

64 Joshua Sarner, *Justice, Take Two: The Continuing Debate Over Cameras in the Courtroom*, 10 SETON HALL CONST. L.J. 1053, 1058.

65 Maness, *supra* note 25, at 138; *Chandler*, 449 U.S. at 575.

66 *See* McCall, *supra* note 63, at 1551.

67 *Chandler*, 449 U.S. at 582.

68 Sarner, *supra* note 64, at 1072.

influenced the American Bar Association, the national representative of the legal profession, to alter its previously unwavering stance against cameras.[69] After the *Chandler* decision in 1981 the ABA finally lightened its ban on cameras in the courtroom that had stood strong since its inception of Canon 35 in 1937.[70] Canon 35 was modified at that point to allow some use of cameras in the courtroom under the supervision of each state's highest court.[71]

Press Enterprise v. Superior Court

The Supreme Court of the United States further cemented the presumption of openness in courtrooms five years after *Chandler*.[72] In *Press-Enterprise Co. v. Superior Court*, the Court framed the burden a defendant must meet before a judge can ban the electronic media from the proceedings.[73] To be granted a closed courtroom, a defendant must first demonstrate the existence of a "substantial probability that [his] right to a fair trial [would] be prejudiced by publicity that closure would prevent."[74] Second, a defendant must demonstrate that "reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights."

Since 1979, Florida courts have left the cameras decision to the sound discretion of the presiding judge.[75] The *Post-Newsweek* Court articulated the burden a defendant in Florida must overcome to bar cameras:

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69 S.L Alexander, University of Florida, *Curious History: The ABA Code of Judicial Ethics Canon 35*, Paper Presented to the Law Division at the Annual Meeting of the Association for Education in Journalism and Mass Communications, Portland, Oregon (July 1988), at 6, *available at* http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1d/a7/20.pdf; *See* American Bar Association website, http://www.abanet.org/about (last visited July 20, 2008).

70 Alexander, *supra* note 69.

71 *Id.* at 6, 20.

72 *See Press-Enterprise Co. v Superior Court*, 478 U.S. 1 (1986).

73 Sarner, *supra* note 64, at 1079.

74 *Id.* (quoting *Press-Enterprise Co.*, 478 U.S. at 14).

75 *In re Petition of Post-Newsweek Stations*, 370 So.2d at 779.

> The presiding judge may exclude electronic media coverage of a particular participant only upon a finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media.[76]

PART III

THE DEBATE

The unending debate over cameras in courtrooms hinges on two constitutional provisions and the conflicting fundamental rights they protect: the public's First Amendment right of access vs. the defendant's Sixth Amendment right to a fair trial.[77] Commentators rage on in debate over these seemingly adverse amendments, often overlooking their positive interplay. In the context of allowing media coverage of court proceedings, the First and Sixth amendments are in fact "mutually reinforcing."[78] Media presence in courtrooms provides a check on arbitrary government power, thereby strengthening the defendant's right to a fair trial.[79] Jury presence in courtrooms vindicates the public's right to free speech and to criticize the government.[80]

While most pundits choose to turn a blind eye to the mutuality of these amendments, the respective constitutional arguments must be given credence. When states such as Florida permit a defendant to illustrate to a judge how camera coverage would prejudice the proceeding, a balance is struck between the defendant's Sixth Amendment rights and the public's First Amendment rights. Media rights to accessing courtroom proceedings should not be unfettered.[81]

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76 *Id.*; *Florida v. Palm Beach Newspapers, Inc.*, 395 So. 2d 544 (Fla. 1981).

77 Maness, *supra* note 25, at 156.

78 *Id.* at 157.

79 *Id.*

80 *Id.* (citing Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (1988) at 23: "It becomes even more clear that popular speech was the paradigm of our First Amendment when we recall its historic connection to jury trial: popular bodies outside regular government would protect popular speech criticizing government.").

81 Winograde, *supra* note 59, at 39.

If a defendant illustrates how cameras will render his trial unfair, this qualified First Amendment right of the media must yield to the Sixth Amendment right to a fair trial.[82]

A. Camera Proponents

1. Extralegal Check

Historically, trials were public events in order to provide a check on oppressive and arbitrary government action.[83] The public – and the press beginning in the eighteenth century – provided an "extralegal check" on judicial misbehavior.[84] While fear of governmental tyranny has waned since the time of our nation's founding, the importance of keeping tabs on the judicial system is still a concern. Today, this concern is quelled by media presence – America's watchful eye.[85] Widespread viewership of trials ensures procedural rights are upheld and justice is administered equally.[86] Justices of the highest court in the land understand the importance of judicial oversight. The Court has opined that electronic coverage of criminal trials is central to the "common core purpose" of the First Amendment, "assuring freedom of communication on matters relating to the functioning of government."[87]

As stated by Justice Harry Blackmun:

> It has been said that publicity "is the soul of justice." And in many ways it is: open judicial processes, especially in the criminal field, protect against judicial, prosecutorial, and police abuse; provide a means for citizens to obtain information about the criminal justice system and the performance of public officials; and safeguard the integrity of the courts. Publicity is essential to the preservation of public confidence in the rule of law and in the operation of courts. Only in rare circumstances does this principle clash with the rights of the criminal defendant to

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82 *See id.* at 40 (citing *In re Dow Jones & Co* , 842 F.2d 603, 609 (2d. Cir. 1988)).

83 Maness, *supra* note 25, at 159.

84 *Id.*

85 *See id.* at 160.

86 Winograde, *supra* note 59, at 28.

87 McCall, *supra* note 63, at 1559 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980)).

> a fair trial so as to justify exclusion. The Sixth and Fourteenth Amendments require that the States take care to determine that those circumstances exist before excluding the public from a hearing to which it otherwise is entitled to come freely.[88]

2. Public Education

The prevailing argument proffered today in support of cameras in the courtroom is that broadcasting court proceedings educates the American public.[89] In modern America, the public increasingly utilizes the media as an educational source; broadcasting judicial processes and proceedings plays a crucial role in teaching the public about the judicial institution, its activities and its decisions, its strengths and its faults.[90] And Americans need the electronic media. Only forty-three percent of Americans can name one justice of the Supreme Court.[91] Additionally, Americans are widely uninformed regarding the workings of their court systems.[92] An educated citizenry must have the necessary tools to shape laws and procedures and their implementation[93]: Gavel-to-gavel broadcasts represent legal events with a sense of realism that cannot be accomplished by the traditional print media.[94]

While the cases that make the airways today are often those that are particularly thrilling,[95] the more cameras become a common fixture in courtrooms the more the run-of-the-mill cases will be broadcast. At that point, courtroom cameras will capture the true judicial

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88 *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 448 (1979) (Blackmun, J., dissenting).

89 Maness, *supra* note 25, at 161.

90 *See id.*; ELLIOT E. SLOTNICK & JENNIFER A. SEGAL, TELEVISION NEWS AND THE SUPREME COURT: ALL THE NEWS THAT'S FIT TO AIR? 5-6 (Cambridge University Press 1998); *see also* JEFFREY J. HUNT, CAMERAS IN THE COURTROOM 1 (2003). "...cameras in the courtroom are an indispensable tool for disseminating information about the judicial system to the public,..."

91 *See* Maness, *supra* note 25, at 172, n.407.

92 *See* Winograde, *supra* note 59, at 28.

93 *Id.* at 28-29.

94 *See* SLOTNICK & SEGAL, *supra* note 90, at 7.

95 *See* Henry F. Fradella & Brandon Burke, *From the Legal Literature,* 43 NO. 5 CRIM. LAW BULLETIN 8, n.15-16 (2007).

experience. Before the hostility to cameras in the courtroom more fully subsides, Americans must resort mainly to television programs such as *Judge Judy* and even *Law & Order* as a misplaced barometer against which all judicial proceedings are judged.[96] If a network such as C-SPAN expanded its scope to include unedited coverage of the bench as it does the legislature, the judiciary would no longer be rendered the mysterious third branch.[97] Such gavel-to-gavel coverage of judicial action would put to rest any fears of sensationalism[98] and the American public would benefit by a more comprehensive understanding of their judicial system.[99]

One need only look to the first live televised broadcast of a federal court proceeding to understand the educational potential of judicial broadcasts.[100] An appeal of an Air Force drug conviction, the C-SPAN airing included interviews with knowledgeable witnesses and a nationwide call-in segment, in addition to the oral arguments, to create an educational package.[101] The public in a democratic society deserves such an opportunity to view witnesses and personally judge their credibility, as well as watch the interplay of the various participants.

The American Bar Association – which for decades vehemently opposed letting cameras into America's courtrooms – today openly endorses more experimentation of camera coverage in

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96 *See id.* at n.9, 12-13.

97 *See* Strickland & Moore, *supra* note 27, at 434; *see* Winograde, *supra* note 59, at 28. The judicial branch is the area of government activity about which the American public knows so little.

98 *Id.*

99 Henry Schleiff, *Cameras in the Courtroom: A View in Support of More Access,* 28- FALL HUM. RTS. 14 (2001). *Court TV* between 1991 and 2001 "nationally televised more than 730 trials and legal proceedings, giving millions of Americans the opportunity to see firsthand our nation's judicial system at work."

100 *See* Fradella & Burke, *supra* note 95, at n.58.

101 *Id.* at n.59.

federal courtrooms.[102] The ABA understands the accountability and education electronic coverage brings to Americans:

> Courts that conduct their business openly and under public scrutiny protect the integrity of the federal judicial system by guaranteeing accountability to the people they serve. Judicial proceedings that are accessible and visible benefit the public because of the invaluable civic education that results when citizens witness federal courts in action. Ultimately, we all benefit because informed, engaged and civic-minded citizens are central to the vitality and preservation of our democratic institutions.[103]

3. Unfiltered Information

Camera opponents argue that trial coverage by the traditional print media is sufficient to provide the public with all the information it needs about the judicial process.[104] They claim the broadcast news media distort courtroom events by editing all but a few snippets and by focusing only on the most provocative footage.[105] But a camera cannot lie. While a reporter, who may or may not be educated on the legal process, internalizes the information and might relay a biased synopsis to the public, the camera is a mirror that reflects back the truth. Should federal courts open their doors to cameras and the American public,[106] C-SPAN is poised to provide gavel-to-gavel coverage of its proceedings, devoid of misleading editing or inaccurate analysis.[107] Moreover, permitting camera coverage enables news organizations to pool audio or videotape. This collaborative effort increases accuracy in reporting.[108]

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102 Letter from Robert D. Evans, Director, American Bar Association, Governmental Affairs Office, to Arlen Specter, Senator (Nov. 17, 2005), [hereinafter Evans Letter] *available at* http://www.abanet.org/poladv/letters/judiciary/051117letter_cameras.pdf.

103 *Id.*

104 Christo Lassiter, *Put the Lens Cap Back on Cameras in the Courtroom: A Fair Trial is at Stake*, 67-JAN. N.Y. ST. B.J. 6, 11 (1995).

105 *See id.*

106 *See* discussion *infra* notes 186-89.

107 *Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 99 (2005) (testimony of Brian P. Lamb, Chairman and CEO, C-SPAN Networks).

108 Cochran Hearing, *supra* note 7.

B. Camera Opponents

1. Prejudicial Effect

The critics of broadcasting trials employ an arsenal of arguments to refute the efficacy of cameras in courtrooms. In modern America, each of these concerns is addressed by safeguards. The Sixth Amendment guarantees defendants the right to a fair trial,[109] and states have adopted rules to ensure the fair administration of justice. For example, in Florida, the media are prohibited from recording or broadcasting any court conferences, be they between client and counsel or counsel and bench, to protect the defendant's right to counsel.[110]

Camera opponents argue that the mere presence of a camera will prejudice the jury, witnesses, and/or the judge.[111] However, defendants are armed with numerous procedural shields to ensure fairness: opportunity for continuance, opportunity for change of venue, voir dire, and the possibility of ruling for a mistrial or reversal on appeal.[112] In regards to appellate courts in particular, the prejudice argument is faulty. Because witnesses and jurors are not involved in appellate proceedings, they cannot be influenced by camera presence.[113]

As vigorously as camera critics argue, they cannot negate studies which invariably show that cameras in courtrooms simply do not make proceedings unfair.[114] Studies widely conclude that camera presence has not unfairly prejudiced proceedings, nor has it had a negative impact on

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109 Winograde, *supra* note 59, at 33.

110 Fla. R. Jud. Admin. 2.450(g) (2008).

111 *See* Maness, *supra* note 25, at 162.

112 *Id.*

113 *See* Cohn, *supra* note 1, at 167; *See* discussion *infra* notes 186-99 (noting that only two of the thirteen federal circuit courts of appeals permit camera coverage despite positive feedback from federal cameras in the courtroom experiments).

114 *See* Cohn, *supra* note 1, at 167.

courtroom decorum.[115] Returns from forty-seven states following camera experiments concluded that cameras do not produce the harms feared by camera proponents.[116]

Surveys conducted by individual states support this conclusion that cameras do not affect the proceedings.[117] For example, the Iowa Supreme Court found after a four-year camera experiment that jurors did not believe cameras had any significant affect on trial participants or any affect on judges or witnesses.[118] The Alaska Judicial Council found after a three-year experiment that cameras had "virtually no effect on courtroom behavior."[119] An independent consulting firm concluded that ninety percent of participating judges and attorneys in California reported little or no interference with courtroom decorum and that courtroom participants were hardly aware of the cameras at all.[120] More recently, in reversing its rule prohibiting cameras in its courtrooms, the New Hampshire Supreme Court concluded in 2002 that the benefits of camera coverage outweighed any negative effects.[121]

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115 Cochran Hearing, *supra* note 7. According to Radio-Television News Directors Association President Barbara Cochran, the presence of cameras in courtrooms has not let to any verdicts being overturned in the hundreds of thousands of judicial proceedings broadcast since 1981.

116 Susan E. Harding, *Cameras and the Need for Unrestricted Electronic Media Access to Federal Courtrooms*, 69 S. CAL. L. REV. 827, 834 (1996).

117 *Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. 91 (2005) (statement of Chuck Grassley, United States Senator, Iowa). Senator Grassley notes that camera opponents arguments are based on faulty assumptions, as at least 15 state studies have reported findings favorable for camera access; *See generally id.* at 66-68.

118 *Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. 66 (2005) [hereinafter Berlin Testimony] (testimony of Seth D. Berlin).

119 *Id.* at 67 (quoting Alaska Judicial Council, *News Cameras in the Alaska Courts: Assessing the Impact* (1988)).

120 *Id.*

121 *Id.*

Even the American Bar Association, whose defunct 1937 Canon 35 had banned cameras in courtrooms for nearly 50 years, acknowledges the widely positive reviews of camera-in-the-courtroom experiments.[122]

2. Courtroom Sanctity Jeopardized

The argument that media presence is detrimental to the sanctity of the courtroom is not without merit. Sensational coverage of some judicial proceedings occasionally sets an unfavorable example for otherwise responsible journalism.[123] Camera opponents argue that such coverage bastardizes the judicial process.[124] Supreme Court Justice Anthony Kennedy similarly misconstrued the effect of cameras in the courtroom, stating in 2007 that broadcasting Supreme Court arguments could "undermine substantive legal discussion and lead the justices to speak in 'sound bites.'"[125] But for every disrespectful cameraman or out-of-context video clip there will be numerous conscientious journalists and quality networks such as C-SPAN covering trials around the country. A judge for the Ninth Circuit Court of Appeals – one of only two federal circuits that allow camera access – noted that not every case for which the media have requested access involved "flashy" subjects.[126]

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122 *See generally* discussion *supra* notes 102-03. The ABA for decades vehemently opposed cameras in the courtroom; Evans Letter, *supra* note 89. "During the 1970s, many state courts started to permit electronic coverage of judicial proceedings. As courts gained experience and technology improved, the vast majority reported favorable results."; Alexander, *supra* note 69.

123 *See* Maness, *supra* note 25, at 173-74.

124 *See* Little, *supra* note 30, at 32. "...Court TV doesn't just show trials, it "packages" them as entertainment, complete with salacious teasers and color commentary. Trials are presented more like football games than as serious civic exercises."

125 Fradella & Burke, *supra* note 95, at n.43.

126 *Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 114 (2005) (testimony of Diarmuid F. O'Scannlain, United States Circuit Judge, United States Court of Appeals for the Ninth Circuit). Also noting at 117 that his experience as a judge with camera coverage has been "overwhelmingly positive."

Moreover, courts rightfully rarely broadcast certain proceedings.[127] For instance, all states ban audio pickup or broadcast of attorney-client conferences.[128] States usually prohibit or limit coverage of proceedings involving juveniles, victims of sex crimes, and domestic relations.[129]

Though traditionalists may not agree with cameras in courtrooms, Americans exceedingly get their news from television; coverage of the judicial branch should be no different.[130] The media are adept at agenda-setting and relaying only socially important news to greater society. The more permissive courts become regarding camera coverage the more the media can provide comprehensive coverage of socially important litigation.

For example, during a fifteen-year span of the civil rights movement, the *New York Times* covered ninety-nine percent of the race discrimination cases.[131] In 1999, New York City Mayor Rudolph Guiliani praised the televising of a case where four plain-clothes police officers shot and killed a West African immigrant.[132] Many in New York had feared a violent reaction if the officers were acquitted, but any such response to the eventual acquittals were pacified because camera presence allowed the public to see the process and understand its fairness.[133]

"I believe that the fact alone – the camera and the television coverage of [the trial] – has changed the minds of a lot of people about what happened, and again, reminds of us the wisdom

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127 Anne E. Skove, *Media Coverage of State Court Proceedings Memorandum: Cameras in the Courts,* NATIONAL CENTER FOR STATE COURTS, *available at* http://www.ncsconline.org/WC/Publications//Memos/CameraCtProceedingsMemo.htm (January, 2007).

128 *Id.*; Fla. R. Jud. Admin. 2.450(g) (2008).

129 Skove, *supra* note 127.

130 *See* Winograde, *supra* note 59, at 30.

131 SLOTNICK & SEGAL, *supra* note 90, at 11.

132 Schleiff, *supra* note 99, at 14-15.

133 *Id.*

of trial by jury," said Mayor Guiliani.[134] There is no reason that television cannot provide the same level of coverage today once offered by the traditional print media.

Opponents further claim that lawyers and judges will grandstand for the cameras, concerned more with entertaining viewers than with zealous advocacy or impartial decision-making. But, for every Judge Larry Seidlin,[135] there will be countless lawyers and judges concerned strictly with upholding the law. The extensive 1978 survey of participants following Florida's one-year pilot program clearly reflected that cameras had little or no effect on trial participants, with ninety to ninety-five percent of judges surveyed reporting that jurors, witnesses, and lawyers were not at all affected by the cameras when carrying out their duties.[136]

3. Disruption

Critics have also long argued that cameras physically disrupt court proceedings. However, even three decades ago when technology was underdeveloped by today's standards, the Florida Supreme Court in *Post-Newsweek* balked at the notion that cameras disturbed the trial process. After considering the Florida camera pilot program survey results, as well as other comments, the court noted that potential disruption was no longer a concern:

> [i]t is apparent that through application and enforcement of the standards imposed by the Court during the pilot program, physical disturbance was so minimal as not to be an arguable factor. Technological advancements have so reduced size, noise, and light levels of the electronic equipment available that cameras can be employed in courtrooms unobtrusively. The standards adopted by the Court vested in the chief judges the means to position electronic media representatives in locations which would be least obtrusive while permitting reasonable access to

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134 *Id.* at 15.

135 *See* Ann O'Neill & Kate King, *If Anna Nicole Smith Case is a Circus, Judge is Ringmaster*, CNN, Feb. 22, 2007, *available at* http://www.cnn.com/2007/LAW/02/21/judge.larry/index.html?eref=rss_topstories. Judge Seidlin received wide criticism for his antics while presiding over a case wherein the status of the remains of deceased former model Anna Nicole Smith were in dispute.

136 *In re Petition of Post-Newsweek Stations*, 370 So.2d at 776.

> coverage. Furthermore, the standards with respect to pooling and resolution of media disputes appear to have proved workable during the pilot period.[137]

Cameras are not the bulky equipment they once were, and modern electronic equipment is small and unobtrusive.[138] Snaked wires and spotlights are no longer a concern.[139] Technology has advanced exponentially since the era when cameras were banned under American Bar Association Canon 35.[140] The media today can completely obscure cameras and equipment and special lighting is no longer needed.[141]

Moreover, states have enacted rules directed at media personnel behavior and equipment operation.[142] For instance, the Florida Rules of Judicial Administration are drafted to ensure courtroom decorum and prevent distractions.[143] First, the Rules allow an appellate court judge to permit only two portable television cameras and a trial judge to permit only one television camera.[144] Second, they authorize up to two still cameras and an audio system for radio broadcasts in all proceedings.[145] Third, the Rules permit only one still photographer and one television camera operator into Florida courtrooms, and further curb distraction by requiring that photographers and camera operators remain in one fixed position.[146]

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137 *Id.* at 775.

138 *See* McCall, *supra* note 63, at 1561; Cochran Hearing, *supra* note 7.

139 Sarner, *supra* note 64, at 1058.

140 *See* McCall, *supra* note 63, at 1561; *see* text accompanying *supra* note 27.

141 *Id.*

142 *Id.*

143 *See generally* Fla. R. Jud. Admin. 2.450 (2008).

144 *See id.* at (b)(1); RTNDA, THE ASSOCIATION OF ELECTRONIC JOURNALISTS, *Freedom of Information, Cameras in the Court: A State-by-State Guide,* http://www.rtnda.org/pages/media_items/cameras-in-the-court-a-state-by-state-guide55.php#FL (last visited Aug. 16, 2008).

145 *See* Fla. R. Jud. Admin. 2.450(b)(2-3); RTNDA, *supra* note 130.

146 Fla. R. Jud. Admin. 2.450(b)(1-2), (d)(1-3).

PART IV

PRESENT STATUS OF CAMERA ACCESS TO COURTROOMS

A. State Courts

1. Other State Court Access

The year 2001 marked a milestone for the cameras in the courtroom movement. With a favorable ruling by the South Dakota Supreme Court that year, every state recognized the public's right to camera coverage in the courtroom.[147] Today, all fifty states allow some level of audiovisual coverage in their courts; the District of Columbia, however, still bans cameras in both trial and appellate proceedings.[148]

That said, each state's rules governing electronic coverage vary immensely.[149] Forty-three states permit electronic access at the trial level; six states allow coverage of only appellate proceedings.[150] Thirty-seven states allow cameras in criminal trials.[151] Thirty-six states have permanent rules approving cameras for both trials and appellate courts.[152] New York came into the spotlight in 2003 when Court TV challenged a longstanding New York law prohibiting

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147 Bruce Moyer, *Courtroom Cameras Legislation Could Pass Congress*, 48-JUL. FED. LAW. 6, 14 (2001); ROGER L. SADLER, ELECTRONIC MEDIA LAW 367 (Sage Publications) (2005). Mississippi also in 2001 authorized electronic coverage in its courtrooms, becoming the 49th state to do so.

148 NATIONAL CENTER FOR STATE COURTS, CAMERAS IN THE COURTS: SUMMARY OF STATE COURT RULES, [hereinafter STATE COURT RULES] *available at http://www.ncsconline.org/WC/Publications/KIS_CameraPub.pdf* (2002); *Cameras in Court, supra* note 15.

149 *Id.*

150 Cochran Hearing, *supra* note 7; Berlin Testimony, *supra* note 118, at 65.

151 *Id.*; STATE COURT RULES, *supra* note 148.

152 STATE COURT RULES, *supra* note 148.

cameras from its criminal trials.[153] The Manhattan Supreme Court ultimately upheld the law, ruling that the ban did not violate the First Amendment.[154]

2. Florida Court Access

Florida has embraced openness in its courtrooms.[155] Cameras are allowed in Florida courtrooms at both the trial and appellate levels, in both criminal and civil proceedings.[156] A 1994 amendment to the Florida Rules of Judicial Administration expanded the media's right to broadcast courtroom activities. This amendment was a departure from the limited access prescribed by American Bar Association Canon 35 in that it provided the electronic media with general access to Florida courtrooms; consent from participants is not required.[157]

Should a judge utilize his discretion and issue an order that prohibits cameras from the proceeding, or from videotaping a particular participant, the media may appeal the order.[158] In 1997 the media utilized this appellate review after a Palm Beach County judge issued an order prohibiting the media from photographing prospective or seated jurors during a criminal trial.[159]

In *WFTV*, the Fourth District Court of Appeal ruled that the judge erred by restricting camera access without first giving the media notice and the opportunity to be heard and found the judge had not made the required findings.[160] The *WFTV* court rejected the state's argument that jurors are not "participants" envisioned by the Florida Supreme Court in 1979 when it

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153 *Cameras in Court, supra* note 16.

154 *Id.*

155 D'Alemberte Interview, *supra* note 45.

156 *See generally* Fla. R. Jud. Admin. 2.450 (2008).

157 *See Id.* (Court Commentary, 1994 Amendment).

158 Fla. R. Jud. Admin. 2.450(i) (2008).

159 *WFTV, Inc. v. State*, 704 So.2d 188 (Fla. 4th DCA 1997); *see In re Amendments to the Rules of Judicial Administration*, No. SC05-173, at 8 [hereinafter *In re Amendments*] (Fla. Nov. 3, 2005).

160 *WFTV*, 704 So.2d at 191.

articulated the burden a defendant must meet before a judge may prohibit cameras from the courtroom.[161]

> Florida courts continue to utilize this standard established in *In re Post-Newsweek*:
>
> > The presiding judge may exclude electronic media coverage of a particular *participant* only upon a finding that electronic media coverage will have a will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media.[162]

Thus, judges may only prohibit videotaping of jurors – just like with witnesses, parties, or attorneys – upon a proper showing of prejudice.

WFTV adhered to Florida Supreme Court precedent which holds that a precondition to an order excluding or limiting media coverage of a trial is a noticed evidentiary hearing at which media representatives have a fair opportunity to be heard.[163] The Florida Supreme Court also ruled that photographing jurors in a courtroom did not violate the defendant's right to a fair trial.[164] Accordingly, the Florida Supreme Court in 2005 rejected a proposed amendment to its Florida Rules of Judicial Administration that would have added to its electronic coverage rule a provision authorizing a presiding judge the discretion to prohibit the photographing of jurors'

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161 *Id.* at 190; *In re Petition of Post-Newsweek Stations*, 370 So.2d at 779; *see infra* p. 11.

162 *In re Petition of Post-Newsweek Stations*, 370 So.2d at 779 (emphasis added).

163 *See State v. Green*, 395 So.2d 532, 538 (Fla. 1981); *State v. Palm Beach Newspapers, Inc.*, 395 So.2d 544, 548 (Fla. 1981).

164 *Chavez v. State*, 832 So.2d 730 (Fla. 2002); *see also The Sarasota Herald-Tribune v. State*, 916 So.2d 904 (Fla. 2nd DCA 2005) (court's order prohibiting news media from at any time taking photographs or video of faces of the prospective or seated jurors operated as a prior restraint on speech).

faces.[165] The rule would have permitted judges to ban electronic media coverage without first giving the media an opportunity to object.[166]

That same year, the Florida Supreme Court rejected another proposed change to its technological coverage rule that would have negatively infringed on the public's right of access.[167] The proposed rule would have authorized the presiding judge to close certain proceedings he felt imposed on participants' privacy.[168] The broadly drafted rule would have given judges too much discretion and could serve to block the media from newsworthy proceedings.[169]

3. Florida Access in Relation to Other States

While state rules vary from the permissive to somewhat restrictive regarding the level of electronic media access to courtrooms, Florida rules regarding access are among the most progressive in the country.[170] Unlike Florida, which gives its judges broad discretion in allowing electronic media coverage, many states either require judges to get the consent of certain

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165 *See In re Amendments, supra* note 159.

166 Berlin Testimony, *supra* note 118, at 69; Associated Press, *Florida High Court Nixes Proposed Courtroom Camera Restrictions*, FIRST AMENDMENT CENTER, Nov. 4, 2005, http://www.firstamendmentcenter.org/news.aspx?id=16023.

167 *See In re Amendments, supra* note 159; Barbara W. Wall, *State Courts Back Cameras in Courtroom, Congress Considers Issue, available at* http://www.gannett.com/go/newswatch/2005/november/nw1118-4.htm (last visited July 29, 2008).

168 *In re Amendments, supra* note 159. Proposed Rule 2.170(a)(iii) would have expressly recognized the judge's authority to "protect rights of privacy and prevent disclosure of privileged and confidential matters" stemming from electronic coverage; Wall, *supra* note 167.

169 Wall, *supra* note 167.

170 *See* RTNDA, *supra* note 144.

participants before they permit camera coverage, or prohibit coverage when participants object.[171] For example:

- Alabama: Judges need affirmative written consent from accused persons.[172]
- Arkansas: Courts must inform witnesses of their right to refuse having their photographs taken.[173]
- Delaware: Consent is required of both parties and witnesses.[174]
- Louisiana: Courts may prohibit or limit coverage if a party files a written objection.[175]
- Maryland: Trial courts require written consent of all parties except the government.[176]
- Massachusetts: Courts can prevent coverage if a party so moves.[177]
- Minnesota: Judges may allow coverage only if both parties and witnesses consent.[178]
- Nevada: Judges may prohibit coverage of a party who wishes not to be photographed.[179]
- Ohio: Judges must inform victims and witnesses of the right to object to electronic coverage.[180]
- Oklahoma: Judges must prohibit the photographing or broadcast of any witness or party who objects to the judge.[181]

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171 *See generally* NATIONAL CENTER FOR STATE COURTS, COURT-MEDIA RELATIONS, MEDIA COVERAGE OF STATE COURT PROCEEDINGS, *available at* http://www.ncsconline.org/WC/Publications/Memos/CameraStCtProceedingsTable.pdf (last visited Aug. 17, 2008).

172 *Id.* at 1.

173 *Id.* at 3.

174 *Id.* at 7.

175 *Id.* at 17.

176 *Id.* at 18.

177 *Id.* at 19.

178 *Id.*

179 *Id.* at 22.

180 *Id.* at 26.

181 *Id.* at 28.

- Pennsylvania: Courts require consent from parties and witness in "appropriate cases"; they also ban coverage when parties or witnesses object.[182]

- Tennessee: Judges must suspend coverage of proceedings when the accused in a criminal case objects.[183]

- Vermont: Judges, either by their own motion or by a party's motion, may prohibit or limit coverage.[184]

- Virginia: Judges must advise parties in advance of the coverage, and may then ban coverage if the parties object.[185]

B. Federal Courts

1. District Courts and Circuit Courts of Appeal

Currently only two federal appellate courts – the Second and Ninth Circuit Courts of Appeals – allow coverage of their proceedings.[186] Cameras are banned in federal trial courts.[187] This federal reluctance to allow camera coverage came unexplainably on the heels of a three-year Judicial Conference of the United States cameras-in-the-courtroom pilot program which yielded positive results. The experiment, run from 1991 to 1994, permitted camera coverage of civil appellate proceedings in the Sixth and Ninth Circuit, as well as in six federal trial courts.[188] Camera coverage of criminal trials was not allowed.[189]

A 50-page report issued by the Federal Judicial Center concluded that judges entering the experimental program held generally neutral attitudes toward electronic coverage, but the

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182 *Id.* at 29.
183 *Id.* at 31.
184 *Id.* at 32.
185 *Id.* at 33.
186 Fradella & Burke, *supra* note 95, at n.67.
187 THE THIRD BRANCH, NEWSLETTER OF THE FEDERAL COURTS, *Court Security Bill Passes House with Cameras in the Courtroom Provision*, (Dec. 2005), *available at* http://www.uscourts.gov/ttb/dec05ttb/legislationwaits/index2.html.
188 Fradella & Burke, *supra* note 95, at n.67.
189 Sadler, *supra* note 147, at 366.

collective attitudes became more favorable after participating in the program,[190] and most judges who participated in the program reported favorable experiences.[191] In addition, the Judicial Conference found "small or no effect of camera presence" on participants or proceedings during the program.[192] The Federal Judicial Center also considered surveys conducted by twelve states before issuing its report.[193] The resulting federal survey reported that "the majority of jurors and witnesses who experience electronic media coverage do not report negative consequences or concerns."[194]

Despite the success of the three-year program and the favorable report by the Federal Judicial Center, the Judicial Conference chose in 1995 to once again prohibit electronic coverage inside federal courts.[195] However, one year later the Judicial Conference lifted this absolute ban and reversed its prejudice against cameras.[196] Beginning in 1996, federal appellate courts were authorized to permit camera coverage.[197] Despite this endorsement, only the two circuits previously cited have chosen not to ban cameras, while the other eleven have adopted policies

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190 Berlin Testimony, *supra* note 102, at 66 (citing FEDERAL JUDICIAL CENTER, ELECTRONIC MEDIA COVERAGE OF FEDERAL CIVIL PROCEEDINGS: AN EVALUATION OF THE PILOT PROGRAM IN SIX DISTRICT COURTS AND TWO COURTS OF APPEAL 38-42 [hereinafter FEDERAL JUDICIAL CENTER REPORT] (1994). The twelve states were Arizona, California, *Florida*, Hawaii, Kansas, Maine, Massachusetts, Nevada, New Jersey, New York, Ohio, and Virginia (emphasis added)).

191 *Cameras in Court, supra* note 16.

192 *See* Rebecca Leigh Casal, *Cameras in the Courtroom*, 46-SEPT. FED. LAW. 22; Sadler, *supra* note 147, at 366. The Judicial Conference is a federal agency responsible for setting policies for federal courts.

193 Berlin Testimony, *supra* note 118, at 66. The twelve states were Arizona, California, *Florida*, Hawaii, Kansas, Maine, Massachusetts, Nevada, New Jersey, New York, Ohio, and Virginia (emphasis added).

194 *Id.* (citing FEDERAL JUDICIAL CENTER REPORT, *supra* note 190).

195 Evans Letter, *supra* note 102.

196 *Id.*; Fradella & Burke, *supra* note 95, at n.66, n.70; *Cameras in Court, supra* note 16.

197 Fradella & Burke, *supra* note 95, at n.66, n.70; *Cameras in Court, supra* note 16.

expressly prohibiting electronic coverage.[198] The Judicial Conference continues to overlook the favorable evidence regarding cameras in the courtroom and consistently opposes opening federal court proceedings to cameras.[199]

2. The U.S. Supreme Court

The Supreme Court has never wavered on its stance to keep its proceedings off the airwaves. This stance doesn't seem likely to change anytime soon. At his 2005 confirmation to the Court, Chief Justice John Roberts claimed to be undecided regarding his views toward letting in camera to the sacred chambers.[200] Chief Justice Roberts later declared in 2006 that "[w]e don't have oral arguments to show the public how we function." Likewise, Justice Samuel Alito said at his Supreme Court confirmation hearing that he would keep an open mind to broadcasting arguments.[201] He too soon had a change of heart and aligned with his High Court colleagues.[202]

Supreme Court justices oft-preach how the judiciary is no more deserving of privacy than its sister branches:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraised the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.[203]

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198 Maness, *supra* note 25, at 151.

199 Moyer, *supra* note 147, at 6.

200 Cohn, *supra* note 1, at 164; The Associated Press, *Chief Justice Says Court Not Interested in Allowing Cameras*, July 16, 2006, *available at* http://www.firstamendmentcenter.org/news.aspx?id=17161.

201 *Id*

202 *Id.* at 165.

203 *Bridges v. California*, 314 U.S. 252, 270-71 (1941).

Yet, at no time in modern history has a Supreme Court justice practiced what they preached by advocating for a reversal of the Court's archaic stance against electronic coverage. As so aptly stated by Barbara Cochran, President of Radio-Television News Directors Association, "The anachronistic, blanket ban on electronic media coverage of federal proceedings conflicts with the values of open judicial proceedings and disserves the people."[204]

C. Congressional Intervention

> "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[205]

In this vein, Congress has become increasingly disapproving of the federal courts' reluctance to permit cameras in their courtrooms.[206] While yet to any avail, Congress in the past number of years has made repeated attempts to open federal courtrooms to camera coverage in an attempt to mirror the progress of states.[207] Senator Charles Grassley, R-Iowa, made the first congressional attempt to open the federal courtroom door to cameras when he introduced the Sunshine in the Courtroom Act in 1999.[208]

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204 Cochran Hearing, *supra* note 7.

205 Berlin Testimony, *supra* note 118 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980)).

206 Fradella & Burke, *supra* note 95 at n.68.

207 *See Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. 1 (2005) [hereinafter Specter Statement] (opening statement of Sen. Arlen Specter, R-PA). Sen. Specter notes that Senator Charles Grassley had cameras in the courtrooms legislation pending for the previous five years to allow electronic coverage in federal courts, including the Supreme Court of the United States; *see also* Associated Press, *Congressmen Push Bill to Allow Cameras in Federal Courts*, July 13, 2001, *available at* http://www.freedomforum.org/templates/document.asp?documentID=14386. Rep. William Delahunt, D-Mass, and Rep. Steve Chabot, R-Ohio, co-sponsored the House's companion bill to the Senate's Grassley-Schumer bill.

208 Miller, *supra* note 3, at 27.

Senators Grassley and Chuck Schumer, D-New York, reintroduced the Sunshine in the Courtroom Act in June 2001 after the first attempt died.[209] The timing of the second bill was not coincidental, as the Supreme Court had only months earlier released audio recordings of the Bush and Gore election case immediately after oral arguments.[210] The Act, which again failed to pass, would have authorized federal trial and appellate judges, as well as the Supreme Court, to permit broadcasting and photographing in their courtrooms.[211] The legislation was subsequently reintroduced – and failed to pass – in 2003, and again in 2005.[212]

But the cameras-in-the-courtroom movement at the Congressional level has not stopped. In 2007 camera champions in both chambers of Congress once again introduced bills that would let the sun shine on federal courtrooms by way of electronic coverage. Sen. Grassley introduced the Senate's version of the bill – S. 352 – on January 22, 2007 and Rep. Steve Chabot, R-Ohio, introduced the House's version – H.R. 2128 – on May 3, 2007.[213] As with previous attempts, the sponsors seek to pass this legislation so federal courts can mirror the permissive camera rules of state courts.[214] The Sunshine in the Courtroom Act of 2008 would be a momentous change in that it would authorize television coverage in *all* federal courts, including the U.S. Supreme Court.[215] In March of 2008 the Senate Judiciary Committee approved S. 352, which currently

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209 Sadler, *supra* note 147, at 366.

210 *See id.* at 366; *Bush v. Gore*, 531 U.S. 98 (2000).

211 Sadler, *supra* note 147, at 366; Specter Statement, *supra* note 207, at 3.

212 Sadler, *supra* note 147, at 367; Washington Briefs, On the Intersection of Law and Politics in the Nation's Capital, *Cameras in the Courtroom Bill Approved by Senate Panel*, [hereinafter Washington Briefs] http://washingtonbriefs.blogspot.com/2008/03/cameras-in-courtroom-bill-passes.html, (Mar. 6, 2008, 12:42 EST).

213 Sunshine in the Courtroom Act, S. 352, 110th Cong. (2008); Sunshine in the Courtroom Act, H.R. 2128, 110th Cong. (2007).

214 *Id.*; S. 352, *supra* note 213.

215 Washington Briefs, *supra* note 212.

awaits debate in the Senate. Chabot's bill passed through the House Judiciary Committee on October 24, 2007 by a vote of 17-11 and awaits consideration by the full House.[216]

Even the American Bar Association – which has enjoyed a "long and cautious history" in regards to camera coverage of federal court proceedings – accepts the widespread positive results of camera experiments and the merits of cameras in the courtrooms.[217] The ABA, the national representative of the legal profession, has supported the recent Sunshine-in-the-Courtroom legislation.[218] The organization now seeks to permit cameras in every federal courtroom, including the Supreme Court.[219]

The Sunshine-in-the-Courtroom Act of 2008 authorizes presiding judges in district courts, circuit courts of appeals, or the Supreme Court the discretion to "permit the photographing, electronic recording, broadcasting, or televising to the public of any court proceeding over which that judge presides."[220] A judge is not allowed to authorize electronic coverage in any case in which he determines that such coverage would result in a violation of the due process rights of any party to the proceeding.[221]

Nor may a judge permit audio pickup or broadcast of attorney-client conferences.[222] Thus, the bill strikes a balance between the First Amendment concerns of the right of public access to judicial proceedings and the Sixth Amendment concerns of the defendant's right to a fair trial. An in an attempt to assuage the privacy concerns of camera opponents, the legislation

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216 *Id.*

217 Evans Letter, *supra* note 102.

218 *Id.*; *See* American Bar Association website, http://www.abanet.org/about/.

219 The ABA would like to see more experimentation in federal courts before Congress mandates electronic coverage at the federal level. *See* Evans Letter, *supra* note 102.

220 S. 352, *supra* note 213, at section (2)(b)(1)(A).

221 *Id.* at section (2)(b)(1)(B).

222 *Id.* at section (2)(b)(7).

stipulates that a judge may also exclude coverage of certain individuals, including minors and witnesses.[223] Also, unlike Florida where judges may prohibit the broadcasting of jurors' faces only upon a showing of prejudice, the federal act would automatically prohibit such coverage.[224]

PART V

CONCLUSION

We live in a dynamic, ever-changing society. While change may not be immediately on the horizon, it should only be a matter of time before the Supreme Court modernizes and invites cameras into its chambers[225] and before Congress passes the Sunshine in the Courtroom Act to enable broadcast coverage of all federal court proceedings. Notwithstanding this slow response to modernity at the federal level, every state in the nation has embraced camera technology to ensure public access to the judicial branch of government. This article has illustrated that the public's right of access to the judicial process can be effectively weighed against the defendant's right to a fair trial.

Whether cameras are allowed in a courtroom or not, a newsworthy trial is a newsworthy trial. The public will crave coverage of such proceedings, and the media will cover the proceedings regardless of whether cameras are allowed into the courtroom. Americans will be best educated about judicial processes and significant decisions through unadulterated broadcasts. The public in a democratic society ought to be able to access information through an

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223 *Id.* at section (2)(b)(2)(A)(ii); (2)(b)(2)(C); (2)(b)(5). Requiring the Judicial Conference of the United States upon passage of this bill to promulgate mandatory guidelines to which judges must adhere regarding obscuring vulnerable witnesses; Washington Briefs, *supra* note 212.

224 S. 352, *supra* note 213, at section (2)(b)(2)(B).

225 *See* Cohn, *supra* note 1, at 168 (quoting Justice Sandra Day O'Connor: "Eventually we will probably have television."); D'Alemberte Interview, *supra* note 45. Prof. D'Alemberte stated opinion that the Supreme Court is destined to eventually allow camera coverage.

unfiltered lens rather than through secondhand reporting. Fortunately, Florida continues to cultivate an environment of access to its courts:

> While many courts, including federal courts, permit only sketch artists into the courtroom, Florida has long permitted liberal access to the media. Our supreme court regularly conducts its oral arguments open to the world by live video on the internet. We live in a state that strongly believes that the legitimacy of our court system and the strength of our democracy is fostered when the public has broad access to court proceedings. There is no question that the informal partnership that the courts have built with the media over the last generation has given the public a far more accurate understanding of court proceedings than can ever be achieved by sketch artists.[226]

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[226] *The Sarasota Herald-Tribune v. State*, 916 So.2d 904, 907 (Fla. 2nd DCA 2005).

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June 20, 2008

Mr. Frederick K. Grittner
Clerk of the Appellate Courts
Supreme Court Administrator
Minnesota Judicial Center
25 King Boulevard
St. Paul, MN 55155

Re: Proposed Amendments to Minnesota Code of Judicial Conduct
Canon 3A(11), and Minnesota General Rule of Practice 4
("Cameras in Courts")
Court File No. CX–89–1863

Dear Mr. Grittner:

With this cover, I am submitting 12 copies of materials prepared by Arthur England, in anticipation of the Supreme Court's public hearing on July 1 with respect to the above-captioned matter. Mr. England is a retired chief justice of the Florida Supreme Court, and the materials were prepared by him in Florida. I realized after I received them that the binding may not conform to Minnesota's rule. Under the circumstances, I would respectfully request that the rule be waived and that you accept the materials for filing in their present form. I sincerely apologize for any inconvenience it may cause.

Also, I would like to request, through you to the Court, that Justice England be registered to appear, and that he be permitted somewhat more time to speak at the public hearing than might otherwise be typically allowed. The basis for this request is that Justice England will be traveling here from Miami solely for that appearance, and the fact that not only was Justice England chief of the Florida Supreme Court at the time it adopted a more liberal set of rules governing electronic coverage of Florida's trial courts, but he has been an authority on the subject since then. Thus it would seem he might be able to offer

our Court unique insights. If I should submit this request directly to the Court or other members of its staff, I would appreciate it if you could let me know.

As always, I much appreciate your assistance.

Yours truly,

Mark R. Anfinson

STATE OF MINNESOTA
IN THE SUPREME COURT

CASE NO. CX-89-1863

IN RE: SUPREME COURT
ADVISORY COMMITTEE ON
GENERAL RULES OF PRACTICE

REQUEST FOR ORAL PRESENTATION

Arthur J. England, Jr., an attorney in good standing in the States of Florida, New York, and Colorado, and the former Chief Justice of the Supreme Court of Florida, respectfully requests the opportunity to make an oral presentation to the Court on the subject of "cameras in courts" which is scheduled for a hearing on July 1, 2008.

Florida was the first state in the nation to open all of its courts to the electronic media, including television cameras, for the broadcast of trial and appellate proceedings as they were taking place in Florida's courtrooms. Camera access to the courts of Florida was provided by the Florida Supreme Court in an original proceeding brought by the Post-Newsweek stations of Florida seeking to change Florida's Code of Judicial Conduct.

I was serving as a Justice of Florida Supreme Court at the time the Post-Newsweek petition for cameras was first brought to the Court, and as Chief Justice when the Court authorized open access. In that capacity, I visited a number of

states to explain the background of the program and its implications for the administration of justice.

If granted permission to present oral argument, I would summarize for the Court the genesis of Florida's cameras program, the steps which led to its full implementation, the legal and practical concerns which were considered and addressed by the Supreme Court, the mechanisms devised to address circumstances when jurisprudential considerations might make open camera access inappropriate, and the experience in having electronic media in Florida's courts over the past thirty years. To assist the Court in its deliberations with respect to cameras in the Minnesota courts, I have attached and will reference in my remarks some of the Florida appellate court decisions which have addressed the issue of open electronic access to Florida's trial and appellate courts.

Respectfully submitted,

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MIA ENGLANDA 180.102.061v4 999901 285497 6-16-08

APPENDICES

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4. *Petition of Post-Newsweek Stations, Fla., Inc.*, 358 So. 2d 1360 (Fla. 1978)

5. *Petition of Post-Newsweek Stations, Fla., Inc.*, 370 So. 2d 764 (Fla. 1979)

6. *Chavez v. State*, 832 So. 2d 730 (Fla. 2002), *cert. denied*, 539 U.S. 947 (2003)

7. *WFTV, Inc. v. State*, 704 So. 2d 188 (Fla. 4th DCA 1977)

8. *Sunbeam Television Corp. v. State*, 723 So. 2d 275 (Fla. 3d DCA 1998), *review denied*, 740 So. 2d 529 (Fla. 1999)

9. *Sarasota Herald-Tribune v. State*, 916 So. 2d 904 (Fla. 2d DCA 2005)

10. *State v. Green*, 395 So. 2d 532 (Fla. 1981)

11. *Miami Herald Publishing Co. v. Lewis*, 426 So. 2d 1 (Fla. 1983)

12. *State v. Palm Beach Newspapers, Inc*, 395 So. 2d 544 (Fla. 1981)

13. Link to viewing current and past oral arguments at the Florida Supreme Court (http://www.wfsu.org/gavel2gavel/index.php)

MIA ENGLANDA 180.102.061v4 999901 285497 6-16-08

▷Petition of POST-NEWSWEEK STATIONS, FLORIDA, INC. FOR CHANGE IN CODE OF JUDICIAL CONDUCT.
Fla., 1976.

Supreme Court of Florida.
Petition of POST-NEWSWEEK STATIONS, FLORIDA, INC. FOR CHANGE IN CODE OF JUDICIAL CONDUCT.
No. 46835.

Jan. 28, 1976.

Case of Original Jurisdiction-Code of Judicial Conduct.

Talbot D'Alemberte, Steel, Hector & Davis, Miami, for petitioner.
Joseph C. Jacobs, Ervin, Varn, Jacobs & Odom, Tallahassee, for the Florida Association of Broadcasters, Inc.
Parker Lee McDonald, Chairman, Orlando, for the Florida Conference of Circuit Judges.
Richard C. McFarlain, Asst. Director, Tallahassee, for The Florida Bar.
Robert Eagan, State Atty., and Donald A. Lykkebak, Asst. State Atty., for the State of Florida.
Ellis S. Rubin, Ellis Rubin Law Offices, P.A., Miami, for Rommie L. Loudd.
A. Broaddus Livingston, Chairman, Tampa, and Larry S. Stewart, Chairman-Elect, Miami, for Trial Lawyers Section of The Florida Bar.
C. Gary Williams, Ausley, McMullen, McGehee, Carothers & Proctor, Tallahassee, for Society of Professional Journalists, Sigma Delta Chi, Southeast Region and Greater Miami Chapter, intervenor.
Richard E. Gerstein, State's Atty., and N. Joseph Durant, Jr., Chief Asst. State's Atty., for Florida Prosecuting Attorneys Association.
Harold Peter Barkas, Miami, for the Academy of Florida Trial Lawyers, amicus curiae.

INTERLOCUTORY DECISION
ROBERTS and SUNDBERG, Justices.
*1 Post-Newsweek Stations, Florida, Inc. filed a petition for modification of Canon 3A(7) of the Code of Judicial Conduct of the State of Florida to the extent of allowing the televising of judicial proceedings and for the adoption of a rule in relation thereto proposed by the petitioner. In our Order, May 21, 1975, this Court denied that portion of the petition which seeks approval of the substitute of Canon 3A(7) proposed by the petitioner but granted the portion which seeks a reexamination of the Canon for the purpose of making the Court's own revision, if such should be deemed appropriate.

*1 The petition for change is opposed by (1) The Florida Bar, (2) the Conference of Circuit Judges, (3) the Trial Lawyers Section of The Florida Bar, (4) *Chairman of the Judicial Qualifications Commission* expressing a personal view, and (5) others. Pursuant to the entry of our Order on May 21, 1975, the Court received various materials both pro and con in relation to the subject and observed a television video *2 tape film prepared under the auspices of the Supreme Court of the State of Washington. Upon examination of all the foregoing, the Court determined that an on-site experimental prgogram conducted under the auspices of this Court whereby one televised courtroom trial of a criminal case and one such trial of a civil case to be heard by the Circuit Court of the Second Judicial Circuit of Florida would be of assistance to this Court in the final disposition of the matter. To that end and for that purpose, this Court, by its Order of December 18, 1975, called for a conference of all counsel to convene at 10:30 A.M. on Thursday, January 15, 1976, in the Supreme Court Building to discuss the feasibility of such program. The Court's Senior Justice, B.K. Roberts, was designated as its conferee with directions to preside over the conference above referred to. Later, Justice Alan Sundberg was added as a co-conferee by the Chief Justice.

*1 Upon inquiry from this Court, prior to the January 15, 1976, conference, Honorable Ben C. Willis, Chief Judge of the Circuit Court of the Second Judicial Circuit of Florida in and for Leon County, Florida, agreed to make a courtroom available for the two experimental trials and to personally conduct them.

*1 The conference of counsel met on January 15, 1976, as directed, supra, and heard two hours of discussion by all interested parties. The conferees

have made their report to the Court.

*1 Now, therefore, as an exception to Canon 3A(7) of the Judicial Code of Florida for experimental purposes, Honorable Ben C. Willis, Chief Judge of the Second Judicial Circuit of Florida, he having accepted the assignment, is authorized to proceed with the trial of one criminal case and one civil case allowing television coverage, subject to the hereinafter mentioned guidelines, but with the Court vesting a wide discretion in the learned trial judge in the regulation of the television coverage and operation and the providing of such additional guidelines as he, in his discretion, may deem appropriate. The authority herein granted is subject to the following specific guidelines:

*2 1. The parties to the litigation, jurors and witnesses must consent to the televising of their participation in the trial.

*2 2. The television equipment in the criminal case shall be fully screened from view but in the civil case, with the consent of the parties, the television equipment may be in the open.

*2 3. The trial judge shall have full authority to terminate the televising of all or any part of the proceedings which he deems would be an effective interference in the administration of the justice of the cause.

*2 4. At the conclusion of each trial, the television film or tape shall be delivered to the trial judge for transmittal by him to this Court for filing as an exhibit in these proceedings. Neither the television film nor any copy thereof shall be used in any public newscast without prior permission of this Court.

*2 5. The Supreme Court, either by a committee of its Justices or other monitors, from an unobtrusive location in the courtroom, will observe the proceedings and at the conclusion of each trial, the Court, through its designee or designees, will interview such of the participants as it deems appropriate, for their individual reactions in order to assist in determining the total effect of television coverage upon the conduct of the trials.

*2 6. At the conclusion of the trials, request is made that the trial judge provide the Court with his analysis of the experiment.

*2 It is so ordered.

ADKINS, C.J., and BOYD, OVERTON, ENGLAND and HATCHETT, JJ., concur.
Fla., 1976.
Petition of Post-Newsweek Station, Florida, Inc. for Change in Code of Judicial Conduct
327 So.2d 1

END OF DOCUMENT

HPetition of POST-NEWSWEEK STATIONS, FLORIDA, INC., for Change in Code of Judicial Conduct.
Fla. 1976.

Supreme Court of Florida.
Petition of POST-NEWSWEEK STATIONS, FLORIDA, INC., for Change in Code of Judicial Conduct.
No. 46835.

Sept. 17, 1976.

Case of Original Jurisdiction, Code of Judicial Conduct.

***804** Talbot D'Alemberte of Steel, Hector & Davis, Miami, for petitioner.
Joseph C. Jacobs of Ervin, Varn, Jacobs & Odom, Tallahassee, for the Florida Association of Broadcasters, Inc.
Parker Lee McDonald, Chairman, for the Florida Conference of Circuit Judges.
***805** Richard C. McFarlain, Asst. Director, Tallahassee, for The Florida Bar.
Robert Eagan, State's Atty. and Donald A. Lykkebak, Asst. State's Atty., Orlando, for the State of Florida.
Ellis S. Rubin of the Ellis Rubin Law Offices, Miami, for Rommie L. Loudd, A. Broaddus Livingston, Chairman, Orlando and Larry S. Stewart, Chairman-Elect, Miami, for Trial Lawyers Section of The Florida Bar.
C. Gary Williams of Ausley, McMullen, McGehee, Carothers & Proctor, Tallahassee, for Society of Professional Journalists, Sigma Delta Chi, Southeast Region and Greater Miami Chapter, intervenor.
Richard E. Gerstein, State's Atty., and N. Joseph Durant, Jr., Chief Asst. State's Atty., for Florida Pros. Attys. Ass'n and Harold Peter Barkas, Miami, for the Academy of Florida Trial Lawyers, amicus curiae.

SUPPLEMENTAL INTERLOCUTORY DECISION PER CURIAM.
This Court has been advised by The Honorable Ben C. Willis, Chief Judge of the Second Judicial Circuit, that he is having difficulty obtaining agreement of parties and counsel to provide a civil and criminal trial for televising in accordance with the guidelines set forth in our interlocutory decision reported in In re Petition of Post-Newsweek Stations, Florida, Inc., 327 So.2d 1 (Fla.1976), as supplemented by our order dated April 12, 1976.

We hereby amend our previous decision in this cause in order to authorize The Honorable Parker Lee McDonald, Circuit Judge of the Ninth Judicial Circuit, to conduct for experimental purposes one televised criminal trial and one televised civil trial in accordance with the guidelines set forth in our prior interlocutory decision in this cause reported at 327 So.2d 1 (Fla.1976), as supplemented by our order of April 12, 1976.

Judge McDonald has consented to exercise this authority in his jurisdiction in Orange County, Florida. The authority herein granted to Judge McDonald is in addition to the authority previously granted to Judge Willis.

It is so ordered.

OVERTON, C.J., and ROBERTS, ADKINS, BOYD, ENGLAND, SUNDBERG and HATCHETT, JJ., concur.
Fla. 1976.
Petition of Post Newsweek Stations, Florida, Inc.
337 So.2d 804

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CPETITION OF POST-NEWSWEEK STATIONS, ETC.
Fla. 1977.

Supreme Court of Florida.
In re PETITION OF POST-NEWSWEEK STATIONS, FLORIDA, INC. for Change in Code of Judicial Conduct.
No. 46835.

April 7, 1977.

Case of Original Jurisdiction Code of Judicial Conduct.

Talbot D'Alemberte of Steel, Hector & Davis, Miami, for petitioner.
Joseph C. Jacobs of Ervin, Varn, Jacobs & Odom, Tallahassee, for Fla. Ass'n of Broadcasters, Inc.
Parker Lee McDonald, Orlando, Chairman, for the Fla. Conference of Circuit Judges.
Richard C. McFarlain, Tallahassee, Asst. Director, for The Fla. Bar.
Robert Eagan, State's Atty. and Donald A. Lykkebak, Asst. State's Atty., for State of Fla.
*403 Ellis S. Rubin of Ellis Rubin Law Offices, Miami, for Rommie L. Loudd.
A. Broaddus Livingston, Chairman, Tampa, and Larry S. Stewart, Chairman-Elect, Miami, for Trial Lawyers Section of The Florida Bar.
Gary C. Williams of Ausley, McMullen, McGehee, Carothers & Proctor, Tallahassee, for Soc. of Professional Journalists, Sigma Delta Chi, Southeast Region and Greater Miami Chapter, intervenor.
Richard E. Gerstein, State's Atty., and N. Joseph Durant, Jr., Chief Asst. State's Atty., for Fla. Prosecuting Attys. Ass'n, amicus curiae.
Harold Peter Barkas, Miami, for Academy of Fla Trial Lawyers, amicus curiae.

SUPPLEMENTAL INTERLOCUTORY DECISION

SUNDBERG, Justice.
By interlocutory opinion filed in this cause on January 28, 1976, reported at 327 So.2d 1 (Fla.1976), which decision has been several times supplemented to provide, inter alia, for inclusion of still camera photography, this Court has sought to have conducted for experimental purposes one televised civil and one televised criminal trial. The purpose of the experimental trials was to provide the Court additional data upon which to base its decision concerning the proposed modification of Canon 3 A(7) of the Code of Judicial Conduct of the State of Florida.

Among the guidelines imposed by the interlocutory decision was the requirement that all participants in such experimental trials consent to the experiment. The Court has met with total failure in securing the conduct of a trial in which all participants will consent, within the deadline of April 1, 1977, for conducting the experimental trials. However, it remains the view of this Court that a test period during which trials will be conducted at which the electronic media and still photographers will be present is essential to a reasoned decision on the petition for modification of Canon 3 A(7).

Consequently, in order to gain the experience which we deem essential to a proper final determination of this cause, it is the decision of this Court to invoke a pilot program with a duration of one year from July 1, 1977, during which the electronic media, including still photography, may televise and photograph, at their discretion, judicial proceedings, civil, criminal, and appellate, in all courts of the State of Florida, subject only to the prior adoption of standards with respect to types of equipment, lighting and noise levels, camera placement, and audio pickup, and to the reasonable orders and direction of the presiding judge in any such proceedings. To this end, counsel for the respective parties are directed to develop and submit to this Court on or before May 15, 1977, proposed standards concerning technology and conduct for consideration and adoption by the Court prior to July 1, 1977. In the event accord cannot be reached by the parties as to such recommended standards, the respective recommendations of the parties shall be submitted to the Court not later than May 15, 1977, for consideration and resolution. At the request of counsel for any party to these proceedings, a conference may be convened with Justice Sundberg, as conferee of the Court, to clarify and expedite the procedures for development of the

proposed standards.

It is so ordered.

OVERTON, C. J., and ADKINS, BOYD, ENGLAND, SUNDBERG, HATCHETT and KARL, JJ., concur.
Fla. 1977.
Petition of Post-Newsweek Stations
347 So.2d 402, 2 Media L. Rep. 1832

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HPETITION OF POST-NEWSWEEK STATIONS, FLA., INC.
Fla. 1978.

Supreme Court of Florida.
Petition of POST-NEWSWEEK STATIONS, FLORIDA, INC., for Change in Code of Judicial Conduct.
No. 46835.

May 11, 1978.
Rehearing Denied July 5, 1978.

See 359 So.2d 1195.

Case of Original Jurisdiction.
PER CURIAM.
By Supplemental Interlocutory Decision filed April 7, 1977,[FN1] implemented by Order ***1361** filed June 14, 1977,[FN2] which adopted standards of conduct and technology, this Court invoked a pilot program authorizing coverage of judicial proceedings in the courts of Florida by the electronic media and still photographers in order to assist the Court in reaching a reasoned decision upon the petition of Post-Newsweek Stations, Florida, Inc., for modification of Canon 3 A(7), Code of Judicial Conduct. By the terms of the orders the pilot program shall terminate at 11:59 p. m. on June 30, 1978. To aid the Court in evaluating the pilot program it was requested that all media participants, all parties hereto, and all participating judges furnish the Court a report of their experiences under the program at its conclusion.

FN1.In re Petition of Post-Newsweek Stations, Florida, Inc. for Change in Code of Judicial Conduct, 347 So.2d 402 (Fla.1977).

FN2.Petition of Post-Newsweek Stations, Florida, Inc., for Change in Code of Judicial Conduct, 347 So.2d 404 (Fla.1977).

A request has been received from counsel representing Post-Newsweek Stations, Florida, Inc., under date of March 3, 1978, that the Court (i) allow current submission of papers evaluating the experiment to date and (ii) allow the continuation of full media coverage after July 1, 1978. It is suggested that petitioner be permitted to file papers in support of its petition within 30 days after April 1, 1978, with all other parties being authorized to respond within 30 days from the filing by petitioner. It is further suggested that all parties be permitted a short time after July 1, 1978, within which to supplement their papers.

In consideration of the foregoing:

(1) The pilot program shall terminate at 11:59 p. m., June 30, 1978, as designated by the decisions of this Court filed April 7, 1977 and June 14, 1977, respectively. The provisions of Canon 3 A(7), Code of Judicial Conduct, [FN3] shall govern the presence of electronic media and still photographers in the court facilities of this State after June 30, 1978, and until further order of the Court in this cause. The avowed purpose of the pilot program authorized in these proceedings was to aid this Court in reaching a reasoned decision upon the application for modification of Canon 3 A(7). No cause has been made to appear to require a modification of the procedure earlier established and, in fact, a revision of this procedure arguably will impede the orderly consideration of the issues by this Court.

FN3.32 F.S.A. 198-99 (Supp.1978).

(2) To promote the orderly presentation of views evaluating the pilot program and arguments supporting or opposing modification of Canon 3 A(7), proponents of the petition for modification shall be allowed until June 15, 1978, within which to submit written argument and supporting materials. Opponents to the petition shall be allowed until July 15, 1978, within which to respond in writing to arguments of the proponents and submit supporting materials. Proponents shall then be allowed until July 31, 1978, to reply to arguments of the opponents.

(3) Consistent with paragraph numbered 9 of this Court's Order filed June 14, 1977,[FN4] all media participants, all parties hereto, all participating judges, and any member of the public who has

participated in the experiment are invited to furnish to the Court, during the period commencing July 1, 1978 and ending July 31, 1978, a report of their experiences and views under the program.

FN4.347 So.2d at 406.

It is so ordered.

ENGLAND, SUNDBERG, HATCHETT and ALDERMAN, JJ., concur.
OVERTON, C. J., concurs in part and dissents in part with an opinion, with which ADKINS, J , concurs.
BOYD, J., concurs in part and dissents in part with an opinion, with which ADKINS, J., concurs.OVERTON, Chief Justice, concurring in part, dissenting in part.
I concur in provisions in the majority opinion that set forth the procedure for the presentation of all views evaluating the pilot program. I dissent on that portion of ***1362** the order that denies the request to extend the pilot period beyond June 30, 1978. I would extend the pilot period until September 15, 1978. There have been no substantial problems presented to this Court with regard to the pilot program. In view of this fact, I see no justification for not extending the pilot program to a time certain within which a final opinion may be rendered by this Court.

ADKINS, J., concurs.BOYD, Justice, concurring in part and dissenting in part.
I concur in that portion of the majority opinion providing for receiving and evaluating evidence in anticipation of a permanent decision relating to new procedures of photographic and electronic recording equipment in courtrooms.

I dissent to that portion of the opinion limiting responses to media participants and all participating judges. Since the final order to be entered will affect the lives of almost every person in this State, the public generally should be invited to give expressions of views to this Court.

I further dissent to that portion of the order terminating the experiment on June 30, 1978. Responses which I have heard from judges and lawyers thus far lead me to conclude that the public will be beneficially affected by continuing the program indefinitely pending review by this Court. After one calendar year judges, lawyers, jurors, witnesses, news reporters and the viewing public have grown accustomed to cameras in court. The temporary termination of such activity, with the probability of its renewal within a few weeks, would tend to disrupt and frustrate the program which at this time appears to be generally accepted in this State.

ADKINS, J., concurs.
Fla. 1978.
Petition of Post-Newsweek Stations, Fla., Inc.
358 So.2d 1360, 3 Media L. Rep. 2614

END OF DOCUMENT

CPetition of Post-Newsweek Stations, Florida, Inc.
Fla., 1979.

Supreme Court of Florida.
In re Petition of POST-NEWSWEEK STATIONS, FLORIDA, INC., for Change in Code of Judicial Conduct.
No. 46835.

April 12, 1979.

In original proceeding on petition for change in Code of Judicial Conduct, the Supreme Court, Sundberg, J., held that: (1) electronic media coverage of courtroom proceedings is not per se a denial of due process; (2) First and Sixth Amendments do not mandate that electronic media be permitted to cover courtroom proceedings, and (3) canon would be amended to permit electronic media to have access to courtrooms, subject to standards adopted by Supreme Court and the authority of presiding judge to control conduct of proceedings to ensure fair trial.

Ordered accordingly.

See also, Fla., 358 So.2d 1360.

West Headnotes

[1] **Constitutional Law 92 ⚿3994**

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3991 Trial
92k3994 k. Course and Conduct of Trial. Most Cited Cases
(Formerly 92k314)
Electronic media coverage of courtroom proceedings is not per se a denial of due process. U.S.C.A.Const. Amends. 5, 14; West's F.S.A.Const. art. 1, § 9.

[2] **Constitutional Law 92 ⚿2129**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(W) Telecommunications and Computers
92k2126 Broadcasting and Electronic Media in General
92k2129 k. Journalists. Most Cited Cases
(Formerly 92k90.1(9))

Criminal Law 110 ⚿635

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k635 k. Publicity of Proceedings. Most Cited Cases

Trial 388 ⚿20

388 Trial
388III Course and Conduct of Trial in General
388k20 k. Publicity of Proceedings. Most Cited Cases
First and Sixth Amendments do not mandate that electronic media coverage of courtroom proceedings be permitted. U.S.C.A.Const. Amends. 1, 6, 14.

[3] **Criminal Law 110 ⚿633.16**

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))

Trial 388 ⚿20

388 Trial
388III Course and Conduct of Trial in General
388k20 k. Publicity of Proceedings. Most Cited Cases
In certain instances, it is appropriate to prohibit electronic media coverage of particular participants in a judicial proceeding. U.S.C.A.Const. Amends. 9, 14; West's F.S.A.Const. art. 1, § 1.

[4] **Constitutional Law 92 ⚿1225**

92 Constitutional Law
92XI Right to Privacy
92XI(B) Particular Issues and Applications
92k1225 k. In General. Most Cited Cases
(Formerly 92k82(7))
There is no constitutionally recognized right of privacy in context of a judicial proceeding. U.S.C.A.Const. Amends. 9, 14; West's F.S.A.Const. art. 1, § 1.

[5] Constitutional Law 92 ⚿1210

92 Constitutional Law
92XI Right to Privacy
92XI(A) In General
92k1210 k. In General. Most Cited Cases
(Formerly 92k82(7))
State Constitution does not expressly or impliedly guarantee a right of privacy. West's F.S.A.Const. art. 1, § 1.

[6] Criminal Law 110 ⚿633.16

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))

Trial 388 ⚿20

388 Trial
388III Course and Conduct of Trial in General
388k20 k. Publicity of Proceedings. Most Cited Cases
Canon would be amended to permit electronic media to have access to courtrooms, subject to standards adopted by Supreme Court and subject to the authority of presiding judge at all times to control conduct of proceedings before him to ensure a fair trial; prime motivating consideration for such amendment was state's commitment to open government. 32 West's F.S.A. Code of Judicial Conduct, Canon 3, subd. A(7).

***765** Talbot D'Alemberte and Donald M. Middlebrooks of Steel, Hector & Davis, Miami, for petitioner.
Joseph C. Jacobs of Ervin, Varn, Jacobs, Odom & Kitchen, Tallahassee, for the Florida Association of Broadcasters, Inc.
Parker Lee McDonald, Ex-Chairman, Orlando, and Harold R. Clark, Chairman, Jacksonville, for the Florida Conference of Circuit Judges.
Richard C. McFarlain, Tallahassee, for The Florida Bar.
Robert Eagan, State's Atty., and Donald A. Lykkebak, Asst. State's Atty., Orlando, for the State of Florida.
Ellis S. Rubin of the Ellis Rubin Law Offices, Miami, for Rommie L. Loudd.
A. Broaddus Livingston, Chairman, and Larry S. Stewart, Chairman-Elect, Miami, for Trial Lawyers Section of The Florida Bar.
C. Gary Williams of Ausley, McMullen, McGehee, Carothers & Proctor, Tallahassee, for Society and Professional Journalists, Sigma Delta Chi, Southeast Region and Greater Miami Chapter.
Allan Milledge and Alan Rosenthal of Milledge & Hermelee, Miami, for Sunbeam Television Corp., intervenors.
Richard E. Gerstein, State's Atty., and N. Joseph Durant, Jr., Chief Asst. State's Atty., Miami, for Florida Prosecuting Attorneys Association.
Harold Peter Barkas, Miami, for the Academy of Florida Trial Lawyers.
Joel Hirschhorn of Hirschhorn & Freeman, Miami, Jack O. Johnson, Public Defender, Bartow, for the Florida Public Defender Association.
Thomas M. Pflaum, Asst. Atty. Gen., Tallahassee, for the Atty. Gen. of the State of Florida, amici curiae.
SUNDBERG, Justice.
After careful deliberation, we deal today with whether the electronic media [FN1] shall be permitted access to the courtrooms of the State of Florida to cover and report judicial proceedings. The issue emerged on January 24, 1975, when Post-Newsweek Stations, Florida, Inc. filed its petition for change in the code of judicial conduct specifically Canon 3 A(7).[FN2] This is a matter of ***766** original Jurisdiction in this Court pursuant to article V, Florida Constitution.

FN1. Unless the context otherwise requires, "electronic media" shall be used as a generic term which encompasses television film and video tape cameras, still photography cameras, tape recording devices, and radio broadcast equipment.

FN2. Fla.Code Jud.Conduct, Canon 3 A(7) provides:
(7) A judge should prohibit broadcasting, televising, recording, or taking photographs in

> the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:
> (a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;
> (b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;
> (c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:
> (i) the means of recording will not distract participants or impair the dignity of the proceedings;
> (ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;
> (iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and
> (iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

Respondents to the petition, intervenors, and amici curiae include: the Florida Association of Broadcasters, Inc.; the Florida Conference of Circuit Judges; The Florida Bar; the attorney general of the State of Florida; Rommie L. Loudd; the Trial Lawyers Section of The Florida Bar; the Society of Professional Journalists, Sigma Delta Chi, Southeast Region and Greater Miami Chapter; the Florida Prosecuting Attorneys Association; the Florida Public Defender Association; the Academy of Florida Trial Lawyers; and Sunbeam Television Corporation. Pursuant to the Court's invitation, individuals, officials, organizations, and corporations too numerous to mention have filed comments, reports, and exhibits which number in the thousands of pages.

HISTORY OF THE PROCEEDINGS

By order filed May 21, 1975, this Court denied the portion of the petition which sought approval of a proposed substitute for Canon 3 A(7) but granted the portion seeking a reexamination of the canon for the purpose of making the Court's own revision, if it was so disposed. Pursuant to this order the Court received sundry materials, favorable and opposed, and observed a television video tape prepared under the auspices of the Supreme Court of Washington. Upon examination of these materials, the Court determined that an on-site experimental program should be conducted in the Second Judicial Circuit involving the televising of one civil and one criminal trial subject to specific guidelines, including the consent of all participants. Petition of Post-Newsweek Stations, Florida, Inc., 327 So.2d 1 (Fla.1976). By order dated April 12, 1976, the foregoing interlocutory decision was supplemented to include still photography cameras within the purview of the experiment.

Due to difficulty in obtaining the required consent of participants to conduct the experiment in the Second Judicial Circuit, on September 17, 1976, the Court authorized an expansion of the experiment to include the Ninth Judicial Circuit,[FN3] and then on December 21, 1976, to include the Fourth and Eighth Judicial Circuits. A termination date of April 1, 1977, was imposed for securing the conduct of the experimental trials. Notwithstanding the territorial enlargement, the attempt to conduct the experimental trials, subject to participant consent, met with total failure. Nevertheless, it was the view of the Court that a test period during which trials would be conducted with electronic media coverage was essential to a reasoned decision on the petition for modification of Canon 3 A(7). Accordingly, by supplemental interlocutory decision filed April 7, 1977, the Court invoked a one-year pilot program to commence on July 1, 1977, during which the electronic media would be permitted to cover judicial proceedings in the courts of this state, without participant consent, but subject to the prior adoption of standards with respect to conduct and technology. Petition of Post-Newsweek Stations, Florida, Inc., 347 So.2d 402 (Fla.1977). In our decision we requested the parties to develop and submit proposed standards for adoption by the Court prior to July 1, 1977.

> FN3.Petition of Post-Newsweek Stations, Florida, Inc., 337 So.2d 804 (Fla.1976).

On June 14, 1977, we filed our opinion promulgating the standards of conduct and technology to govern the one-year pilot program. Petition of Post-Newsweek Stations, Florida, Inc., 347 So.2d 404 (Fla.1977). A copy of the standards is appended to this opinion as Appendix 1. The opinion called for the experiment to commence at 12:01 a. m. on July 5, 1977, and to end at 11:59 p. m. on June 30, 1978. Pursuant to this authorization, proceedings at all levels of the Florida court system were covered by the electronic media. Only trial court proceedings***767** were

covered by the radio broadcast media. More than 2,750 persons participated as judge, attorney, court attache, juror, or witness in trials covered by the electronic media during the experimental period.[FN4] Although this Court issued several administrative orders clarifying the standards during the course of the pilot program, consistent with the terms of the standards no appellate review was afforded to representatives of the electronic media from orders entered by the trial courts ruling upon matters arising under the standards.

> FN4. A Sample Survey Involving Electronic Media and Still Photograph Coverage in Florida Courts Between July 5, 1977 and June 30, 1978; prepared by: The Judicial Planning Coordination Unit, Office of the State Courts Administrator (hereinafter referred to as "The Sample Survey"), Appendix A.

Pursuant to paragraph 9 of the Court's opinion filed June 14, 1977, the parties, media participants in the program, and all participating judges were requested to furnish to the Court, at the conclusion of the pilot program, a report of their experiences under the program. By application dated March 3, 1978, counsel for petitioner requested the Court (i) to allow current submission of papers evaluating the experiment to date and (ii) to allow the continuation of full media coverage after July 1, 1978, pending final decision upon the petition for amendment of Canon 3 A(7). In response the Court established an accelerated briefing schedule and enlarged the invitation for comments concerning the experiment to include any member of the public who had participated, but denied the request to extend the pilot program beyond June 30, 1978. Petition of Post-Newsweek Stations, Florida, Inc., 358 So.2d 1360 (Fla.1978). In rejecting an extension of the termination date, it was stated:

The avowed purpose of the pilot program authorized in these proceedings was to aid this Court in reaching a reasoned decision upon the application for modification of Canon 3 A(7). No cause has been made to appear to require a modification of the procedure earlier established and, in fact, a revision of this procedure arguably will impede the orderly consideration of the issues by this Court.

358 So.2d at 1361.

The pilot program terminated on June 30, 1978. Briefs, reports, letters, resolutions, comments, and exhibits were received through mid-August, 1978. The amount of materials submitted was imposing. The comments reflect honest and deeply felt convictions concerning the propriety of admitting the electronic media to the courtrooms of the State of Florida. We would be remiss not to pause here and accord recognition to the overwhelming majority of trial judges of this state who, while generally unsympathetic to the experiment, made a good faith effort to comply with the terms and spirit of the pilot program. They, once again, demonstrated the quality of our judiciary which, parenthetically, is an important factor in reaching our decision today.

THE SURVEY

At the time of the initial experiment which was to involve only two trials, it was contemplated that academicians from the Florida State University System would interview all trial participants as soon after their participation as feasible. Their responses were to be transcribed and filed in these proceedings as evidence. Unhappily, the interview technique proved impractical once the one-year pilot program was instituted. However, shortly before conclusion of the program a representative of the academic community [FN5] urged upon us the feasibility of a sample survey of the attitudes of the nonjudicial participants [FN6] in the judicial proceedings which had been covered by the electronic media during the experimental period. Although it was apparent that no controlled experiment could be conducted *768 due to the lapse of time, the Court was persuaded that a post hoc sample survey of the participants' attitudes would be an aid to our decision, though by no means conclusive. After consultation with counsel for the parties and with their cooperation, we called upon the Judicial Planning Coordination Unit of the Office of the State Courts Administrator (OSCA) to identify through court records the participants in trials which had received electronic media coverage and to devise appropriate questionnaires for submission to the nonjudicial participants. The parameters established for development of the survey were: (i) responses would be sought only from individuals who had participated in or were associated with trials that had electronic media coverage; (ii) judges would not be included in the survey; [FN7] (iii) all data would be collected by August 4, 1978; and (iv) all responses would remain anonymous. The final survey questionnaires [FN8] evolved through an eclectic process of review and modification by the Court, the parties, OSCA staff, and interested academicians. The questionnaires were essentially based upon a five-point, modified Lickert

scale, but with an additional summary question permitting the expression of personal views.[FN9]

FN5. Pauline Holden, Ph. D., University of Florida Criminal Justice Program.

FN6. Judicial participants were surveyed by the Florida Conference of Circuit Judges and the results filed in this cause.

FN7.Id.

FN8. A separate questionnaire was composed for each group sampled, i. e., attorneys, witnesses, jurors, and court personnel (bailiffs, court clerks, and court reporters).

FN9. The Sample Survey, s II. B.2.

The questionnaires were distributed on July 19, 1978. The majority of the responses were received by the August 4, 1978 deadline. The survey response was extraordinarily high (1349). The percentage response was:

Witness	44%
Attorney	65%
Court Personnel	72%
Juror	65%
Combined Response Rate	62% [10]

FN10. Id., Appendix A.

Results of the survey were compiled by OSCA staff and filed as a report in this cause on November, 1, 1978.[FN11]

FN11.Id.

Mindful that the survey results are nonscientific and reflect only the respondents' attitudes and perceptions about the presence of electronic media in the courtroom, nonetheless, the results do provide some general indications:

(1) Presence of the electronic media in the courtroom had little effect upon the respondents' perception of the judiciary or of the dignity of the proceedings.[FN12]

FN12. Id., s II. A.1., questions 1.-4. and 15.

(2) It was felt that the presence of electronic media disrupted the trial either not at all or only slightly.[FN13]

FN13. Id., s II. A.1., question 5.

(3) Respondents' awareness of the presence of electronic media averaged between slightly and moderately.[FN14]

FN14. Id., s II. A.1., question 6.

(4) The ability of the attorney and juror respondents to judge the truthfulness of witnesses was perceived to be affected not at all.[FN15]The ability of jurors to concentrate on the testimony was similarly unaffected.[FN16]

FN15. Id., s II. A.1., question 7.

FN16. Id., s II. A.1., question 8.

(5) All respondents were made to feel slightly self-conscious by the presence of electronic media.[FN17]

FN17. Id., s II. A.1., question 9.

(6) Both jurors and witnesses perceived that the presence of electronic media made them feel just slightly more responsible for their actions.[FN18]

FN18. Id., s II. A.1., question 10.

(7) Presence of electronic media made all respondents feel only slightly nervous or more attentive.[FN19]

FN19. Id., s II. A.1., questions 11 and 12.

*769 (8) The distracting effect of electronic media was deemed to range from almost not at all for jurors, to slightly for witnesses and attorneys.[FN20]

FN20. Id., s II. A.1., questions 13.

(9) The degree to which jurors and witnesses felt the urge to see or hear themselves on the media fell between not at all and slightly.[FN21]

FN21. Id., s II. A.1., question 14.

(10) Presence of electronic media affected the different participants' sense of the importance of the case in varying degrees. Jurors felt that it made the case more important to a slight degree; witnesses to a degree between slightly and moderately; court personnel slightly; and attorneys moderately.[FN22]

FN22. Id., s II. A.1., question 16.

(11) To a degree between not at all and slightly, jurors perceived that the presence of electronic media in the courtroom during the testimony of a witness made that witness's testimony more important.[FN23]

FN23. Id., s II. A.1., question 17.

(12) There was no significant difference in the participants' concern over being harmed as a result of their appearance on electronic media broadcast (including still photography) as opposed to their names appearing in the print media. In each instance the concern ranged on the scale between not at all and slightly.[FN24]

FN24. Id., s II. A.1., questions 19-22.

(13) Jurors and witnesses manifested the same attitude concerning the possibility that persons would attempt to influence their decision or testimony. There was no discernible difference in the height of their concern as between electronic and print media; the average response was slightly on the lower end of the spectrum between not at all and slightly.[FN25]

FN25. Id , s II. A.1., questions 23-26.

(14) Court personnel and attorneys perceived that the presence of electronic media made the participating attorneys' actions more flamboyant only to a slight extent.[FN26]

FN26. Id., s II. A.2., question 2.

(15) Court personnel and attorneys were of the attitude that the presence of electronic media affected the flamboyancy of witnesses to a degree between not at all and slightly.[FN27]

FN27. Id. s II. A.3., question 5.

(16) They also felt that the witnesses were slightly inhibited by the presence of electronic media [FN28] and that jurors were made slightly self-conscious, nervous, and distracted, but also slightly more attentive.[FN29]

FN28.Id., S II. A.3., question 7.

FN29. Id., s II. A.3., questions 13-16.

No survey sample was taken with respect to participants in appellate proceedings. However, no response, positive or negative, was received from any source commenting upon experience in the appellate courts. From our own experience with electronic media coverage of oral arguments before this Court during the pilot program we found absolutely no adverse effect upon the participants' performance or the decorum of the proceedings.

SURVEY OF THE FLORIDA CONFERENCE OF CIRCUIT JUDGES

As earlier noted, judges were not included in the sample survey conducted by OSCA because the Conference of Circuit Judges had previously conducted a survey of its membership. Those survey results were included as an appendix to the report filed in this cause by the Conference. There was a 54% Response to the survey. Approximately two-thirds of the respondents (96-50) indicated some experience with electronic media during the pilot program. Of these, thirty-six indicated positive reaction, twenty-nine negative reaction, and thirty-seven neutral. The circuit judge under whose direction the survey was administered reported that "the neutrals generally made favorable comments as 'I am neutral but the press were professional, no disturbances,*770 etc.'"[FN30] In response to questions 6, 7, and 8 of the survey, it was the reaction of the circuit judges (90 to 95%) that jurors, witnesses, and lawyers were not affected in the performance of their sworn duty by the presence of electronic media.[FN31]

FN30. Report of the Florida Conference of Circuit Judges, Appendix-1.

FN31.Id., Appendix-2.

Although the Florida Conference of Circuit Judges takes a position in its filed report in opposition to any change in Canon 3 A(7), the empirical data collected in its survey, particularly from respondents who experienced electronic media coverage, does not seem to support the formal position taken. As stated by Circuit Judge Arthur J. Franza in his survey recapitulation and analysis:

From the whole, I think Courts do not object to the use of cameras in the courtroom now that they have had some experience. However, in certain areas, some Judges have strong opinions. Paramount being:

1. That the presiding Judge have control of his courtroom.

2. That confidential or undercover agents who are witnesses, victims of crimes, family especially children of the convicted, and juvenile proceedings not be photographed.[FN32]

FN32.Id., Appendix-2.

HISTORY OF AMERICAN BAR ASSOCIATION CANON 35

Sparked by the spectacular publicity and broadcast attendant to the trial of Bruno Hauptmann for the Lindbergh kidnapping,[FN33] the American Bar Association House of Delegates adopted a resolution creating a Special Committee on Cooperation Between Press, Radio, and Bar.[FN34]The resolution also suggested a complete ban of radio broadcasting and still photography during judicial proceedings to prevent a breach of judicial decorum.[FN35]A canon, designated Canon 35 proscribing photographic and broadcast coverage of courtroom proceedings was adopted by the American Bar Association House of Delegates in 1937.[FN36]A second Special Committee of the American Bar Association, in 1952, produced a report that caused the House of Delegates to amend Canon 35 to proscribe televising court proceedings as well. A majority of states adopted the substance of Canon 35. Its current form is found in Florida as Canon 3 A(7).

FN33.State v. Hauptmann, 115 N.J.L. 412, 180 A. 809, Cert. denied, 296 U.S. 649, 56 S.Ct. 310, 80 L.Ed. 461 (1935).

FN34. Proceedings of the Fifty-fifth Annual Meeting, Sixth Session, 18 ABA J. 761, 762 (1932).

FN35. Ironically, such coverage of "investitive, ceremonial, or naturalization proceedings" is exempted from operation of Canon 35, presumably upon the premise that the conduct of such proceedings in a courtroom adds dignity to the event. See Fla. Code Jud. Conduct, Canon 3 A(7)(b).

FN36. A complete summary of the history of Canon 35 is contained in an appendix to Justice Harlan's concurring opinion in Estes v. Texas, 381 U.S. 532, 596, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965).

Forty years after the adoption of Canon 35 by the House of Delegates of the American Bar Association, that association's Adjunct Committee on Fair Trial-Free Press commenced, on August 9, 1977, a reevaluation of standards relating to Fair Trial-Free Press. The committee released its proposed revised standards on February 11, 1978. They included a provision sanctioning courtroom coverage by electronic media under conditions to be established by local rule or by agreement with representatives of the news media, provided it could be carried out unobtrusively and without affecting the conduct of the trial.[FN37]The proposed standard expressly concluded that electronic media coverage of judicial proceedings "is not Per se inconsistent with the right to a fair trial."[FN38]The commentary makes clear that no right of access by electronic media is created by the standard; that is left to *771 the discretion of the trial court absent the establishment of a general policy by the highest court of a jurisdiction.

FN37. Proposed Standard 8-3. 6(a).

FN38.Id.

On March 22, 1978, the Standing Committee on Association Standards for Criminal Justice reviewed and favorably recommended the adjunct committee's proposed standard. After meetings on April 8 and 9, 1978, the Committee on Criminal Justice and the Media

recommended that the Council of the Section of Criminal Justice "endorse the proposed electronic media standard."However, despite these two previous favorable committee recommendations, the Council of the Section of Criminal Justice voted 7-5 on April 30, 1978, not to support the proposed standard. The comments of each reviewing body were transmitted to the Committee on Association Standards for Criminal Justice which presented all Fair Trial-Free Press standards to the House of Delegates. At its midwinter meeting in February, 1979, the House of Delegates of the American Bar Association considered and rejected the proposed standard relating to electronic media coverage of court proceedings.

The total prohibition of photographic and televised coverage of court proceedings contained in Canon 3 A(7) was also the subject of a special committee created by the late Chief Justice William O'Neill of the Conference of Chief Justices in February, 1978. On August 2, 1978, the Conference of Chief Justices by a vote of forty-four to one, with one abstaining, approved a modification of the canon which would allow each of the states, by its highest court, to establish necessary standards and guidelines for radio, television, and photographic coverage of court proceedings.

DUE PROCESS CONSIDERATIONS

[1] The opponents to revision of Canon 3 A(7) assert that electronic media coverage of courtroom proceedings is per se a denial of due process under the fourteenth amendment to the Constitution of the United States. The assertion is founded on Estes v. Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965). The Supreme Court first encountered the issue in Stroble v. California, 343 U.S. 181, 72 S.Ct. 599, 96 L.Ed. 872 (1952). Stroble was convicted in 1949 of first degree murder for the brutal sex-slaying of a young child. The crime, arrest, and trial generated pervasive and sensationalized newspaper, radio, and television publicity. The district attorney periodically released "play-by-play" press releases, and the California Legislature convened in special session and held committee hearings in various parts of the state to study the problem of sex crimes. The record does not disclose exactly which portions of the court proceedings were televised or photographed. The trial judge apparently permitted televising of the seating of the jury, portions of the hearings, and the verdict return. Still photographs were taken throughout the trial.

Stroble contended that the extraordinary amount of prejudicial publicity had created a lynch mob atmosphere and fatally infected his trial. He also objected to the presence of television and still photography cameras in the courtroom. The California Supreme Court and the United States Supreme Court rejected these contentions and held that Stroble received a fair and impartial trial.

The California Supreme Court directly addressed the cameras in the courtroom issue. They viewed the presence of cameras as improper but Not unconstitutional:

We can also assume that it was improper to allow the taking of news photographs or televising of scenes in the court room; but there is no indication that the jury's verdict was influenced by the taking of the pictures or the televising of court room scenes.

People v. Stroble, 36 Cal.2d 615, 226 P.2d 330, 334 (1951).

The United States Supreme Court affirmed the conviction in Stroble without specifically alluding to this issue. In dissent, Justice Frankfurter made bare reference to the televising of certain portions of the trial but failed to confront the problem head-on. 343 U.S. at 199-200, 72 S.Ct. 599.

***772** In Estes v. Texas, the Supreme Court dealt with the notorious televised trial of Billy Sol Estes on charges of swindling. The facts portray a carnival-like proceeding incessantly interrupted by reporters, cameras, and cameramen. In his opinion for the Court, Justice Clark described the scene in this way:

Petitioner's case was originally called for trial on September 24, 1962, in Smith County after a change of venue from Reeves County, some 500 miles west. Massive pretrial publicity totaling 11 volumes of press clippings, . . . had given it national notoriety. All available seats in the courtroom were taken and some 30 persons stood in the aisles. However, at that time a defense motion to prevent telecasting, broadcasting by radio and news photography and a defense motion for continuance were presented, and after a two-day hearing the former was denied and the latter granted.

These initial hearings were carried live by both radio and television, and news photography was permitted throughout. The videotapes of these hearings clearly illustrate that the picture presented was not one of that

judicial serenity and calm to which petitioner was entitled. . . . Indeed, at least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and television the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and the counsel table. It is conceded that the activities of the television crews and news photographers led to considerable disruption of the hearings.

381 U.S. at 535-36, 85 S.Ct. at 1629 (citations omitted).

Based on these facts, the Court had little trouble in finding that Estes was denied due process.[FN39]The plurality opinion contains sweeping language which at first blush appears to cast doubt upon the constitutionality of any televising of a criminal trial. In his concurring opinion, however, Justice Harlan demonstrates that the Estes decision is limited to its peculiar facts:

> FN39. No showing of actual prejudice was required. Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963). In Rideau the defendant was subjected to a televised interview in his jail cell the morning following his arrest. Thousands of people watched on television as Rideau, flanked by the sheriff and two state troopers, admitted in detail the commission of a robbery, kidnapping, and murder in response to leading questions by the sheriff. The Supreme Court held that it was a denial of due process to refuse Rideau's request for a change of venue, "after the people of Calcasieu Parish had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged."373 U.S. at 726, 83 S.Ct. at 1419.The Court concluded that "(a)ny subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality."Id. There is no evidence of any televised coverage of courtroom proceedings in Rideau, and thus it has no application here.

The Estes trial was a heavily publicized and highly sensational affair. I therefore put aside all other types of cases . . . . The resolution of those further questions should await an appropriate case; the Court should proceed only step by step in this unplowed field. The opinion of the Court necessarily goes no farther, for only the four members of the majority who unreservedly join the Court's opinion would resolve those questions now. 381 U.S. at 590-91, 85 S.Ct. at 1663-64 (emphasis supplied).

Moreover, Justice Clark's characterization of the issue before the Court in Estes belies the seemingly expansive reach of the decision:

While petitioner recites his claim in the framework of Canon 35 of the Judicial Canons of the American Bar Association he does not contend that we should enshrine Canon 35 in the Fourteenth Amendment, but only that the time-honored principles of a fair trial were not followed in his case and that he was thus convicted without due process of law. . . . In short, the question here is not the validity of either Canon 35 of the *773 American Bar Association or Canon 28 of the State Bar of Texas,[FN40] But only whether petitioner was tried in a manner which comports with the due process requirement of the Fourteenth Amendment.

> FN40. Canon 28 of the State Bar of Texas left to the discretion of the trial judge the question of the presence of cameras.

381 U.S. at 535, 85 S.Ct. at 1629 (emphasis supplied).

The Court expressly limited its opinion to the crude state of the television art existing in 1965 and acknowledged the advent of technological advances."When the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case."381 U.S. at 540, 85 S.Ct. at 1631.Justice Clark, while noting that "at this time those safeguards (to ensure a fair trial) do not permit the televising and photographing of a criminal trial,"[FN41] concluded with the clear message that the decision did not forever proscribe such electronic media coverage:

> FN41.381 U.S. at 540, 85 S.Ct. at 1631.

It is said that the ever-advancing techniques of public communication and the adjustment of the public to its presence may bring about a change in the effect of telecasting upon the fairness of criminal trials. But we are not dealing here with future developments in the field of electronics. Our judgment cannot be rested on the hypothesis of tomorrow but must take the facts as they are presented today.

381 U.S. at 551-52, 85 S.Ct. at 1637.

Justice Harlan, the swing vote in the plurality, echoed the underlying philosophy and restricted scope of Justice Clark's opinion:

Finally, we should not be deterred from making the constitutional judgment which this case demands by the prospect that the day may come when television will have become so commonplace an affair in the daily life of the average *person as to dissipate all reasonable likelihood* that its use in courtrooms may disparage the judicial process. If and when that day arrives the constitutional judgment called for now would of course be subject to re-examination in accordance with the traditional workings of the Due Process Clause.[FN42]

> FN42. In dissent, Justice Brennan agreed that "today's decision is Not a blanket constitutional prohibition against the televising of state criminal trials."381 U.S. at 617, 85 S.Ct. at 1678 (emphasis in original).

381 U.S. at 595-96, 85 S.Ct. at 1666.

Of particular interest is Justice Harlan's express recognition of the benefits to be derived from state experimentation with electronic media coverage."Forbidding this innovation . . . would doubtless *impinge upon one of the valued attributes of our* federalism by preventing the States from pursuing a novel course of procedural experimentation."[FN43]381 U.S. at 587, 85 S.Ct. at 1662.

> FN43. It should be here noted that eighteen jurisdictions have adopted either permanent or experimental rules allowing some form of electronic media coverage of judicial proceedings, and additional states have such rules under consideration. See Appendix 2 to this opinion for a report of recent developments in the adoption of rules for permitting electronic media coverage of judicial proceedings prepared by the National Center for State Courts dated February 7, 1979.

In opinions subsequent to Estes, the United States Supreme Court has reaffirmed the narrow scope of that decision. In Nebraska Press Association v. Stuart, 427 U.S. 539, 552, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), the Court stated that in Estes the volume of trial publicity, the judge's failure to control the proceedings, and the telecast of a hearing and the trial itself Combined to deny the defendant due process. In Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975), Justice Marshall delineated the holdings of Sheppard v. Maxwell [FN44] and Estes in this manner:

> FN44.384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). In Sheppard, the Court reversed the conviction of Dr. Sam Sheppard due to the prejudicial impact of pretrial publicity and the trial court's failure to protect the defendant's right to a fair trial.

***774** The proceedings in these cases were entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob. They cannot be made to stand for the proposition that juror exposure to *information about a state defendant's prior convictions* or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process.
421 U.S. at 799, 95 S.Ct. at 2036.

Neither decision characterized Estes as imposing a per se constitutional ban on the televising of state criminal trials.

Similarly, several lower courts have concluded that televised coverage of a criminal trial is not a per se denial of a defendant's right to due process.Bradley v. Texas, 470 F.2d 785 (5th Cir. 1972); CBS, Inc. v. Lieberman, 439 F.Supp. 862 (N.D.Ill.1976); Gonzales v. People, 165 Colo. 322, 438 P.2d 686 (1968).

It is our conclusion, then, that without demonstration of prejudice, there is no per se proscription against electronic media coverage of judicial proceedings imposed by the *fourteenth amendment to the United States Constitution* nor by article I, section 9, Florida Constitution.

FIRST AND SIXTH AMENDMENT CONSIDERATIONS

[2] While we have concluded that the due process clause does not prohibit electronic media coverage of judicial proceedings per se, by the same token we reject the argument of the petitioner that the first and sixth amendments to the United States Constitution mandate

entry of the electronic media into judicial proceedings. We are satisfied that this issue was laid to rest not only in the Estes [FN45] decision, but more recently in Nixon v. Warner Communications, Inc., 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978), where with particular reference to the sixth amendment, it was stated:

FN45.381 U.S. at 539-42, 85 S.Ct. 1628.

Respondents contend that release of the tapes is required by the Sixth Amendment guarantee of a public trial. They acknowledge that the trial at which these tapes were played was one of the most publicized in history, but argue that public understanding of it remains incomplete in the absence of the ability to listen to the tapes and form judgments as to their meaning based on inflection and emphasis.

In the first place, this argument proves too much. The same could be said of the testimony of a live witness, yet there is no constitutional right to have such testimony recorded and broadcast. Estes v. Texas, supra (381 U.S.), at 539-542, 85 S.Ct. (1628) at 1631-32. Second, while the guarantee of a public trial, in the words of Mr. Justice Black, is "a safeguard against any attempt to employ our courts as instruments of persecution,"In re Oliver, 333 U.S. 257, 270, 68 S.Ct. 499, 506, 92 L.Ed. 682 (1948), it confers no special benefit on the press. Estes v. Texas, 381 U.S., at 583, 85 S.Ct., at 1653 (Warren, C. J., concurring); Id., at 588-589 (Harlan, J., concurring). Nor does the Sixth Amendment require that the trial or any part of it be broadcast live or on tape to the public. The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed. Id., at 588-589, 85 S.Ct. at 1662-1663 (Harlan, J., concurring). That opportunity abundantly existed here.

435 U.S. at 610, 98 S.Ct. at 1318 (footnotes omitted).

Accordingly, our decision in this case is predicated upon the supervisory authority which reposes in this Court pursuant to article V of the Florida

CONSTITUTION AND NOT UPON ANY CONSTITUTIONAL IMPERATIVE. CONSIDERATIONS AGAINST ALLOWING ELECTRONIC MEDIA COVERAGE OF JUDICIAL PROCEEDINGS

The opponents to electronic media coverage of judicial proceedings have raised a ***775** multitude of issues militating against such coverage. The grounds for objection can be classified into the following categories: (i) physical disturbance or disruption; (ii) adverse psychological effect on the participants in carrying out their solemn duties in connection with the decision-making process; (iii) exploitation of the courts for commercial purposes as opposed to the performance of an educational function; (iv) prejudicial publicity; (v) effect on particular categories of witnesses, I. e., confidential informants, victims, relatives of victims, minors, witnesses under protection of anonymity, prisoners; and (vi) privacy rights of participants. It is asserted that each adversely bears upon the ability of the parties to receive a fair and impartial trial.

(i) Physical disruption.

After sifting through the voluminous arguments, comments, survey results, and concessions of the opponents,[FN46] it is apparent that through application and enforcement of the standards imposed by the Court during the pilot program, physical disturbance was so minimal as not to be an arguable factor.[FN47]Technological advancements have so reduced size, noise, and light levels of the electronic equipment available that cameras can be employed in courtrooms unobtrusively. The standards adopted by the Court vested in the chief judges the means to position electronic media representatives in locations which would be least obtrusive while permitting reasonable access to coverage. Furthermore, the standards with respect to pooling and resolution of media disputes appear to have proved workable during the pilot period. Comments received indicate that while disputes arose from time to time, the burden was properly shifted to media representatives to resolve those disputes without involving the trial judge as arbitrator. In a number of instances the media, both with and without participation of the court, established protocols to anticipate and deal with problem areas.[FN48]

FN46. Report of the Florida Conference of Circuit Judges, Appendix-1.; Brief of Amicus Curiae Hirschhorn and Freeman, P.A., p. 3.

FN47. Supra note 13, at 768.

FN48. See, e. g., Report of Judge Paul Baker re: Conduct of Audio-Visual Trial Coverage, filed

Dec. 15, 1977, at 3-4.

A related issue is whether the very presence of electronic media in the courtroom detracts from the decorum of the proceedings. The attitudes of all participants surveyed clearly indicate that there is no such discernible effect.[FN49]

FN49. Supra note 12, at 768.

(ii) Psychological effect.

Because of the scanty empirical data available to permit an assessment of the psychological impact upon courtroom participants, opponents assert that the presence of electronic media will have myriad adverse effects. They maintain that: (1) lawyers will "grandstand" or "play to the cameras" to advance their own self interests; (2) judges will engage in "posturing" particularly at election time; (3) witnesses will either assume a stage presence and "ham it up" or will be so intimidated as not to be able to present fairly their testimony; (4) jurors will either be distracted from concentrating on the evidence and the issues to be decided by them or, because of their identification with the proceedings, they will fear for their personal safety, be subjected to influence by members of the public, or attempt to conform their verdict to community opinion; and (5) the presence of electronic media in the courtroom will make that case appear to the participants to be a cause celebre and, therefore, prevent an objective and dispassionate presentation and resolution of the issues. These are concerns that any fair minded person would share because they would, certainly in combination, be antithetical to a fair trial. The fact remains, however, that the assertions are but assumptions unsupported by any evidence. No respondent has been able to point to any instance during the pilot program period where these fears were substantiated. Such evidence as exists would appear to ***776** refute the assumptions. The Survey reflects that the assumed influences upon participants during the experimental period were perceived to vary in degree from not at all to slightly. More importantly, there was no significant difference in the presence or degree of these influences as between the electronic and print media.Ante 769.Similarly, it was the opinion of an overwhelming majority (90-95%) of respondents to the survey of the Florida Conference of Circuit Judges that jurors, witnesses, and lawyers were not affected in the performance of their sworn duty in the courtroom. Ante 770.With particular reference to the charge of an inflated appearance of newsworthiness created by the presence of the electronic media in the courtroom, it must be recognized that newsworthy trials are newsworthy trials, and that they will be extensively covered by the media both within and without the courtroom whether Canon 3 A(7) is modified or not. Consequently, if it is deemed to be to the public advantage to permit electronic media coverage in the courtroom, it seems inappropriate to be dissuaded by honestly perceived but unsubstantiated concerns as to adverse psychological effects on participants.

(iii) Exploitation of the courts for commercial purposes as opposed to the performance of an educational function.

Some of the opponents maintain that the electronic media is but an entertainment form without serious content and that editing practices not only eliminate any educational value but mislead the public as to the judicial process and the issues in a particular proceeding. We have been treated to the spectre of a three-minute segment coverage of the local trial sandwiched between a dog food commercial on the one end and a panty hose commercial on the other. That may be. However, nothing prohibits the print media from juxtaposing just such advertisements against its news story covering the same trial. Surely it has occurred. Just as surely the image and majesty of the judiciary has survived unsullied. We perceive no discernible difference in commercial exploitation of the courts by the electronic media as contrasted with the print media.

As to the lack of serious content on the part of the electronic media, we must concede that much of its broadcast time is devoted to entertainment. However, so too is substantial space in newspapers and magazines devoted to cartoons, comics, sports, entertainment, advertising, and the like. Is a "men's entertainment" magazine more calculated to educate and less to entertain than the local television station? At best the answer to that question is a value judgment, but no one would seriously suggest that a reporter for such a magazine should be precluded from covering and reporting a trial because it is not intended to educate or inform the public that it intends only to exploit the courts commercially. Furthermore, a medium which has brought us such events as the funeral of assassinated President John F. Kennedy, the landing of the first man to reach the moon, and the Hearings on Watergate and Related Activities Before the Senate Select Committee on Presidential Campaign Activities cannot be said to be altogether without serious content.

We must also concede that selective editing, with or without ulterior motive, can affect the accuracy with which a legal proceeding is reported. However, this is true of all segments of the media, including the sketch artist, and no one in recent memory has suggested that as a basis for denying the print media access to the courtroom. The judiciary's concern in matters of media content and editorial policy as it relates to judicial proceedings is limited to those words or depictions which present an imminent and serious threat to the administrative of justice.[FN50]

FN50. See Craig v. Harney, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947); Pennekamp v. Florida, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946); Bridges v. California, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941).

*777 (iv) Prejudicial publicity.

This point raises two issues: (a) that witnesses placed under the rule which excludes them from the courtroom while other witnesses testify and jurors will be contaminated in the fulfillment of their oath and performance of their duty by viewing excerpts of the trial on television; and (b) that it will be impossible to secure a fair and impartial jury for retrial of a case or for the trial of a codefendant who is tried separately. In regard to witness and juror influence, our response is threefold. First, the allegation assumes that witnesses and jurors are either incapable or unwilling to abide by their solemn oath or directions from the court. We will not indulge in this assumption, for to do so would be to impeach the foundation of our system of justice. Second, the assertion simply is not borne out by the responses in the two surveys of participants in the year-long pilot program.[FN51]Third, we discern no appreciable difference in this regard between willful exposure to the electronic media as opposed to the print media. A witness or juror disposed to disregard an oath or direction from the court is just as apt to read about the trial in the newspaper as to view a film of it on television or to listen to it on a radio broadcast.

FN51. Supra note 21, at 769; note 25, at 769; note 31, at 770.

The problem of retrials or the separate, subsequent trial of a codefendant, is one only of degree. Just as electronic media broadcast may contaminate a prospective venire, so may extensive newspaper coverage. Furthermore, it is unrealistic to equate the presence of electronic media in the courtroom with the amount of publicity which will be generated about any trial. Newsworthy trials will be covered by the electronic media whether from within or without the courtroom. Even without access to the courtroom, television news broadcasts often utilize artist sketches, still photographs, or out-of-court films of the participants coupled with quotations or paraphrasing of testimony or legal argument which takes place in the courtroom. Who can assess whether this type of coverage will be any less sensational or have any less impact on the community than an accurate, direct broadcast of the events occurring in the courtroom. A situation similar to the one under consideration occurred in the "Watergate" conspiracy and obstruction of justice trial of Messrs. Haldeman, Ehrlichman, and Mitchell. United States v. Haldeman, 181 U.S.App.D.C. 254, 559 F.2d 31 (1976), Cert. denied, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977). It is hard to conceive of a trial preceded by more pervasive media coverage, including live telecast of the hearings before the United States Senate. Nonetheless, the court held that it was not error for the trial court to deny, prior to attempting selection of a jury, either a request for protracted continuance or for change of venue from the District of Columbia. The court further affirmed the verdicts and judgments of guilt against an attack of prejudicial publicity upon review of the voir dire examination. The court there made an interesting comment concerning the impact of pretrial publicity which has significance beyond that case.

Our own reading of the 2,000-page Voir dire demonstrates that the Government's assessment of the public interest in Watergate matters is correct. Most of the venire simply did not pay an inordinate amount of attention to Watergate. This may come as a surprise to lawyers and judges, but it is simply a fact of life that matters which interest them may be less fascinating to the public generally.

181 U.S.App.D.C. at 285 n.37, 559 F.2d at 62 n.37 (emphasis supplied).

Be that as it may, the issue presented is ordinarily one of determining the existence of actual prejudicial publicity whether before or at the trial. In the case of the former, voir dire examination has proven to be an effective method of insuring jury impartiality and of gauging whether prejudice is so great that an impartial jury cannot be selected from the community. Murphy v. Florida,

supra.In the extreme case a continuance or change of venue is an effective judicial tool to remedy the situation.*778 Where witness and juror prejudice is suspected or anticipated at trial, the judicial devices of court instruction, and sequestration in extreme cases, may be employed. There is no evidence that accurate electronic transmission of events in a public courtroom would enhance the potential for prejudice of witnesses and jurors. Nor has it been demonstrated that such transmission would generate a need to change the present standard for gauging prejudice.

(v) Effect on particular categories of witnesses.

Experience during the pilot period demonstrated that there were occasional instances of significant adverse impact on some categories of witnesses. Although the standards as adopted by this Court recognized "the authority of the presiding judge conferred by statute, rule or common law to control the conduct of proceedings before him," no standard for exercise of the judge's discretion in this regard was articulated.[FN52]As a result, some of the problems relating to electronic media coverage of certain categories of witnesses anticipated by the opponents did, in fact, arise. In the case of State v. Paul Jacobson, Case No. 75-8791, Eleventh Judicial Circuit of the State of Florida, the electronic media asserted the right to photograph witnesses who were under federal protection and relocated about the country to protect their identity.[FN53]After a hearing the presiding judge declined to permit such coverage.

FN52.Petition of Post-Newsweek Stations, Florida, Inc., 347 So.2d 404 (Fla.1977).

FN53. Brief of Amicus Curiae Hirschhorn and Freeman, P.A., app. at 46.

In State v. Herman, Case No. 77-1236, Fifteenth Judicial Circuit of the State of Florida, two problems occurred concerning the coverage of certain types of witnesses. The widow of the deceased murder victim sought to prohibit electronic media coverage of her appearance as a witness. The presiding judge overruled her claimed right to privacy under the ninth and fourteenth amendments to the United States Constitution and article I, section 1, Florida Constitution. Both this Court [FN54] and the Federal District Court for the Southern District of Florida refused to intervene.[FN55]During the same trial Judge Sholts denied the objection to electronic media coverage interposed by an inmate of the Florida Corrections System who had been called as a witness by the state. Spurred by the fear of reprisals from fellow inmates if she testified, the prisoner refused to take the stand and as a result was held in contempt.[FN56]It is not clear that in either instance the presiding judge perceived that discretion reposed in him to grant the objection by the witness.

FN54.Kreusler v. Sholts, 355 So.2d 515 (Fla.1978) (prohibition denied).

FN55. Report of Judge Thomas E. Sholts re Conduct of Audio-Visual Trial Coverage, filed June 19, 1978, at 4-5

FN56.Id., at 10-11.

In State v. Bannister, Case No. 77-521-CF-A-01, Twelfth Judicial Circuit of the State of Florida, the presiding judge considered but refrained from prohibiting electronic media coverage of the testimony of a sixteen-year-old rape victim. The District Court of Appeal, Second District, intervened to the extent of requesting the trial judge to hold a hearing on such proposal, after notice to the media, before entering any order prohibiting media coverage.Times Publishing Co. v. Hall, 357 So.2d 736 (Fla.2d DCA 1978). Although not invoked, the presiding judge apparently concluded that this Court's standards provided him discretionary authority to bar electronic media coverage of a particular witness.

[3] The foregoing examples demonstrate that unique problems can arise with respect to particular participants in a judicial proceeding. They do not, however, reveal any compelling reason for refusing to amend Canon 3 A(7). What is called for is an articulated standard for the exercise of the presiding judge's discretion in determining whether it is appropriate to prohibit electronic media coverage of a particular *779 participant. Implicit in this statement, of course, is the conclusion that in certain instances it is appropriate to prohibit electronic media coverage of particular participants. This is so because, for certain trial participants, there is a qualitative difference between the printed word and a photograph. Electronic media coverage of certain child custody proceedings could have a devastating impact on the welfare of the child participant. The future well-being of the child far outweighs the public's interest in being informed of such proceedings. And we can conceive of situations where it would be legally appropriate to exclude the electronic media where the public in general is not excluded.[FN57]Similar considerations can present

themselves where prisoners, confidential informants, sexual battery victims, relatives of victims, and witnesses under protection of anonymity are concerned. However, we deem it imprudent to compile a laundry list or adopt an absolute rule to deal with these occurrences. Instead, the matter should be left to the sound discretion of the presiding judge to be exercised in accordance with the following standard:

> FN57. See Remarks by Fred W. Friendly, Edward R. Murrow, Professor of Broadcast Journalism, Columbia University Graduate School of Journalism, at the National Conference on State Courts, Williamsburg, Virginia, March 20, 1978, at 17.

The presiding judge may exclude electronic media coverage of a particular participant only upon a finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media.

(vi) Privacy rights of participants.

[4][5] It is contended here that it is an invasion of an espoused right of privacy to compel a witness or juror to appear in a judicial proceeding by legal process, then expose him against his will to the notoriety or publicity attendant to his image appearing in a newspaper, magazine, or television broadcast. This argument fails for two reasons. First, a judicial proceeding, subject to certain limited exceptions, is a public event which by its very nature denies certain aspects of privacy. Second, and more compelling, there is no constitutionally recognized right of privacy in the context of a judicial proceeding. The scope of privacy interests protected by the United States Constitution, which have been characterized as penumbrae formed by emanations from the specific guarantees in the Bill of Rights,[FN58] has been narrowly circumscribed by recent decisions of the United States Supreme Court to include only matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976); See also Laird v. State, 342 So.2d 962 (Fla.1977), and cases cited therein. Furthermore, there is no express guarantee of a right of privacy contained in the Constitution of Florida, nor has any such constitutionally guaranteed right yet been found to exist through implication. Laird v. State.Consequently, objections to amendment of Canon 3 A(7) predicated upon violation of participants' privacy rights are unavailing.

> FN58.Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

CONSIDERATIONS FOR ALLOWING ELECTRONIC MEDIA COVERAGE OF JUDICIAL PROCEEDINGS

[6] The proponents for change of Canon 3 A(7) make many claims for permitting electronic media in the courtrooms of Florida. They assert that: (i) there is no logical basis to distinguish between the print and electronic media insofar as access is concerned; (ii) the sixth amendment concept of a public trial is promoted by electronic media coverage; (iii) there is educational value in electronic media coverage; (iv) newsworthy trials will be covered by the electronic media either from within or without the courtroom and that the former is less apt to interfere with a fair trial; (v) the pilot program has demonstrated that the ***780** state of the art in television and photographic equipment is such that no disturbance of judicial proceedings results from coverage and, furthermore, that media pooling arrangements prevented any serious problems in connection with coverage; and (vi) the judiciary and the public's confidence in that institution will be enhanced by electronic media coverage.

While we do not accept all of the claims made by the proponents and will not discuss them in detail, we are persuaded that on balance there is more to be gained than lost by permitting electronic media coverage of judicial proceedings subject to standards for such coverage. The prime motivating consideration prompting our conclusion is this state's commitment to open government.[FN59]We have heretofore articulated this philosophy in the context of the court system:

> FN59. See, e. g., ch. 119, Fla.Stat. (1977) (inspection of public records law); s 286.011, Fla.Stat. (1977) (open public meetings law); art. II, s 8(a) and (b), Fla.Const. (full and public financial disclosure by public officials and candidates).

Reporters are plainly free to report whatever occurs in open court through their respective media. A trial is a public event, and there is no special perquisite of the judiciary which enables it to suppress, edit or censor events which transpire in proceedings before it, and those

who see and hear what transpired may report it with impunity, subject to constitutional restraints mentioned herein.
State ex rel. Miami Herald Publishing v. McIntosh, 340 So.2d 904, 908-09 (Fla.1977) (footnotes omitted).

This principle, that a trial is a public event and that what transpires in an open courtroom is public property, has found expression in numerous United States Supreme Court decisions. See, e. g., Sheppard v. Maxwell, supra;Estes v. Texas, supra;Stroble v. California, supra;Craig v. Harney, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947).

Electronic media coverage of all other branches and subdivisions of Florida government exists and apparently has served not only to inform the public about the operation of their government but has made the representatives of government act more responsibility. At the advent of gavel-to-gavel television coverage of the Florida Legislature, members of that body expressed many of the same fears held by the respondents before us today. That experience, however, has demonstrated that the legislative process has been enhanced rather than degraded:

Television changes everything it touches. It has subtly altered the legislative process for the better. Many of our legislators had their doubts about the wisdom of gavel-to-gavel televising because they feared television would encourage grandstanding. This did not happen. Instead, television coverage had a favorable impact on the lawmaking process. No one mumbles bills through. You seldom see legislators reading newspapers and never see them eating lunch at their desks during debate any more. (e. s.)

Nowadays, under the eye of the television cameras, those sponsoring bills are far more careful to give the House and the viewing public an adequate explanation of what the pending measure does. In other words, debate has become far more structured.[FN60]

> FN60. Remarks by Allen Morris, Clerk, Florida House of Representatives, at Annual Meeting of the American Society of Legislative Clerks and Secretaries, New Orleans, La., November 29, 1977, at 13 (emphasis supplied).

The court system is no less an institution of democratic government in our society. Because of the courts' dispute resolution and decision-making role, its judgments and decrees have an equally significant effect on the day-to-day lives of the citizenry as the other branches of government. It is essential that the populace have confidence in the process, for public acceptance of judicial judgments and decisions is manifestly necessary to their observance.Florida Bar v. McCain, 361 So.2d 700, 709 (Fla.1978)***781** (Sundberg, J., concurring). Consequently, public understanding of the judicial system, as opposed to suspicion, is imperative.

Regrettably, public knowledge and understanding of the judicial process is at a low ebb:

The rulers of America, the numerous John Q. Citizens who have intention of becoming lawyers, should be taught what their courts do and why. For alas, they know too little of that subject. American journalism, on the whole, does a poor job of accurately reporting court-doings. Our lawyers have made little effort to explain to the laymen, in intelligible terms, the workings of our judicial system. The resultant public ignorance is deplorable. Our courts are an immensely important part of our government. In a democracy, no portion of government should be a mystery. But what may be called "court-house government" still is mysterious to most of the laity.

J. Frank, Courts on Trial 1 (1949).

This is particularly deplorable in Florida, where we have a system and judges in which we can take pride. Unlike other states where reform of the judicial system has sometimes lagged, Florida has developed a modern court system with procedures for merit appointment of judges and for attorney discipline. Florida courts have proved innovative in developing new concepts to speed the system and improve the administration of justice. We have no need to hide our bench and bar under a bushel. Ventilating the judicial process, we submit, will enhance the image of the Florida bench and bar and thereby elevate public confidence in the system.

In view of the lack of any serious problems of disruption occurring during the term of the pilot program, and supported by the limited empirical data developed through the surveys, it is our judgment that Canon 3 A(7) should be amended to permit access to the courtrooms of this state by electronic media subject to standards adopted by this Court and subject also to the authority of the presiding judge at all times to control the conduct of

proceedings before him to ensure a fair trial to the litigants. This judgment is buttressed by a practical reality; newsworthy trials will continue to be covered by the electronic media from without the courtroom if the canon is not altered. We have all been exposed to far too many examples of this out-of-court coverage to believe that it promotes the interests of a fair trial or the image of the judicial process. Proponents represent, and we accept in good faith, that this type of sensational and uncomplimentary coverage will be displaced by the sort of orderly and dignified in-court coverage demonstrated during the pilot program.

In reaching our conclusion we are not unmindful of the perceived risks articulated by the opponents of change. However, there are risks in any system of free and open government. A democratic system of government is not the safest form of government, it is just the best man has devised to date, and it works best when its citizens are informed about its workings.

AMENDMENT OF CANON 3 A(7)

In consideration of the foregoing, Canon 3 A(7) of the Florida Code of Judicial Conduct is amended, effective May 1, 1979, by striking the same in its entirety and substituting therefor the following:

3 A(7)

Subject at all times to the authority of the presiding judge to (i) control the conduct of proceedings before the court, (ii) ensure decorum and prevent distractions, and (iii) ensure the fair administration of justice in the pending cause, electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed in accordance with standards of conduct and technology promulgated by the Supreme Court of Florida.

COMMENTARY

This canon represents a departure from former Canon 3 A(7) (ABA Canon 35). The former canon generally proscribed electronic media and still photography *782 coverage of judicial proceedings from within and in areas immediately adjacent to the courtroom, with three categories of exceptions (a) use for judicial administration, (b) coverage of investitive, ceremonial, and naturalization proceedings, and (c) use for instructional purposes in educational institutions. Subject to the limitations and promulgation of standards as mentioned therein, the revised canon constitutes a general authorization for electronic media and still photography coverage for all purposes, including the purposes expressed as exceptions in the former canon. Limited only by the authority of the presiding judge in the exercise of sound discretion to prohibit filming or photographing of particular participants, consent of participants to coverage is not required. The text of the canon refers to Public judicial proceedings. This is in recognition of the authority reposing in the presiding judge, upon the exercise of sound discretion, to hold certain judicial proceedings or portions thereof In camera, and in recognition of the fact that certain proceedings or portions thereof are made confidential by statute. The term "*presiding judge*" *includes the chief judge of an appellate* tribunal.

In view of the foregoing amendment to Canon 3 A(7), Florida Rule of Criminal Procedure 3.110 is repealed as of the effective date of such amendment.

Pursuant to Canon 3 A(7), as herein amended, the standards of conduct and technology set forth in Appendix 3 attached to this opinion are hereby promulgated to govern electronic media and still photography coverage of judicial proceedings in the *courts of the State of Florida.*

Because of the protracted and deliberate consideration afforded this matter by the Court, and in view of the desirability of establishing a definitive date for commencement of electronic media coverage, rehearing is dispensed with in this cause and this decision shall be final upon filing.

It is so ordered.

ENGLAND, C. J., and ADKINS, BOYD, OVERTON, *HATCHETT and ALDERMAN, JJ., concur.*

Appendix to follow.

*783 APPENDIX 1

PETITION OF POST-NEWSWEEK STATIONS, ETC.

Cite as, Fla., 347 So.2d 404

1. Equipment and personnel.

(a) Not more than one portable television camera [film camera-16 mm sound on film (self blimped) or video tape electronic camera], operated by not more than one camera person, shall be permitted in any trial court proceeding. Not more than two television cameras, operated by not more than one camera person each, shall be permitted in any appellate court proceeding.

(b) Not more than one still photographer, utilizing not more than two still cameras with not more than two lenses for each camera and related equipment for print purposes shall be permitted in any proceeding in a trial or appellate court.

(c) Not more than one audio system for radio broadcast purposes shall be permitted in any proceeding in a trial or appellate court. Audio pickup for all media purposes shall be accomplished from existing audio systems present in the court facility. If no technically suitable audio system exists in the court facility, microphones and related wiring essential for media purposes shall be unobtrusive and shall be located in places designated in advance of any proceeding by the chief judge of the judicial circuit or district in which the court facility is located.

(d) Any "pooling" arrangements among the media required by these limitations on equipment and personnel shall be the sole responsibility of the media without calling upon the presiding judge to mediate any dispute as to the appropriate media representative or equipment authorized to cover a particular proceeding. In the absence of advance media agreement on disputed equipment or personnel issues, the presiding judge shall exclude all contesting media personnel from a proceeding.

2. Sound and light criteria.

(a) Only television photographic and audio equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. Specifically, such photographic and audio equipment shall produce no greater sound or light than the equipment designated in Appendix A annexed hereto, when the same is in good working order. No artificial lighting device of any kind shall be employed in connection with the television camera.

(b) Only still camera equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. Specifically, such still camera equipment shall produce no greater sound or light than a 35 mm Leica "M" Series Rangefinder camera, and no artificial lighting device of any kind shall be employed in connection with a still camera.

(c) It shall be the affirmative duty of media personnel to demonstrate to the presiding judge adequately in advance of any proceeding that the equipment sought to be utilized meets the sound and light criteria enunciated herein. A failure to obtain advance judicial approval for equipment shall preclude its use in any proceeding.

3. Location of equipment and personnel.

(a) Television camera equipment shall be positioned in such location in the court facility as shall be designated by the chief judge of the judicial circuit or district in which such facility is situated. The area designated shall provide reasonable access to coverage. If and when areas remote from the court facility which permit reasonable access to coverage are provided all television camera and audio equipment shall be positioned only in such area. Video tape recording equipment which is not a component part of a television camera shall be located in an area remote from the court facility.

(b) A still camera photographer shall position himself or herself in such location in the court facility as shall be designated by the chief judge of the judicial circuit or district in which such facility is situated. The area designated shall provide reasonable access to coverage. Still camera photographers shall assume a fixed position within the designated area and, once a photographer has established himself or herself in a shooting position, he or she shall act so as not to call attention to himself or herself through further movement. Still camera photographers shall not be permitted to move about in order to obtain photographers of court proceedings.

*784 (c) Broadcast media representatives shall not move about the court facility while proceedings are in session, and microphones or taping equipment once positioned as required by 1(c) above shall not be moved during the pendency of the proceeding.

4. Movement during proceedings.

News media photographic or audio equipment shall not be

placed in or removed from the court facility except prior to commencement or after adjournment of proceedings each day, or during a recess. Neither television film magazines nor still camera film or lenses shall be changed within a court facility except during a recess in the proceeding.

5. Courtroom light sources.

With the concurrence of the chief judge of a judicial circuit or district in which a court facility is situated, modifications and additions may be made in light sources existing in the facility, provided such modifications or additions are installed and maintained without public expense.

6. Conferences of counsel.

To protect the attorney-client privilege and the effective right to counsel, there shall be no audio pickup or broadcast of conferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, or between counsel and the presiding judge held at the bench.

7. Impermissible use of media material.

None of the film, video tape, still photographs or audio reproductions developed during or by virtue of the pilot program shall be admissible as evidence in the proceeding out of which it arose, any proceeding subsequent or collateral thereto, or upon any retrial or appeal of such proceedings.

8. Appellate review.

So that the Court may evaluate in depth all experiences engendered under the program at the end of one year, and to preclude appellate activity during the test year, (1) no appellate review shall be available to the electronic or still photographic media from individual orders entered by trial or appellate courts ruling upon matters arising under these standards, and (2) no appellate court shall entertain any petition by the electronic or still photographic media for extraordinary writ seeking in any way to affect such media reporting of a judicial proceeding or proceedings; provided however, that any party to this proceeding, any electronic media representative or any circuit or district court chief judge may at any time during the one-year pilot program apply to this Court, with proper notice to all parties, to amend the standards set out in this Order for the purpose of meeting unforeseen technical difficulties in their general application.

9. Evaluation of program.

At the conclusion of the one-year pilot program, all media participants in the program, all parties hereto, and all participating judges are requested to furnish to the Court a report of their experience under the program, so that the Court can determine whether or to what extent Canon 3 A(7) shall be modified.

*785 APPENDIX A

FILM CAMERAS-	16mm Sound on Film (self blimped)	
1. CINEMA PRODUCTS	CP-16A-R	Sound Camera
2. ARRIFLEX	16mm-16BL Model	Sound Camera
3. FREZZOLINI	16mm (LW16)	Sound on Film Camera
4. AURICON	"Cini-Voice"	Sound Camera
5. AURICON	"Pro-600"	Sound Camera
6. GENERAL CAMERA	SS III	Sound Camera
7. ECLAIR	Model ACL	Sound Camera
8. GENERAL CAMERA	DGX	Sound Camera
9. WILCAM REFLEX	16mm	Sound Camera

VIDEO TAPE
ELECTRONI

C CAMERAS

1. Ikegami	HL-77	HL-33	HL-35	HL-34	HL-51
2. RCA	TK 76				
3. Sony	DXC-1600 Trinicon				
3a. ASACA	ACC-2006				
4. Hitachi	SK 80	SK90			
5. Hitachi	FP-3030				
6. Philips	LDK-25				
7. Sony BVP-200	ENG Camera				
8. Fernseh	Video Camera				
9. JVC-8800u	ENG Camera				
10. AKAI	CVC-150	VTS-150			
11. Panasonic	WV-3085	NV-3085			
12. JVC	GC-4800u				

VIDEO TAPE RECORDERS/used with video cameras

1. Ikegami	3800
2. Sony	3800
3. Sony	BVU-100
4. Ampex	Video Recorder
5. Panasonic	1 inch Video Recorder
6. JVC	4400
7. Sony	3800H

*786 APPENDIX 2

National Center for State Courts

300 Newport Avenue

Williamsburg, Virginia 23185

(804)253-2000

February 7, 1979

To: Members of the Executive Council
Conference of Chief Justices

From: Jag C. Uppal, Director Secretariat Services

Subject: Television in the Courtroom - Recent Developments

The enclosed report provides information on significant developments concerning the televising of judicial proceedings. While the National Center for State Courts has been assisting the state courts in this area for some time, the policy resolution [FN*] adopted last summer by the Conference of Chief Justices designated the National Center as the Clearinghouse for all photographic and electronic-in-the-courtroom information for state and federal jurisdictions.

The staff of the National Center has been collecting rules, guidelines, opinions, reports, articles and other background information pertaining to television in the courtroom. All this information has enhanced the capacity of the National Center to provide timely assistance to the various state supreme courts, special committees, bar associations, media organizations, judges and other groups involved in studying the issues concerning television coverage. A compendium of materials has been mailed out to the Chief Justices and State Court Administrators, including material sent in response to specific requests.

We appreciate the cooperation of the members of the Conference of Chief Justices and their staffs for the materials received regarding developments in television, radio and photographic coverage of the courts in their states, To help us perform the clearinghouse functions more efficiently in the future, we would like to encourage you to continue to forward us such information. Some of you are aware that we are in the process of preparing two grant proposals to further develop the clearinghouse capability of the National Center.

FN* A copy of the resolution is attached to this appendix.

TELEVISION IN THE COURTROOM: RECENT DEVELOPMENTS

The Conference of Chief Justices approved a resolution on August 2, 1978, recommending that the Code of Judicial Conduct be amended to permit the supervisory court in each state and federal jurisdiction to "allow television, radio and photographic coverage of judicial proceedings in courts under their supervision."Since August, 1978, Supreme Courts in five states Alaska, California, Idaho, N. Dakota, Oklahoma and West Virginia have already amended their rules to allow *television coverage on an experimental basis for varying* periods. The rule in New Hampshire has been amended to permit trial coverage as of January 26. The State Supreme Court had authorized permanent coverage of its proceedings since December, 1977.

A number of other states are considering allowing cameras in the courts. The Supreme ***787** Court of New Jersey permitted one-day test coverage of its proceedings on December 12, 1978. Details of these and other major developments in the various states are provided under state-by-state descriptions.

While a number of individual judges allowed photographic and television cameras in their courtrooms during the mid-fifties in Idaho, Kansas, Oklahoma and Texas, Colorado was the first state which officially began to allow coverage in 1956. The Estes decision in 1965 (381 U.S. 532, 536) in effect, closed state courtrooms to cameras because allowing cameras would be a violation of the Fourteenth Amendment right to due process. Only Colorado continued to allow cameras in the courtroom after Estes.

State-by-State Description

A. STATES WHICH PERMIT COVERAGE ON PERMANENT BASIS:

1. Alabama

The Supreme Court adopted the Alabama Canons of Judicial Ethics in December, 1975, approving courtroom photography in trial and appellate courts with consent of *all parties and following a plan approved by the state* supreme court. In a criminal trial, all accused persons and the chief prosecuting attorney must give prior written consent before cameras will be allowed. In a civil proceeding, all litigants involved and their chief attorneys must give written consent.

2. Colorado

The Supreme Court of Colorado authorized photographing and broadcasting in the courtroom since February 27, 1956. Canon 3 A(7)-3 A(10) stipulate that there shall be no photographing or broadcasting of court proceedings unless permitted by order of the trial judge and only under the prescribed conditions. Consent of the accused and of witnesses and jurors under subpoena and the consent of the judge is required.

3. Georgia

The Canon 3 A was amended by the Supreme Court of Georgia on May 12, 1977 to include a new subparagraph (8).Canon 3 A(8) states that the Supreme Court may authorize the broadcasting, televising, recording, filming and taking of photographs in the courtrooms of the state *including the Supreme Court. A plan for any use of*

cameras in the courtroom must be approved by the Supreme Court in advance. If witnesses or jurors do not provide consent, cameras may be allowed in the courtroom but may not photograph or film those refusing to give consent.

4. New Hampshire

The Supreme Court adopted a rule # 29, authorizing photograph or broadcast by radio or television, of its oral proceedings with prior consent of the court effective January 1, 1978. Amendment of Rule 78(a) effective January 29, 1979, allows photographing, recording, broadcasting by radio, television or other means, court proceedings upon prior approval and order of the Presiding Judge.

5. Texas

The state Code of Judicial Conduct was amended in November, 1976, which permits recording by electronic means of oral arguments by the parties in appellate courts. Prior consent must be obtained from the Presiding Judge.

6. Washington

The Supreme Court approved the amendment of Canon 3 A(7) in September, 1976 which permits a judge to prescribe conditions for coverage of judicial proceedings. If witnesses and jurors express prior objection, no telecast or photographs are allowed of those persons. A Supreme Court authorized experiment was conducted in December, 1974.

B. EXPERIMENTAL COVERAGE IS PERMITTED IN THE FOLLOWING STATES:

1. Alaska

The Supreme Court authorized one-year pilot program governing media coverage of proceedings in the Supreme Court and in the Trials Courts in Anchorage. Prior approval of a plan for media coverage by the Supreme Court is required.***788** Prior consent must be obtained from the judge and counsel for all parties. Without permission of witnesses or jurors broadcast or telecast is not allowed. The program began September 18, 1978.

2. California

The Judicial Council of California approved on December 2, 1978, a one-year experimental program to permit broadcasting and photographing of court proceedings in selected courts with the consent of the judge and the parties and without cost to the Judicial Council or the courts. Chief Justices' Special Committee on the Courts and the Media has been appointed to advise the Judicial Council in developing rules and procedures for conducting and evaluating the project. The Committee's report is expected in June.

3. Florida

The state Supreme Court was first petitioned by the Post-Newsweek Stations, Florida, Inc. in May 1975 to amend Canon 3 A(7) relaxing the ban on coverage. After studying the issue the Court agreed that two trials be selected for the experiment which were to be conducted under specific guidelines including consent of all parties. Attempts to find trials for the experiment were unsuccessful.

A one-year pilot program was approved by the Court starting July 1, 1977. Under this program the court allowed an exception to Canon 3 A(7) of the Florida Code of Judicial Conduct. The Zamora murder trial came during the experimental period. This pilot program was terminated in June, 1978, as scheduled to evaluate the effects of the experiment. A sample survey of the attitudes of individuals associated trials involving electronic media and still photography coverage was conducted in Florida. (Copies of the Survey were mailed by the National Center to the members of CCJ and COSCA in November, 1978.) The decision of the Court is expected soon.

4. Idaho

The Supreme Court authorized an experimental broadcast and photographic coverage including radio, televising and electronic recording of public hearings and appeals before the Supreme Court. The experiment began on October 18, 1978, and it is to terminate on June 30, 1979.

(Idaho is one of the four states allowing cameras in Supreme Court sessions only. The other three states are Minnesota, North Dakota and Tennessee).

5. Louisiana

The Supreme Court approved February 23, 1978 a one-

year pilot project on camera and electronic coverage of court proceedings in Division B of the Ninth Judicial District Court for Rapides Parish. Written permission of the parties and their counsel is required. In criminal cases, this includes the victim and the District Attorney. It has not been possible to record and telecast a full trial until the end of January because of the lack of permission. (We understand that since the parties have given permission, a trial is likely to be covered in February.)

6. Minnesota

The Supreme Court adopted on January 27, 1978, rules governing experimental coverage of oral arguments in the Court by television, radio and photography. The rule stipulates suspension of Canon 3 A(7) at the discretion of the Court in particular cases.

7. Montana

Canon 35 of the Montana Canons of Judicial Ethics was suspended effective April 1, 1978 for an experimental period of two years. All court proceedings open to the public shall permit the recording and broadcasting. No consent is required. If, however, coverage is not permitted, the presiding judge must state reasons for such prohibition in the record of such case.

8. North Dakota

The Supreme Court authorized one-year experimental electronic media and photographic coverage of certain proceedings*789 before the Court. The rule provides for an evaluation of the experiment at its conclusion on January 31, 1980.

9. Oklahoma

The Supreme Court revised Canon 3 A(7) for an experimental period of one year effective January 1, 1979. A judge is authorized to permit broadcasting, televising, recording and taking photographs in the courtroom. If prior objection is expressed to the judge by jurors, parties, and witnesses, they may not be photographed or their testimony broadcast or telecast. Consent of the parties is required in criminal proceedings.

10. Tennessee

By amending the Tennessee Code of Judicial Conduct, the Supreme Court permitted photographic and broadcast coverage of the oral arguments presented to the Court for "a reasonable test period." The experiment began May 24, 1978.

11. West Virginia

The Supreme Court authorized a six-month experiment for television and broadcast coverage in Monongahela County (Morgantown) Circuit Court. No consent is necessary, but if witnesses, jurors and counsel express prior objection, they cannot be photographed or televised. Experiment began Jan. 22, 1979.

12. Wisconsin

The Supreme Court ordered a suspension of Rule 14 of the State Code of Judicial Ethics for a one-year experimental period beginning April 1, 1978. The guidelines require designation of a coordinator to work with the chief judge of the district and presiding judge in a court providing the use of cameras.

C. STATES ACTIVELY CONSIDERING ALLOWING COVERAGE INCLUDE:

1. Arkansas

The American Bar Association's Committee on Cameras in Courtroom has been examining this subject. It is not certain whether the state judiciary is involved in this study.

2. Delaware

The Supreme Court sponsored a television demonstration for the Supreme Court judges in May, 1978, to acquaint the judges with television equipment and procedures. Subsequently, the Chief Justice appointed two study groups from the Delaware Bar Association and the Bar-Bench Press Conference to make recommendations to the Chief Justice by May 1, 1979.

3. Massachusetts

The Supreme Judicial Court appointed on January 31 an Advisory Committee on Media Coverage in Court. The Committee has been charged with presenting its recommendations by April 30 concerning camera in the courts.

4. Nebraska

The Nebraska State Bar Association's Bar-Media Committee has been studying the questions relating to televising of courtroom proceedings. The extent of the state courts involvement in this program is not known but, it is understood, that the Chief Justice is interested in the work of the Committee.

5. Nevada

The Supreme Court Rule 240 permits taking of still photographs in the courtroom to be "regulated by local rule or practice."The Nevada Canon 3 A(7) of Judicial Ethics prohibits cameras on motion of the court, attorney or at the request of a witness. The canon follows the Supreme Court Rule as above. The Nevada Code of Law, Section 1.220, however, prohibits cameras in the courtroom.

6. New Jersey

The Supreme Court relaxed the provisions of the Canon 3 A(7) for the purpose of permitting the videotaping of the proceedings of the Court on December 12, 1978. Since then, the Supreme Court has appointed a special committee to study and report on allowing television and photographic coverage in the courts. The committee is expected to present its recommendations by the end of March.

7. Ohio

The Supreme Court had appointed two committees of broadcasters and newspaper publishers. Both these committees presented their reports last summer. The ***790** court then invited comments about the proposals submitted by the two groups. The matter is presently under consideration by the Court.

8. Rhode Island

The Chief Justice appointed a special committee last Fall to review the rules of the Court regarding television, radio and photographic coverage. The Committee is expected to present its recommendations sometime this Summer.

National Center for State Courts

300 Newport Avenue

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(804)253-2000

RULES CONCERNING
TELEVISION, RADIO AND
PHOTOGRAPHIC
COVERAGE OF JUDICIAL
PROCEEDINGS

SUMMARY TABLE

A. STATES WHICH PERMIT
COVERAGE * ON PERMANENT
BASIS:

State	Authority and Nature of Coverage	Effective Date
1. Alabama	Supreme Court authorizes and approves coverage plan. Consent of parties required.	Feb. 1, 1976
2. Colorado	Judicial Canons permit coverage *(first state to allow.)* Consent of the accused, witness,	Feb. 27, 1956

	juror and judge required.	
3. Georgia	Supreme Court authorizes approves coverage plan. All plans require prior consent.	May 12, 1977
4. New Hampshire	Supreme Court authorized coverage of its proccedings. Rule has been amended to allow trial coverage as of Jan. 26, 1979. No consent required.	Jan. 1, 1978
5. Texas	Supreme Court authorized appellate coverage.	Nov. 9, 1976
6. Washington	Supreme Court approved rule. (Test was authorized and conducted in 1974.) If witnesses and jurors express prior objection, no telecast or photographs allowed.	Sept. 20, 1976

B. STATES WHICH PERMIT COVERAGE ON EXPERIMENTAL BASIS:

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1. Alaska	Supreme Court authorized one-year pilot program in the Supreme Court and Anchorage Trial Courts. Consent of the parties and judge required.	Sept. 18, 1978
2. California	Judicial Council approved one-year experimental coverage. Guidelines, evaluation procedures and the question of consent are being considered by a Special Committee.	Dec. 2, 1978
3. Florida	One year experiment completed	July 1, 1977

	June 30, 1978. Its evaluation is under review by the state Supreme Court.	
4. Idaho	Supreme Court authorized a seven-month experiment of proceedings in Supreme Court.	Dec. 4, 1978
5. Louisiana	Supreme Court authorized one-year pilot program in Division B of the 9th Judicial District Court. Consent required.	Feb. 23, 1977
6. Minnesota	Supreme Court authorized experimental coverage in the *Supreme Court*.	Jan. 27, 1978
7. Montana	Supreme Court suspended the ban for a two-year experimental period. Consent is nor required.	April 1, 1978
8. North Dakota	Supreme Court authorized one-year experimental coverage of its proceedings.	Feb. 1, 1979
9. Oklahoma	Supreme Court authorized one-year experiment. If prior objection is expressed, telecast or photographs not allowed.	Jan. 1, 1979
10. Tennessee	Supreme Court authorized coverage of its proceedings for "a reasonable test period."	May 24, 1979
11. West Virginia	Supreme Court approved a six-month experiment in Monongahela County (Morgantown) Circuit Court. Consent	Jan. 22, 1979

	is not required.
12. Wisconsin	Supreme Court suspended the ban on coverage for one-year period. Consent not required. April 1, 1978

C. STATES ACTIVELY CONSIDERING ALLOWING COVERAGE INCLUDE:

Arkansas, Delaware, Massachusetts, Nebraska, New Jersey (Supreme Court permitted one-day test coverage of its proceedings on Dec. 12, 1978), Ohio and Rhode Island. (Nevada Court rule and canons permit coverage whereas statutes prohibit it.)

February 10, 1979

FN* Includes television, radio and photographic coverage.

***791** RESOLUTION I

TELEVISION, RADIO, PHOTOGRAPHIC COVERAGE OF JUDICIAL PROCEEDINGS

WHEREAS, the Conference of Chief Justices appointed a sixteen-member committee in February, 1978, to study the possible amendment of Canon 3 A(7) of the Code of Judicial Conduct to permit electronic and photographic coverage of the courts of our nation under guidelines that would preserve the decorum and fairness of our judicial proceedings; and

WHEREAS, the Conference has discussed, debated, and considered the judicial canon which bans broadcasting, televising, audio recording, or taking photographs during trial and appellate proceedings for news purposes; and

WHEREAS, the highest court in each state has the authority and responsibility to provide ethical standards, to upgrade the quality of justice administered, and to improve the contact with the public in each state; and

WHEREAS, the news media, both print and electronic, serves an important role in informing the public and it is in the best interest of the public to be fully and accurately informed of the operation of judicial systems;

***792** NOW, THEREFORE, BE IT RESOLVED by the Conference of Chief Justices that the Canon 3 A(7) of the Code of Judicial Conduct be amended by adding the following paragraph and the commentary:

Notwithstanding the provisions of this paragraph, the (name the supervising appellate court or body in the state or federal jurisdiction) may allow television, radio, and photographic coverage of judicial proceedings in courts under their supervision consistent with the right of the parties to a fair trial and subject to express conditions, limitations, and guidelines which allow such coverage in a manner that will be unobtrusive, will not distract the trial participants, and will not otherwise interfere with the

administration of justice.

Commentary: If television, radio, and photographic coverage is permitted, it should be supervised by the appropriate appellate body which supervises the courts within its jurisdiction. It is necessary that there be express conditions and guidelines adopted by the supervising court or body in order to provide a specific manner and means for this type of media coverage. These guidelines should include the type and location of equipment, the discretion left to the individual trial or appellate court, and the necessity, if any, to obtain the consent of the participants. Absent special circumstances for good cause shown, no consent appears necessary in appellate courts. Special circumstances may exist in all courts for the restriction of this type of coverage in cases such as rape, custody of children, trade secrets, or where such coverage would cause a substantial increase in the threat of harm to any participants in a case.

BE IT FURTHER RESOLVED that the Conference designate the National Center for State Courts as the clearinghouse for all photographic and electronic in-the-courtroom information for various states and federal jurisdictions. In order to provide the complete exchange of information, the Conference recommends that each jurisdiction forward to the National Center all rules, statistics, guidelines, opinions, reports, and other information pertaining to the use of photographic and electronic devices in the courtrooms of their states, and that all information be made readily available to the courts upon request.

Adopted at the annual meeting held in Burlington, Vermont, August 2, 1978.

APPENDIX 3

STANDARDS OF CONDUCT AND TECHNOLOGY GOVERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF JUDICIAL PROCEEDINGS

1. Equipment and personnel.

(a) Not more than one portable television camera (film camera 16 mm sound on film (self blimped) or video tape electronic camera), operated by not more than one camera person, shall be permitted in any trial court proceeding. Not more than two television cameras, operated by not more than one camera person each, shall be permitted in any appellate court proceeding.

(b) Not more than one still photographer, utilizing nor more than two still cameras with not more than two lenses for each camera and related equipment for print purposes shall be permitted in any proceeding in a trial or appellate court.

(c) Not more than one audio system for radio broadcast purposes shall be permitted in any proceeding in a trial or appellate court. Audio pickup for all media purposes shall be accomplished from existing audio systems present in the court facility. If no technically suitable audio system exists in the court facility, microphones and related wiring essential for media purposes shall be unobtrusive and shall be located in places designated in advance of any proceeding by the chief judge of the judicial circuit or district in which the court facility is located.

(d) Any "pooling" arrangements among the media required by these limitations on equipment and personnel shall be the sole responsibility of the media without calling *793 upon the presiding judge to mediate any dispute as to the appropriate media representative or equipment authorized to cover a particular proceeding. In the absence of advance media agreement on disputed equipment or personnel issues, the presiding judge shall exclude all contesting media personnel from a proceeding.

2. Sound and light criteria.

(a) Only television photographic and audio equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. Specifically, such photographic and audio equipment shall produce no greater sound or light than the equipment designated in Schedule A annexed hereto, when the same is in good working order. No artificial lighting device of any kind shall be employed in connection with the television camera.

(b) Only still camera equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. Specifically, such still camera equipment shall produce no greater sound or light than a 35 mm Leica "M" Series Rangefinder camera, and no artificial lighting device of any kind shall be employed in connection with a still camera.

(c) It shall be the affirmative duty of media personnel to demonstrate to the presiding judge adequately in advance of any proceeding that the equipment sought to be utilized meets the sound and light criteria enunciated herein. A failure to obtain advance judicial approval for equipment shall preclude its use in any proceeding.

3. Location of equipment personnel.

(a) Television camera equipment shall be positioned in such location in the court facility as shall be designated by the chief judge of the judicial circuit or district in which such facility is situated. The area designated shall provide reasonable access to coverage. If and when areas remote from the court facility which permit reasonable access to coverage are provided all television camera and audio equipment shall be positioned only in such area. Video tape recording equipment which is not a component part of a television camera shall be located in an area remote from the court facility.

(b) A still camera photographer shall position himself or herself in such location in the court facility as shall be designated by the chief judge of the judicial circuit or district in which such facility is situated. The area designated shall provide reasonable access to coverage. Still camera photographers shall assume a fixed position within the designated area and, once a photographer has established himself or herself in a shooting position, he or she shall act so as not to call attention to himself or herself through further movement. Still camera photographers shall not be permitted to move about in order to obtain photographs of court proceedings.

(c) Broadcast media representatives shall not move about the court facility while proceedings are in session, and microphones or taping equipment once positioned as required by 1.(c) above shall not be moved during the pendency of the proceeding.

4. Movement during proceedings.

News media photographic or audio equipment shall not be placed in or removed from the court facility except prior to commencement or after adjournment of proceedings each day, or during a recess. Neither television film magazines nor still camera film or lenses shall be changed within a court facility except during a recess in the proceeding.

5. Courtroom light sources.

With the concurrence of the chief judge of a judicial circuit or district in which a court facility is situated, modifications and additions may be made in light sources existing in the facility, provided such modifications or additions are installed and maintained without public expense

6. *Conferences of counsel.*

To protect the attorney-client privilege and the effective right to counsel, there ***794** shall be no audio pickup or broadcast of conferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, or between counsel and the presiding judge held at the bench.

7. Impermissible use of media material.

None of the film, video tape, still photographs or audio reproductions developed during or by virtue of coverage of a judicial proceeding shall be admissible as evidence in the proceeding out of which it arose, any proceeding subsequent or collateral thereto, or upon any retrial or appeal of such proceedings.

8. *Appellate review.*

Review of an order excluding the electronic media from access to any proceeding, excluding coverage of a particular participant or upon any other matters arising under these standards shall be pursuant to Florida Rule of Appellate Procedure 9.100(d).

SCHEDULE A

FILM CAMERAS-	16mm Sound on Film (self blimped)	
1. CINEMA PRODUCTS	CP-16A-R	Sound Camera
2. ARRIFLEX	16mm-16BL Model	Sound Camera

3. FREZZOLINI	16mm (LW16)	Sound on Film Camera
4. AURICON	"Cini-Voice"	Sound Camera
5. AURICON	"Pro-600"	Sound Camera
6. GENERAL CAMERA	SS III	Sound Camera
7. ECLAIR	Model ACL	Sound Camera
8. GENERAL CAMERA	DGX	Sound Camera
9. WILCAM REFLEX	16mm	Sound Camera

VIDEO TAPE ELECTRONIC CAMERAS

1. Ikegami	HL-77	HL-33	HL-35	HL-34	HL-51
2. RCA	TK 76				
3. Sony	DXC-1600 Trinicon				
3a. ASACA	ACC-2006				
4. Hitachi	SK 80	SK90			
5. Hitachi	FP-3030				
6. Philips	LDK-25				
7. Sony BVP-200	ENG Camera				
8. Fernseh	Video Camera				
9. JVC-8800u	ENG Camera				
10. AKAI	CVC-150	VTS-150			
11. Panasonic	WV-3085	NV-3085			
12. JVC	GC-4800u				

VIDEO TAPE RECORDERS/used with video cameras

1. Ikegami	3800
2. Sony	3800
3. Sony	BVU-100
4. Ampex	Video Recorder
5. Panasonic	1 inch Video Recorder
6. JVC	4400
7. Sony	3800H

Fla., 1979.
Petition of Post-Newsweek Stations, Florida, Inc.
370 So.2d 764, 14 A.L.R.4th 82, 5 Media L. Rep. 1039

END OF DOCUMENT

Chavez v. State
Fla.,2002.

Supreme Court of Florida.
Juan Carlos CHAVEZ, Appellant,
v.
STATE of Florida, Appellee.
No. SC94586.

Nov. 21, 2002.

Defendant was convicted in a jury trial in the Circuit Court, Dade County, Marc Schumacher, J., of first-degree murder, kidnapping, and sexual battery of nine-year-old victim, and was sentenced to death. Defendant appealed. The Supreme Court held that: (1) police had probable cause to arrest; (2) confession was voluntary despite 54 hours of police custody; (3) lack of prompt first appearance and probable cause determination did not require suppression of confession; (4) allowing photography of jurors in courtroom did not violate right to a fair trial; (5) State submitted sufficient proof of corpus delicti of sexual battery charge; (6) evidence supported finding of death penalty aggravators; and (7) death penalty was appropriate and proportional.

Affirmed.

Anstead, C.J., concurred in result only as to conviction, and concurred as to sentence.

Shaw and Pariente, JJ., concurred in result only.

West Headnotes

[1] **Arrest 35 ⚿63.4(16)**

35 Arrest
35II On Criminal Charges
35k63 Officers and Assistants, Arrest Without Warrant
35k63.4 Probable or Reasonable Cause
35k63.4(16) k. Possession, Disposal, or Concealment of Article; Flight or Hiding. Most Cited Cases

Arrest 35 ⚿63.4(17)

35 Arrest
35II On Criminal Charges
35k63 Officers and Assistants, Arrest Without Warrant
35k63.4 Probable or Reasonable Cause
35k63.4(17) k. Arrested Person's Presence or Association. Most Cited Cases
Police had probable cause to arrest defendant in connection with disappearance of nine-year-old victim who was last seen months earlier at bus stop after school, where defendant's employer and owner of property on which defendant lived tipped police as to discovery of book bag with victim's name on it, along with a handgun stolen from employer, in defendant's trailer, employer's property was in general vicinity from which victim disappeared, and neighborhood had been saturated with flyers depicting victim, and asking for help. U.S.C.A. Const.Amend. 4.

[2] **Arrest 35 ⚿63.4(1)**

35 Arrest
35II On Criminal Charges
35k63 Officers and Assistants, Arrest Without Warrant
35k63.4 Probable or Reasonable Cause
35k63.4(1) k. Grounds for Warrantless Arrest in General. Most Cited Cases
Fact that police maintained that defendant submitted to them voluntarily, or that State also argued that there was probable cause to arrest defendant for stealing property of his employer, who tipped police as to discovery of missing child victim's book bag in defendant's trailer on employer's premises, did not invalidate defendant's arrest based upon probable cause in connection with victim's kidnapping. U.S.C.A. Const.Amend. 4.

[3] **Arrest 35 ⚿63.4(5)**

35 Arrest
35II On Criminal Charges
35k63 Officers and Assistants, Arrest Without

Warrant
35k63.4 Probable or Reasonable Cause
35k63.4(5) k. Nature of Offense; Felony or Misdemeanor. Most Cited Cases
Probable cause for arrest exists where an officer has reasonable grounds to believe that the suspect has committed a felony. U.S.C.A. Const.Amend. 4.

[4] Arrest 35 ⚿63.4(2)

35 Arrest
35II On Criminal Charges
35k63 Officers and Assistants, Arrest Without Warrant
35k63.4 Probable or Reasonable Cause
35k63.4(2) k. What Constitutes Such Cause in General. Most Cited Cases
Standard of conclusiveness and probability for probable cause to arrest is less than that required to support a conviction. U.S.C.A. Const.Amend. 4.

[5] Arrest 35 ⚿63.4(1)

35 Arrest
35II On Criminal Charges
35k63 Officers and Assistants, Arrest Without Warrant
35k63.4 Probable or Reasonable Cause
35k63.4(1) k. Grounds for Warrantless Arrest in General. Most Cited Cases
Question of probable cause to arrest is viewed from the perspective of a police officer with specialized training and takes into account the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. U.S.C.A. Const.Amend. 4.

[6] Criminal Law 110 ⚿1144.12

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.12 k. Reception of Evidence. Most Cited Cases

Criminal Law 110 ⚿1158.12

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.8 Evidence
110k1158.12 k. Evidence Wrongfully Obtained. Most Cited Cases
(Formerly 110k1158(4))
Trial court's denial of defendant's motion to suppress is presumed to be correct and must be upheld where decision is supported by the record.

[7] Criminal Law 110 ⚿519(3)

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k519 Voluntary Character in General
110k519(3) k. Confessions While in Custody in General. Most Cited Cases
Police interrogation was not so coercive as to render defendant's confession involuntary, even though defendant was subject to police custody for more than 54 hours, where defendant was provided with food, drink, and cigarettes, as requested, at appropriate times, and permitted to have frequent breaks, interrogation was interspersed with time away from police facilities for visits to various properties, defendant had a six-hour rest period during which he was offered a blanket and a pillow, and times when he was left alone for quiet reflection, and defendant was repeatedly given *Miranda* warnings, in Spanish, and indicated each time that he fully understood them.

[8] Criminal Law 110 ⚿412.1(4)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.1 Voluntary Character of Statement
110k412.1(4) k. Interrogation and Investigatory Questioning. Most Cited Cases
Length of interrogation was a significant factor to consider in determining whether defendant's statements to police were coerced.

[9] Criminal Law 110 ⚿1139

110 Criminal Law

110XXIV Review
110XXIV(L) Scope of Review in General
110k1139 k. Additional Proofs and Trial De Novo. Most Cited Cases

Criminal Law 110 ⚿1158.12

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.8 Evidence
110k1158.12 k. Evidence Wrongfully Obtained. Most Cited Cases
(Formerly 110k1158(4))
In reviewing the denial of defendant's motion to suppress, Supreme Court defers to trial court on questions of historical fact, but conducts a de novo review of the constitutional issue.

[10] Criminal Law 110 ⚿412.1(1)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.1 Voluntary Character of Statement
110k412.1(1) k. In General. Most Cited Cases
To establish that a statement is involuntary, there must be a finding of coercive police conduct.

[11] Criminal Law 110 ⚿519(9)

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k519 Voluntary Character in General
110k519(9) k. Questioning and Soliciting in General. Most Cited Cases
Officers' questionable requests for information from defendant, in form of suggestions that child victim's remains needed to be discovered for a decent burial, did not coerce defendant's confession or render it involuntary, even though one such event prompted an emotional response from defendant in which he said that victim no longer existed, where that response occurred only after defendant already admitted to having disposed of victim's body, and neither of the occasions precipitated a truthful account of where body was located.

[12] Criminal Law 110 ⚿412.2(3)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.2 Right to Counsel; Caution
110k412.2(3) k. Informing Accused as to His Rights. Most Cited Cases
Defendant was sufficiently informed of his Miranda rights before questioning, where defendant, who indicated that he had a 12th-grade education, read a previously upheld Miranda form in Spanish, and initialed it.

[13] Criminal Law 110 ⚿519(1)

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k519 Voluntary Character in General
110k519(1) k. What Confessions Are Voluntary. Most Cited Cases
Defendant's expression of desire to remain silent if not promised the death penalty did not render confession involuntary, where, when defendant indicated that he would disclose the location of victim's body only if he were assured a death sentence, he was told unequivocally that he could not be guaranteed that the death penalty would be imposed, and despite having been so advised, defendant, after a period of silent reflection, elected to confess. U.S.C.A. Const.Amend. 5.

[14] Criminal Law 110 ⚿519(1)

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k519 Voluntary Character in General
110k519(1) k. What Confessions Are Voluntary. Most Cited Cases

Criminal Law 110 ⚿519(9)

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions

110k519 Voluntary Character in General
110k519(9) k. Questioning and Soliciting in General. Most Cited Cases
Defendant's intelligence, education, and alienage did not adversely affect his understanding of his rights during police interrogation, and thus, defendant's confession was voluntary, where questions were translated to Spanish from the beginning for defendant until detective who was bilingual assumed questioning in Spanish, defendant's lengthy handwritten statement in Spanish was grammatically correct, reflecting a literate person, and even contained caveat that dates included in statement were not exact, defendant was careful to correct both spelling and grammatical errors when his formal statement was transcribed, and defendant was repeatedly advised in Spanish of his *Miranda* rights, and stated that he knew his polygraph test result was not admissible evidence.

[15] Criminal Law 110 ⚿519(8)

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k519 Voluntary Character in General
110k519(8) k. Confessions While in Custody Illegally or Under Invalid Process. Most Cited Cases
Failure to provide defendant with a first appearance within 24 hours after his arrest did not require suppression of his final confession, where defendant was repeatedly advised of his *Miranda* rights, and knowingly, intelligently, and voluntarily waived them prior to confessing. West's F.S.A. RCrP Rule 3.130.

[16] Criminal Law 110 ⚿519(8)

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k519 Voluntary Character in General
110k519(8) k. Confessions While in Custody Illegally or Under Invalid Process. Most Cited Cases
Assuming a Fourth Amendment violation occurred due to failure to provide defendant with a probable cause determination within 48 hours of his arrest, that violation did not require suppression of defendant's final confession, where there was probable cause to arrest defendant in connection with disappearance of child victim at time defendant was detained, defendant, who was given his *Miranda* rights four times prior to confessing, also signed an affidavit waiving his first appearance within 48 hours of apprehension, and defendant willingly cooperated with police officers in their investigation of victim's disappearance. U.S.C.A. Const.Amend. 4; West's F.S.A. RCrP Rule 3.133.

[17] Criminal Law 110 ⚿1169.12

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.12 k. Acts, Admissions, Declarations, and Confessions of Accused. Most Cited Cases
Any error in admitting defendant's final confession which was allegedly obtained in violation of his Fourth Amendment right to probable cause determination within 48 hours of arrest was harmless, given overwhelming evidence of guilt. U.S.C.A. Const.Amend. 4; West's F.S.A. RCrP Rule 3.133.

[18] Criminal Law 110 ⚿519(8)

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k519 Voluntary Character in General
110k519(8) k. Confessions While in Custody Illegally or Under Invalid Process. Most Cited Cases
Assuming a Fourth Amendment violation occurred due to failure to provide defendant with a probable cause determination within 48 hours of arrest, defendant's final confession was sufficiently an act of free will to purge the primary taint of the unlawful invasion, where defendant was repeatedly given *Miranda* warnings, defendant gave several incriminating statements during the 48-hour period, with only the very last version of his confession being given after 48 hours elapsed, defendant had numerous breaks, outings, refreshments, and quiet reflection during period, there was probable cause to arrest defendant at time he was first detained, and continued detention focused on locating his child victim, rather than on gathering additional evidence to justify the arrest. U.S.C.A. Const.Amend. 4; West's F.S.A. RCrP Rule 3.133.

[19] Criminal Law 110 ⚿228

110 Criminal Law
110XII Pretrial Proceedings
110k222 Necessity and Requisites of Preliminary Examination
110k228 k. Time for Examination. Most Cited Cases
Defendant had a Fourth Amendment right to have a judicial determination that probable cause existed for his continued detention within the first 48 hours after his arrest, and the delay in obtaining that determination was presumptively unreasonable. U.S.C.A. Const.Amend. 4; West's F.S.A. RCrP Rule 3.133.

[20] Arrest 35 ⚿70(2)

35 Arrest
35II On Criminal Charges
35k70 Custody and Disposition of Prisoner
35k70(2) k. Presentation to Magistrate, Etc.; Arraignment. Most Cited Cases
While the probable cause hearing following arrest may be combined with the first appearance, the purpose of a first appearance is different; it serves as a venue for informing defendant of certain rights, and provides for a determination of conditions for defendant's release. West's F.S.A. RCrP Rules 3.130, 3.133.

[21] Criminal Law 110 ⚿519(8)

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k519 Voluntary Character in General
110k519(8) k. Confessions While in Custody Illegally or Under Invalid Process. Most Cited Cases
Where a defendant has been sufficiently advised of his rights, a confession that would otherwise be admissible is not subject to suppression merely because defendant was deprived of a prompt first appearance, unless delay induced confession. West's F.S.A. RCrP Rule 3.130.

[22] Criminal Law 110 ⚿228

110 Criminal Law
110XII Pretrial Proceedings
110k222 Necessity and Requisites of Preliminary Examination
110k228 k. Time for Examination. Most Cited Cases
Lack of probable cause determination within 48 hours of defendant having been taken into police custody shifted burden to State to show that the existence of a bona fide emergency or other extraordinary circumstance justified delay; otherwise, a violation of defendant's Fourth Amendment right to probable cause determination within 48 hours of arrest occurred. U.S.C.A. Const.Amend. 4; West's F.S.A. RCrP Rule 3.133.

[23] Criminal Law 110 ⚿228

110 Criminal Law
110XII Pretrial Proceedings
110k222 Necessity and Requisites of Preliminary Examination
110k228 k. Time for Examination. Most Cited Cases
So long as police do not detain a suspect for purpose of gathering probable cause to justify arrest after the fact, questioning an arrestee about the crime for which he or she has been arrested does not constitute an unreasonable delay which would support a finding of violation of Fourth Amendment right to probable cause determination within 48 hours of arrest. U.S.C.A. Const.Amend. 4; West's F.S.A. RCrP Rule 3.133.

[24] Criminal Law 110 ⚿519(8)

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k519 Voluntary Character in General
110k519(8) k. Confessions While in Custody Illegally or Under Invalid Process. Most Cited Cases
Factors for analyzing whether evidence obtained following an illegal detention must be suppressed include whether *Miranda* warnings were given, the temporal proximity of the arrest and confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of officer misconduct. U.S.C.A. Const.Amend. 4.

[25] Criminal Law 110 412.1(3)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.1 Voluntary Character of Statement
110k412.1(3) k. Illegality of Detention. Most Cited Cases

Criminal Law 110 414

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k414 k. Proof and Effect. Most Cited Cases
The voluntariness of a defendant's statement which was obtained following an illegal detention is a threshold requirement for admitting statement, and burden of showing admissibility is on state. U.S.C.A. Const.Amend. 4.

[26] Arrest 35 70(2)

35 Arrest
35II On Criminal Charges
35k70 Custody and Disposition of Prisoner
35k70(2) k. Presentation to Magistrate, Etc.; Arraignment. Most Cited Cases
Delay in providing defendant a first appearance within 24 hours of arrest did not interfere with defendant's state constitutional right to counsel, where defendant was properly, timely, and repeatedly informed of his right to counsel, defendant knowingly and voluntarily waived that right, and record did not support a conclusion that the delay in his first appearance induced that waiver. West's F.S.A. Const. Art. 1, § 16; West's F.S.A. RCrP Rule 3.130.

[27] Criminal Law 110 412.2(4)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.2 Right to Counsel; Caution
110k412.2(4) k. Absence or Denial of Counsel. Most Cited Cases
Exclusion of assistant public defender who had not yet been appointed as defendant's counsel from participation in process of interrogating defendant did not violate defendant's state constitutional right to counsel. West's F.S.A. Const. Art. 1, § 16.

[28] Criminal Law 110 1719

110 Criminal Law
110XXXI Counsel
110XXXI(B) Right of Defendant to Counsel
110XXXI(B)2 Stage of Proceedings as Affecting Right
110k1719 k. Adversary or Judicial Proceedings. Most Cited Cases
(Formerly 110k641.3(4))
State constitutional right to counsel attaches at the earliest of the following points: when defendant is formally charged with a crime via the filing of an indictment or information, or as soon as feasible after custodial restraint, or at first appearance. West's F.S.A. Const. Art. 1, § 16.

[29] Criminal Law 110 633.16

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))
Trial court did not deprive defendant of right to fair trial when, upon change of venue from first county to second county, court reversed its earlier ruling prohibiting photography of jurors in courtroom, where court advised prospective jurors that cameras would be allowed in proceedings, and asked jurors, as a group, whether any of them had concerns about that, two prospective jurors who expressed reservations regarding media coverage were removed for cause, court advised defense counsel that it was well aware of his position with respect to photographing jurors, and said that court would readdress issue if it was warranted in future, and court assigned jurors identification numbers to be used instead of their names, and required still photographer to remain seated in one seat while jurors were in courtroom. U.S.C.A. Const.Amend. 6;

West's F.S.A. R.Jud.Admin.Rule 2.170.

[30] Criminal Law 110 ⚿635

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k635 k. Publicity of Proceedings. Most Cited Cases
When determining whether media access will be restricted in courtroom, the court must provide notice and opportunity for media to be heard. West's F.S.A. R.Jud.Admin.Rule 2.170.

[31] Criminal Law 110 ⚿633.16

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))
Presiding judge may exclude electronic media coverage of a particular trial participant only upon a finding that such coverage will have a substantial effect upon particular individual which would be qualitatively different from effect on members of public in general and such effect will be qualitatively different from coverage by other types of media. West's F.S.A. R.Jud.Admin.Rule 2.170.

[32] Criminal Law 110 ⚿1166.6

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1166.5 Conduct of Trial in General
110k1166.6 k. In General. Most Cited Cases
Per se reversible error does not occur in a trial court allowing jurors' faces to be photographed in a controversial criminal trial; it is ultimately the fairness of proceedings which determines appropriateness of limitations on media access. West's F.S.A. R.Jud.Admin.Rule 2.170.

[33] Criminal Law 110 ⚿404.36

110 Criminal Law
110XVII Evidence
110XVII(K) Demonstrative Evidence
110k404.35 Particular Objects
110k404.36 k. In General. Most Cited Cases
Prejudicial impact of evidence of blood-stained mattress found in defendant's trailer in which victim was apparently killed did not outweigh its probative value of disproving defendant's contention that officers who interrogated defendant suggested all elements of defendant's detailed confession, even though blood belonged to neither defendant nor victim and thus arguably raised spectre that defendant murdered an additional person other than victim; blood on mattress was apparent, and, although it had not been forensically checked while defendant was being questioned, had officers been prompting defendant, as he claimed, it would have been logical to have asked about mattress, and there was no suggestion in record that defendant killed anyone other than victim. West's F.S.A. § 90.403.

[34] Criminal Law 110 ⚿1169.1(10)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.1 In General
110k1169.1(10) k. Documentary and Demonstrative Evidence. Most Cited Cases
Any error in admitting allegedly prejudicial evidence of mattress that was found in defendant's trailer and that was stained with blood from person other than defendant or victim, thus arguably raising spectre that defendant murdered an additional person other than victim, was harmless error, given the overwhelming evidence of defendant's guilt. West's F.S.A. § 90.403.

[35] Criminal Law 110 ⚿1162

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1162 k. Prejudice to Rights of Party as Ground of Review. Most Cited Cases
Chapman harmless error analysis requires appellate courts to first consider the nature of the error complained of and then the effect this error had on the triers of fact.

[36] **Criminal Law 110 ⚿338(7)**

110 Criminal Law
110XVII Evidence
110XVII(D) Facts in Issue and Relevance
110k338 Relevancy in General
110k338(7) k. Evidence Calculated to Create Prejudice Against or Sympathy for Accused. Most Cited Cases

Relevant evidence is inadmissible if its probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or potential to mislead jury; these competing values must be weighed in determining admissibility. West's F.S.A. § 90.403.

[37] **Criminal Law 110 ⚿409(7)**

110 Criminal Law
110XVII Evidence
110XVII(L) Admissions
110k405 Admissions by Accused
110k409 Proof and Effect
110k409(6) Corroboration
110k409(7) k. Corpus Delicti. Most Cited Cases

State submitted sufficient proof of corpus delicti of sexual battery charge to admit evidence of defendant's admissions that he sexually assaulted victim; victim, who was a little boy, disappeared months before his body was found, at a time when he was expected to return home directly from school, property on which defendant lived was in general vicinity from which victim disappeared, property owner found handgun which was stolen from her in defendant's trailer at same time that she discovered victim's book bag there, both gun and book bag had defendant's prints on them, gun was positively identified as murder weapon, victim's pants were unzipped and he was partially unclothed, and a tube of lubricant matching description defendant gave in his confession was recovered from trailer.

[38] **Criminal Law 110 ⚿26**

110 Criminal Law
110I Nature and Elements of Crime
110k26 k. Criminal Act or Omission. Most Cited Cases

Phrase "corpus delicti" refers to proof independent of a confession that the crime was in fact committed.

[39] **Criminal Law 110 ⚿680(2)**

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k680 Order of Proof in General
110k680(2) k. Proof of Corpus Delicti. Most Cited Cases

Although the general order of proof is to show that a crime has been committed and then that the defendant committed it, in many cases the two elements are so intimately connected that the proof of corpus delicti and the guilty agency are shown at same time; thus, evidence which tends to prove one may also tend to prove the other, so that existence of the crime and the guilt of defendant may stand together and inseparable on one foundation of circumstantial evidence.

[40] **Criminal Law 110 ⚿409(7)**

110 Criminal Law
110XVII Evidence
110XVII(L) Admissions
110k405 Admissions by Accused
110k409 Proof and Effect
110k409(6) Corroboration
110k409(7) k. Corpus Delicti. Most Cited Cases

Criminal Law 110 ⚿535(2)

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k533 Corroboration
110k535 Corpus Delicti
110k535(2) k. Sufficiency of Proof Of. Most Cited Cases

Defendant's confession or statement may be considered in connection with other evidence, but the corpus delicti cannot rest upon the confession or admission alone.

[41] **Criminal Law 110 ⚿412(6)**

110 Criminal Law
110XVII Evidence

110XVII(M) Declarations
110k411 Declarations by Accused
110k412 In General
110k412(6) k. Proof of Corpus Delicti; Corroboration. Most Cited Cases

Criminal Law 110 ⚿517.3(2)

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k517.3 Proof of Corpus Delicti; Corroboration in General
110k517.3(2) k. Necessity of Proof. Most Cited Cases
Before a confession or statement may be admitted, there must be prima facie proof tending to show the crime was committed.

[42] Criminal Law 110 ⚿563

110 Criminal Law
110XVII Evidence
110XVII(V) Weight and Sufficiency
110k563 k. Corpus Delicti. Most Cited Cases
By the end of trial, the corpus delicti must be proved beyond a reasonable doubt.

[43] Criminal Law 110 ⚿438(8)

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publications
110k438 Photographs and Other Pictures
110k438(8) k. Special Types of Photographs; Enlargements, Motion and Sound Pictures, X-Rays. Most Cited Cases
Gruesome photographs depicting victim's remains were relevant to show injuries to the organs, and specifically to the heart.

[44] Criminal Law 110 ⚿675

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k675 k. Cumulative Evidence in General. Most Cited Cases
Gruesome photographs depicting victim's remains, which photographs were relevant to show injuries to the organs, were not cumulative, where medical examiner testified that photographs were not duplicative, and explained the differences between them.

[45] Sentencing and Punishment 350H ⚿1681

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1681 k. Killing While Committing Other Offense or in Course of Criminal Conduct. Most Cited Cases
Evidence supported finding of death penalty aggravator of murder in the course of a kidnapping; child victim was taken from an area near school bus stop by an adult stranger at gunpoint to a remote trailer where his blood stains were later found, and that conduct was obviously intended to facilitate subsequent sexual battery, which could not have been so easily effected where victim was abducted. West's F.S.A. § 787.01(1)(a) 2, 3, (1)(b).

[46] Sentencing and Punishment 350H ⚿1682

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1682 k. Escape or Other Obstruction of Justice. Most Cited Cases
Evidence supported finding of death penalty aggravator of murder committed for the purpose of avoiding lawful arrest; child victim, who was taken by an adult stranger at gunpoint to a trailer in a remote location, bled on threshold of trailer, suggesting that the murderer stopped victim as he tried to escape, and defendant stated that it was the only way that defendant had to prevent victim from going out of trailer.

[47] Sentencing and Punishment 350H ⚿1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, Heinousness, or Atrocity. Most Cited Cases

Evidence supported finding of death penalty aggravator of murder which was heinous, atrocious, or cruel; defendant abducted nine-year-old victim from an area near school bus stop and took victim to a remote trailer in which defendant sexually battered victim, defendant then drove victim to other locations before finally returning victim to trailer, victim asked at least twice if he was going to be killed, defendant played "mind games" with victim by asking victim what victim thought defendant could do to him, victim constantly sobbed throughout ordeal, and defendant held victim captive for over three and one-half hours before shooting victim when victim tried to escape from trailer at the sound of helicopter overhead.

[48] Sentencing and Punishment 350H ⚿1780(2)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(2) k. Arguments and Conduct of Counsel. Most Cited Cases

Sentencing and Punishment 350H ⚿1780(3)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(3) k. Instructions. Most Cited Cases
Prosecutor did not improperly diminish jury's role in making a sentencing recommendation during voir dire and penalty phase of capital murder trial, where trial court informed jury that jury's recommendation would be advisory, and given great weight.

[49] Sentencing and Punishment 350H ⚿1661

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1661 k. Determinations Based on Multiple Factors. Most Cited Cases
Death penalty was appropriate and proportional for first-degree murder conviction arising from incident in which defendant abducted nine-year-old victim from an area near school bus stop and took victim to a remote trailer in which defendant sexually battered victim, and then fatally shot victim to end the three and one-half hour ordeal when victim tried to escape.

*736 Robert Augustus Harper,Steven Brian Whittington, and Jason Michael Savitz of Robert Augustus Harper Law Firm, P.A., Tallahassee, FL, for Appellant.
Richard E. Doran, Attorney General, and Scott A. Browne, Assistant Attorney General, Tampa, FL, for Appellee.
PER CURIAM.
The opinion issued in this case on May 30, 2002, is withdrawn, and the following revised opinion is substituted in its place. We have on appeal the judgment and sentence of the trial court imposing the death penalty upon Juan Carlos Chavez. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the reasons stated below, we affirm the judgments and sentences under review.

MATERIAL FACTS

Jimmy Ryce's Disappearance

On the afternoon of September 11, 1995, nine-year-old Samuel James ("Jimmy") Ryce disappeared after having been dropped off from his school bus at approximately 3:07 p.m. at a bus stop near his home in the Redlands, a rural area of south Miami Dade County. An extensive and well-publicized search of the area followed, but failed to locate the child.

At that time, the defendant, Juan Carlos Chavez, was living in a trailer on property owned by Susan Scheinhaus. Chavez worked as a handyman for the Scheinhaus family, and was permitted to use their Ford pickup truck to run errands or do other work for the family. As part of his duties, Chavez frequently cared for horses owned by the Scheinhaus family, but housed on property owned by David Santana, which contained an avocado grove. There was also a trailer on that property, referred to throughout Chavez's trial as the "avocado grove trailer" or the "horse-farm trailer." [FN1]

FN1. The parties did not dispute that Jimmy

Ryce died there, and the State introduced evidence that a spot of the child's blood was found on the floor of the trailer.

*737 In August or September of 1995, Mrs. Scheinhaus reported to the police several times that items (including a handgun and some jewelry) were missing from her residence. Although she suspected Chavez, she lacked evidence of his culpability. She testified at trial that, in November, she had decided to obtain the evidence required to pursue her claim. With the help of a locksmith, on December 5, 1995, while Chavez was away for the day, Mrs. Scheinhaus and her son, Edward Scheinhaus ("Ed"), entered the trailer located on her property which Chavez occupied. She found the handgun-which she later identified in court as a gun she had purchased in April of 1989-in plain view on a counter opposite the trailer door.

As Mrs. Scheinhaus continued to look inside the trailer, she discovered, in the closet area, a book bag which was partially open. Looking inside the bag, she saw papers and books. The work appeared to be in a child's handwriting, and she noticed the name "Jimmy Ryce." She also observed this name on one of the books.[FN2] When Mrs. Scheinhaus asked her son to look at the items, he also recognized the child's name.

FN2. Jimmy Ryce's name appeared on several notebooks and a science book found in the backpack.

As a result of this discovery, Mrs. Scheinhaus notified the FBI. When Chavez returned to the Scheinhaus residence at about 7:15 on the evening of December 6, armed FBI agents quickly surrounded and secured him. After being patted down, he agreed to go with Metro Dade Police officers, who were also present, to the station for questioning.

Chavez's Detention

Chavez was involved in a questioning process that was punctuated by regular refreshment, food, bathroom breaks and a rest period, and interspersed with two outings returning to the Scheinhaus and Santana properties in southern Miami Dade County. Although Chavez was first brought to the police station on the night of December 6, he did not sleep until shortly after midnight on December 7.[FN3] Detective Luis Estopinan, who was bilingual, conducted most of the questioning, although other officers also participated. Various police detectives, an FBI agent, Mrs. Scheinhaus and an independent interpreter all had opportunities to observe Chavez at various times throughout this period. Chavez was consistently described as alert and articulate during this time, and no one observed police detectives mistreating Chavez in any way throughout the period of questioning. He received repeated warnings and instructions in accordance with *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and indicated that he fully understood them on four occasions during the period of interrogation.

FN3. The record reflects that, on the evening of December 7, Chavez commenced making a written statement, which he concluded at about 12:24 a.m. on December 8. He then received a restroom break and was offered a pillow and blanket, which he declined. Chavez returned to the interview room, where, without interruption by any interrogation, he slept or rested with the lights out until about 7:30 a.m. At that time, Chavez was awakened, provided with another restroom break, and fed breakfast before traveling to the horse farm property and the Scheinhaus property in the southern portion of Miami Dade County, accompanied by the police officers, at about 9:25 a.m.

Over the course of the interrogation, and after having been repeatedly advised of his *Miranda* rights and knowingly waiving them, Chavez provided several versions of his involvement in Jimmy's disappearance. As law enforcement officers engaged in a contemporaneous investigation of Chavez's changing narratives, he agreed to accompany*738 officers on two occasions to visit the horse farm property and the Scheinhaus property, where he showed them the location of the events he had recounted had transpired. On those occasions, Chavez was asked to reveal where the boy's remains were located, to permit Jimmy's family to have closure.

After the physical evidence resulting from this contemporaneous investigation totally discredited

each version of events which Chavez had initially proposed, Chavez agreed to tell the truth. However, Chavez explained that, before he would disclose the location of Jimmy's remains, he wanted the officers to guarantee that he would receive the death penalty. Estopinan advised Chavez that he could not guarantee that the death penalty would be imposed. However, Chavez continued to talk, asserting that the events would not have happened had he not been sexually battered by a relative in Cuba. Estopinan told Chavez that he "felt that it was time for him to be truthful and tell us what really happened to Jimmy, and ... went back and began to ask him about Jimmy and where Jimmy was located. We wanted to find Jimmy."

A break followed this inquiry and then Chavez reiterated to Sergeant Jimenez the most recent account which he had given Estopinan. Chavez then went to the restroom for another break and, upon returning to the interview room, informed the officers that they were now going to hear the truth: "[W]hat do you want to know? I'll tell you what happened to Jimmy Ryce."

Chavez proceeded to admit to Estopinan and Jimenez that he had abducted Jimmy at gunpoint, traveled to the horse ranch, and sexually assaulted Jimmy before finally shooting him. Estopinan explained that the officers would need details from Chavez,[FN4] and requested permission to take a sworn statement. Chavez agreed to continue the questioning, and Estopinan and Jimenez "began to get details" about what had happened to Jimmy Ryce. At trial, Estopinan testified regarding the final version of Chavez's statement.

> FN4. Estopinan testified: "During what's called the preinterview such as in this case, what we do is we receive the information from the person we are speaking to and we document the information on to a note pad. Eventually we do our report which is consistent with the notes."

Chavez said that he had observed young children playing in water on his way home from Home Depot at approximately 3 p.m. Some of the boys were wearing just their underwear, and "as he saw the young boys wearing just the[ir] underwear, he took an interest in them." After observing the children, Chavez drove off, but returned a short while later, because he "still had a mental picture of what happened, meaning that he saw the young boys in their underwear by the canal bank, and decided that he wanted to take another look." Estopinan testified:

> And while this is occurring, he was driving on the avenue, he sees a young-he sees a figure of a person, and then he realizes it was a young boy that he saw. At the same time he sees the young boy who later turns out to be Jimmy Ryce, again he's thinking about the young boys who are at the canal bank.
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> ....
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> He said at this point he's feeling something sexual and he wants to-he is-what he's doing, he's doing picture-what he explains to me is that he has a mental picture in his mind of the young boys in the canal with their underwear and he's also picturing Jimmy Ryce the young boy, and what he does as he's driving the pickup truck in the opposite ***739** direction of Jimmy Ryce, he said at the time he had with him the Scheinhaus revolver, the Taurus, .38 caliber. And he said at this time Jimmy is walking on the left side of the road, and what he did is driving on the opposite side, he begins to drive on the opposite side of the traffic and drives and stops right in front of Jimmy Ryce causing him to stop.
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> The minute that Jimmy stops, he stops the truck, he gets out of the truck with the gun in his hand and tells Jimmy at gunpoint, do you want to die. And Jimmy made a comment to him, no. And he told Jimmy in English to get inside the truck. And Jimmy responds by getting into the truck via the driver's side door.
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> Once Jimmy is inside the pickup truck, he tells him to-Jimmy removes his backpack and puts it between his legs and he Chavez gets into the truck with Jimmy, still holding the handgun. It's at that point he takes the revolver and he places it underneath his lap and tells Jimmy to put his head down so Jimmy wouldn't be seen by anyone. And at that point he tells me that he drives back to the horse ranch where the trailer was located.
>
> ....

He told me that Jimmy left his backpack inside the pickup truck. Once they both exit the pickup truck, both him and Jimmy at his direction they go inside the trailer that's located inside the horse ranch. He goes on to explain that once inside the trailer he tells Jimmy to sit down on the bed. Jimmy complies. And that he sits on a black office chair close to Jimmy by the entrance and he begins to talk to Jimmy, he notices that Jimmy is, he's nervous and he's scared and Jimmy begins sobbing. And while this is occurring, Jimmy began to ask him, why did you take me? And Chavez explains to him, what he does, he begins to ask, he wants Jimmy to answer his own questions, well, why do you think I took you, things to that effect. He wants Jimmy to answer his own questions. He goes on to explain that at this point he feels like doing something sexual and that he tells Jimmy to remove his clothing. He said Jimmy complied by removing his shirt, his shorts, his sneakers and he wasn't sure if Jimmy was wearing socks or not. And then Jimmy remains in his underwear only, his white underwear he believes. He goes on to tell me that at this point he gets up and he tells Jimmy to also go ahead and remove his underwear. Jimmy complies and removed his underwear. And then he tells Jimmy to lay on the bed in the trailer and Jimmy complies. Jimmy lays on his stomach on the bed. Chavez tells me that he went into the bathroom area of the trailer looking for something. And I asked him, what are you looking for. He said, I'll explain. And he told me I was looking for something like a lubricant. And then he goes into the bathroom and he finds a see through plastic container, he said, with some blue lettering on it. And then he took a sample of the contents of the container to see if it would burn, and when it didn't, he came back to where Jimmy was and he placed this, the substance or the lubricant on to Jimmy's rectum, he said, and as he was placing the lubricant on Jimmy's rectum, Jimmy is asking what are you doing. And he mentioned to Jimmy that what do you think is going to happen, things to that effect. He unzipped his pants, he exposed his penis and he inserted his penis into Jimmy's rectum.

....

He told me right after he inserted his penis in Jimmy's rectum, he again has a mental picture of the young boys in their underwear which he had seen at the *740 canal and he said that he quickly ejaculated, and once he ejaculated inside Jimmy, he said he removed himself.[FN5]

> FN5. Forensic serologist Theresa Merritt of the Metro Dade Police Department testified that she received some items for examination on December 8, 1995. Merritt tested Jimmy's shorts for the presence of semen. The shorts "had a very bad odor, and they were very obviously biologically contaminated." "When an item is badly decomposed, the test we conduct for the presence of semen-we're looking for what is called an enzyme. This is a protein substance that doesn't last very long. And under circumstances like that, I would not really expect to find it." Merrit found no semen on the decomposed shorts.

Chavez said that he and Jimmy then dressed and left in the truck, indicating that he had intended to leave Jimmy in the area where he had picked him up. However, upon nearing the area where he had abducted Jimmy, Chavez noticed that police cars were present. Believing "that someone had reported Jimmy missing and they were looking for Jimmy," Chavez kept Jimmy's head down in the truck and returned to the horse farm.

Estopinan testified regarding what transpired when Chavez and Jimmy returned to the horse farm:

> He said once inside the trailer, Jimmy is trembling and crying. And Jimmy asked, what's going to happen to me. Are you going to kill me. He noticed that Jimmy was very frightened. And what he does, he begins to speak to Jimmy in order to calm him down.

Chavez told Estopinan that he tried to calm Jimmy down by asking him questions.[FN6] He then explained how he killed Jimmy:

> FN6. The responses which Chavez indicated Jimmy made contained factual information consistent with facts to which Mrs. Ryce testified at trial.

Well, the next thing Chavez mentions happened is he heard a helicopter fly over the horse ranch. It was his opinion he believed the helicopter belonged to the police, that the police were searching for Jimmy. When he heard the helicopter flying over him, he went ahead and held Jimmy close by to him so Jimmy wouldn't go anywhere, and eventually he heard the chopper several times flying over him, and at one point he said he got up and began looking out the window to see if he could see the chopper, the helicopter that is.

And while he was looking for the helicopter, Jimmy is still close to the front entrance of the trailer. He said that Jimmy made a dash for the door, Jimmy ran for the door trying to escape. He said that he tried to reach up to Jimmy, but he got tangled on the floor of the bathroom and at that point he said he took out the revolver belonging to Mrs. Scheinhaus, he pointed the handgun in the direction of Jimmy, fired one time hitting him.[FN7]

> FN7. As Chavez explained [transcribed statement]: "It was the only way that I had in order-I'm sorry. It was the only way that I had in order to avoid-to prevent him from going out." Chavez stated that Jimmy "screamed, apparently-or, well, certainly-because of the impact of the bullet."

He said that Jimmy collapsed right by the door and collapsed to the right by the door inside the trailer. He said after he shot Jimmy, he came up to Jimmy, he turned Jimmy around and held Jimmy in his arms and Jimmy took one last breath, he expressed it, and he said that was the last thing Jimmy did.

Chavez described that, to dispose of Jimmy's body, he found a metal barrel inside the trailer at the horse farm, and placed Jimmy's body inside the barrel. He transported the barrel containing the body from the horse farm to the Scheinhaus*741 residence, where he removed the barrel and placed it in Chavez's disabled van, which was parked in the stable area. Chavez removed Jimmy's book bag from the pickup and carried it with him to his own trailer. That night, Chavez looked at some of the note pads inside Jimmy's book bag. Chavez noticed blood on his own clothing and eventually destroyed the clothes. During the night and into the next morning, "all he could think about was what he was going to do with Jimmy's body."

Two or three days later, Chavez attempted to use a backhoe on the Scheinhaus property to dig a hole in which to bury Jimmy, but the machine did not operate properly. Chavez remained concerned, particularly when he noticed that the lid of the barrel which contained Jimmy's body had come off.

Chavez pulled Jimmy's body from the barrel onto a piece of plywood, and, from there, his remains fell to the ground. "And he said at that point he went ahead and began to dismember Jimmy's body with the use of a tool." Chavez described the tool he used to dismember Jimmy's body, and even drew a picture of the implement. He explained that it took him a while to dismember Jimmy's body, as he was becoming sick and vomiting. "[B]ut then he completes it and he places three of Jimmy's parts [into] these three planters. And once he fills these planters with Jimmy's remains, he goes ahead, goes into the stable area of the stable where the building is located and he locates some cement bags. With those cement bags he seals the tops of the planters with cement." [FN8]

> FN8. Ms. Scheinhaus testified that Chavez had prepared planters with concrete in them that were placed on her property. She assumed that this was done to keep the horses from eating her hedges.

The oral interview concluded at 10:50 p.m. on December 8. While an interpreter and a stenographer were being obtained to record a formal statement, Chavez remained in the interview room, and did not further converse with Estopinan until the interpreter arrived. Then, at 11:45 p.m., Chavez began to provide a formal statement. Estopinan, Sergeant Jimenez, and the court reporter were present as the statement was obtained. After some preliminary questions, Chavez was again advised of his *Miranda* rights. At this time, Chavez confirmed that he had voluntarily agreed to waive his first court appearance and that he had given the officers consent to search his property.[FN9]

> FN9. Chavez later testified at trial that he had read the *Miranda* warnings, but had signed the consent to search without reading it.

When the statement was completed, each page of the statement was reviewed, and Chavez made any corrections he desired. He acknowledged in the statement that he was making the transcribed statement voluntarily; that no one had threatened or coerced him into making the statement; and that he had been treated well. Estopinan testified that, at the time he made his sworn statement, Chavez was "polite, cooperative and he was alert."

Marilu Balbis testified that she was the professional interpreter providing services during Chavez's sworn statement. Ms. Balbis was an independent contractor who had been an interpreter and translator for twelve years. The confession was unusually long, and Ms. Balbis had the opportunity to closely observe Chavez's demeanor.[FN10] *742 Chavez did not appear sleepy, and was alert.[FN11] At no point did the detectives give Chavez any answers.

> FN10. She observed: "He seemed-he seemed fine. He was calm. He spoke very clearly, very-he expressed himself very clearly. He spoke very clearly. He spoke-he actually spoke very well. That's another thing that I always remembered. He expressed himself in very correct Spanish. He was calm. He spoke slowly."
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> FN11. The transcription of Chavez's final confession was completed after he had been with the police officers for a period of about fifty-two hours (including numerous breaks, *Miranda* warnings, at least two trips to the southern part of Miami Dade County where he walked freely around the property investigated, and one period of sleep). Defense counsel objected to the statements based on grounds stated in the pretrial motion to suppress. Chavez also objected to the statements on corpus delicti grounds.

Once the confession was finished, Ms. Balbis read each page, word by word, to Chavez to make sure that it was typed correctly. Chavez approved every page by initialing each page at the bottom. Ms. Balbis indicated that the police officers treated Chavez with courtesy, and that she did not observe them threaten or raise their voices toward Chavez.[FN12]

> FN12. FBI Special Agent Russell testified that he was present when Metro Dade officers questioned Chavez. He stated that he did not observe Chavez mistreated in any way.

Chavez's Trial and Sentencing

Officer Michael Byrd recovered the loaded handgun from Chavez's trailer. Byrd also found a poster in Chavez's trailer bearing the likeness of Jimmy Ryce, which he processed as evidence. A box of bullets containing live ammunition, and one spent shell casing, were also found in the trailer.

Crime scene technician Elvey Melgarejo testified that, on December 8, 1995, he helped search and process a trailer on a horse/avocado farm. He searched the trailer and found "a tube of JR water-based lubricant" on a shelf inside the trailer. Melgarejo collected a sofa cushion and part of the wood floor of the trailer just inside the front door. These items were packaged for transmittal to serology for processing. Melgarejo also traveled to the Scheinhaus property, where he noticed the three concrete-filled planters and became suspicious that they might contain a cadaver.

Fingerprint technician William Miller identified Chavez's fingerprint on the handgun recovered from his trailer. To determine whether fingerprints were present on the handgun, he placed it in a laboratory chamber in which super glue fumes were released, surrounding the handgun and adhering to the residue and oils left by any fingerprints. As a result, a fingerprint matching that of Chavez was found on the firearm. Miller testified that there were "ten points of identification throughout this fingerprint, which is only common to Chavez. It's an absolute and positive identification that his left thumb print made on the weapon."

On December 8, 1995, Miller also examined the books and notebooks found inside the book bag belonging to Jimmy Ryce.[FN13] He found Chavez's fingerprint on the front of one notebook found in the book bag. The fingerprint located on the interior of the notebook cover was found to "have sixteen points of identification, a positive identification, based on the left thumb print of Mr. Juan Carlos Chavez against the print which was developed on the inside

cover." Another print of value was located on the textbook entitled *Journeys in Science*. He found "this particular print of value from this area to be made by the right middle fingerprint of Chavez. I had nine points of identification." When compared to the prints of Mrs. Scheinhaus and Edward Scheinhaus, the prints on the book bag contents did not match.

> FN13. Detective McColman testified that he locked the book bag in Sergeant Smith's desk for approximately two hours. However, the book bag and its contents were never brought into contact with Chavez, or placed in the same room with him.

*743 Forensic serologist Theresa Merritt of the Metro Dade Police Department testified that she received items for examination on December 8, 1995. She was dispatched to the horse farm to assist crime scene personnel in attempting to determine whether blood was present. Merritt tested a twin-size mattress from the trailer, a cushion present on the bench in the trailer and a cut-out portion of the threshold area from the floor of the trailer. A scraping from the floor area produced a positive result for the presence of blood. Another sample, from a cushion in the trailer, yielded blood scrapings. (State's Exhibit 135.)

Anita Mathews, assistant director of the forensic identity testing laboratory for "LabCorp" of North Carolina, testified that she was "responsible for doing interpretation on the results of the testing that the technologists conduct." Mathews testified that they were not able to obtain a sufficient quantity or quality of genetic material from samples collected from the body of Jimmy Ryce for testing. However, DNA from the oral swab samples taken from his parents, Don and Claudine Ryce, was compared to the blood found on the floor of the trailer. This comparison produced the conclusion that the blood on the floor was extremely likely to have come from a child of Don and Claudine Ryce.[FN14] Two other blood samples taken from the floor of the trailer carried the same genetic characteristics. Another blood sample, taken from the cushion found in the trailer, also was consistent with having come from the biological child of the Ryces.[FN15]

> FN14. Mathews testified:
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> In the Caucasian population, the parentage index is 2,350,059,902 to 1. And basically what that number means is that it's just over two billion times more likely that the blood sample on the floor originated from a child of Don and Claudine Ryce than from some random couple in the population, in the Caucasian population.
>
> Expressed another way, the probability of parentage was "99.99 percent."

> FN15. Over defense objection, the State introduced into evidence a bloodstained mattress found in the avocado grove trailer. (State's Exhibit 136.) Testing showed that the blood did not belong to either Jimmy Ryce or Chavez. The judge instructed the jury that the mattress was being admitted "for the limited purpose of showing that the stain on that exhibit is not related to this case, and specifically that the source of that stain is unknown, and that Samuel James Ryce and Chavez have been excluded as the source of that stain."

Dr. Roger Mittleman, Chief Medical Examiner for the Dade Medical Examiner's Department, testified that, on December 9, he conducted an examination of the contents of the three planters.[FN16] The cement in each planter encased the remains of what appeared to be a young boy.[FN17] The remnants of a cement bag were in at least one of the planters.

> FN16. Photographs of the planters and their contents were received into evidence and displayed to the jury. (State's Exhibits 103-107.)

> FN17. The planters were marked "A," "B" and "C." The skull, the remains of the left lower extremity and a left sneaker were found in planter "A." In planter "B," the right lower extremity was found with attached pelvis and clothing. "There was also a portion of vertebral column and also portions of pelvis as detached from the body." In planter "C," they found "the chest with the arms attached and the chest was clad in a T-shirt."

Dr. Mittleman described the clothing found on

Jimmy's body: "It was dressed in this T-shirt and had on jeans and underwear. There was one sneaker on; one sneaker was off. There were socks." The doctor then corrected himself, and stated that only one sock was found on the body.[FN18] The doctor testified that a body expands as it decomposes due to the *744 breakdown of material and biological processes, causing gases to expand. This process could cause a body placed in a barrel to expand to the point that a lid would be forced off or open.

> FN18. In addition to showing that only one shoe was on, and one sock was removed, the photographs revealed that Jimmy's pants were unzipped.

The remains were significantly decomposed.[FN19] Using dental records from Jimmy's family dentist, a forensic dentist testified that the comparison with the jaw and teeth of the body was so strong that the "skeletal remains" were "positively identified as that of Jimmy Ryce."An X-Ray of the body cavity revealed a flattened projectile jacket that lodged in the area of the heart and "great vessels." The bullet entered at the point where the right sixth rib is located, went upward in the body, through the lung and the heart, and exited from the upper left chest. Based upon the trajectory of the bullet, the gun would have been pointing slightly upward and below the individual who was shot. However, there was no evidence on the body which would demonstrate how far away the gun was when it was fired.[FN20]

> FN19. Chavez objected to the gruesome photographs as cumulative and unduly prejudicial. The doctor's photographs showed the heart exposed by the doctor, a metal probe which had been run through the body to demonstrate the actual path of the bullet, and pictures of a bush hook (a heavy chopping instrument, like an axe or machete, with a thicker blade) shown alongside severed body parts. This objection was overruled.

> FN20. Answering a hypothetical question, the medical examiner testified that the gunshot pathway observed on Jimmy's remains was consistent with a child who is fifty-five inches tall having been shot by someone who was falling or who had fallen and was shooting up towards the victim.

On December 20, 1995, Detective McColman had transported a tool known as a "bush hook," which had previously been impounded, to the medical examiner's office. Dr. Mittleman was asked to examine the bush hook to determine if its cutting characteristics were consistent with the injuries inflicted on Jimmy's body. The medical examiner noted that a number of the injuries inflicted on the body during dismemberment were consistent with having been made by the bush hook.[FN21] However, he also testified that it was possible that more than one instrument had been used.

> FN21. Forensic serologist Theresa Merritt of the Metro-Dade Police Department examined the bush hook, but found no evidence of blood or tissue on it.

Firearms examiner Thomas Quirk of the Metro-Dade Police Department Crime Laboratory testified that a .38 caliber Taurus model 85 revolver (State's Exhibit 23) was submitted for his examination after it had been processed by the fingerprint section. He also received one aluminum jacket from a projectile recovered from the body of the victim, and two .38 caliber casings-a projectile identified as having come from a red bullet box (State's Exhibit 36) and a casing that had been fired from a firearm (State's Exhibit 35). The two empty .38 caliber shell casings found in Chavez's trailer were fired from the .38 recovered from Chavez's trailer.

Quirk testified that the manufacture of the barrel and the rifling process provide microscopic differences which are transferred to the bullet during firing and which repeat, similar to a fingerprint. Also, the projectile jacket recovered by the medical examiner and the lead core (the fatal bullet) were positively identified as having been fired by the gun recovered from Chavez's trailer: "My conclusion is that this bullet was fired in this weapon to the exclusion of all other weapons in the world. This is the gun that fired this bullet."

After the State rested, Chavez moved for judgment of acquittal, which was denied. Defense counsel specifically argued *745 the State's failure to establish a corpus delicti for the crime of sexual battery. The defense then began the presentation of

its case. During the examination of Ed Scheinhaus, Ed explained that he had been under house arrest at the time the kidnaping occurred. He worked from 10 p.m. to 6 a.m., and was required to stay at home at all other times, unless he arranged in advance to be away from his house. He had an ankle device, and would be called each day at random times (as controlled by a computer) throughout the period he was confined to his home. When called, he would have to "report in" by placing the ankle bracelet next to a device installed in his home.

Chavez also testified in his own defense, stating that he had belonged to a counter-revolutionary group in Cuba.[FN22] He gave details of his imprisonment (for attempting to escape and for stealing military property) in Cuba, and his eventual escape from the island. According to his trial testimony,[FN23] Chavez encountered Ed Scheinhaus at the horse farm trailer after Jimmy had already been killed, and helped Ed to dispose of the boy's body.[FN24]

FN22. United States Immigration and Naturalization Service documents reflected that Chavez never disclosed his alleged political activities to authorities upon his arrival in the United States. Chavez's childhood friend, Pedro Caballo, also testified (during the penalty phase) that Chavez never talked about politics, complained about the Cuban government, or expressed dissatisfaction with it.

FN23. Chavez testified that there was a key to the horse ranch which hung in the Scheinhauses' kitchen. He stated that, on September 11, 1995, he had come to the horse ranch, and seen Ed Scheinhaus's car parked there. He heard a sound-not like a gun shot, but like a door closing-coming from the trailer. He went in to find the boy's body on the floor and Ed in a panic. Chavez saw that the boy was dead, and wanted Ed to go to the police or the hospital. Ed explained that it was an accident, that the boy had wanted to escape, and that Ed had gotten tangled up in clothes by the bathroom, or had fallen, and had shot the boy to prevent his leaving. Chavez did not know why Ed had the boy. After Ed prevailed upon Chavez to help him put the body into the truck, Ed drove off in the truck. Chavez assumed that he was going to report the matter to the authorities.

Chavez got into Ed's Acura and pushed the seat back to accommodate his height (he is taller than Ed). At that time, he saw the gun under the seat, and handled it. He had used this gun for target practice before, and kept bullets which could be used with the gun in his own trailer. Those .38 bullets had been found during the aftermath of Hurricane Andrew, when various belongings from the home were being salvaged. Although Chavez did not keep the gun, he thought he could use the bullets for some future target practice, when permitted to use the gun.

Chavez drove to the Scheinhaus residence, and was surprised to find Ed. Ed told him that he had to help dispose of the body, or Ed would tell authorities that Chavez had already helped, and he would be deported. They put the body into Chavez's disabled van. A few days later, without explanation, Ed told Chavez that he had taken care of everything. Chavez suspected that Ed had put the body into the planters.

FN24. Chavez's trial testimony was rife with inconsistencies, both with his own prior statements, and with evidence properly admitted at trial. He had earlier told Diaz that he had removed the gun from a kitchen cabinet in Mrs. Scheinhaus's residence, and had it with her permission, because he believed it was his duty to protect the property. At trial, he claimed to have used the gun for target practice while it was in Danny Frometa's possession. Mrs. Scheinhaus testified, however, that the last time she saw her handgun, it was in her underwear drawer.

Further, the medical examiner's testimony reflected that the victim would have died almost instantaneously from the gunshot wound, yet Chavez did not testify that he saw Ed outside the trailer as he drove up

to it, or that Ed had the gun in his hands when Chavez entered the trailer, or at any other time during the period when Chavez was purportedly working with Ed to help dispose of the victim's body. Rather, he testified that Ed was holding rags, which the two of them used to cover the body prior to loading it into the truck; and that, immediately thereafter, Ed sped off in the truck. While Chavez claimed to have found the gun later under the driver's seat of the Acura, there is no accounting for how the gun got from the trailer to the car, nor any opportunity, under Chavez's trial version of the facts, for Ed to have placed it there after Jimmy was instantaneously killed. Lastly, the testimony of both Ed and his parole officer reflected that Ed was under house arrest on the day that Jimmy died, reporting in electronically on a regular basis.

***746** Chavez testified that, after he was brought to police headquarters in connection with Jimmy's disappearance, he was mistreated. He stated that, when he was placed in the police car, he was told, "Don't do anything stupid or we'll shoot you. We're going to kill you." [FN25] He complained that his watch and beeper were taken away from him, and returned only after he gave his final confession.[FN26] Chavez stated that, when they were interrogating him, he did not know what date or time it was.[FN27] He said that he was not permitted to sleep, and no one ever offered him a pillow or a blanket. Chavez also claimed that the officers brought the book bag into the interrogation room, and asked Chavez to handle it and look through its contents, which he did. According to Chavez, the police goaded him into making up lies.[FN28] He stated that the officers suggested details of his confession, and, to avoid deportation, he did whatever they wanted.[FN29]

FN25. Chavez recounted additional instances of mistreatment by the police which allegedly occurred during his questioning. He claimed that an officer slapped him on the back of the head with his fingertips, and ignored him when he said he was tired. At one point, when Chavez was sitting on the floor to stretch his legs, Detective Diaz allegedly came into the room, slammed a brown leather jacket on the table, and told Chavez to "put your ass on that fucking chair." He asserted that the officers told him that they would "get the truth out of me whether it was by pulling my tongue out in pieces or squeezing my nuts, that tougher men than me have gone through that chair, and at the end they were all wound up as shit. He couldn't get anything out of me. He was not about to leave me free on the streets either, that he was going to take the pleasure of sending my ass back to Cuba and that Castro would take care of me. They don't want queers in this country, all those types of things that were going on." Chavez also claimed that he was given a bagel and a cup of coffee on a poster bearing Jimmy's likeness, and asked if he had "any balls for eating while you're looking at his face."

FN26. This assertion is inconsistent with photographs of Chavez taken when he was later showing the police detectives various places on the Scheinhaus property, which photos reflect that Chavez was wearing his watch at that time.

FN27. On cross examination, Chavez was confronted with one of the documents which he had personally signed and dated during questioning.

FN28. He stated that, at first, he told the officers a lie, thinking that, when they discovered it was false, they would know that he knew nothing about the case. Chavez claimed that, when he eventually tried to tell Estopinan about Ed Scheinhaus, Estopinan stormed off, unwilling to listen.

FN29. Chavez denied being a homosexual. He said that he had made up a story about his homosexual lover "Ivan" being involved in Jimmy's disappearance because the police thought that another person must be involved, and had told him, in their experience, there were only three motives for kidnapping and killing a child: accident, ransom, and sexual molestation.

After the defense rested, the State presented rebuttal testimony. The officers refuted that they had ever threatened Chavez, coerced him, or suggested any part of the confession to him; they denied that they had taken Chavez's watch away or that anyone had hit him; and they testified that he had never mentioned Ed as the perpetrator during the questioning process.[FN30] Ed Scheinhaus's parole officer *747 testified that Ed (who is in the pest control business) had his permission to travel to take care of a client on the afternoon on which he had received a speeding ticket, and that Ed had shown the ticket to the parole officer himself, without being asked to do so. He testified that Ed had lost his ankle bracelet once (prior to September 11), and that he had come in that same day to have it replaced with a new one. He said that the file would only reflect times when calls were made to the house and Ed did not respond. He said that he had nothing in the file for the month of September 1995, which indicated that Ed had remained home as required, and that no violations had occurred.

> FN30. Officer Diaz (who had purportedly slammed his brown leather jacket on the table) testified that he did not, at any time, own a brown leather jacket, and had not slammed one on the table during Chavez's questioning.

At the close of rebuttal, Chavez renewed all motions, including the motion to suppress his statements, the motion for judgment of acquittal (particularly reiterating that the State had failed to prove the corpus delicti of the charge of sexual battery), and the motion for mistrial, based upon alleged cumulative errors. These motions were denied. The jury was instructed, and, following deliberation, entered verdicts of "guilty" on all of the counts charged.

Following the penalty phase of the trial, the jury recommended death by a vote of twelve to zero. The trial court followed the jury's recommendation, sentencing Chavez to death for the homicide and to consecutive terms of life imprisonment with three-year mandatory minimum sentences for the convictions of kidnapping and sexual battery.

On November 10, 1998, a hearing was conducted pursuant to *Spencer v. State*, 615 So.2d 688 (Fla.1993). Consistent with Chavez's request, a prepared presentence investigation report was not considered. Sentencing memoranda were filed, and both the State and Chavez relied upon the evidence already presented. A death sentence was imposed on November 23, 1998, and this timely appeal followed.

APPEAL

Chavez raises multiple claims of error on appeal. We address each claim in turn. In so doing, we initially observe that, despite the egregious and inflammatory facts involved in a tragedy such as this case, we must conduct that dispassionate review which our system of law requires to arrive at a just and legally correct result so that there is no miscarriage of justice.

Probable Cause For Chavez's Arrest

[1][2][3][4][5] First, Chavez asserts that the police did not have probable cause to arrest him in connection with Jimmy Ryce's disappearance. On this record, we conclude that such probable cause did exist. As we stated in *Walker v. State*, 707 So.2d 300, 312 (Fla.1997):

> Probable cause for arrest exists where an officer "has reasonable grounds to believe that the suspect has committed a felony. The standard of conclusiveness and probability is less than that required to support a conviction." *Blanco v. State*, 452 So.2d 520, 523 (Fla.1984). The question of probable cause is viewed from the perspective of a police officer with specialized training and takes into account the "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Schmitt v. State*, 563 So.2d 1095, 1098 (Fla. 4th DCA 1990).

See also *McCarter v. State*, 463 So.2d 546, 548-49 (Fla. 5th DCA 1985) ("Probable cause to arrest exists when facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information are sufficient to warrant a person of reasonable caution to believe *748 that an offense has [been] or is being committed.").

Here, the officer's tip came from a reliable, identified citizen informant who was unconnected to the crime which was being investigated. That informant, being

Chavez's employer and the owner of the property where Chavez lived, had reason to know that Chavez was not a friend of the Ryce child. Ed Scheinhaus, the informant's son, who was also present when the book bag was found in Chavez's trailer, had indicated his shock to his mother when he realized that the book bag contained items which belonged to Jimmy Ryce. He knew that Chavez had seen the televised requests for assistance related to Jimmy's disappearance, and had expressed an interest in them.

The little boy had disappeared months earlier, when he had been expected to return home directly from school, suggesting that he was taken by force. A handgun stolen from Mrs. Scheinhaus was found in the trailer by the informant at the same time the book bag was discovered. Further, the Scheinhaus property where Chavez lived was in the same general vicinity from which the little boy had disappeared. That neighborhood had been saturated with flyers depicting Jimmy, and asking for help. Under these circumstances, it is illogical to suggest that a reasonable person (aware of the massive effort to locate Jimmy) who merely happened to find the book bag would take it to his living quarters without ever reporting the matter to authorities.

This cumulative information, known at the time Chavez was apprehended, constituted probable cause to arrest Chavez in connection with the Ryce kidnapping. *Cf. Justus v. State*, 438 So.2d 358, 363 (Fla.1983) (upholding an arrest without a valid warrant based upon "cumulative information" which provided probable cause in a murder/kidnapping case). The fact that the police maintained that Chavez submitted to them voluntarily, or that the State also argued that there was probable cause to arrest Chavez for stealing property of Mrs. Scheinhaus, does not invalidate Chavez's arrest based upon probable cause in connection with Jimmy Ryce's kidnapping. *Cf. State v. Carmody*, 553 So.2d 1366, 1367 (Fla. 5th DCA 1989) (observing that the validity of Carmody's arrest was not affected where, despite two valid reasons providing probable cause for the arrest, he was arrested on an unsupportable one); *McCarter v. State*, 463 So.2d at 549 n. 1 (Fla. 5th DCA 1985) (observing that the "fact that McCarter was arrested for attempted first degree murder rather than attempted kidnapping does not invalidate the search incident to the arrest since the label placed upon an arrest by the arresting officer is not determinative of the question of whether the arrest was legal").

Chavez's Confession

[6] Chavez argues that the trial court erred in denying his motion to suppress the confession, for a variety of reasons. The trial court's denial of Chavez's motion to suppress is presumed to be correct and must be upheld where, as here, that decision is supported by the record. *See Rhodes v. State*, 638 So.2d 920, 925 (Fla.1994); *Owen v. State*, 560 So.2d 207, 211 (Fla.1990).

Length of Interrogation

[7][8][9][10] Chavez claims that his confession must be suppressed as involuntary, because he was subjected to a period of continuous police custody for more than fifty-four hours. The length of interrogation is a significant factor to consider in determining whether Chavez's statements were coerced. In reviewing the denial of his motion to suppress, this Court defers to the trial court on questions of historical fact, but conducts a de novo review of the ***749** constitutional issue. *See Connor v. State*, 803 So.2d 598 (Fla.2001). To establish that a statement is involuntary, there must be a finding of coercive police conduct. *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986) (recognizing that the defendant's own perception of coercion is not the determinative factor).

Under the unique circumstances of this case,[FN31] the police interrogation conducted here was not so coercive as to render Chavez's confession involuntary. His version of the facts regarding the circumstances of his questioning-which was refuted by testimony both from an independent witness (the translator) and from the officers involved-was apparently disbelieved by the trier of fact.

> FN31. Although, upon careful review, we conclude that the length of interrogation here did not coerce Chavez's confession, we nonetheless emphasize the importance of providing detainees in the criminal justice system both a probable cause determination and a first appearance within the time constraints established by rules 3.130 and 3.133 of the Florida Rules of Criminal Procedure.

Although Chavez was questioned over the course of several days, he was provided with food, drink, and cigarettes (as requested) at appropriate times, and permitted to have frequent breaks. His interrogation was also interspersed with time away from the police facilities for visits to various properties, a six-hour rest period (where Chavez was offered a blanket and a pillow), and times when he was left alone for quiet reflection. He was repeatedly given *Miranda* warnings, in Spanish, and indicated each time that he fully understood them. Consequently, the trial court did not err in denying Chavez's motion to suppress on this ground. *Compare* Walker v. State, 707 So.2d 300, 311 (Fla.1997) (upholding voluntariness of confession where the defendant was questioned for six hours during the morning and early part of day, was provided with drinks and allowed to use the bathroom when he wished, and was never threatened with capital punishment, or promised anything other than that the officer would inform the prosecutor that the defendant had cooperated), *with* Brewer v. State, 386 So.2d 232 (Fla.1980) (finding confession to be involuntary where police threatened the defendant with the electric chair, implying that they had power to reduce the charge against him and that his confession would lead to lesser charge), *and* State v. Sawyer, 561 So.2d 278, 290-91 (Fla. 2d DCA 1990) (finding confession to be involuntary where it was the product of enforced sleeplessness resulting from a sixteen-hour serial interrogation during which the defendant was provided with no meaningful breaks and police asked him misleading questions, denied his requests to rest, refused to honor his *Miranda* rights and used the defendant's history of blackouts to undermine his reliance on his own memory).

Subject of Decent Burial

[11] Next, Chavez asserts that his confession should be suppressed as involuntary because, on two occasions, officers suggested that Jimmy's remains needed to be discovered for a decent burial, each of which precipitated incriminating statements. The record reflects that Estopinan did, on two occasions, say to Chavez that Jimmy deserved a decent burial. While one such event prompted an emotional response from Chavez (when he said that Jimmy no longer existed), this occurred only after Chavez had already admitted to having disposed of Jimmy's body. Neither of the occasions precipitated a truthful account of where the body was located. In context, these questionable requests for information did not coerce Chavez's confession, nor did they render it "involuntary."***750***See* Lukehart v. State, 776 So.2d 906 (Fla.2000) (finding no error in failure to suppress statements Lukehart made after use of Christian burial suggestion, where this did not directly result in statements being given).

Sufficiency of *Miranda* Warnings

[12] Chavez also asserts that his confession must be suppressed as involuntary because he was not properly advised of his right to consult with counsel before questioning. *See* Traylor v. State, 596 So.2d 957, 957 n. 13 (Fla.1992) (observing that "the suspect has the right to consult with a lawyer before being interrogated and to have the lawyer present during the interrogation"). Here, Chavez, who indicated that he had a twelfth-grade education, read the Metro Dade *Miranda* form in Spanish, and initialed it. This form has specifically been upheld as sufficient. *See* Cooper v. State, 739 So.2d 82, 84 n. 8 (Fla.1999) (approving this warning on the Metro Dade rights form: "If you want a lawyer to be present during questioning, at this time or any time thereafter, you are entitled to have a lawyer present."). Thus, Chavez's claim that he was insufficiently informed of his *Miranda* rights fails.

Request for Death Penalty

[13] Chavez asserts that his confession must be suppressed as involuntary because he expressed his desire to remain silent if not promised the death penalty. However, the record reflects that when Chavez indicated that he would disclose the location of Jimmy's body only if he were assured a death sentence, he was told unequivocally that he could not be guaranteed that the death penalty would be imposed. Despite having been so advised, Chavez, after a period of silent reflection, elected to confess. As stated in Connecticut v. Barrett, 479 U.S. 523, 529, 107 S.Ct. 828, 93 L.Ed.2d 920 (1987), "*Miranda* gives the defendant a right to choose between speech and silence, and [the defendant] chose to speak." As in Keen v. State, 504 So.2d 396 (Fla.1987), the record here does not support a Fifth Amendment violation. *Cf.* Keen, 504 So.2d at 400 (refusing to suppress a statement where the defendant "never expressed to the detectives a desire to speak with counsel on any

of the four occasions when he was advised of his rights, he initiated conversations with the detectives throughout this entire time, and signed a waiver of rights form") (citing *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *Hoffman v. State*, 474 So.2d 1178 (Fla.1985); and *Cannady v. State*, 427 So.2d 723 (Fla.1983)).

Chavez's Alienage

[14] Chavez next claims that his confession should have been suppressed as involuntary because his alienage, lack of prior experience with the United States criminal justice system, and limited understanding of English produced an involuntary confession. *Cf. United States v. Fung*, 780 F.Supp. 115, 116 (E.D.N.Y.1992) (reflecting that Fung's poor language skills and ignorance of the American legal system were sufficient to show that she lacked understanding of *Miranda* rights even though she read them aloud in her native language). In this case, Chavez began the interview process speaking in English; however, Detective Murias translated all questions into Spanish from the beginning, until Estopinan entirely assumed the questioning which was conducted in Spanish (after administration of polygraph tests). Chavez's lengthy handwritten statement in Spanish (his first version of what happened to Jimmy, in which he recounted having crushed the boy accidentally against the horse farm gate), which is contained in the record, is grammatically correct, reflecting a literate person, and even contains the caveat that ***751** Chavez wished "it to be considered that the dates he has included in the statement are not considered to be exact." In fact, when Chavez's formal statement was transcribed, he was careful to correct both spelling and grammatical errors. He was repeatedly advised in Spanish of his *Miranda* rights, and stated that he knew his polygraph test result was not admissible evidence.

The record clearly reflects that Chavez's intelligence, education, and alienage did not adversely affect his understanding of his rights during the police interrogation progress. Finding no support in the record, the argument that Chavez's background caused him to misapprehend his rights in the American system fails.

Probable Cause/First Appearance

[15][16][17][18][19] Chavez argues that the delay in bringing him before a judicial officer violated Florida Rules of Criminal Procedure 3.130 and 3.133, and therefore required suppression of his confession. A trial court's ruling on a motion to suppress is presumed correct. *See Medina v. State*, 466 So.2d 1046 (Fla.1985). However, under *Gerstein v. Pugh*, 420 U.S. 103, 125, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), and *County of Riverside v. McLaughlin*, 500 U.S. 44, 56, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991), Chavez had a constitutional right to have a judicial determination that probable cause existed for his continued detention within the first forty-eight hours after his arrest, and the delay in obtaining that determination is presumptively unreasonable. *Cf. Powell v. Nevada*, 511 U.S. 79, 83-84, 114 S.Ct. 1280, 128 L.Ed.2d 1 (1994) (observing that, although the four-day delay involved was presumptively unreasonable under *McLaughlin*, it did not "necessarily follow, however, that Powell must 'be set free' ... or gain other relief, for several questions remain open for decision on remand, [including] the appropriate remedy for a delay in determining probable cause (an issue not resolved by *McLaughlin*),... or the district attorney's argument that introduction at trial of what Powell said on November 7, 1989, was harmless in view of a similar, albeit shorter, statement Powell made on November 3, prior to his arrest."). In determining whether the trial court erred in denying Chavez's motion to suppress his confession for this reason, we begin by examining the purpose furthered by the criminal defendant's right to a prompt probable cause determination and first appearance.

The principles underlying the necessity for a probable cause determination can be found in *Gerstein*. There, the Supreme Court observed that the Fourth Amendment required such a determination as a prerequisite to a detainee's further restraint of liberty:

> A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the

> overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication.

McNabb v. United States, 318 U.S. 332, 343, 63 S.Ct. 608, 87 L.Ed. 819 (1943), *quoted in* Gerstein, 420 U.S. at 118, 95 S.Ct. 854. The limited purpose of the ***752** hearing shaped its parameters, as established by the Supreme Court:

> The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing. The standard is the same as that for arrest. That standard-probable cause to believe the suspect has committed a crime-traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof.
>
> ...
>
> The use of an informal procedure is justified not only by the lesser consequences of a probable cause determination but also by the nature of the determination itself. It does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt. See F. Miller, Prosecution: The Decision to Charge a Suspect with a Crime 64-109 (1969). This is not to say that confrontation and cross-examination might not enhance the reliability of probable cause determinations in some cases. In most cases, however, their value would be too slight to justify holding, as a matter of constitutional principle, that these formalities and safeguards designed for trial must also be employed in making the Fourth Amendment determination of probable cause.
>
> Because of its limited function and its nonadversary character, the probable cause determination is not a "critical stage" in the prosecution that would require appointed counsel. The Court has identified as "critical stages" those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel. *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970); *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).

Gerstein, 420 U.S. at 120-22, 95 S.Ct. 854 (footnotes omitted).

[20] While the probable cause hearing may be combined with the first appearance, the purpose of a first appearance is different. It serves as a venue for informing the defendant of certain rights, and provides for a determination of the conditions for the defendant's release. At first appearance, a judicial officer informs the defendant of the charge (providing the defendant with a copy of the complaint), and further informs the defendant that:

> (1) the defendant is not required to say anything, and that anything the defendant says may be used against him or her;
>
> (2) if unrepresented, that the defendant has a right to counsel, and, if financially unable to afford counsel, that counsel will be appointed; and
>
> (3) the defendant has a right to communicate with counsel, family, or friends, and if necessary, will be provided reasonable means to do so.

Fla. R.Crim. P. 3.130; *see generally* 1 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 1.3(k) (2d ed.1992). Thus, the first appearance certainly provides one point at which the right to counsel may become affixed. *See generally* Fla. R.Crim. P. 3.111(a).

[21] Chavez contends that his last confession was improperly coerced through a deprivation of his right to a first court appearance within twenty-four hours of arrest. We have held that coercion of this type, if properly shown, would be a possible ground for suppression of a confession. *See* ***753** *Keen v. State*, 504 So.2d 396, 399-400 (Fla.1987), *disapproved in part on other grounds*, *Owen v. State*, 596 So.2d 985, 990 (Fla.1992). However, where, as here, a defendant has been sufficiently advised of his rights, a confession that would otherwise be admissible is not

subject to suppression merely because the defendant was deprived of a prompt first appearance. "[W]hen a defendant has been advised of his rights and makes an otherwise voluntary statement, the delay in following the strictures of [rule 3.130] must be shown to have induced the confession." *Keen*, 504 So.2d at 400;*see also Johnson v. State*, 660 So.2d 648, 660 (Fla.1995) (observing that a confession may be suppressed where it was coerced through deprivation of a first court appearance within twenty-four hours); *Williams v. State*, 466 So.2d 1246, 1248 (Fla. 1st DCA) (reflecting that no per se rule required suppression of confession-which was suppressed on other grounds-because of delay of first appearance until thirty hours after arrest), *review denied*,475 So.2d 696 (Fla.1985).

On this point, the Court's analysis in *Keen* is particularly instructive:

> Keen urges three reasons why his statement should have been suppressed. First, he claims that pursuant to Rule of Criminal Procedure 3.130, which requires an arrested person to be taken before a judicial officer within twenty-four hours of arrest, any statement made in violation of the rule must be suppressed. Keen points out that the statement at issue here was made more than twenty-four hours after his arrest. While a violation of the rule has been shown, we reject Keen's suggestion that an otherwise voluntary statement given after twenty-four hours is per se inadmissible. We agree with the reasoning expressed by the First District Court of Appeal in *Headrick v. State*, 366 So.2d 1190 (Fla. 1st DCA 1978), that each case must be examined upon its own facts to determine whether a violation of the rule has induced an otherwise voluntary confession. *Id.* at 1191. The court reasoned that when a defendant has been advised of his rights and makes an otherwise voluntary statement, the delay in following the strictures of the rule must be shown to have induced the confession. *Id. See also Williams v. State*, 466 So.2d 1246 (Fla. 1st DCA), *review denied*,475 So.2d 696 (Fla.1985). Sub judice, Keen was advised on his rights to remain silent and his right to counsel on four separate occasions and gave the statement at issue only after voluntarily signing a waiver of rights. Absent a showing that the delay induced this otherwise voluntary statement, we find that the trial court properly denied Keen's motion to suppress.
>
> Keen's suggestion that our decision in *Anderson v. State*, 420 So.2d 574 (Fla.1982), mandates that his statement be suppressed is unpersuasive. *Anderson* is clearly distinguishable as there the evidence presented to this Court showed that Anderson had been indicted prior to being taken into custody by Florida law enforcement officials who drove Anderson by car for four days from Minnesota back to Florida. The deputies were aware that Anderson had no counsel in Minnesota and that he desired appointed counsel once returned to Florida. Holding that Anderson's statement should have been suppressed, we found "significant" the fact that the statement at issue came "far after" Anderson should have been brought before a judicial officer "with the attendant advice of rights and appointment of counsel." *Id.* at 576. We also found that the record failed to show a valid waiver. *Id.* The facts sub judice stand in stark contrast. Keen was not indicted until after the statement was given to the detectives, he was advised on four separate occasions of his right to remain *754 silent and his right to counsel, and he signed a waiver before giving the statement. It unequivocally appears from the record that Keen knowingly, intelligently and voluntarily waived his rights before making the statement.

504 So.2d at 399-400.

Applying the same analysis to this record, we conclude that the failure to provide Chavez with a first appearance within twenty-four hours after his arrest did not compel his confession. Here, as in *Keen*, the record reflects that Chavez was repeatedly advised of his *Miranda* rights, and knowingly, intelligently, and voluntarily waived them prior to confessing. Therefore, the trial court properly denied his motion to suppress on that basis. However, the question of whether suppression of Chavez's last confession is appropriate as a remedy for the failure to provide a prompt probable cause determination remains.

[22] Because Chavez was not afforded a probable cause determination within forty-eight hours of having been taken into police custody, the burden shifts to the State to show that the existence of a bona fide emergency or other extraordinary circumstance

justified the delay; otherwise, a *McLaughlin* violation has occurred. *See* McLaughlin, 500 U.S. at 57, 111 S.Ct. 1661. Here, record testimony suggests that the police perceived that exigent circumstances existed because of their efforts to locate the missing child, who had disappeared under untoward circumstances.[FN32] However, given the amount of time which had transpired between Jimmy's initial disappearance and Chavez's apprehension, those circumstances were not as compelling as they might otherwise have been had the two events occurred more closely in time. It is therefore unclear whether extraordinary circumstances would excuse the officers' failure to obtain a probable cause determination within forty-eight hours of Chavez's arrest.

> FN32. Estopinan testified that, although he suspected that Jimmy Ryce was dead, he was not certain of that fact when questioning Chavez. He testified that, just prior to Chavez's last confession, "I felt that it was time for him to be truthful and tell us what really happened to Jimmy, and I went back and began to ask him about Jimmy and where Jimmy was located. We wanted to find Jimmy." Officer Michael Malott testified that the detectives were concerned that Chavez had provided information regarding Jimmy's death: "[M]y concerns were that he had made admissions to a crime that we had not been able to disprove, and my concerns were we wanted to continue our investigation in hopes of detectives looking for or actually finding Jimmy Ryce and getting truthful information."

Nonetheless, assuming that the failure to bring Chavez before a magistrate to determine probable cause violated the rule articulated in *McLaughlin*, we conclude that suppression of his last confession is not an appropriate remedy for the violation.[FN33] On this record, the unique circumstances leading to Chavez's last confession weigh in favor of admission rather than suppression. Further, even assuming that suppression were appropriate, given the overwhelming evidence of Chavez's guilt, the error in admitting his last confession would be harmless.

> FN33. The Supreme Court has specifically declined to address the issue of whether a confession which is voluntary under the Fifth Amendment must be suppressed where a *McLaughlin* violation has occurred. *See* Powell v. Nevada, 511 U.S. 79, 85, 114 S.Ct. 1280, 128 L.Ed.2d 1 (1994) (declining to address the issue); *but cf. id.* at 89, 114 S.Ct. 1280 (Thomas, J., joined by Rehnquist, C.J., dissenting) (reasoning that the defendant's statement in that case should not be suppressed "because the statement was not a product of the *McLaughlin* violation").

As stated earlier, probable cause to arrest Chavez in connection with the disappearance of Jimmy Ryce existed at the time of his apprehension. Chavez has not ***755** demonstrated that either his arrest on December 6 or his detention during the first forty-eight hours following the arrest was unlawful. During that period of time, Chavez admitted his involvement with Jimmy's disappearance; admitted shooting the boy; admitted disposing of Jimmy's remains; and stated that what he had done would never have happened had he not been sexually battered as a boy in Cuba.

During this time, crime scene investigators also had noticed the cement-filled planters on the Scheinhaus property, and suspected that they might contain a cadaver.[FN34] A "tube of JR water-based lubricant" and a blood-stained part of the wood floor of the horse farm trailer just inside the front door had been collected by crime scene technicians and packaged for transmittal to serology for processing. The murder weapon, containing Chavez's fingerprint, had already been recovered. While the particulars of how and why Jimmy died and what was done to his body afterwards evolved over this period of time, Chavez's involvement as the perpetrator of the crimes, and the motivation he ultimately revealed for committing them, did not change significantly from what investigators came to know during the first forty-eight hours, as compared to what Chavez disclosed in his last confession which occurred very shortly thereafter.

> FN34. On December 7, 1995, at approximately 1 p.m., four K 9 dogs were taken to the Scheinhaus property to search for Jimmy's remains. Two dogs alerted, showing basic interest in the cement planters located near the horse stables. Additionally,

> the medical examiner testified that, when he was on the Scheinhaus property on December 8 at about 12 noon, he thought the concrete-filled planters looked suspicious, expressing his concerns at that time that the planters might contain the remains of a body.

[23] A number of courts which have examined the rationale of *Gerstein* and *McLaughlin* have concluded that the failure to provide a defendant with a timely probable cause determination does not require suppression of evidence obtained during an interrogation if sufficient evidence existed at the time the individual was first taken into police custody to arrest the defendant for the crime with which he or she was subsequently charged. In *United States v. Daniels*, 64 F.3d 311 (7th Cir.1995), *cert. denied*, 516 U.S. 1063, 116 S.Ct. 745, 133 L.Ed.2d 693 (1996), the defendant was arrested for bank robbery, and arraigned within the forty-eight hour time limit of *McLaughlin* (some forty hours after his arrest), but he argued that the police delayed his arraignment so that they could gather more evidence against him-specifically, so they could conduct another lineup while Daniels was still in their custody. The *Daniels* court disagreed, reasoning that *McLaughlin* prohibited delays designed to gather "additional evidence to justify the arrest." It observed that the lineup was conducted to bolster the case against Daniels:

> Daniels' argument seems to interpret [*McLaughlin*] to preclude law enforcement from bolstering its case against a defendant while he awaits his *Gerstein* hearing; that is a ludicrous position. *Gerstein* and its progeny simply prohibit law enforcement from detaining a defendant to gather evidence to justify his arrest, which is a wholly different matter. Probable cause to arrest Daniels already existed and that is what Ewer's affidavit reported.

Id. at 314; *see also Peterson v. State*, 653 N.E.2d 1022, 1025 (Ind.Ct.App.1995) (holding that interrogation of an arrested suspect does not constitute an unreasonable delay where police had probable cause for arrest); *State v. Chapman*, 343 N.C. 495, 471 S.E.2d 354, 356 (1996) (holding that the interrogation of a defendant about crimes for which he has just been arrested is not an "unnecessary delay" for purposes ***756** of a *McLaughlin* analysis). As stated in *Riney v. State*, 935 P.2d 828, 834-35 (Alaska Ct.App.1997):

> If *McLaughlin* were interpreted in the manner Riney suggests [that interrogation of an arrested suspect would constitute an unreasonable delay even where the police already have probable cause for the suspect's arrest], it would lead to an unjustifiable disparity in treatment between persons arrested on warrants and persons arrested without warrants. Under even the most expansive interpretation of *McLaughlin*, persons arrested on warrants can be interrogated following their arrest: no *Gerstein* hearing is required when a person is arrested on a warrant, because the judicial determination of probable cause for the arrest has already been made. *See State v. Vice*, 519 N.W.2d at 566. Thus, under Riney's reading of *McLaughlin*, the existence or non-existence of an arrest warrant would determine whether the police were authorized to question someone they had just taken into custody. Riney suggests no rationale for such a rule, and we perceive no convincing rationale for it either. So long as the police do not detain a suspect for the purpose of gathering probable cause to justify the arrest after the fact, questioning an arrestee about the crime(s) for which he or she has been arrested does not constitute an "unreasonable" delay under *Gerstein* and *McLaughlin*.

Here, there was probable cause to arrest Chavez in connection with Jimmy's disappearance at the time he was detained, and the defendant, who was given his *Miranda* rights four times prior to confessing, also signed an affidavit waiving his first appearance within forty-eight hours of apprehension.[FN35] The record reflects ample evidence of Chavez's informed waiver of his right to counsel, his knowing waiver of the right to first appearance, and his willing cooperation with the police officers in their investigation of Jimmy's disappearance.[FN36]

> FN35. The defense maintained that Chavez was taken into custody at 7:35 p.m. on December 6. Detective Estopinan testified that, although Detective Piderman had interrupted this discussion with Chavez at 4:30 p.m. on December 8 with an affidavit waiving Chavez's first appearance, because Chavez was emotional and talking about having been sexually battered by a relative

in Cuba, Estopinan decided to let Chavez finish talking before they discussed the waiver. This occurred at 6:30 p.m., at which time Estopinan told Chavez of the right to appear before a judge within twenty-four hours; that, during this hearing he would be advised of any charges against him; that he would have a right to meet with his family, friends or others he wished to see; and that he would be entitled to speak with an attorney. Estopinan testified that he asked Chavez if he would be willing to forego the hearing, and Chavez agreed. Chavez then signed the waiver of first appearance form at 6:50 p.m.

FN36. Some courts have applied a "voluntariness" test in determining whether a confession must be suppressed in light of a *McLaughlin* violation. *See United States v. Perez-Bustamante*, 963 F.2d 48, 51-54 (5th Cir.1992); *State v. Tucker*, 137 N.J. 259, 645 A.2d 111, 117-19 (1994).

[24][25] Further, even assuming a Fourth Amendment violation occurred due to the failure to comply with the *McLaughlin* rule, the record here reflects that Chavez's confession "was sufficiently an act of free will to purge the primary taint of the unlawful invasion." *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) [FN37] As we stated (in a ***757** different context) in *Voorhees v. State*, 699 So.2d 602, 611 (Fla.1997):

FN37. Other jurisdictions have rejected the "voluntariness" test, applying a "fruit of the poisonous tree" analysis to determine whether a confession obtained during an illegal detention must be suppressed. *See State v. Huddleston*, 924 S.W.2d 666, 673 (Tenn.1996) (citing *Williams v. State*, 264 Ind. 664, 348 N.E.2d 623, 629 (1976), and *Black v. State*, 871 P.2d 35 (Okla.Crim.App.1994)).

Several years after *Wong Sun [v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)], the Supreme Court clarified the analysis to be undertaken when determining whether evidence obtained following an illegal detention must be suppressed. *See Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). These factors include whether *Miranda* warnings were given, the temporal proximity of the arrest and confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of officer misconduct. *Id.* at 603-04,95 S.Ct. at 2261-62. The voluntariness of the statement is a threshold requirement, and the burden of showing admissibility is on the state. *Id.*; *see also Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); *Sanchez-Velasco v. State*, 570 So.2d 908 (Fla.1990), *cert. denied*,500 U.S. 929, 111 S.Ct. 2045, 114 L.Ed.2d 129 (1991).

Applying the *Brown* factors, we conclude that the trial court did not err in denying suppression of Chavez's confession.

Here, Chavez was given *Miranda* warnings three times during the first forty-eight hours of his detention, and was informed of those rights a fourth time immediately prior to his final confession. Chavez gave several incriminating statements during this time, with only the very last version of his confession being given after forty-eight hours had elapsed. Importantly, during the period that Chavez was in police custody, there were numerous breaks, including two separate outings to properties in the Redlands. Although Chavez was in the company of police officers, the testimony of those who observed Chavez, and the photographs depicting him, reflect that Chavez was not constrained in any way during that time. Only hours before giving his final confession, after a period of reflection, Chavez himself initiated the conversation with Detective Estopinan in which he recounted his sexual abuse in Cuba, stating that, but for those experiences, what he had done here would not have occurred. These numerous periods of rest, outings to the southern part of the county, refreshments, and quiet reflection weigh significantly in our analysis.

Lastly, we consider the purpose and flagrancy of the official misconduct. Here, as indicated earlier, there was probable cause to arrest Chavez at the time he was first detained, and it is clear that Chavez's continued detention was focused on locating his child victim, rather than on "gathering additional evidence to justify the arrest." *McLaughlin*, 500 U.S. at 56, 111 S.Ct. 1661. While we admonish against, and in no way condone, the delay which occurred here in obtaining a prompt and impartial probable cause

determination, the totality of the circumstances reflected in this record does not evidence purposeful misconduct on the part of the officers motivating that delay.

Accordingly, after considering the above factors, we conclude that Chavez's final confession, even if made while Chavez was held in violation of the Fourth Amendment, was not the product of the unlawful detention. *Cf.* *Powell*, 511 U.S. at 89, 114 S.Ct. 1280 (Thomas, J., joined by Rehnquist, C.J., dissenting) (reflecting that, had the issue of the propriety of suppressing the defendant's statement been reached, applying established precedents, the statement should not be suppressed "because the statement was not a product of the *McLaughlin* violation"); *Darks v. State*, 954 P.2d 152 (Okla.Crim.App.1998) (affirming Darks' conviction, even though he was not given a probable cause determination within forty-eight hours, because he was ***758** not "coerced into giving evidence he otherwise would not give," and his "confession was not a product of an illegal detention"). Therefore, under the unique circumstances of this case, the record supports the trial court's denial of Chavez's motion to suppress.

Right to Counsel

[26][27][28] Chavez also argues that the delay in providing him a first appearance within twenty-four hours of arrest interfered with his right to counsel, which would have attached at first appearance, resulting in a deprivation of this right. *Cf.* *Peoples v. State*, 612 So.2d 555, 557 & n. 2 (Fla.1992) (observing that the knowing exploitation of an opportunity to confront the accused without counsel is as much a breach of the obligation "not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity"). Under the Florida Constitution, the right to counsel attaches "at the earliest of the following points: when he or she is formally charged with a crime via the filing of an indictment or information, or as soon as feasible after custodial restraint, or at first appearance." *Traylor v. State*, 596 So.2d 957, 970 (Fla.1992) (footnotes omitted). Chavez also argues that his right to counsel was infringed upon when police investigators wrongfully excluded an Assistant Public Defender who had not yet been appointed as Chavez's counsel from participation in the interrogation process.

As fully discussed before, here, Chavez was properly, timely and repeatedly informed of his right to counsel. He knowingly and voluntarily waived that right, and the record does not support a conclusion that the delay in his first appearance induced that waiver. Further, as this Court has previously held, it was not error for the police to exclude an Assistant Public Defender who had not yet been appointed as Chavez's counsel. *See* *Harvey v. State*, 529 So.2d 1083, 1085 (Fla.1988) (finding no due process violation where the police denied a public defender access to the defendant when the public defender voluntarily went to the jail after hearing about the defendant's arrest to see if the defendant needed a lawyer); *cf. also* *Smith v. State*, 699 So.2d 629 (Fla.1997) (observing, in a case where the defendant tried to suppress his confession obtained after an assistant public defender had volunteered and been appointed to represent the defendant that "[t]he mere appointment of an attorney at the attorney's request is not enough to invoke the right [to counsel]; the accused must invoke the right."). Therefore, the trial court did not err in failing to suppress Chavez's confession based upon a claimed violation of the right to counsel for this reason.

Media Coverage

[29][30] As his next claim, Chavez asserts that the trial court deprived him of the right to a fair trial when, upon change of venue from Dade County to Orange County, it reversed its earlier ruling prohibiting photography of jurors in the courtroom. Florida Rule of Judicial Administration 2.170 (Standards of Conduct and Technology Governing Electronic Media and Still Photography Coverage of Judicial Proceedings) expressly authorizes the use of video and still cameras in the courtroom, and provides, in subdivision (i), that "[r]eview of an order excluding the electronic media from access to any proceeding, excluding coverage of a particular participant, or *upon any other matters arising under these standards* shall be pursuant to Florida Rule of Appellate Procedure 9.100(d)." (Emphasis supplied.) As occurred on two occasions here, when determining whether media access will be restricted, the court must provide notice and an opportunity for the media to be heard. *See* *WFTV, Inc. v. State*, 704 So.2d 188, 190 (Fla. 4th DCA 1997). This hearing enables the court to determine ***759** whether there is

an evidentiary basis to conclude that the effect of cameras on the proceeding would be qualitatively different on the participants from the effect persons ordinarily experience in the presence of cameras, or whether that effect would be qualitatively different from the result of coverage by other types of media. *See* *State v. Palm Beach Newspapers*, 395 So.2d 544 (Fla.1981); *State v. Green*, 395 So.2d 532 (Fla.1981); *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764 (Fla.1979); *Florida Times-Union v. State*, 747 So.2d 1030, 1032 (Fla. 1st DCA 1999).

[31] In *Post-Newsweek Stations*, this Court considered a petition to change Canon 3A(7) of the Code of Judicial Conduct to allow the electronic media access to Florida's courtrooms. *See* *In re Petition of Post-Newsweek Stations*, 370 So.2d at 765. One of the arguments considered by the Court involved the psychological impact on courtroom participants; in particular, the expressed concern that "jurors [would] either be distracted from concentrating on the evidence and the issues to be decided by them or, because of their identification with the proceedings, they [would] fear for their personal safety, be subjected to influence by members of the public, or attempt to conform their verdict to community opinion." *Id.* at 775. The Supreme Court addressed these "concerns that any fair minded person would share because they would, certainly in combination, be antithetical to a fair trial," stating:

> The fact remains, however, that the assertions are but assumptions unsupported by any evidence. No respondent has been able to point to any instance during the pilot program period where these fears were substantiated. Such evidence as exists would appear to refute the assumptions.

Id. at 775-76. The trial court's exercise of discretion in deciding whether to prohibit media coverage of a particular trial participant is based upon the following standard:

> The presiding judge may exclude electronic media coverage of a particular participant only upon a finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media.

Id. at 779. In the context of jury selection, however, it would not "be necessary to show particularized concern on the part of each prospective juror in order to preclude cameras from photographing the entire venire." *Times Publishing Co. v. State*, 632 So.2d 1072, 1075 (Fla. 4th DCA 1994); *accord* *Sunbeam Television Corp. v. State*, 723 So.2d 275, 280 (Fla. 3d DCA 1998) (Cope, J., dissenting) (observing, in the dissenting opinion later adopted by the court on rehearing en banc, that "[w]here, as here, the concern about unsolicited contact with jurors is applicable to the entire group of potential, and actual, jurors, the jurors can be treated as a group, without a juror-by-juror inquiry").

In making its ruling here, the court relied upon the original panel decision in *Sunbeam Television Corp. v. Florida*, 723 So.2d 275 (Fla. 3d DCA), *reh'g en banc granted, id.* at 280 (Fla. 3d DCA 1998), *review denied*, 740 So.2d 529 (Fla.1999). In that highly controversial case, two television stations challenged an order prohibiting them from publishing jurors' names and addresses and videotaping them. On appeal, the broadcasters conceded that the court could forbid publication of names and addresses, but argued that they could not be prevented from photographing the jurors. The court initially upheld the prohibition against publication of names and addresses, but quashed the prohibition on ***760** video photography, holding that the court's concern that jurors could be identified from a broadcast and subjected to unsolicited contact from members of the public did not justify the order. On rehearing en banc, in a decision published just prior to Chavez's *Spencer* hearing, the district court adopted the dissenting view which had been in the earlier decision before a panel of the court, concluding that the court's expressed interest in insulating jurors from undue influence supported its prohibition against videotaping jurors' faces. Such order could not, however, act as an unconstitutional prior restraint by precluding the broadcasting of any juror information revealed in open court.

[32] Had the trial judge been prescient, he would not have abused his discretion in continuing the order prohibiting the jurors' faces from being photographed. However, Chavez has not shown that the judge abused his discretion in failing to do so. No court has held that it is per se reversible error to allow

the jurors' faces to be photographed in a controversial criminal trial. It is ultimately the fairness of the proceedings which determines the appropriateness of limitations on media access.

Here, the prospective jurors were advised by the trial court that cameras would be allowed in the proceedings, and were asked, as a group, whether any of them had concerns about that. The two prospective jurors who did express reservations regarding media coverage were removed for cause, and did not serve on Chavez's jury. The record does not reflect that Chavez sought review of the trial court's ruling which permitted such coverage, as he was entitled to do, even though defense counsel consistently maintained that the trial court had the authority to continue to limit media access as it had originally ordered.

Further, the trial court advised defense counsel that it was well aware of his position with respect to photographing the jurors, and said that the court would "readdress this issue if it's warranted in the future. So if the issues change and you need to bring something to the Court's attention, please notify the Court." To minimize disruption in the courtroom, the trial court assigned the jurors identification numbers to be used instead of their names, and required that the "still photographer, if there is one going to be in court during the proceedings, will have to remain seated in one seat throughout the course of the proceedings while the jurors are in the courtroom," in accordance with the Rules of Judicial Administration. Considering all these circumstances, the order allowing jurors to be photographed and the denial of Chavez's request to conduct individual voir dire of jurors not expressing concerns about the presence of cameras did not impair the fundamental fairness of Chavez's trial.

Admission of Mattress

[33][34] Chavez maintains that the trial court reversibly erred in admitting, over timely objection, a mattress (found in the trailer at the horse farm) which was stained with blood stipulated to belong to neither Chavez nor Jimmy Ryce. Chavez asserts that, even if the mattress had any probative value, it was clearly outweighed by the prejudicial impact. *See* § 90.403, Fla. Stat. (1995) ("Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence.").

[35][36] As we observed in *Goodwin v. State*, 751 So.2d 537, 540 (Fla.1999) (citing *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)), the harmless error analysis adopted in *Chapman***761*"requires appellate courts to first consider the nature of the error complained of and then the effect this error had on the triers of fact." The "oft-quoted standard" of appellate review (in the context of alleged improper prosecutorial conduct) requires reversal where it is "completely impossible ... to say that the State has demonstrated, beyond a reasonable doubt" that the error complained of "did not contribute to" the defendant's conviction. *Id.* (quoting *Chapman*, 386 U.S. at 26, 87 S.Ct. 824). Under section 90.403, Florida Statutes (1995), relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or potential to mislead the jury. These competing values must be weighed in determining admissibility. *See State v. McClain*, 525 So.2d 420, 422-23 (Fla.1988).

Here, Chavez objected to admission of the mattress, which was stipulated to be unrelated to this case. The State argued, principally, that it was being offered to show, contrary to the defense theory of the case, that the interrogating officers did not "force-feed" Chavez the elements of his confession during questioning. The State reasoned that, because the police knew about the bloody mattress at the time of Chavez's interrogation, had they been supplying Chavez with the details of his confession, the mattress would logically have been included as an element of the factual narrative. The trial court, agreeing that the mattress was relevant, permitted its introduction into evidence, providing the cautionary instruction that the mattress was not related to this case, and that neither Chavez nor Jimmy Ryce was the source of the blood stain.

The discovery by authorities of the obviously bloody mattress in the trailer during the time that Chavez was being questioned, and its subsequent testing, were logically relevant to disprove Chavez's contention that the officers who interrogated him had suggested all the elements of his detailed confession. The blood on the mattress was apparent, and, although it had not been forensically checked while

Chavez was being questioned, had the officers been prompting Chavez, as he claims, it would have been logical to have asked about the mattress. Further, the fact that the mattress was tested is relevant to Chavez's claim that the police failed to investigate his lead when he told them that Ed was the real killer. For this limited purpose, however, it would have been sufficient to admit into evidence testimony regarding the mattress and photographs of the mattress as it appeared at the crime scene, rather than the mattress itself.

Here, defense counsel argued that the bloody mattress raised the spectre that Chavez had murdered an additional person other than the victim in this case. However, that conclusion does not logically flow from the facts as adduced at trial. By his own confession, Chavez does not appear to have been familiar with the interior of the trailer where Jimmy was murdered. Chavez said that he had to look around for something to use as a lubricant, and test it to see if it burned.[FN38] Further, his victim was shot while trying to escape; he was not stabbed to death, nor does the record reflect the extensive presence of blood. There is absolutely no suggestion in the record that Chavez killed anyone other than Jimmy.

> FN38. Chavez had stated in his confession that, in sexually assaulting Jimmy, he had used a tube of lubricant containing blue lettering on it which he had found in the horse farm trailer. A bottle of water-based lubricant was recovered from the horse farm trailer and received into evidence without objection as State's Exhibit 139.

***762** However, even assuming that the court erred in allowing the mattress itself to be admitted (because the prejudicial effect potentially outweighed the probative value), such error was harmless. Given the overwhelming evidence of Chavez's guilt, on this record, there is no possibility that admission of the mattress contributed to the outcome of the proceedings. *See* Blackwood v. State, 777 So.2d 399, 408 (Fla.2000), *cert. denied*, 534 U.S. 884, 122 S.Ct. 192, 151 L.Ed.2d 135 (2001); State v. DiGuilio, 491 So.2d 1129, 1139 (Fla.1986).

Corpus Delicti for Sexual Battery

[37][38] Chavez next claims that the trial court erred in denying his motion for judgment of acquittal as to the capital sexual battery charge because the State failed to prove the corpus delicti of the crime. The phrase "corpus delicti" refers to proof independent of a confession that the crime was in fact committed. *See* Schwab v. State, 636 So.2d 3, 6 (Fla.1994). Here, as in *Schwab*, we find this assertion unpersuasive.

[39][40][41][42] In *Schwab*, the defendant had moved for judgment of acquittal on the murder, sexual battery, and kidnapping charges against him, arguing that the State had failed to prove the corpus delicti of those crimes independent of his statements. On appeal, Schwab argued that the trial court erred in denying those motions. In rejecting this argument, the Court articulated the general principles which govern a corpus delicti analysis:

> The general order of proof is to show that a crime has been committed and then that the defendant committed it. Spanish v. State, 45 So.2d 753 (Fla.1950); *see* State v. Allen, 335 So.2d 823 (Fla.1976). "But in many cases the two elements are so intimately connected that the proof of the corpus delicti and the guilty agency are shown at the same time." Spanish, 45 So.2d at 754. Thus, the "evidence which tends to prove one may also tend to prove the other, so that the existence of the crime and the guilt of the defendant may stand together and inseparable on one foundation of circumstantial evidence." Cross v. State, 96 Fla. 768, 780-81, 119 So. 380, 384 (1928). A defendant's confession or statement "may be considered in connection with the other evidence," but "the *corpus delicti* cannot rest upon the confession or admission alone." Id. at 781, 119 So. at 384. Before a confession or statement may be admitted, there must be prima facie proof tending to show the crime was committed. Frazier v. State, 107 So.2d 16 (Fla.1958); *Cross*; *see* Farinas v. State, 569 So.2d 425 (Fla.1990); Bassett v. State, 449 So.2d 803 (Fla.1984). Additionally, by the end of trial the corpus delicti must be proved beyond a reasonable doubt. *Cross*

636 So.2d at 6. In applying these principles to the facts in *Schwab*, we stated:

> The state's proof met these standards. The medical examiner testified that the victim died from manual asphyxiation, most probably by strangling or smothering. The victim's nude body

> and the clothes that had been cut off him were found concealed in a footlocker in a remote location. *Cf. Stano v. State*, 473 So.2d 1282 (Fla.1985), *cert. denied*,474 U.S. 1093, 106 S.Ct. 869, 88 L.Ed.2d 907 (1986). A wad of tape also found in the footlocker yielded a fingerprint identified as Schwab's. Witnesses testified that Schwab rented and returned the U-haul truck. Although the victim may have gone willingly with Schwab initially, the conclusion that at some point he was held against his will is inescapable. *Cf Sochor v. State*, 619 So.2d 285 (Fla.), *cert. denied*,510 U.S. 1025, 114 S.Ct. 638, 126 L.Ed.2d 596 (1993); *Bedford v. State*, 589 So.2d 245 (Fla.1991), *cert. denied*,503 U.S. 1009, 112 S.Ct. 1773, 118 L.Ed.2d 432 (1992). The details in ***763** Schwab's statements correspond well with the physical evidence. Therefore, we hold that the state submitted sufficient proof of the corpus delicti to admit Schwab's admissions that he kidnapped and raped the victim. Moreover, all of the evidence proved beyond a reasonable doubt the corpus delicti of each of the charged crimes and that Schwab committed them.

The *Schwab* analysis is instructive in this case. Here, as in *Schwab*, the details in Chavez's confession "correspond well with the physical evidence." The victim-a little boy-had disappeared months before his body was found, at a time when he had been expected to return home directly from school (suggesting that he was taken by an adult by force). The Scheinhaus property where Chavez lived was in the same general vicinity from which the little boy had disappeared. Mrs. Scheinhaus found a handgun which had been stolen from her in Chavez's trailer at the same time that she discovered the victim's book bag there. Both the gun and the book bag were found to have Chavez's prints on them, and the gun was positively identified as the murder weapon. From these facts, as in Schwab, "the conclusion that at some point [the child victim] was held against his will is inescapable."

The little boy, who died almost instantly from a gunshot wound, bled on the threshold of the horse farm trailer (which was situated in a remote location), suggesting that the murderer had stopped him as he tried to escape. As observed by the trial court here in making its ruling, "[t]he state established that the victim didn't know the defendant, and there was no reason for Jimmy Ryce to be alone with the defendant in a remote area of Dade County in a small trailer. There was no evidence that a ransom demand was ever made."

Jimmy's remains showed, significantly, that his pants were still unzipped. He was also otherwise partially unclothed, having one shoe off, and a sock missing, further suggesting that he had, at some point, been disrobed. A tube of lubricant matching the description Chavez gave in his final confession was recovered from the trailer where the victim died and admitted into evidence, providing additional corroboration of the details of Chavez's confession regarding the sexual battery.

On these facts, the trial court did not err in concluding that the State had submitted sufficient proof of the corpus delicti to admit into evidence Chavez's admissions that he had sexually assaulted the victim. The evidence proved beyond a reasonable doubt the corpus delicti of the sexual battery charge, and that Chavez committed it.

Cumulative Photos

[43][44] Chavez claims that the trial court erred in admitting, over defense objection, cumulative gruesome photographs depicting the victim's remains. As stated by the Court in *Henderson v. State*, 463 So.2d 196, 200 (Fla.1985), "[t]hose whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." Here, the medical examiner testified that the photographs showing injury to the organs, and specifically to the heart, were not cumulative.[FN39] The doctor also explained the difference between Exhibits 22 and 29, refuting the suggestion that these photographs were cumulative. Thus, the record supports admission of the photographs as relevant and not cumulative.

FN39. The medical examiner testified:

> Well, first of all, there are no photographs duplicative of 22 and there are no photographs duplicative of 24. In terms of 21, I can see some of the injuries in 24 as shown in 21; however, it's out of sequence in terms of my explanation that I've aligned in these slides. So it would be

kind of out of sequence to take that out. It's also a much further distance as shown in 24.

*764 In the Course of Kidnapping Aggravator

[45] The trial court here denied Chavez's requested instruction on "doubling." Chavez asserts that the jury based its conviction for first-degree murder on the felony murder theory with kidnapping as the underlying felony; therefore, the penalty phase instruction regarding kidnapping allowed the jury to improperly "double" the same aspect of the crime. Additionally, Chavez maintains that the trial court erred in finding the "in the course of a kidnapping" aggravator in this case.

Here, Chavez was charged in the indictment with the offense of kidnapping Jimmy Ryce. As provided in section 787.01(1)(a)(2)-(3), Florida Statutes (1995), "[t]he term 'kidnapping' means forcibly, secretly, or by threat confining, abducting, or imprisoning another person against her or his will and without lawful authority, with intent to ... [c]ommit or facilitate commission of any felony," or to "[i]nflict bodily harm upon or terrorize the victim or another person." Further, under section 787.01(1)(b), "[c]onfinement of a child under the age of 13 is against his will within the meaning of this subsection if such confinement is without the consent of his parent or legal guardian."

In *Faison v. State*, 426 So.2d 963, 965 (Fla.1983), this Court adopted the test enunciated in *State v. Buggs*, 219 Kan. 203, 547 P.2d 720, 731 (1976), whereby, to sustain a conviction for kidnapping, the confinement (a) must not be slight, inconsequential and merely incidental to the other crime; (b) must not be of the kind inherent in the nature of the crime; and (c) must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection. In *Faison*, applying that test, the Court held that the defendant's act of moving one victim to the rear of an office and another victim from the kitchen to the bedroom was sufficient for a kidnapping conviction.

Here, the child victim was taken by an adult stranger at gunpoint to a remote trailer where his blood stains were later found. This conduct was obviously intended to facilitate the subsequent sexual battery, which could not have been so easily effected where Jimmy was abducted. Applying a *Faison* analysis, the jury could properly conclude that these facts were sufficient to support a kidnapping conviction. *See also Ferguson v. State*, 533 So.2d 763, 764 (Fla.1988) (recognizing that evidence that the victim was confined to make another crime substantially easier to commit is sufficient to support a kidnapping charge). Further, this Court's precedent has already resolved the "doubling" argument contrary to Chavez's position. *See Hudson v. State*, 708 So.2d 256, 262 (Fla.1998) (rejecting an argument that the "murder in the course of a felony" aggravator is an invalid automatic aggravator).

Avoiding Arrest Aggravator

[46] Chavez argues that his death sentence should be reversed because the trial court erred in considering, and in instructing the jury that it could consider, as an aggravating factor that the murder was committed for the purpose of avoiding lawful arrest. The trial court, in its sentencing order, stated the following:

> The totality of the circumstances of this case would suggest that the sole or dominant motive for the murder of Samuel James Ryce was the elimination of this witness. The defendant stated in his confession that while he intended to release the victim in a remote area of the county he was unable to do so because a helicopter was conducting a search of the area. The defendant stated that he believed that if he released *765 the victim at this time he would be caught. The defendant shot and murdered the victim when he attempted to escape from the trailer where he was being held captive. The evidence in this case clearly established that the defendant's sole motive for the murder for the victim was to eliminate the only witness of the kidnaping and sexual battery.
>
> The Court finds that this aggravating circumstance has been proven beyond a reasonable doubt.

The correctness of the trial court's legal conclusion was confirmed not only by evidence establishing the circumstances of the victim's death, but by Chavez's own transcribed statement, in which he explained, "It was the only way that I had in order to avoid-to

prevent him from going out." Being amply supported by the record, the trial court's finding that the "avoid arrest" aggravator was established on these facts was not error.

Heinous, Atrocious or Cruel Aggravator

[47] Next, Chavez claims that his death sentence should be reversed because the trial court erred in giving the "heinous, atrocious, or cruel" aggravator ("HAC") instruction. Here, the trial court found:

> The evidence in this case established that the victim, Samuel James Ryce, was abducted at gunpoint by the defendant. The defendant approached the victim with a gun in his hand and asked him if he wanted to die. The victim became frightened and answered no and was then ordered by the defendant to get into his truck. The defendant then drove his vehicle to a trailer in a remote area of the county where he sexually battered Samuel James Ryce. After committing the sexual battery the defendant drove the victim to other locations before he finally returned the victim to the trailer. During this period of time the victim on at least two (2) occasions asked the defendant if he was going to be killed. The defendant, Juan Carlos Chavez, never told Samuel James Ryce that he was not going to die nor did he take any action to alleviate the victim's fear of death. In fact, the evidence revealed that the defendant played 'mind games' with the victim by asking him what he thought the defendant could do with him. The defendant also stated that throughout this period of time the victim was constantly sobbing.
>
> "For the purpose of this aggravator a common sense inference as to the victim's mental state may be inferred from the circumstances." *Swafford*, 533 So.2d at 277.[FN40] The victim was held captive by the defendant for over 3 1/2 hours before he was killed. Based upon the evidence, there can be no doubt that Samuel James Ryce lived every minute of his last few hours of his life with the fear of death. This fear and emotional strain was willfully inflicted on this victim by the defendant and was unnecessarily torturous in nature.

FN40. *Swafford v. State*, 533 So.2d 270 (Fla.1988).

As this Court stated in *Swafford*, 533 So.2d at 277 (additional citations omitted):

> In numerous cases the Court has held that this aggravating factor could be supported by evidence of actions of the offender preceding the actual killing, including forcible abduction, transportation away from possible sources of assistance and detection, and sexual abuse. In *Parker v. State*, 476 So.2d 134, 139 (Fla.1985), we quoted the statement in *Adams v. State*, 412 So.2d 850, 857 (Fla.), *cert. denied*, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982), that "fear and emotional strain preceding a victim's almost instantaneous death may be considered as contributing to the heinous nature of the capital felony." Moreover, the victim's mental state may ***766** be evaluated for purposes of such determination in accordance with a common-sense inference from the circumstances. *Preston v. State*, 444 So.2d 939, 946 (Fla.1984) ("victim *must have* felt terror and fear as these events unfolded") (emphasis added).

Here, as in *Swafford*, factors based on events preceding the shooting-abduction, fear, mental anguish, and sexual abuse-support the trial court's finding of HAC.

Diminishment of Jury's Role in Sentencing

[48] Chavez argues that the prosecutor improperly diminished the jury's role in making a sentencing recommendation during both voir dire [FN41] and the penalty phase [FN42] of the trial. However, during voir dire, when a juror suggested that the advisory recommendation "[took] a burden off" him, the trial court immediately, and properly, informed the jury that it would give great weight to any advisory sentence recommended.[FN43]

> FN41. During voir dire questioning, the following exchange occurred:
>
> > MR. BAND: Well, I'm not sure that I follow that. In a sense, you are correct. Ultimately, the Judge makes the decision. And as he has told you, he gives the jury's recommendation great weight. He looks to the jury for advice. You sit as an advisory board to the Court, if you will. Does that-I kind of get the drift, I guess, that that

> produces on you or places upon you some burden you feel uncomfortable with?
>
> JUROR 991: No, just the opposite. I feel like it takes the burden off of me, because ultimately-

FN42. During closing argument of the penalty phase, the prosecutor stated:

> Remember, again, you are not asked to pass sentence. That is solely the burden of the Court, and this Court alone. The Court will weigh your recommendation-

FN43. The trial court advised the panel:

> Ladies and gentlemen, I just want you to understand that whatever recommendation you make, I give great weight to that recommendation. And I must underline "great weight." So it's not a situation where you can sit here as jurors and say, well, it doesn't matter what we do, because it's going to be the judge making the decision.

On this record, viewing the totality of the circumstances (including the trial court's curative instruction), the jury's role in sentencing was not impermissibly diminished. It was told that its recommendation would be advisory, and given great weight. This correctly states the law in Florida. *See generally Grossman v. State*, 525 So.2d 833, 839-40 (Fla.1988).

Proportionality and Remaining Claims

[49] Consistent with our mandate, we have conducted a proportionality review in this case, and determined that, here, the death penalty is appropriate and proportional.[FN44] *Cf. Wike v. State*, 698 So.2d 817, 823 (Fla.1997) (holding death sentence proportional***767** for kidnapping and murder of a six-year-old child committed concurrently with the kidnapping, attempted murder, and sexual battery of her eight-year-old sister, where CCP and committed-to-avoid-arrest aggravators were proven); *Schwab*, 636 So.2d at 7 (holding death sentence proportional for kidnapping, murder, and sexual battery of a thirteen-year-old boy, where prior conviction of violent felony, felony murder and HAC were proven); *Carroll v. State*, 636 So.2d 1316 (Fla.1994) (holding death sentence proportional for strangulation murder and sexual battery of child victim). We reject without discussion Chavez's remaining claims.[FN45] On rehearing, Chavez has asserted that Florida's capital sentencing scheme violates the United States Constitution under the holding of *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court addressed a similar contention in *Bottoson v. Moore*, 833 So.2d 693 (Fla.2002), and *King v. Moore*, 831 So.2d 143 (2002), and denied relief. We find that Chavez is likewise not entitled to relief on this claim.

FN44. The trial court found the following aggravators: (1) that a capital felony was committed while the defendant was engaged in the commission of or in an attempt to commit or escape after committing the crime of kidnapping; (2) that a capital felony was committed for the purpose of avoiding or preventing a lawful arrest; (3) that the capital felony was especially heinous, atrocious or cruel. The trial court found the following statutory mitigators, according them the weight indicated: (1) the defendant's family background and good family relationship (some weight); (2) the defendant's political and economic background (little weight); (3) the defendant's good work record and ability to work and earn a living (some weight); and (4) the defendant's ability to establish and maintain positive and helping relationships (some weight). The trial court also found the following nonstatutory mitigators, according them the weight indicated: (1) the defendant's good jail conduct and courtroom demeanor (very little weight) and (2) the defendant's lack of a prior history of violence (some weight). After delineating these factors, the trial court stated:

> This Court finds that the quality of the aggravating factors in this case greatly outweigh the mitigating circumstances. The strength of the aggravating circumstances in this case are so overwhelming that they make the

mitigating circumstances appear insignificant by comparison.

FN45. These are: (1) The death penalty is unconstitutional. *See Ferguson v. State*, 417 So.2d 639, 641 (Fla.1982) ("The death penalty in Florida as prescribed in section 921.141, Florida Statutes (1977), has been upheld repeatedly against arguments that it constitutes cruel and unusual punishment or violates the constitutional guarantees of equal protection and due process."). (2) Section 921.141(7), Florida Statutes (1995) (permitting victim impact evidence in a capital sentencing proceeding) is unconstitutional. *See Payne v. Tennessee*, 501 U.S. 808, 823, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (finding that victim impact evidence is not offered to encourage a comparison of victims but to "show instead each victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be."); *Burns v. State*, 699 So.2d 646, 653 (Fla.1997) (rejecting challenges to the victim-impact statute based upon claims that it violates the prohibition against ex post facto laws, improperly regulates practice and procedure, allows admission of irrelevant evidence which does not pertain to any aggravator or mitigator, and violates equal protection because it may encourage the jury to give different weight to the value of different victims' lives); *see generally Windom v. State*, 656 So.2d 432, 438 (Fla.1995) (reflecting that "[this] evidence must be limited to that which is relevant as specified in section 921.141(7)"), *cert denied*, 516 U.S. 1012, 116 S.Ct. 571, 133 L.Ed.2d 495 (1995).

CONCLUSION

In summary, we affirm Chavez's first-degree murder conviction and sentence of death. We also affirm Chavez's convictions and sentences for kidnapping and sexual battery.

It is so ordered.

WELLS, LEWIS, and QUINCE, JJ., and HARDING, Senior Justice, concur.
ANSTEAD, C.J., concurs in result only as to conviction, and concurs as to sentence.
SHAW and PARIENTE, JJ., concur in result only.
Fla.,2002.
Chavez v. State
832 So.2d 730, 27 Fla. L. Weekly S991

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HWFTV, Inc. v. State
Fla.App. 4 Dist.,1997.

District Court of Appeal of Florida,Fourth District.
WFTV, INC., d/b/a Palm Beach Newspapers, Inc., Scripps Howard Broadcasting Company (WPTV Channel 5), and The Associated Press, Petitioners,
v.
STATE of Florida and James Clyde Baber III, Respondents.
No. 97-3537.

Dec. 24, 1997.
Rehearing Denied Feb. 6, 1998.

Various electronic and print media organizations petitioned for review of *sua sponte*order of the Circuit Court, Palm Beach County, Edward A. Garrison, J., which prohibited video and still camera operators from photographing prospective or seated jurors in courtroom during criminal trial. The District Court of Appeal, Gross, J., held that trial court's failure to hold properly noticed evidentiary hearing and to make findings that media coverage would have a substantial effect upon jurors was error.

Petition granted; order quashed.

Farmer, J., filed a dissenting opinion.

West Headnotes

[1] Criminal Law 110 ⚿1134.26

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)3 Questions Considered in General
110k1134.26 k. Mootness. Most Cited Cases
(Formerly 110k1134(3))
Even though criminal trial in which judge *sua sponte* prohibited video and still camera operators from photographing prospective or seated jurors in courtroom during trial had concluded, alleged error in issuing order was capable of repetition while evading review, permitting District Court of Appeal to review order.

[2] Criminal Law 110 ⚿633.16

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))
In exercising discretion accorded under court rule governing trial court's control over electronic media and still photography coverage of a trial court proceeding, presiding judge may exclude electronic media coverage of a particular participant only upon a finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from effect on members of public in general and such effect will be qualitatively different from coverage by other types of media. West's F.S.A. R.Jud.Admin.Rule 2.170(a).

[3] Criminal Law 110 ⚿633.33

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.33 k. Gag Orders and Injunctions. Most Cited Cases
(Formerly 110k633(1))
Precondition to an order excluding or limiting media coverage of a trial is a noticed evidentiary hearing at which media representatives have a fair opportunity to be heard. West's F.S.A. R.Jud.Admin.Rule 2.170(a).

[4] Criminal Law 110 ⚿633.16

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases

(Formerly 110k633(1))

Criminal Law 110 ⚿660

110 Criminal Law
110XX Trial
110XX(B) *Course and Conduct of Trial in* General
110k660 k. Objections and Exceptions. Most Cited Cases
(Formerly 110k633(1))
Trial court's *sua sponte* order prohibiting video and still camera operators from photographing prospective or seated jurors in courtroom during criminal trial was error, where trial court neither held properly noticed evidentiary hearing nor made findings that media coverage would have a substantial effect upon jurors. West's F.S.A. R.Jud.Admin.Rule 2.170(a).

[5] **Criminal Law 110 ⚿633.16**

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))
Jurors are "participants" in a trial within meaning of court rule governing trial court's control over electronic media and still photography coverage of participants in a trial court proceeding. West's F.S.A. R.Jud.Admin.Rule 2.170(a).

***189** L. Martin Reeder, Jr.,Edward M. Mullins, and Barbara Bolton Litten of *Steel Hector & Davis*, L.L.P., West Palm Beach, for petitioners.
Robert A. Butterworth, Attorney General, Tallahassee, and Denise S. Calegan, Assistant Attorney General, West Palm Beach, for Respondent-State of Florida.
GROSS, Judge.
This is a petition to review an order entered by the trial court prohibiting video and still camera operators from photographing prospective or seated jurors in the courtroom during a criminal trial.

In the underlying criminal trial, the defendant [FN1] was charged with DUI manslaughter. On the day the trial was scheduled to begin, after sending the bailiff for the jury venire, the trial judge *sua sponte* instructed the cameramen as follows:

> FN1. By written response, the criminal defendant has taken no position in this litigation.

> Let me address the members of the media, specifically the cameramen: You will not take pictures of the jury. You are welcome to stay in the courtroom as long as you maintain decorum, but you will not take pictures of the faces of the jury at any time during the trial. If I see that happening, or the bailiff, the camera will be removed from the courtroom. Okay.
> Prior to the oral order, there had been no motion to restrict coverage of the trial, no prior notice to any news media organization, ***190** and no hearing at which the media could be heard in opposition to the restrictive order. The trial judge made no factual findings in support of the order.

[1] This court has jurisdiction. Florida Rule of Judicial Administration 2.170(i) provides that review of "an order excluding the electronic media from access to any proceeding [or] excluding coverage of a particular participant" shall be pursuant to Florida Rule of Appellate Procedure 9.100(d). Rule 9.100(d)(1) permits review of an oral order "excluding the press ... from access to any proceeding [or] any part of a proceeding...." Even though the trial has concluded, we address the issue raised because it is capable of repetition by evading review. *See Times Publishing Co. v. State*, 632 So.2d 1072, 1073 (Fla. 4th DCA 1994).

[2] Electronic media and still photography coverage of a trial court proceeding is controlled by Florida Rule of Judicial Administration 2.170. Subsection (a) of the rule provides:

> Subject at all times to the authority of the presiding judge to: (i) control the conduct of proceedings before the court; (ii) ensure decorum and prevent distractions; and (iii) ensure the fair administration of justice in the pending cause, electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed in accordance with the following standards of conduct and technology

promulgated by the Supreme Court of Florida.

In exercising the discretion accorded under the rule,

> [t]he presiding judge may exclude electronic media coverage of a particular participant only upon a finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media.

See In re Post-Newsweek Stations of Florida, Inc., 370 So.2d 764, 779 (Fla.1979).

[3] A precondition to an order excluding or limiting media coverage of a trial is a noticed evidentiary hearing at which media representatives have a fair opportunity to be heard. *See State v. Green*, 395 So.2d 532, 538 (Fla.1981); *State v. Palm Beach Newspapers, Inc.*, 395 So.2d 544, 548 (Fla.1981).

[4] The trial court's sua sponte order in this case was error, since the court neither held the properly noticed evidentiary hearing required under *Green* and *Palm Beach Newspapers* nor made the findings mandated by *Post-Newsweek*.

[5] As to both this court's jurisdiction and the merits, the state argues that jurors are not "participants" in a trial within the meaning of either Rule 2.170(i) or the standard enunciated in *Post-Newsweek* (the "trial judge may exclude electronic media coverage of a *particular participant*..."). The state's position is that the jurors, like referees in a sporting event, do not participate in the proceeding they are observing.

We reject this argument because in the case shaping the parameters of electronic and still photography coverage of court proceedings, the supreme court treated jurors as a category of "participant" in the process. In *Post-Newsweek*, the court observed, under the subtitle "Privacy rights of participants," that opponents of coverage contended that it was an invasion of privacy "to compel a witness or juror" to appear in a judicial proceeding and then "expose him against his will to the notoriety or publicity attendant to his image appearing in a newspaper, magazine, or television broadcast." 370 So.2d at 779. The court rejected this argument, commenting that a trial is, subject to limited exceptions, "a public event which by its very nature denies certain aspects of privacy." *Id.* Similarly, the court considered and rejected the argument of electronic media opponents that

> jurors will either be distracted from concentrating on the evidence and the issues to be decided by them or, because of their identification with the proceedings, they will fear for their personal safety, be subjected to influence by members of the public, or attempt to conform their verdict to community opinion.

**191 *Id.* at 775. Along with witnesses, attorneys and court personnel, jurors were one of the classifications of trial participants surveyed to assist the court in rendering the *Post-Newsweek* decision. *Id.* at 767-769. Jurors' responses to the survey formed part of the data that the supreme court considered in fashioning the camera access rule.

Nothing in Rule 2.170, *Post-Newsweek*, or any other supreme court opinion suggests that jurors or prospective jurors are to be treated differently from other types of trial participants- such as attorneys, witnesses, or court personnel- for the purposes of publishing or broadcasting their photographic images. A trial court may not restrict the coverage of jurors without complying with the procedures articulated in *Green* and *Palm Beach Newspapers*.

We grant the petition for review and quash the trial court's oral order quoted above.

KLEIN, J., concurs.
FARMER, J., dissents with opinion.
FARMER, Judge, dissenting.
I dissent because I do not understand the trial judge's order directing the television coverage not to show the jurors to be an *exclusion* of the media from the proceeding. To my mind it is merely a matter of the trial judge exercising ordinary "control [of] the conduct of proceedings before the court." *See* Fla.R.Jud.Admin. 2.170(a).

Moreover, while I agree that a hearing would ordinarily be required to exclude television coverage entirely, I do not understand what a hearing in this case would involve. The television medium was present when the judge directed the cameras away from the jurors. The TV people did not suggest that they wanted to offer evidence at such a hearing to test

the veracity of any non-testimonial data relied on by the judge in directing the cameras away from jurors, or to show what less restrictive measures might be available. *See State v. Palm Beach Newspapers, Inc.*, 395 So.2d 544, 548 (Fla.1981) (evidentiary hearing should be allowed in all cases to elicit relevant facts to test the veracity of non-testimonial data, or to determine what less restrictive measures are available, when these matters are made an issue). There is nothing in this record showing that the TV representatives sought to make these matters an issue as to the direction of cameras away from jurors.

Finally, I cannot avoid observing that in recent highly publicized trials in California and Massachusetts, there were no television pictures of the jurors themselves. I simply cannot imagine any basis for challenging a trial judge's direction in a criminal case not to show the jurors on television. It seems to me one thing to exclude television coverage entirely; it seems quite another to preclude the media from showing the jurors during court proceedings. I side with the trial judge on this one.

Fla.App. 4 Dist.,1997.
WFTV, Inc. v. State
704 So.2d 188, 23 Fla. L. Weekly D59, 26 Media L. Rep. 1862

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Sunbeam Television Corp. v. State
Fla.App. 3 Dist.,1998.

District Court of Appeal of Florida,Third District.
SUNBEAM TELEVISION CORPORATION, d/b/a WSVN/Channel 7, and Post-Newsweek Stations Florida, Inc., d/b/a WPLG/Channel 10, Petitioners,
v.
STATE of Florida and Humberto Hernandez, Respondents.
No. 98-1969

Aug. 4, 1998.
Opinion Adopting Panel Dissent on Grant of Rehearing En Banc Nov. 4, 1998.
Rehearing Denied Jan. 13, 1999.

Television broadcasters filed petition for certiorari to quash order by the Circuit Court, Dade County, Roberto M. Pineiro, J., prohibiting video photography of prospective or seated jurors in high-profile criminal trial. The District Court of Appeal, Sorondo, J., held that judge's generalized concerns regarding jurors were sufficient to warrant prohibiting disclosure of jurors' names and addresses. On rehearing en banc, the District Court of Appeal held that: (1) judge's concerns were sufficient to support court order prohibiting video photography of jurors, but (2) prohibiting publication of juror information that would be disclosed in open court would be unconstitutional prior restraint.

Petition denied.

Cope, J., filed written dissent on original submission.

Sorondo, J., filed dissenting opinion on rehearing, in which Goderich, J., joined.

West Headnotes

[1] Jury 230 ⚿144

230 Jury
230VI Impaneling for Trial, and Oath
230k144 k. Designation and Identity of Jurors. Most Cited Cases
Trial judge's generalized concerns for jurors in high-profile case were sufficient to warrant prohibiting disclosure of jurors' names and addresses.

[2] Jury 230 ⚿144

230 Jury
230VI Impaneling for Trial, and Oath
230k144 k. Designation and Identity of Jurors. Most Cited Cases
Trial judge's generalized concerns that jurors in high-profile case might be approached by unknown people who would have seen them on television if video photography of jurors was allowed, were sufficient to support court order prohibiting video photography of jurors.

[3] Criminal Law 110 ⚿1131(4)

110 Criminal Law
110XXIV Review
110XXIV(J) Dismissal
110k1131 In General
110k1131(4) k. Grounds of Dismissal in General. Most Cited Cases
(Formerly 110k1134(3))
Although underlying criminal trial had ended, District Court of Appeal would not treat action as moot for purposes of determining whether jurors in high-profile case could be videotaped for television broadcast, since issue presented was likely to recur.

[4] Constitutional Law 92 ⚿2096

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(V) Judicial Proceedings
92XVIII(V)1 In General
92k2096 k. Juries. Most Cited Cases
(Formerly 92k90.1(3))

Jury 230 ⚿144

230 Jury
230VI Impaneling for Trial, and Oath

230k144 k. Designation and Identity of Jurors. Most Cited Cases
Prohibiting publication of juror information that would be disclosed in open court during high-profile case would be an unconstitutional prior restraint, notwithstanding trial judge's generalized concerns for jurors.

***276** Milledge & Iden and Allan Milledge and Dana J. McElroy; Mitrani, Rynor, Adamsky, Macaulay and Zorrilla and Karen Williams Kammer, Miami, for Petitioners.
Robert A. Butterworth, Attorney General, and Keith S. Kromash, Assistant Attorney General, for Respondents.

Before COPE, GODERICH and SORONDO, JJ.

SORONDO, J.
Sunbeam Television Corporation, d/b/a WSVN/Channel 7 and Post-Newsweek Stations Florida, Inc., d/b/a WPLG/Channel 10 (collectively, "the media") petition this Court for a writ of certiorari quashing the trial court's order prohibiting video photography of prospective or seated jurors in the criminal trial of former Miami Commissioner Humberto Hernandez, on charges of Fabricating Physical Evidence, Conspiracy to Fabricate Physical Evidence, and Accessory After the Fact.

According to the facts before us in this expedited matter, the trial judge advised a television reporter who was present at a hearing conducted on Thursday, July 30, 1998, that the court would be addressing the issue of limiting the media's ability to televise the trial in this case. Formal notice was provided to the media on the morning of Friday, July 31, 1998, for a 1:00 p.m. hearing. At oral argument before this court, counsel for the media indicated that they were not arguing a lack of notice as a ground for quashing of the order in question.

At the July 30th hearing, the trial judge announced:

> I do know that-I have advised both parties that based upon discussions we had before, based upon the request made by the state, that I'm going to provide for basically protection, and for non-disclosure of the prospective jurors' identities or address.

At this point the media noted their objection to the court's intent and provided the judge with case law requiring both proper notice and an evidentiary hearing before the entry of such an order. *See In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764 (Fla.1979); *WFTV, Inc. v. State*, 704 So.2d 188 (Fla. 4th DCA 1997). The judge then announced that he was conducting an evidentiary hearing and stated as follows:

> Okay. I'm going to conduct an evidentiary hearing at this time. This Court will allow into evidence judicial notice of what it considers to be in the interest of the community.
>
> This is a case of very intense public interest. This is a case that, basically, the media has a great deal of interest in, that the media at large has a great deal of interest in.
>
> There have been numerous newspaper reports, numerous television reports.
>
> And in fact, it's safe to say that there's a great deal of interest in this case. The prevention of the broadcasting of the identities of the individuals who will be participating in jury selection is for the purpose of assuring that when they are going about their business as jurors, and go back home, go out to dinner, go to church, synagogue, ***277** go to Publix Supermarket, whatever, they are not accosted by people who will say to them, I saw you on television.
>
> You are on this case, you are on the case trying Humberto Hernandez, and let me tell you this about that.
>
> It's for that purpose, in and of itself, that that Court order has been entered.
>
> It's a very slight infringement on the public at large, you will be present, the media will be present, the television cameras will be present, and they will be able to broadcast each and every event in this courtroom but for the juror's appearance.
>
> They will not broadcast their faces, but the answers to questions provided to the Court, to the parties, will be a matter of public broadcast. You

can go into that.

> So, basically, the order is simply to prevent the disclosure of the identities of the jurors, which is something that is envisioned under the law, since the law allows the Court to prevent dissemination of a juror's name and address.

The media did not seek to present any evidence and concedes that the evidentiary hearing satisfied the requirements of Florida law. They argue here, as they did below, that the trial judge's order was error.

The state takes no position on the issue presented to this Court. Contrary to the trial judge's suggestion that his order was entered pursuant to the state's motion, the state asserts that it filed no such motion. At oral argument, the state advised this Court that during a previous hearing there might have been a general discussion about keeping the names and addresses of the jurors confidential, but that the state never requested the prohibition of video photography ordered by the trial judge. Further, the state indicated that it does not feel that such a measure is necessary to protect the integrity of the trial.

[1] Both the State and the media now agree that the portion of the trial court's order which forbids the publication of the jurors' names and addresses is lawful. Accordingly, we deny that portion of the petition which seeks to quash this part of the order under review.

We now consider that portion of the trial court's order which prohibits the video photography of the jurors.

At the evidentiary hearing, the trial judge took judicial notice of the intense pre-trial publicity which has accompanied this case. In *State v. Palm Beach Newspapers,* 395 So.2d 544 (Fla.1981), the Florida Supreme Court reviewed an order excluding television coverage of two state witnesses during their trial testimony. Both witnesses were incarcerated. They provided affidavits which set forth their fear of reprisals in prison if it became public knowledge that they were cooperating with the state. In discussing the nature of a hearing which results in an order excluding the media, the Court stated:

> Affidavits are sufficient to ground a trial court's determination that electronic media should be prohibited from covering the testimony of a particular witness. ***Indeed, a ruling can be supported by matters within the judicial knowledge of the trial judge, provided they are identified on the record and counsel given an opportunity to refute or challenge them.***

Id. at 547 (emphasis added). The Court went on to say that "the dangers of in-prison violence ... may well be a matter judicially noticed ..."*Id.* In the present case, the judge was well within his right to judicially notice the publicity which has surrounded the voting fraud and related issues which are the gravamen of the charges against this defendant. The question presented here is whether that publicity and the trial judge's concern that unknown people may approach the jurors at restaurants, the market, church, synagogue, etc., is enough to support the order under review. We conclude that it is not.

In *Post-Newsweek Stations,* the Supreme Court determined that the petition for change in the code of judicial conduct, specifically Canon 3A(7), should be granted so as to allow the electronic media access to Florida's courtrooms. *In re Petition of Post-Newsweek Stations, Florida* at 765. In a lengthy opinion the Court considered the arguments made by the various interested parties. One of the arguments considered by the Court involved the psychological impact *278 upon the courtroom participants. One of the expressed concerns was that "jurors [would] either be distracted from concentrating on the evidence and the issues to be decided by them or, because of their identification with the proceedings, they [would] fear for their personal safety, be subjected to influence by members of the public, or attempt to conform their verdict to community opinion;" in short, virtually the same concerns expressed by the trial judge in the present case. The Supreme Court addressed this and other concerns and concluded that:

> These are concerns that any fair minded person would share because they would, certainly in combination, be antithetical to a fair trial. The fact remains, however, that the assertions are but assumptions unsupported by any evidence. No respondent has been able to point to any instance during the pilot program period where these fears were substantiated. Such evidence as exists would

appear to refute the assumptions.

Id. at 775. The Court went on to say that there could be circumstances where it would be appropriate to prohibit electronic media coverage of a particular trial participant. It left that decision to the sound discretion of the presiding trial judge to be exercised under the following standard:

> The presiding judge may exclude electronic media coverage of a particular participant only upon a finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media.

Id at 779. We agree with the Fourth District Court of Appeal's analysis in *Times Publishing Co. v. State*, 632 So.2d 1072 (Fla. 4th DCA 1994), that within "the context of the selection of the jury it would [not] be necessary to show a particularized concern on the part of each prospective juror in order to preclude cameras from photographing the entire venire." *Id.* at 1075. We do not believe, however, that the general concerns expressed by the trial judge in this case for prohibiting the video photography of jurors are sufficient to justify the prohibition imposed. The facts the judge took judicial notice of are true of all high-publicity criminal cases. To hold that such general concerns are sufficient to forbid the video photographing of jurors, where those same general concerns would not suffice to forbid the video photographing of witnesses, lawyers and/or judges, would elevate jurors to a special class of trial participant not contemplated by the Florida Supreme Court in *Post-Newsweek Stations*. The pre-trial publicity problems associated with high profile criminal cases, like the problems of jury intimidation and bribery, are not new and were undoubtedly considered by the Supreme Court in the exhaustive study which led to its decision in *Post-Newsweek Stations*. No special treatment was formulated for prospective or seated jurors.

The dissent argues that common sense dictates that "where an order forbidding disclosure of names and addresses is justified, it is also permissible to prohibit the photographing of jurors." We perceive a qualitative difference between the listing of jurors' names and addresses and the video photographing of jurors. Even if the media's cameras are present and recording throughout the entire trial, the actual footage broadcast on television rarely amounts to more than a few seconds. Accordingly, during the voir dire examination of over 100 potential jurors, very few will actually have their picture broadcast. As concerns the selected petit jurors, during the course of a criminal trial the issues of interest rarely concern jurors and media cameras are rarely trained upon them. But even if the pictures of jurors are broadcast, their faces will be recognized by the very small percentage of people who know them personally, and even those people may not know where the juror in question resides. On the other hand, publishing the names and addresses of jurors could expose them to unwanted telephone calls and visits from abusive and potentially threatening strangers.

We emphasize that there are circumstances where a trial judge can successfully enter an order like the one in this case. Moreover, we do not foreclose the trial judge ***279** in this case from revisiting this issue if new facts requiring such measures should arise. Because the trial court's order fails to satisfy the standard set forth in *Post-Newsweek Stations*, we grant that portion of the Petition which seeks relief from the trial court's order prohibiting the video photographing of prospective and seated jurors and quash same.

GODERICH, J., concurs.
COPE, J. (dissenting).
All agree that in a high-publicity case like this one, the court has the power to forbid the disclosure of the names and addresses of prospective, and actual, jurors. This harks back to the Sheppard murder case, in which:

> [T]he jurors were thrust into the role of celebrities by the judge's failure to insulate them from reporters and photographers. *The numerous pictures of the jurors, with their addresses, which appeared in the newspapers before and during the trial itself exposed them to expressions of opinion from both cranks and friends.*

Sheppard v. Maxwell, 384 U.S. 333, 353, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966) (citation omitted; emphasis added).

The point of a nondisclosure order in a high-publicity case is to insulate the jurors from such influences. *See id.* This is accomplished by prohibiting disclosure of the identity of the jurors. If it is appropriate to prohibit disclosure of names and addresses, then it is also appropriate to prohibit the photographing and videotaping of the jurors' faces. A photograph when broadcast or published can disclose identity as effectively as publication of the juror's name and address.

The trial court in this case said:

> THE COURT: Okay. I'm going to conduct an evidentiary hearing at this time. This Court will allow into evidence judicial notice of what it considers to be in the interest of the community.
>
> This is a case of very intense public interest. This is a case that, basically, the media has a great deal of interest in, that the media at large has a great deal of interest in.
>
> There have been numerous newspaper reports, numerous television reports.
>
> And in fact, it's safe to say that there's a great deal of interest in this case. The prevention of the broadcasting of the identities of the individuals who will be participating in jury selection is for the purpose of assuring that when they are going about their business as jurors, and go back home, go out to dinner, go to church, synagogue, go to Publix supermarket, whatever, they are not accosted by people who will say to them, I saw you on television.
>
> You are on this case, you are on the case trying Humberto Hernandez, and let me tell you this about that.
>
> It's for that purpose, in and of itself, that that Court order has been entered.
>
> It's a very slight infringement on the public at large, you will be present, the media will be present, the television cameras will be present, and they will be able to broadcast each and every event in this courtroom but for the jurors' appearance.
>
> They will not broadcast their faces, but the answers to questions provided to the Court, to the parties, will be a matter of public broadcast. You can go into that.
>
> So, basically, the order is simply to prevent the disclosure of the identities of the jurors, which is something that is envisioned under the law, since the law allows the Court to prevent the dissemination of a juror's name and address.

Transcript at 21-22.

Petitioner Sunbeam Television Corporation argues that the record is inadequate to support the order, but that is not so. The Florida Supreme Court has said that "a ruling can be supported by matters within the judicial knowledge of the trial judge, provided they are identified on the record and counsel given an opportunity to refute them." *State v. Palm Beach Newspapers, Inc.*, 395 So.2d 544, 547 (Fla.1981). Such an opportunity was given here.

Sunbeam does not dispute that the instant criminal prosecution is, as stated by the judge, a matter of "very intense public interest." Based on findings of voting fraud, this court recently set aside the results of the last ***280** City of Miami mayoral election, resulting in the ousting of Mayor Xavier Suarez and the seating of Mayor Joe Carollo. *See In re the Matter of the Protest of Election Returns and Absentee Ballots in the November 4, 1997 Election for the City of Miami, Florida*, 707 So.2d 1170, 1171-75 (Fla. 3d DCA), *review denied*, No. 92,735, 725 So.2d 1108 (Fla. Sept. 24, 1998). The instant criminal charges against former Miami City Commissioner Humberto Hernandez stem from the election investigation.[FN1]

> FN1. The charges are (1) fabricating physical evidence in violation of section 918.13, Florida Statutes; (2) conspiracy to do same; and (3) acting as an accessory after the fact in violation of section 777.03, Florida Statutes.

Under Florida Rule of Judicial Administration 2.170(a), videotaping and still photography in the courtroom are "[s]ubject at all times to the authority of the presiding judge to: (i) control the conduct of proceedings before the court; ... and (iii) ensure the

fair administration of justice in the pending cause ...." The Florida Supreme Court has said:

> [W]e can conceive of situations where it would be legally appropriate to exclude the electronic media where the public in general is not excluded.... *However, we deem it imprudent to compile a laundry list or adopt an absolute rule to deal with these occurrences. Instead, the matter should be left to the sound discretion of the presiding judge to be exercised in accordance with the following standard:*
>
> The presiding judge may exclude electronic media coverage of a particular participant only upon a finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media.

In re Petition of Post-Newsweek Stations, Florida, Inc., 370 So.2d 764, 779 (Fla.1979) (emphasis added; footnote omitted).

Jurors qualify as "participants." *See WFTV, Inc. v. State*, 704 So.2d 188, 190 (Fla. 4th DCA 1997). Where, as here, the concern about unsolicited contact with jurors is applicable to the entire group of potential, and actual, jurors, the jurors can be treated as a group, without a juror-by-juror inquiry. *See Times Publ'g Co. v. State*, 632 So.2d 1072, 1075 (Fla. 4th DCA 1994) ("We are not convinced that in the context of the selection of the jury it would be necessary to show particularized concern on the part of each prospective juror in order to preclude cameras from photographing the entire venire.").

In sum, the purpose of forbidding disclosure of the jurors' identities in a high-publicity case is "to protect the jury from outside influence." *Sheppard*, 384 U.S. at 358, 86 S.Ct. 1507. The common sense of the matter is that where (as here) an order forbidding disclosure of names and addresses is justified, it is also permissible to prohibit the photographing of the jurors.

Certiorari should be denied.[FN2]

FN2. The State has explained that its only specific request was to prohibit the disclosure of juror names and addresses, and that it did not ask for a proscription on the photographing of jurors. Be that as it may, the court had the latitude to raise the issue on its own motion.

Before SCHWARTZ, C.J., and NESBITT, JORGENSON, COPE, LEVY, GERSTEN, GODERICH, GREEN, FLETCHER, SHEVIN, and SORONDO, JJ.

On Rehearing En Banc

PER CURIAM.

[2][3] On the court's own motion, the court grants rehearing en banc, *see* Fla. R. App. P. 9.331(d)(1), and adopts the dissent of Judge Cope to the panel opinion as the opinion of this court. Although in the meantime the underlying criminal trial has ended, we decline to treat the case as moot because the issue presented is likely to recur. *See Godwin v. State*, 593 So.2d 211, 212 (Fla.1992); *Holly v. Auld*, 450 So.2d 217, 218 n. 1 (Fla.1984).

[4] In an abundance of caution we address a point raised by footnote in the petition for writ of certiorari. At one point in the delivery of the oral ruling in this case, the trial court said that the broadcast media "will not broadcast their [the jurors'] faces, but the answers to questions provided to the Court, to the parties, will be a matter of ***281** public broadcast." Petitioners state that they "are uncertain whether the Trial Court's Order also prohibits publication of juror information disclosed in open court. To the extent the Order seeks to prevent such publication, it is an unconstitutional prior restraint. *Nebraska Press Association v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976)." When the trial court's oral pronouncements are read in context, we are confident that the court only intended to impose a prohibition on the photographing of the jurors' faces, and that the court in no way intended to prohibit publication of juror information disclosed in open court.

We conclude that the trial court's order did not depart from the essential requirements of law, and accordingly the petition for writ of certiorari is denied.

SCHWARTZ, C.J., and NESBITT, JORGENSON, COPE, LEVY, GERSTEN, GREEN, FLETCHER and SHEVIN, JJ., concur.
SORONDO, J. (dissenting).
I respectfully dissent. I note that neither the defendant, Humberto Hernandez, nor the State of Florida opposed the position taken by the media, the petitioners in this case; that no motion for rehearing has been filed by any party; that the trial judge entered the ruling under review under the mistaken impression that the state was seeking the relief ultimately granted, and that the state candidly told this court that it had no reason to believe that the integrity of the jury in this case was in jeopardy. Regardless of these factors, the majority has decided to review this case *en banc* and in doing so concludes, contrary to the position taken by both the state and the media, that there is no difference between the publication of the prospective jurors' names and addresses and the broadcasting of their faces. For the reasons set forth in the original panel's majority opinion I disagree with that conclusion and re-emphasize that there is a qualitative difference between publishing a juror's name and address and broadcasting a juror's image during a newscast.

The majority opinion holds that where an order forbidding disclosure of names and addresses of jurors is justified, the standard set forth by the Florida Supreme Court in *Post-Newsweek Stations* for the prohibition of electronic media coverage is not applicable. The legal authority relied upon is "the common sense of the matter." I believe this decision is in direct conflict with *Post-Newsweek Stations* In order to ensure review by the Florida Supreme Court, I would certify the following question as one of great public importance:

> "WHERE A TRIAL COURT'S ORDER FORBIDDING DISCLOSURE OF THE NAMES AND ADDRESSES OF POTENTIAL AND SELECTED JURORS IS JUSTIFIED, IS IT PERMISSIBLE TO PROHIBIT THE ELECTRONIC VIDEO-PHOTOGRAPHY OF THE JURORS WITHOUT COMPLYING WITH THE STANDARD SET FORTH IN *POST-NEWSWEEK STATIONS* FOR THE EXCLUSION OF SUCH MEDIA COVERAGE?"

GODERICH, J., concurs.
Fla.App. 3 Dist.,1998.

Sunbeam Television Corp. v. State
723 So.2d 275, 23 Fla. L. Weekly D1835, 26 Media L. Rep. 2553

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HSarasota Herald-Tribune v. State
Fla.App. 2 Dist.,2005.

District Court of Appeal of Florida,Second District.
The SARASOTA HERALD-TRIBUNE, Tampa Tribune, and WFLA-TV News Channel 8,
Petitioners,
v.
STATE of Florida and Joseph Smith, Respondents.
No. 2D05-5337.

Nov. 17, 2005.

Background: Newspapers and television station filed petition for writ of certiorari, seeking review of order of the Circuit Court, Sarasota County, Andrew D. Owens, Jr., J., that attempted to protect the privacy interests of jurors who were serving in high profile murder trial by requiring all of the litigants and court personnel to refer to the jurors by number, instead of name, during court proceedings.

Holdings: The District Court of Appeal, Altenbernd, J., held that:
(1) trial court's order prohibiting news media from publishing the names and addresses of prospective or seated jurors was prior restraint on speech; and
(2) court's order prohibiting news media from at any time taking photographs or video of faces of the prospective or seated jurors operated as a prior restraint on speech.

Petition granted and order quashed in part.

West Headnotes

[1] Criminal Law 110 ⚿854(1)

110 Criminal Law
110XX Trial
110XX(J) Issues Relating to Jury Trial
110k854 Separation
110k854(1) k. Necessity of Keeping Jury Together Generally. Most Cited Cases
There may be times when sequestration of the jury is essential to protect a defendant's right to a fair trial or to assure the media its First Amendment rights, but sequestration should be a last resort. U.S.C.A. Const.Amend. 1.

[2] Criminal Law 110 ⚿1134.65

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)6 Extent of Review as Determined by Mode Thereof
110k1134.65 k In General. Most Cited Cases
(Formerly 110k1134(7))
A district court reviews a trial court order under its certiorari jurisdiction to determine whether the trial court violated procedural due process or whether its order departed from the essential requirements of the law. U.S.C.A. Const.Amend. 14.

[3] Constitutional Law 92 ⚿2116

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(V) Judicial Proceedings
92XVIII(V)2 Criminal Proceedings
92k2116 k. Juries. Most Cited Cases
(Formerly 92k90.1(3))

Jury 230 ⚿131(12)

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(12) k. Rights and Privileges of Jurors. Most Cited Cases

Jury 230 ⚿144

230 Jury
230VI Impaneling for Trial, and Oath
230k144 k. Designation and Identity of Jurors. Most Cited Cases
Trial court's order prohibiting news media from publishing names and addresses of prospective or

seated jurors in high profile murder trial, except as provided herein, was a prior restraint on speech, and thus, the prohibition would be stricken; with respect to order's phrase "except as provided herein," there did not appear to be any exceptions actually provided within order involving anyone other than the parties, news media was not party in the ongoing trial, and order not only restricted publication of jurors' names and addresses obtained through court, but it also prevented publication of this information when obtained through any outside source. U.S.C.A. Const.Amend. 1.

[4] **Constitutional Law 92 ⚿1830**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(I) Harassment and Threats
92k1829 Threats
92k1830 k. In General. Most Cited Cases
(Formerly 92k90.1(1))
In order for a threat to the administration of justice to permit the imposition of a prior restraint, that threat must be immediate. U.S.C.A. Const.Amend. 1.

[5] **Constitutional Law 92 ⚿2070**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(U) Press in General
92k2070 k. In General. Most Cited Cases
(Formerly 92k90.1(8))
Although a government may deny access to information and punish its theft, government may not prohibit or punish the publication of the information once it falls into the hands of the press unless the need for secrecy is manifestly overwhelming U.S.C.A. Const.Amend. 1.

[6] **Constitutional Law 92 ⚿2118**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(V) Judicial Proceedings
92XVIII(V)2 Criminal Proceedings
92k2118 k. Photographing, Recording, or Televising Proceedings. Most Cited Cases
(Formerly 92k90.1(3))

Jury 230 ⚿131(12)

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(12) k. Rights and Privileges of Jurors. Most Cited Cases

Jury 230 ⚿144

230 Jury
230VI Impaneling for Trial, and Oath
230k144 k. Designation and Identity of Jurors. Most Cited Cases
Trial court's order prohibiting news media from at any time taking photographs or video of the faces of the prospective jurors or seated jurors in high profile murder case operated as a prior restraint on speech because the obvious intent of prohibiting the act of photographing a juror's face was to prohibit the subsequent publication of that image, and the restraints imposed by trial court's order were overbroad. U.S.C.A. Const.Amend. 1.

[7] **Criminal Law 110 ⚿633.16**

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))
The presiding judge may exclude electronic media coverage of a particular participant only upon a finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media.

[8] **Criminal Law 110 ⚿633.16**

110 Criminal Law

110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))
The media's rights in recording courtroom proceedings are not absolute, and the trial court may properly impose certain restrictions on the media's presence in a court proceeding.

[9] Constitutional Law 92 ⚿2116

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(V) Judicial Proceedings
92XVIII(V)2 Criminal Proceedings
92k2116 k. Juries. Most Cited Cases
(Formerly 92k90.1(3))

Jury 230 ⚿131(12)

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(12) k. Rights and Privileges of Jurors. Most Cited Cases

Jury 230 ⚿144

230 Jury
230VI Impaneling for Trial, and Oath
230k144 k. Designation and Identity of Jurors. Most Cited Cases
Trial court order prohibiting news media from having "any contact" with prospective or seated jurors during high profile murder trial was overbroad and ambiguous, and thus, the prohibition would be stricken; the prohibition was not limited as to time or place and phrase "any contact" was overbroad.

[10] Constitutional Law 92 ⚿2116

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(V) Judicial Proceedings
92XVIII(V)2 Criminal Proceedings
92k2116 k. Juries. Most Cited Cases
(Formerly 92k90.1(3))

Criminal Law 110 ⚿633.33

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.33 k. Gag Orders and Injunctions. Most Cited Cases
(Formerly 110k633(1))

Criminal Law 110 ⚿855(8)

110 Criminal Law
110XX Trial
110XX(J) Issues Relating to Jury Trial
110k855 Misconduct of or Affecting Jurors
110k855(8) k. Communication Between Jurors and Third Persons. Most Cited Cases
Trial court's orders prohibiting news media from publishing names and addresses of jurors, publishing photographs of jurors, and having any contact with jurors during high profile murder trial, which were impermissible prior restraints on speech, would be deemed to have expired, to extent orders referred to prospective jurors, because jury panel had already been selected and seated, and, to extent that orders referred to seated jurors, orders would not be immediately stricken, so that trial court would have opportunity to enter a new, properly defined order. U.S.C.A. Const.Amend. 1.

***905**Gregg D. Thomas and Rachel E. Fugate of Holland & Knight LLP, Tampa, for Petitioners.
Charles J. Crist, Jr., Attorney General, Tallahassee, and Cerese Crawford Taylor, Assistant Attorney General, Tampa, for Respondent State of Florida.
Elliott C. Metcalfe, Jr., Public Defender, and Adam Tebrugge, Assistant Public Defender, Sarasota, for Respondent Joseph Smith.
John R. Blue, Matthew J. Conigliaro, and Robert E. Biasotti of Carlton Fields, ***906** P.A., St. Petersburg, for The Honorable Andrew D. Owens, Jr.
ALTENBERND, Judge.
The Sarasota Herald-Tribune, Tampa Tribune, and WFLA-TV News Channel 8 (the Media) petition this court to review an order entered by the trial court that attempts to protect the privacy interests of jurors who

are currently serving in the criminal trial of Joseph P. Smith. Mr. Smith stands accused of having murdered Carlie Brucia. The case has attracted extraordinary media interest. The trial court's order also attempts to protect Mr. Smith's right to receive a fair trial by jury, uninfluenced by matters or persons outside the courtroom. The Media challenges the order, claiming that it violates its rights under the First Amendment and that aspects of the order constitute prior restraint.

I. A Questionable "Emergency," and a First Amendment Issue that is Created More by the Openness of Florida's Courts Than by their Secrecy.

The challenged order, entered on October 21, 2005, is attached to this opinion as Appendix A. The order basically requires all of the litigants and court personnel to refer to the jurors by number, instead of name, during court proceedings. The lawyers are free to ask the jurors the usual questions during voir dire in open court, except that they are not to reveal the jurors' names or addresses. The Media is free to print descriptions of the jurors and observations about their statements and conduct in the courtroom, but the Media is not permitted to publish the names and addresses of the jurors even if the Media learns this information from an outside source. The Media is free to photograph the jury and to publish those photographs, except for the faces of the jurors. As in all trials, the jurors have been instructed by the trial court not to discuss the case with anyone before the case is over. If a juror has a problem or concern, that matter is to be addressed first to the bailiff or the trial judge and not to any other person. In this case, the trial court has reinforced these usual rules by instructing the Media not to have any contact with the jury during the proceedings.

The Media asks this court to quash the portions of the order "restricting release of juror names, banning photographing jurors, prohibiting the publication of juror names and addresses, and precluding the media from having any contact with jurors during the proceedings." Although the Media describes this matter as an "emergency," it admits that it does not make a practice of publishing the names and addresses of jurors during criminal trials and that it does not normally release photographs of the faces of such jurors or make any effort to contact them during trial. The Media claims no desire or intention to do any of these acts during this trial. The Media merely does not wish to have an order instructing it to do that which it intends to do voluntarily. Thus, the Media has filed this "emergency" petition more as a matter of principle and as academic exercise rather than from a genuine need and desire to publish information that it has determined to be vital to its readers or viewers.

The Media did not file this petition as rapidly as most true emergencies are filed in this court. The trial court's October 21, 2005, order was entered two days before the commencement of jury selection. The Media waited until November 7, 2005, to file this petition. Thus, the petition was not filed until the jury had been selected and had already been promised by the trial court that its privacy would be protected ***907** in this manner. The decision not to sequester the jury had already been implemented before the petition was filed.

The Media filed the petition after the jury had been sworn and jeopardy had attached. The respondents in this petition, of course, are all involved in a very serious murder trial in which the State is seeking the death penalty. Neither the State nor Mr. Smith has any disagreement with the trial court's order. It has been difficult for the respondents, the State, Mr. Smith, and the trial judge, to allocate time to respond on an emergency basis to the Media's petition, which appears to be an emergency in name only.

There is a certain irony in the reality that the trial court's order protecting the privacy of the jurors in this case is brought on, not by the secrecy of Florida's courts, but by the extraordinary steps that Floridians have taken to open our courts to the press and to the public. While many courts, including federal courts, permit only sketch artists into the courtroom, Florida has long permitted liberal access to the media. Our supreme court regularly conducts its oral arguments open to the world by live video on the internet. We live in a state that strongly believes that the legitimacy of our court system and the strength of our democracy is fostered when the public has broad access to court proceedings. There is no question that the informal partnership that the courts have built with the media over the last generation has given the public a far more accurate understanding of court proceedings than can ever be achieved by sketch artists.

But our joint success in making the courtroom accessible to the public has not come without complications. Mr. Smith's trial is being broadcast live, essentially to the world, by cable television. The cable television industry has come to realize that the public, including people far from Sarasota County, Florida, will view a trial not merely to assure that both sides receive a fair trial, but as a form of informative entertainment. Since the trial of O.J. Simpson, we have known that judges, lawyers, and expert witnesses can easily become household names and celebrities by virtue of a well-publicized trial.

Mr. Smith's trial, however, from his perspective, is not a matter of informative entertainment. He has a constitutional right to a fair trial by a jury, uninfluenced by matters or people outside the courtroom. Likewise, the jurors did not come to the courthouse to be celebrity guests on a reality TV show. Because they are adults with drivers licenses, they received an order of court compelling them to appear. They are obeying the law and performing a valuable public service that many others shirk.

In article 1, section 23, of the Florida Constitution, every natural person is guaranteed the right "to be let alone and free from governmental intrusion into the person's private life." Admittedly, we do not guarantee our citizens that they will be free from media intrusion into their lives, but citizens who are compelled to serve as jurors would seem to be entitled to some degree of protection when the government partners with the media to transform a courtroom into a live television show, supplemented by a large number of multimedia internet sites.

When a trial becomes such an extraordinary event, the trial court often needs to protect the jury from outside influence. Without some protection during the trial, jurors' names and faces would be readily recognizable by strangers who see them at the gas station, grocery store, or a restaurant. The likelihood that one or more persons would try to influence their decisions,*908 innocently or otherwise, seems very high.

[1] Sequestration of a jury is always a possibility, but the truth is that sequestration is little better than imposing an involuntary detention on a group of citizens because of their willingness to perform their civic duty. It should be a last resort. There may be times when sequestration is essential to protect a defendant's right to a fair trial or to assure the media its First Amendment rights, but sequestration is a major intrusion into the liberty rights of the jurors and their families.

It is in this context that the trial court tried to balance the respective constitutional rights of Mr. Smith, the Media, and the jurors. In seeking to achieve this balance, the trial court presented its findings, as they relate to the level of media coverage surrounding these events, to the media representatives prior to imposing the challenged order. It is important to note that the objections raised by the Media did not contest these findings.

II. Analysis

[2] The Media's petition seeks certiorari review of the order. A district court reviews a trial court order under its certiorari jurisdiction to determine whether the trial court violated procedural due process or whether its order departed from the essential requirements of the law. *Fassy v. Crowley*, 884 So.2d 359 (Fla. 2d DCA 2004). There is no dispute that the trial court gave the Media notice of its intention to impose some restrictions and that it held a hearing on October 13, 2005, to determine the necessity for imposing any limitations on media publication of jury information. The specific media outlets represented at the hearing were The Sarasota Herald Tribune, Sarasota News Now, WFLA Channel 8, The Tampa Tribune, The Bradenton Herald, and all outlets owned by Times Publishing Company. These represented outlets attended the hearing and were given an opportunity to help fashion the least restrictive means to protect Mr. Smith's right to a fair trial. Thus, the Media is not arguing that it was deprived of due process. It argues that the order departs from the essential requirements of the law and violates the First Amendment.

[3] The Media's objections go to three provisions within the order:

> 1. The clerk of this court shall not release to any person the names, addresses, or any other identifying information concerning potential jurors in this case, except as provided herein. The news media is prohibited from publishing the names and

> addresses of prospective or seated jurors in this case, except as provided herein.
>
> ....
>
> 4. The news media is prohibited at any time from taking photographs or video of the faces of the prospective jurors or seated jurors in this case.
>
> 5. The media is precluded from having any contact with prospective or seated jurors during the proceedings.

As to the restrictions in paragraph 1, we would first note that although both sentences in paragraph 1 end with "except as provided herein," there do not appear to be any exceptions actually provided within the order involving anyone other than the parties. As the Media is not a party in the ongoing trial, it would appear it has not been afforded any of the exceptions provided in the order. Furthermore, we note that where members of the media challenged an order of the trial court in a highly publicized criminal trial, in a case with similar facts and circumstances to those in the instant case, the media and the parties were able to reach an independent***909** conclusion that the withholding of jurors' names and addresses by the court was permissible. *Sunbeam Television Corp. v. State*, 723 So.2d 275 (Fla. 3d DCA 1998).

However, the second sentence of paragraph 1 is unquestionably a prior restraint. As stated, this sentence not only restricts publication of jurors' names and addresses obtained through the court, but it also prevents the publication of this information when obtained through any outside source. Furthermore, the order does not expressly state whether these restrictions will end at the conclusion of the trial. At best, these deficiencies make the restrictions in paragraph 1 overly broad.

Florida Rule of Judicial Administration 2.170 provides a presiding judge with the authority to control electronic media and still photography coverage of trial court proceedings. Rule 2.170(a) specifically provides:

> Subject at all times to the authority of the presiding judge to: (i) control the conduct of proceedings before the court; (ii) ensure decorum and prevent distractions; and (iii) ensure the fair administration of justice in the pending cause, electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed in accordance with the following standards of conduct and technology promulgated by the Supreme Court of Florida.

[4] In order for a threat to the administration of justice to permit the imposition of a prior restraint, that threat must be immediate. *Miami Herald v. McIntosh*, 340 So.2d 904, (Fla.1976). None of the parties or participants in this proceeding have indicated that there exist any specific threats to either the jury venire as a whole or to any individual member of the impaneled jury. However, the findings of the trial court regarding the intense media coverage during these proceedings and the possibilities of juror influence or harassment while the jurors are going about their daily lives is certainly a valid concern related to the fair administration of justice. There are unquestionably times when it might be necessary for a trial judge to impose media restrictions on the publication of juror information, and nothing in this opinion should be read to fault the trial court in the execution of its valid intent to protect the jurors' privacy interests and the Sixth Amendment rights of the accused while maintaining a balancing with the First Amendment interests of the press and public.

The test used to analyze whether restraints imposed on the media in criminal cases constitute an unconstitutional prior restraint was established in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976). The Supreme Court in *Nebraska Press* set forth a three-prong consideration to determine: (1) the nature and extent of pretrial news coverage; (2) whether alternative, less restrictive measures are available which would protect the integrity of the judicial process without imposing a restraint on the media; and (3) the effectiveness of the ordered restraint.

There is no doubt that the media coverage of this trial is extreme as it relates to the first prong of *Nebraska Press*. Furthermore, the trial court cannot be expected to rely on an indication from seven represented media outlets, the unrepresented internet bloggers, and other less reputable communication sources that they have no intent to publish the names and addresses of the

jury to ensure the integrity of trial. Nothing in the record before this court allows us to conclude that any specific intimidation or threat to the jury has occurred, but the trial court clearly ***910** sets forth a basis for why the publication of jurors' names and addresses might create individualized instances of intimidation. Taking steps to prevent court-provided access to the very information that would enable specific identification of individual juror members would appear to be within the trial court's discretion. Neither the State, Mr. Smith, the media, or any other entity has presented evidence or documentation to suggest that this order has been ineffective in protecting the jury from public intimidation and ensuring that throughout the proceedings, thus far, ANY undue influence has occurred. However, our concern with the restraint imposed in paragraph 1 is primarily related to whether less restrictive alternatives to denying any and all publication of this information, regardless of its source, were ever available or considered.

[5] As it is broadly stated, we must quash that portion of paragraph 1 that prohibits the publication of the otherwise obtained jury information. "Although a government may deny access to information and punish its theft, government may not prohibit or punish the publication of the information once it falls into the hands of the press unless the need for secrecy is manifestly overwhelming." *Fla. Publ'g. Co. v. Brooke*, 576 So.2d 842 (Fla. 1st DCA 1991). Although we make no specific findings as to whether circumstances at this point in the trial would or would not allow for the prior restraint of this information, there currently exists nothing in the record before us to say that all less restrictive means were adequately considered, and we cannot uphold this portion of the order.

[6] As to the restrictions in paragraph 4, we first note that the Media characterizes this restriction as a prohibition against photographing the jurors, when the restriction is actually limited to the jurors' faces. We recognize, however, that it might be difficult or impossible to photograph the jurors without the risk of photographing their faces. Additionally, the order contains no time limit and is ambiguous as to whether it applies to locations other than the courtroom or the courthouse. Effectively, paragraph 4 also operates as a prior restraint because the obvious intent of prohibiting the act of photographing a juror's face is to prohibit the subsequent publication of that image.

[7][8] "No court has held that it is per se reversible error to allow the jurors' faces to be photographed in a controversial criminal trial. It is ultimately the fairness of the proceedings which determines the appropriateness of limitations on media access." *Chavez v. State*, 832 So.2d 730, 760 (Fla.2002). By waiting to file this petition, the Media created a situation whereby the seated jurors have now been given an assurance of privacy in reliance on the trial court's order; making it difficult to examine the less restrictive alternatives that might have been available to the court at the time the prior restraint was imposed when many of those less restrictive means are no longer available in light of the jurors' foreseeable reliance on privacy assurances of the order.

> The presiding judge may exclude electronic media coverage of a particular participant only upon a finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media.

In re Post-Newsweek Stations, 370 So.2d 764, 779 (Fla.1979). Although *WFTV v. State*, 704 So.2d 188, 191 (Fla. 4th DCA 1997), holds that "[n]othing in Rule 2.170, *Post-Newsweek*, or any other supreme court opinion suggests that jurors or prospective***911** jurors are to be treated differently from other types of trial participants-such as attorneys, witnesses, or court personnel-for the purposes of publishing or broadcasting their photographic images," the media's rights in recording the courtroom proceedings are not absolute, and the trial court may properly impose certain restrictions on the media's presence in a court proceeding.

The holding in *Sunbeam* identifies the possibility of circumstances whereby a trial court could properly impose a restriction on the media coverage of jurors when that court finds that, as set forth in *Post-Newsweek*,"such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types

of media." 723 So.2d at 278. In imposing the restrictions in the order currently on review, the trial court argues that it specifically made the requisite findings. This argument raises the question of whether, in light of the holding in *Sunbeam*, the trial court's order as to paragraph 4 is in fact a departure from the essential requirements of law. Our review of this question would be somewhat limited by the Media's self-imposed necessity for this court's hurried review. However, we need not reach a conclusion to this far-reaching question to fully review the issue currently before us because the restraints imposed by paragraph 4 are overbroad as currently written.

[9] As to the restrictions in paragraph 5, although it appears to be intended as merely a counterpart to the restrictions placed on the jury through any standard jury instructions, the prohibition against "any contact" "during the proceedings" seems very broad and ambiguous and requires that the prohibition be stricken.

The overbreadth of paragraphs four and five is partially remedied by the fact that a jury has already been seated. In paragraph four, the trial court prohibited the news media from taking a photograph or video of the face of a prospective juror as well as a selected or seated juror "at any time." Similarly, in paragraph five, the news media was prohibited from having "any contact with prospective or seated jurors during the proceedings." Paragraph four prohibits the taking of a photograph or video depiction of a *prospective* juror "at any time." As there is no legal basis to continue to maintain the bar, because a jury panel has now been selected and seated, such a prohibition, even if initially valid, must now expire. Paragraph five similarly bars "any contact" with *prospective* jurors by the media. The prohibition is not limited as to time or place and "any contact" is, as used, overbroad. However, for the reasons previously expressed related to prospective jurors in paragraph 4, this bar must also now expire.

The remaining prohibitions upon the Media set forth in paragraphs four and five pertaining to the actual sitting jurors suffer from the identical overbroad deficiencies as those identified for prospective jurors. For example, paragraph four could be read to preclude publication even after the jurors' terms of service have expired. Paragraph five suffers from a similar defect. As another example, the term "during these proceedings" could be interpreted to include all legal proceedings involving the instant case, including appeals.

[10] Accordingly, we hold that the prohibitions that remain set forth in paragraphs four and five shall expire at 11:00 p.m. on November 18, 2005. We do not strike them immediately so that the trial court may, if it so chooses, enter a new, ***912** properly defined order with all necessary findings as set forth by current case law, prior to the expiration of time identified herein. Due to the constraints of the continuing trial process, it may be necessary for the trial court to seek assistance from another judge to accomplish this task. For the above-stated reasons, we grant the Media's petition in part and quash that portion of the trial court's order referred to in this opinion as the second sentence of paragraph 1. Furthermore, should the trial court decline to enter a new order addressing the deficiencies identified in paragraphs 4 and 5 within the time constraints set forth in this opinion, those portions of the order are also quashed.

Petition granted and order quashed in part.

CASANUEVA and VILLANTI, JJ., Concur.

APPENDIX A

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT

IN AND FOR SARASOTA COUNTY, FLORIDA

STATE OF FLORIDA,

vs.

JOSEPH P. SMITH, Defendant.

CASE NO. 2004 CF 2129 NC

ORDER CONCERNING MEDIA COVERAGE; ORDER LIMITING RELEASE OF JUROR INFORMATION; ORDER RESTRICTING INTERVIEWS HELD WITHIN SARASOTA JUDICIAL CENTER

This matter came before the Court on its own motion in anticipation of the pending jury trial scheduled to commence on November 7, 2005. The Court provided timely notice of the hearing to the parties and the media representatives to allow a fair opportunity to be heard.[FN1] At the conclusion of the hearing, which was held on October 13, 2005, counsel for the media requested additional time to file additional, written objections, and the request was granted.

FN1. *See WFTV, Inc. v. State*, 704 So.2d 188, 190 (Fla. 4th DCA 1998).

Case law provides that a "ruling can be supported by matters within the judicial knowledge of the trial judge, provided they are identified on the record and counsel [is] given an opportunity to refute or challenge them." *State v. Palm Beach Newspapers*, 395 So.2d 544, 547 (Fla.1981). At the hearing, the Court set forth the following findings and rulings on the record and provided counsel and media representatives a fair and reasonable opportunity to challenge or refute them.

Findings

1. This is a case of intense public interest, which has generated significant media attention, both nationally and locally. The media coverage has consisted not only of newspaper articles, but has also included television, radio, and online coverage.

2. Examples of online media coverage include the following:

a. On the *Sarasota Herald-Tribune's* website, there is a section entitled "Special Section: Carlie Brucia Abduction" containing an extensive history of the Brucia case including videos, documents and archived news stories. *See Sarasota Herald-Tribune Online* (visited October 13, 2005)

b. *The Tampa Tribune's* website has a similar "Special Reports" section dedicated to news stories, videos and ongoing coverage of the Carlie Brucia case. ***913***See The Tampa Tribune Online* (visited October 13, 2005)

c. *The St. Petersburg Times Online* has a similar "websection" devoted to "The Search for Carlie" *See The St. Petersburg Times Online* (visited October 13, 2005)

3. A Google internet search using the words, "Carlie Brucia murder" yields approximately 15,000 hits and likely will yield more hits as the trial date approaches.

4. The national media has also covered this case extensively and an online search reveals that as of October 13, 2005, approximately 9 stories had been posted on CNN.COM and 22 stories has been posted on FOXNEWS.COM.

5. Jurors must be assured of the ability to go about their daily business without being identified, or accosted, by individuals in the community who may recognize their names or faces from the television or media coverage of the trial. This need requires that reasonable steps be taken to restrict the release of identifying information of the jurors. *See Sunbeam Television Corp. v. State*, 723 So.2d 275 (Fla. 3d DCA 1998), *reh'g en banc granted* 723 So.2d at 280 (Fla. 3d DCA 1998) *rev. denied* 740 So.2d 529 (Fla.1999).

6. By protecting the jurors' identities, they will be protected from outside influences, such as individuals who may recognize them and offer unsolicited "advice," or "tips," unwanted personal comments, or opinions about the case. *See Sunbeam Television Corp. v. State*, 723 So.2d 275 (Fla. 3d DCA 1998) *reh'g en banc granted* 723 So.2d at 280 (Fla. 3d DCA 1998) *rev. denied* 740 So.2d 529 (Fla.1999).

7. In *Sheppard v. Maxwell*, the United States Supreme Court described the unfortunate impact of a lower court failing to properly protect jurors and noted:

> The numerous pictures of the jurors, with their addresses, which appeared in the newspapers before and during the trial itself exposed them to expressions of opinion from both cranks and friends.

Sheppard v. Maxwell, 384 U.S. 333, 353, 86 S.Ct. 1507, 16 L.Ed.2d 600, (1966).

8. The Court has an affirmative duty to control all aspects of pretrial and trial proceedings and must take steps to ensure that the jurors are not improperly influenced by extraneous factors or sources sufficient to endanger the Defendant's right to a fair trial. *Gannett Co. Inc. v. State*, 571 A.2d 735, 751 (Del.1990).[FN2]

> FN2. The Florida Supreme Court also stressed that, "it remains essential for trial judges to err on the side of fair trial rights for both the state and the defense. The electronic media's presence in Florida's courtrooms is desirable, but it is not indispensable." *State v. Palm Beach Newspapers*, 395 So.2d 544, 549 (Fla.1981).

9. The Court finds there is an imminent threat to the administration of justice in this case, sufficient to ban the media from photographing and videotaping prospective or seated jurors. *See Times Publishing Co. Inc. v. State*, 632 So.2d 1072, 1075-1076 (Fla. 4th DCA 1994). This Order extends beyond the courtroom as detailed below.

10. The Court finds it would serve little purpose to protect juror privacy within the courtroom without instituting measures to protect the jurors' privacy and security once they leave the judicial center.

11. The Court has coordinated with the Sarasota County Sherriff's Office to ensure that proper security measures are in place. To detail the extent of the security measures that the Sherriff's Office and the Court have been taken in this Order, which when entered will be a public record,***914** would seriously curtail the effectiveness of those measures.

12. Pursuant to the provisions of Administrative Order 2004-24.2, paragraph 11, which provides "if available, space for interviews will be designated," the Court makes a specific finding that the Sarasota Judicial Center does not contain adequate space available for media representatives to conduct interviews. Media representatives will need to conduct interviews outside the Sarasota Judicial Center.

It is, therefore,

ORDERED:

1. The clerk of this Court shall not release to any person the names, addresses, or any other identifying information concerning potential jurors in this case, except as provided herein. The news media is prohibited from publishing the names and addresses of prospective or seated jurors in this case, except as provided herein.

2. Trial Counsel for the State of Florida and the Defendant are hereby exempted from this provision and shall be given full access to potential juror information. Trial Counsel may use such information to investigate for the purposes of the voir dire process, but shall not reveal this information to anyone not a party to this action or a member of the trial counsel's litigation team.

3. On jury selection days, prospective jurors will be assigned numbers. Each prospective juror will have a unique number. In open court, the Judge, trial counsel, the courtroom clerk, and the jury office will refer to the prospective jurors (and eventually seated jurors) only by number. No one shall reference a prospective juror by name or reveal juror-identifying information, such as addresses in open court.

4. The news media is prohibited at any time from taking photographs or video of the faces of the prospective jurors or seated jurors in this case.

5. The media is precluded from having any contact with prospective or seated jurors during the proceedings.

6. The news media remains free, subject to the specific provisions of this Order, to report any events surrounding this case.

7. The media is not precluded from being present in the courtroom according to prior agreed-upon procedures for high-profile cases.

8. The media is not precluded from publishing identifying juror information disclosed in court or answers to questions that are disclosed in open court.

9. The media is not to approach trial counsel, the Defendant, witnesses, or the Judge while in the

Courtroom.

10. If juror questionnaires or information sheets are used, and those records are deemed to constitute public records under Florida law, and proper requests are made for those records during the time of jury selection and the trial of this case, prior to their release, any juror identifying information (for either prospective or seated jurors) shall be released from the questionnaires or information sheets.

11. Due to space constraints within the Sarasota Judicial Center and for safety considerations, all interviews conducted by media representatives must occur outside of the Sarasota Judicial Center.[FN3]

> FN3. As clarified in open court, the media may make a request for an interview while in the Sarasota Judicial Center; however, the actual interview must occur outside.

12. No cellular telephones or electronic devises, which security determines may ***915** cause unnecessary disruptions or distractions will be permitted in the courtroom.

DONE AND ORDERED in Sarasota, Sarasota County, Florida, on this 21st day of October 2005.

/s/ Andrew D. Owens, Jr.

Andrew D. Owens, Jr., Circuit Judge

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Copies to:

Office of Court Administration-Sarasota County

Court Reporter-Sarasota County

Bailiffs-Sarasota County

Court Clerk-Sarasota County

Fla.App. 2 Dist.,2005.
Sarasota Herald-Tribune v. State
916 So.2d 904, 30 Fla. L. Weekly D2630, 34 Media L. Rep. 1707

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HState v. Green
Fla., 1981.

Supreme Court of Florida.
STATE of Florida, Petitioner,
v.
Adelita Quejado GREEN, Respondent.
No. 57398.

March 5, 1981.

Defendant was convicted in the Circuit Court, Dade County, Allen M. Gable, J., of grand larceny, and she appealed. The District Court of Appeal, 377 So.2d 193, reversed and remanded. On petition for writ of certiorari on a certified question, the Supreme Court, Overton, J., held that: (1) trial court's evidentiary finding that actual in-court electronic coverage would render otherwise competent defendant incompetent to stand trial met requirements of "qualitatively different" test used to determine whether electronic media should be excluded from courtroom, and (2) where defendant had previously been found incompetent to stand trial, where treatment subsequently rendered her competent to proceed with the cause, and where defense motion to exclude electronic media asserted under oath that defense counsel would produce psychiatric testimony at evidentiary hearing which would establish that the presence of electronic media would adversely affect defendant's ability to communicate with counsel, trial court was required to have an evidentiary hearing on the competency issue which would have allowed application of the "qualitatively different" test.

Certified question answered in affirmative; remanded for new trial.

Adkins, J., concurs in result only.

West Headnotes

[1] Constitutional Law 92 ⚿4605

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)4 Proceedings and Trial
92k4603 Public Trial
92k4605 k. Publicity. Most Cited Cases
(Formerly 92k268(2.1), 92k268(2))

Criminal Law 110 ⚿633.16

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1), 92k268(2.1), 92k268(2))
Trial court's evidentiary finding that actual in-court electronic coverage would render otherwise competent defendant incompetent to stand trial met requirements of "qualitatively different" test used to determine whether electronic media should be excluded from courtroom; accordingly, trial court was compelled under the due process clause to prohibit electronic media coverage of the court proceedings. West's F.S.A.Const. Art. 1, § 9; U.S.C.A.Const. Amend. 14.

[2] Criminal Law 110 ⚿633.16

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))
A defendant does not have an absolute constitutional right at his or her option to exclude electronic media coverage of the judicial proceedings.

[3] Criminal Law 110 ⚿633.16

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))
Trial judge's discretionary authority in applying "qualitatively different" test, to determine whether

electronic media coverage will have a substantial effect upon particular individual which is "qualitatively different" from effect on members of public in general and whether such effect will be qualitatively different from coverage by other types of media, is analogous to the authority trial judges have traditionally applied in cases where special injury and special damages arise resulting from public disclosure of confidential informants, trade secrets, and details of child custody proceedings.

[4] Criminal Law 110 ⚿633.16

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))
Any general effect resulting from public notoriety of case will not suffice to trigger electronic media exclusion from courtroom.

[5] Criminal Law 110 ⚿633.16

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))
Single addition of the camera in the courtroom in circumstances where trial has engendered considerable public interest resulting in courtroom full of spectators, news reporters, and sketch artists, should not increase tension significantly so as to require exclusion of electronic media from courtroom, given fact that electronic media will report the proceedings even if its camera is not actually in courtroom.

[6] Criminal Law 110 ⚿633.16

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))
Wider dissemination of information concerning judicial proceedings is not reason to exclude camera from courtroom.

[7] Criminal Law 110 ⚿633.16

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))
Procedural process which necessarily follows from trial judge's discretionary authority in applying "qualitatively different" test requires expeditious hearing in all cases where proper motions to exclude electronic media from courtroom are presented.

[8] Criminal Law 110 ⚿633.16

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))
Proper motion to exclude electronic media from courtroom should set forth facts that, if proven, would justify entry of a restrictive order; general assertions or allegations are insufficient.

[9] Criminal Law 110 ⚿633.16

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))
Trial court must allow affected media to participate in hearing held pursuant to motion to exclude such media from the courtroom.

[10] Criminal Law 110 ⚿633.16

110 Criminal Law

110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))
Proceedings to determine whether electronic media should be excluded from trial coverage are collateral and, as such, should not necessarily delay main proceeding, particularly in criminal matters where right to speedy trial may be adversely affected.

[11] Criminal Law 110 ⚿633.16

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))
"Qualitatively different" test, used to determine whether electronic media should be excluded from trial coverage, has constitutional dimensions when applied to a criminal defendant in that the constitutional right to fair trial is at issue. U.S.C.A.Const. Amends. 6, 14.

[12] Criminal Law 110 ⚿633.16

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))
Given fact that "qualitatively different" test, used to determine whether electronic media should be excluded from trial coverage, has constitutional dimensions when applied to the criminal defendant, a different quantum of proof applies to a criminal defendant as compared to all other trial participants.

[13] Criminal Law 110 ⚿633.16

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))
General trial participant must clearly show some special and identifiable injury from presence of camera and electronic media under "qualitatively different" test used to determine whether electronic media should be excluded from trial coverage.

[14] Criminal Law 110 ⚿633.16

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))
Criminal defendant has twofold opportunity to show either that there is reasonable and substantial likelihood that identifiable prejudice to right of fair trial will result from presence of electronic media under "qualitatively different" test, or the same special or identifiable injury as other trial participants.

[15] Criminal Law 110 ⚿633.16

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))
Under "qualitatively different" test, showing must be made that prejudice or special injury resulted solely from presence of electronic media in courtroom in manner which is qualitatively different from that caused by traditional media coverage.

[16] Criminal Law 110 ⚿625.10(4)

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k623 Separate Trial or Hearing on Issue of Insanity, Incapacity, or Incompetency
110k625.10 Preliminary Proceedings
110k625.10(4) k. Initiation by Prosecution or Sua Sponte by Court; Absence of Request. Most Cited Cases

(Formerly 110k625)
Trial judge has the responsibility of conducting an evidentiary hearing on a defendant's competency to stand trial whenever any reasonable indication of incompetency arises, whether or not trial counsel requests such a hearing.

[17] Criminal Law 110 ⚿633.16

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))
Where defendant had previously been found incompetent to stand trial, where treatment subsequently rendered her competent to proceed with the cause, and where motion to exclude electronic media asserted under oath that defense counsel would produce psychiatric testimony at evidentiary hearing which would establish that presence of electronic media would adversely affect defendant's ability to communicate with counsel and cause her to lapse back into psychosis, trial judge was required to have an evidentiary hearing on the competency issue which would have allowed application of the "qualitatively different" test to determine whether electronic media should have been excluded from courtroom.

[18] Criminal Law 110 ⚿633.16

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))
While requiring a hearing, procedure to determine applicability of "qualitatively different" test, used to determine whether electronic media should be excluded from courtroom, may not necessarily require an evidentiary hearing; trial court in many instances could have a hearing and make a decision on the basis of affidavits after all parties have had an opportunity to be heard.

[19] Criminal Law 110 ⚿633.16

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))
Cameras in courtrooms should not be situated so that they *interfere with proceeding or with any of trial participants* or their activities, especially defense counsel-defendant conferences in criminal trials.

*534 Jim Smith, Atty. Gen., and James H. Greason, Asst. Atty. Gen., Miami, for petitioner.
Roy E. Black, Miami, for respondent.
Talbot D'Alemberte and Donald M. Middlebrooks, of Steel, Hector & Davis, Miami, *535 for Post-Newsweek Stations, Florida, Inc., amicus curiae.
OVERTON, Justice.
This is a petition for writ of certiorari from a decision of the Third District Court of Appeal, reported at 377 So.2d 193 (Fla.3d DCA 1979), in which it certified to this Court the following question to be of great public interest:

> Whether a trial court is constitutionally required (under the due process clause of the Fourteenth Amendment to the United States Constitution and article I, section 9, of the Florida Constitution) to prohibit electronic media coverage of court proceedings in a criminal case upon a demonstration that such coverage would render an otherwise competent defendant incompetent to stand trial?

[1] We have jurisdiction.[FN1] Applying the facts of the instant case to the certified question, we approve the affirmative answer of the district court and hold that a *trial court's evidentiary finding that actual in-court* electronic coverage would render an otherwise competent defendant incompetent to stand trial meets the requirements of the "qualitatively different" test set forth in In re Post-Newsweek Stations, Florida, Inc., 370 So.2d 764 (Fla.1979).[FN2] This answer is also mandated by the principles expressed by the United States Supreme Court in Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). See Lane v. State, 388 So.2d 1022 (Fla.1980).

FN1. Art. V, s 3(b)(3), Fla.Const. (1972).

FN2. In Post-Newsweek, we held that electronic media courtroom coverage did not per se violate

> due process standards under the United States Constitution. That holding has recently been approved. Chandler v. Florida, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981).

The district court reversed and remanded the cause for a new trial based on three trial court errors: (1) the trial court's failure to require a pretrial evidentiary hearing on respondent's motion to exclude electronic media; (2) the trial court's failure to enforce respondent's subpoena duces tecum; and (3) the trial court's exclusion of two of respondent's impeachment witnesses.

We approve the district court decision and find points two and three were properly decided, do not concern the certified question, and necessitate no further discussion.

The relevant facts concerning the first issue, which is the basis of the certified question, are as follows. Respondent, an attorney, was charged with grand larceny for allegedly misappropriating client funds. After three court-appointed psychiatrists found respondent incompetent to stand trial, the trial court postponed the proceedings. Several months later, respondent was reexamined by the same three psychiatrists and found to be competent to stand trial, although each agreed that she continued to be mentally disturbed. After an evidentiary hearing on the issue, the trial judge found that respondent was indeed competent for trial and set a trial date.

Defense counsel thereafter moved for the exclusion of electronic media from the trial, asserting as grounds the history of respondent's mental illness and, by affidavit, set forth the opinion of one of the court-appointed psychiatrists who allegedly had concluded:

> (A)ppearance of the electronic media in this case would adversely affect the defendant. Her anxiety and depression will be heightened and actively interfere with her ability to defend herself and to communicate with counsel.

Defense counsel further stated:

> That based upon his extensive contact with the defendant over a ten month period he has concluded that extensive media coverage of the trial will severely lessen defendant's ability to properly defend herself. Up to a month ago this defendant was unable to actively assist in the preparation of her defense: she was totally apathetic, had no interest in discussing the details of the transactions involved, and continually expressed extreme depression concerning the future.***536** Her condition is still very fragile; articles in newspapers, radio and television affect her greatly. The intrusion of cameras into the courtroom would paralyze her with apprehension and consequently prevent her from defending herself.

The motion also included the report of respondent's treating psychiatrist who had concluded that the presence of electronic media in the courtroom would adversely impact respondent's competency to stand trial. The trial court heard argument on the merits of the motion but refused to take any testimony on the issues presented. The motion was denied.

[2] On appeal, the Third District Court correctly rejected respondent's contention that she had an absolute constitutional right at her option to exclude electronic media coverage of the judicial proceedings, Chandler v. Florida, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740, 99 U.S.L.W. 4141 (1981); Post-Newsweek ; but found that respondent's motion to exclude electronic media alleged probable prejudice violative of constitutional due process standards sufficient to require an evidentiary hearing on the matter. The district court expressly found from the record:

> Although the trial court adjudged the defendant competent to stand trial, no determination or inquiry was ever made by the trial court as to whether such competency would exist in the event the trial were televised.... (I)t was incumbent upon the trial court to conduct a full evidentiary hearing thereon which, at a minimum, should have included testimony or reports by the court-appointed psychiatrists as to the impact which electronic media coverage of this trial would have on *the defendant's competency to stand trial.*

377 So.2d at 200-01. The district court concluded that the trial court committed reversible error in refusing to provide an evidentiary hearing on this issue.

[3] The issue in the instant case sharpens the focus on the discretionary authority given the trial judge to restrict electronic coverage as it applies to criminal defendants and other trial participants generally. We established the test for the trial judge to apply in Post-Newsweek :

> The presiding judge may exclude electronic media coverage of a particular participant only upon a finding that such coverage will have a substantial effect upon

> the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media.

Id. at 779. This "qualitatively different" test gives the trial judge definitive guidelines by which he is allowed to exclude electronic media from court proceedings. We note that the trial judges' discretionary authority in this regard is analogous to the authority trial judges have traditionally applied in cases where special injury and special damages arise resulting from public disclosure of confidential informants, trade secrets, and details of child custody proceedings.

[4][5] The instant test emphasizes that any general effect resulting from public notoriety of the case will not suffice to trigger electronic media exclusion. We realize that courtrooms are intimidating and that apprehension accompanies most individuals who must participate in a court proceeding. This, however, is not a product of electronic media's presence. Courtrooms were intimidating long before the advent of electronic media. Trials with considerable public interest have always resulted in courtrooms full of spectators, news reporters, and sketch artists, all of whom add to the intimidation of the courtroom atmosphere. In our view, the single addition of the camera in the courtroom in these circumstances should not increase tension significantly, given the fact that electronic media will report the proceedings whether or not its camera is actually in the courtroom.

[6] Wider dissemination of information concerning judicial proceedings is not a reason to exclude the camera from the courtroom. Local knowledge of the proceedings *537 will be no greater proportionately with electronic media than when this country was primarily agrarian and commonplace court attendance resulted in widespread knowledge of courtroom proceedings. As our society has become more complex and urbanized, more citizens have become dependent on the media for courtroom knowledge rather than actual observation. The camera's physical presence in the courtroom once again allows, to a limited extent, personal observation of the judicial process.

We determined in our Post-Newsweek decision that the presence of electronic media in and of itself was not prejudicial. In fact, answers to a questionnaire submitted to witnesses, jurors, and court personnel reflected that there was almost no difference in concern about the dissemination and publication of their trial participation by the print media as compared to its dissemination by the electronic media.[FN3] We concluded that under these circumstances, citizens should not be denied this additional means to see their government in operation absent a truly overriding interest.

> FN3. The following questions and responses are excerpted from the Court's trial participant survey conducted after the pilot program initially allowing electronic media access to Florida courts. See Post-Newsweek, 370 So.2d at 767.
>
> 27. To what extent did knowing that the proceedings may be televised affect your desire to participate in the trial?

Juror	
---	
1. Not at all	86.1%
2. Slightly	5.9%
3. Moderately	2.8%
4. Very	2.8%
5. Extremely	2.4%

average response	1.3

Witness

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1. Not at all	73.2%
2. Slightly	10.4%
3. Moderately	4.6%
4. Very	5.7%
5. Extremely	6.2%
average response	1.63

Court Personnel

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1. Not at all	80.4%
2. Slightly	9.3%
3. Moderately	6.5%
4. Very	1.9%
5. Extremely	1.9%
average response	1.35

Attorney

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1. Not at all	56.5%
2. Slightly	20.4%

3. Moderately	15.6%
4. Very	4.1%
5. Extremely	3.4%
average response	1.74

30. To what extent did knowing that the proceedings may receive newspaper coverage affect your desire to participate in the trial?

Juror

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1. Not at all	87.6%
2. Slightly	6.2%
3. Moderately	4.5%
4. Very	.2%
5. Extremely	1.4%
average response	1.2

Witness

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1. Not at all	78.3%
2. Slightly	8.4%
3. Moderately	5.7%
4. Very	3.2%
5. Extremely	4.4%
average response	1.5

Court Personnel

---

1. Not at all	86.1%
2. Slightly	6.5%
3. Moderately	4.6%
4. Very	1.9%
5. Extremely	.9%
average response	1.2

Attorney

---

1. Not at al	65.3%
2. Slightly	15.3%
3. Moderately	13.3%
4. Very	3.3%
5. Extremely	2.7%
average response	1.6

In Post-Newsweek we recognized certain examples which might meet the qualitatively different test: (a) witnesses who are undercover officers or confidential informants; (b) witnesses who, because of their prior testimony, have new identities; (c) witnesses who are presently incarcerated and have real fears of reprisal upon return to prison environment; (d) rape victims; and (e) child custody proceedings. These examples were not intended to be all-inclusive.*538 The trial court's discretion in applying the qualitatively different test controls. In his remarks addressing television coverage of trials, Journalism Professor Fred W. Friendly recognized the need for this discretionary authority by stating: "But not even the most zealous advocates suggest coverage of all trials in all courts. I doubt that any serious journalist would wish to invade the privacy of rape victims or most juveniles."Friendly, On Judging the Judges, in State Courts: A Blueprint for the Future, 70, 75 (T. Fetter ed. 1978).

[7][8][9][10] The procedural process which necessarily follows from the trial judge's discretionary authority in applying the qualitatively different test requires an expeditious hearing in all cases where proper motions to exclude the electronic media are presented. A proper motion should set forth facts that, if proven, would justify the entry of a restrictive order. General assertions or allegations are insufficient. The trial court must allow the affected media to participate in the hearing although all parties must recognize that these proceedings are collateral and, as such, should not unnecessarily delay the main proceeding, particularly in criminal matters where the right to speedy trial may be adversely affected.

[11][12][13][14][15] It should be recognized that the qualitatively different test has constitutional dimensions when applied to a criminal defendant because the constitutional right to fair trial is at issue. Given this factor, a different quantum of proof applies to a criminal defendant as compared to all other trial participants. The general trial participant must clearly show some special and identifiable injury from the presence of the camera and electronic media under the test. However, the criminal defendant has a two-fold opportunity to either show that there is a reasonable and substantial likelihood that an identifiable prejudice to the right of fair trial will result from the presence of electronic media under the test or the same special or identifiable injury as other trial participants. In all instances, a showing must be made that the prejudice or the special injury resulted solely from the presence of electronic media in the courtroom in a manner which is qualitatively different from that caused by traditional media coverage.

[16][17] In the instant case, this criminal defendant's right to fair trial was at issue because defense counsel had properly raised respondent's competency to stand trial as well as asserting that respondent met the qualitatively different test. Competency is an extremely sensitive area of the criminal law which the United States Supreme Court and this Court have discussed at length. Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); Lane v. State, 388 So.2d 1022 (Fla.1980). The United States Supreme Court and this Court have made it clear that the trial judge has the responsibility of conducting an evidentiary hearing on a defendant's competency to stand trial whenever any reasonable indication of incompetency arises, whether or not trial counsel requests such a hearing. Under the facts of this cause, respondent had previously been found incompetent to stand trial. Treatment subsequently rendered her competent to proceed with the cause. The motion to exclude electronic media asserted under oath that defense counsel would produce psychiatric testimony at an evidentiary hearing which would establish that the presence of electronic media would adversely affect respondent's ability to communicate with her counsel and cause her to lapse back into psychosis. Under these facts, the trial judge was required by Drope and Lane to have an evidentiary hearing on the competency issue, which by the circumstances would also allow an application of the qualitatively different test.

[18] The procedure determining whether the qualitatively different test applies, while requiring a hearing, may not necessarily require an evidentiary one. In our opinion, the trial court in many instances could have a hearing and make a decision on the basis of affidavits after all parties have had an opportunity to be heard. In the instant case, however, the competency issue mandated an evidentiary hearing. The trial judge erred in not allowing one.

*539[19] One further matter should be mentioned. By establishing the standards for camera placement in the courtroom in Post-Newsweek, we contemplated that the chief judges of each circuit would place the cameras in locations which would allow coverage but at the same time not interfere or disrupt the conduct of the trial. Cameras should not be situated so that they interfere with the proceeding or with any of the trial participants or their activities, especially defense counsel-defendant conferences in criminal trials. In some instances, small courtrooms may not be suitable for camera coverage. This may require the chief judge to reschedule the proceeding in a larger available courtroom to ensure electronic media's noninterference. We have been impressed with the responsibility of the media, the trial judiciary, and the legal profession in providing electronic media trial coverage to the public without disruption of the proceedings. We hope that they will continue to reasonably and responsibly address the unique problems which arise by reason of electronic media coverage.

In conclusion, we note that in a free democratic society openness has historically been necessary for judicial credibility. The presumption of openness in our courts is basic and essential to assure free citizens that no inside or outside manipulations influence the judicial process. The United States Supreme Court recognized this factor in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S.Ct. 2814, 2825, 65 L.Ed.2d 973 (1980), in which Chief Justice Burger stated: "From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inures in the very nature of a criminal trial under our system of justice."

The certified question is answered in the affirmative. We approve the excellent opinion of Judge Hubbart applying our decision in Post-Newsweek to the instant facts and also approve the disposition of the other issues in the cause. The guidelines expressed in this opinion should assist in proper and justifiable use of electronic media in the courtroom. Accordingly, we remand this cause to the trial court for a new trial.

It is so ordered.

SUNDBERG, C. J., and BOYD, ALDERMAN and McDONALD, JJ., concur.
ADKINS, J., concurs in result only.
ENGLAND, J., did not participate in the consideration of this case.
Fla., 1981.
State v. Green
395 So.2d 532, 7 Media L. Rep. 1025

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Miami Herald Pub. Co. v. Lewis
Fla.,1982.

Supreme Court of Florida.
The MIAMI HERALD PUBLISHING CO., etc., et al., Petitioners,
v.
Royce R. LEWIS, et al., Respondents.
No. 59392.

Sept. 2, 1982.
Rehearing Denied March 2, 1983.

Media appealed from ruling entered in the Circuit Court, Indian River County, Royce R. Lewis, J., which closed pretrial hearing on the motion to suppress confessions of alleged murder and sealed records pertaining to that suppression hearing until selection and swearing in of jury at forthcoming trial. The District Court of Appeal, 383 So.2d 236, Letts, J., affirmed in part, reversed in part and remanded with directions and certified the matter as one of great public importance. The Supreme Court, Adkins, J., held that there is no First Amendment protection of public's and press's rights to attend pretrial suppression hearing as distinguished from right to attend criminal trial, and summarized guidelines for trial judge to use in applying the three-pronged standard.

Quashed and remanded with instructions.

West Headnotes

[1] Courts 106 1

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k1 k. Nature and Source of Judicial Authority. Most Cited Cases
(Formerly 110k633(1))

Courts 106 78

106 Courts
106II Establishment, Organization, and Procedure
106II(F) Rules of Court and Conduct of Business
106k78 k. Power to Regulate Procedure. Most Cited Cases
(Formerly 110k633(1))
Courts have inherent power to preserve order and decorum in courtroom, to protect rights of parties and witnesses, and generally to further administration of justice.

[2] Constitutional Law 92 855

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)9 Freedom of Speech, Expression, and Press
92k855 k. In General. Most Cited Cases
(Formerly 92k42.2(1))
News media, even though not party to litigation, has standing to question validity of order restricting publicity because its ability to gather news is directly impaired or curtailed.

[3] Criminal Law 110 633.8

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.8 k. Right of Defendant to Fair Trial in General. Most Cited Cases
(Formerly 110k633(1))
Trial court has inherent power to control conduct of proceedings before it, and it is trial court's responsibility to protect defendant in criminal prosecution from inherently prejudicial influences which threaten fairness of his trial and abrogation of his constitutional rights.

[4] Constitutional Law 92 2107

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press

92XVIII(V) Judicial Proceedings
92XVIII(V)2 Criminal Proceedings
92k2105 Access to Proceedings; Closure
92k2107 k. Preliminary or Pretrial Proceedings. Most Cited Cases
(Formerly 92k90(3), 92k90.1(1))
There is no First Amendment protection of public's and press's rights to attend pretrial suppression hearing as distinguished from right to attend criminal trial. U.S.C.A. Const.Amend. 1.

[5] Criminal Law 110 ⚿230

110 Criminal Law
110XII Pretrial Proceedings
110k229 Conduct of Preliminary Examination
110k230 k. In General. Most Cited Cases
Trial courts in criminal proceedings may exclude public and press from pretrial hearing where closure is necessary to prevent serious and imminent threat to administration of justice; no alternatives are available, other than change of venue, which would protect defendant's right to fair trial; and closure would be effective in protecting rights of accused, without being broader than necessary to accomplish this purpose. West's F.S.A. Const. Art. 1, § 16.

[6] Criminal Law 110 ⚿230

110 Criminal Law
110XII Pretrial Proceedings
110k229 Conduct of Preliminary Examination
110k230 k. In General. Most Cited Cases
Those seeking closure of pretrial hearing have burden of producing evidence and proving by greater weight of evidence that closure is necessary, presumption being that pretrial hearing should be open one.

[7] Criminal Law 110 ⚿635

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k635 k. Publicity of Proceedings. Most Cited Cases
When motion for closure is filed and when it is heard by trial court, notice must be given to at least one representative of local news media.

[8] Criminal Law 110 ⚿230

110 Criminal Law
110XII Pretrial Proceedings
110k229 Conduct of Preliminary Examination
110k230 k. In General. Most Cited Cases
In determining whether to close pretrial hearing, factors to be considered in determining whether closure is necessary to prevent serious and imminent harm to administration of justice include extent of prior hostile publicity, probability that issues involved at pretrial hearing will further aggravate adverse publicity, and whether traditional judicial techniques to insulate jury from consequences of such publicity will ameliorate the problem.

[9] Criminal Law 110 ⚿230

110 Criminal Law
110XII Pretrial Proceedings
110k229 Conduct of Preliminary Examination
110k230 k. In General. Most Cited Cases
In determining whether pretrial hearing should be closed, evidentiary hearing should be held and findings of fact should be recorded by judge in his order granting or refusing closure.

[10] Criminal Law 110 ⚿230

110 Criminal Law
110XII Pretrial Proceedings
110k229 Conduct of Preliminary Examination
110k230 k. In General. Most Cited Cases
Less restrictive alternative measures to closure of pretrial hearing include: continuance, severance, change of venue, voir dire, peremptory challenge, sequestration, and admonition of jury.

[11] Constitutional Law 92 ⚿2107

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(V) Judicial Proceedings
92XVIII(V)2 Criminal Proceedings
92k2105 Access to Proceedings; Closure
92k2107 k. Preliminary or Pretrial Proceedings. Most Cited Cases

(Formerly 92k90.1(3))
News media have no First Amendment right to attend pretrial hearing as long as, when closure is ordered, transcript of hearing is made available to news media at specified future time, when danger of prejudice will be dissipated. U.S.C.A. Const.Amend. 1.

[12] Criminal Law 110 ⚿230

110 Criminal Law
110XII Pretrial Proceedings
110k229 Conduct of Preliminary Examination
110k230 k In General. Most Cited Cases
At hearing to determine whether to close pretrial hearing, court, where possible, should exclude contents of confession or of wiretap, or nature of evidence seized, when issues involved relate to manner in which prosecution obtained this material.

*2 Parker D. Thomson, Sanford L. Bohrer and Richard J. Ovelmen of Paul & Thomson, Miami, James D. Spaniolo, Gen. Counsel, The Miami Herald, Miami, and Florence Beth Snyder, Gen. Counsel, Palm Beach Newspapers, Inc., West Palm Beach, for petitioners.
Jim Smith, Atty. Gen., and Lucy H. Harris, Asst. Atty. Gen., Tallahassee, for respondents.
Barry Scott Richard of Roberts, Miller, Baggett, LaFace, Richard & Wiser, Tallahassee, for The Florida Press Ass'n and The Florida Soc. of Newspaper Editors, amicus curiae.
ADKINS, Justice.
The matter before us has been certified as of great public importance by the Fourth District Court of Appeal in the case of *Miami Herald Publishing Co. v. Lewis*, 383 So.2d 236 (Fla. 4th DCA 1980). We have jurisdiction. Art. V, § 3(b)(4), Fla. Const.

The questions certified are:

> (1) HOW CAN THE TRIAL COURTS MEANINGFULLY INCLUDE THE MEDIA AT EVIDENTIARY HEARINGS CONVENED TO DECIDE WHETHER THE MEDIA SHOULD BE PRECLUDED FROM ACCESS TO THAT VERY SAME EVIDENCE?
>
> (2) SHOULD THIS COURT ABANDON THE THREE-PRONGED STANDARD WHICH WE ADOPTED IN *MIAMI HERALD v. STATE* IN VIEW OF THE HOLDING IN *GANNETT*?

The district court held that in light of pretrial publicity, the trial judge in the murder trial of Brooks John Bellay properly ordered closure of a hearing on a motion to suppress Bellay's confessions, but that the judge improperly sealed records pertaining to the suppression hearing.

The facts upon which the trial judge based his order closing the hearing and sealing the record are as follows. Fourteen-year-old Brooks John Bellay became the focal point of an investigation into the murder of four-year-old Angel Halstead. Angel's disappearance, the search for and discovery of her body, and the investigation into her murder were all extensively covered by local news media. Bellay was interviewed and quoted widely by the print and broadcast media, perhaps because of his active role in the search and his seemingly intimate knowledge of the crime. Bellay was questioned by police shortly after Angel's body was found. He gave them four inculpatory statements. The details of the search, the killing, and Bellay's confession were widely reported by the press, as were certain of Bellay's pretrial hearings. Dozens of articles and several videotapes of television broadcasts were presented by Bellay's attorney to the trial judge. The tapes and articles made numerous and repeated references to Bellay and included interviews with him and quotations from him. The public had been made aware, by the news media, that Bellay had confessed to the crime. The public was virtually inundated with information detailing the crime.

*3 Petitioner's position in the matter is that this Court should formally adopt the so-called "three-pronged test" for closure of judicial proceedings, and that press participation in closure motions poses no threat to the fair administration of justice. *See Miami Herald Publishing Co. v. State*, 363 So.2d 603 (Fla. 4th DCA 1978). The three-pronged test would impose the following requirements on an order to close a pretrial hearing.

1. Closure is necessary to prevent a serious and imminent threat to the administration of justice;

2. No less restrictive alternative measures than closure are available; and

3. Closure will in fact achieve the court's

purpose.

Respondent, on the other hand, argues that we should abandon the three-pronged standard in view of the holding of the United States Supreme Court in *Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979). Respondent further argues that there are certain situations that warrant exclusion of the press from pretrial suppression hearings. Respondent finally argues, as an alternative to the three-pronged test, that the following requirements be imposed on closure of a pretrial hearing.

1. Closure is necessary to prevent a serious and imminent threat to the administration of justice;

2. No alternatives are available, other than change of venue, which would protect a defendant's right to a fair trial; and

3. Closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose.

We adopt the three-pronged test proposed by respondent.

The precise question raised in this case is whether a trial court in a criminal proceeding has the authority to exclude the public and press from a pretrial suppression hearing in order to assure the defendant a "speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed." U.S. Const. amend. VI.

In considering this question, we must delicately balance the competing yet fundamental rights of an accused to a fair trial by an impartial jury, and of the free press guaranteed by the first amendment. The inherent conflict between these two rights is a difficult one to resolve, and in so doing, we seek a solution that gives maximum importance to both interests.

An additional factor that must be considered is the inherent power and interest of the court in guaranteeing to the litigants the fundamental right to a fair trial. The question then, is three dimensional, dealing with the power and authority of the court, the rights of the defendant, and the rights and interests of the public and the press.

Generally speaking, an accused who seeks to exclude the news media from a judicial proceeding does so based on the sixth amendment right to a "speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const.amend. VI. Although this has been recognized to be a fundamental right of one accused of a crime, *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir.1978), *cert. denied*,440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979); *United States v. Columbia Broadcasting System Inc.*, 497 F.2d 102 (5th Cir.1974); it is also clear that freedom of the press is a basic right and must be weighed in the balance when fair trial rights are being considered.

[1] Courts have the inherent power "to preserve order and decorum in the court room, to protect the rights of the parties and witnesses and generally to further the administration of justice." *State ex rel. Gore Newspapers Co. v. Tyson*, 313 So.2d 777, 782 (Fla. 4th DCA 1975) (overruled*English v. McCrary*, 348 So.2d 293 (Fla.1977), citing *People v. Hinton*, 31 N.Y.2d 71, 334 N.Y.S.2d 885, 286 N.E.2d 265 (1972), *cert. denied*,410 U.S. 911, 93 S.Ct. 970, 35 L.Ed.2d 273 (1973). "This power exists apart from any statute or specific constitutional provision and springs from the creation*4 of the very court itself; it is essential to the existence and meaningful functioning of the judicial tribunal." *Id.* at 781.

[2][3] We held in *State ex rel. Miami Herald Publishing Co. v. McIntosh*, 340 So.2d 904 (Fla.1977), that the public should generally have unrestricted access to all judicial proceedings, *id.* at 908, and we recognize that the news media, even though not a party to litigation, has standing to question the validity of an order restricting publicity because its ability to gather news is directly impaired or curtailed. *Id.* "Nevertheless, a trial court has the inherent power to control the conduct of the proceedings before it, and it is the trial court's responsibility to protect a defendant in a criminal prosecution from inherently prejudicial influences which threaten [the] fairness of his trial and the abrogation of his constitutional rights." *Id.* at 909, citing *United States v. Dickinson*, 465 F.2d 496 (5th Cir.1972) (footnotes omitted).

Two recent United States Supreme Court decisions pertinent to the issues are *Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979) and *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980). In *Gannett*, defense attorneys for two men charged with murder moved to close a pretrial suppression hearing to the press and public. The defendants' lawyers argued that adverse publicity had jeopardized their clients' fair trial rights. The motion was not opposed by the prosecutor and was not objected to by the representative of the petitioner newspaper. The trial judge ultimately granted defendants' motion, concluding that the interests of the press and public were outweighed by defendants' right to a fair trial. The trial judge found that an open suppression hearing would pose a "reasonable probability of prejudice to these defendants...." 443 U.S. at 376, 99 S.Ct. at 2903. The Supreme Court of the State of New York vacated the trial court's orders holding that the exclusionary orders transgressed the public's vital interest in open judicial proceedings and constituted an unlawful prior restraint in violation of the first and fourteenth amendments. *Gannett Co. v. DePasquale*, 55 App.Div.2d 107, 389 N.Y.S.2d 719 (1976).

On appeal, the New York Court of Appeals upheld the exclusion based on the danger to the defendants' fair trial rights, which rights overcame the presumption of openness surrounding criminal trials. *Gannett Co., Inc. v. DePasquale*, 43 N.Y.2d 370, 401 N.Y.S.2d 756, 372 N.E.2d 544 (1977). The United States Supreme Court in *Gannett* considered two aspects of the access issue. As to the sixth amendment, the Court held that "members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials." 443 U.S. at 390, 99 S.Ct. at 2911.

The Court, while declining to rule on the first amendment claims, concluded that the actions of the trial judge were consistent with any right of access that may have been available under the first and fourteenth amendments.

> Several factors lead to the conclusion that the actions of the trial judge here were consistent with any right of access the petitioner may have had under the First and Fourteenth Amendments. First, none of the spectators present in the courtroom, including the reporter employed by the petitioner, objected when the defendants made the closure motion. Despite this failure to make a contemporaneous objection, counsel for the petitioner was given an opportunity to be heard at a proceeding where he was allowed to voice the petitioner's objections to closure of the pretrial hearing. At this proceeding, which took place after the filing of briefs, the trial court balanced the "constitutional rights of the press and the public" against the "defendants' right to a fair trial." The trial judge concluded after making this appraisal that the press and the public could be excluded from the suppression hearing and could be denied immediate access to a transcript, because an open proceeding would pose a "reasonable probability of prejudice to these defendants." Thus, the trial court found *5 that the representatives of the press did have a right of access of constitutional dimension, but held, under the circumstances of this case, that this right was outweighed by the defendants' right to a fair trial. In short, the closure decision was based "on an assessment of the competing societal interests involved .... rather than on any determination that First Amendment freedoms were not implicated." *Saxbe [v. Washington Post. Co.] supra*, [417 U.S. 843] at 860, 94 S.Ct. 2811, [at 2819] 41 L.Ed.2d 514 (Powell, J., dissenting).
>
> Furthermore, any denial of access in this case was not absolute but only temporary. Once the danger of prejudice had dissipated, a transcript of the suppression hearing was made available. The press and the public then had a full opportunity to scrutinize the suppression hearing. Unlike the case of an absolute ban on access, therefore, the press here had the opportunity to inform the public of the details of the pretrial hearing accurately and completely. Under these circumstances, any First and Fourteenth Amendment right of the petitioner to attend a criminal trial was not violated.

443 U.S. at 392-93, 99 S.Ct. at 2911-12 (footnote omitted).

In the conclusion of the Court's opinion it is made clear that the constitution affords no affirmative right of access to the pretrial hearing at issue in *Gannett*.

Richmond Newspapers involved the closure of an entire trial. This was the defendant's fourth trial on

the same murder charges. Defense counsel's motion to close the trial to the public was not objected to and was granted by the trial judge. The trial judge apparently relied on a Virginia statute which granted discretion to courts in criminal cases to exclude persons from the trial whose presence would impair the conduct of a fair trial. The Virginia Supreme Court found no reversible error. The United States Supreme Court reversed, holding that the court order violated the right of access of the public and the press to criminal trials granted by the first and fourteenth amendments. *Gannett* was distinguished in *Richmond Newspapers*, as follows:

> In *Gannett*..., the Court was not required to decide whether a right of access to *trials*, as distinguished from hearings on *pre* trial motions, was constitutionally guaranteed. The Court held that the Sixth Amendment's guarantee to the accused of a public trial gave neither the public nor the press an enforceable right of access to a *pre* trial suppression hearing. One concurring opinion specifically emphasized that "a hearing on a motion before trial to suppress evidence is not a *trial*..." 443 U.S., at 394 [99 S.Ct. at 2912],... (Burger, C.J., concurring). Moreover, the Court did not decide whether the First and Fourteenth Amendments guarantee a right of the public to attend trials, *id.*, at 392, and n. 24 [99 S.Ct. at 2911, and n. 24] nor did the dissenting opinion reach this issue. *Id.* at 447 [99 S.Ct. at 2940] (opinion of Blackmun, J.).

448 U.S. at 564, 100 S.Ct. at 2821 (emphasis in the original.)

The specific holding in *Richmond Newspapers* is that the right to attend criminal trials is implicit in the guarantees of the first amendment. This holding is somewhat qualified, however, by footnote 18, which provides, *inter alia*:

> We have no occasion here to define the circumstances in which all or parts of a criminal trial may be closed to the public .... but our holding today does not mean that the First Amendment rights of the public and representatives of the press are absolute. Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic ... so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial.

448 U.S. at 581 n. 18, 100 S.Ct. at 2830 n. 18.

The *Richmond Newspapers* decision is distinguishable from *Gannett*, and from the facts of the instant case, so it does not set ***6** forth mandatory precedent with respect to the question before us.

[4] There is no first amendment protection of the public's and press' rights to attend pretrial suppression hearings as distinguished from the right to attend a criminal trial. Indeed, in his concurring opinion in *Richmond Newspapers*, Justice Stewart suggested that there has not yet been a definitive statement by the Court concerning the application of the first and fourteenth amendments to pretrial suppression hearings. 448 U.S. at 598-99, 100 S.Ct. at 2839. The Court in *Gannett* spoke to this issue generally, and in dicta, however, it was explicitly stated that a decision would not be made based on the first and fourteenth amendments. This, we feel, leaves us considerable leeway in determining how we will resolve this problem in the state of Florida.

This Court has been supportive of open government, as witnessed by our decisions in *Board of Public Instruction v. Doran*, 224 So.2d 693 (Fla.1969), and *City of Miami Beach v. Berns*, 245 So.2d 38 (Fla.1971). We have been supportive of open government with respect to the judicial branch as well. In *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764 (Fla.1979), we permitted the electronic media to have access to courtrooms. "The prime motivating consideration prompting our conclusion is this state's commitment to open government." 370 So.2d at 780 (footnote omitted). And in *State ex rel. Miami Herald Publishing Co. v. McIntosh*, 340 So.2d 904, 908-09 (Fla.1977), we held:

> A trial is a public event, and there is no special perquisite of the judiciary which enables it to suppress, edit or censor events which transpire in proceedings before it, and those who see and hear what transpired may report it with impunity, subject to constitutional restraints mentioned herein.

(Footnote omitted).

So a concern for open government is not new to us, nor is the application of a policy of open government to the judicial branch. *See also* King v. State, 390 So.2d 315 (Fla.1980), *aff'd in part and rev'd in part,* State v. Hegstrom, 401 So.2d 1343 (Fla.), *cert. denied,*450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed.2d 825 (1981); Harnum v. State, 384 So.2d 1320 (Fla. 2d DCA 1980); Green v. State, 377 So.2d 193 (Fla. 3d DCA 1979); Smith v. State, 376 So.2d 455 (Fla. 1st DCA 1979), *cert. denied,*402 So.2d 613 (Fla.1981), (all following the Florida Supreme Court's decision in *Post-Newsweek*).

[5] In our opinion, *Gannett* does not require that we abandon the three-pronged test. However, it should be modified in the following particulars, as suggested by respondent.

> 1. Closure is necessary to prevent a serious and imminent threat to the administration of justice;
>
> 2. No alternatives are available, other than change of venue, which would protect a defendant's right to a fair trial; and
>
> 3. Closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose.

Every defendant has the right "to have a ... trial ... in the county where the crime was committed." Art. I, § 16, Fla.Const. (1968). There is no first amendment protection of the press' rights to attend pretrial hearings. *Gannett.* We should not elevate this non-constitutional privilege of the press above the constitutional right of the defendant to be tried in the county where the crime was committed. A change of venue should not be considered as an alternative to closure.

Public access to the courts is an important part of the criminal justice system, as it promotes free discussion of governmental affairs by imparting a more complete understanding to the public of the judicial system. Mills v. Alabama, 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966). Such access gives the assurance that the proceedings were conducted fairly to all concerned. *Richmond Newspapers.* Aside from any beneficial consequences which flow from having open courts, the people have a right *7 to know what occurs in the courts. The Supreme Court of the United States has noted repeatedly that a trial is a public event. What transpires in the courtroom is public property. Craig v. Harney, 331 U.S. 367, 373-74, 67 S.Ct. 1249, 1253-54, 91 L.Ed. 1546 (1947). Public access also serves as a check on corrupt practices by exposing the judicial process to public scrutiny, Nebraska Press Ass'n. v. Stuart, 427 U.S. 539, 559-560, 96 S.Ct. 2791, 2802-2803, 49 L.Ed.2d 683 (1976), and protects the rights of the accused to a fair trial. Richmond Newspapers, 448 U.S. at 564, 100 S.Ct. at 2821 et seq. Finally, because participating lawyers, witnesses and judges know their conduct will be subject to public scrutiny, it is fair to conclude that they will be more conscientious in the performance of their roles.

The above three-pronged test provides the best balance between the need for open government and public access, through the media, to the judicial process, and the paramount right of a defendant in a criminal proceeding to a fair trial before an impartial jury. The courts of other states have recently faced the issue of press access to pretrial suppression hearings or trials, and their decisions support endorsement of three-part tests similar to the one here. Lexington Herald Leader Co. v. Tackett, 601 S.W.2d 905 (Ky.1980); Detroit Free Press, Inc. v. Recorder's Court Judge, 409 Mich. 364, 294 N.W.2d 827 (1980); Commonwealth v. Hayes, 489 Pa. 419, 414 A.2d 318,*cert. denied,*449 U.S. 992, 101 S.Ct. 528, 66 L.Ed.2d 289 (1980); Herald Ass'n v. Ellison, 138 Vt. 529, 419 A.2d 323, (1980); Federated Publications, Inc. v. Kurtz, 94 Wash.2d 51, 615 P.2d 440 (1980); State ex rel. Herald Mail Co. v. Hamilton, 267 S.E.2d 544 (W.Va.1980); Williams v. Stafford, 589 P.2d 322 (Wyo.1979).

The other question certified to us by the District Court reads:

> How can the trial courts meaningfully include the media at evidentiary hearings convened to decide whether the media should be precluded from access to that very same evidence?

In State ex rel. Pensacola News-Journal, Inc. v. Fleet, 388 So.2d 1106, 1107 (Fla. 1st DCA 1980), the court correctly noted "that only the circumstances

surrounding the giving of the statement [to be suppressed] are at issue [in a suppression hearing], not necessarily the contents of the alleged confession." Thus, in a typical case, a carefully controlled suppression hearing can itself be conducted in open court without creating any prejudice whatever. The issues concern not so much the contents of a confession or of a wiretap, or the nature of the evidence seized, but the circumstances under which the prosecution obtained this material.

[6] The news media has been the public surrogate on the issue of courtroom closure. Therefore, the news media must be given an opportunity to be heard on the question of closure prior to the court's decision. Implicit in the right of the members of the news media to be present and to be heard is the right to be notified that a motion for closure is under consideration. This procedure will avoid unnecessary appeals that will otherwise eventually occur.

[7][8][9] At the hearing, those who seek closure should first provide an adequate basis to support a finding that closure is necessary to prevent a serious and imminent threat to the administration of justice. The primary purpose of closure is to protect the defendant's right to a fair trial, one free of widespread hostile publicity, so as to insure him an unbiased jury. *The factors to be considered include the extent of* prior hostile publicity, the probability that the issues involved at the pretrial hearing will further aggravate the adverse publicity, and whether traditional judicial techniques to insulate the jury from the consequences of such publicity will ameliorate the problem. Absent a showing of widespread adverse publicity, the trial court should not grant a motion to close the hearing. The trial judge must determine if there is a serious and imminent threat that publication will preclude the fair administration of justice. In determining this question, an evidentiary hearing should be held and ***8** findings of fact should be recorded by the judge in his order granting or refusing closure.

[10] Second, those seeking closure should be required to show that no less restrictive alternative measures than closure are available for this purpose. Where a less restrictive alternative is available for assuring the fair trial guarantee and the use of the alternative does not unduly burden the expeditious disposition of the cause, the alternative procedure should be opted for in preference to closure. The following alternatives should be considered: continuance, severance, change of venire, voir dire, peremptory challenges, sequestration, and admonition of the jury. One or more of these alternatives may adequately protect the accused's interest and relieve the court of any need to close the proceeding in advance.

Third, those seeking closure should demonstrate that there is a substantial probability that closure will be effective in protecting against the perceived harm. Where prejudicial information already has been made public, there would be little justification for closing a pretrial hearing in order to prevent only the disclosure of details which had already been publicized. Of course, the probability that the issues involved at the pretrial hearing will further aggravate the adverse publicity is a factor to be considered in determining whether or not closure is necessary to prevent a serious and imminent threat to the administration of justice.

The trial court should begin its consideration with the assumption that a pretrial hearing be conducted in open court unless those seeking closure carry their burden to demonstrate a strict and inescapable necessity for closure. The issues considered at such hearings are of great moment beyond their *importance to the outcome of the prosecution.* A motion to suppress involves allegations of misconduct by police and prosecution that raise constitutional issues. Such allegations, although they may prove to be unfounded, are of importance to the public as well as to the defendants. The searches and interrogations that such hearings evaluate do not take place in public. The suppression hearing is the only opportunity that the public has to learn about police and prosecutorial conduct. It is important that a decision of the trial judge on a motion to suppress be made on the basis of evidence and argument offered in open court, so that all who care to see or read about the case may evaluate for themselves the propriety of the exclusion.

The trial court, upon ruling that a closure motion is warranted, must make findings of fact and must extend its order no further than the circumstances warrant. It is impossible to adopt prophylactic rules to guide the trial judge in applying the three-pronged test. It is within the inherent power of the court to protect the rights of the parties and witnesses and

generally to further the administration of justice. The judge's goal is to balance the countervailing interest, restricting each as little as possible while still serving the ends of justice.

[11][12] As a summary of guidelines for the trial judge to use in applying the "three-pronged standard," we hold: (1) Notice must be given to at least one representative of the local news media when a motion for closure is filed and when it is heard by the court. *See State ex rel. Miami Herald Publishing Co. v. McIntosh*, 340 So.2d 904, 912 (Fla.1977) (Sundberg, J., concurring). (2) Those seeking closure have the burden of producing evidence and proving by a greater weight of the evidence that closure is necessary, the presumption being that a pretrial hearing should be an open one. (3) The news media have no first amendment right to attend the pretrial hearing as long as when closure is ordered, the transcript of the hearing is made available to the news media at a specified future time, when the danger of prejudice will be dissipated (for example, after the trial jury is sequestered). (4) Where possible, the court should exclude the contents of a confession or of a wiretap, or the nature of the evidence seized, when the issues involved relate to the manner in which the prosecution obtained this material. (5) The trial ***9** judge shall make findings of fact and conclusions of law so that the reviewing court will have the benefit of his reasoning in granting or denying closure.

The decision of the District Court of Appeal is quashed and the cause is remanded with instructions to affirm the order of the trial court.

It is so ordered.

ALDERMAN, C.J., and BOYD, OVERTON, SUNDBERG and McDONALD, JJ., concur.
Fla.,1982.
Miami Herald Pub. Co. v. Lewis
426 So.2d 1, 8 Media L. Rep. 2281

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State v. Palm Beach Newspapers, Inc.
Fla., 1981.

Supreme Court of Florida.
STATE of Florida, Petitioner,
v.
PALM BEACH NEWSPAPERS, INC., Respondent.
No. 58598.

March 5, 1981.

Review was sought of an order of the Circuit Court for Palm Beach County, Thomas E. Sholts, J., curtailing activities of the electronic media in reporting trial of a criminal case. The District Court of Appeal, Downing, C. J., 378 So.2d 862, reversed and remanded. On certiorari to the District Court of Appeal, the Supreme Court, England, J., held that: (1) affidavits are sufficient to ground a trial court's determination that electronic media should be prohibited from covering testimony of a particular witness; indeed, a ruling can be supported by matters within the judicial knowledge of the trial judge, provided they are identified on record and counsel has opportunity to refute or challenge them; (2) an evidentiary hearing should be allowed in all cases to elicit relevant facts if veracity of nontestimonial data or whether less restrictive measures are available are made an issue, provided demands for time or proof do not unreasonably disrupt main trial proceeding; (3) bare assertion of fear of reprisals may, but ordinarily should not, be sufficient to exclude electronic media coverage of a witness' testimony; and (4) where state asserted need for witnesses, who were prison inmates, to testify in prosecution of a fellow inmate for first-degree murder, but the witnesses declared by affidavit that they would not testify if television coverage were allowed due to fear of reprisals, even under threat of contempt of court, media's interest in covering the testimony was less important than state's need to try defendant for crime charged, and thus exclusion of electronic media coverage was warranted.

Ordered accordingly.

Adkins, J., concurred in result.

West Headnotes

[1] Criminal Law 110 ⚿633.16

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))
Trial court erred in refusing to disclose affidavits of two prospective witnesses in prosecution for first-degree murder, who were inmates of state prison, and who stated that they feared reprisals as result of television reporting of their live testimony against defendant, to electronic media for purposes of hearing on the state's request to exclude television coverage of such witnesses' testimony.

[2] Criminal Law 110 ⚿633.16

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))
Requirement of a "finding" within meaning of rule stating that the presiding judge may exclude electronic media coverage of a particular participant only upon a finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media does not require written order which separately identifies and labels a paragraph or sentence as a "finding of fact" but, rather, what is contemplated is a finding on record, whether that be in a written order or in a transcript of the hearing.

[3] Criminal Law 110 ⚿633.16

110 Criminal Law

110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))
Affidavits are sufficient to predicate a "finding" that electronic media should be prohibited from covering testimony of a particular witness within rule stating that the presiding judge may exclude electronic media coverage of a particular participant only upon a finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media; indeed, ruling can be supported by matters within judicial knowledge of the trial judge, provided they are identified on the record and counsel has opportunity to refute or challenge them.

[4] Criminal Law 110 ⚿633.16

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))
Evidentiary hearing should be allowed in all cases to elicit relevant facts if veracity of nontestimonial data, such as whether an affidavit-asserted fear of reprisal is well-grounded, or whether less restrictive measures are available, are made issue, provided demands for time or proof do not unreasonably disrupt main trial proceeding, prior to exclusion of electronic media from courtroom.

[5] Criminal Law 110 ⚿633.16

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))
Bare assertion of fear by prisoner that he will suffer reprisals as result of trial testimony against fellow prisoner may, but ordinarily should not, be sufficient to result in automatic exclusion of electronic media coverage of his testimony, where media representatives are not allowed by time or circumstances to test by cross-examination the prisoner's fear of reprisal.

[6] Criminal Law 110 ⚿633.16

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases
(Formerly 110k633(1))
Where state asserted need for witnesses, prison inmates, to testify in prosecution of fellow prison inmate for first-degree murder, and witnesses declared by affidavit that they would not testify if televisioncoverage were allowed due to fear of reprisals, even under threat of contempt of court, media's interest in covering their testimony was less important than state's need to try defendant for crime charged, and thus exclusion of electronic media coverage from courtroom was warranted.

***546** Jim Smith, Atty. Gen., and Robert L. Bogen, Asst. Atty. Gen., West Palm Beach, for petitioner.
Talbot D'Alemberte of Steel, Hector & Davis, Miami, and Florence Beth Snyder, West Palm Beach, for respondent.
ENGLAND, Justice.
We have agreed to review a decision of the Fourth District Court of Appeal, reported at 378 So.2d 862, which interprets our authorization for cameras in Florida's courtrooms by explicating the standards for trial judges to exercise their discretion in determining whether to exclude electronic media coverage of trial testimony. This case involves no first amendment issues regarding public access to the courts, and it in no way challenges the validity of our decision in In re Post-Newsweek Stations, Florida, Inc., 370 So.2d 764 (Fla.1979), which in general allows electronic media coverage of Florida court proceedings.

[1] The issues before us arose in the course of a criminal prosecution against Arthur Sakell for first degree murder. Sakell was an inmate of Glades Correctional Institute who allegedly caused the death of another inmate. Prior to trial, the state presented to the trial judge two affidavits of former prisoners of

that institution, on the basis of which it requested that the court exclude television coverage of their live trial testimony. The affidavits indicated that both prisoners had been moved to Lantana Correctional Institute, but nonetheless reflected the inmates' fear of reprisal as a result of television reporting their live testimony against Sakell. Media representatives were notified of a hearing on the state's request to exclude television coverage of these witnesses' testimony, but were not furnished copies of the affidavits prior to or at the scheduled hearing.[FN1]

> FN1. We agree completely with the district court that the trial judge erred in refusing to disclose the affidavits to the electronic media for purposes of the exclusionary hearing. The state now concedes that the denial of access to those materials was an error. Were the matter still relevant we would reverse the action of the trial judge on that basis alone, for notice of a hearing without an opportunity to see the documentary basis for the state's motion would be, in essence, no notice at all. Cf. State ex rel. Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904 (Fla.1976) (news media have special concerns entitling them to notice and at least a summary hearing before any trial court enjoins or limits publication of court proceedings).

At the hearing on the state's request to exclude television coverage, no evidence was adduced by the state other than the two affidavits which had already been filed and made a part of the record of the proceeding. A prison official was available in court at the time of the hearing, apparently to testify regarding the facts of prison violence and the validity of the witnesses' fears of prison reprisal. He was never called upon to testify, however. The entire hearing consisted of a discussion between counsel and the court. The hearing resulted in a determination by the trial judge that the media should be excluded.[FN2]

> FN2. The judge apparently also ruled that sketch artists would be excluded from the courtroom, although the record is not clear that a formal ruling was made. There was plainly no basis for an exclusion of sketch artists in this case. See United States v. Columbia Broadcasting Sys., Inc., 497 F.2d 102 (5th Cir. 1974). The alleged ruling makes no difference in this proceeding as it now stands, however, inasmuch as the trial of Sakell has gone forward and resulted in his acquittal.

The issues in this case focus squarely around that sentence in our Post-Newsweek decision which delegates to trial judges the authority to exclude electronic media in certain instances. The standard we adopted is:

> The presiding judge may exclude electronic media coverage of a particular participant only upon a finding that such coverage will have a substantial effect ***547** upon the particular individual which would be qualitatively different from the effect on members of the public in general and such effect will be qualitatively different from coverage by other types of media.

370 So.2d at 779 (emphasis added). The controversies between the state and the media in this case center around the requirement of a "finding," and the standards for its rendition.

Preliminarily, we reject the assertion that we have already ruled on the issue of excluded coverage with respect to prisoners who may testify against others in the prison system. It is true that our Post-Newsweek decision discussed a number of considerations which might allow a ban on electronic media coverage in judicial proceedings, and that one of the considerations we mentioned was the refusal of a prisoner-witness to testify for fear of reprisals from fellow inmates.Id. at 778. That discussion was not a determination that prisoner-witnesses are automatically eligible for an exclusionary ruling with respect to television and radio coverage of their testimony, however. It was merely illustrative of the type of "unique problems (which) can arise with respect to particular participants in a judicial proceeding,"[FN3] so as to justify our authorizing trial judges to exercise their discretion in particularized determinations.

> FN3.In re Post-Newsweek Stations, Florida, Inc., 370 So.2d 764, 778 (Fla.1979).

[2] As another preliminary matter, we reject any

suggestion that a "finding" within the contemplation of our Post-Newsweek decision requires a written order which separately identifies and labels a paragraph or sentence as a "finding of fact." What is contemplated is a finding on the record, whether that be in a written order or in a transcript of the hearing. No special requirements attend this exclusionary finding which do not pertain in other areas, and certainly no additional formalities are necessary. The situation here with respect to the adequacy of "findings" is no different from that in Peterson v. State, 382 So.2d 701 (Fla.1980), in which we permitted trial judges to recite their conclusory findings regarding the voluntariness of confessions sought to be admitted.

Our determination of a standard to be applied by a trial judge in an exclusionary proceeding is aided materially by the articulations of the members of the district court panel which considered this case. Judge Downey, writing for the panel's majority, expressed the view that an evidentiary hearing would be necessary to meet the Post-Newsweek standards, and that a "finding" such as would be required to exclude electronic media could not be predicated merely upon affidavits and a discussion between counsel and the court. Judge Letts, on the other hand, expressed in his dissent the view that the affidavits would be sufficient to predicate a "finding," just as affidavits are acceptable as a predicate for other numerous trial court rulings.[FN4] The lucid exposition of disparate views by Judge Downey and Judge Letts has been very helpful to set the issue here in clear perspective.

> FN4. Examples of proceedings which can be determined by affidavits alone are summary judgment hearings (Fla.R.Civ.P. 1.510(a)), temporary injunction hearings (Fla.R.Civ.P. 1.610(b)), nonadversary probable cause hearings (Fla.R.Crim.P. 3.131(a)(3)) and motions for a new trial (Fla.R.Crim.P. 3.600(c)).

[3] Affidavits are sufficient to ground a trial court's determination that electronic media should be prohibited from covering the testimony of a particular witness. Indeed, a ruling can be supported by matters within the judicial knowledge of the trial judge, provided they are identified on the record and counsel given an opportunity to refute or challenge them. The dangers of in-prison violence, for example, may well be a matter which can be judicially noticed, particularly in a criminal prosecution for a jail house murder. In short, the evidentiary showing which must ground an exclusionary ruling is both simple and traditional. Affidavits are adequate for this purpose, as in other types of hearings.

***548** Given that a finding is required, the question then arises whether an evidentiary hearing must in all cases be allowed either to test the veracity of non-testimonial data, such as whether an affidavit-asserted fear of reprisal is well-grounded, or to determine what less restrictive measures are available. This issue flows from our determination in Post-Newsweek that electronic media coverage of witness testimony is qualitatively different from the print media coverage which would in all events be available in trial proceedings.[FN5]

> FN5. This case in no way involves a prior restraint on what the media may publish, such as we dealt with in State ex rel. Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904 (Fla.1976).

[4] An evidentiary hearing should be allowed in all cases to elicit relevant facts if these points are made an issue, provided demands for time or proof do not unreasonably disrupt the main trial proceeding.[FN6] For example, going to the issue of less restrictive means, it might be relevant to an exclusionary ruling concerning a prisoner-witness, and a proffer of proof might be made, to show the ease or difficulty with which prison officials may curtail inmate access to particular forms of electronic media coverage.[FN7] We need not speculate exactly what areas or items of proof could be developed to aid the court's decision-making responsibility, but the "qualitatively different" standard of our Post-Newsweek decision should be established on the record with competent evidence whenever it is an issue and the opportunity for data-gathering is presented. Here, of course, that was not done.

> FN6. Media counsel suggests that many of the problems concerning electronic coverage would be eliminated if there were better pre-hearing communication between opposing counsel, and if these sensitive matters were not "dumped" on the trial judge without a clear presentation of the reasons underlying

the parties' respective positions. We, too, would urge improved communication between counsel to aid the courts' decision-making capabilities.

FN7. For instance, evidence may be presented by the media to compare prisoner access to newspapers, television and radio broadcasts, and to explain institutional mechanisms or practices for the control of each.

[5] Given a proper hearing, an issue still remains whether a bare assertion of fear by a prisoner will result in the automatic exclusion of the electronic media coverage of his testimony, where media representatives are not allowed by time or circumstances to test by cross-examination the prisoner's fear of reprisal. We conclude that the bare assertion of fear may, but ordinarily should not, be sufficient. The important point of the exclusionary inquiry is not whether the inmate's fear is justified. The key issue is whether the state and the defendant will be able to proceed to trial under circumstances which allow each to develop its case fully. The interest of the justice system in these proceedings is to set the procedural stage for a fair determination of the trial issues, and that interest overshadows any concern as to the reasonableness of the subjective state of mind of any individual witness. The trial judge in these peculiar exclusionary proceedings must satisfy himself that there is some adverse effect (or potential effect) on the proceeding due to the qualitative difference between electronic media coverage and other forms of trial reporting.

[6] Stated another way, the issue in these hearings is collateral to the rights of the state and the defendant to a fair trial rights which include the opportunity to present live witness testimony deemed by counsel to be indispensable. Where there is no competing first amendment claim, as here, the issue must of necessity be tipped in favor of exclusion, even though media representatives cannot test the foundation for affidavits by direct confrontation of the affiants. We note that in this case the state not only asserted a need for these witnesses to testify, but the witnesses declared by affidavit that they would not testify if television coverage were allowed, even under threat of contempt of court. The media's interest in covering their testimony was less important on this record than the state's need to try Sakell for the crime charged.

***549** As a next matter, we decline to adopt a precise standard of proof for exclusionary proceedings such as these, and we decline to prescribe witness requirements for any hearing which might be held. Trial judges must exercise their discretion on the basis of what is available at the time and under the circumstances.[FN8] Mini-trials which disrupt the timing, procedures or sequence of the main trial are to be avoided at all costs. Yet we do not give trial judges carte blanche authority. Trial judges can, obviously, abuse their discretion in a variety of ways, such as foreclosing a meaningful presentation of evidence, defeating adequate notice requirements, or acting wholly without record support which is readily available. In the final analysis, though, when the rules of the game are obeyed and a fair exchange of views obtained, it remains more important that a trial go forward with the testimony of witnesses than that the media be permitted to cover their testimony, even conceding that witnesses' names may appear in the written media and that the indicted defendant will himself, from his position in the courtroom, see these witnesses testify.

FN8.Canon 3A(7) of the Florida Code of Judicial Conduct, which constitutes a general authorization for electronic media and still photography trial coverage, provides:

> Subject at all times to the authority of the presiding judge to (i) control the conduct of proceedings before the court, (ii) ensure decorum and prevent distractions, and (iii) ensure the fair administration of justice in the pending cause, electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed in accordance with standards of conduct and technology promulgated by the Supreme Court of Florida.

(emphasis added). In addition, the procedural suggestions expressed by Justice Sundberg in State ex rel. Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904, 912 (Fla.1976) (Sundberg, J., concurring), are relevant here and would

eliminate many of the potential problems.

The premise of our Post-Newsweek decision, translated into the context of this case, is that there may well be a qualitative difference between the display of inmate-witnesses' images on television sets in the halls of their prison home, on the one hand, and either a word-of-mouth campaign spread by the indicted defendant when he returns to jail to the effect that two of his former jail colleagues "finked," or written reports of their testimony carried in local newspapers, on the other. The media here recognizes that qualitative difference, but asks us to emphasize that only that type of difference may be the basis for an exclusionary ruling against the electronic media. We restate, because the media is correct, that this difference alone is the focus of the hearing.[FN9]

> FN9. As media counsel aptly put the matter at the television exclusion hearing:
>
> > (Y)ou show us where it's going to make any more difference if we're photographing you than if someone on the radio speaks about you and mentions your name or if they take a picture with a still camera or any other means that the media uses when you speak about the rights of the public to know.

We also reiterate, however, that it remains essential for trial judges to err on the side of fair trial rights for both the state and the defense. The electronic media's presence in Florida's courtrooms is desirable, but it is not indispensable. The presence of witnesses is indispensable. That difference should always affect but never control a trial judge in his approach to the exercise of his discretion in excluding electronic media coverage of a prisoner-witness, or for that matter, any witness.

For the foregoing reasons, we must disagree with the majority decision of the district court below and adopt the standards for evidentiary exclusionary proceedings with respect to electronic media expressed above. Were we to apply these standards to the order of the trial court in this case, we would conclude that the trial judge improperly excluded electronic media coverage of these prisoner-witnesses. First, the notice of hearing to media representatives was fundamentally inadequate. Second, given the denial of copies of the affidavits to media representatives and the ready availability of a prison official to speak concerning prison conditions or the means ***550** by which inmate access to particular forms of electronic media coverage might have been curtailed, the hearing itself was defective. Nonetheless, the trial of Sakell has been concluded so that no remand for further proceedings is necessary.

It is so ordered.

SUNDBERG, C. J., and BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.
ADKINS, J., concurs in result only.
Fla., 1981.
State v. Palm Beach Newspapers, Inc.
395 So.2d 544, 7 Media L. Rep. 1021

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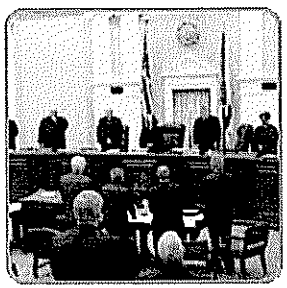

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