Balancing the Rights of the Public with the Jurors' Right to Privacy During the Jury Selection Process

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I. Introduction

It is rare for a trial judge hearing a criminal case to receive a motion to intervene filed by third parties not named in the proceedings. In the jury selection process of cases involving high profile defendants, however, the public — including the press — has a heightened interest in the proceedings. At the same time, the trial judge may have a heightened interest in the protection of juror privacy.

This article discusses the issue of when and under what circumstances a trial court may close proceedings to the public during the jury selection process and seal the written responses to juror questionnaires. Part II relates the circumstances of a high profile criminal case presided over by the author in which issues relating to the closure of part of the juror selection proceedings and the sealing of responses to questionnaires arose unexpectedly. Part III summarizes the constitutional principles which allow for limited protection of jury privacy interests when balanced against the First Amendment rights of the public to attend and have access to jury selection proceedings. Part IV is a summary of the principles developed by the United States Supreme Court that trial judges must follow when the issue of the protection of privacy concerns of prospective jurors arises.

*The author served as a Judge of the Superior Court of Arizona in and for Maricopa County for twenty-one years. Judge Gerst is presently an Associate Professor of Law at Phoenix School of Law in Phoenix, Arizona. This article is the second by Judge Gerst discussing issues arising out of the trial of Bishop Thomas J. O’Brien, a trial over which the author presided. The first article, Comparative Proportionality Analysis: Its Feasibility and Usefulness in Sentencing, was published in Phoenix Law Review, 1 Phoenix L. Rev. 69 (2006). The author acknowledges and expresses his gratitude for the research assistance of Joshua P. De La Ossa, a student at Phoenix School of Law, and for the editing and publishing assistance of Ted McClure, a Public Service Librarian at Phoenix School of Law.

This article does not deal with the constitutional principles which allow for limited protection of jury privacy interests against the right of an accused to a public trial under the Due Process Clause of the Fourteenth and Sixth Amendments. This issue, however, was recently addressed by the United States Supreme Court in Pressey v. Georgia, 130 S. Ct. 721, 30 Media L. Rep. (BNA) 1161 (2010), where the Court essentially adopts the same principles, guidelines and authority discussed in this article.
BALANCING THE RIGHTS OF THE PUBLIC

Part V contrasts juror anonymity and anonymous juries with the right of the public to information provided by prospective jurors during voir dire. Part VI reviews how trial courts have applied the United States Supreme Court's principles to subsequent cases. Part VII discusses how the author applied the Supreme Court's principles in Part IV to the high profile case discussed in Part II. Part VIII provides concluding observations.

II. State of Arizona v. Thomas J. O'Brien

On February 17, 2004, Thomas J. O'Brien, the Bishop of the Roman Catholic Diocese of Phoenix, Arizona, became the first American bishop to be convicted of the felony offense of leaving the scene of a fatal accident.¹

The arrest of the bishop was reported as the "lead story" of all news events in Arizona for the year 2003.² The arrest took place when public media attention nationwide was focused on allegations of criminal conduct within the Catholic Church. Although Bishop O'Brien was never accused of any personal sexual misconduct, there were allegations in Arizona that certain members of the Catholic clergy had sexually abused children for many years, and that leaders within the Church had known and either covered it up or dissuaded victims from reporting it to authorities.³ Bishop O'Brien was a leader within the diocese (its bishop since 1981) during the time when sexual abuse allegedly occurred.⁴

Due to the high public interest and media attention to the trial proceedings, a large number of citizens were summoned for jury duty. It was anticipated that many prospective jurors would have already been familiar with news accounts and might have already formed opinions or biases that needed to be questioned. Additionally, many prospective jurors may have had present or past associations with the

⁴Michael Canady, New Program Aims to Boost Watchfulness, Ariz. Republic, Oct. 12, 2006, at B1 (stating "at least 33 priests who have lived or worked in the diocese have been accused of abuse, and dozens of victims have come forward to press their concerns. Many of these concerns have resulted in lawsuits or criminal allegations. The diocese has been sued on abuse matters at least 40 times.").

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Catholic Church and its clergy. Lastly, there was concern over the widespread media attention given to the sexual abuse scandal that existed locally and nationally within the Catholic Church and how that might affect potential jurors. As a result, the court had to delicately balance an invasive voir dire process with juror privacy concerns to elicit the most candid responses to deeply personal questions.

The trial began on January 12, 2004 in the Maricopa County courthouse. The venue of prospective jurors was assembled in a large courtroom for a general introduction to the case, introduction of counsel and the defendant, and an explanation of the jury selection process. In public each juror was identified only by an assigned number throughout the jury selection process and trial. No objection was raised. Counsel had access to the identity of each prospective juror and other information prospective jurors are required to provide upon answering their summons to jury duty. Bishop O'Brien chose to be referred to throughout the trial by his title. He also wore his clerical garb throughout the trial. Following the general introduction to the process of jury selection, each of the jurors was asked to provide written answers to a questionnaire which included inter alia questions about the following:

1) Whether the prospective juror had any physical, mental, or emotional condition or problems,
2) Whether the prospective juror was affiliated, or had been affiliated, with the Catholic Church or its clergy,
3) Whether the prospective juror, any members of his or her family, or any close friends, had ever been accused of or victim of a sexual assault or sexual offense involving children,
4) Whether the prospective juror had any information the prospective juror wished to provide to the court in private,
5) Whether the prospective juror was requesting to be excused

Unless otherwise noted, the information in this paragraph is from case title number CR 2003-016197, Arizona Superior Court, Maricopa County, Arizona.

Ariz. R. Civ. P. 16.3 provides that the parties shall, on the day jury selection is commenced, be furnished with a list of the name, zip code, employment status, occupation, employer, residency status, educational level, prior jury service, and felony conviction status of each potential juror and that the court shall keep all jurors' names and business telephone numbers and addresses confidential unless good cause for disclosure is shown.

As there was no appeal taken from the conviction of Bishop Thomas O'Brien, no official transcript of proceedings of the trial was ever ordered. Trial events are referred to by reference documents and pleadings in the case file and personal observations of the author and the author's trial notes. References to Bishop O'Brien's "title" and "gown" are from the personal observations of the author.

See supra note 8.
BALANCING THE RIGHTS OF THE PUBLIC

Part V contrasts juror anonymity and anonymous juries with the right of the public to information provided by prospective jurors during voir dire. Part VI reviews how trial courts have applied the United States Supreme Court’s principles to subsequent cases. Part VII discloses how the author applied the Supreme Court’s principles in Part IV to the high profile case discussed in Part II. Part VIII provides concluding observations.

II. State of Arizona v. Thomas J. O’Brien

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Due to the high public interest and media attention to the trial proceedings, a large number of citizens were summoned for jury duty. It was anticipated that many prospective jurors would have already been familiar with news accounts and might have already formed opinions or beliefs that needed to be questioned. Additionally, many prospective jurors may have had present or past associations with the Catholic Church and its clergy. Lastly, there was concern over the widespread media attention given to the sexual abuse scandal that existed locally and nationally within the Catholic Church and how that might affect potential jurors. As a result, the court had to delicately balance an invasive voir dire process with juror privacy concerns to elicit the most candid responses to deeply personal questions.

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1Dennis Wagner, O’Brien Secured; Power Tweetering — Charged with Felony


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from serving on this case for any reason, and, if so, a detailed explanation of the reason or reasons.18

Except for asking prospective jurors to detail any reason or reasons they were requesting to be excused from serving on the case, the court did not ask the prospective jurors for written details in connection with any affirmative responses to the questions on the questionnaire. Instead, the court determined that with respect to any affirmative responses to questions on the questionnaire, counsel would be given wide latitude in individually questioning each prospective juror in a closed proceeding on the record.19

After a review of the responses to the questionnaires with counsel, those prospective jurors who answered any of the above questions in the affirmative were notified to return to court for limited voir dire proceedings, which would be conducted individually and on the record in a courtroom closed to the public. All prospective jurors, including those questioned separately, were scheduled to return to court at a later date for general voir dire proceedings in open court.20

The closed voir dire proceedings began as scheduled.21 The court elicited the details of any affirmative responses to the above questions on the questionnaire. Counsel for each party was then permitted to question the prospective juror. This process was ongoing when the court received an application filed by a newspaper publisher, a broadcasting company, and certain named news reporters, requesting the right to intervene in the proceedings for the limited purpose of objecting to the closing of any voir dire proceedings, and requesting the immediate release of all transcripts of the closed proceedings. The application also requested the unsealing and release of the responses to all written questionnaires.22

In over twenty years on the bench, and over ten years of criminal trials, the author had never had to address the issues raised in this motion. Neither counsel had raised any objection to the closed proceeding or advised the court of possible objections of third parties.

19See note 8.
20See note 8.

Considering the threat of trial disruption from this issue, the court scheduled an expedited hearing for the following day, January 15, 2004. With the benefit of the legal memoranda and arguments of counsel, it became apparent to the court that its efforts to protect jurors’ privacy might have been in conflict with the rights of the public to open proceedings under the First Amendment.23 The court concluded that these issues had not been adequately addressed, and that, unless immediate corrective action was taken, the court risked interlocutory appeal,24 accompanying disruption of the trial, and possible grounds for reversal in the record.

III. The law

The right of public — and the press — to attend criminal trials was first addressed by the United States Supreme Court in Richmond Newspapers, Inc. v. Virginia,25 where the Court held the right of the public to attend criminal trials is guaranteed under the First and Fourteenth Amendments absent an overriding interest articulated by the trial court.26

The leading case on the issue of courtroom closure and the right of the public to an open voir dire proceeding is Press-Enterprise Company v. Superior Court of California.27 Although the Court in Press-Enterprise concluded that the jury selection process may, in some

18The defendant having no objection to the closed proceedings, the right of the defendant to a public trial and open proceedings was not an issue in this case. See note 1.
21Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 579-82. The defendant was commencing his fourth trial on a murder charge. The defendant's motion to close the proceedings to the public and press was granted by the trial judge without objection by the prosecutor. The appellant newspaper's motion to vacate the trial court's order was denied and upheld on appeal to the Virginia Supreme Court. The Supreme Court of the United States granted certiorari and reversed the Virginia court order.
22Press-Enterprise Co. v. Superior Court of California, Riverside County, 494 U.S. 701, 104 S. Ct. 619, 79 L. Ed. 2d 929, 10 Meda L. Rep., (BNA) 1161 (1984). The case involved a particularly brutal rape and murder case involving a fifteen-year-old girl. The California trial court closed the voir dire proceedings to the public and press and refused to release a transcript of the proceedings. The California Supreme Court refused to vacate the trial court's orders. After granting certiorari, the United States Supreme Court held that (1) the First Amendment guarantees applicable to criminal proceedings apply to voir dire examinations, and (2) the trial court could not constitutionally close all but three days of a six-week voir dire examination of prospective jurors without considering alternatives to closure and without articulating findings to support such an order. See also Press-Enterprise Co. v. Superior Court of California for Riverside County, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1, 15 Meda
from serving on this case for any reason, and, if so, a detailed explanation of the reason or reasons.11

Except for asking prospective jurors to detail any reason or reasons they were requesting to be excused from serving on the case, the court did not ask the prospective jurors for written details in connection with any affirmative responses to the questions on the questionnaire. Instead, the court determined that with respect to any affirmative responses to questions in the questionnaire, counsel would be given wide latitude in individually questioning each prospective juror in a closed proceeding on the record.12

After a review of the responses to the questionnaires with counsel, those prospective jurors who answered any of the above questions in the affirmative were notified to return to court for limited voir dire proceedings, which would be conducted individually and on the record in a courtroom closed to the public. All prospective jurors, including those questioned separately, were scheduled to return to court at a later date for general voir dire proceedings in open court.13

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circumstances, give rise to a compelling state interest to protect the privacy of a prospective juror when voir dire questions touch on deeply personal matters, the opinion did not recognize or identify any constitutional right of a prospective juror to protect personal information during the jury selection process. This conclusion is further emphasized in the concurring opinion by Justice Blackmun:

I write separately to emphasize my understanding that the Court does not decide, nor does this case require it to address, the asserted "right to privacy" of the prospective jurors.

Both the majority opinion by Chief Justice Burger and the concurring opinion by Justice Blackmun agree, however, that courts have the inherent right to exercise discretion to prevent unnecessarily intrusive voir dire questions.

The majority opinion is premised upon the belief that the "openness" of criminal trials to the public, and the "appearance of fairness" (including the defendant's right to a fair trial), are essential to public confidence in the criminal justice system. Quoting from Globe Newspaper Co. v. Superior Court, Chief Justice Burger wrote:

The circumstances under which the press and public can be barred from

L. Rep. (BNA) 1001 (1986) (Press-Enterprise II), where the U.S. Supreme Court reversed a decision of the California Supreme Court upholding a trial court order granting a defendant's motion to exclude the public from the preliminary hearing in a case involving charges against a nurse for murdering twelve patients by administering massive doses of the heart drug lidocaine. The Court held the public and press had a qualified First Amendment right of access to preliminary hearings, and that such proceedings cannot be closed unless specific on the record findings are made demonstrating that "closure is essential to preserve higher values and is narrowly tailored to serve that interest." Id. at 9.

Press-Enterprise Co., 464 U.S. at 512 (stating that prospective jurors have privacy "interests," not privacy "rights," which must be balanced against the historic values already present in the open nisi prius court proceedings).

Press-Enterprise Co., 464 U.S. at 514 (expressing his concern "that recognition of a juror's 'right to privacy' would unnecessarily complicate the lives of trial judges attempting to conduct a fair voir dire proceeding.


Press-Enterprise Co., 464 U.S. at 514 (Blackmun, J., concurring) (citing cases from 1823 and 1857 in which he points out, "In England . . . the juror was not obliged to answer a question tending to fix infamy, or disgrace, on him . . .").


a criminal trial are limited; the State's justification in denying access must be a weighty one. Where . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

What, then, are the circumstances that may give rise to a "compelling governmental interest" that a prospective juror be permitted to answer questions in voir dire from which the public and the press are excluded?

Chief Justice Burger acknowledged that the circumstances in the Press-Enterprise case might give rise to legitimate privacy interests of some prospective jurors. As an example, Chief Justice Burger wrote,

A prospective juror might privately inform the judge that she, a member of her family, had been raped but had declined to seek prosecution because of the embarrassment and emotional trauma from the very disclosure of the episode.

Even in this example Chief Justice Burger qualified any acknowledgement that the prospective juror should be offered privacy protection:

The privacy interests of such a prospective juror must be balanced against the historic values we have discussed and the need for openness of the process.

Since the California trial judge in the Press-Enterprise case failed to articulate findings with requisite specificity, and failed to consider alternatives to closure and the sealing of the transcript, the California orders were vacated and the case was remanded.

IV. Summary of Supreme Court guiding principles for trial judges

In balancing the "privacy interests" of prospective jurors against the "historical values," and the need for "openness of the process," Chief Justice Burger offers some very specific guidance to trial judges

Newspaper the Supreme Court held that in order to exclude the public and press from the courtroom even during the testimony of a victim of a sexual offense under the age of eighteen, the state must show that closure is necessitated by a compelling governmental interest and any order of closure must be tailored to serve that interest. It held that it is not enough that a state statute has as its primary purpose the protection of minor victims from sex crimes from further trauma and embarrassment or in encouraging victims to come forward and testify in a truthful and credible manner.

Press-Enterprise Co., 464 U.S. at 510 (citation omitted).


circumstances, give rise to a compelling state interest to protect the privacy of a prospective juror when voir dire questions touch on deeply personal matters, the opinion did not recognize or identify any constitutional right of a prospective juror to protect personal information during the jury selection process.49 This conclusion is further emphasized in the concurring opinion by Justice Blackmun:

I write separately to emphasize my understanding that the Court does not decide, nor does this case require it to address, the asserted "right to privacy" of the prospective jurors.50

I put off to another day consideration of whether and, under what conditions, that interest relates to the level of a constitutional right.51

Both the majority opinion by Chief Justice Burger52 and the concurring opinion by Justice Blackmun53 agree, however, that courts have the inherent right to exercise discretion to prevent unnecessarily intrusive voir dire questions.

The majority opinion is premised upon the belief that the "openness" of criminal trials to the public, and the "appearance of fairness" (including the defendant's right to a fair trial), are essential to public confidence in the criminal justice system. Quoting from Globe Newspaper Co. v. Superior Court,54 Chief Justice Burger wrote:

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Press-Enterprise Co., 464 U.S. at 514 (expressing his concern "that recognition of a juror's "right to privacy" would unnecessarily complicate the lives of trial judges attempting to conduct a fair voir dire proceeding).
In the Press-Enterprise decision, these guiding principles are summarized as follows:

1. A trial judge must at all times maintain control of the process of jury selection and should inform the array of prospective jurors of the general nature of sensitive questions in order to inform them that those individuals who believe public questioning of them will prove damaging because of embarrassment, may properly request an opportunity to present the problem to the judge in camera but with counsel present and on the record;

2. By requiring the prospective juror to make an affirmative request, the trial judge can ensure that there is in fact a valid basis for a belief that disclosure infringes a significant interest in privacy;

3. When a trial judge believes that limited closure is necessary, and so orders, the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time if it turns out that disclosure can be accomplished while still safeguarding the juror’s valid privacy interests;

4. When a valid privacy interest arises to the level that part of the transcript should be sealed, or the name of the juror withheld, to protect the juror from embarrassment, the trial judge must articulate findings with requisite specificity showing that the trial judge considered available alternatives to closure. Moreover, the trial judge should seal only such parts of the transcript as are necessary to preserve the anonymity of the individuals sought to be protected.18

Justice Marshall, in a concurring opinion in Press-Enterprise, recommends that before issuing a closure order, a trial court should be obliged to show that the order in question constitutes “the least restrictive means available” for protecting compelling state interests.19 He advises that the “constitutionally preferable method”20 is to redact transcripts in such a way as to preserve the anonymity of jurors while disclosing the substance of their responses. Justice Marshall’s “constitutionally preferable method”21 implicitly recognizes that “juror anonymity” is of lesser concern than the withholding of other juror information from the public.

V. Juror Anonymity Contrasted with Closure of Proceedings

In recent years, courts have increasingly withheld names and identifying information of trial jurors from the public, from the media, and sometimes from the defendant and counsel, in a practice commonly referred to as impaneling an “anonymous jury.”22 In practical terms, courts use the anonymous jury concept usually withheld the names, addresses, and phone numbers of the jurors. Some courts withhold other identifying information, such as occupation, ethnicity, religion, or the responses to juror questionnaires. Sometimes juror names are given to the court, but not to the media or even the parties in the case. Sometimes the parties’ lawyers are given access to juror information but it is withheld from the public record and the media. The primary arguments in favor of anonymous jurors are that their purpose is to avoid jury tampering, protect juror safety, and alleviate juror stress. Sometimes, however, a court’s primary motivation is to avoid media coverage of the jurors.

Although it would seem that such measures as anonymous jurors would be considered drastic and disfavored exceptions to the presumption of openness in judicial proceedings,23 the Supreme Court of the United States has not directly addressed the subject. It does not appear that the use of anonymous jurors has raised the same kind of constitutional concerns that are raised by closure of court proceedings or sealing of records.24

As noted above, the issue of juror anonymity is distinct from the

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18See U.S. v. Barnes, 501 F.2d 121 (2d Cir. 1979). (Anonymity jurors are a relatively new phenomenon. The first fully anonymous jury empanelled in the United States was in the 1967 trial of drug kingpin Larry Barnes in New York City. The Court believed Barnes presented an unusually dangerous risk to the jurors and therefore took the extraordinary measure of hiding their identities.) See also Ashley Gauthier, Anonymous Juries, Secret Justice, Sep. 17, 2006, available at http://www.cfo.org/sacramento/anonymous_juries/testimony.html ("These days, anonymous jurors are used sparingly, primarily in sensitive cases where the defendant was notoriously dangerous and the court reasonably believed a fair trial could not be held without protecting the jurors’ identities.").


21Nancy J. King, Nameless Justice: The Case for the Routine Use of Anonymous Jurors in Criminal Trials, 49 Vand. L. Rev. 123 (1996). The author argues that an anonymity policy does not infringe on anyone’s constitutional rights, first, because it is not accurate to conclude that the public has historically enjoyed an unconditional privilege to learn of juror identity and, second, that courts have for many decades retained the inherent power to control the release of juror’s names. The author distinguishes identity information about jurors from jury proceedings which are subject to First Amendment considerations, id. at 133 n. 22 (O’Brien, J., concurring).


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2) By requiring the prospective juror to make an affirmative request, the trial judge can ensure that there is in fact a valid basis for a belief that disclosure infringes a significant interest in privacy;

3) When a trial judge believes that limited closure is necessary, and so orders, the constitutional values sought to be protected by holding open proceedings may be satisfies later by making a transcript of the closed proceedings available within a reasonable time if it turns out that disclosure can be accomplished while still safeguarding the juror’s valid privacy interests;

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V. Juror anonymity contrasted with closure of proceedings

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As noted above, the issue of juror anonymity is distinct from the is-

1See U.S. v. Barnes, 604 F.2d 121 (2d Cir. 1979). (Anonymous jurors are a relatively new phenomenon. The first fully anonymous jury empaneled in the United States was in the 1977 trial of drug kingpin Louis Barnes in New York City. The Court believed Barnes presented an unusually dangerous risk to the jurors and therefore took the extraordinary measure of hiding their identities; see also Ashley Gathier, Anonymous Jurors, Secret Justice, Sep. 17, 2006, available at http://www.cfo.org/sacramento/anonymousjurors/text.html ("Three other anonymous juries were used sporadically in criminal cases when the defendant was notoriously dangerous and the court reasonably believed a fair trial could not be held without protecting the jurors’ identities.").


4Nancy J. King, Nameless Justice: The Case for the Routine Use of Anonymous Jurors in Criminal Trials, 49 Vand. L. Rev. 123 (1996). The author argues that an anonymity policy does not infringe on anyone’s constitutional rights, first, because it is not accurate to conclude that the public has historically enjoyed an unconditional privilege to learn of juror identity and, second, that courts have for many decades retained the inherent power to control the release of juror’s names. The author distinguishes identity information from juror from jury proceedings which are subject to First Amendment considerations, e.g., ABA Jury Principles, Principle 11, Subdivision 1285 of 1328.
sues of closing jury selection proceedings and denying public access to responses to voir dire questions which may bear on a prospective juror's ability to be fair and impartial. It appears, however, that there may be evidence that the withholding of identity information may have the effect of easing a juror's concerns about sharing information relevant to the jury selection process. It also appears likely that, whatever view the Supreme Court may take regarding jury anonymity, if the circumstances justify the closure of proceedings and the redaction of transcripts, Justice Marshall's suggestion of choosing juror anonymity over the withholding of the substance of juror responses will most likely be considered the constitutionally preferable method of reconciling the First Amendment interests of the public and press with the legitimate privacy interests of jurors.

VI. Application of Supreme Court principles to subsequent cases

One might think that, with such detailed guidance set forth by the Supreme Court in Press-Enterprise with respect to what a court must do in order to properly protect juror privacy in voir dire trials, a court would have little difficulty in applying the principles. A sampling of federal court of appeals decisions since Press-Enterprise, however, shows mixed results.

Closure was found proper in:

U.S. v. King. Don King, the famous boxing agent, was indicted on wire fraud charges. He moved to close the voir dire of prospective jurors, which was granted following the judge's citing evidence on the

H (2001) (proposing that the use of anonymous juries be limited to compelling circumstances that are demonstrated to the trial court). Subdivision H is premised on those core values that uphold public trust and the presumption of innocence. Open court proceedings serve the critical goals of public education and engendering public trust and confidence in the courts. The use of anonymous juries erodes the presumption of innocence and makes jurors less accountable. Anonymity may create additional roadblocks for obtaining important information about biases or impartiality of prospective jurors. The factors weighing in favor of open juries are overwhelming. Accordingly, subdivision H strongly discourages anonymous jury trials.

Two Pauls L. Hammerland, Safeguarding Jury Privacy, 85 Judicature 19, 23 (2001) (failure to protect juror privacy can undermine the primary objective of voir dire — namely, to elicit sufficient information about prospective jurors to determine if they can serve fairly and impartially); see also id. at 23 n.2 ("A 1991 study of jurors honestly during voir dire found that 29 percent of jurors failed to disclose prior criminal victimization by themselves or their family members, Richard Saltzer et al., Juror Honesty During the Voir Dire, 19 Crime. Just. 451 (1991)"); id. at 19 n.3 ("I'm a more recent study of the effectiveness of individual voir dire, Judge Gregory Mize (D.C. Superior Court) found that 28 percent of prospective jurors failed to disclose requested information that Judge Mize believed was relevant to their ability to serve fairly and impartially," Gregory E. Mize, On Better Jury Selection: Spurring UFO Jurors Before They Enter the Jury Room, 36 C. Rev. 10 (1999)).


record supporting concern over jurors' candor, including the fact that Don King is a controversial figure, who has been the subject of a great amount of publicity. Jurors were directed to fill out extensive questionnaires, which would be followed up with questions asked of jurors in closed proceedings. Jurors were given the opportunity during the closed proceedings to indicate whether they wished to have protection of privacy on any matters which the court would then consider, using the guidance outlined in the Press-Enterprise case.

In re Greensboro News Co. This case involved violation of civil rights actions against members of the Ku Klux Klan and National Socialist Party of America after being acquitted of murder charges in the shooting of members of an anti-Klan rally. As a result of widespread media attention, the district court judge ordered the voir dire proceedings to be closed to the public and press and transcripts of the proceedings be provided upon transcription in two weeks. The court found that a lack of privacy would lead to retribution for honest answers and that the Klan was known for being prone to violence. It also found no harm in a two-week delay as well as the absence of less restrictive alternatives.

Matter of Dallas Morning News Co. This case involved a matter relating to the collapse of one of the largest savings and loan company failures in the United States. The district court ordered closure of jury selection proceedings for individual voir dire questions with general voir dire questions being asked in open court. Transcripts of the individualized voir dire were to be released after the jury was empanelled. The court of appeals held the closure proper but suggested the better practice would have been to inform the prospective jurors that they could have individualized voir dire in closed proceedings only if privacy was requested by them.

In the following cases closure of proceedings was found to be not proper:

ABC, Inc. v. Stewart. This case involved the trial of Martha Stewart on charges of securities fraud. The trial court entered an order for certain jurors who answered questionnaires to be individually questioned in closed proceedings in the judge's robing room without the presence of the public or press. The court promised that transcripts would be released the following day with names redacted.


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U.S. v. King, 140 F.3d 76, 96 Media L. Rep. (BNA) 1449 (25th Cir. 1996).\(^{47}\)

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The district court's decision to deny access was reversed by the court of appeals finding the providing of a transcript was no substitute for being present in the courtroom, and there was no showing of misconduct of the media or that any controversial issue was being probed during the questioning.

In re Memph Pub Co.** This case involved tax evasion charges against a Memphis State University basketball coach that garnered "massive pretrial publicity." Instead of closing the courtroom, the district judge employed a white noise machine that emitted a noise that made individual prospective juror answers inaudible to fellow jurors, the media, and the public in the courtroom. A transcript was promised following the selection of the jury. The court of appeals found that a generalized concern over a defendant's right to a fair trial was not sufficient cause to close the voir dire proceedings without specific findings of fact to support that conclusion.

U.S. v. Peters.44 The defendants in this case were charged with distributing cocaine. Their arrests were widely reported in the media. An initial request for a closed voir dire was denied, but later granted after a newspaper article was published describing the voir dire and personal information provided by some of the prospective jurors. The court of appeals found error in the district court's closure order because there was no indication that prospective jurors had violated a general admonition not to read any media article about the case and the district court had failed to explore alternatives to closure.

VII. Applying the Supreme Court principles to the O'Brien case

Following the hearing on the application of the press to intervene in the O'Brien case, the court issued its ruling and entered the following orders:**

1) All questionnaires will be reviewed as soon as practicable and redactions made of any identity information and any information which the Court finds infringes on any significant privacy interest. The Court will make specific findings as to any redactions. The redacted questionnaires will then be made part of the public record.

2) With respect to closed voir dire, the Court will complete its limited closed voir dire of the selected jurors. All such voir dire will be on the record. As soon as reasonably practicable, the Court will review a transcript of the closed voir dire and redact

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any identity information or information the Court finds infringes on any significant privacy interest. Specific findings will be made.

The redacted transcripts will then be made public record.

Upon review of the completed questionnaires, the court issued the following orders:

The Court and counsel have reviewed the written questionnaire responses in this case. As to each questionnaire the Court has redacted the following responses:

1. The name and juror number of the prospective juror.

2. All information that could reasonably lead to the identity of the prospective juror.

3. Any response to Question 11 which inquires into whether a prospective juror or family member have been accused of or victim of a sexual assault or sexual offense involving children.

4. Any affirmative response to Question 16 which refers to information a prospective juror wishes to provide the Court in private.

The Court makes the following findings:

1. Those prospective jurors who provided an affirmative response to Question 11, 14, and/or 16 and who provided additional information have substantial privacy interests that outweigh the value of openness to the media and public.

2. The withholding of disclosure of such information is essential to preserve the higher value of prospective juror privacy.

3. The information subject of these findings are not in issue nor are they relevant to the present proceedings except insofar as they must be considered in determining whether a prospective juror can be fair and impartial in this case.

In making these findings, the Court has considered all cases relevant to balancing First Amendment freedoms and a juror's right to privacy.

4. All other information provided by the prospective jurors in their responses shall be made a part of the public record in these proceedings.

IT IS ORDERED AS FOLLOWS:

1. The original Questionnaires and responses shall be sealed and filed with the Clerk of this Court.

2. Counsel shall, forthwith, return all copies of said original Questionnaires and responses to this Court.

3. All such copies shall be destroyed.

4. Counsel shall not, at any time, disclose any information ordered sealed by the Court.

5. A redacted copy of responses to the Questionnaires shall be made an Exhibit to the voir dire in this case and filed as a public record.
The district court's decision to deny access was reversed by the court of appeals finding the providing of a transcript was no substitute for being present in the courtroom, and there was no showing of misconduct of the media or that any controversial issue was being procured during the questioning.

In re Memphis Pub. Co.** This case involved tax evasion charges against a Memphis State University basketball coach that garnered "massive pretrial publicity." Instead of closing the courtroom, the district judge employed a white noise machine that emitted a noise that made individual prospective juror answers inaudible to fellow jurors, the media, and the public in the courtroom. A transcript was promised following the selection of the jury. The court of appeals found that a generalized concern over a defendant's right to a fair trial was not sufficient cause to close the voir dire proceedings without specific findings of fact to support that conclusion.

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6. A copy of the redacted copy of responses to the Questionnaire shall be delivered to the Court's Public Information Officer. The foregoing orders are set forth verbatim to show how the author dealt with the issues at a time when the court needed to act quickly and correctly in order to proceed with the trial. Fortunately, the case was not object to the rulings of the court and, in fact, provided assistance with their memoranda of law. Neither counsel for the state nor the defendant were particularly interested in the issues raised except to have them resolved in a manner that would be least disruptive to the trial schedule of witnesses.

One of the things most concern to the court at the time, however, was that the court had advised the victim that their answers to the written questionnaire would not be made public, and that anything they told the court during voir dire proceedings held in private would not be disclosed. Given the rulings of the court, such blanket privacy would not prevail. Moreover, the court had already pre-empted privacy would be an affirmative necessity of requiring a prospective juror to make an affirmative request for privacy, as was strongly suggested in the guiding principles set forth by Chief Justice Burger.

The court handled the matter by informing all prospective jurors that legal pleadings filed by the media interested had raised legal issues over was what the court had previously advised them would be protected as what the court had previously advised them would be protected as what the court had previously advised them would be protected as what the court had previously advised them would be protected as private. The court explained that, after studying the law, the court would still be able to protect their privacy as to certain matters but would be more than just a formality in the course of proceedings, would qualify as being subject to privacy, or responses given in closed proceedings, would qualify as being subject to privacy, for the protection of public. In layman's terms the court outlined to the prospective jurors what the above orders contained and how determinations of a right to privacy would be made. Finally, the court invited any juror who felt misled by the court or who was especially uncomfortable with the process that the court offered to follow the court's procedures to announce any such feelings could be taken into consideration in whether the juror should be excused from service. The court received no requests to be excused on the basis of the privacy issues.

The foregoing orders were the court's attempt to follow Chief Justice Burger's guidance with respect to the making of findings for the necessity of limited closure, the making of transcripts and written questionnaires available at the earliest opportunity, and the making of specific

findings with respect to redactions. Finally, the court made certain that all original questionnaires and transcripts of closed proceedings were properly sealed and filed with the clerk of court for preservation in the event of any requested review by appellate courts.

VIII. Conclusion

No appeal or other action was taken from the findings and orders of the court. The trial of Bishop O'Brien lasted for over one month. He was convicted of the crime charged and a date was set for his sentencing.

The lessons from the O'Brien case are several:

1) The trial court must be aware of the legal process that is related to the intersection of a juror's privacy with the right of the public to open proceedings.

2) In all cases, the trial judge must be concerned and knowledgeable regarding a defendant's right to a fair and public trial.

3) A trial judge cannot rely on trial counsel to either raise or educate the court on issues that arise when jury privacy concerns and public access concerns come into conflict.

4) The goal of ensuring a fair and impartial jury can best be achieved by a jury selection process that includes adequate and meaningful consideration of jury privacy interests as well as the rights of the public and the defendant.


45Although the issue did not come up in the O'Brien case, there may be instances where a juror's privacy concerns conflict with a defendant's right to a public trial.
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The lessons from the O’Brian case are several:

1) Trial preparation for a high profile case must include being knowledgeable of the law relating to the intersection of a juror’s privacy interests with the right of the public to open proceedings.

2) In all cases, the trial judge must be concerned and knowledgeable regarding a defendant’s right to a fair and public trial. 47

3) A trial judge cannot rely on trial counsel to either raise or educate the court on issues that arise when jury privacy concerns and public access concerns come into conflict.

4) The goal of ameliorating a fair and impartial jury can best be achieved by a jury selection process that includes appropriate consideration of juror privacy interests as well as the rights of the public and the defendant.

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