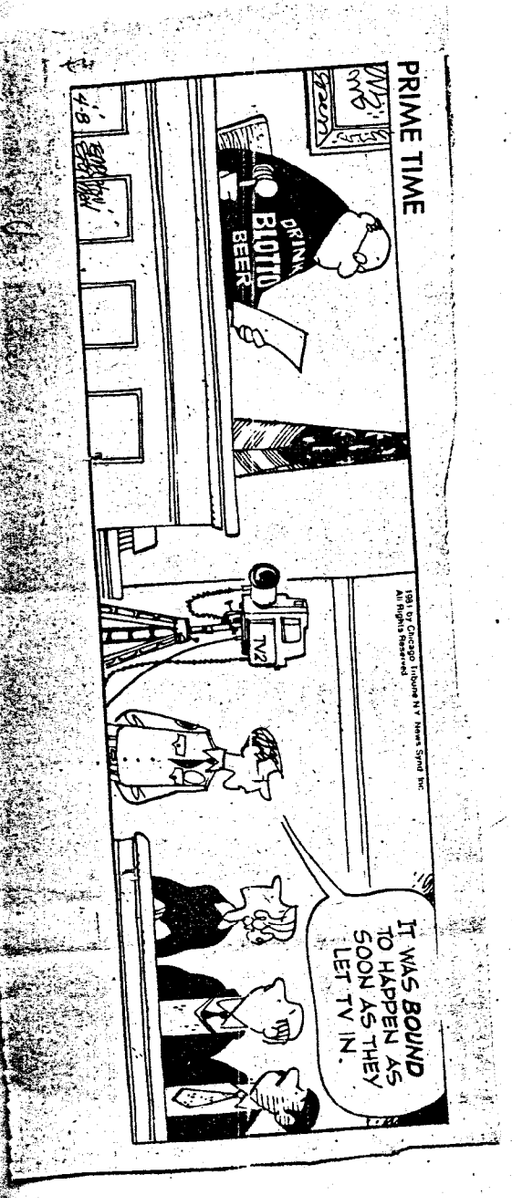


The Palm Beach **Post-Times**

Daniel J. Mahoney, Jr. — Publisher
Cecil B. Kelley, Jr. — General Manager
Thomas A. Kelly — Editor
Samuel J. Pepper — Managing Editor
Clarke B. Ash, Associate Editor

SATURDAY MORNING, MARCH 4, 1978

Exhibit 19

AFFIDAVIT

STATE OF FLORIDA)
)
COUNTY OF PALM BEACH)

The undersigned, being duly sworn, does say:

1. That he is a Circuit Court Judge in and for the Fifteenth Judicial Circuit, Palm Beach County, Florida.

2. He presided over the case of State of Florida v. Mark Herman, Case No. 77-1236 CF.

3. The attached report is a true and correct copy of the original report prepared and submitted by the undersigned to the Florida Supreme Court in accordance with Petition of Post-Newsweek Stations, Florida, Inc., 347 So.2d 404 (Fla. 1977).

Thomas E. Sholts, Circuit Judge

Sworn to and subscribed before me, this 2nd day of September, 1981.

Notary Public, State of Florida at Large

My Commission Expires: 9-2-82

Exhibit 20

IN THE CIRCUIT COURT

FIFTEENTH JUDICIAL CIRCUIT

OF FLORIDA

CRIMINAL DIVISION

THOMAS E. SHOLTS, JUDGE

Case No. 77-1236 CF

STATE OF FLORIDA

v.

MARK A. HERMAN

Report to

The Supreme Court of Florida

re:

Conduct of

AUDIO-VISUAL TRIAL COVERAGE

Pursuant to paragraph (9) of the opinion of the Supreme Court of Florida in re: Petition of Post-Newsweek Stations, Florida, Inc., 347 So.2d 404 (Fla. 1977), this Court submits its report concerning media coverage in the trial of State of Florida v. Mark A. Herman (Circuit Court Case No. 77-1236 CF).

HISTORY

Judicial Canon 3A(7) (formerly known as Canon 35) originated from a 1932 ABA resolution which suggested a complete ban (to prevent breaches of judicial decorum) on radio broadcasting and the taking of still photographs of judicial proceedings. Its complete history is attached as an Appendix to Justice Harlan's concurring opinion in Estes v. Texas, 381 U.S. 532 (1965). The Canon's adoption was related to excessive and spectacular media coverage of the Lindbergh kidnapping trial in State v. Hauptmann, 180 A. 809 (N.J. 1935), cert. denied 296 U.S. 649 (1935). Canon 35 was formally adopted by the ABA House of Delegates in 1937 and amended in 1952 to ban the televising of court proceedings.

Rule 3.110, Florida Rules of Criminal Procedure, presently bans broadcasting, photographing, televising and taping of criminal judicial proceedings. Florida Experimental Rule 3A(7) was taken from ABA Canon 35 and temporarily supersedes Rule 3.110.

On January 24, 1975, Post-Newsweek Stations, Florida, Inc. filed a petition for modification of Rule 3A(7) to permit use of

radio broadcasting equipment and television cameras in Florida judicial proceedings. By order entered January 28, 1976, the Florida Supreme Court permitted television coverage on a restricted basis of one criminal trial and one civil trial in the Second Judicial Circuit. Post-Newsweek Stations, Florida, Inc., 327 So.2d 1 (Fla. 1976). Consent of jurors, witnesses and parties was required. Any camera film was to be filed with the Florida Supreme Court and could not, without prior approval, be shown for public broadcast. On April 12, 1976, by interlocutory order, still photography cameras were also included.

The Second Judicial Circuit authorization was expanded (due to difficulty in obtaining agreement of all involved persons) to include the Ninth Judicial Circuit. Petition of Post-Newsweek Stations, Florida, Inc., 337 So.2d 804 (Fla. 1976). On December 21, 1976, a supplementary order granted similar authorization to the Fourth and Eighth Judicial Circuits. Having no success in obtaining all parties' consent, the Florida Supreme Court decided an involuntary experimental program was essential to a reasoned decision and, in effect, did away with the consent portion of its former order when it stated:

> "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. Post-Newsweek Stations, Florida, Inc., 347 So.2d 402, 403 (Fla. 1977).

The starting date was subsequently changed from July 1, 1977, to July 5, 1977, at 12:01 a.m. ending at 11:59 p.m. June 30, 1978. A motion to extend the pilot program for an additional year was recently denied on May 11, 1978. The Florida Bar's Board of Governors on the same day, by resolution (21 in favor-8 against), instructed its counsel to oppose any effort to continue the experimental pilot program.

On June 14, 1977, the Florida Supreme Court in Post-Newsweek Stations, Florida, Inc., supra, p. 404, established standards and criteria for use of cameras and electronic recording devices in Florida's courtrooms. Operation of the cameras was subject to strict standards, and the media had no right of appeal from restrictive trial court orders during the pilot program. The standards related to: equipment and personnel; sound and light criteria; location of equipment and personnel; movement during proceedings; courtroom light sources; conferences of counsel; impermissible use of media material; appellate review; and evaluation of the program. The Florida Supreme Court also limited the number of camera and audio system operators in trial proceedings to:

a. One camera person operating not more than one television camera.

b. One photographer operating not more than two still cameras.

c. One audio system for radio broadcast.

The court also designated brands and models of cameras for courtroom use. The chief judge of each circuit was given responsibility to designate appropriate courtroom areas for placement of equipment.

During the past year, Florida's Experimental Rule has not proceeded unchallenged:

a. One criminal defendant sought a Federal Court injunction of the Experimental Rule.

b. Two criminal defendants requested the Florida Supreme Court ban cameras in trial proceedings.

c. One witness in a criminal case requested the Florida Supreme Court prohibit televising her testimony.

d. An attempt was made to bar televising the testimony of a sixteen-year-old rape victim.

Each challenge was rejected. See Briklod v. State, Fla. Sup. Ct., No. 52,499; Briklod v. Rivkind, S.D. Fla., No. 77-2148-Civ-JLK, opinion filed July 20, 1977; Wilhoit v. State, 351 So. So.2d 409 (Fla. 1977); State v. Granger, 352 So.2d 175 (Fla. 1977); State v. Bannister, ____So.2d____ (2DCA Fla. 1978), No. 78-376, opinion filed March 10, 1978; Kreusler v. Sholts, ____ So.2d____, No. 53,348; Kreusler v. Sholts, S.D. Fla., No. 78-8039 Civ-CF.

The last two mentioned cases concern this report because they arose when the widow of the deceased murder victim in the Herman trial objected to televising her testimony upon a claimed right to privacy under authority of the 9th and 14th Amendments to the U. S. Constitution and Article I, §1, Florida Constitution 1968. She sought injunctive relief in the Federal District Court and a direct Writ of Prohibition in the Florida Supreme Court. Her claims were dismissed in both instances.

The lead federal case regarding the media's presence in the courtroom is Estes, supra, although Estes was not the first case in which the United States Supreme Court addressed the issue of cameras in the courtroom. Stroble v. California, 343 U.S. 181 (1952). Most recently, both Estes and Stroble were referred to in Nebraska Press Association v. Stuart, 427 U.S. 539 (1976). See also Sheppard v. Maxwell, 384 U.S. 333(1966) and Murphy vs. Florida, 421 U.S. 794 (1975).

An analysis of the Florida decisions as well as those of various federal and state courts is found in Attorney General Shevin's written presentation of April 8, 1978, to the American Bar Association's standing Committee on Standards for Criminal Justice.

STATE OF FLORIDA V. MARK A. HERMAN

The Herman trial was televised gavel-to-gavel by WPBT-Channel 2 (Public Broadcasting System). The proceedings were

extensively reported in most major newspapers published in Southeastern Florida, usually accompanied by still camera courtroom photographs. There was no separate radio broadcasting system installed, although a facility for audio pickup was made available by WPBT-Channel 2.

At 9:00 a.m., Monday, February 6, 1978, the trial began. Pooling arrangements for media personnel were made in advance of the trial. The court appointed Mr. R. L. Horey, Court Administrator of the Fifteenth Judicial Circuit, to serve as liaison between the media and the court. Media personnel did not attempt to bypass the court's liaison officer, and all media personnel cooperated with the court in carrying out suggestions and requests.

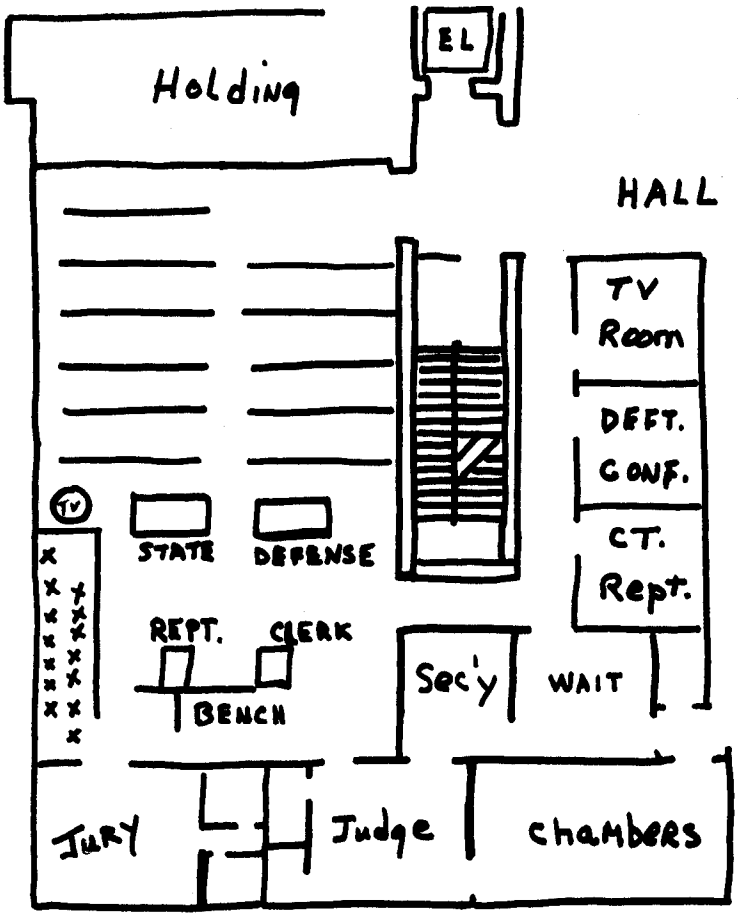
One portable television camera was used throughout the trial. The camera was operated by personnel of WPBT-Channel 2. Only one camera person manned the camera at any given time. Substitution of camera operators was done during recesses so as not to disrupt the proceedings. The court requested all microphones, including the directional microphone located on the camera, be turned off when panning counsel tables and side-bar conferences.

A room immediately adjacent to the courtroom was reserved for personnel and equipment for video and audio tape reproduction. Thus, the halls immediately outside the courtroom

were not unduly congested nor were other courts in session overly disturbed by this activity.

The courtroom was not remodeled to accommodate television equipment, but additional microphones, necessary cable equipment, the television camera and required video tape reproduction equipment were installed over the weekend before the trial. The court met with media representatives on Sunday afternoon, February 5, 1978, to finally inspect and approve the installation and equipment.

The television camera was mounted on a fixed tripod base located directly to the rear of the jury box.



The camera and cables were relatively unobtrusive, but because of the configuration of the courtroom and the location of existing benches, counsel tables and seating arrangements, the camera was located much too close to the jury box.

The television and audio equipment caused no significant distractions. The trial was televised without resort to artificial lighting. Existing courtroom light was sufficient without increasing light intensity. The courtroom's air conditioning equipment caused some interference with the audio portion of the televised signal. This problem was somewhat remedied by adding, at the request of Channel 2, two microphones--one located at the bench and the other at the witness stand.

On several occasions, before and after normal court hours, the court held informal conferences with Mr. Thomas N. Donaldson, Producer/Director of WPBT, concerning such matters as the length of a given day's session and particularly with respect to the two Saturday sessions which were televised "live" rather than video tape rebroadcast. For that, it was necessary to install additional equipment (a microwave transmitter) on the courthouse roof. Arrangements were made well in advance to satisfactorily complete this work. Channel 2 personnel and the building maintenance staff of the Palm Beach County Courthouse cooperated well in installing and setting up all necessary additional equipment.

The court permitted one photographer utilizing two still cameras (with not more than two lenses for each camera) to take still photographs. These still cameras partially conformed to specifications set forth by the Florida Supreme Court. In July, 1977, the Chief Judge of this Circuit generally approved the Leica M-2, Nikon F-2 and Leica M-4-2, cameras ultimately used at the Herman trial.

A special seat was indicated for the still camera photographer who was not permitted to move about the courtroom. The news media agreed between themselves as to which still photographer would take pictures on any given day.

During the first three days of trial, the court noticed some movement by the still camera photographer (from one side of the aisle to the other) when taking pictures. As soon as the matter was brought to the photographer's attention, the movement stopped and there was no further problem. In comparison, the clicking of the still photographer's camera shutter was more disruptive than the presence of the television camera. Although the court imposed no restriction on the number of still camera shots permitted, it now seems reasonable to minimize this distraction by setting a limit on the number of still camera shots taken of each witness.

The front row of public benches were reserved for media personnel which included representatives from local newspapers,

radio and television stations, and employees of the Public Broadcasting System. The court requested media personnel refrain from interviewing, photographing or conducting any activity in the hallway immediately outside the courtroom because of possible interference with the free flow of spectators, parties, attorneys, witnesses and jurors to the courtroom.

During the first week of trial, and contrary to the court's directive, a local television station (not WPBT-Channel 2) took mini-camera television shots in the hall immediately outside the courtroom. Interestingly, the court received a formal complaint about this activity from other media personnel and immediately rectified the problem by speaking with the offenders.

Thus, it must be fairly stated that the experiment of fully televising the Herman trial worked out much better than the court believed possible.

EVALUATION AND RECOMMENDATIONS

There were no histronics and no thespians, although the danger of acting for the camera will always exist. The attorneys, witnesses and all interested parties were properly behaved. One witness refused to testify from fear of her safety, partially contributed to by the television's presence. The court rejected

the witness' position and held her in contempt.

The defendant objected to televising the trial on due process grounds. The court overruled his objections because of the Supreme Court's ruling temporarily suspending FRCrP 3.110. The State originally took no position either for or against televising the trial, although subsequent to the verdict, the prosecutor stated an objection on security grounds because of possible retribution against several prison inmate witnesses who testified for the State and who might not otherwise have been identified to fellow inmates except for exposure on television.

Because of excessive pretrial publicity and Channel 2's decision to televise the trial, the court decided to sequester the jury. The defendant requested the court sequester the witnesses as well. The court denied this request because there were approximately fifty named witnesses, and it was unreasonable and economically unfeasible to grant defendant's request. However, when the court invoked the witness rule, each witness was specifically directed not to watch television proceedings nor listen to radio news broadcasts, nor read any newspaper headlines or accounts concerning the trial. The inmate witnesses (housed at the Palm Beach County Jail) were not permitted to listen to any radio or television broadcasts, nor read any

newspaper accounts of the trial. This procedure was arranged and agreed to by the parties and enforced by court order.

Because of the defendant's motion to change venue (generated by excessive pretrial publicity and contributed to by Channel 2's decision to fully televise the trial), the court followed a pre-qualifying voir dire procedure by examining each juror individually away from the remainder of the jury panel and outside the presence of the television camera, although newspaper reporters and a still camera photographer were permitted to be present.

Four general areas were discussed with each juror:

a. Pretrial media publicity (most of which dealt with the defendant's extensive criminal record).

b. Juror attitudes toward television and other media coverage of the trial.

c. Jury sequestration and length of the trial (estimated at three weeks).

d. Capital punishment.

The pre-qualification process was lengthy but necessary. The court was afraid the answers of individual jurors on such sensitive matters, if made within earshot of the entire panel, might prejudice other prospective jurors by causing the formation of opinions leading to disqualification.

A panel of eighty-three jurors was individually interviewed. Thirty-five were excused for cause. Forty-eight were pre-qualified after which the voir dire examination moved from chambers to the courtroom.

The pre-qualifying procedure lasted four complete working days. The voir dire proceedings held in the courtroom took one working day. Of the thirty-five jurors discharged, fourteen were excused because of pre-conceived opinions formed by pretrial publicity; the others were excused because of attitudes about capital punishment or for hardship reasons.

The great majority of jurors interviewed during voir dire stated they preferred not to have the trial televised but would nevertheless be able to render a fair and impartial verdict. Only a few thought the idea of televising the trial and taking still photographs in the courtroom good. By the end of the trial, the sitting jurors apparently changed their views about the media's presence in the courtroom. The court, with agreement of the parties, requested each trial juror to voluntarily complete a jury survey form provided by the Department of Communication of Florida Technological University which is currently making a study of the impact of the media on courtroom proceedings. The court also asked interested courtroom personnel to fill out the same form. A synopsis of the information received as well as a sample of the survey form is attached.

The jury of twelve persons and two alternates was selected on Friday, February 10, 1978, and instructed to return home, pack belongings, and return to court on Saturday morning, February 11, 1978, when the jury was sworn and testimony began. Meanwhile, arrangements were made to lodge the jury at a local

motel whose management had been instructed to remove all television and radio sets from jurors' rooms. Sequestration was absolutely necessary to protect the record by making it impossible for jurors to watch proffers of evidence and other related matters not normally seen by the jury. The court would not have sequestered this jury except for the presence of the media in the courtroom. The expense of sequestration borne by the taxpayers of Palm Beach County (not the media) amounted to approximately $11,500 including hotel rooms, meals, overtime for round-the-clock bailiffs and jury transportation.

The verdict was rendered February 22, 1978. During the trial and directly related to the widespread public interest caused by the television coverage, the court received two bomb threats on its direct telephone line. Additionally, courthouse personnel received four other bomb threats telephoned to other departments in the courthouse. The court also received three or four other telephone messages pertaining to so-called "leads" in the case. The anonymous bomb threats necessitated several security searches of the courtroom and adjacent areas, and the "leads" necessitated investigation by the State Attorney's office and defense counsel. The bomb threats and "leads" were kept from public knowledge for security reasons.

I believe all previous objections to the media's presence in the courtroom on grounds the equipment utilized creates a

theatrical appearance no longer has merit, although to minimize the possibility of distraction and prejudice, courtrooms should be remodeled to include a booth for media personnel and equipment. The portable television camera was compact and relatively unobtrusive. As previously noted, the proceedings were more disrupted by the clicking shutter of the still photographer's camera which was most noticeable during the pre-qualifying voir dire proceedings but obvious as well in the courtroom. There were no Kleig lights present and care was taken to hide television cables. The transmitting truck was parked on the public sidewalk immediately adjacent to the northwest door of the courthouse. Necessary cables from the truck were strung through the stairwell to the fourth floor courtroom. The cables were visible but care was taken to protect the safety of persons using the stairs.

The media claims the right to take still photographs, to tape and broadcast testimony and to televise trials because it wishes to educate the public. I doubt the intellectual integrity of the media's position in making its request to change Canon 3A(7). To my knowledge, no civil proceeding has been fully televised in Florida during the one-year experimental period. The reported challenges to the proposed amended rule pertain only to criminal cases, particularly those dealing with lurid murder and sex offenses. As Mr. Herb Sites,

an editorial writer for the Palm Beach Times, amply pointed out March 6, 1978:

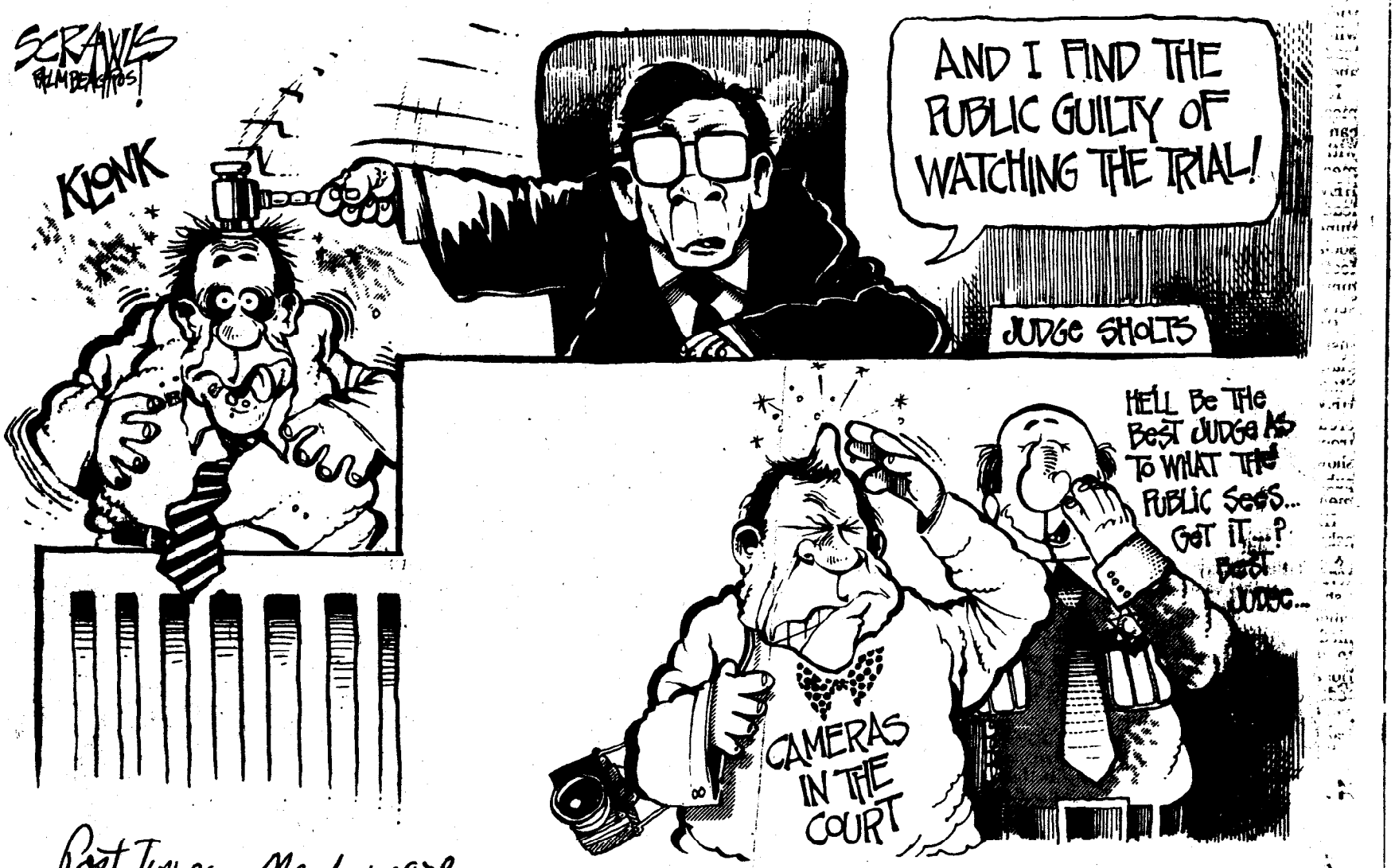
> "I do have doubts, though, of the value of TV trial coverage as an educational aid to the public. True, in the Herman trial airing, many people saw for the first time how a murder case is actually conducted. This one had some of the elements of the more lurid TV dramatizations viewers have been fed in the past. But it could hardly be considered a fair sample of the day-to-day operation of our courts of justice.
>
> Perhaps 90 per cent of our normal court proceedings are deadly dull. No rating-hungry TV station or network would dare make them daily fare for their viewers. It is logical to assume that even if the court camera ban is permanently removed, TV coverage would be offered only on the most sensational trials. And that would provide more 'Roman circuses' than education."

When a defendant's problems become entertainment for the public, the trial takes on a different form than an orderly search for the truth. The chief function of our judicial trial machinery is to ascertain the truth. The use of television does not materially contribute to this objective. Its use amounts to injection of irrelevant factors into court proceedings. Trials are open to the public if the public desires to attend. Permitting the media to televise trials and take still camera photographs during courtroom proceedings creates unnecessary problems at the risk of great possible prejudice. As previously noted, the adoption of Canon 35 was directly related to media excesses in the Hauptmann case, supra. Those excesses have happened in many other reported

cases, and there is no reason to believe the media's behavior will improve in the future. The gathering of sensitive news is dependent upon strong pressure to "get the scoop" or "beat the competition", and therein lies the problem. The zeal of competition will cause repetition of past excessive behavior. After the trial, the media asked the court about its opinion concerning the cameras' presence in the courtroom. When the court indicated it did not favor televising trials, the media's response was publication of the attached caricature.

I am opposed to televising criminal trials for the reasons noted in Estes v. Texas, supra, as well as others:

1. The potential impact of television on jurors is significant. As soon as the public knows a case will be fully televised, it becomes a "cause celebre". The entire community (including prospective jurors) becomes interested in all morbid details about the matter. As happened in the Herman case, the trial immediately assumes an immensely important status in the press, and the accused is highly publicized along with the gory details of the offense. Realistically, it is only the notorious trial which will be fully broadcast. The conscious or unconscious effect this may have on any given juror's judgment is questionable, but experience indicates it is not only possible but highly probable it will have a direct bearing on a juror's vote. Where pretrial publicity creates



Post Times March 4, 1978

Letters to the Editor

intense public feeling, aggravated by telecasting of a trial, the televised jurors cannot help but feel the pressures of knowing that friends, neighbors and the public are watching. I believe jurors may very well be distracted by the presence of the television camera because jurors are aware of the fact of telecasting, and to some extent most people are self-conscious when being televised.

2. The quality of testimony in criminal trials may be impaired. The impact upon a witness who knows he or she is being viewed via television by a vast audience is simply incalculable. Some may be demoralized and frightened, some cocky and given to overstatement, memories may falter, accuracy of testimony may be severely undermined and embarrassment may impede the search for the truth as may a natural tendency of over-dramatization.

3. Invocation of the witness rule is frustrated. Unless the witnesses are sequestered, they are able to view broadcasts of the day's trial proceedings, notwithstanding an admonition not to do so. They can view and hear the testimony of proceedings and other witnesses and so shape their testimony as to make its impact crucial. Also, the mere fact the trial is televised may render witnesses reluctant to appear and testify, thereby impeding the trial.

4. Additional responsibilities are directly placed upon

the trial judge. He or she has the responsibility of maintaining the integrity of the trial, protecting the due process rights of the participants and making sure the accused receives a fair trial. When television and still camera photographers come into the courtroom, the judge must also supervise that presence and spend a great deal of time on unwarranted ancillary matters.

5. The impact of courtroom television on a defendant is extremely important. The inevitable closeups of his or her gestures and expressions may overcome personal sensibilities, dignity and the ability to concentrate--sometimes the difference between life and death. A defendant is entitled to his or her day in court which should not become a television sound stage or a movie set.

The television camera is a powerful weapon. Its coverage must from technological and fiscal necessity be selective--that is, edited. Total television coverage of all trials all the time is technically possible but economically impossible. Editing is therefore essential and inevitable, and the editing is the prerogative of the media. Editing is difficult without value judgment. No mechanics presently exist for media portrayal of the value judgments of the judicial system independent of the value judgment of the media. The power to portray certain trials or certain portions while not portraying

other trials or other portions is the power to distort the effects of the administration of justice. Unintentionally or otherwise, there is the potential of destroying a defendant and his or her case in the eyes of the public. As previously mentioned, the camera invariably focuses upon the unpopular or infamous accused. Obviously, public sentiment can affect trial participants, and the real unknown is the possibility of prejudice to criminal defendants in such instances.

6. Because of excessive pretrial publicity and the media's presence in the courtroom, the voir dire process takes much longer which unnecessarily prolongs the trial.

7. An important State's witness in the Herman trial was granted a change of venue in his subsequent trial for first degree murder based upon excessive pretrial publicity, attributable to his television exposure.

8. Counsel for the co-defendant of Ronny A. Zamora received permission to voir dire Grand Jurors who would be considering an amended indictment for murder because the original indictment had been dismissed on technical grounds. This situation presents a case of first impression in Florida, directly attributable to the television coverage of the Zamora trial and opens a Pandora's box of new problems for the court.

9. Gavel-to-gavel television coverage is expensive. As

previously noted, jury sequestration in the Herman trial cost the taxpayers approximately $11,500. This cost should properly be borne by the media and not by the taxpayers of Palm Beach County.

10. The presence of the media in the courtroom unnecessarily gives each defendant another ground for reversal should there be a conviction, which adds additional burdens to an already clogged and overworked appellate court system.

I therefore recommend that Canon 3A(7) and FRCrP 3.110 not be amended.

If the Supreme Court decides to amend the Canon and rule, I then recommend:

a. No amendment unless and until further studies are made to determine whether or not the presence of television and still photography cameras is prejudicial to defendants in criminal cases.

b. Strict regulation of the media be imposed.

c. The Supreme Court require the media pay all reasonable costs necessarily incurred as a result of its presence in the courtroom, which should include remodeling alterations, jury and witness sequestration expenses, salary charges for overtime of bailiffs and court personnel and related charges.

d. The Supreme Court grant the trial court judge full and complete discretion to deal with particular problems on a case-to-case basis.

Respectfully submitted,

Thomas E. Sholts

OPINION SURVEY

This research project is being conducted by the Department of Communication of Florida Technological University, in cooperation with the court. Our purpose is to secure information which will, hopefully, help us improve our court system. We are asking you to please fill out the following questionnaire. Your cooperation is voluntary and not in any way required by the court. We do deeply appreciate your time and effort. We do not need your name so do not sign this form; we respect your right to privacy.

DATE: _____

Check the Appropriate Box

[9] Female [9] Male

Age: [ ] Under 20 [4] 21-31 [3] 31-40 [11] over 40

1. I participated in this trial in the following way:

[1] Judge	[ ] Defendant
[ ] Defense Attorney	[2] Spectator
[1] Prosecuting Attorney	[1] Court Reporter
[ ] Witness for the Defense	[2] Bailiff
[ ] Witness for the Prosecution	[ ] Court Clerk
[11] Juror	

2. I <u>was</u> [16] <u>was not</u> [2] aware before coming to this trial that television and still cameras were going to be permitted in the courtroom.

   <u>NOTE</u>: For the following statements, check the point on the scale over the words which best describe how you feel about the statement. Indicate your feelings for both the television and still cameras.

3. As a participant or observer in this trial, I found the presence and use of the television and still cameras to be very distractive. (One juror said clicking noise was distracting, and one of the court personnel remarked about the "loud shutter".)

	Strongly Agree	Agree	Uncertain	Disagree	Strongly Disagree
Television Camera:		2	1	8	7
Still Camera:	2	2	2	9	3

4. As a participant or observer in this trial, I believe the presence and use of the television and still cameras to be fair to the defendant.

	Strongly Agree	Agree	Uncertain	Disagree	Strongly Disagree
Television Camera:	5	4	6	2	1
Still Camera:	4	6	6	1	1

5. As a participant or observer in this trial, I believe the presence and use of the television and still cameras to be fair to the witnesses.

	Strongly Agree	Agree	Uncertain	Disagree	Strongly Disagree
Television Camera:	5	4	4	2	3
Still Camera:	5	3	5	2	3

6. As a participant or observer in this trial, I believe the presence and use of the television and still cameras interfere with the conduct of the trial.

	Strongly Agree	Agree	Uncertain	Disagree	Strongly Disagree
Television Camera:		3	1	9	5
Still Camera:		2	4	9	3

7. As a participant or observer in this trial, I believe the presence and use of the television and still cameras in the courtroom are in the best interest of the public.

	Strongly Agree	Agree	Uncertain	Disagree	Strongly Disagree
Television Camera:	5	5	1	4	3
Still Camera:	4	8	3	1	2

8. As a participant or observer in this trial, I found the presence and use of the television and still cameras in the courtroom made me feel tense.

	Strongly Agree	Agree	Uncertain	Disagree	Strongly Disagree
Television Camera:		3		11	4
Still Camera:		3	1	9	5

9. In my opinion the presence and use of the television and still cameras in the courtroom is a desirable practice.

	Strongly Agree	Agree	Uncertain	Disagree	Strongly Disagree
Television Camera:	3	6	4	3	2
Still Camera:	3	8	4	2	1

10. In my opinion, the presence and use of television and still cameras in the courtroom inhibited the testimony of witnesses.

	Strongly Agree	Agree	Uncertain	Disagree	Strongly Disagree
Television Camera:	2	2	3	7	4
Still Camera:	1	3	3	8	3

11. In my opinion the presence and use of television and still cameras in this trial had an intimidating effect on the judge.

Television Camera:

Strongly Agree	Agree	Uncertain	Disagree	Strongly Disagree
		1	7	10

Still Camera:

Strongly Agree	Agree	Uncertain	Disagree	Strongly Disagree
		1	7	10

12. In my opinion the presence and use of television and still cameras in this trial did not affect the courtroom behavior of the attorneys in any way.

Television Camera:

Strongly Agree	Agree	Uncertain	Disagree	Strongly Disagree
4	7	3	4	

Still Camera:

Strongly Agree	Agree	Uncertain	Disagree	Strongly Disagree
5	8	2	3	

13. In my opinion, the presence and use of television and still cameras in the courtroom in this trial caused the jurors to be distracted.

Television Camera:

Strongly Agree	Agree	Uncertain	Disagree	Strongly Disagree
	1	4	8	5

Still Camera:

Strongly Agree	Agree	Uncertain	Disagree	Strongly Disagree
	4	4	5	5

NOTE: Please place additional comments below.

[3] Check here if you have had previous experience with television or still cameras in the courtroom.

Additional Comments:

1. "I felt that the camera overemphasized the role of the attorneys in the trial and gave too little weight to the evidence. Human beings catch the eye of the TV viewers more than a piece of evidence. This tends to make the best speaker the winning attorney in the estimation of the audience. This is the opinion of most of my friends.

"As a juror I felt the witnesses, lawyers and jurors were ever aware of the presence of the camera and at times reacted just for TV."

2. "I feel that a trial that is televised in its entirety tends to be misleading to the public. Despite warnings, the public still bases its opinion on what it saw and heard and closes the mind as to what the jury saw and heard."

3. "I can only speak for myself--I heard no juror say they were distracted by the television camera. I feel if I were a witness it would bother me because I am basically a shy person and don't like to be on display or the focus of everyone's attention. I feel the general public is interested in seeing the real thing rather than just reading about it in the papers. But I personally never watched any of the Ronny Zamora trial.

"I can't really say from my own experience if it's right or wrong, good or bad. I'm sure I'd have a definite opinion if I or a member of my family, or a friend were directly involved. Then I probably wouldn't like it."

Exhibit 21

BOOTH, SHAW and WENTWORTH, JJ., concur.

378 So.2d 862

PALM BEACH NEWSPAPERS, INC., Petitioner,

v.

The STATE of Florida, Respondent.

No. 79-2096.

District Court of Appeal of Florida, Fourth District.

Dec. 20, 1979.

Rehearing Denied Jan. 24, 1980.

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 the trial of a criminal case. The District Court of Appeal, Downey, C. J., held that motion and affidavits simply setting forth subjective fears of two prospective witnesses, who were inmates of state prison, that if they were televised or they were photographed their personal safety would be jeopardized was insufficient to support finding of necessity so as to warrant curtailment of electronic and still photography.

Reversed and remanded.

Letts, J., filed opinion dissenting in part.

1. Criminal Law ⇐633(1)

While it is incumbent on the trial judge to protect those witnesses who by testifying in front of electronic media may actually be exposed to serious harm, the need for such unique protection must be clearly demonstrated by competent evidence, and fact that witness falls into one of the enumerated categories in Code of Judicial Conduct, such as prisoners, does not give rise to presumption of necessity to limit photography. 32 West's F.S.A. Code of Judicial Conduct, Canon 3, subd. A (7).

2. Criminal Law ⇐633(1)

It was appropriate for court to require notice to the media of hearing on State's motion to curtail electronic and still photography at criminal trial. 32 West's F.S.A. Code of Judicial Conduct, Canon 3, subd. A (7).

3. Criminal Law ⇐633(1)

Motion and affidavits simply setting forth subjective fears of two prospective witnesses, who were inmates of state prison, that if they were televised or photographed in their appearance at criminal trial their personal safety would be jeopardized was insufficient to support finding of necessity so as to warrant curtailment of electronic and still photography. 32 West's F.S.A. Code of Judicial Conduct, Canon 3, subd. A (7).

4. Criminal Law ⇐1226(3)

In proceeding on motion to curtail electronic or still photography of witnesses in a criminal trial, there was no reason for withholding the witnesses' affidavits from the press at hearing or for their subsequent sealing in the record where no request was made that they be sealed nor did they contain any relevant matter not already known to the parties or reflected by the record.

Talbot D'Alemberte of Steel, Hector & Davis, Miami, for petitioner.

Jim Smith, Atty. Gen., Tallahassee, and Robert L. Bogen, Asst. Atty. Gen., West Palm Beach, for respondent.

Florence Beth Snyder, West Palm Beach, for amicus curiae—Florida Society of Newspaper Editors.

DOWNEY, Chief Judge.

In this proceeding the media, in the person of Palm Beach Newspapers, Inc., seeks

review of a trial court order curtailing the activities of the electronic media in reporting the trial of a criminal case.

In a case pending in the Circuit Court, Arthur Michael Sekell stands indicted for first degree murder for allegedly killing William Wright, Jr., by setting him afire. A pretrial motion was filed by the state requesting the court to limit filming or photographing of two witnesses. The motion alleges that both witnesses are inmates at Lantana Correctional Institute and are vital to the state's case; both fear that if there is television coverage of the trial while they testify their personal safety in prison will be greatly jeopardized.

The press was given notice of the hearing on said motion and counsel for the petitioner was present. As the hearing opened the state furnished the court and defense counsel with affidavits from the two witnesses in question. Counsel for petitioner was not furnished copies of these affidavits nor apprised directly of their contents. However, the prosecutor advised the court that neither of the witnesses would testify at trial, even under pain of contempt, if their testimony were televised or if they were photographed. He also advised the court that a Lieutenant from the prison was present to testify regarding the danger envisioned by the witnesses. An extended colloquy thereafter ensued, mostly between counsel for the defense and the press, on the one hand, and the trial judge, on the other, concluding with the judge's announcing:

> So I will grant the motion and I will not permit the still cameras photography or the televising if there is going to be any televising.

Earlier in the hearing, in an attempt to point up the folly in prohibiting photographs and the televising of the witnesses, counsel for the press suggested that the press was free to make sketches of the witnesses or publish existing photographs and thus divulge their image to the public. At this suggestion the trial judge stated he would bar that activity also. No written order was entered, but the parties have treated the court's ruling as being restricted to photographs, sketches and televising of the two witnesses in question.

The focus of this case, as we see it, is not on the constitutional right of access to the courts, but rather on the proper construction and interpretation of the guidelines set forth by the Supreme Court in Florida in *In Re Petition of Post-Newsweek Stations, Florida, Inc., for Change in Code of Judicial Conduct*, 370 So.2d 764 (Fla.1979). In that case of original jurisdiction, after a lengthy pilot program to study the effects of the electronic media in the courtroom, the Supreme Court concluded that Canon 3 A(7), Florida Code of Judicial Conduct, prohibiting broadcasting, televising, recording or taking photographs in the courtroom was no longer required to insure a defendant's right to a fair trial or to preserve an atmosphere conducive to judicial proceedings. Thus, said Canon was amended to allow electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state in accordance with the standard of conduct and technology promulgated by the Supreme Court. The allowance of such media coverage, however, was made subject to the authority of the trial judge to control the proceedings before the court so as to ensure decorum, prevent distraction and ensure the fair administration of justice. For clarity, the Court included its own commentary which, in pertinent part, points out that the revised Canon constitutes a general authorization for electronic media and still photography coverage of court proceedings for all purposes, subject to the limitation of the court's own standards having to do with equipment, personnel, etc.

The *Post-Newsweek* Court recognized that there are unique problems which can arise with respect to particular participants in judicial proceedings, such as a child in a custody proceeding, prisoners, confidential informants, sexual battery victims and witnesses under identity protection. Therefore, it was felt expedient to promulgate a standard to assist the presiding judge in exercising his discretion in determining whether to prohibit electronic media cover-

age of a particular participant. In that regard the Court stated:

> [W]e 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. (Emphasis added.) 370 So.2d at 779.

[1] The state contends that *Post-Newsweek* authorizes the exclusion of electronic media when individuals who fall into one of the enumerated categories, such as prisoners, are called to testify. Further, the state seems to be of the view that the trial judge need not support his decision to limit electronic or still photography coverage with a finding of necessity since the necessity, in such instances, is presumed. We reject that analysis of the *Post-Newsweek* case. On the contrary, while it is incumbent upon the trial judge to protect those witnesses who by testifying in front of the electronic media may actually be exposed to serious harm, the need for such unique protection must be clearly demonstrated by competent evidence. Our concern on this review is to determine whether the record before this court comports with the foregoing standard. It is our conclusion that it fails to do so.

[2] We think it was appropriate for the court to require notice to the media of the hearing on the state's motion to curtail electronic and still photography. Ostensibly, the purpose of such a proceeding is for the presiding judge to hear evidence so that he can make findings as a predicate for the exercise of his discretion in granting or denying the motion. In the nature of things, we would expect the press to contest any proposed limitation upon full coverage as envisioned by Canon 3 A(7), *supra*. Therefore, the party moving for a limitation on coverage would seem to have the burden of adducing some credible evidence necessitating the limitation, while the press should have the right to cross-examination and the adduction of contrary proof.

In the case at bar the state filed a motion which alleged essentially that it had two vital witnesses who were inmates of a Florida prison and that they were afraid if their testimony were televised or they were photographed their personal safety would be jeopardized. The trial court was furnished with identical affidavits from the two witnesses, which the prosecutor and Attorney General state show the witnesses will refuse to testify if their testimony is to be televised or photographed because they fear for their safety in prison. At the hearing the prosecutor also advised the court that the state had a prison official present who would testify in support of the motion. However this testimony was not presented and, as we mentioned earlier, the trial court discussed the matter with counsel and, based solely upon the motion and affidavits, the motion was granted.

[3] We emphasize that the trial judge made no findings, as required by the *Post-Newsweek* standard, nor, in our judgment, could he have done so. The motion and affidavits [1] simply set forth subjective fears of the two witnesses involved without any objective facts upon which the court could make a determination regarding the substantive validity thereof; to say nothing of the inability of the press under the circumstances to test the substance of the state's position. No facts were shown so that the court could determine whether the alleged fear was real or imagined. To require less would result in an automatic exclusion of

1. The trial judge sealed the affidavits of the two witnesses but they have been furnished to this court for our consideration.

the media upon any witness simply advising the court that he harbored some uncertainty about his safety should he be exposed to the media while testifying.

[4] Finally, we see no reason for withholding the witnesses' affidavits from the press at the hearing or for their subsequent sealing in the record. No request was made that they be sealed nor do they contain any relevant matter not already known to the parties or reflected by the record which needed to be secreted.

In view of the foregoing the order sought to be reviewed is reversed and the cause is remanded to the trial court for the purpose of holding a further hearing so that findings can be made to enable the trial court to exercise its discretion in determining the issue presented. We also direct that the affidavits in question be unsealed and filed in the court file.

ANSTEAD, J., concurs.

LETTS, J., dissents in part.

LETTS, Judge, dissenting in part.

I agree with the majority that there was no reason to withhold the affidavits and Judge Sholts apparently confused this situation with a total blackout affecting all the media such as we had before us in *Miami Herald Publishing Company v. State*, 363 So.2d 603 (Fla. 4th DCA 1978). I also agree with the statement that the press should have been advised of the hearing. However, I would otherwise reluctantly affirm based on my interpretation of the *Post Newsweek* decision. First of all our majority speaks of "a finding of necessity", but the word *necessity* does not appear in the *Post Newsweek* decision. *Post Newsweek* "call[s] for . . . 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 participant."[1] The Court then goes on to articulate the standard to be exercised in the "sound discretion" of the trial judge upon a *finding* that such coverage will have a substantial effect upon the particular individual who does not wish to be televised or photographed. The result in the case now before us hinges on what the "*finding*" minimally requires. Judge Downey sees it as a full evidentiary hearing with cross-examination and the like. I agree it is unfortunate that we have *not* been given clearer guidelines, but I see no reason why a finding cannot be predicated on affidavits. There are innumerable findings that control the outcome of cases, based on affidavits and I see no bar to same set forth by *Post Newsweek*.

As to the sufficiency of these particular affidavits I agree with the majority that mere subjective fears of the witnesses should be inadequate. Yet how can we so hold a trial judge to have abused his discretion when our own Supreme Court has clearly indicated that the subjective fears of fellow prisoners *are* enough? In the *Post Newsweek* case there appears the following passage commenting on the Mark Herman murder trial:

> 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. It is not clear that in either instance the presiding judge perceived that discretion reposed in him to grant the objection by the witness.

Thus it would appear that we are foreclosed from holding subjective fears, coupled by refusal to testify, to be insufficient. It seems obvious that the affidavits now before us were tailored to conform to the above quotation.

There is too much license taken in one statement made by the majority when it concluded:

> To require less would result in an automatic exclusion of the media upon any witness' simply advising the court that he

1. emphasis added.

harbored some uncertainty about his safety should he be exposed to the media while testifying.

Commenting on the above quotation, it is obvious that Judge Sholts was not faced with "*any*" witness. He was faced with witnesses who were fellow inmates from jail. Nor does the fear for their lives expressed, quite comport with "some uncertainty about [their] safety" especially when the man they are afraid of has already allegedly killed another inmate. Lastly the majority ignores the fact that Judge Sholts was particularly influenced by the flat refusal to testify unless cameras (not the entire media) were excluded.

Two questions to which the majority gives no answer are: At this initial hearing to determine whether the cameras are to be excluded, must the witnesses, who have already said under oath that they will not testify if the cameras roll, testify and be cross-examined with the cameras rolling? What happens if they refuse.

At the beginning of this dissent I mentioned my reluctance to affirm and but for the wording of *Post Newsweek* I would reverse altogether, not remand. To me it makes little sense to suppose that the suppression of photographs or T.V. coverage will protect one prisoner from another. I concede that prison inmates are often only known to each other by street names and that newspaper circulation does not enjoy a high penetration in correctional institutes. Nevertheless it seems unlikely that the prison grapevine, referred to by counsel for the Amicus "as the most effective communication known to man," will not quickly spread the word when one prisoner squeals on another. The accused in the case before us is already being charged with the ghastly torching death of a fellow prisoner inside the jail (surely a classic demonstration of justified terror of him) and this very defendant will be sitting in the courtroom observing his betrayal with his own eyes and ears.[2] All this being so, I find it hard to accept that the suppressing of a photograph will provide a "qualitative difference" from the printed word.

There remains, however, the problem of recalcitrant witnesses who flatly refuse to testify if the cameras are rolling. If such witnesses are already in jail for extended periods, finding them in contempt is a futile gesture. Under such circumstances, if their testimony is essential to "insure the fair administration of justice" as set forth in *Post Newsweek* I cannot find a suppression of cameras to be outside the sound discretion of the trial judge. In this case, in extended colloquy, Judge Sholts commented on this very point which was a basis for his finding.

Nevertheless I remain convinced that the safety of these particular witnesses, if their fears are justified, will depend on the security arrangements made for them *after* they testify rather than on the suppression of their pictures. Accordingly, but for *Post Newsweek* I would reverse and permit the photography under the facts of this case.

2. I concede the witnesses are currently incarcerated at a different location from the defendant. However the word can easily be spread from one jail to another and others solicited to extract revenge.

EDWARDS DAIRY, INC., Appellant,

v.

PASCO WATER AUTHORITY, INC., Appellee.

No. 78-2174.

District Court of Appeal of Florida, Second District.

Dec. 21, 1979.

Action was brought alleging that leasehold interest in land was disturbed by construction of pipeline, and also seeking dam-

Exhibit 22

per noncapital, nonlife felony case, $500 per misdemeanor case. In our view, a case as so used by the statute must be considered a count charging an alleged crime in an indictment or information as applied to an adult criminal trial. Any other interpretation makes little sense. for example, when we deal with a multi-count indictment or information charging various types of felonies [which may include capital, life, and first, second or third degree felonies], as well as misdemeanors, one can only logically categorize each count as a capital case, a life felony case, a noncapital, nonlife felony case, and a misdemeanor case depending on the crime charged therein. We reject Dade County's contention that a case should be construed as an indictment or information no matter how many or what kinds of counts or charges are contained therein, because it would be logically impossible to determine thereafter what type of case it was as each count may charge, as here, significantly different crimes. The only logical way of interpreting the statute, in our view, is to consider each count as a separate case and catagorize the case according to the crime charged in the count. Moreover, it makes no sense and is patently unfair to compensate an attorney who represents an insolvent defendant on a one-count indictment or information on the same basis as an attorney who represents an insolvent defendant on a multi-count indictment or information; the amount of work expended in defense of the two types of indictments or informations is frequently different as the multi-count indictment or information necessarily exposes the defendant to a much greater criminal liability. In short, any other construction of the statute, other than the one we reach herein, would yield an illogical and unreasonable result which we are constrained by law to avoid. *Thomas v. State*, 317 So.2d 450 (Fla.3d DCA 1975).

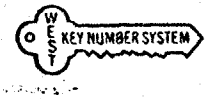
We approve this reasoning.

[5] Having resolved the matter on that basis, we need not, and do not, rule on the constitutionality of the statute. *Williston Highlands Development Corp. v. Hogue*, 277 So.2d 260 (Fla.1973). Likewise, the circuit court's ruling on the constitutionality of the statute was unnecessary. Accordingly, those portions of its order of compensation finding section 925.036, Florida Statutes, unconstitutional as applied and on its face are reversed.

It is so ordered.

SUNDBERG, C. J., and BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.

ENGLAND, J., concurs in result only.



395 So.2d 544

STATE of Florida, Petitioner,

v.

PALM BEACH NEWSPAPERS, INC., Respondent.

No. 58598.

Supreme Court of Florida.

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 evidentia-

ry 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.

1. Criminal Law ⇐633(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 ⇐633(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.

See publication Words and Phrases for other judicial constructions and definitions.

3. Criminal Law ⇐633(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 ⇐633(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 ⇐633(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 ⇐633(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 television

coverage 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.

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.[1]

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.[2]

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

1. 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).

2. 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.

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,"[3] so as to justify our authorizing trial judges to exercise their discretion in particularized determinations.

[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.[4] The lucid exposition of disparate views by Judge Downey and Judge Letts has been very helpful to set the issue here in clear perspective.

[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.

3. *In re Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764, 778 (Fla.1979).

4. 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)).

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.[5]

[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.[6] 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.[7] 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.

[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.

5. 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).

6. 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.

7. 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.

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.[8] 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.

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.[9]

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

8. 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.

9. 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.

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.

THE FLORIDA BAR, Complainant,

v.

Donald F. LEGGETT, Respondent.

No. 59522.

Supreme Court of Florida.

March 5, 1981.

In disciplinary action, the Supreme Court held that failure to prosecute mortgage foreclosure suit and personal injury action warrants probation and public reprimand.

So ordered.

Attorney and Client ⇐58

Failure to prosecute a mortgage foreclosure suit and personal injury action for clients warrants probation and public reprimand.

John A. Weiss, Bar Counsel and James P. Hollaway, Deputy Staff Counsel, Tallahassee and Donald L. Braddock, Past Chairman, Fourth Judicial Circuit Committee "B", Jacksonville, for complainant.

Donald F. Leggett, in pro. per.

PER CURIAM.

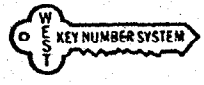
The Florida Bar charged Leggett with violating Disciplinary Rule 6–101(A)(3) by failing to prosecute a mortgage foreclosure suit and a personal injury action for two of his clients. Leggett entered an unconditional plea of guilty as charged, and the referee recommended that he be found guilty of neglecting legal matters entrusted to him. The referee further recommended a twelve-month suspension, but added a proviso recommending a public reprimand and a two-year probation if Leggett made restitution to a client and paid the costs of the instant proceedings within forty days.

On December 3, 1980, the Bar informed this Court that Leggett had made restitution and paid the costs assessed against him. We therefore approve the referee's report and recommendations.

Donald F. Leggett is placed on probation for two years from the date this opinion is filed. During probation he is directed to file quarterly reports with general staff counsel to the Florida Bar and a copy of those reports with the Clerk of the Supreme Court. We remind Mr. Leggett that members of the legal profession are expected to devote their talent and attention to the matters entrusted to them. Publication of this opinion shall constitute a public reprimand.

It is so ordered.

ADKINS, Acting C. J., and BOYD, OVERTON, ENGLAND and McDONALD, JJ., concurring.



THE FLORIDA BAR, Complainant,

v.

Guillermo FARINAS, Respondent.

No. 60166.

Supreme Court of Florida.

March 5, 1981.

Original Jurisdiction—The Florida Bar.

Cynthia Prettyman, Bar Counsel, Fort Lauderdale, John F. Harkness, Jr., Execu-

EDWARD R. CLARK #100675
Box 55
Stillwater, Mn. 55082

October 11, 1981

Committee On Cameras In The Courtroom
c/o Minnesota Supreme Court
230 State Capitol Building
St. Paul, Minnesota 55155

Dear Committee Members:

I am incarcerated at the Minnesota Correctional Facility - Stillwater. I have been following the hearings over the past two years regarding the news media wanting to use cameras in the courtrooms, and would like to offer my personal opinion.

One of the repeated arguements against it has been "it will infringe upon the rights of the defendant". To the contrary, I, and many other men here who I have discussed this matter with, agree that if the testimony of witnesses and the decisions of the judges while the trial is in progress were to come under the scrutiny of TV viewers, mainly law professors and experts in the field of forensic science, a defendant would stand a better chance of receiving a fair trial.

Although its not openly admitted in the judicial system, the more serious the charge, the more burden upon the defendant to prove his innocence. And there have been many instances where the conviction has been based upon the "expert" witneses' testimony. I believe the experts would be more inclined to testify to the facts rather than what the prosecution wants the jury to hear if there was a possibility of such testimony being aired.

Also, there have been numerous cases where the prosecution withholds evidence favorable to the defense. There again, if the trial was aired to the general public, persons with such information may be inclined to contact the court or the defense counsel when they discover the information is withheld.

In closing, I believe that every defendant would not object to cameras in the courtroom if their was the slightest inclination that by their presence it would contribute to a fair trial. The reputation of the accused has already been damaged by the mere fact of the accusation, irregardless of the outcome of the trial.

Respectfully yours,

Edward R. Clark

Edward R. Clark

Exhibit 24

NEWS MEDIA COVERAGE OF JUDICIAL PROCEEDINGS WITH CAMERAS AND MICROPHONES: A SURVEY OF THE STATES (as of August 6, 1981)

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION
Ernest J. Schultz, Jr.
Executive Vice President
1735 DeSales Street, N.W.
Washington, D.C. 20036
202-737-8657

J. Laurent Scharff
Joel M. Hamme
Pierson, Ball & Dowd
1000 Ring Building
1200 18th Street, N.W.
Washington, D.C. 20036
202-331-8566
General Counsel for RTNDA

Table of Contents

Introduction

RTNDA believes this survey of the States will prove helpful to those concerned with the present state of the law regarding journalistic coverage of judicial proceedings by television, radio and photography. The information is divided into two major parts:

(1) a description of the rules of each of the fifty States and the District of Columbia, compiled in alphabetical order (Part I); and

(2) categorizations of the rules of the States. (Part II).

Because of rapid changes in this area of the law, RTNDA will frequently revise these materials to assure that they are as current as possible. RTNDA and its legal counsel maintain copies of the rules of, and other materials from, all of the jurisdictions described in these materials. Individuals interested in obtaining copies of materials related to this issue are invited to contact RTNDA.

1. Background

From 1937, when the ABA adopted Canon 35 of its Canons of Judicial Ethics in response to media coverage of the trial of Bruno Hauptmann (accused kidnapper of the Lindbergh baby) until recently, a large majority of States prohibited the presence of the electronic media during proceedings in their courts.[1/] Indeed, for a time after the decision of the

---

1/ As amended through 1963, ABA Canon 35 prohibited photographing, broadcasting, or televising of courtrooms (during or between sessions) except for naturalization proceedings. A copy of ABA Canon 35 is contained in these materials. See Part I, infra.

Supreme Court in Estes v. Texas, 381 U.S. 532 (1965), only Colorado continued to permit the electronic media in its courts. During the same period, federal court rules prohibited, and continue to prohibit, the electronic coverage of adversarial proceedings. For example, Rule 53 of the Federal Rules of Criminal Procedure absolutely prohibits photographs or radio broadcasts during the progress of criminal proceedings.

Starting in 1974, however, a number of States began authorizing coverage of judicial proceedings. Although these materials do not attempt to provide an historical chronicle of these changes, it is important to note that the activities of the States were often, and continue to be, highly diverse. Some States undertook experiments of limited duration; others made permanent changes to their rules. Some States focused their efforts on both trial and appellate proceedings, others on appellate proceedings only, and still others on trial proceedings. Some States decided to make coverage contingent on the consents of various participants; other States chose not to have consent requirements. Section B of these materials reflects much of this diversity, but it also underscores the fact that, in every instance, courts have explicitly retained authority to terminate coverage if it proves distracting or disruptive or if it threatens the fairness of the judicial process.

Of the State experiments, the most publicized, and probably the most significant, has been that of Florida. The experimental rule and, later, the permanent rule adopted in Florida did not condition coverage upon consents of the parties, including the defendant in a criminal trial. In Chandler v. Florida, ___ U.S. ___, 101 S.Ct. 802 (1981), the Supreme Court upheld the constitutionality of Florida's actions, thereby removing one of the obstacles to adoption of rules facilitating coverage of judicial proceedings by the electronic and photographic media.

Part I

Narrative Description Of State Rules On Coverage Of Courts By Electronic And Photographic Media

The following material describes and categorizes the courtroom coverage rules of the 50 States and the District of Columbia and, where possible, furnishes official citations to those rules. For purposes of this material, the term "coverage" refers to audio and/or visual coverage of courtrooms by the electronic media and still photographers -- whether on behalf of television, radio, or the print media -- for news purposes.

A number of allusions are made in these descriptions to similar American Bar Association ("ABA") coverage regulations. This is done as a short-hand means of describing State rules. The current terms of Canon 3A(7) of the ABA Code of Judicial Conduct are as follows:

> "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.

"Commentary: Temperate conduct of judicial proceedings is essential to the fair administration of justice. The recording and reproduction of a proceeding should not distort or dramatize the proceeding."

Formerly, ABA Canon 35 covered this issue. As originally enacted in 1937, this provision read:

"Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted."
62 A.B.A. Rep. 1134-35 (1937).

In 1952, Canon 35 was amended by insertion of a prohibition on:

"'televising' of court proceedings and insertion of the descriptive phrase 'distract the witness in giving his testimony' before the phrase 'degrade the court.' In addition, a second paragraph was added providing for the televising and broadcasting of certain ceremonial proceedings." 77 A.B.A. Rep. 607, 610-11 (1952).

In 1963, Canon 35 was again amended. Deleted material is shown in brackets and emphasis is added to the material which was added at that time.

> "The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings [are calculated to] detract from the essential dignity of the proceedings, distract [the] participants and witnesses in giving [his] testimony, [degrade the court] and create misconceptions with respect thereto in the mind of the public and should not be permitted.
>
> "Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization."

(1) Alabama - On December 15, 1975, the Supreme Court of Alabama adopted Canons of Judicial Ethics to be effective February 1, 1976. Canon 3A(7A) and (7B) provides that trial and appellate courtroom coverage is permissible if the Supreme Court of Alabama has approved a plan for the courtroom in which coverage will occur. The plan must contain certain safeguards to assure that coverage will not detract from or degrade court proceedings, or otherwise interfere with a fair trial. If such a plan has been approved, a trial judge may, in the exercise of "sound discretion" permit coverage if: (1) in a criminal proceeding, all accused persons and the prosecutor give their written consent and (2) in a civil proceeding, all litigants and their attorneys give their written consent. Following approval of their coverage plans, appellate courts may authorize coverage if the parties and their attorneys give their written consents. In both trial and appellate contexts, the court must halt coverage during any time that a witness, party, juror, or attorney expressly objects. In an appellate setting, it must also halt coverage during any time that a judge expressly objects to coverage. Authority: Canon 3A(7), 3A(7A), and 3A(7B), Alabama Cannons of Judicial Ethics, ALA. CODE, Vol. 23 (Rules of Alabama Supreme Court).

(2) Alaska - By Order No. 324 (August 24, 1978), the Alaska Supreme Court permitted experimental coverage of the proceedings of the Supreme, Superior, and District Courts in the Anchorage court facility effective September 15, 1978. By Order No. 387 (September 27, 1978), the Alaska Supreme Court amended Canon 3(A)(7)(c) of the Alaska Code of Judicial Conduct to permit coverage of trial and appellate proceedings effective November 1, 1979. Prior to such coverage, a plan must be approved by the Supreme Court and must include safeguards to ensure that coverage will not distract participants, impair the dignity of court proceedings, or interfere with a fair trial. For trial proceedings, permission for coverage must be expressly granted by the judge and by the attorneys for all parties. Witnesses, jurors, or parties who object shall neither be photographed nor have their testimony broadcast or telecast. For coverage of Supreme Court proceedings, only the permission of the Court is required. Authority: Canon 3(A)(7), Alaska Code of Judicial Conduct, Alaska Rules of Court Procedure and Administration, Vol. IIA.

(3) Arizona - Canon 3(A)(7) of the Arizona Code of Judicial Conduct parallels the current ABA Canon. By order dated April 16, 1979, however, the Supreme Court of Arizona suspended this Canon to permit coverage of its proceedings and the proceedings of the State Courts of Appeals for the one-year period beginning May 31, 1979 and ending May 31, 1980. Under this experiment, coverage must not detract from the dignity of court proceedings. Subsequently, by order dated April 22, 1980, this experimental coverage was extended for one year (until May 31, 1981). By order dated April 29, 1981, the Supreme Court of Arizona extended the experiment until April 16, 1982. Authority: Canon 3(A)(7), Arizona Code of Judicial Conduct, adopted by Rule 45, Rules of the Arizona Supreme Court, ARIZ. REV. STAT., Vol. 17A (as modified by above-referenced orders).

(4) Arkansas - Canon 3(A)(7) of the Arkansas Canons of Judicial Ethics follows the current ABA Canon. By order dated December 8, 1980, however, the Arkansas Supreme Court initiated a year's experiment commencing January 1, 1981. Trial and appellate coverage is permitted but consents of parties, attorneys, and witnesses are required. See also Moore v. State, 229 Ark. 335, 315 S.W.2d 907 (1958) (continuance of trial not warranted where media photographed trial from outside the courtroom). Authority: Canon 3A(7), Arkansas Canons of Judicial Ethics, Supreme Court of Arkansas Manual of Rules and Committees (Judicial Department of Supreme Court of Arkansas).

(5) California - Rule 980 of the California Rules of Court forbids coverage; Rule 980.1 of those rules permits coverage studies if approved by the California Judicial Council. On May 10, 1980, the Judicial Council of California added Rules 980.2 and 980.3 to permit experimental coverage and experimental educational coverage of trial and appellate courts in California for the period July 1, 1980 through June 30, 1981. These rules were the result of a prolonged study conducted prior to and after the Judicial Council of California had, on December 2, 1978, approved the concept of a one-year experimental coverage program. Under the rules, the coverage must not be distracting or interfere with court proceedings. The judge must consent to coverage and, in trial court proceedings in criminal cases, written consents of the prosecutor and defendant must be obtained. The court may exercise its discretion concerning coverage of objecting witnesses. Note: Due to the United States Supreme Court's notation of probable jurisdiction in Chandler v. Florida, the Judicial Conference of California amended these experimental rules in two respects. First, it delayed the beginning of the experiment by one month. Second, it amended Rule 980.2 to require the consent of the defendants and the prosecutors in criminal trial proceedings. However, following the ruling of the United States Supreme Court in Chandler v. Florida, __ U.S. __, 101 S.Ct. 802 (1981), the California experiment was modified, and the requirement

that, in criminal cases, the defendant and prosecutor must consent was deleted effective January 31, 1981. On May 20, 1981, the California experiment was extended through December 31, 1981 by the California Judicial Council. It is expected that a consultant's report analyzing the first year of California's experiment will be made available to the Judicial Council at its Fall 1981 meeting. Authority: Rules 980, 980.1, 980.2, and 980.3, California Rules of Court, CAL. [Civil and Criminal Court Rules] CODE, Vol. 23, Part 2, 1979 Supp. Pamph. (West).

(6) Colorado - Canon 3(A)(7) through (10) of the Colorado Code of Judicial Conduct permits coverage of trial and appellate courts in Colorado. These rules were the result of hearings ordered by the Colorado Supreme Court on December 12, 1955. Following hearings in late January and early February, 1956, the referee (Justice Otto Moore) issued a report. That report, dated February 20, 1956, favored coverage and was adopted by the Colorado Supreme Court on February 27, 1956. In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics, 132 Colo. 591, 296 P.2d 465 (1956). Coverage must not detract from the proceedings, degrade the court, distract witnesses, or otherwise interfere with a fair trial. Trial judges may permit coverage by order. No coverage is permitted of criminal proceedings unless the defendant affirmatively consents. Nor shall any witness or juror in attendance under court order or by subpoena be covered if he or she expressly objects. Following the decision of the United States Supreme Court in Chandler v. Florida, __ U.S. __, 101 S.Ct. 802 (1981), the Colorado Bar-Media Committee asked the Supreme Court to hold public hearings to adopt the Florida standards in Colorado. This request was opposed by the Board of Governors of the Colorado Bar Association. The Court has not yet decided whether to hold the public hearings. Authority: Canon 3(A)(7), 3(A)(8), 3(A)(9) and 3(A)(10), Colorado Code of Judicial Conduct, COLO. REV. STAT., Vol. 7A (Court Rules), Appendix to Chapter 24.

(7) Connecticut - Canon 3(A)(7) of the Connecticut Code of Judicial Conduct is similar to ABA Canon 3(A)(7). The media have requested that coverage be permitted and have provided the Judicial Assembly (all State judges) with demonstrations of coverage, including tapes of mock trials. The Connecticut Bar Association Task Force, including attorneys and judges, submitted recommendations favoring experimental coverage to the Connecticut Bar Association House of Delegates on September 29, 1980. On May 11, 1981, the House of Delegates rejected those recommendations. WFSB in Hartford is expected, however, to petition the Rules Committee of the Superior Court for modification of Canon 3(A)(7). Authority: Canon 3(A)(7), Connecticut Code of Judicial Conduct, Connecticut Practice Book (1978 Revision), Vol. 1.

(8) Delaware - Canon 3(A)(7) of the Delaware Judges' Code of Judicial Conduct is similar to the current ABA Canon. Rule 169 of the Rules of the Delaware Court of Chancery applies this code to its proceedings. Rule 53 of the Delaware Superior Court Criminal Rules, Rule 53 of the Court of Common Pleas Criminal Rules, and Rule 31 of the Criminal Rules of Delaware Courts of Justices of the Peace forbid coverage. On March 16, 1981, the Bar-Bench-Press Conference of Delaware issued a report recommending that Canon 3(A)(7) be suspended for one year, from September 1, 1981 to August 31, 1982, to permit an experiment modeled after the Florida rule. Consents of parties would not be required and final decision regarding coverage would rest with the judge after giving all interested parties and participants an opportunity to be heard. Authority: Canon 3(A)(7), Delaware Judges' Code of Judicial Conduct, adopted by Rule 74, Rules of the Delaware Supreme Court, DEL. CODE, Vol. 16; Rule 53, Delaware Court of Common Pleas Civil Rules, DEL. CODE, Vol. 16; Rule 53, Delaware Superior Court Criminal Rules, DEL. CODE, Vol. 17; Rule 31, Delaware Courts of Justice of the Peace, Criminal Rules, DEL. CODE, Vol. 16. See also Rule 169, Rules of the Delaware Court of Chancery, DEL. CODE, Vol. 16.

(9) District of Columbia - Canon 35 of the District of Columbia Canons of Judicial Ethics parallels the provisions of former Canon 35 of the ABA Canons of Judicial Ethics. Rule 53(b) of the Superior Court Rules of Criminal Procedure, Rule 203(b) of the Superior Court Rules of Civil Procedure, Superior Court Neglect Proceedings Rule 24(b), Superior Court Juvenile Proceedings Rule 53(b), and Superior Court Domestic Relations Rule 203(b) forbid coverage in trial proceedings. Authority: All Provisions cited in the foregoing paragraph are contained in D.C. Code Encyl. (Court Rules- D.C. Courts).

(10) Florida - A coverage experiment was initiated by the Florida Supreme Court in Petition of Post-Newsweek Stations, Florida, Inc. on January 27, 1976. 327 So.2d 1. Initially, the experiment was not statewide and required that parties, jurors, and witnesses consent to coverage of their participation. This requirement was deleted, however, when the Florida courts met with total failure in obtaining the needed consents. On April 7, 1977, the Supreme Court ordered a one-year experiment from July 1, 1977 until June 30, 1978 (347 So.2d 402) and adopted standards of conduct and technology (347 So. 2d 404). Prior approval by the Supreme Court of proposed standards and technology governing coverage was required. On April 12, 1979 in Petition of Post-Newsweek Stations, Florida, Inc., 370 So. 2d 764, the Florida Supreme Court amended Canon 3A(7) of the Florida Code of Judicial Conduct to permit coverage of trial and appellate courts effective May 1, 1979 and repealed Florida Rule of Criminal Procedure 3.110. Coverage is subject only to the authority of the presiding judge to control court proceedings, prevent distractions, maintain decorum, and assure fairness of the trial. In Chandler v. Florida, __ U.S. __, 101 S.Ct. 802 (1981), the United States Supreme Court held that Florida's coverage rules met federal constitutional requirements. Subsequently, the Florida Supreme Court has issued opinions adopting standards for the exclusion of the electronic media and noting that such exclusion is permissible only where

it is shown that the proceedings will be adversely affected because of a "qualitative difference" between electronic and other forms of coverage. Florida v. Palm Beach Newspapers, __ So. 2d __, 7 Media L. Rptr. 1021 (1981); Florida v. Green, __ So. 2d __, 7 Media L. Rptr. 1025 (1981) (exclusion of electronic media is appropriate where an otherwise competent criminal defendant would be rendered incompetent by electronic media coverage). Authority: Canon 3A(7), Florida Code of Judicial Conduct, Florida Rules of Court (West 1980). See also Article X, Integration Rule of the Florida Bar, Florida Rules of Court (West 1980)(applicability of code to members of the Florida Bar).

(11) Georgia - On May 12, 1977, the Supreme Court of Georgia amended the Georgia Code of Judicial Conduct by adding Canon 3A(8), 238 Ga. 855. (The Code had previously been adopted on December 17, 1973, effective January 1, 1974. 231 Ga. A-1.) Under Canon 3(A)(8), coverage of Georgia courts is permitted if a plan is approved in advance by the Supreme Court and if the affected court permits coverage. The Supreme Court is explicitly empowered to make rules to assure that the dignity and decorum of the proceedings remain unimpaired. Plans approved by the Supreme Court, including the plan for coverage of its own proceedings, have required consent of the attorneys and the parties and -- in the trial context -- of witnesses. Authority: Canon 3A(7) and 3A(8), Georgia Code of Judicial Conduct, referenced in GA. CODE ANN. § 24-4542 (Rule 42, Rules of the Georgia Supreme Court).

(12) Hawaii - Canon 3A(7) of the Hawaii Code of Judicial Conduct follows the current ABA Canon. In November, 1980, the Hawaii State Bar Association Committee On Cameras In The Courtroom issued a preliminary report recommending that the Hawaii Code of Judicial Conduct be amended to permit courtroom coverage. This preliminary report recommended that appellate court coverage be allowed, that trial court coverage be permitted if all parties consent and if witnesses to be covered consent, that jurors not be covered, and that family court coverage be prohibited. Authority: Canon 3A(7), Hawaii Code of Judicial Conduct, adopted by Rule 16, Rules of the Supreme Court of the State of Hawaii (Appendix B) (Supreme Court of Hawaii).

(13) Idaho - By order dated September 27, 1976, the Idaho Supreme Court adopted a Code of Judicial Conduct to replace the Canons of Judicial Ethics which were previously in effect. Canon 3A(7) of the Idaho Code of Judicial Conduct specifies that judges shall comply with any coverage rule promulgated by the Supreme Court. By order dated October 18, 1978, the Supreme Court approved a plan for experimental coverage of its Boise proceedings for the period December 4, 1978 through June 30, 1979. Coverage was subject to the Court's discretion. By order dated August 27, 1979, the Supreme Court authorized coverage of its Boise proceedings for an indefinite period. The Supreme Court retains discretion to forbid coverage when it would interfere with "the proper administration of justice." On August 27, 1979, the Supreme Court also authorized one year (October 9, 1979 through October 8, 1980) of experimental coverage -- subject to the Court's discretion -- of its proceedings outside the Boise area. On September 3, 1980, coverage of Supreme Court proceedings outside Boise was permitted on a permanent basis. Authority: Canon 3A(7), Idaho Code of Judicial Conduct, Idaho State Bar Desk Book.

(14) Illinois - Rule 61(c)(24) of the Rules of the Illinois Supreme Court parallels the provisions of former ABA Canon 35 as originally adopted in 1937. Illinois Revised Statutes, Chapter 51, § 57 specifies that no witness shall be compelled to testify in any court in the State if any portion of his testimony is to be covered. Petitions of the Chicago Council of Lawyers and the Illinois News Broadcasters Association to amend Illinois Supreme Court Rule 61(c)(24) were denied by the Illinois Supreme Court on May 20, 1975 and May 26, 1978, respectively. On March 6, 1981, however, the Chicago Council of Lawyers again submitted a petition proposing experimental coverage where all private parties consent. On April 24, 1981, CBS Television also petitioned the Illinois Supreme Court for adoption of electronic coverage guidelines but sought rules similar to Florida's (i.e., no consent of the parties would be required). The Illinois News Broadcasters Association, the Illinois Freedom of Information Council, and 34 other media organizations also filed a petition with the Illinois Supreme Court on May 24, 1981 and requested that electronic coverage be permitted. This proposal would allow coverage unless the court affirmatively determined it inappropriate or contrary to the interests of justice. Under this proposal, a presumption of validity would attend requests to forbid coverage in specified types of cases (e.g., police informant cases or evidentiary suppression proceedings). Authority: Rule 61(c)(24), Rules of the Illinois Supreme Court, ILL. REV. STAT. Chapter 110A; ILL. REV. STAT. Chapter 51, § 57.

(15) Indiana - Canon 3A(7) of the Indiana Code of Judicial Conduct is based on the current ABA provision. Coverage of a number of trial proceedings has occurred in Indiana but ceased after the Chief Justice of the Indiana Supreme Court notified State judges of the requirements of Canon 3A(7). Authority: Canon 3A(7), Indiana Code of Judicial Conduct, IND. CODE ANN. (Court Rules, Book 2)(Burns).

(16) Iowa - Canon 3A(7) of the Iowa Code of Judicial Conduct is similar to the present ABA Canon. On June 25, 1979, the Iowa Supreme Court ordered a public hearing on the coverage question. Following a hearing on September 18, 1979, that Court, by order dated November 21, 1979, suspended Canon 3A(7) for a one-year period beginning January 1, 1980 and substituted a revised provision which enumerates technical guidelines and which permits coverage of trial and appellate courts subject to the affected Court's prior permission. In determining whether to grant permission, judges are to allow coverage unless, upon objection and showing of good cause, it would "materially interfere" with a fair trial. Consents of the parties are not required except in "juvenile, dissolution, adoption, child custody or trade secrets cases". On December 12, 1980, the Supreme Court of Iowa extended the experiment for a year. The experiment now expires on December 31, 1981. Authority: Canon 3A(7), Iowa Code of Judicial Conduct, adopted by Rule 119, Rules of Iowa Supreme Court, IOWA CODE (Court Rules), Vol. III.

(17) Kansas - Canon 3A(7) of the Kansas Code of Judicial Conduct is premised on the current ABA provision. By order dated January 6, 1981, however, the Supreme Court added Supreme Court Rule 1.07, permitting audio tape recorders in its proceedings and use of such recordings for news purposes. A one week experiment, permitting photography, was authorized on April 24, 1981 by the Kansas Supreme Court. The experiment was conducted during the week of May 4, 1981 in Supreme Court cases agreed upon by the Chief Justice and pool representatives of the media. Authority: Canon 3A(7), Kansas Code of Judicial Conduct, adopted by Rule 601, Rules of the Kansas Supreme Court, KAN. STAT. § 20-176; Rule 1.07, Rules of the Kansas Supreme Court, KAN. STAT. § 20-176.

(18) Kentucky - Canon 3A(7) of the Kentucky Code of Judicial Conduct formerly paralleled the present ABA provision. The Kentucky Code of Judicial Conduct had been adopted in its entirety on October 24, 1977, was effective January 1, 1978, and rendered inoperative in an August 23, 1977 resolution of the Jefferson Circuit Court (30th Judicial Circuit). Under this resolution, the signatory judges agreed to permit coverage of their trial proceedings unless it became disruptive or except in certain sensitive trial situations involving children and matters of domestic relations. The Kentucky Supreme Court, on April 10, 1981, amended Canon 3A(7) to permit electronic coverage of appellate and trial court proceedings effective July 1, 1981. Consents of the parties are not required, but coverage is subject to the authority of the presiding judge. Authority: Canon 3A(7), Kentucky Code of Judicial Conduct, adopted by Rule 4.300, Rules of the Kentucky Supreme Court, KY. REV. STAT. (Rules), Vol. 18.

(19) Louisiana - Canon 3A(7) of the Louisiana Code of Judicial Conduct follows the current ABA provision. On February 23, 1978, the Louisiana Supreme Court Conference authorized one year of experimental coverage in a trial court -- Division B of the Ninth Judicial District Court for Rapides Parish. Under the guidelines, written permission of the parties and their counsel was required and, in criminal cases, this included the consents of the victim and the District Attorney. A report, dated March 30, 1979, by the trial judge recommended extension of the experiment and, on May 3, 1979, the Supreme Court of Louisiana extended the experiment for one year from the date of its order. Shortly thereafter, on July 13, 1979, Section 4164 of Title 13 of the Louisiana Revised Statutes became law. It permits coverage of court proceedings pursuant to any motion and stipulation, agreed to by all parties and approved by the judge. In Fitzmorris v. Lambert, 377 So.2d 65 (1979), the Louisiana Supreme Court held that this statute and Canon 3A(7) did not necessarily conflict as long as a trial judge, in exercising his authority under the statute, complies with the requirements of the Canon. On May 9, 1980, Judge Douglas M. Gonzales, Division L of the Nineteenth Judicial District for East Baton Rouge Parish requested the Louisiana Supreme Court to authorize a one year experiment permitting coverage of civil trials in that division. The proposed experiment would use the same guidelines employed in

the Ninth Judicial District and was the result of several years of study conducted by a Bench-Bar-Media Committee for the Nineteenth District. Authority: Canon 3A(7), Louisiana Code of Judicial Conduct, LA. REV. STAT. ANN., Vol. 8 (Appendix); LA. REV. STAT. ANN. § 13-4164.

(20) Maine - Rule 53 of the Maine Rules of Criminal Procedure bars coverage in criminal cases. Likewise, Rule 53 of the Maine District Court Criminal Rules forbids coverage in district court criminal cases. The Maine Code of Judicial Conduct deletes Canon 3A(7). Maine Rules of Court, Desk Copy (West 1979). Accordingly, Maine has no provision barring coverage of civil cases. At present, the Maine Supreme Court Advisory Committee on Criminal Rules is studying the coverage issue, but recommendations are not expected until 1982. Authority: Rule 53, Maine Rules of Criminal Procedures, Maine Rules of Court, Desk Copy (West 1979); Rule 53, Maine District Court Criminal Rules, Maine Rules of Court, Desk Copy (West 1979).

(21) Maryland - Canon XXXIV of the Maryland Canons of Judicial Ethics is based on ABA Canon 35 following the 1963 amendments. Rule 11 of the Maryland Rules of Judicial Ethics also forbids coverage. A petition to modify Canon XXXIV was submitted to the Maryland Court of Appeals on September 25, 1979. Petition of WBAL Division. Experimental coverage was subsequently recommended by a Judges' Committee and by the Special Committee on Cameras in the Courtroom of the Maryland State Bar Association. On June 24, 1980, the Maryland Court of Appeals heard oral agreement on the proposal. By order dated November 10, 1980, the Maryland Court of Appeals ordered an 18 month experimental coverage of trial and appellate courts effective January 1, 1981. Certain consents were required in criminal trials. Two bills to prohibit electronic media coverage passed both the Maryland House of Delegates and the Maryland Senate and were sent to the Governor. S.123, forbidding electronic coverage of any trial court proceedings, was vetoed. H.231, adding Section 467B to Article 27 of the Annotated Code of Maryland and barring electronic coverage of criminal trials, was signed by Governor Hughes on May 19, 1981. Authority: Canon XXXIV, Maryland Canons of Judicial Ethics, adoted by Rule 1231, MD. ANN. CODE (Maryland Rules of Procedure), Vol 9C; MD. ANN. CODE art. 27, § 467B.

(22) Massachusetts - Canon 3A(7) of the Massachusetts Code of Judicial Conduct is similar -- but not identical -- to the current ABA provision. On March 21, 1980, the Supreme Judicial Court suspended this canon effective April 1, 1980 for an experimental one-year period. Appellate court coverage of civil and criminal cases began April 1, 1980; coverage of public, non-jury trials (civil and criminal) commenced May 1, 1980; and coverage of public jury trials (civil and criminal) was permissible as of June 1, 1980. As a general rule, coverage is to be allowed unless the court finds that there is "a substantial likelihood of harm to any person or other serious harmful consequence" resulting from such coverage. On April 16, 1981, the Supreme Judicial Court extended the experiment on all court levels until June 1, 1982. Authority: Canon 3A(7), Massachusetts Code of Judicial Conduct, adopted by Rule 3:25, Rules of Massachusetts Supreme Judicial Court, Massachusetts Rules of Court, Desk Copy (West 1980)(as modified by above-referenced order).

(23) Michigan - Canon 3A(7) of the Michigan Code of Judicial Conduct forbids coverage except as authorized by the Michigan Supreme Court. To date, no coverage authorization has been given. Authority: Canon 3A(7), Michigan Code of Judicial Conduct, Michigan Court Rules (West 1979).

(24) Minnesota - Canon 3A(7) of the Minnesota Code of Judicial Conduct parallels the current ABA provision. By order dated January 27, 1978, the Minnesota Supreme Court permits Canon 3A(7) to be waived for experimental purposes in cases pending before that tribunal. The experiment is for an indefinite period, and waiver of the rules is at the discretion of the Court. On March 18, 1981, various media groups petitioned the Minnesota Supreme Court for a permanent amendment of Canon 3A(7) or, alternatively, for a two year experiment. Petition For Modification Of Canon 3A(7) Of The Minnesota Code Of Judicial Conduct, Minnesota Supreme Court, No. 81-300 (March 18, 1981). Authority: Canon 3A(7), Minnesota Code of Judicial Conduct, MINN. STAT. ANN. (Court Rules), Vol. 52 (West)(as modified by above-referenced order).

(25) Mississippi - Canon 3A(7) of the Code of Judicial Conduct of Mississippi Judges is the operative provision and parallels the current ABA Canon. The coverage issue is currently being studied by a committee of the Mississippi Conference of Judges. Authority: Canon 3A(7), Code of Judicial Conduct of Mississippi Judges, Code of Professional Responsibility, Code of Judicial Conduct, Ethics Opinions (Mississippi State Bar).

(26) Missouri - Canon 3A(7) of the Missouri Code of Judicial Conduct is based on the current ABA provision. On November 19, 1979, the Board of Governors of the Missouri Bar submitted a proposal to the Missouri Supreme Court recommending that coverage of appellate proceedings be permitted with the consent of the parties. That proposal was rejected by the Missouri Supreme Court on May 5, 1981. Authority: Canon 3A(7), Missouri Code of Judicial Conduct, adopted by Rule 2, Missouri Supreme Court Rules, MO. ANN. STAT. (Rules, Vol. 1)(Vernon).

(27) Montana - On February 3, 1978, the Montana Supreme Court suspended Canon 35 of the Montana Canons of Judicial Ethics, which was premised on ABA Canon 35 following its amendment in 1952, to allow for a two-year experiment commencing April 1, 1978. In the Matter of Canon 35 of the Montana Canons of Judicial Ethics. Experimental Canon 35 required trial and appellate courts in Montana to permit coverage unless coverage in a particular case was deemed to "substantially and materially interfere with the primary function of the court to resolve disputes fairly." In such cases, the court was required to record its reasons for forbidding coverage. On April 18, 1980, the Montana Supreme Court amended Canon 35 of the Montana Canons of Judicial Ethics, effective immediately, to allow coverage of trial and appellate courts in that State. The terms of the amended Canon are identical to those of the experimental canon. Authority: Canon 35, Montana Canons of Judicial Ethics, 144 Mont. xxii (1964), amended by order of April 18, 1980 (5 Montana Lawyer 12-13).

(28) Nebraska - Canon 3A(7) of the Nebraska Code of Judicial Conduct, adopted on April 18, 1973, is the same as ABA Canon 3A(7). Authority: Canon 3A(7), Nebraska Code of Judicial Conduct (no official citation or publication).

(29) Nevada - Canon 3A(7) of the Nevada Code of Judicial Conduct specifies that a court shall -- on its own motion, the motion of any attorney, or the request of a witness testifying under subpoena -- prohibit coverage by minute order. Chapters 1.220 and 178.604 of the Laws of Nevada, captioned "Court may prohibit broadcasting, televising, motion pictures of proceedings," reflected the same rule but were repealed by Assembly Bill No. 571 on March 21, 1979. By order dated February 6, 1980, the Nevada Supreme Court suspended Canon 3A(7) of the Nevada Code of Judicial Conduct to permit one year of experimental coverage of trial and appellate courts effective April 7, 1980. In the Matter of Rules Setting Forth the Standards of Conduct and Technology Governing Electronic Media and Still Photo Coverage of Judicial Proceedings, ADKT 26. The experimental rule does not require consent of the participants but subjects coverage to the judge's authority to ensure decorum, prevent distractions, and assure a fair trial. Prior to the effective date of the experimental rule, however, both trial and appellate coverage had been permitted on a sporadic basis. The experiment has not yet officially been renewed. The Final Statistical Report on cameras in the courtroom was submitted on May 7, 1981, noted an "overall positive reaction" to the experiment, and recommended that yearly evaluations of electronic coverage be continued. Authority: Canon 3A(7), Nevada Code of Judicial Conduct, adopted as Part IV of the Rules of the Nevada Supreme Court, NEV. REV. STAT., Vol. 1 (as modified by above-referenced order).

(30) New Hampshire - Rule 29 of the Rules of the Supreme Court of New Hampshire, issued December 6, 1977, and effective January 1, 1978, permits coverage of that Court's proceedings subject to the Court's consent. Canon 3A(7) of New Hampshire Supreme Court Rule 25 was, by order dated October 12, 1977, amended to permit the New Hampshire Superior Court to issue rules governing coverage effective January 1, 1978. Rule 78(A) of the Rules of the New Hampshire Superior Court, also effective January 1, 1978, forbids coverage except as provided in those rules or by order of the Presiding Justice. Interim guidelines for that rule permit coverage and state that the Presiding Justice may forbid coverage on his motion or on the motion of an attorney, party, or any witness called to testify. They also require prior express approval of the Presiding Justice in order to cover the jury in criminal cases. Authority: Rule 25 and 29, New Hampshire Supreme Court Rules, State of New Hampshire Court Rules and Directory (Equity); Rule 78M, New Hampshire Superior Court Rules and Directory (Equity). These rules were formerly published as Appendices to N.H. REV. STAT. ANN. Chapters 490.

(31) New Jersey - Rule 1:44 of the Rules of General Application to the Courts of New Jersey states that the ABA Code of Judicial Conduct, as amended and supplemented by the New Jersey Supreme Court, governs the conduct of New Jersey judges. By order dated November 21, 1978, the New Jersey Supreme Court ordered relaxation of Canon 3A(7) of the New Jersey Code of Judicial Conduct for the purpose of allowing coverage of its proceedings on December 12, 1978. On March 15, 1979, that Court ordered further relaxation of the Code of Judicial Conduct to permit coverage for an experimental period lasting one year or until six trials had been covered. The experiment commenced May 1, 1979. Under the experiment, coverage of New Jersey's appellate courts was permitted, and coverage of trial courts was allowed in Atlantic and Bergen Counties. Consents of participants were not required, but coverage of trials was banned in juvenile court cases or cases involving rape, child custody, divorce or matrimonial disputes, and trade secrets. Trial courts were also explicitly empowered to prohibit coverage where coverage would substantially increase the threat of harm to any participant or interfere with a fair trial or the fair administration of justice. On April 30, 1980, the New Jersey Supreme Court extended the experiment for an additional six months (until November 1, 1980) and expanded the experiment to permit trial coverage in all counties of the State. On October 8, 1980, the New Jersey Supreme Court made permanent

its rule permitting coverage of appellate proceedings. On October 29, 1980, the Supreme Court extended to July 1, 1981 the trial court experiment. By order dated June 9, 1981 and effective the same date, the New Jersey Supreme Court made permanent its rule concerning coverage of trial. Authority: Canon 3A(7), New Jersey Code of Judicial Conduct, Rules of General Application to the Courts of New Jersey, Part I (Appendix), New Jersey Court Rules (Pressler) (as modified by above-referenced orders); Rule 1:14, Rules of General Application to the Courts of New Jersey, New Jersey Court Rules (Pressler).

(32) New Mexico - The New Mexico Supreme Court, by order dated August 14, 1978, permitted coverage of a criminal trial proceeding. In the Matter of Photographs, Radio and Television Coverage in State of New Mexico v. Richard Miller, Canon No. 30581-Criminal, Bernalillo County, New Mexico, 8000 Misc. By order dated April 28, 1980, the New Mexico Supreme Court withdrew Canon 3A(7) of the New Mexico Code of Judicial Conduct and substituted a provision authorizing coverage of trial and appellate courts in New Mexico for an experimental period of one year beginning July 1, 1980. Under the experiment, which has subsequently been extended until the New Mexico Supreme Court reviews the results of the experiment, appellate court coverage is not contingent upon the consent of the parties or their counsel, although the court may impose limitations on coverage. In the trial courts, coverage may be authorized by the court acting within its discretion except that judges shall not permit coverage of any witness or juror who objects and who is in attendance under subpoena or court order. Coverage is prohibited in criminal cases unless the defendant gives consent. Photographic coverage of individual jurors is banned except in cases where the court and the jurors consent. For victims of sex crimes and their families, police informants, undercover agents, relocated witnesses, and juveniles, photographic coverage is absolutely forbidden. Authority: Canon 3A(7), New Mexico Code of Judicial Conduct, N.M. STAT. ANN., Vol. 2 (Judicial Volume)(as modified by above referenced orders).

(33) New York - Canon 3A(7) of the New York Code of Judicial Conduct is similar to the current ABA provision. The Code of Judicial Conduct specifies, however, that its rules are subordinate to those of the Administrative Board of the Judicial Conference. The Administrative Board's rule, 22 NYCRR § 33.3(a)(7), specifies that coverage is prohibited unless permission is first obtained from the Chief Judge of the Court of Appeals or the Presiding Justice of the Appellate Division in which the court is located. By order dated August 16, 1979, the New York Court of Appeals authorized coverage of its proceedings on a one-day experimental basis. This coverage occurred on October 16, 1979. A Media Advisory Committee, appointed by the Chief Judge of the New York Court of Appeals on December 6, 1979, submitted its report to the Court on May 30, 1980. After studying the one-day experiment in the Court of Appeals and the experience in other States, the Committee recommended that coverage of appellate proceedings be permitted on a permanent basis. The Committee also recommended experimental trial court coverage of civil proceedings for one year or at least twenty trials with consents of participants being a pre-condition to coverage. A similar recommendation, suggesting permanent rules on appellate court coverage and an experiment with civil and criminal trial court coverage in which consents would not be an absolute pre-condition, was made on April 7, 1980 by the Special Committee on Communications Law

of the Association of the Bar of the City of New York. By order dated November 21, 1980, the New York Court of Appeals amended 22 NYCRR § 33.3(a)(7) to permit coverage of appellate court proceedings. Consents of the parties and the counsel are not required and this amendment became effective January 1, 1981. Simultaneously, the New York Court of Appeals authorized experimental coverage for a one year period of civil trial proceedings. This portion of the order, however, is contingent upon amendment or repeal of Section 52 of New York's Civil Rights Law which bans coverage when witnesses appear under subpoena. No consents of the parties, counsel or witnesses would be required. Senate Bill 6787 and Assembly Bill 8750 were introduced in the New York legislation during its 1981-82 regular session and sought to modify Section 52 to permit coverage of witnesses under subpoena when permitted by court rule. Assembly Bill 8750 was defeated in the New York Assembly on June 17, 1981. Authority: Canon 3A(7), New York Code of Judicial Conduct, N.Y. [Judiciary Law] LAW, Book 29 (Appendix) (McKinney); 22 NYCRR § 33.3(a)(7), reported in New York Civil Practice Annual (Court Rules) (Bender 1978-79) (as modified by above-referenced order).

(34) North Carolina - Canon 3A(7) of the North Carolina Code of Judicial Conduct parallels the present ABA provision. Rule 15 of the General Rules of Practice for the Superior and District Courts of North Carolina bans coverage except on ceremonial occasions. Authority: Canon 3A(7), North Carolina Code of Judicial Conduct, N.C. GEN. STAT., Vol. 4A (Appendix VII - A); Rule 15, General Rules of Practice for the Superior and District Courts of North Carolina, N.C. GEN. STAT., Vol. 4A (Appendix I(5)).

(35) North Dakota - On December 1, 1978, the North Dakota Supreme Court amended Canon 3A(7) of the North Dakota Code of Judicial Conduct, which previously paralleled the current ABA provision, to permit coverage of its proceedings subject to guidelines. In that order, the Supreme Court announced that experimental coverage of its proceedings would be permitted for a one-year period beginning February 1, 1979. The Court retained the right to prohibit coverage of certain proceedings, but coverage was not conditioned on consents of the parties or their counsel. Petition For An Administrative Order Providing An Exception To Canon 3A(7) Of The Code Of Judicial Conduct Allowing A Period Of Experimental Electronic Media And Photographic Coverage Of Certain Cases And Proceedings Before The North Dakota Supreme Court, AO 1-1978. See note to N.D. CENT. CODE § 27-01-02. By order dated January 24, 1980, the North Dakota Supreme Court extended the experiment for a period of six months (until July 1, 1980) and announced that, on May 6, 1980, it would hold a hearing to evaluate the experiment. Electronic And Photographic Coverage Of Supreme Court Cases Extended To July 1, 1980, AO 1-1980. On May 16, 1980, the North Dakota Supreme Court amended Canon 3A(7) of the North Dakota Code of Judicial Conduct to permit coverage of its proceedings on a permanent basis effective July 1, 1980. This coverage is subject to the same rules used during the experiment. Electronic and Photographic Coverage Of Supreme Court

Hearings, AO 1A-1980. Rule 53 of the North Dakota Rules of Criminal Procedure prohibits coverage of criminal trial proceedings. Authority: Canon 3A(7), North Dakota Code of Judicial Conduct, Manual of North Dakota Supreme Court (North Dakota Supreme Court); Rule 53, North Dakota Rules of Criminal Procedures, N.D. CENT. CODE, Vol. 5B (Rules of Procedure).

(36) Ohio - On July 31, 1978, the Ohio Supreme Court published proposed draft amendments to Canon 3A(7) of the Ohio Code of Judicial Conduct, Superintendence Rule 11 of the Ohio Supreme Court, and Rule 9 of the Rules of Superintendence for Municipal Courts. These provisions had previously precluded coverage of Ohio courts, and the proposed amendments would have eliminated that ban. Following the period allowed for comments on the proposals, the Supreme Court adopted experimental provisions to be effective for a one-year period beginning June 1, 1979. Under these provisions, coverage of trial and appellate courts in Ohio is permitted subject to the court's power to preclude coverage when it would be distractive, impair the dignity of the proceedings, or interfere with a fair trial. Coverage is not contingent on consent of participants, although the court may ban coverage of objecting witnesses or victims provided it determines there is reasonable cause for the objection. By order dated May 22, 1980, the Ohio Supreme Court extended the experiment until further order to permit continued coverage pending the Court's study of the experiment. Authority: Canon 3A(7) and the rules cited in this paragraph are contained in OHIO REV. CODE ANN. (Rules Governing the Courts of Ohio) (Page 1979).

(37) Oklahoma - By order dated October 25, 1978, the Oklahoma Supreme Court withdrew Canon 3A(7) of the Oklahoma Code of Judicial Conduct -- which paralleled the current ABA provision -- and substituted a revised Canon 3A(7) to be effective for one year beginning January 1, 1979. Under the experimental provision, trial and appellate coverage is permitted subject to consent of the court. Coverage of objecting witnesses, jurors, or parties is not permitted and, in a criminal trial, the defendant must consent to coverage. By order dated December 27, 1979, the Oklahoma Supreme Court extended the experiment for another year commencing January 1, 1980. By order dated December 22, 1980, the Oklahoma Supreme Court extended the experiment for another year, commencing January 1, 1981, and deferred until July 1, 1981 an opinion regarding use of bar dues for scientific study of the experiment. No further opinion has yet been issued. Authority: Canon 3A(7), Oklahoma Code of Judicial Conduct, Oklahoma Court Rules and Procedures, Desk Copy (West 1979-80) (as modified by above-referenced orders).

(38) Oregon - Canon 3A(7) of the Oregon Code of Judicial Conduct parallels the present ABA provision. Experimental coverage was proposed by the Public Information Committe of the Oregon Judicial Conference on April 1, 1980, but the Oregon Judicial Conference tabled the proposal on April 29, 1980. This action followed discussions in which the United States Supreme Court's notation of probable jurisdiction in Chandler v. Florida was cited as a reason for delaying immediate action. The Oregon Supreme Court, however, has since decided against dropping the coverage issue completely. Authority: Canon 3A(7), Oregon Code of Judicial Conduct, Oregon State Bar Desk Book (Oregon State Bar).

(39) Pennsylvania - By order dated September 20, 1979, the Pennsylvania Supreme Court amended Canon 3A(7) of the Pennsylvania Code of Judicial Conduct to permit experimental coverage of non-jury civil trial proceedings for a one-year period beginning October 1, 1979. In Re WTAE-TV, No. 51 (W.D. Misc. Docket 1978). Previously, the Pennsylvania Canon paralleled the current ABA provision. Coverage is also forbidden by Rules 27 and 328 of the Pennsylvania Rules of Criminal Procedure and Rule 7 of the Rules Governing Standards of Conduct of Justices of the Peace. Under the experiment, non-jury civil trial proceedings do not include support, child custody, or divorce proceedings. Permission of the court must be received prior to coverage, and coverage of objecting witnesses or parties is not permitted. In May, 1980, a supplementary petition was filed in the WTAE-TV proceeding. The supplementary petition requested the Pennsylvania Supreme Court to expand the experiment to allow coverage of criminal trial proceedings and civil jury proceedings. Alternatively, the supplementary petition suggested that the existing experiment be extended six months. By order dated June 26, 1980, the Pennsylvania Supreme Court deferred action on the supplementary petition until its September, 1980 session. On October 1, 1980, the Pennsylvania Supreme Court continued the experiment but denied the petition to expand it and, subsequently, Justice John P. Flaherty, Jr., a Supreme Court Justice, was designated to prepare a report

regarding the experiment. A bill introduced in the legislature on February 3, 1981, S.B. 271, would permit coverage by amending the Pennsylvania Constitution. Authority: The provisions cited in this paragraph are contained in Pennsylvania Rules of Court, Desk Copy (West 1980).

(40) Rhode Island - Canon 30 of Rhode Island's Canons of Judicial Ethics prohibits broadcasting or televising of court proceedings as well as the taking of photographs or sketching in the courtroom. Rule 53 of the Rules of Criminal Procedure of the Rhode Island Superior Court contains a similar prohibition. Rule 53 of the Rules of Criminal Procedure of Rhode Island's District Court is identical except that no prohibition on sketching is included. A special committee was appointed by the Rhode Island Supreme Court to study the coverage question, completed its report on March 13, 1981, and recommended a one year experiment. On April 22, 1981, the Rhode Island Supreme Court ordered a one year experiment, beginning September 1, 1981, in appellate and trial court proceedings. Consents of parties will be required and courts will have broad discretion to act upon any objections. Individuals may object to their coverage. Individual jurors may not be photographed unless they consent. Authority: Canon 30, Rhode Island Canons of Judicial Ethics, adopted by Rule 48, Rules of the Rhode Island Supreme Court, R.I. GEN. LAWS, Vol. 2B (Court Rules); Rule 53, Rhode Island Superior Court Rules of Criminal Procedure, R.I. GEN. LAWS, Vol. 2B (Court Rules); Rule 53, Rhode Island District Court Rules of Criminal Procedure, R.I. GEN. LAWS, Vol. 2B (Court Rules).

(41) South Carolina - Canon 3A(7) of the South Carolina Judicial Conduct is similar to the present ABA provision. Coverage has been permitted by at least one trial judge, Wade S. Weatherford, Jr. of the Seventh Circuit, in a non-jury matter. Judge Weatherford was later informed of the requirements of Canon 3A(7), and coverage ceased as a result.

Authority: Canon 3A(7), South Carolina Code of Judicial Conduct, adopted by Rule 33, Rules of the South Carolina Supreme Court, S.C. CODE, Vol. 22 (Court Rules).

(42) South Dakota - Canon 3A(7) of the South Dakota Code of Judicial Conduct is similar to the present ABA provision. The South Dakota Broadcasters Association has made coverage presentations to the South Dakota Supreme Court and its Advisory Committee. On December 12, 1980, the Advisory Committee recommended one year of experimentation for the South Dakota Supreme Court and a one year trial experiment subject to consents of all parties. The South Dakota Supreme Court is currently considering this recommendation. In the legislature, S.158, a bill to repeal the coverage restrictions, failed. Authority: Canon 3A(7), South Dakota Code of Judicial Conduct, S.D. CODIFIED LAWS, § 16-2 (Appendix).

(43) Tennessee - By order dated May 24, 1978, the Tennessee Supreme Court amended Canon 3A(7), contained in Rule 43 of its rules, to adopt an interim provision allowing coverage of its proceedings subject to the objection of participating counsel. In re Rule 43, Canon 3A(7) -- Code of Judicial Conduct. On February 22, 1979, the Tennessee Supreme Court ordered the amendment of Canon 3A(7) to permit coverage of trial and appellate proceedings in Tennessee. Under the amendment, appellate courts may adopt rules permitting coverage subject to certain guidelines, including the injunction that coverage shall not detract from court proceedings. Trial courts are also authorized to permit coverage in accordance with plans which must be approved by the Tennessee Supreme Court. In criminal trial proceedings, the defendant must consent to coverage. In all trial proceedings, objections by a witness or juror will suspend coverage as to that person while objections by an attorney or party will suspend all coverage. By its terms, the Tennessee Supreme Court's order had no applicability to criminal proceedings until such time as the Tennessee legislature approved amendments to the Tennessee Rules of Criminal Procedures. In re Rule 43, Canon 3A(7) -- Code of Judicial Conduct. Effective August 15, 1979, Rule 53 of those rules -- which prohibited coverage of criminal proceedings -- was withdrawn. Authority: Canon 3A(7), Tennessee Code of Judicial Conduct, adopted by Rule 10 (formerly Rule 43), Rules of the Tennessee Supreme Court, TENN. CODE ANN., Vol. 5A (Court Rules).

(44) Texas - By order dated November 9, 1976, the Texas Supreme Court amended Canon 3A(7) of the Texas Code of Judicial Conduct to permit coverage of appellate proceedings. The prior consent of the court (or the Chief Justice or Presiding Judge) must be obtained, and the coverage must not distract participants or impair the dignity of proceedings. In or around April, 1981, the Texas State Bar Committee on Cameras in the Courtroom completed proposed new rules for trial court coverage which were submitted to the bar and the Texas Supreme Court. These proposals would permit coverage with court consent, would essentially parallel the rules used in the California experiment, and will be considered at a Judicial Conference to be held from September 29 - October 2, 1981. Authority: Canon 3A(7), Texas Code of Judicial Conduct, TEX. REV. CIV. STAT. Vol. 1A, Title 14 (Appendix B)(Vernon).

(45) Utah - Canon 3A(7) of the Utah Code of Judicial Conduct is similar to the present ABA provision. A petition requesting experimental coverage was submitted to the Utah Supreme Court and was argued in November, 1979. In re Petition of Society of Professional Journalists, Case No. 16140. On April 27, 1981, the Utah Supreme Court amended Canon 3A(7) to permit still photography in that State's courtrooms. Consents of parties and witnesses are required prior to the taking of photographs of those individuals. In its opinion, the Utah Supreme Court reaffirmed the prohibitions on broadcasting, televising, or recording of court proceedings. Authority: Canon 3A(7), Utah Code of Judicial Conduct, Utah State Bar Desk Book (Utah State Bar).

(46) Vermont - Canon 3A(7) of the Vermont Code of Judicial Conduct parallels the current ABA provision. Rule 53 of the Vermont Rules of Criminal Procedure prohibits coverage in criminal cases except as allowed by order of the Vermont Supreme Court. At present, a committee of the Vermont Bar Association is monitoring the issue of cameras in the courtrooms. Authority: Canon 3A(7), Vermont Code of Judicial Conduct, VT. STAT. ANN., Title 12, Appendix VIII, Administrative Order No. 10.

(47) Virginia - Canon 3A(7) of the Virginia Canons of Judicial Conduct is similar but not identical, to the present ABA provision. See 215 Va. 859, 931 (1975); 216 Va. 914, 1134 (1976). Coverage of criminal proceedings is also forbidden under Section 19.2-266 of the Virginia Code and Supreme Court Rule 3A:34 [VA. CODE (Vol. 2 - Rules of Court)]. Supreme Court Rule 1:14 [VA. CODE (Vol. 2 - Rules of Court)] precludes coverage of all judicial proceedings. House Bill 1599, submitted January 19, 1981, would have permitted the Supreme Court to draft rules allowing media coverage in the courtrooms. This bill passed in a committee of the Virginia House of Delegates but failed in a committee of the Virginia Senate. Authority: Canon 3A(7), Virginia Canons of Judicial Conduct, Virginia Supreme Court Rules (Part VI, Section III - Integration of the State Bar), VA. CODE (Vol. 2 - Rules of Court). See also citations provided in paragraph above.

(48) Washington - Acting upon a recommendation of the Bench-Bar-Press Committee of Washington, the Supreme Court of Washington, on November 28, 1973, authorized experimental courtroom coverage. This coverage first occurred in a criminal trial proceeding on December 2, 1974. State v. Fetter, Case No. 69484 (King County). Following its review of the results of that experiment, the Washington Supreme Court, by order dated July 23, 1976, amended Canon 3A(7) of the Washington Code of Judicial Conduct effective September 20, 1976. In the Matter of the Adoption of Amendments to Code of Judicial Conduct, Canon 3(A)(7). Under that amendment, coverage of trial and appellate proceedings in Washington is permitted if the court grants permission and if coverage will not distract participants or impair the dignity of the proceedings. No coverage of witnesses, jurors, or parties who express prior objections is permitted. Authority: Canon 3(A)(7), Washington Code of Judicial Conduct, Washington Court Rules Annotated, Vol. 1, Part 1 (Bancroft-Whitney).

(49) West Virginia - Canon 3A(7) of the West Virginia Judicial Code of Ethics parallels the current ABA provision. By letter dated November 14, 1978, the Chief Justice of the West Virginia Supreme Court of Appeals authorized the Seventeenth Judicial Circuit (Monongalia County) to permit coverage of its trial proceedings subject to certain guidelines. Under those guidelines, the trial court was empowered both to decide whether coverage should be permitted in particular cases and to terminate existing coverage when it would impede justice. Although parties, witnesses, or attorneys could object to coverage, the court was given the authority to rule on such objections. To obtain further experience under the experiment, the Chief Judge of the Seventeenth Judicial Circuit extended the experiment, which eventually began in January 1979, through the end of 1979. (The Chief Judge had originally recommended only a six-month experimental period.) The Chief Judge later informed the Supreme Court of Appeals that, unless it objected, he would continue the experiment into 1980. On May 7, 1981, the West Virginia Supreme Court of Appeals approved permanent trial and appellate court coverage under rules similar to those employed during the experiment. Authority: Canon 3A(7), West Virginia Judicial Code of Ethics, W. VA. CODE, Vol. 1 (Constitutions), Appendix.

(50) Wisconsin - On December 23, 1977, the Wisconsin Supreme Court suspended Rule 14 of the Wisconsin Code of Judicial Ethics to permit coverage of trial and appellate proceedings for a one-year experimental period beginning April 1, 1978. The court also specified that it would permit coverage of its proceedings on January 3, 1978 and of its February 20, 1978 hearing to determine guidelines for the experiment. By order dated March 16, 1978, the Wisconsin Supreme Court promulgated these experimental guidelines. Under those guidelines, the courts were authorized to determine whether coverage should be permitted in particular cases or portions of particular cases. Upon a showing of cause, the courts could prohibit coverage on their own motions or on those of participants. The experiment was eventually extended through June 30, 1979, by order of the Wisconsin Supreme Court. Following a review of the April 1, 1979 "Report of the Supreme Court Committee to Monitor and Evaluate the Use of Audio and Visual Equipment in the Courtroom," the Wisconsin Supreme Court, on June 21, 1979, rescinded Rule 14 of the Wisconsin Code of Judicial Ethics and permanently authorized trial and appellate coverage effective July 1, 1979. Under the permanent rule, courts retain authority to determine whether coverage should occur and, upon a finding of cause, to prohibit coverage. A presumption of validity attends objections to coverage of participants in cases involving the victims of crimes (including sex crimes), police

informants, undercover agents, juveniles, relocated witnesses, divorce, trade secrets, and motions to suppress evidence. The Wisconsin Code of Judicial Ethics (Wisconsin Supreme Court Rules, Chapter 60) no longer refers to the coverage issue. Instead, Chapter 61 of the Wisconsin Supreme Courts Rules contains the rules governing coverage. Authority: Chapter 61, Wisconsin Supreme Court Rules, WIS. STAT. ANN. (Supreme Court Rules)(West 1980 Special Pamphlet).

(51) Wyoming - By order dated September 4, 1973, the Supreme Court of Wyoming adopted the ABA Code of Judicial Conduct in its entirety with one minor exception not relevant here. Rule 50 of the Wyoming Rules of Criminal Procedure prohibits coverage of criminal proceedings. Rule 12 of the Uniform Rules for the District Courts of Wyoming likewise bars coverage. Authority: All of the provision cited in this paragraph are contained in Wyoming Court Rules Annotated (Michie 1979 Rev. Ed.).

Part II

Categorization Of State Rules On Coverage Of Courts By Electronic And Photographic Media

In Part II, States which permit courtroom coverage by the electronic media are classified according to a number of relevant categories. It is to be noted that, in this Part, we have not included several States (such as Indiana and South Carolina) in which sporadic coverage has occurred but not as the direct result of rules or decisions of these States' highest courts. More detailed information on the rules of each jurisdiction and citations to those rules are furnished in Part I.

A. Categorization According To Types Of Courts In Which Coverage Permitted

	Coverage Permitted	States	Total
1.	Trial and Appellate Courts	Alabama, Alaska, Arkansas, California, Colorado, Florida, Georgia, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, 1/ Ohio, Oklahoma,	26

1/ The New York Court of Appeals permitted coverage of its proceedings on a one-day experimental basis on October 16, 1979 and, on November 21, 1980, issued an order allowing permanent appellate coverage. A one year experiment for civil trial procedings is contingent upon amendment or repeal of a New York statute prohibiting coverage of witnesses under subpoena.

Coverage Permitted	States	Total
	Rhode Island, Tennessee, Utah, 2/ Washington, West Virginia, Wisconsin	
2. Trial Courts Only	Pennsylvania	1
3. Appellate Courts Only	Arizona, Idaho, Kansas, Minnesota, North Dakota, Texas	6

B. Categorization According To Whether Rule Permitting Coverage Is Permanent Or Experimental

Type Of Rule	States	Total
1. Permanent	Alabama, Alaska, Colorado, Florida, Georgia, Idaho, Kansas (appellate recording), 3/ Kentucky, Louisiana, 4/ Montana, New Hampshire, New Jersey, New York (appellate), 5/ North Dakota, Tennessee, Texas, Utah, 6/ Washington, West Virginia, Wisconsin	20

2/ Utah permits still photography of its courtroom proceedings but forbids broadcasting, televising, or recording of court proceedings.

3/ Kansas has a permanent rule under which audio tapes of Supreme Court proceedings may be made and used for broadcast purposes. It also held an experiment permitting photographic coverage of Supreme Court proceedings during the week of May 4, 1981.

4/ The Louisiana Supreme Court has authorized experimental coverage and is considering additional authorization for experimentation. By statute, however, the Louisiana legislature has furnished directives under which permanent coverage may occur.

5/ See note 1, supra.

6/ See note 2, supra.

Type Of Rule	States	Total
2. Experimental	Arizona, Arkansas, California, Iowa, Louisiana, 7/ Kansas, 8/ Maryland, Massachusetts, Minnesota, Nevada, New Mexico, New York (trial), 9/ Ohio, Oklahoma, Pennsylvania, Rhode Island	16

Note: Since Kansas, Louisiana and New York fall into both categories, the total number of States with permanent or experimental rules is really 33 rather than 36. Twelve States (Alaska, Florida, Idaho, Louisiana, Montana, New Jersey, New York (appellate), North Dakota, Tennessee, Washington, West Virginia, and Wisconsin) have implemented permanent rules during or after a period of formal experimentation.

C. Categorization According To Types Of Proceedings Which May Be Covered

Overall Rule	Type Of Proceeding Coverable	States	Total
1. Trial Coverage Only	Civil and Criminal	None	0
	Criminal Only	None	0
	Civil Only	Pennsylvania 10/	1
2. Appellate Coverage Only	Civil and Criminal	Arizona, Idaho, Kansas, 11/ Minnesota, North Dakota, Texas	6

7/ See note 4, supra.

8/ See note 3, supra.

9/ See note 1, supra.

10/ Pennsylvania limits civil trial coverage to non-jury proceedings.

11/ See note 3, supra.

Overall Rule	Type Of Proceeding Coverable	States	Total
	Criminal Only	None	0
	Civil Only	None	0
3. Trial and Appellate Coverage	Civil and Criminal	Alabama, Alaska, Arkansas, California, Colorado, Florida, Georgia, Iowa, Louisiana, Kentucky, Maryland (appellate only), 12/ Massachusetts, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York (appellate only), 13/ Ohio, Oklahoma, Rhode Island, Tennessee, Utah, Washington, West Virgina, Wisconsin	26
	Criminal Only	None	0
	Civil Only	Maryland (trials only), 14/ New York (trials only) 15/	2

Note: Maryland and New York appear twice in the classification in Section 3 (See notes 1 and 12, supra).

12/ As approved by the Court of Appeals, Maryland's experiment originally encompassed coverage of civil and criminal cases in trial and appellate courts. Subsequently, however, an act barring coverage of criminal trials was passed by the legislature and approved by the Governor.

13/ See note 1, supra.

14/ See note 12, supra.

15/ See note 1, supra.

D. Consent As A Precondition Or Limitation On Coverage 16/

Entity	States With Consent Of Entity As Absolute Precondition (Total)	States With Consent Of Entity As Limited Condition (Total)	States Where Consent Of Entity Not Required (Total)
1. Court's Consent 17/ (all cases)	Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Iowa, Kansas, 18/ Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, 19/ Washington, West Virginia, Wisconsin (33)	None (0)	None (0)

16/ In this categorization, the term "absolute precondition" means that the particular entity's consent or acquiescence must be obtained for any coverage to occur. "Limited condition", unless otherwise stated, means that, if consent is not obtained or objection is made, that particular entity (e.g., jurors) may not be covered but the remainder of the proceeding may be. In States where consent is not required or a limited condition is not imposed, coverage of the proceeding or the entity is not contingent upon consent.

17/ Thirty-three States (all States allowing trial and/or appellate coverage) fall within this description.

18/ See note 3, supra.

19/ See note 2, supra.

Entity	States With Consent Of Entity As Absolute Precondition (Total)	States With Consent Of Entity As Limited Condition (Total)	States Where Consent Of Entity Not Required (Total)
Party's Consent 20/ (civil cases and criminal appeals)	Alabama, Arkansas, Georgia, 21/ Louisiana, Maryland (civil cases, 22/ Tennessee (6)	Alaska, Oklahoma, Pennsylvania, 23/ Utah, 24/ Washington 25/ (5)	Arizona, California, Colorado, Florida, Idaho, Iowa, 26/ Kansas, Kentucky, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico New York, 27/ North Dakota,

20/ Thirty-three States (all States allowing trial and/or appellate coverage) fall within this description.

21/ Although the general Georgia coverage provisions do not explicitly require the parties' consents, all plans approved by the Georgia Supreme Court contain such a requirement.

22/ In Maryland, a party may move for termination or limitation of coverage in criminal appellate cases.

23/ Pennsylvania does not permit appellate court coverage.

24/ See note 2, supra.

25/ It is not entirely clear what would occur in Alaska, Oklahoma, and Washington if a criminal defendant objects to coverage of his appeal. Taken literally, the rules of those States would seem to permit coverage of the proceedings but preclude coverage of the defendant in those circumstances. Since many defendants do not attend their appeal proceedings, the point may be a relatively minor one.

26/ In Iowa, consents of parties are not required except in "juvenile, dissolution, adoption, child custody, or trade secrets cases."

27/ See note 1, supra.

Entity	States With Consent Of Entity As Absolute Precondition (Total)	States With Consent Of Entity As Limited Condition (Total)	States Where Consent Of Entity Not Required (Total)
			Ohio, Rhode Island, Texas, West Virginia, Wisconsin (22)
3. Counsel's Consent 28/	Alabama, Alaska, Arkansas, Georgia, Louisiana, Tennessee (6)	None (0)	Arizona, California, Colorado, Florida, Idaho, Iowa, Kansas, 29/ Kentucky, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, 30/ North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Texas, Utah, 31/ Washington, West Virginia, Wisconsin (27)

28/ Thirty-three States (all States allowing trial and/or appellate coverage) fall within this description. As used here, the term "Counsel" excludes only prosecutors in criminal trials. Prosecutors are covered in a separate category, infra.

29/ See note 3, supra.

30/ See note 1, supra.

31/ See note 2, supra.

ntity	States With Consent Of Entity As Absolute Precondition (Total)	States With Consent Of Entity As Limited Condition (Total)	States Where Consent Of Entity Not Required (Total)
Witness's Consent 32/ (civil and criminal trials)	None (0)	Alabama, Alaska, Arkansas, Colorado, 33/ Georgia, Maryland (victims only), 34/ New Mexico, 35/ Oklahoma, Pennsylvania, Rhode Island, Tennessee, Utah, 36/ Washington (13)	California, Florida, Iowa, Kentucky, Louisiana, Maryland, (all witnesses except victims), 37/ Massachusetts, Montana, Nevada, New Hampshire, New Jersey, New York, 38/ Ohio, West Virginia, Wisconsin (15)

2/ This entity description encompasses 27 States--those allowing trial and appeals coverage (26 States) and those allowing trial coverage only (1 State). Maryland, as noted, falls into two of the three categories described herein.

33/ In Colorado, consents of witnesses are not required except that a judge shall prohibit coverage of objecting witnesses and jurors in attendance under court order or subpoena.

34/ See note 12, supra.

35/ In New Mexico, consents of witnesses are not required except that a judge shall prohibit coverage of objecting witnesses and jurors who are in attendance under court order or subpoena.

36/ See note 2, supra.

37/ See note 12, supra.

38/ See note 1, supra.

ntity	States With Consent Of Entity As Absolute Precondition (Total)	States With Consent Of Entity As Limited Condition (Total)	States Where Consent Of Entity Not Required (Total)
Juror's Consent 39/ (civil and criminal trials	None (0)	Alabama, Alaska, Colorado, 40/ New Mexico, 41/ Oklahoma, Rhode Island, Tennessee, Washington, Wisconsin (9)	Arkansas, 42/ California, Florida, Georgia, Iowa, Kentucky, Louisiana, Maryland, 43/ Massachusetts, Montana, Nevada (individual jurors not to be covered deliberately), New Hampshire, 44/ New Jersey, 45/ New York, 46/ Ohio, Utah, 47/ West Virginia (17)

9/ This entity description embraces 26 States--those allowing trial and appeals coverage (26 States) and those allowing trial coverage in jury cases (0 States). Pennsylvania does not permit coverage of jury proceedings.

0/ See note 33, supra.

1/ See note 35, supra.

2/ Arkansas does not permit coverage of the jury.

3/ See note 12, supra.

4/ In New Hampshire in criminal cases, prior express approval of the Presiding Justice of the Superior Court is needed for jury coverage.

5/ Coverage of jurors in New Jersey is permissible but it may not be such as to allow actual visual recognition of jurors.

6/ See note 1, supra.

7/ See note 2, supra.

Entity	States With Consent Of Entity As Absolute Precondition (Total)	States With Consent Of Entity As Limited Condition (Total)	States Where Consent Of Entity Not Required (Total)
6. Defendant's Consent 48/ (criminal trials)	Alabama, Arkansas, Colorado, Georgia, 49/ Louisiana, New Mexico, Oklahoma, Tennessee (8)	Alaska, 50/ Rhode Island, Utah, 51/ Washington (4)	California, Florida, Iowa, Kentucky, Massachusetts, Montana, Nevada, New Hampshire, New Jersey, Ohio, West Virginia, Wisconsin (12)
7. Prosecutor's Consent 52/ (criminal trials)	Alabama, Alaska, Arkansas, , Georgia, 53/	None (0)	California, Colorado, Florida, Iowa, Kentucky,

---

48/ This description includes 24 States--those allowing trial and appeals coverage of criminal proceeding (24 States) and those allowing trial coverage of criminal cases (0 States). Maryland, New York and Pennsylvania do not allow coverage of criminal trial proceedings. Prior to passage of legislation forbidding coverage of criminal trials, Maryland permitted coverage only if the defendant consented.

49/ Although the general Georgia coverage provisions do not explicitly require the criminal defendant's consent, all plans approved by the Georgia Supreme Court contain a provision mandating the parties' consents.

50/ It should be noted, however, that, in Alaska, counsel's consent is an absolute precondition to coverage in all cases. See Part I.

51/ See note 2, supra.

52/ This entity description includes 24 States. See note 48, supra.

53/ Although the general Georgia coverage provisions do not explicitly require the prosecutor's consent, all plans approved by the Georgia Supreme Court contain a provision requiring counsel's consent.

Entity	States With Consent Of Entity As Absolute Precondition (Total)	States With Consent Of Entity As Limited Condition (Total)	States Where Consent Of Entity Not Required (Total)
Prosecutor's Consent (cont'd)	Louisiana, Tennessee (6)		Massachusetts, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Rhode Island, Utah, 54/ Washington, West Virginia, Wisconsin (18)

54/ See note 2, supra.

E. Coverage Exemptions For Certain Specified Types Of Cases

The rules of a number of States (e.g., Nevada and Oklahoma) make clear the fact that coverage is not permitted when access is otherwise restricted by law. Moreover, although the courts in all States which permit coverage retain the authority to preclude coverage on a case-by-case basis, a number of States have explicitly prohibited or limited coverage in particular types of cases. In this category, those particular types of cases are enumerated.

Type of Case	States (Total)
1. Adoption	Arkansas, 55/ Iowa, 56/ Maryland, 57/ Rhode Island (4)

55/ Arkansas prohibits coverage of minors without parental or guardian consent. It totally prohibits coverage of juvenile, adoption, guardianship, or domestic relations proceedings.

56/ In these types of cases, Iowa permits coverage if consents of the parties are obtained. In all other cases, Iowa requires no consents of the parties.

57/ Maryland provides that the objection of participants are presumed to have validity in cases involving police informants, minors, undercover agents, relocated witnesses, evidentiary suppression hearings, trade secrets, divorce, and custody. Maryland's experiment does not apply to its Orphans' Courts. See also note 12, supra.

2.	Child Custody	Arkansas (guardianship), 58/ Iowa, 59/ Maryland, 60/ New Jersey, 61/ Rhode Island (if child is a participant), 62/ Pennsylvania, 63/ Wisconsin 64/ (7)
3.	Divorce	Arkansas, 65/ Iowa, 66/ Kentucky, Maryland, 67/ New Jersey, 68/ Pennsylvania, 69/ Wisconsin 70/ (6)

58/ See note 55, supra.

59/ See note 56, supra.

60/ See note 57, supra.

61/ New Jersey absolutely precludes coverage of these proceedings and uses the broad term "matrimonial disputes."

62/ Rhode Island prohibits coverage in any matters in Family Court in which juveniles are significant participants.

63/ Pennsylvania specifically excludes these cases from the scope of non-jury civil proceedings which may be covered.

64/ Wisconsin requires that objections of participants to coverage in these cases shall be presumed to have validity. Wisconsin's rule extends to the victims of crimes, including sexual crimes.

65/ See note 55, supra.

66/ See note 56, supra.

67/ See note 57, supra.

68/ See note 61, supra.

69/ See note 63, supra.

70/ See note 64, supra.

Type of Case	States (Total)
4. Juvenile Proceedings	Arkansas, 71/ Iowa, 72/ Maryland, 73/ New Jersey, 74/ New Mexico, 75/ Rhode Island 76/ Wisconsin 77/ (7)
5. Motions to Suppress Evidence	Maryland, 78/ Wisconsin, 79/ (2)
6. Police Informants	Arkansas, 80/ Maryland, 81/ New Mexico, 82/ Wisconsin 83/ (4)

71/ See note 55, supra.

72/ See note 56, supra.

73/ See note 57, supra.

74/ See note 61, supra.

75/ New Mexico forbids photographic coverage of these individuals.

76/ Rhode Island explicitly forbids coverage in these cases. See also note 62, supra.

77/ See note 64, supra.

78/ See note 57, supra. By statute, Maryland's experiment has been precluded from encompassing coverage of criminal trial proceedings.

79/ See note 64, supra.

80/ See note 55, supra.

81/ See note 78, supra.

82/ See note 75, supra.

83/ See note 64, supra.

Type of Case	States (Total)
7. Relocated Witnesses	Maryland, 84/ New Mexico, 85/ Wisconsin 86/ (3)
8. Sex Crimes	Arkansas, 87/ New Jersey (rape only), 88/ New Mexico, 89/ Wisconsin, 90/ (4)
9. Trade Secrets	Iowa, 91/ Maryland, 92/ New Jersey, 93/ Wisconsin 94/ (4)
10. Undercover Agents	Arkansas, 95/ Maryland, 96/ New Mexico, 97/ Wisconsin 98/ (4)

84/ See note 78, supra.

85/ See note 75, supra.

86/ See note 64, supra.

87/ See note 55, supra.

88/ See note 61, supra.

89/ New Mexico forbids photographic coverage of victims and their families in cases involving sexual crimes.

90/ See note 64, supra.

91/ See note 56, supra.

92/ See note 57, supra.

93/ See note 61, supra.

94/ See note 64, supra.

95/ See note 55, supra.

96/ See notes 57 and 78, supra.

97/ See note 75, supra.

98/ See note 64, supra.

Type of Case	States (Total)
11. Orphans' Court	Maryland, 99/ Rhode Island 100/ (if child is participant) (2)
12. In Camera Proceedings	Arkansas (1)

99/ See note 57, supra.

100/ See note 62, supra.

In The

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1260

Noel Chandler and Robert Granger,

Appellants,

vs.

State of Florida,

Appellee.

On Appeal from the
Supreme Court of Florida

BRIEF OF APPELLANTS

JOEL HIRSCHHORN, P.A.
By Joel Hirschhorn, Esquire
742 Northwest 12th Avenue
Miami, Florida 33136
(305) 324-5320

Counsel for Appellants

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued)

In The

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1260

Noel Chandler and Robert Granger, *Appellants,*

vs.

State of Florida, *Appellee.*

On Appeal from the
Supreme Court of Florida

BRIEF OF APPELLANTS

OPINIONS BELOW

The opinion of the Florida Supreme Court (App. 3-4)[1] is reported at 376 So.2d 1157 (Fla. 1979). The opinion of the District Court of Appeal of Florida, Third District (App. 7-25) is reported at 366 So.2d 64 (Fla.3d DCA 1979).

JURISDICTION

The Florida Supreme Court denied Appellants' Petition for Rehearing on December 10, 1979 (App. 9-10). Appellants filed their Notice of Appeal on January 3, 1980 (App. 26). Appellants' Jurisdictional Statement was filed in this Court on February 14, 1980. The Court noted probable jurisdiction on April 21, 1980.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(2).

QUESTION PRESENTED

Whether Experimental (now permanent) Canon 3A(7) of the Code of Judicial Conduct of the State of Florida is violative of a defendant's rights to a fair and impartial trial, and to due process of law under the Sixth and Fourteenth Amendments to the Constitution of the United States as written or when applied to permit electronic and still photographic media coverage of a trial in progress over a defendant's objection.

[1]The following abbreviations will be used in this Brief: JS—Jurisdictional Statement; App—Appendix to Jurisdictional Statement; R—Original Record on Appeal; A—"Single" Appendix; AB—Appendix to Appellants' Brief.

CONSTITUTIONAL PROVISIONS

Amendment VI, to the Constitution of the United States, provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.

Amendment XIV, to the Constitution of the United States, provides in pertinent part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law . . .

STATUTE INVOLVED[2]

32 F.S.A. Jud. Conduct Canon 3A(7) (Supp. 1978) was revised by the Florida Supreme Court to permit electronic media coverage of courtroom proceedings. The original Canon 3A(7), in pertinent part, provided:

> (7) A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto . . .

The Canon was revised to permit such coverage on an experimental basis in *Petition of Post-Newsweek Stations, Fla., Inc.*, 327 So.1 (Fla. 1976), *modified*, 337 So.2d 804 (Fla. 1976), *modified*, 347 So.2d 402 (Fla. 1977), *modified*, 347 So.2d 404 (Fla. 1977).

[2]The Canon in question is considered a statute, under 28 U.S.C. §1257(2), where the constitutionality of same has been upheld by the highest State Court. *See In re Griffiths*, 413 U.S. 717 (1973) and *Mayer v. City of Chicago*, 404 U.S. 189 (1971).

Subsequently, Canon 3A(7) was permanently amended to permit electronic media and still photographic coverage of courtroom proceedings, and now 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 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.

32 F.S.A. Jud. Conduct Canon 3A(7) (Supp. Sept. 1979).

STATEMENT OF THE CASE

On July 5, 1977, Florida courts embarked on a one-year experimental program which authorized electronic media and still photographic coverage of all criminal (and civil) trials, while in progress, regardless of a defendant's objection to same. This rule was promulgated by the Florida Supreme Court pursuant to its general supervisory power under Article V, Section 2 of the Florida Constitution (1972), which authorizes that court to enact rules of procedure regulating the proceedings in all Florida courts.

Four days before the beginning of this "experimental" year, the Appellants, City of Miami Beach Police Officers at the time of their arrests, were charged by criminal information with conspiracy to commit a felony, burglary, grand larceny and possession of burglary tools arising out of the early morning, May 23rd, 1977, breaking into and entry of

Picciolos Restaurant, a well-known South Miami Beach dining spot (R. 1098-1101, J.S. 10). As detailed in the Jurisdictional Statement (J.S. 10-11), the unique facts and circumstances which led to Appellants' arrests, coupled with the popularity of the restaurant and the "breach" of trust by the two police officers made this case a "natural" for media to report, televise and publicize, during pretrial, trial and post-trial proceedings. Even the Assistant State Attorney prosecuting the trial termed this case "unusual" and "fascinating" during his opening statement to the jury (R. 206, 207). Earlier, the trial judge acknowledged the case presented "rather unique circumstances" (R. 42-43).

On July 21, 1977, Appellants filed their first motion seeking to have Florida's Experimental Rule 3A(7) declared unconstitutional as written and as applied (A. 3-4). The Trial Court declined to grant the requested relief, and instead "certified" the Rule's constitutionality to the Florida Supreme Court pursuant to the then-applicable provision of the Florida Appellate Rules (AB. 2). The Florida Supreme Court declined to rule on the "certified" question, dismissing same on the grounds that it was not "dispositive" of the criminal charges against Appellants (J.S. 11). *State v. Granger*, 352 So.2d 175 (Fla. 1977).

Thereafter, Appellants' case progressed on the trial docket. On October 25, 1977, Appellants renewed their motion challenging the constitutionality of the Experimental Rule (A. 5). This motion was denied by the trial court on the same day (A. 5-6) and by written order entered October 31, 1977 (AB. 4).

Prior to trial, on November 17, 1977, the Court conducted a hearing on Appellants' Motion to Suppress (R. 1129-1135) the tape recording of their conversations which had been intercepted by John Sion in a rather strange manner (App. 21). The tape was a critical item of evidence

linking the two police officers to the burglary of the restaurant (R. 1000). Fortuitously, the electronic media was not present (although newspaper reporters were) during the motion to suppress hearing at which Appellant Chandler testified and admitted using a "Walkie-Talkie" with co-defendant Granger, to "stage a bogus burglary" (R. 25-31, App. 21). The Trial Court denied the motion to suppress (R. 42-43, 1135).

Eighteen days later, Appellants' trial began in Dade County Circuit Court with the selection of the jury. Immediately prior to *voir dire*, Appellants made an *ore tenus* motion to remove the television camera and still photographer from the courtroom (A. 6-7). This was denied (A. 6). Similarly, an *ore tenus* motion to sequester the jury was made and denied (A. 6-7).

During jury selection, each member of the panel was questioned as to his or her ability to sit as a juror and to be "fair and impartial" despite the presence of a television camera during some, or all, of the proceedings (A. 12). All of the prospective jurors stated that they would not be "affected" in any way *(Id.)*, although one juror at first said that she thought the presence of the television camera during the trial would lead her to believe ". . . there is something special about this case." (A. 9). Only two of the prospective jurors had ever been on television before (A. 10). A television camera was present during *voir dire* (A. 8). Following the selection and swearing of the jury, Appellants renewed their motion to sequester the jury because of the television coverage of the courtroom proceedings (A. 13). This was denied (A. 6, 13).

The Trial Court instructed the jury not to "watch, read or see" anything about the case on any of the media (A. 13). Just before the first night's recess, the Court advised the jury, "Perhaps it might be a good idea if you just avoid the local news and watch only the national news on television." (A. 13).

After the jury left for the evening, Appellants renewed their request that the witnesses be instructed by the court not to watch any television accounts of the testimony (A. 14). The trial court declined to do so on the grounds that the "problem" was an "interesting academic one, but of no practical purpose whatsoever." *(Id.)*, because the trial court concluded "no witnesses' testimony was reported or televised in any way" *(Id.)*.

The very next morning during direct examination of the State's "main" witness, John Sion, (the "ham" radio operator who had overheard and tape recorded the "burglary in progress"), the Trial Court was forced to interrupt the proceedings, discontinue the witness' testimony, remove the trial jury, and admonish the television cameraman from WPLG[3] who apparently was doing something with his television camera which the Judge found distracting (A. 15).

The television camera was in place the entire afternoon session during the State's presentation of evidence (A. 15-16). No television camera was present during any portion of the Appellants' presentation of evidence. Neither Appellant testified, at trial, although several defense witnesses were permitted to testify by the trial court (R. 657-919). Other defense witnesses were not permitted to testify, for reasons not relevant to the issue presented herein (R. 657-689).

At the conclusion of all the evidence, the Judge reminded the jury to "carefully abide by the instructions" given to them at the beginning of the trial and before each recess (A. 16).

[3]WPLG, Channel 10, Miami, Florida, is owned by Post-Newsweek Stations of Florida, Inc., which was the original proponent of the televised criminal trial rule.

The jury eventually convicted Appellants of all four charges against them (R. 1284-1291). The Trial Court immediately sentenced each of the Appellants to a total of seven years imprisonment to be followed by five years probation (App. 18). The Court then ordered that Appellants be taken into custody on the grounds that no Notice of Appeal had been filed, and they were, therefore, not entitled to bail pending appeal. The following day, Notice of Appeal having been filed, the Court set appeal bonds on both Appellants. Post-trial motions were first denied on the grounds that the Court lacked jurisdiction. Subsequently, on December 29, 1977, the District Court of Appeal temporarily relinquished jurisdiction to afford the Trial Court an opportunity to rule on the Appellants' post-trial motions (App. 18).

The Appellants' Motion for New Trial alleged, *inter alia*, that they had been denied a fair and impartial trial through no fault of their own (R. 1303). The Trial Court denied that motion without giving Appellants' counsel an opportunity to state specific grounds (R. 1096).

Thereafter, the Florida District Court of Appeal affirmed Appellants' convictions holding, with respect to the issue relevant here, that permitting the electronic media to televise portions of Appellants' trial over their objections did not deprive them of their constitutional rights to a fair trial, due process of law or an impartial jury, as written or applied (App. 19-20). The District Court based its decision on the assumption that the Florida Supreme Court, having decided to permit camera coverage of criminal trials, on an experimental basis, must have determined that such coverage did not violate the Federal and State Constitutions *(Id.)*. The District Court of Appeal did certify the constitutionality, *per se*, of the Experimental Canon to the Florida Supreme Court as "a question of great public interest" *(Id.)*.

Thereafter, the Florida Supreme Court denied the appeal holding that the District Court of Appeal "expressly declined to rule upon the constitutional issue," dismissed the petition for writ of certiorari on the grounds that "no conflict has been demonstrated," and determined that the certified question was rendered moot as a result of its decision in *Petition of Post-Newsweek Stations of Florida, Inc.*, 370 So.2d 764 (Fla. 1979) which was rendered *after* the District Court of Appeal's decision (App. 3-4). *Post-Newsweek, supra*, is the non-adversarial decision amending Canon 3A(7) which first experimentally, and now permanently, authorized television coverage of all trial and appellate proceedings in Florida courts, regardless of an objection by a participant or defendant.

Neither the Florida Supreme Court, nor the District Court of Appeal ever discussed *Estes v. Texas*, 381 U.S. 532 (1965), in their decisions affirming Appellants' convictions (App. 3-4, 7-25).

Appellants timely filed their Notice of Appeal to, and Jurisdictional Statement in, this Court. Mr. Justice Lewis F. Powell, Jr. granted Appellants' motion for a continuation of the stay of proceedings originally entered by the Florida Supreme Court (App. 32-33, 5-6), as a result of which Appellants are still at liberty on their respective appeal bonds.

SUMMARY OF ARGUMENT

I.

The Sixth Amendment guarantees the accused the right to a public trial. This right is personal to the accused. The media has no right greater than the general public's to attend criminal trials. While news reporters are entitled to access to the courtroom as a natural corollary of the public's "right to know," this "right of access" is not without its limitations.

Criminal trials were never intended to serve as an entertainment medium or as an educational "teaching" device. The press is not entitled to take advantage of the accused's "plight in the toils of the law." To permit electronic media to broadcast criminal trials in progress over a defendant's objection would deal a fatal blow to the historical meaning of the Sixth Amendment.

II.

The media's "right of access" to the courtroom, whether predicated on First or Sixth Amendment guarantees, is not superior to the public's right of access. This case does not present a "closure" attempt, but rather an effort by Appellants to keep the balance "nice and true" between the accused's right to a fair and impartial trial, and the media's right to gather news. Courts have the inherent power to prohibit broadcast media from televising pretrial or trial proceedings, and even to limit the public's access to courtrooms, where necessary, in order to prevent erosion of the right to a fair and impartial trial.

The First Amendment does not carry with it, the "unrestrained right to gather information."

III.

The mere presence of television and still photographic cameras during a criminal trial is inherently prejudicial and denies the accused his right to a fair and impartial trial. This Court has previously held that in "notorious" cases at least televising portions of pretrial and trial proceedings denied the defendant basic Constitutional rights, *Estes v. Texas*, 381 U.S. 532 (1956). The *Estes* Court could not agree on the sweep of the rule prohibiting televising trials in progress. This case, while not "notorious" is at least "more than routine," and therefore, offers the Court an opportunity to squarely face and deal with the constitutional question.

Television news gathering is different than other forms of media. The presence of the camera causes different, perhaps unidentifiable, reactions in jurors and witnesses. Socio-psychological studies support the conclusion that when people are distracted, their decision making abilities are altered. Similarly, when people involved in decision-making lose their anonymity, judgments are more likely to conform to socially acceptable opinions, rather than privately held views.

The mere presence of a television camera in the courtroom has a Constitutionally significant "inhibiting" effect upon witnesses, jurors and attorneys. As a result, the defendant's rights to effective assistance of counsel, to compel favorable witnesses, and to confront and cross-examine his accusers, are all impaired. The cost to individuals in terms of denial of due process of law far outweighs whatever benefit, if any, society derives from watching highly selected, frequently lurid glimpses of the judicial process.

Continued television coverage of criminal trials is likely to erode the public's perception of, and confidence in, our system of jurisprudence. The viewing public will hardly understand the terse granting of a televised motion to suppress on a mere "technicality" after it has seen the defendant admit the commission of the offense, (for "standing" purposes).

Commercial needs will compel even more competitive broadcasting of trials in the course of which, the public's perception of the scales of justice will be badly tarnished.

In short, there is no Constitutional basis to justify televising a criminal trial, especially when one considers the damage which will result to our basic freedoms.

IV.

Permitting electronic media and still-photographic coverage during a criminal trial over the defendant's objection denies the accused due process of law guaranteed by the Fourteenth Amendment. Such a constitutional deprivation may be found without an affirmative showing of actual prejudice. Pervasive pretrial publicity and the intrusion of news media into the trial process itself, frequently alters the constitutionally required judicial atmosphere so as to prevent the defendant from receiving a fair and impartial trial through no fault of his own. Where the presence of television cameras involves "such a probability that prejudice will result" due process of law considerations prevail. A "fair trial in a fair tribunal" is a basic requirement of due process of law. The mere presence of television cameras in a criminal proceeding destroys the ability of the accused to receive a fair and impartial trial as a matter of due process.

The Florida Supreme Court's failure to conduct scientifically reliable, and constitutionally valid studies prior to instituting the experimental year fatally taints Appellants' convictions. The Florida Supreme Court authorized the televising of criminal trials without first assuring itself that no one's individual liberties would be impaired. *Post hoc* studies conducted at the conclusion of the experimental year reflect a total failure on the part of the Court to properly test and measure the results of the experiment.

A careful analysis of the "In House" study conducted by the Florida Supreme Court at the conclusion of the experimental year clearly establishes that the conclusions drawn from the study are scientifically unsound and constitutionally deficient. In many cases the Florida Supreme Court overlooked critical data in attempting to

justify the experiment. The survey conducted by the administrative arm of the Florida Supreme Court, suffers from a significant lack of objectivity and serious departure from the "scientific" method.

A constitutionally significant number of witness and juror respondents to the survey established that their own acts, conduct, behavior, self-perception and roles in the televised criminal trials were affected by the presence of electronic and still-photographic media.

Due process of law compels the conclusion that the courtroom must be closed to the camera's eye. Where the State employs a procedure which produces a probability that prejudice will flow therefrom, this Court has not hesitated to strike down such procedures as "inherently lacking in due process of law." Even though one may not put his finger on the "specific mischief" caused by television, by its very nature, television causes prejudice to an accused contrary to his Sixth and Fourteenth Amendment rights.

I.

THE SIXTH AMENDMENT GUARANTEES THE ACCUSED THE RIGHT TO A PUBLIC TRIAL.

Denying Electronic Media and Still Photographic Coverage of Criminal Trials in Progress Will Not Offend the Sixth Amendment.

That the Sixth Amendment guarantees the accused the right to a public trial is beyond debate and discussion. The Constitution clearly states that it is the *accused's* right, not the public's. It is the defendant's sacred right, not that of the

press. In short, "the Sixth Amendment right to a public trial is a right of the accused, and of the accused only. . . ." *Geise v. United States*, 265 F.2d 659, 660 (9th Cir.), cert. denied, 361 U.S. 842 (1959).

This basic tenet of our criminal justice system was reaffirmed by this Court at its last term in *Gannett Co. v. De Pasquale*, U.S. , 99 S.Ct. 2898 (1979). There Mr. Justice Stewart, delivering the opinion for the Court stated:

> For these reasons, we hold that members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials. *Id.* at 2911.

Even the four members of this Court who could not join in Justice Stewart's opinion agreed that:

> By its literal terms the Sixth Amendment secures the right to a public trial only to "The Accused." *Id.* at 2924 (Mr. Justice Blackmun, concurring in part and dissenting in part).

Mr. Justice Blackmun's statement is, of course, consistent with his earlier opinion in *Faretta v. California*, 422 U.S. 806, 848 (1975), where he stated (while dissenting), "[T]he specific guarantees of the Sixth Amendment are personal to the accused."

On the other hand, it is clear that while ". . . a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial [citation omitted]. . . ." *Singer v. United States*, 380 U.S. 24, 35 (1965). *Sub judice* Appellants made no effort to obtain a "private" trial, but rather simply sought to preclude the presence of television cameras and still photographers from the courtroom while their trial was in

progress, consistent with the teachings of *Estes v. Texas*, 381 U.S. 532 (1965). No effort was made to impose a "gag" order, *cf. Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976); nor was any attempt made to exclude the public generally or to close the courtroom to print and/or electronic media reporters, *cf. Richmond Newspapers, Inc. v. Commonwealth of Virginia*, U.S.Sup.Ct. Case No. 79-243 (decision pending on jurisdiction and merits at present).

Members of the "Fourth Estate"[1] were welcome, only their television cameras and still-photographic equipment were sought to be barred. In short, Appellants sought to exercise their rights to a public trial without any effort to limit traditional methods of news-gathering in the courtroom.

The accused's right to a public trial is so deeply rooted in Colonial American History, that the founders of this nation and the draftsmen of our Constitution and the Bill of Rights hardly found it necessary to debate or discuss the reason for this aspect of the Sixth Amendment. Similarly, there is virtually no discussion of the *public* aspect of the right to trial in the Annals of Congress between 1789 and 1791. Colonial Congressional debate focused on venue and jury trial issues. In fact, the Sixth Amendment is virtually identical to James Madison's original proposal. 1 ANNALS OF CONG. 452 (1st Cong., Gales & Seeton, 1789). The House of Representatives

[1]The term, "Fourth Estate" is attributed to the prominent 18th Century British statesman and philosopher, Edmund Burke, who is reported to have called the reporters' gallery in Parliament a "Fourth Estate." The other three were the clergy, the nobility and the bourgeois. Mr. Justice Potter Stewart, in an address given at the Sesquicentennial Convocation, Yale Law School, on November 2, 1974 (as reported in the *American Statesman News*, (Austin, Tx.) Dec. 5, 1974, p. A-29) is reported to have explained the term as follows: "The primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the government as an additional check on the three official branches."

approved Madison's public trial "Amendment" on August 22, 1789. *Id.* at 808. The Senate reports are very sketchy, but the Conference Committee report was accepted by the House on Sept. 24, 1789. *Id.* at 948.[5]

Clearly the purpose was to protect the accused from "Star Chamber" proceedings and to afford the defendant free access to the advice and counsel of not only his attorney, but also his family and friends. *See generally* Magruder and Claire, *The Constitution*, 273-274 (1933) and Mathews, *The American Constitutional System*, 346 (1932). "A public trial however, is not necessarily one to which everyone may be admitted, but it must be sufficiently open to all the friends of the accused and others to witness the proceedings if they desire." Lee, *The Story of the Constitution*, 139 (1932). Neither James Madison, the draftsmen of the Bill of Rights, the States which ratified the first ten amendments, nor this Court, ever contemplated that the accused's right to a public trial would somehow be twisted to provide unlimited access to courtrooms by the (broadcast) media under either the First or Sixth Amendments.

The accused's "trials and tribulations," the personal trauma (whether deserved or not) of being subjected to the adversary system, the need to defend one's self and even be subjected to cross-examination, were never intended to be

[5]The accused's right to a public trial was first included in the 1677 Colonial Charter known as the West New Jersey Concessions, Chapter XXIII. B. Schwartz, I. *The Bill of Rights: A Documented History*, 129 (1971). Schwartz traces this right to Chapter 39 of the Magna Carta (1215). Pennsylvania was the first state to actually guarantee the accused a public trial in its constitution, Pennsylvania, Constitution, Declaration of Rights IX (1776). *In re Oliver*, 333 U.S. 256, 266, n.15 (1948); *United States ex rel Bennett v. Rundle*, 419 F.2d 599, 605, n.21 (3d. Cir. 1969) and *Stamicarbon, N.V. v. American Cyanamid Corporation*, 506 F.2d 532, 539 (2d. Cir. 1974).

made public spectacles, nor should they be permitted to become a form of entertainment or educational shows. This Court ". . . must take cognizance of the fact that the constitutional right of the accused to a public trial is a privilege intended for his benefit. It does not entitle the press or the public to take advantage of [the accused's] involuntary exposure at the bar of justice to employ photographic means to picture his plight in the toils of the law either while in jail, going or coming from court, or while actually in the courtroom." *Tribune Review Publishing Company v. Thomas*, 163 F.Supp. 486, 495 (W.D.Pa. 1957), aff'd, 254 F.2d 883 (1958).

More recently, Mr. Justice Douglas observed in *Illinois v. Allen*, 397 U.S. 337, 351 (1970), that:

> A courtroom is a hallowed place where trial *must proceed with dignity and not become occasions for entertainment* by the participants, by extraneous persons, by *modern mass media, or otherwise.* [emphasis added].

To yield to the electronic media's request would be tantamount to abandoning two hundred years of adherence to the concept of the *accused's* right to a fair and impartial public trial.

Public trials serve a "vital societal function" in that they promote "strict conscientiousness in the performance of duty" by the court, the parties, witnesses and presumably jurors. *See* 6 J. Wigmore, *Evidence in Trials at Common Law*, §1834 at 438 (Chadbourne rev. 1976). Permitting television cameras and still photographic equipment will not add to that "vital societal function" and, as will be demonstrated in Point III, *infra*, may well detract from the performance of that function. Precluding television cameras from the courtroom will still enable the accused to exercise

his constitutional right to a public trial, and likewise permit all media to gather news on an equal basis. In this manner, the "public's right to know" what occurs in criminal trials, *see In re: Oliver*, 333 U.S. n.15 at 266-276, will be preserved as a matter of principle, and the defendant's Constitutional right to a public trial, free from prejudice or outside influence, *see In re: Murchison*, 349 U.S. 133 (1955); *Tumey v. State of Ohio*, 273 U.S. 510 (1927) and *Estes, supra*, 381 U.S. at 593, will remain absolute.

II.

THE MEDIA'S RIGHT TO ACCESS TO THE COURTROOM IS NO GREATER THAN THE PUBLIC'S RIGHT, IN GENERAL.

Neither the First Nor Sixth Amendments Compel the Presence of Broadcast Media in the Courtroom.

This is not a question involving First Amendment considerations. Appellants do not seek to preclude traditional methods of news coverage of trials in progress. The central issue is whether the electronic media's right to access to the courtroom is superior to the accused's right to a fair and impartial trial and to due process of law. While media proponents have sought to cloud the issue with First Amendment arguments, even the Florida Supreme Court, in its decision in *Post-Newsweek, supra*, 370 So.2d at 774, which engendered this litigation, rejected media's argument that the First and Sixth Amendments require entry of the electronic media into judicial proceedings.

Despite that conclusion, more than half of the states followed Florida's lead and "tinkered" with the hallowed trial process. According to the National Center for State Courts,

as of April 21, 1980, ten states have joined the "rush to electronic judgment" authorizing television, radio and still photographic coverage on a permanent basis (AB. 5-6). An additional sixteen states presently permit coverage on an "experimental" basis (AB. 7-9), and two states have enacted legislation which would appear to allow electronic media coverage (AB. 9). In sum, then, at present, at least twenty-eight states permit television coverage in one form or another.

The well financed and organized campaign by media to install television (yet another technological toy) in every courtroom in the United States has not, however, been without criticism from its own "brethren." The September 3, 1979 edition of *The New Yorker* magazine contained a rather caustic cartoon on the subject matter which "told" the entire story in a picture (AB. 10). Similarly, the April 23, 1980, edition of *The New York Times* published an article by George Gerbner, Dean of the University of Pennsylvania's Annenberg School of Communications, which suggested that television cameras do not belong in our courtrooms. The article's headline, "It's 11:30. And Heeeeere's Justice." says it all.

It clearly is a "trying task" to attempt to choose between free speech and fair trial, which are "two of the most cherished policies of our civilization." *Bridges v. California*, 314 U.S. 252, 260 (1941) (Mr. Justice Black). What is so incredible about the broadcast media's demands in America today is that no such request would ever be made in England, from whence our system of jurisprudence sprung. According to Harold Evans, editor of *The London Sunday Times*, "The idea of televising a trial [in England] ha[s] never been advocated by the boldest spirits in the press." 52 *Fla. Bar Journal*, 463 (1978).

There is little justification for a "running battle" between the courts and the press on this fair trial/free press

issue. Both are basic and sacred concepts in our system of government. This Court has endeavored mightily to preserve both and still "keep the peace" by placing emphasis on the Constitution and individual rights. This Court has had little difficulty in repeatedly holding (although admittedly by "split" votes) that members of the press do not have either a First or Sixth Amendment constitutionally guaranteed "right of access" greater than that afforded the public in general. *See, e.g., Pell v. Procunier*, 417 U.S. 817, 833 (1974); *Saxbe v. Washington Post*, 417 U.S. 843, 850 (1974); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Estes v. Texas*, 381 U.S. 532, 540 (1965); and *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609-610 (1978). And, if that is so, how then can the broadcast media successfully claim a right of access superior to their own "brethren" in the printed media?[6] In fact, they cannot, for this Court has made it clear that the "right to access" to courtroom proceedings is not absolute. *Estes, supra*, and *Gannett Co., Inc., supra*, 99 S.Ct. at 2911. Moreover, as Mr. Justice Rehnquist pointed out in his concurring opinion in *Gannett*, at 2918:

> Despite the Court's seeming reservation of the question whether the First Amendment guarantees the public a right of access to pretrial proceedings, it is clear that this Court repeatedly has held that there is no First Amendment right of access in the public or the press to judicial or other governmental proceedings. See *post*, at 2921-2922; *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609, 98 S.Ct. 1306, 1317, 55 L.Ed.2d 570 (1978); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850, 94 S.Ct. 2811, 2815, 41 L.Ed.2d 514 (1974); *Pell v. Procunier*, 417 U.S. 817, 834, 94 S.Ct. 2800, 2810, 41 L.Ed.2d 495 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 684-685, 92 S.Ct. 2646, 2658-2659, 33 L.Ed.2d 626 (1972); *Zemel v. Rusk*, 381 U.S. 1, 16-17, 85 S.Ct. 1271, 1280-1281, 14 L.Ed.2d 179 (1965); *Estes v. Texas*, 381 U.S. 532, 539-540, 85 S.Ct. 1628, 1631-1632, 14 L.Ed.2d 543 (1965). See also *Houchins v. KQED, Inc.*, 438 U.S. 1, 9-15, 98 S.Ct. 2588, 2594-2597, 57 L.Ed.2d 553 (1978) (opinions of BURGER, C. J., WHITE and REHNQUIST, JJ.); *id.*, at 2908 (STEWART, J., concurring). "The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally. The Constitution does no more than assure the public and the press equal access once government has opened its doors." *Ibid.* Thus, this Court emphatically has rejected the proposition advanced in Mr. Justice POWELL's concurring opinion, *ante*, at 2914, that the First Amendment is some sort of Constitutional "sunshine law" that requires notice, an opportunity to be heard and substantial reasons before a governmental proceeding may be closed to the public and press.

Mr. Justice Blackmun, (with whom Justices Brennan, White and Marshall joined) also observed in *Gannett, supra*, at 2922:

> Despite Mr. Justice POWELL's concern, *ante*, *this Court heretofore has not found and does not today find, any First Amendment right of access to judicial or other governmental proceedings.* See, *e.g., Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 608-610, 98 S.Ct. 1306, 1317-1318, 55 L.Ed.2d 570 (1978); *Pell v. Procunier*, 417 U.S. 817,

[6] In *Estes* the Court answered that very question: "It is said, however, that the freedoms granted in the First Amendment extend a right to the news media to televise from the courtroom, and that to refuse to honor this privilege is to discriminate between the newspapers and television. *This is a misconception of the rights of the press.*" 381 U.S. at 539. [emphasis added].

834, 94 S.Ct. 2800, 2810, 41 L.Ed.2d 495 (1974). [emphasis added].

Moreover, a careful reading of *Gannett* makes it clear that Mr. Justice Stewart's opinion for the Court concluded "that the Constitution provides no such [First Amendment] right [of access], greater than the public's right in general." 99 S.Ct. at 2913.

Thus, the invitation to expand the First Amendment, issued to this Court by *Richmond Newspapers, Inc.*, in its Brief on the Merits at pp. 27-43, ought to be declined, despite the apparently harsh closure facts presented in *Richmond Newspapers, Inc. v. Commonwealth of Virginia, supra.*

In any event, the question of "First Amendment access" is academic *sub judice*, because there was no closure order sought. The Appellants merely sought to preclude the presence of tape recorders, television cameras and still photographers from the courtroom. No effort was made to exclude either the general public or news reporters from either print or broadcast media. *See Nixon v. Warner Communications, Inc., supra*, 435 U.S. at 609-610. Appellants did not seek to interfere with the broadcast media's reporters' rights to listen to, gather and write down "events that transpire[d] in the courtroom." *Sheppard v. Maxwell*, 384 U.S. 333, 362-363 (1965). Hence, *Nebraska Press Association v. Stuart, supra*, "gag" order principles do not come into play *sub judice*.

Appellants further contend that Courts have the inherent supervisory power to prohibit broadcast media from televising pretrial or trial proceedings where necessary to prevent interference with a defendant's rights to a fair and impartial trial, consistent with the teachings of *Estes v. Texas, supra*, and *Sheppard v. Maxwell, supra*. While, fortuitously, there was no broadcast media coverage of

Appellant Chandler's testimony during the Motion to Suppress hearing, the trial court certainly had the authority and could have closed the courtroom to prospective jurors to prevent them from being "prejudiced" or "tainted" by observing the accused admit, (for the purpose of the Motion to Suppress), the very acts, words, or deeds which, at trial, the State would be required to prove beyond and to the exclusion of every reasonable doubt (under the Florida standard) without the benefit of compelling the defendant's testimony. *See Rideau v. Louisiana*, 373 U.S. 723 (1963); *Estes v. Texas, supra; Sheppard v. Maxwell, supra;* and *Gannett Publishing Co., Inc. v. DePasqual, supra. See also Gannett Publishing Corp. v. Richardson*, 580 P.2d 49, 55 (Hawaii 1978).

Frequently media representatives, in their zeal to perform their professional responsibilities, overlook the "necessities" and "realities" of the criminal justice system. Rarely, if ever, has the press been concerned with whether its (even accurate) reporting of a matter might prejudice a defendant's rights to receive a fair and impartial trial. Mr. Chief Justice Burger's observation in *Nebraska Press Association v. Stuart, supra*, is most telling on this point:

> It is not asking too much to suggest that those who exercise First Amendment rights in newspapers or broadcasting enterprises direct some effort to protect the rights of an accused to a fair trial by unbiased jurors. 427 U.S. at 561.

How will the television stations' broadcast on the evening news, (reported in living color and live action), of the defendant's admission to the crime (during the Motion to Suppress hearing) "protect the rights of the accused to a fair trial by unbiased jurors," when the following morning the trial judge *denies* the Motion to Suppress and jury selection is commenced? This is a very real problem in Florida, for

example, where the accused has the right to file a Motion to Suppress at any time right up to, and including, the day of the commencement of the trial. Fla.R.Crim.P. 3.190.

Similarly, trial courts should have the inherent supervisory power to prevent members of the public in general from bringing into the courtroom their own noiseless 35mm still cameras and the now-so-readily-available portable video tape recorders and sound cameras which operate on batteries, do not require any special lighting and even have "slow motion" and "instant replay" features. *See Gannett Co., Inc. v. DePasqual, supra,* 99 S.Ct. at 2936 (Mr. Justice Blackmun concurring in part and dissenting in part); *Estes v. Texas, supra; Sheppard v. Maxwell, supra; Amsler v. United States,* 381 F.2d 37, 53 (9th Cir. 1967); and *Tribune Review Publishing Company v. Thomas, supra,* 153 F.Supp. at 494.

Finally, Appellants respectfully remind this Court that "The right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk,* 381 U.S. 1 (1965). The broadcast media which asks this Court to ignore the accused's Sixth and Fourteenth Amendment rights and to overrule *Estes, supra, Sheppard, supra* and *Gannett, supra,* is the same "Fourth Estate" which unsuccessfully sought a court order authorizing the recording, for home television viewing, of anticipated executions at the Texas State Prison. *Garrett v. Estelle,* 556 F.2d 1274 (5th Cir. 1974), cert. den., 4380, 5914 (1978). One can only wonder what lofty First Amendment goal was sought to be promoted by such a macabre request.

III.

THE MERE PRESENCE OF TELEVISION AND STILL PHOTOGRAPHIC CAMERAS DURING A CRIMINAL TRIAL, OVER A DEFENDANT'S OBJECTION, IS INHERENTLY PREJUDICIAL AND DETRACTS FROM ITS BASIC PURPOSE, THUS DENYING THE ACCUSED HIS RIGHT TO A FAIR AND IMPARTIAL TRIAL.

A. *Estes v. Texas,* 381 U.S. 532 (1965), Revisited.

As Mr. Justice Harlan succinctly observed in his concurring opinion in *Estes v. Texas, supra,* 381 U.S. at 587:

> The constitutional issue presented by this case is far-reaching in its implications for the administration of justice in this country. The precise question is whether the Fourteenth Amendment prohibits a State, over the objection of a defendant, from employing television in the courtroom to televise contemporaneously, or subsequently by means of videotape, the courtroom proceedings of a criminal trial of widespread public interest. The issue is no narrower than this because petitioner has not asserted any isolatable prejudice resulting from the presence of television apparatus within the courtroom or from the contemporaneous or subsequent broadcasting of the trial proceedings.

Appellants were not as "notorious" as Billie Sol Estes, yet neither was the trial ". . . of a more or less routine nature." *Id.*

Thus, the decision in this case will fill the hiatus left in this area by the various separate opinions of the *Estes* court. While neither "fish nor fowl," Appellants are still entitled to the guarantee that their liberty ". . . should not be put in jeopardy because of actions of any news media." *Estes, supra,* 381 U.S. at 540 (Mr. Justice Clark quoting the *amici curiae* brief of the National Association of Broadcasters and the Radio Television News Directors Association).

The purpose of public trials is to protect the accused, not to entertain or even to educate. "Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial," *Id.* The televising of criminal trials does not contribute to, or otherwise promote, that lofty end. The Constitution and the Bill of Rights have survived, not because of "majority" rule, but because this Court has been ever vigilant to promote and protect the rights of the unpopular, the oppressed and the minority. "Any attempt to find an answer to the question of what effect do cameras in the courtroom have on the administration of justice which is based on what a majority thinks [see Point IV-D, *infra*], is way wide of the mark."[7]

The solution to the Constitutional dilemma is compounded by the "news media's penchant for extensively covering sensational trials." *United States v. Williams*, 568 F.2d 464, 467 (5th Cir. 1978). This has produced the "so-called 'media circus' cases," *Id.*, despite the "fair play" section of the Code of Ethics of the Society of Professional Journalists [Sigma Delta Chi], which requires "Journalists at all times [to] show respect for the dignity, privacy, rights and well-being of people encountered in the course of gathering and presenting news." Furthermore, the Sigma Delta Chi Code states, "The media should not pander to morbid curiosity about the details of vice and crime." The answer, of course, is found in the "Responsibility" section of the Sigma Delta Chi Code: "The public's right to know of events of public importance is the overriding mission of the mass media." And, the "Ethics" section of the Code makes it poignently clear, "Journalists must be free of obligation to any interest other than the public's right to know."

[7]Report and Recommendations of the *Ad Hoc* Committee of the Bar Association of Greater Cleveland, on the Effect of Cameras in the Courtroom on the Participants in Such a Trial, 51 Cleveland Bar J., 172, 174 (May, 1980).

It is, therefore, understandable, though regretable, that "not a term passes without this Court being importuned to review a conviction had in States throughout the country where substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts. . . ." *Irvin v. Dowd*, 366 U.S. 717, 730 (1961) (Mr. Justice Frankfurter concurring). Now, this Court will be treated to a never-ending parade of "three-ring circuses" arising out of the experiment in "live broadcast justice." It is already clear that jurors, being fallible, have a difficult enough time attempting to ". . . reach a disinterested verdict based exclusively on what [is] heard in the Court, when, before they [enter] the jury box, their minds [have been] saturated by press and radio for months preceding by matter designed to establish the guilt of the accused." *Irvin, supra*, 366 U.S. at 729-730. With the continuation of televised criminal trials, the "mischief" presaged by Mr. Chief Justice Warren in his concurring opinion in *Estes, supra*, 381 U.S. 552-586, will fall upon our system of jurisprudence like the Ten Plagues on the House of Egypt.

The broadcast media now has the ability to determine which criminal cases shall become "notorious," which ones shall present a *"cause célèbre," Estes, supra*, 381 U.S. at 545, simply by setting up a tripod in the Courtroom. Appellants' case, while not "run-of-the-mill," was not notorious. Appellants' case presents this Court with the clear opportunity to "draw the line" finally and firmly, to close the doors to the "snouts," *Id.* at 568, of the "zoom" lens, *Id.* at 578.

B. Television is Different and Causes Witnesses and Jurors to Act, and React, Differently.

As Jaques said:

All the world's a stage,
And all the men and women merely players:
They have their exits and their entrances;
And one man in his time plays many parts. . . .

Shakespeare, "As You Like It," Act II, Sc. vii, 139.

Whether the juror will be distracted, influenced, inhibited, intimidated or unaffected by the presence of television cameras during the trial will never be known "beyond and to the exclusion of every reasonable doubt." What is known, however, are the following facts:

1. Most people have difficulty doing an important task or trying to understand complex messages while being subconsciously distracted by music.[8]

2. When people lose their anonymity, they are more likely to surrender their own personal convictions for a more socially acceptable opinion.[9]

That is to say there is increased pressure to "conform" when the jury loses its anonymity. Why are jurors required to deliberate in secret? Why are lawyers and parties generally prohibited from interviewing jurors post-verdict unless leave of Court is given? Because, there is a time-honored tradition of the sanctity of the jury's deliberations and verdict. Public broadcasting of the members of the jury, and highly edited, sensationalized portions of the trial will adversely affect the jurors' role.[10]

[8]Regan and Cheng, *Distraction and Attitude Change: A Resolution*, 9 Journal of Experimental Social Psychology 138 (1973).

[9]Mouton, Blake & Olmstead, *The Relationship Between Frequency of Yielding and the Disclosure of Personal Identity*, 24 Journal of Personality 339 (1956).

[10]See, Raven, *Social Influence on Opinions and the Communication of Related Content*, 58 Journal of Abnormal and Social Psychology, 119 (1959); *See also* Deutsch & Gerard, *A Study of Normative and Informational Social Influences Upon Individual Judgment*, 51 Journal of Abnormal and Social Psychology, 629 (1955).

The more public a trial is, the more jurors will tend to distort the content of the trial and change their opinions in the direction of the group or community norm, even if the jurors' individual opinions are to remain anonymous. For example, picture the situation of a "liberal" juror living in a "conservative" community. Making the trial more public (which would have the effect of identifying the jurors with the verdict visually and publicly) might cause the "liberal" juror to conform to the "conservative" community opinion. A conviction might well be obtained if the trial was televised, whereas if the trial was kept more private, the jurors more anonymous, the liberal juror might just stick to his private opinion, the result being a "hung" jury, or possibly, ultimately, an acquittal.

This is not to suggest, of course, that jurors are not, or should not, be accountable to the community. They are, as is the system itself. However, inherent to our system is the concept of "jury pardon" and even "irrational" or "illogical" verdicts. While our present system of criminal justice may not be perfect, it is certainly far better than that which has previously been known to man.

3. Nonanonymous groups have far more difficulty making decisions than anonymous groups. In an interesting and unique study, "mock" juries were informed that they would be publicly examined, after their verdict. Those "nonanonymous" juries exhibited considerably different patterns of change in opinion than did the mock juries who were told that deliberations would remain private.[11]

[11]Davis, Strasser, Spitzer & Holt, *Changes in Group Members' Decision Preferences During Discussion: An Illustration With Mock Juries*, 34 Journal of Personality and Social Psychology 1177 (1976). But *see*, Point IV-D *infra*, which points out the difficulties of accurate measurement based on "mock" juries.

4. Finally, in a now classical series of studies by the prominent social psychologist, Dr. Solomon E. Asch, it is clear that "social forces" can easily induce subjects to "surrender" their own private convictions for the sake of conformity and to avoid public ostracism.[12]

Obviously, since jurors arrive at decisions based on observations of the witnesses, the quality of testimony and other factors, where a witness is affected by the presence of broadcast media (*See* Point IV-D, *infra*), there will be a spill-over effect. *See United States v. Columbia Broadcasting System, Inc.*, 497 F.2d 102, 105 (5th Cir. 1974). (Unique prejudicial impact of being telecast.)

According to one study,[13] the respondent participants in trials televised in Florida during the experimental year,

> . . . were puzzled as to whether cameras affected witness behavior. While slightly over one in five respondents felt television and still cameras inhibited witness testimony, over one in four reported uncertainty about this issue.
>
> Since jurors rely upon testimony by witnesses to help reach a decision, it is particularly intriguing to examine juror perceptions of how cameras affect such testimony. Our subsample of 46 jurors who had experienced television cameras and 51 who had served in trials covered by still cameras responded similarly to the other respondents. About one in six believed that television cameras inhibit testimony while one in five found still cameras inhibiting.
>
> In addition, a large number of jurors, almost one-third, were uncertain about TV and still camera effects on testimony. Of the witnesses who responded to this item, two of nine believed that television cameras inhibited testimony, while none of five reported adverse effects of still cameras.

In light of those findings, developed by a team of three University of Central Florida academicians and a former State of Florida Trial Judge (who is now an active trial attorney), Appellants cannot understand why the Attorney General of the State of Florida would continue to press for affirmance of a Rule of Court which had the effect of seriously "inhibiting" witness testimony.[14]

Recently the American Bar Association retained a prestigious New York public opinion research firm to conduct a random cross-section public opinion pole focusing on various news media-court issues. Sixty-eight percent of the attorneys sampled, on a national basis, opposed cameras in the courtroom. Kane, Parsons and Associates, Inc., *ABA LawPoll*, at pg. 39 (April, 1979). Seventy-five percent of the respondent attorneys "agreed that television would distract witnesses." *Id.* at 43. Only thirty-seven percent thought that televising courtroom proceedings would "enhance the public concept of our system of justice." *Id.* at pg. 45.

[12]Asch, *Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority*, 70 Psychological Monographs: General and Applied 1 (1955).

[13]Pryor, Strawn, Buchanon & Meeske, *The Analysis of On-The-Scene Responses to Cameras in the Courtroom*, 45 Southern Speech Communication Journal, 12, 22 (Fall, 1979).

[14]It is a well-known fact which needs no citation that most victims and third-party witnesses are "unhappy" about being "involved" to begin with. Many, many state prosecutions are lost or dropped, because of witness reluctance to "come to court." Now the State of Florida offers these unwilling and disinclined people the opportunity to be harassed, embarrassed, inhibited, distracted, and televised on the evening news, in addition to the normal rigors of direct and cross-examination.

Additional problems of Constitutional dimension are raised by the presence of broadcast media during a trial over a defendant's objection:

1. The accused's right to effective assistance of counsel may be impaired;

2. The defendant's right to compel favorable witnesses to testify in his own behalf may be rendered meaningless, where, for example, the witness refuses to come forward, electing to face a contempt of court citation, rather than being forced to testify on "stage," *cf. United States v. Kleinman*, 107 F.Supp. 407 (D.C.D.C. 1952);

3. Witness *and juror* sequestration will have to be imposed in every case which is broadcast, "human nature being what it is" to assure the defendant of a fair and impartial trial free from "outside influences." And, of course, due process of law cannot be measured in terms of dollars and cents. *See Gagnon v. Scarpelli*, 411 U.S. 778, 788 (1967).

C. Continued Television Coverage of Trials Is Likely to Erode the ". . . Fundamental Conception of What a Trial Should Be," *Estes, supra*, 381 U.S. at 580 (Mr. Chief Justice Warren Concurring).

The public's perception of justice is an important element in maintaining respect for, and decorum in, our courts. While ". . . public knowledge and understanding of the judicial process [may be] at a low ebb [in Florida]," *Post-Newsweek, supra*, 370 So.2d 764, that is hardly sufficient justification for the rule in question. Moreover, it is extremely unlikely that the public gained any significant knowledge or

better understanding of, and more respect for, the traditional system as a result of the media's broadcasting of the *Zamora*,[15] *Bundy*,[16] *Jones*[17] or *McDuffie*[18] debacles.

Do we really expect the viewing public to truly understand the trial court's granting the defendant's Motion to Suppress on the grounds of a *Miranda*,[19] *Calldige*,[20] or *Dunaway*[21] violation? Especially, when the television camera

[15]*See* Part IV-D, *infra*, at n.33.

[16]The now infamous Theodore J. Bundy was made a national television star. The broadcast media did for Bundy what he could not do for himself. A law school dropout, now twice convicted of murder and sentenced to the electric chair, Bundy acted as his own attorney in the presence of national television coverage.

[17]The case of *State of Florida v. Johnny Jones*, tried recently in Dade County, Florida is another prime example of media excess. Dr. Jones, a prominent Black leader in the Miami community, who was also the Superintendent of the Dade County, Florida School System, was tried and convicted (in the press first) of grand theft under the daily glare of special television lighting (AB. 16-18). The *Jones* trial, broadcast every evening by PBS from "gavel-to-gavel" produced several rather unusual events. In addition to the lighting problem, for example, the trial judge, concerned with the public's view of the prosecutor and defense attorneys' vociferous verbal attacks (on each other) told the lawyers in open court, while in session, to "shake hands." The Miami-Herald, April 27, 1980, Section B, at 6, Col. 1. Thus, the Black community was able to see its hero, Dr. Johnny Jones' trial everyday from beginning to end. His conviction brought dismay to the school system and the Black community. Dr. Jones' case, rushed through the prosecutor's office and to trial, partially because of the barrage of adverse publicity, was one of several cases involving black/white confrontations which were the subject matter of much discussion, following what has now been called the "McDuffie" riots in Miami as noted in n.28 *infra*.

[18]See n. 28 *infra*.

[19]*Miranda v. Arizona*, 384 U.S. 436 (1966).

[20]*Calldige v. New Hampshire*, 403 U.S. 443 (1971).

[21]*Dunaway v. New York*, U.S. , 99 S.Ct. 2248 (1979).

"zooms in" on the defendant just as he admits the crime? The lack of the voluntariness of his consent to search, or knowing waiver of his right to counsel, will probably not be aired because of time limitations, commercialism and lack of sensationalism.

Will the need to intersperse portions of the trial with ". . . commercials for soft drinks, soups, eye-drops and seat covers . . ." *Estes, supra*, 381 U.S. at 571, improve the image of justice in America today? Or, will it take such "all-American" advertising as ". . . a dog food . . . and a [Joe Namath] panty hose commercial . . . [or perhaps a 'mean Joe Greene' Coca-Cola ad]," *Post-Newsweek, supra*, 370 So.2d at 776, to "turn the trick" and increase the ratings? How will television and still photographic cameras contribute to the "dignity, decorum and courtesy" of the courtroom? Hazard, *Securing Courtroom Decorum*, 80 Yale Law J. 433, 434 (1970). The list of courtroom rituals, well known to the trial bar, which serve to promote the dignity and decorum of the courtroom, such as the "wearing of the robe"[22] and the solemn austere administration of the "oath," ". . . to tell the truth, the whole truth and nothing but the truth . . . ,"[23] will become as commonplace as the routine at "Archie Bunker's Tavern."

D. There is No Constitutional Basis to Justify Televising a Criminal Trial.

As stated previously, the First Admendment generally grants the press no right to information about a trial superior to that of the general public. *Nixon v. Warner Communications, Inc., supra*, 435 U.S. at 609. Similarly, the

[22]*See* Kennedy, *The Cult of the Robe: A Dissent*, 14 Fordham L.Rev. 192 (1945).

[23]Comment, *Effects of Kinds of Questions and Atmosphere of Interrogation on Accuracy and Completeness of Testimony*, 84 Harv.L.Rev. 1620, 1636 (1971).

Sixth Amendment does not require that the trial, or any part of it, be broadcast live or on tape to the public. *Id.* at 610. The broadcast media cannot "run the show." For as observed in *Dieteman v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971) (civil suit seeking damages for alleged violation of invasion of privacy), the ever "increasing capabilities . . . of electronic devices with their capacity to destroy an individual's anonymity, intrude upon his most intimate activities and expose his most personal characteristics to public gaze," *Id.* at 248. While the criminally accused may have no "right of privacy" as to what is said in open court, other unwilling trial participants such as jurors and witnesses ". . . should not be required to take the risk that what is heard and seen will be transmitted by photograph, or recorded in full living color and hi-fi, to the public at large." *Shevin v. Sunbeam T.V. Corp.*, 351 So.2d 723 (Fla. 1977), appeal dismissed, 435 U.S. 920 (1978).

Broadcast media, and the Florida Supreme Court would do well to heed the words of Chief Judge Gourley, who wrote in *Tribune Review Publishing Company v. Thomas, supra*, 153 F.Supp. at 494:

> *The sanctity and inviolability of the court room is the keystone which supports and buttresses the great, massive arch of freedom, and to weaken this keystone is to invite real peril to our basic freedoms. In short, the greatest danger to freedom may well stem from those who seek the license and luxury of increased liberties at the expense of the process which feed life blood to our free institutions.* [emphasis added].

IV.

PERMITTING ELECTRONIC MEDIA AND STILL PHOTOGRAPHIC COVERAGE DURING A CRIMINAL TRIAL, OVER THE DEFENDANT'S OBJECTION, DENIES THE ACCUSED DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT

A. A Denial of Due Process of Law in Cases Involving the Publicity of Criminal Matters May Be Found Even Without an Affirmative Showing of Actual Prejudice.

Whether the accused is a "rich man, poor man, beggarman, thief, doctor, lawyer, merchant, chief," Gould and Gould, *Annotated Mother Goose* (New American Library, 1967), he is entitled to the constitutional guarantee that he not be deprived of "life, liberty or property, without due process of law." Amendment XIV. The televising, in part or whole, of a criminal trial, denies the accused that right. "Television reshapes the way we perceive reality. Before we allow television in even one more courtroom, we must know more about its effects on criminal trials and on our image of justice." Gerbner, *Trial by Television: Are We at the Point of No Return?* 63 Judicature 416 (1980).

It is abundantly clear that pervasive publicity and the intrusion of news media into the trial process itself can so alter, or destroy, the Constitutionally necessary judicial atmosphere and decorum so that the defendant is denied the requirements of impartiality to which he is entitled as a matter of due process of law. *Sheppard v. Maxwell, supra; Estes v. Texas, supra; Rideau v. Louisiana, supra;* and *Irvin v. Doud, supra.* And, the Appellant need not necessarily make an affirmative showing of actual prejudice. "Indeed where the circumstances involve a probability that prejudice

will result, it is deemed inherently lacking in due process. *Sheppard v. Maxwell,* [citation omitted] and *Estes v. Texas,* [citation omitted]." *State v. Stiltner,* 491 P.2d 1043, 1048 (Wash. 1971). *Estes* clearly controls the case at bar. In *Estes, supra,* the trial court held that the presence of television cameras *"involves such a probability that prejudice will result that it is deemed inherently lacking in due process."* 381 U.S. at 542, [emphasis added], (but see *Bradley v. State of Texas,* 470 F.2d 785 (5th Cir. 1973)) (Affirmance of denial of state prisoner's Federal Habeas Corpus petition which alleged violation of due process where court allowed "still and motion photography" of portions of trial). Because the Court decided *Estes* by a five-to-four vote, media proponents claimed that the courtroom door was left ajar, permitting the re-entry of cameras at a future date.[24] Unfortunately, this

[24]These views are derived primarily from Mr. Justice Harlan's concurring opinion in which he limits the rule of *Estes* to cases "notorious" in nature. Justice Harlan also reserved ruling on the "run-of-the-mill case" for a future time, but admitted that possibly no workable distinction can be drawn based upon the type of case involved.

The second basis from which media proponents have drawn support is Justice Harlan's statement in concurrence:

> [T]he 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. 381 U.S. at 595.

Any such reliance upon Justice Harlan's views is misplaced. He does not cast his concurring vote subject to technological improvements. It is not quieter cameras alone which make television more "commonplace an affair in the daily life of the average person." It is psychological and sociological attitudes toward television, and what jurors, witnesses and judges as trial participants and what the viewing public in general believe television represents which will affect television's likely disparagement of the judicial process to the accused's detriment. (See Point III, *supra.*)

optimism has not been bolstered by any showing that the presence of cameras has any less potential for "mischief" now than in 1965. Appellants acknowledge that the cameras' *operations* are less disruptive by virtue of technological improvements (but see R. 374). It is clear, however, that this Court's primary cause of concern was the impact of the camera's *presence* upon the trial's participants, and the jury in particular. Mr. Justice Clark, speaking for the Court, assessed the subtle dangers upon the jury as: 1) the impact of the juror's awareness of the media's interest in the case; 2) the potential distraction from the proceedings; and 3) in the event of a new trial, potential jurors often will have seen and heard telecasts of the original trial. *Estes, supra*, 381 U.S. at 545-548.

Mr. Justice Clark wrote *Estes* for the Court. Chief Justice Earl Warren, and Justices Douglas, Harlan and Goldberg, joined in the Court's judgment. Mr. Justice Harlan concurred in the Court's opinion, subject to certain reservations set out in 381 U.S. at 587-596. Mr. Justice Harlan succinctly stated:

> My conclusion is that there is no constitutional requirement that television be allowed in the courtroom, and, at least as to a notorious criminal trial such as this one, the considerations against allowing televisions in the courtroom so far outweigh the counter-veilling [sic] factors advanced in its support as to require a holding that what was done in this case infringed the fundamental right to a fair trial assured by the Due Process Clause of the Fourteenth Amendment. *Id.* at 587.

Mr. Chief Justice Warren, (joined by Justices Douglas and Goldberg), also wrote a concurring opinion in *Estes* and said at 381 U.S. at 552.

> *While I join in the court's opinion and agree that the televising of criminal trials is inherently a denial of due process, I desire to express additional views on why this is so. .* [emphasis added].

The Chief Justice went on to state:

> I believe that it violates the Sixth Amendment for federal courts and the Fourteenth Amendment for state courts to allow criminal trials to be televised to the public at large. I base this conclusion on three grounds: (1) That the televising of trials diverts the trial from its proper purpose in that it has an inevitable impact on all the trial participants; (2) that it gives the public the wrong impression about the purpose of trials, thereby detracting from the dignity of court proceedings and lessening the reliability of trial; and (3) that it singles out certain defendants and subjects them to trials under prejudicial conditions not experienced by others. *Id.* at 565.

Mr. Justice Stewart dissented in *Estes* and was joined by Justices Black, Brennan and White. Mr. Justice Stewart wrote:

> I think that the introduction to television into a courtroom is, at least in the present state of the art an extremely unwise policy. It involves many constitutional risks, and detracts from the inherent dignity of a courtroom. But I am unable to escalate this personal view into a *per se* constitutional rule. 381 U.S. 601.

While one could speculate as to what type of rule Mr. Justice Stewart would now promulgate, Appellants believe that Mr. Justice Brennan's joinder in Mr. Justice Stewart's

opinion was likely a result of the "preferred" position they have given the First Amendment as expressed in numerous obscenity cases. Justices White and Brennan also contributed separate dissenting opinions.

Appellants contend ". . . the nub of the question is not [television's] newness but, as Mr. Justice Douglas says, 'the insidious influences which it puts to work in the administration of justice.' Douglas, *The Public Trial and The Fair Press*, 33 Rocky Mt. L. Rev. 1 (1960)" *Estes, supra*, 381 U.S. at 541 (Mr. Justice Clark). As stated *In re Murchison, supra*, 349 U.S. at 625:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system has always endeavored to prevent even the *probability* of unfairness.
>
> * * * * *
>
> [T]o perform its high function in the best way 'justice must satisfy the appearance of justice' *Offutt v. U.S.*, 348 U.S. 11, 14, 75 S.Ct. 11, 13. . . . [emphasis added].

The mere presence of television cameras in a trial denigrates "the appearance of justice," *Offutt v. U.S., supra*, 348 U.S. at 14, and destroys the ability to "hold the balance nice, clear, and true between the state and the accused" *Tumey v. Ohio, supra*, 273 U.S. at 532.

"Due process requires that the accused receive a trial by an impartial jury free from outside influences." *Sheppard v. Maxwell, supra*, 384 U.S. at 362. This Court must take those measures necessary to prevent such influences from infecting the courtroom. *Id.* While answering questions of "substantive

due process has at times been a treacherous field for this Court," *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 502, (1977), one central theme has emerged, under our system of justice, it is far better for "ten guilty men to go free than for one innocent person to be (unfairly, and without due process of law) convicted."

B. The Failure of the Florida Supreme Court to Conduct Scientifically Reliable and Constitutionally Valid Studies to Determine the Effects of Televising Criminal Trials Fatally Taints Appellants' Convictions.

The Florida Supreme Court cast the State judicial system in an uncharted sea when it authorized one year of televised trials. At least Columbus, when "sailing the ocean blue," had a sextant and the stars to guide his voyage. Except for specifying the kinds of photographic and audio/visual camera equipment which could be brought into the courtroom, no apparent effort was made to establish a "scientific method" by which the experiment could be intelligently and meaningfully monitored, measured and analyzed. The Institute for Study of the Trial at the University of Central Florida prepared a report on the experiment which stated:

> Insufficient courtroom photograph data have been collected to identify all of the ramifications of camera usage or to interpret adequately the initial reactions of judges, attorneys, and the public. The experiment of only one year has produced too little data. More time is needed to permit the newly-formed opinions to incubate and mature so that additional research can be conducted to measure the long-term effects of cameras on the trial process.

Pryor, Strawn, Buchanan and Meeske, *The Florida Experiment: An Analysis of On-The-Scene Responses to Cameras in the Courtroom*, 45 Southern Speech Communication Journal 12, 24 (Fall, 1979).

This study, conducted by a former trial judge, now part-time college professor and trial attorney, and the Chairman of, and two professors at, the University of Central Florida's Department of Communication, was submitted to the Florida Supreme Court *prior* to its decision to make the televised criminal trial rule permanent.

Similar "storm" warnings were given to the Florida Supreme Court both before initiation of the experimental period, after its conclusion, and before the *Post-Newsweek* decision converting the Experimental Canon into a permanent Rule of Court. As early as February 6, 1976, the Florida Bar, through its Assistant Executive Director for Legal Affairs, Richard C. McFarlain, suggested to the Florida Supreme Court that "Qualified research scientists from the Florida State University School of Social Science be authorized to conduct research and measuring tests before, during and after the [televised] trials." (AB. 11). Apparently no such research project was established either before, or during the experimental year. *Post-Newsweek, supra*, 370 So.2d at 767-768.

Incredibly, however, despite the fact that the Florida Supreme Court, in its Supplemental Interlocutory decision of April 7, 1977, in *Post-Newsweek, supra*, admitted it had "met with total failure in securing the conduct of a [televised] trial by consent of the parties" (App. 29), it converted the experimental rule from one which required a defendant's consent into one which did not permit a defendant to have any say in whether his trial was televised (App. 30). In light of the warnings that a "scientifically controlled study" was

necessary, the Florida Supreme Court's decision to proceed without one was akin to the Queen of Heart's remark to Alice, "No! No! Said the Queen. Sentence first — verdict afterwards." *Norton Critical Edition: Alice In Wonderland*, 96 (Gray ed. 1971).

At the conclusion of the Experimental year, the Florida Supreme Court commissioned an "in house" *post hoc* study (OSCA), the efficacy and validity of which will be discussed at Point IV-C, *infra*. Several prominent bar association groups, academicians, *amicus* and social scientists urged the Florida Supreme Court to conduct vigorous, carefully controlled socio-psychological studies before reinstating the broadcast media rule.[25]

It is not surprising, of course, that carefully controlled traditional psychological and sociological tests could not be conducted consistent with "the scientific method," for, after all *a jury trial* is neither a laboratory experiment, nor a game, the outcome of which can be erased and submitted to more sterile procedures, or "replayed in the event of rain." In its simplest form, the "controlled" experiment consists of ". . . selecting two samples at random from the same population and then exposing one — the experimental sample — to an additional influence. The effect of the fresh influence is determined by comparing the final characteristics of members of the experimental sample with those of members of the control sample which were not so exposed. Madge, *The Tools of Social Science*, 209 (Doubleday, 1965).

[25]The requests for delay and further study were all filed in the Florida Supreme Court in the original record lodged there under Florida Supreme Court Case No. 46,835, *(In re: Petition of Post-Newsweek Stations, Florida, Inc., supra)*.

"Despite those advantages, it is frequently impossible to conduct the 'controlled' experiment outside the laboratory. Moreover, because both the experimental group and the laboratory conditions have been artificially selected, the ultimate results may bear little relevance to real-life situations." Flango, *On the Difficulties of Studying Juries*, 63 Judicature 438 (April, 1980). Using college students or mock juries to conduct experiments presents difficulties which impeach the studies' relevance and reliability, *Id.*

The alternative method of testing is called "quasi-experimental," which is "field" testing. "A field experiment is a research study in a realistic situation in which one or more variables are manipulated *under as controlled conditions as the situation will permit.*" Kerlinger, *Foundations of Educational Research*, 382 (Holt, Rinehart and Winston, Inc. 1967). "Field experimenting" with cameras in the courtroom while a defendant is being tried for murder, or as here for burglary, grand larceny, possession of burglary tools and conspiracy, is hardly consistent with traditional notions of our Constitutional system.

Once again it is not difficult to see why no control groups were set up during the one-year pilot. What is constitutionally perplexing, however, is the answer to the question, "Was the camera's presence *sub judice* a factor, conscious or subtle, in the jury's verdict?" Appellants contend that it was a negative factor. University of Pennsylvania's Annenberg School of Communications' Dean, George Gerbner, concurs in this contention:

> And so the bandwagon rolls on its road of nonsequiturs, misplaced demonstrations, self-serving tests and generally flawed 'experiments' that permit no controls, disproof, or evaluation. Gerbner, *Trial by Television: Are We At the Point of No Return?* 63 Judicature 416, 425-426 (April, 1980).

It is well settled that the beneficiary of the claimed constitutional error has the burden of establishing that it was "harmless." *Chapman v. California*, 386 U.S. 18, 24 (1967). *Sub judice*, Post-Newsweek, as the originator of this televised criminal trial rule had an obligation to establish *before* institution of the experimental rule that there was no interference with the accused's right to receive a fair and impartial trial and to due process of law. *Id.* This Post-Newsweek did not do, despite its obligation to "direct some effort to protect the rights of an accused to a fair trial by unbiased jurors," *Nebraska Press Association v. Stuart*, 427 U.S. at 561.

Similarly, the Attorney General of the State of Florida, as the Chief law enforcement officer of the State, has that obligation. Interestingly, the Florida Attorney General at the time Post-Newsweek first proposed the televised criminal trial rule, filed an affidavit in the Florida Supreme Court in opposition to the rule change. When he became a candidate for Governor of Florida, his office had a "change of attitude" and supported the rule change, as obviously does the present attorney general. *Cf. Shepperd v. Maxwell, supra*, 384 U.S. at 345, (Opinion noted Trial Judge and Prosecutor "running" for election at time of trial).

Where there is a reasonable possibility that the presence of the camera may have affected the trial proceedings, the beneficiary of that claimed constitutional error has the burden of proving "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California, supra*, 386 U.S. at 24. Appellee cannot meet this burden *sub judice*, because no effort was made before institution of the experimental program to "test the waters." The *ex post facto* surveys and studies, which will be discussed in Point IV, commissioned and utilized by the Florida Supreme Court simply do not pass scientific reliability, much less constitutional muster.

C. The "In House" Post Hoc Office of the State Court Administration (OSCA) Survey Commissioned by the Florida Supreme Court and Relied upon to Sustain the Experiment in Televising Criminal Trials is Constitutionally Deficient and "Scientifically" Unacceptable.

As indicated in Point IV, *supra*, at the conclusion of the year's experiment, the Florida Supreme Court directed the Office of the State Court Administrator (OSCA) to organize and circulate a questionnaire survey of all televised trial participants (except defendants) and to thereafter compile and publish the results of same. While the manner of the actual creation and organization of the questionnaire, and the assimilation of the material and results, is somewhat of a mystery, the Florida Supreme Court conceded "That the survey results [were] nonscientific and reflect only the respondent's attitudes and perceptions about the presence of electronic media in the courtroom." *Post-Newsweek, supra*, 370 So.2d at 768.

Appellants will analyze the individual constitutional significance of various survey questions in Part IV, *supra*. At this juncture Appellants contend that the OSCA survey relied on by the Florida Supreme Court in *Post-Newsweek, supra*, 370 So.2d 767-769 is totally inconclusive, constitutionally defective and simply not acceptable as "scientific" or "pseudo-scientific" "evidence." It is extremely doubtful whether such a survey, much less the conclusions drawn therefrom, would ever be admitted at a trial or judicial hearing, under current rules of evidence.[26]

[26]Hearsay and expert witness objections aside, neither the Florida Evidence Code Ch. 90, Fla.Stat. (1979), nor the Federal Rules of Evidence, would appear to allow either the OSCA survey or its results to be admitted at a judicial proceeding because it lacks the requisite trustworthiness and credibility.

The OSCA survey suffers from the following major defects:[27]

1. It is a well established principle in research that any "in-house" survey is likely to approach its problems and weaknesses with somewhat less than complete objectivity; or at least bring to the problem a certain perspective or point of view. Even institutions, like the humans which run them, suffer from unconscious and unavoidable gaps in objectivity when asked to examine their own problems. This in no way implies a lack of integrity or insincerity on the part of the researchers. It is simply a characteristic of human nature which is inescapable.

2. The Survey itself suffers from the "halo effect," a counter-productive phenomenon inconsistent with true scientific study, in which each of the items under

[27]The critical analysis of the OSCA survey which follows is based on an examination of it by Dr. George J. Mouly (Ph.D.), a professor of Educational Psychology at the University of Miami, and author of *Educational Research: The Art and Science of Investigation* (1978) an expert in the areas of statistical analysis and survey researching. Dr. Mouly was privately retained by Counsel for Appellants in connection with a civil rights suit (filed pursuant to 42 U.S.C. §1983) which had been instituted in the United States District Court for the Southern District of Florida by the undersigned as counsel for other unrelated clients. The object of the civil rights action was to seek an injunction against the enforcement of Rule 3.110, Florida Rules of Criminal Procedure (incorporating amended Canon 3A(7) which authorized televised criminal trials on a permanent basis), and/or in the alternative, a declaratory judgment from that court that the televised criminal trial rule was unconstitutional. Dr. Mouly's critique was never utilized as evidence because the District Judge, Norman C. Roettger, Jr., granted the Attorney General's Motion to Dismiss the suit on the grounds of lack of subject matter jurisdiction (no actual case or controversy) in an unreported decision. That case, *Trinidad v. Stettin*, (S.D.Fla., Case No. 79-1905-Civ-NCR), is now pending on Appeal in the United States Court of Appeal, (5th Cir., Case No. 79-2555). Dr. Mouly "found a sufficient number of departures from minimal research requirements to suggest the need for considerable caution in the interpretation of [its] results" (AB. 14).

examination are approached from the same standpoint, as a result of which, the questions asked "color" or influence each other.

3. Many of the questions posed contain inherent "social desirability" factors, the effect of which interferes with the objectivity of The Survey. (An example are those questions which stress the concept of "government in the sunshine," a particularly "hot" political issue in Florida prior to, during and immediately after the experimental year.) These are "loaded" questions in which the respondent is subsconsciously steered to a preferred result.

4. According to the Florida Supreme Court, "The final survey questionnaires evolved through an eclectic process of review and modification by the Court, the parties, the OSCA staff and interested academicians." *Post-Newsweek, supra,* 370 So.2d 768. Although that statement sounds "nice," it is somewhat misleading.

While the selection process may have been "eclectic," it was hardly scientific or Constitutionally based. Of those four categories of individuals or institutions who participated in the "sifting and winnowing" process, two, the Florida Supreme Court and the Office of the State Court Administrator staff, were actually from, or of, the same "institution." The only "parties" to the nonadversary proceeding were the original proponent. *Post-Newsweek* and the Florida Bar. The latter, although originally opposed to the rule change, was obliged, under Florida's Integrated Bar Rules to act at the Supreme Court's pleasure once the decision had been made to implement the rule allowing broadcast media in the courtroom. The final category, "interested academicians," is as ambiguous as it is mysterious. Except for the name, Pauline Holden, Ph.D., University of Florida Criminal Justice Program (See *Post-Newsweek, supra,* 370 So.2d at 767, n.5), not a single person

is identified nor are the qualifications of the "interested academicians" set out anywhere in the *Post-Newsweek* decision. Nor can one glean from a reading of the decision, who actually retained and paid for the services of these "experts."

How then, under these circumstances, can this Court, or any appellant, attempt to properly appraise the validity of the OSCA study?

5. Overall, the OSCA survey obtained less than a two-thirds response (and barely fifty percent if undelivered and late responses are excluded). In short, the incompleteness of the returns raises, to survey researchers, the question of nonresponse as a source of bias, the magnitude and direction of which will never be known. For example, if two hundred questionnaires were sent out, and one hundred returned, and of those one hundred, sixty said "Yes" to a particular question and forty responded "No" to the same questions, we can say "sixty percent said 'Yes'," but Survey researchers have to say either "sixty percent of those who responded said 'Yes'," or "sixty out of two hundred persons polled," or "only thirty percent, said 'Yes'." Thus, the overall validity of the survey as providing a true reading of even the "subjective" responses, is in great doubt.

6. The questions and alternative responses were highly subjective, and often speculative. The response alternatives reeked of personal guess-work and individual interpretation. In sum, there was a Constitutionally significant lack of objectivity in the question and answer alternatives.

7. Finally, one must question why the significant discrepancies in response categories for questions 4 and 15, dealing with the dignity of courtroom proceedings and respect for the court, were not pursued? And, why were the respondents not asked about the effects of the television

cameras on the accused or the likelihood of his receiving a "fair" trial? After all, wasn't that what the survey was all about?

The Florida Supreme Court made note of a second survey, not commissioned by it, in *Post-Newsweek, supra,* 370 So.2d at 767, n.6, 769-770. The Court noted that the Florida Conference of Circuit Judges (FCCJ) conducted its own survey, and further, the conference had taken a position in opposition to the proposed televised criminal trial rule. *Post-Newsweek, supra,* 370 So.2d at 770. In the very next breath, the Florida Supreme Court stated, ". . . the empirical data collected [by the Conference] . . . does not seem to support the formal position taken." *Id.*

In fact, the formal position taken by the Conference:

1. Made it quite clear that the State trial court judges were opposed to any change in Canon 3A(7),

2. Underscored the fact that in the experimental year, "with some exceptions the media has shown an interest only in a few sensational criminal cases in which defendants have been charged with notorious crimes," and further, that "only small portions of these cases have reached the viewing audience, more often only the video portion being shown, overlaid by the capsulized audio summary of the reporter," and

3. Concluded that, "[w]ith its selective closeup and editorial comment, it [television coverage] so far surpasses what some more [sic] persons may see and hear in the courtroom that it has an influencing effect both on the person being televised and those who see the recording of that person's image and voice. Unless the entire trial is evenly televised and

photographed, out-of-context emphasis and attention is drawn to selected witnesses and to those moments of high drama and excitement that only occasionally occur in a trial."[28] Hon. Harold R. Clark, Circuit Judge, Chairman, The Florida Conference of Circuit Judges, Report of the Florida Conference of Circuit Judges to the Florida Supreme Court, filed in *In re Post-Newsweek Stations, Florida, Inc.* (July 18, 1978).

[28]Regretably, it is as if Judge Clark were gazing into a crystal ball. Massive civil disorder and rioting broke out in Miami, Florida, on Saturday, May 17, 1980, and lasted for several days. Sixteen people were killed, 436 people were injured, 1,267 people were arrested. The resultant property damage (at the time of this writing) came to 100 million dollars. While the riots were largely a result of economic and housing disparity problems in Miami's Black community, the one event which "lit the fuse" was the drama of seeing, on television, the acquittal of four white City of Miami Police Officers who had been charged with beating a black man to death. The now infamous "McDuffie" trial (named ironically for the black victim) had been moved from Miami to Tampa in order to assure the accuseds of their right to a fair and impartial trial. The trial lasted for six weeks. Television coverage of the trial in progress was broadcast back to the Miami area on the evening news on all four of Miami's commercial television stations. Only three to four minutes of each day's courtroom activities were shown, and then, only the most lurid and sensational aspects of the State's case. The televised acquittal stunned the Miami community. The broadcast media showed the defendants rejoicing in full view. Dean George Gerbner, (in an interview with Gannett News Services, published on May 21, 1980) regarding the causal relationship between televising the McDuffie trial and the riots in Miami, observed that, "It is a chilling example of what happens when television selects a trial to televise. Such coverage arouses the emotions of people who might not attend to the news otherwise. What happened in Miami is a very high price to pay for a very little gain. The only gain is spectacle."

The "empirical data" brushed aside by the Florida Supreme Court, as "unsupportive" of the Conference's conclusion and recommendations against the continuation of televised criminal trials included the following significant fact. Of the two hundred eighty-six Circuit Court (trial) Judges in the state, one hundred fifty-five, or fifty-four percent, responded to the Conference's televised trials questionnaire. Ninety-six of the one hundred fifty-five judges had had some experiences with broadcast media in their courtrooms or chambers. Other judges reported experiences with the broadcast media in areas of the courthouse other than their courtrooms or chambers. Twenty-nine of the judges responded that their reactions to broadcast media in relation to televised trials and court proceedings were negative. Thirty-six judges said their reactions were positive, while thirty-seven gave "neutral" responses. See Appendix to Report of the Florida Conference of Circuit Judges, *supra.*

Assuming that the information contained in the Conference Appendix was "empirical," Appellants contend that where twenty-nine of one hundred and two judges, or thirty-five percent of the responding State trial judges report negative reactions to broadcast media in courtrooms and chambers, and around the courthouse, the Florida Supreme Court has totally and callously misinterpreted the very "survey upon which it seeks to rely in an effort to justify the unconstitutional continuation of televised criminal trials."

D. A Close Analysis of The Survey Establishes that there is a Constitutionally Significant Number of Witness and Juror Respondents Whose Acts, Conduct, Behavior, Self-Perception and Role in Televised Trials Were Affected by the Presence of Electronic and Still Photographic Equipment.

The Florida Supreme Court placed a great deal of reliance on the sample survey which its own Administrative Office conducted. *Post-Newsweek, supra,* 370 So.2d 767-769.[29] While not published as part of the *Post-Newsweek* decision *per se, The Survey,* raw data and appendices thereto were filed with the Florida Supreme Court and copies of same were made available to "interested" parties. Appellants, clearly interested, obtained a copy for analysis in this brief.

The Survey is a rhinestone, which fails to rise to the level of gem quality necessary before the noble sails of federally guaranteed Constitutional rights are trimmed. It is obvious that the Florida Supreme Court's misplaced reliance on what it clearly conceded to be a less than scientific study, *Post-Newsweek, supra,* 370 So.2d at 768, has literally emasculated Appellants' rights to due process of law.

The synopsis of *The Survey* and the historical evolution of the experimental program, by the Judicial Planning Coordination Unit (JPCU) of the Office of the State Court's Administrator (OSCA), accurately state that the proponent of the Rule, Post-Newsweek, was supported by various media groups and commercial broadcasting companies. The Florida Bar, Conference of Circuit Court Judges, and the Academy of the Florida Trial Lawyers Association, *inter alia,* opposed the experiment. *The Survey,* at pg. 2. This report also conceded that ". . . the ideal analysis, one which would incorporate an experimental design to measure the impact of the presence of the media and photographers in the courtroom was not feasible." *Id.* at pg. 5.

[29] *A Sample Survey Involving Electronic Media and Still Photography Coverage in Florida Courts between July 5, 1977 and June 30, 1978;* prepared by the Judicial Planning Coordination Unit, Office of the State Courts Administration (hereinafter referred to as "The Survey"). *Post-Newsweek, supra,* 370 So.2d at 767, n.4.

Finally, in analyzing its own Survey, the JPCU observed:

> It should be noted that, as indicated above, the Court did not wish to perform an experiment regarding the impact of the presence of electronic media and still photography coverage in the courtroom. Nor, could it have done so under the circumstances of the pilot program.
>
> An experiment encompasses the isolation and testing of a new event upon a particular situation. It requires that the experimenter compare all aspects of the situation, both prior to and after the occurrence of the event, or through control groups, similar situations where the event occurred and did not occur.
>
> This survey of selected trial participants cannot be considered an experiment. No attempt was made to determine the reactions of participants of trials which did not involve media coverage. The information which is contained in this document must be reviewed with this thought in mind to ensure that erroneous interpretations or invalid applications of the data do not result. *The Survey,* at pg. 6.

According to the JPCU's synopsis, *The Survey,* was *designed* and implemented by two members of its own OSCA staff (whose expertise and qualifications in this sensitive area are nowhere described). "Technical assistance" was provided by three other staff members (whose *curricula vitae* are likewise omitted). And, as the Court itself noted, *Post-Newsweek, supra,* 370 So.2d at 767, n.5, Dr. Pauline Holden, University of Florida Criminal Justice Program, "served in a consultative capacity for reviewing the questionnaire format." *The Survey* Synopsis, *supra,* at pg. 7. Appellants

contend that the Florida Bar's suggestion that qualified social scientists from the Florida State University System (AB. 11-13), if followed, would have more likely provided a "truer" reading of the experiment than the above-described individuals, whose qualifications, background and experience in the matters at hand are totally unknown and unreported (officially, at least).[30]

The lack of professional expertise in designing and implementing *The Survey* is underscored by the JPCU's explanation as to why *The Survey* relied on attorneys, as a group, rather than behavioral specialists (such as psychiatrists, pyschologists and social scientists) to assess "the behavior of jurors, witnesses and judges in the courtroom when media was present." *The Survey,* at pg. 8. According to the synopsis, "since . . . [attorneys have] been involved in more than one court situation, it was felt that their answers would be more valid concerning certain behavior than individuals who had only been involved with one trial." *Id.* Whatever else lawyers may be, competent or otherwise, they are engaged in an adversary system and have subjective feelings about witnesses, judges and jurors, which frequently depend upon the outcome of their particular case. Trial lawyers are not professionally trained to make the kind of objective judgment necessary to a meaningful "scientific" study. Thus, the authors of that particular aspect of *The Survey* arrived at a conclusion which may not necessarily have been reasonably, or rationally, derived from the underlying hypothesis.

---

[30]Appellants do not mean to suggest than even highly qualified social scientists could have designed or implemented a meaningful test or survey (see Point IV - C, *supra*), but, having set out on this pilot program, it would have been far better to have utilized the resources of recognized experts rather than unknown novices, especially when one considers the dimensions of the Constitutional problem at stake. After all, the Federal Aviation Administration clearly would not permit a student pilot to fly a 747 Jumbo Jet.

The contents of *The Survey* itself, as reported in *Post-Newsweek, supra,* 370 So.2d 767-770, are likewise susceptible to a chameleon-like quality, depending on who is doing the interpreting. For example, the Florida Supreme Court stated, "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." *Id.* at 767 [footnote omitted]. Yet, only 2,660 survey questionnaires were sent out by OSCA, and only 1,349 were returned in time to be used in *The Survey. Id.* at 768 and *The Survey, supra,* Appendix.

Significantly, only 44% of all witnesses who received questionnaires returned them in time; 65% of the attorneys and jurors were timely, and 72% of the court personnel[31] (probably the least important group of respondents in terms of the constitutional impact of media broadcasting) responses were seasonal. *Id.* Thus, one of the groups on which the effects of media broadcasting (witnesses) is critical had the lowest percentage of return rate and the constitutionally least important group had a tremendously greater response. No apparent effort was made to "grade" or "weigh" groups according to the role they "played" at trial. Thus, we see, from the very start, the wisdom of the Eighteenth Century British Statesman, George Canning, who remarked, "Statistics — I can prove anything by statistics — except the truth!"

The Florida Supreme Court's opinion studiously avoids a rather telling statistic obtained from attorneys who were surveyed. In the "Attorney — Biographical Data" portion of *The Survey* synopsis, *supra* at 22, the respondent attorneys were asked:

[31]i.e., bailiffs, court clerks and court reporters

In general, your feelings about your court service *prior* to allowing cameras in the court were:

1.	Very Favorable	59.1%
2.	Favorable	37.4%
3.	Undecided	2.6%
4.	Unfavorable	.9%
5.	Very Unfavorable	0%

In general, your feelings about your court service *where cameras,* photographers and related equipment *were present were:*

1.	Very favorable	39.7%
2.	Favorable	28.9%
3.	Undecided	10.7%
4.	Unfavorable	10.7%
5.	Very Unfavorable	9.9%

[emphasis added].

Appellants are mystified as to how the Florida Supreme Court could so cavalierly ignore the overwhelming increase in the adverse reactions of the Bar's trial attorneys, from less than 1% to 20.6%.

Even if the Court determines that *The Survey* was validly and scientifically conducted, Appellants' analysis of *The Survey* challenges the very integrity of the Florida Supreme Court's reliance upon, and the conclusions drawn, from specific Survey questions. Appellants contend that the sixteen "general indications," *Post-Newsweek, supra,* 370 So.2d at 768-769, to which the Florida Supreme Court so proudly points as indicia of the lack of Constitutional error, on closer and more careful examination, actually support the proposition that a Constitutionally significant statistical response indicates that electronic media and still

photographic presence during a trial in progress denies the accused a fair and impartial trial and due process of law.[32]

The Florida Supreme Court concluded, *Post-Newsweek, supra,* 370 So.2d at 768, [Footnote omitted]:

> (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.

An analysis of Question 4 of *The Survey* shows jurors and witnesses felt a 14.7% and 27.3% *decrease,* respectively, in their perception of "courtroom dignity;" likewise, Question 15 produced an 8.4% and 16.5% decrease in jurors' and witnesses' "respect for the courts." Those percentages are hardly "little."

The Court then went on to state, *Post-Newsweek, supra,* 370 So.2d at 768, [Footnote omitted]:

> (2) It was felt that the presence of electronic media disrupted the trial either not at all or only slightly.

In fact, in response to Survey Question 5, "[t]o what extent did the presence of television, photographic or radio coverage in the courtroom disrupt the trial?", 22.4% of the jurors and 43.1% of the witnesses responded that broadcast media disrupted the proceedings either "slightly," "moderately," "very" or "extremely."

[32]This Court has not hesitated in the past to apply statistical evidence in arriving at judgments which have held that defendants have been denied equal protection of the law. *See, for example, Alexander v. Louisiana,* 405 U.S. 625 (1972); *Castaneda v. Partida,* 430 U.S. 482 (1977); *See also* Baldus and Cole, *Statistical Proof of Discrimination,* (1980).

Next the Florida Supreme Court concluded, *Post-Newsweek, supra,* 370 So.2d at 768 [Footnote omitted]:

> (3) Respondents' awareness of the presence of electronic media averaged between slightly and moderately.

But, only 19.5% of the jurors and only 20% of the witnesses responded that they were "not at all" aware of electronic media's presence. *The Survey,* Question 6. Are not Appellants Constitutionally entitled to *no disruption* by the "awareness" caused by the presence of broadcast media?

The Florida Supreme Court then stated, *Post-Newsweek, supra,* 370 So.2d at 768 [Footnote omitted] that:

> (4) The ability of the attorney and juror respondents to judge the truthfulness of witnesses was perceived to be affected not at all. The ability of jurors to concentrate on the testimony was similarly unaffected.

Actually, 3.8% of the jurors responded that electronic media presence either "slightly" or "greatly" hindered their "ability to judge the truthfulness of the witness." *The Questions 7 and 15.* 15.5% of the respondent jurors admitted that broadcast media's presence affected their ability to "concentrate on the testimony." *The Survey,* Question 8.

Our system of justice was designed to prevent jurors from arriving at decisions affected in some way by "outside" influences. To the accused, and as Appellants contend, to this Court, a 3.8% hindrance factor *is* constitutionally significant. A 15.5% disruption in a jury's ability to concentrate on a witnesses' testimony clearly rises to the level of a due process violation.

The Florida Supreme Court's next observation was, *Post-Newsweek, supra,* 370 So.2d at 768 [footnote omitted], that:

> (5) All respondents were made to feel slightly self-conscious by the presence of electronic media.

Even this conclusion is inconsistent with the data in *The Survey*. For example, 3.5% of all jurors, and 6.6% of all witnesses responded that they were "extremely" self-conscious as a result of broadcast media's presence. *The Survey,* Question 9.

The Florida Supreme Court then concluded, *Post-Newsweek, supra,* 370 So.2d at Page 768 [footnote omitted], that:

> (6) Both jurors and witnesses perceived that the presence of electronic media made them feel just slightly more responsible for their actions.

Once again, the Florida Supreme Court has misread the significance of that particular survey question. Proponents of the televised criminal trial rule have long and loudly proclaimed that broadcasting, (live and in full color), criminal trials in progress will make the jurors and witnesses more responsible for their actions and conduct. In fact, that, along with the "educational carrot" dangled in front of the Florida Supreme Court, has been media's most publicly vocal argument. Yet the response to *Survey* Question 10 makes clear that 76% of the jurors and 61.2% of the witnesses were not made to feel responsible at all by the presence of television, photographic or radio coverage.

Next, the Florida Supreme Court found, *Post-Newsweek, supra,* 370 So.2d at Page 768 [footnote omitted], that:

> (7) Presence of electronic media made all respondents feel *only slightly nervous* or more attentive. [emphasis added].

Appellants have difficulty reconciling the above statement with the realities of *The Survey* responses. It is almost as if the Florida Supreme Court had a different set of responses and compiled data than that supplied by the OSCA to the undersigned and the public. In fact, 25.3% of all jurors and 46.7% of all witnesses who responded to *The Survey* admitted to degrees of nervousness as a result of the presence of broadcast media, ranging between "slightly," "moderately," "very" and "extremely." And, only 19.8% of all jurors and 35.8% of all witnesses who responded (not all, as the Florida Supreme Court stated) reported they were either "slightly," "moderately," "very" or "extremely" more attentive as a result of television's presence. *The Survey, supra,* Question 11 and 12.

One might argue that making witnesses and jurors "more attentive" is a positive feature of "Cyclops'" presence. But, when we begin to impose novel amendments to time honored systems, we first ought to be certain that individual rights are not swept away by the sea of "change for change's sake."

The Florida Supreme Court next concluded, *Post-Newsweek, supra,* 370 So.2d at Page 769 [footnote omitted] that:

> (8) The distracting effect of electronic media was deemed to range from *almost not at all* for jurors, *to slightly* for witnesses and attorneys. [emphasis added].

Once again, this statement is misleading. *The fact of the matter is that 23.1% of the jurors and 39.4% of the witnesses*

admitted that the presence of broadcast media during the trial distracted them. *The Survey,* Question 13.

Are not those two figures Constitutionally significant?

The next conclusion by the Florida Supreme Court, *Post-Newsweek, supra,* 370 So.2d at Page 769 [footnote omitted] was that:

> (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.

In *Estes v. Texas, supra,* Mr. Justice Clark, without the benefit of a crystal ball, stated that absent juror sequestration, ". . . jurors would return home and turn on the TV if only to see how they appeared upon it." *Id.,* 381 U.S. at Page 544. Mr. Justice Clark's statement even presumes the trial judge would admonish the jurors not to do just that. *Sub judice, The Survey response established, contrary to the Florida Supreme Court's statement, that 27.7% of the jurors and 37.4% of the witnesses admitted they had an urge to see or hear themselves on the media, The Survey,* Question 14.[33]

The Florida Supreme Court then concluded, *Post-Newsweek, supra,* 370 So.2d at Page 769 [footnote omitted] that:

[33]In the highly publicized Dade County, Florida, televised first degree murder trial of *Ron Zamora,* the jury was sequestered. Television sets were removed from their hotel rooms and they were instructed by the judge not to watch television. During the second week of trial, the foreman of the jury requested that the jury be ". . . allowed to watch themselves on television with the sound turned off, just to see what [they] look[ed] like." (AB 15) The trial judge properly denied the request. *Id.* But, a star was born . . . . twelve of them!

> (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.*

The Survey, Question 16, reflects that *48% of the jurors and 58% of the witnesses* felt the "presence of television, photographic or radio coverage in the courtroom during the trial made the case *more important." Id.* Does it make any difference at all, as a matter of due process of law, whether the responses to that question were "slightly," "moderately," "very" or "extremely?" Of course not! The percentages speak for themselves. "Matters of degree" are really quite beside the point. Would the FDA permit the continued sale of a drug where, after research, it found that___% of those using the drug became "slightly" ill,___% became "extremely" ill, and *only*___% died?

The next conclusion of the Florida Supreme Court, *Post-Newsweek, supra,* 370 So.2d at Page 769 [footnote omitted], was that:

> (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.*

Forgetting about "degrees," the fact of the matter is that *26.5% of the jurors felt that the presence of a television camera during the testimony of a witness made that witness' testimony "more important." The Survey,* Question 17.

By implication, this means, as occurred *sub judice,* the portion of the witness' testimony which is televised is "more important" than the portion which is not in the "spot-light," at least to 26.5% of the jury. *Sub judice* the television camera was present during John Sion's testimony on direct

examination. (R.374) No cameras were present on cross-examination, nor was there a camera present during presentation of defense testimony. Therefore, we may conclude from the study that slightly more than one-fourth of the trial jury below "felt" the televised testimony was "more important." Is that due process of law?

The Florida Supreme Court then concluded, *Post-Newsweek, supra,* 370 So.2d at Page 769 [footnote omitted], that:

> (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.

While there might not have been any "significant difference" as stated by the Florida Supreme Court above, 39.6% of the jurors and 29% of the witnesses expressed some degree of concern over being televised in the context of this particular question. *The Survey,* Question 19. 39.1% of the jurors and 29.4% of the witnesses expressed some degree of concern over being photographed (by newspapers), *Id.*, at Question 20; 36.1% of the jurors and 28.1% of the witnesses expressed varying degrees of concern about "being in the newspapers,"[34] *Id.*, at Question 21; and, by comparison, only 23.6% of the jurors and 21.1% of the witnesses expressed concern over their participation being on radio. *Id.*, at Question 22.

Perhaps, then, it is true that "a picture is worth a thousand words!"

[34] "A better question would have been what degree of concern, if any, would the witnesses and jurors have if just their name, without a picture, appeared in the newspaper. A trained researcher would have seen the significance of that question.

The Florida Supreme Court next concluded, *Post-Newsweek, supra,* 370 So.2d at Page 769 [footnote omitted], that:

> (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.

The juror response about varying degrees of concern with respect to "attempts to influence" as a result of:

(a)	being on television was	19.1%
(b)	being photographed was	15.8%
(c)	radio coverage was	11.8%
(d)	newspaper coverage was	14.4%

The Survey, Questions 23a, 24a, 25a and 26a.

Witness responses to the same question were as follows:

(a)	being on television was	17.5%
(b)	being photographed was	16.1%
(c)	radio coverage was	14.0%
(d)	newspaper coverage was	16.4%

The Survey, Questions 23b, 24b, 25b and 26b.

Insofar as "flamboyancy" of attorneys and witnesses is concerned, the Florida Supreme Court's findings are, Appellants contend, relatively inconsequential in terms of the Constitutional issue, *Post-Newsweek, supra,* 370 So.2d at Page 769 [footnote omitted]:

> (14) Court personnel and attorneys perceived that the presence of electronic media made the participating attorneys' actions more flamboyant only to a slight extent.
>
> (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.

After all, what well prepared, competent, skilled trial attorney does not yearn for that moment in his career when he can step into "Clarence Darrow's shoes" and with just the right word, just the right phrase, just the correct gesture and intonation, "snatch victory from the jaws of defeat!" And, a well-prepared, well-trained, skilled trial lawyer should have little difficulty dealing with the "flamboyant" witness who comes to court with his "make-up bag and blue shirt."

The Florida Supreme Court's broad statement, *Post-Newsweek, supra,* 370 So.2d at Page 769 [footnote omitted], however, that attorneys:

> [(16)] . . . also felt that the witnesses were slightly inhibited by the presence of electronic media and that jurors were made slightly self-conscious, nervous, and distracted, but also slightly more attentive,

oversimplifies the problem.

In the first place, for whatever value the attorneys' judgment of the witness' condition and attitude, the following were the attorneys' Survey responses to the question, "Did the presence of television, photographic or radio coverage in the courtroom",

(1) "make the witness more self-conscious?"

75.9% of the attorneys said, "yes" in one degree or another. *The Survey,* §II, Appendix 3, Question 1.

(2) "make the witness more cooperative?"

83.2% said "not at all." *Id.,* Question 2.

(3) "make the witness more nervous?"

75.2% of the attorneys said "yes" in one degree or another. *Id.,* Question 3.

(4) "make the witness more attentive?"

64.7% of the attorneys said "no." *Id.,* Question 4.

(5) "distract the witness?"

62.8% said "yes" in one degree or another. *Id.,* Question 6.

(6) "inhibit the witness?"

56% said television did inhibit the witness to one degree or another. *Id.,* Question 7.

The Florida Supreme Court overlooked certain other aspects of the study, which Appellants contend support their claim of denial of due process of law. For example, the following responses were elicited with respect to the following *Survey, supra,* questions:

(1) "Was the presence of the equipment distracting to you personally?" *The Survey, supra,* Question 33.

11% of the jurors said yes, as did 21% of the witnesses and 41.9% of the attorneys.

While media proponents may claim modern technology reduces "distraction," *The Survey* responses seem to indicate to the contrary.

(2) "To what extent did the presence of television, photographic or radio coverage in the courtroom make you [the respondent attorney] nervous?" *Id.*, §II. A.2., Question 4c.

40% of the respondent attorneys indicated that they were nervous to some degree, ranging from "extremely" (2%) to "slightly" (26.7%). Right to counsel, guaranteed by the Sixth Amendment to the United States Constitution, carries with it right to effective counsel. Where 40% of the attorneys engaged in trials expressed some degree of nervousness by virtue of the presence of television, photographic or radio coverage in the courtroom, one must be concerned, seriously, with the question of effective representation of counsel.

(3) "To what extent did the presence of television, photographic or radio coverage in the courtroom distract you [the respondent attorney]?" *Id.*, at Question 6.

59.3% of the attorneys expressed that they were distracted to one degree or another.

(4) "To what extent did the presence of television, photographic or radio coverage in the courtroom distract the judge?" *Id.*, §III. A.2, Question 12.

42.4% of the respondent attorneys indicated that in their view the presence of television, photographic or radio coverage in the courtroom "distracted" the judge. Where one's life, liberty or property is at stake, due process of law compels an attentive judge free from "outside influence." No matter how well prepared the Trial Court and the litigants' attorneys may be, in virtually every trial there are exigencies which cannot be anticipated, questions asked or answers given, which require immediate action by either the attorney (in the nature of an objection) or the Court. As a result of this broadcast media "happening," trial judges must now be not only diligent to the normal activities and events which transpire in every trial, keep notes for appropriate rulings on motions, objections and the like, but in addition, suffer the "distraction" that a significant number of attorneys perceived to exist during their trials as indicated in *The Survey.*

These then are the cold facts. The prominent early Twentieth Century English manufacturer, Sir Harold Bowden, said, "Facts that are not frankly faced have a habit of stabbing us in the back!" While the Florida Supreme Court may have been well-intentioned in the commission of *The Survey,* the foundation on which it was built was quicksand, not concrete.

E. Due Process of Law Compels Closing the Courtroom to the Camera's Eye.

"The law, however, favors publicity in legal proceedings, so far as that object can be attained without injustice to the persons immediately concerned." 2 *Cooley's Constitutional Limitation* 931 (Carrington ed. 1927). While ordinarily this Court has required, in most cases involving claims of due process of law violations, a showing of identifiable prejudice to the accused, exceptions have been carved to that Rule where, ". . . a procedure employed by the State involves

such a probability that prejudice will result that it is deemed inherently lacking in due process." *Estes, supra,* 381 U.S. 542-543. This Court has followed that rule in *Rideau, supra; Turner v. State of Louisiana,* 379 U.S. 866 (1965); and, in somewhat slightly different context, *Gideon v. Wainwright,* 372 U.S. 335 (1963) and *White v. State of Maryland,* 373 U.S. 59 (1963). *Estes, supra,* at Page 544.

As demonstrated by the very study which Florida seeks to rely on to sustain the electronic media experiment, "[t]elevision in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused. Still one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced." *Id.* And, the Court ought not require the Appellants to go beyond that rule today. The Court did not recede from that basic proposition in *Shepperd v. Maxwell, supra,* nor ought it now. To permit the media to continue to "wag" the State Court's "tail" on the grounds of their spurious claim of a "superior right to access" would allow our courts to violate the Sixth and Fourteenth Amendments with impunity, safe in the knowledge that state courts could wash their hands at the alter of the First Amendment in a manner not consistent with due process of law.

CONCLUSION

Television is like the "Devil's Hook" — so tempting, yet so very dangerous. Why even nibble at media's bait? The day of the printed word is far from ended. Although a radio bulletin may swiftly deliver a message, and even though "eye-witness" television news may be graphic, yet content, context, clarity and meaning must be added. Even if the electronic media had a Constitutional right to televise a trial in progress, people simply cannot absorb meanings at the speed of light. Continuation of televised criminal trials will destroy the intent and purpose of the Sixth and Fourteenth Amendments.

The televising of a criminal trial in progress does not contribute one iota to the fact-finding process, to the "search for the truth." The mere presence of television cameras is, subconsciously distracting to, and disruptive of, the trial process itself. The English journalist, C. P. Scott, is reported to have said, "Television? The word is half Latin and half Greek. No good can come of it." Televising criminal trials has not promoted the ends of justice, nor has it truly "educated" the public. Why then, should this experiment in electronic justice continue? As stated by Lord Denman, while addressing the House of Lords in the case of *O'Connell v. Queen,* (1844), "If such a practice [improper jury selection] should be allowed to pass without a remedy . . . trial by jury itself, instead of being a security to persons who are accused, will be a delusion, a mockery, and a snare." 1 Cox, *Reports of Cases in Criminal Law Argued and Determined in All the Courts in England and Ireland,* 519 (1846).

The Appellants' Constitutional Rights to a fair and impartial trial, and to due process of law are clearly superior to the broadcast media's unsupported claim that the presence of television cameras in a criminal trial will enable the public "to know" what is happening in our courtrooms.

Media access is not without limitations. This is so because, as Napoleon is reputed to have said, "A journalist is a grumbler, a censurer, a giver of advice, a regent of sovereigns, a tutor of nations. Four hostile newspapers are more to be feared than a thousand bayonnets."

"Due process of law requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communication and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to insure that the balance is never weighed against the accused." *Shepperd v. Maxwell, supra,* 384 U.S. at 362. "[J]ustice must satisfy the appearance of justice." *Offutt v. United States,* 348 U.S. 11, 14 (1954).

"The 'double feature' has ended. The show is over; [Appellants contend] the verdict is in: [electronic media is] guilty," *Rhodes v. State,* 283 So. 2d 351, 359 (Fla. 1973), of violating the Sixth and Fourteenth Amendments by its insistence upon televising criminal trials in progress over the accuseds' objection. The judgment below should be reversed.

Respectfully submitted,

JOEL HIRSCHHORN, P.A.
742 Northwest 12th Avenue
Miami, Florida 33136
(305) 324-5320

By: Joel Hirschhorn,
Attorney for Appellants
Chandler and Granger

APPENDIX

APPENDIX TO BRIEF

Index

IN THE CIRCUIT COURT
OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO.: 77-5070

STATE OF FLORIDA,

Plaintiff,

-vs-

ROBERT GRANGER AND NOEL CHANDLER,

Defendants.

ORDER CERTIFYING QUESTION TO FLORIDA SUPREME COURT PURSUANT TO RULE 4.6 F.A.R.

STATEMENT OF FACTS

Defendants, City of Miami Beach Police Officers, have been informed against by the Dade County State Attorney's Office in the above-styled cause and charged with Conspiracy, Burglary, Grand Larceny, and Possession of Burglary Tools. The Defendants' arrest and arraignment have been reported in media within Dade County, Florida.

Defendants, through counsel, have filed their motion to declare Florida's experimental Rule 3A(7) unconstitutional as written and as applied, attacking this Court's order modifying the Canons of Judicial Ethics found in 32 FSA Pocket Part and Rule 3.110 as set forth with more particularity in the Florida Supreme Court's Opinion of June 17, 1977, in the case styled *In Re: Petition of Post-Newsweek Station,* ____ So.2d ____ (1977).

While the granting of [sic] denying of Defendants' motion, (a copy of which is attached hereto as Exhibit 1), [Exhibit 1 is omitted as it is set forth in full in A. 3-4 and R. 1117-1118] will not necessarily be dispositive of the case against the Defendants, the motion does raise, in this Court's opinion, a question or proposition of law which is without controlling precedent in this State. The undersigned judge believes that instruction from this Court will facilitate the proper disposition of Defendants' motion and presumably thereby eliminate the possibility of reversible error should there be a conviction in this case.

QUESTION OF LAW TO BE ANSWERED

WHETHER, NOTWITHSTANDING THIS COURT'S DECISION *IN RE: PETITION OF POST-NEWSWEEK STATIONS,* ____ So. 2d ____ CASE NO. 46,835, DECIDED JUNE 17, 1977, A CRIMINAL TRIAL MAY BE TELEVISED OVER THE OBJECTION OF THE DEFENDANT, IN THE LIGHT OF ESTES v. TEXAS, 381 U.S. 532 (1965).

DONE AND ORDERED at Miami, Dade County, Florida, this 27th day of July, 1977.

/S/
ALAN R. SCHWARTZ
DADE COUNTY CIRCUIT COURT
JUDGE

(Certificate of Service Omitted)

* * * * *

(Title of Case and filing information Omitted)

ORDER DENYING RENEWED MOTION CHALLENGING CONSTITUTIONALITY OF CANON 3A(7)

THIS CAUSE having come on to be heard before me upon Defendants' Renewed Motion for Order Challenging the Constitutionality of Experimental Canon 3A(7) and seeking an Order precluding live coverage of the Defendants' trial, and the Court having considered said Motion and being otherwise fully advised in the premises, it is thereupon

ORDERED and ADJUDGED that said Motion be and the same is hereby DENIED.

DONE and ORDERED in Open Court at Miami, Dade County, Florida, this 31st day of October, 1977.

CIRCUIT COURT JUDGE

(Certificate of Service and Clerk's Certification of True Copy Omitted)

[Please note that this Order is in the Original Record, unnumbered, but should be found at R. 1126]

National Center for State Courts
300 Newport Avenue
Williamsburg, Virginia 23185
(804) 253-2000

Edward B. McConnell
Director

RULES CONCERNING TELEVISION, RADIO AND PHOTOGRAPHIC COVERAGE OF JUDICIAL PROCEEDINGS

SUMMARY TABLE

A. STATES THAT 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. Alaska	Supreme Court ruled in favor of permitting coverage of trial and appellate courts on a permanent basis. Consent of parties is required. A one-year pilot program concluded September 1979.	Nov. 1, 1979
3. Colorado	Judicial Canons permit coverage (first state to allow.) Consent of the accused, witness, juror and judge required.	Feb. 27, 1956
4. Florida	Supreme Court ruled in favor of allowing cameras and recording equipment on permanent basis. A one-year experiment completed June 30, 1978 and its evaluation preceded the Court's unanimous	May 1, 1979

	decision on April 12. Presiding judge can prohibit coverage for cause. No consent required.	
5. Georgia	Supreme Court authorizes and approves coverage Plan. All plans require prior consent.	May 12, 1977
6. New Hampshire	Supreme Court authorized coverage of its proceedings. Supreme Court also approved a Superior Court resolution to allow trial coverage with the permission of the judge. No consent required.	Jan. 1, 1978
7. Tennessee	Supreme Court rules permit coverage on a permanent basis. Each plan must be approved by trial court and the Supreme Court. Consent required. Parties, jurors and witnesses can bar their individual coverage. Experimental coverage of proceedings in the Supreme Court lasted from May 26, 1978, to February 1979.	Feb. 27, 1979
8. Texas	Supreme Court authorized coverage of appellate proceedings.	Nov. 9, 1976
9. Washington	Supreme Court approved rule allowing coverage. If witnesses and jurors express prior objection, no telecast or photographs allowed. Test was authorized and conducted in 1974.	Sept. 20, 1976
10. Wisconsin	Supreme Court rules permit coverage on a permanent basis. Consent is not required except for coverage of individual jurors. A one-year experiment was completed on March 31, 1979.	July 1, 1979

B. STATES THAT PERMIT COVERAGE ON EXPERIMENTAL BASIS

State	Authority and Nature of Coverage	Effective Date
1. Arizona	Supreme Court authorized one-year experimental coverage of appellate proceedings.	May 31, 1979
2. California	Judicial Council approved one-year experimental coverage. Approval of the judge is required. Consent of the defendants is needed. A separate evaluation of the experiment will be conducted. [It is significant to note that California modified its rule to require the defendant's consent after this Court noted probable jurisdiction in this case.]	June 1, 1980
3. Idaho	Supreme Court authorized seven-month experiment in coverage of its proceedings has been extended for an indefinite period in Boise. Rules now permit one-year experimental coverage in locations outside of Boise.	Dec. 4, 1978
4. Iowa	Supreme Court approved one-year experimental coverage of trial and appellate proceedings at the discretion of the judge. No consent is required.	Jan. 1, 1980
5. Louisiana	Supreme Court authorized a one-year pilot program in Division B of the Ninth Judicial District Court. The experiment was extended. Consent is required.	Feb. 23, 1978

B. STATES THAT PERMIT COVERAGE ON EXPERIMENTAL BASIS (continued)

6. Mass.	Supreme Judicial Court allowed one-year experimental program in appellate and trial courts. Consent is not required.	April 1, 1980
7. Minnesota	Supreme Court authorized experimental coverage in the Supreme Court. Test period not specified.	Jan. 27, 1978
8. Montana	Supreme Court suspended the ban for a two-year experimental period. Consent was not required. Survey is being conducted to evaluate the experiment.	April 1, 1978
9. Nevada	Supreme Court authorized one-year coverage on an experimental basis. Consent of the parties is not required.	April 7, 1980
10. New Mexico	Supreme Court approved televising of appellate and trial court proceedings. Rules and guidelines are to be finalized. Effective date has not been determined.	
11. New Jersey	Supreme Court approved experimental coverage for one-year or until at least six trial-court cases have been covered. No consent required.	May 1, 1979
12. North Dakota	Supreme Court authorized one-year experimental coverage of its proceedings. The experiment has been extended to July 1, 1980.	Feb. 1, 1979
13. Ohio	Supreme Court authorized one-year experimental coverage of trial and appellate proceedings. Consent not required.	June 1, 1979

14. Oklahoma	Supreme Court authorized one-year experiment has been extended for another year. If prior objection is expressed, telecast or photographs not allowed.	Jan. 1, 1979
15. Pennsylvania	Supreme Court authorized one-year experimental program to allow coverage of non-jury civil trial proceedings, if the trial judge permits. Consent is not required. If a party or witness expresses prior objection judge can disallow coverage.	Oct. 1, 1979
16. West Virginia	Supreme Court approved a six-month experiment in Mononhagela County Circuit Court (Morgantown). Consent was not required. Report of the experiment is expected.	Jan. 22, 1979

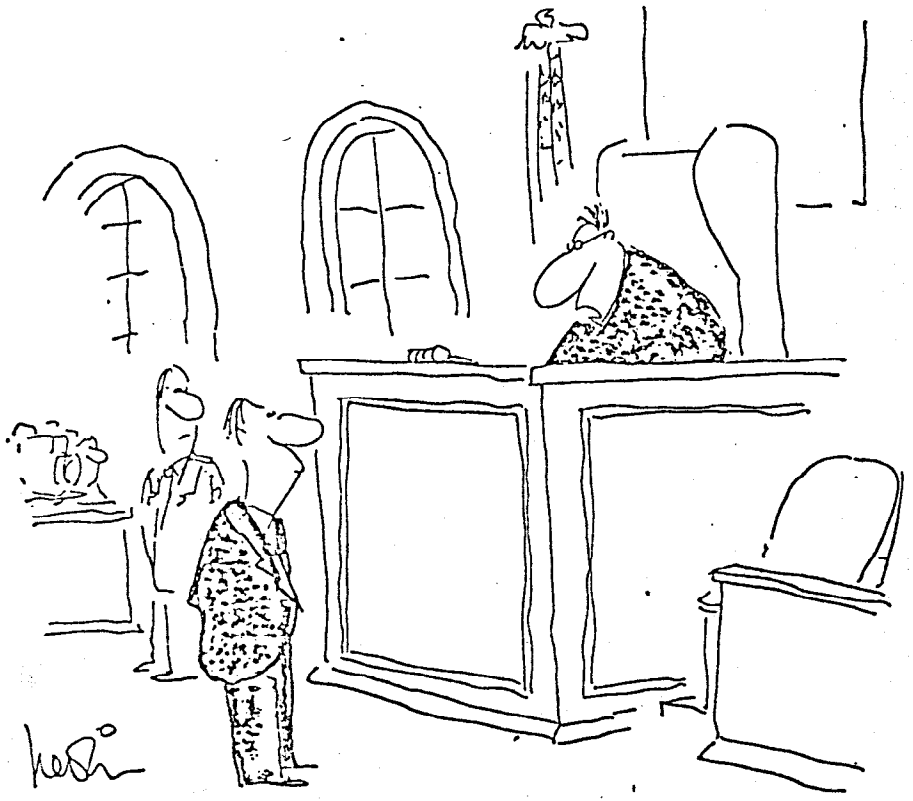
C. STATES ACTIVELY CONSIDERING ALLOWING COVERAGE

Arkansas, Connecticut, Michigan, Mississippi, Nebraska, New York, Rhode Island, Utah, and Vermont.

D. Legislative Developments in the States

1. Louisiana: Revised Section 4164 of Title 13 of the Louisiana Revised Statutes, in part, reads "no proceeding in any court within this state shall be televised or recorded by television equipment." Recording of proceedings is allowed in "accordance with the terms of a motion and stipulation agreed to by all parties to the proceeding and approved by the judge hearing the matter."

2. Maine: Recently passed statute requires that all pretrial criminal proceedings be open to the general public unless the court finds a substantial reason to disallow. (15 MRSA Section 457).



"For heaven's sake, man, look ashamed. We're being televised."

Drawing by Levin; © 1979
The New Yorker Magazine, Inc.

THE FLORIDA BAR

Legal Affairs

Tallahassee, Florida 32304
Telephone (904) 222-5286

February 6, 1976

Honorable B.K. Roberts
Chief Justice, Supreme Court
of Florida
Supreme Court Building
Tallahassee, Florida 32304

Re: Petition of Post-Newsweek Stations, Florida, Inc. For Change in Code of Judicial Conduct.

Dear Justice Roberts:

I write this to you as the Court's senior Justice. As such, you have been designated Conferee in charge of the Post-Newsweek Petition. The purpose of this letter is to suggest an approach to this matter that, if adopted, will allow the Court to have the benefit of objective scientific analysis unclouded by the advocacy of any of the proponents or opponents of cameras in the courtroom.

The Bar's basic objections are unchanged. However, as the Court has allowed two exemptions to be made to Canon 3A(7), we feel duty-bound to assist the Court in the experiment. Toward this end I propose that qualified research scientists from the Florida State University School of Social Science be authorized to conduct research and measuring tests before, during and after the trials. These

tests would, of course, be subject to Judge Willis' overall control.

When the results of the tests are in, the Court can have the advantage of scientifically measured responses from all participants. This will be particularly valuable in the Court's determination on the importance of the stress factor, embarrassment if any, anxiety, "ham actor" tendencies and other factors not well measured by the profession nor the industry.

In the hope that you will look with favor upon this attempt to come up with measurable scientific data, I have contacted Dr. Kent Miller and Dr. Jack Brigham. Dr. Miller is with the Institute of Social Research and Dr. Brigham with the Department of Psychology at FSU. They think well of the project and are willing to work on this experiment as established by the Court. They have access to the full University's facilities including help from qualified graduate students. They feel, and I agree, that to do a competent job they would need the Court's blessing.

Specifically: 1) they need to clear in advance, procedures to maximize their ability to obtain an unbiased and objective evaluation of the effects of cameras and electronic equipment on the proceedings and, 2) they will need assistance in the research design wherein all the parties involved in direct observation of the proceedings are involved and access to the records and tapes from the proceedings.

If this research is permitted by the Court, it may go far in getting us measurable proof of what counsel only speculate upon in their advocacy. The Court, of course, would not be bound by their findings. No matter how interesting they may prove to be, such a small sampling could not be considered scientific proof of any final proposition, but it would be enlightening, have weight and give this project the scholarly approach of disciplines outside of the legal system.

If the Conference Committee, Judge Willis or counsel of the case feel this should be put in the form of a formal motion, that will be done. I use the device of this letter only to avoid formalities and because time will be a factor in setting up the project if approved.

Thank you for your consideration.

Respectfully,

/s/ RICHARD C. McFARLAIN
Richard C. McFarlain

RCM:jg

cc: Justice Alan C. Sunberg

NOTE: Please see attached list of recipients of carbon copy.

(List of recipients of copy of letter omitted)

UNIVERSITY OF MIAMI
CORAL GABLES, FLORIDA 33124

SCHOOL OF EDUCATION
P.O. BOX 248065

May 27, 1979

Mr. Joel Hirschhorn
Hirschhorn & Freeman
742 N.W. 12th Avenue
Miami, Fla. 33136

Dear Mr. Hirschhorn:

Thank you for your letter of May 21 regarding your temporary postponement of your suit against cameras in the

courtroom. Enclosed is a bill for $665.70 to cover services and expenses in the analysis of the OSCA and the UCF research reports.

I made a thorough review of every aspect of the two studies and found a sufficient number of departures from minimal research requirements to suggest the need for considerable caution in the interpretation of their results. On the other hand, the UCF study — which is the better of the two, although certainly not free from "bugs" — does lend support to your position in "challenging the advisability. . . ." of using cameras in the courtroom. The data of the OSCA study, although not synthesized into a formal conclusion, would probably also support your position. I would be glad to go over my analysis with you at your convenience.

I enjoyed working on the project. It took me out of the usual "behavioral" research format. Although I have taught (statistics to) graduate students in criminal justice, this was my first look at what is obviously a most significant problem in the nation's justice system. I look forward to continuing with the project when you resume operations.

Cordially,

/s/ George J. Mouly
George J. Mouly.

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

NO. 77-25123A

THE STATE OF FLORIDA,
Plaintiff,

-vs-

RONNEY A. ZAMORA,
Defendant.

EXCERPT OF PROCEEDING, OCTOBER 4, 1977

* * * * *

THE COURT: You may be seated. Ladies and gentlemen, at this time, we're going to recess for the day. I'm not going to hold you back there any longer.

Let me say that I have received the request of the jury that they be allowed to watch themselves on television with the sound turned off, just to see what you look like.

I can't permit that during the course of the trial, but I will arrange for it after the trial. You will all get to see yourselves on television.

With that assurance from the Court, have a pleasant evening. Court will reconvene at 10:00 a.m. Court stands in recess.

WHR INVESTIGATIONS, INC.
1600 N.W. North River Drive • Suite 100
Miami, Florida 33125 • (305) 324-6982

William H. Riley

Mailing Address:
P.O. Box 160868
Miami, Florida 33116

WHR #80-296

April 29, 1980

Mr. Joel Hirschhorn
742 Northwest 12 Avenue
Miami, Florida

Dear Joel:

On April 24, 1980, at your request, at the conclusion of the trial for the day in the State of Florida vs. Johnny L. Jones being heard before Judge Thomas Scott I took an incident-light meter reading.

The reading was taken from inside the jury box prior to the lights being turned off in the Courtroom.

The light reading at this time was 730 foot candles.

A reading was then taken from inside the jury box inside of Judge Gordon's Courtroom. The lights were on in the courtroom. The light reading was 260 foot candles.

This is an approximate ratio of 2 to 1 of more foot candle brightness.

An incident light meter measures the light incident upon a subject. Incident light meters are the preferred choice among commercial photographers and motion picture cameramen for measuring light.

Lastly, I would note that a foot candle is a unit of illumination equivalent to that produced by a standard candle at a distance of one foot.

Sincerely,

/s/ BILL
William H. Riley

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA

NO. 80-3039B

EXCERPT
April 21, 1980

STATE OF FLORIDA,

Plaintiff,

-vs-

JOHNNY L. JONES,

Defendant.

* * * * *

[Assistant State Attorney] DEPOSGAY: This is also being televised, and this is also going into the news media, and I have repeatedly and did ask your Honor last time to order the television not to make comment on the strength or weakness of witnesses' testimony.

[Defense Attorney] McGUIRK: I don't want my arguments publicized, your Honor, that I have pending

before the Court. Would your Honor — frankly, I think Mr. DePozgay's objection is well taken, and one of our Motions addresses that precise issue.

. . . We would ask leave, of course in the event your Honor decides to proceed with the trial of this case today — we would ask leave of Court to have a photographer for the defense come into the courtroom and take pictures in this courtroom and in the hallway outside for the purpose of demonstrating in the Record the nature of the — well, for example, there are special lights, lighting, and spotlights. There are cameras in the courtroom. I noticed during a Hearing this past week there was a still photographer who was taking pictures in the courtroom and we simply ask leave of Court to take pictures so we may have a photographic record of the atompshere [sic] in the courtroom and in the hallway outside.

[Assistant State Attorney] RICHEY: Judge, we would ask that when the jury does come in that these lights could be turned down so they're not right in their eyes, if the lights could be dimmed during the voir dire, perhaps not during the trial — if that is acceptable to the Court.

* * * * *

[Assistant State Attorney] LOWEY: . . . we do think the lights could be dimmed. They are shining in our eyes, which is disconcerting us. I don't know what the jury situation would be. It is directed at our table and not the jury box.

* * * * *

CASE NO. 79-1260

in the

Supreme Court of the United States

OCTOBER TERM, 1979

Noel Chandler and Robert Granger, *Appellants,*

vs.

State of Florida, *Appellee.*

On Appeal from the Supreme Court of Florida

REPLY BRIEF OF APPELLANTS

JOEL HIRSCHHORN, P.A.
By: Joel Hirschhorn, Esquire
742 Northwest 12th Avenue
Miami, Florida 33136
(305) 324-5320
Counsel for Appellants

November 3, 1980

QUESTION PRESENTED

Whether Experimental (now permanent) Canon 3A(7) of the Code of Judicial Conduct of the State of Florida is violative of a defendant's rights to a fair and impartial trial, and to due process of law under the Sixth and Fourteenth Amendments to the Constitution of the United States as written or when applied to permit electronic and still photographic media coverage of a trial in progress over a defendant's objection.

TABLE OF CONTENTS

TABLE OF CONTENTS (Cont.)

TABLE OF CONTENTS (Cont.)

TABLE OF CITATIONS

CASES: Page

CASES: Page

CASES: Page

Page

CONSTITUTIONAL AND STATUTORY AUTHORITIES:

MISCELLANEOUS: Page

MISCELLANEOUS continued:

CASE NO. 79-1260

in the

Supreme Court

of the

United States

OCTOBER TERM, 1979

Noel Chandler and Robert Granger,

Appellants,

vs.

State of Florida,

Appellee.

On Appeal from the
Supreme Court of Florida

REPLY BRIEF OF APPELLANTS

ARGUMENT

I.

THE SIXTH AMENDMENT GUARANTEES *THE ACCUSED* THE RIGHT TO A PUBLIC TRIAL.

Neither the Appellee nor any of the many *Amici* directly addressed this issue, relying instead on oblique references to, and incorrect interpretations of, the various opinions of the Court in *Richmond Newspapers, Inc. v. Virginia*, ____ U.S. ____, 100 S.Ct. 2814 (1980), for the proposition that the Sixth Amendment guarantee of the right to a public trial belongs to the media and the public in general. In fact, Mr. Chief Justice Burger made it clear that ". . . throughout its evolution, the trial has been open to all who *cared* to observe." *Id.*, at 2821 [emphasis added]; and, that *Richmond Newspapers, Inc., supra,* presented for the first time the question of whether closure of a trial is proper where there is no demonstration of the need to close the courtroom in order ". . . to protect the defendant's *superior* right to a fair trial." *Id.*, at 2821 [emphasis added]. Mr. Justice Stevens' concurring opinion in *Richmond Newspapers, Inc.* arrived at the same conclusion: ". . . the Framers quite properly identified the party who has the greatest interest in the right to a public trial." *Id.*, 100 S.Ct. at 2831, n. 2.

In short, the Court's decision in *Richmond Newspapers, Inc.* did not, in any way, depreciate the quality and integrity of the Sixth Amendment's guarantee of a public trial for the benefit of the accused.

II.

THE MEDIA'S RIGHT TO ACCESS TO THE COURTROOM IS NO GREATER THAN THE PUBLIC'S RIGHT, IN GENERAL.

All *Amici* and the State of Florida argue that:

1. *Richmond Newspapers, Inc., supra,* has created a right of access to the courtroom which is superior to that of the public in general;

2. Appellants seek to "close" the courtroom to the public (and media) in general; and

3. The media is the great "surrogate" for all persons and all purposes.

None of the above contentions is valid.

As previously indicated, *Richmond Newspapers, Inc., supra,* dealt with the arbitrary, seemingly inexplicable closure of the Courtroom, to the press and public alike, on the defendant's unopposed motion for same. *Richmond Newspapers, Inc., supra,* makes it clear that before a judge may bar the press and public from the Courtroom, there must be some demonstration of the need to protect the accused's ". . . superior right to a fair trial, or that some other overriding consideration requires closure." *Id.*, at 2821. *Sub judice* Appellants do not seek closure. The *Amici* briefs all argue that Appellants seek to bar the press in general. Nowhere in Appellants' Brief is that contention made, much less even suggested. It is almost as if *Amici* have not even read Appellants' Brief.

Messrs. Justices White and Stevens joined in the Chief Justice's opinion in *Richmond Newspapers, Inc., supra,* which concluded that the First Amendment prohibited the government from *summarily* closing the courtroom doors to the press. Appellants did not seek to bar either the public or the press. All Appellants objected to was the presence of the television cameras and the still photographer. Had the local newspapers attempted to set up a copy desk or printing press in the courtroom, Appellants would have, likewise, objected. Unlike *Richmond Newspapers, Inc., supra,* no effort was made to bar news reporters from the courtroom. News

reporters for television, radio and newspapers were all welcome to attend the trial. Appellee and "surrogates" have done a disservice to this Court by suggesting anything to the contrary.

Appellants agree, "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the *public.*" *Richmond Newspapers, Inc., supra,* 100 S.Ct. at 2830 (Burger, C.J.) [emphasis added and footnote omitted]. This is not to say, however, that the First Amendment rights of the public and the press are absolute. As pointed out by Mr. Chief Justice Burger (*Id.,* at 2830, n. 18), Mr. Justice Brennan (concurring, with whom Mr. Justice Marshall joined) (*Id.,* at 2832, n. 2) and Mr. Justice Stewart (concurring) (*Id.,* at 2840), this right of access is not without limit; it is *not* absolute.

Not content with reading, interpreting and arguing *Richmond Newspapers, Inc.* beyond recognition, the media *Amici* have the audacity to suggest that they are the ever-powerful, omnipresent force which protects the public. It is as if the Constitution of the United States and this Court did not exist. The media's claim as "surrogate" for the public is bottomed on three sentences from Mr. Chief Justice Burger's opinion in *Richmond Newspapers, Inc., supra.*[1]

These self-appointed "surrogates", however, serve their own special interests. Who "appointed" the media to act for the public? The media! While a free press may be the backbone of our system of justice, the Defendant's right to a

[1] "Instead of acquiring information about trials by firsthand observation or word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public. While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard." (Burger, C.J.) (100 S.Ct. at 2825).

fair trial is its *life's blood.* Presumably the press could accurately report on what occurred on a particular day and in a particular courtroom without a single television camera ever poking its tunnel-vision eye into the courtroom. But, how does a wrongfully convicted defendant recover the loss of his freedom?

The "surrogates" make mighty claims and extravagant statements about all the wonderful things television has done, and can do, for the public. It is not necessary to present a "laundry list" of television's commercial and educational accomplishments. It suffices to say, promoting a fair and impartial trial for the accused is not one of those accomplishments. " . . . [T]he news media's penchant for extensively covering sensational trials"[2] is well documented. Consider, for example, *Calley v. Callaway,* 519 F.2d 184 (5th Cir. 1975); *Sheppard v. Maxwell,* 384 U.S. 333 (1966), and *Estes v. Texas,* 381 U.S. 532 (1965).[3] With "surrogates" like that, who needs enemies?

Stung by *Gannett Co., Inc. v. De Pasquale,* U.S. , 99 S.Ct. 2898 (1979), and its progeny, every time the media is barred from a pretrial hearing by a conscientious judge attempting to protect a defendant's rights to a fair trial and due process of law, the media uses its power to villify and condemn those sworn to uphold the Constitution. In Florida, (as in every state which elects its judges), a barrage of " . . . editorial denunciation [is] visited upon every trial judge who bars the Media from his courtroom", *The Miami Herald Pub. Co. v. Hon. Royce R. Lewis,* 383 So.2d 236, 244 (Fla. 4th DCA 1980) (Letts, C.J., On Petition for Rehearing), regardless of the reason and irrespective of the need to protect a litigant's rights.

[2] *United States v. Williams,* 568 F.2d 464, 467 (5th Cir. 1978).

[3] It is significant to note that each opinion in *Richmond Newspapers, Inc.,* which made reference to *Estes, supra.,* did so in an approving manner.

The "surrogates" perceive *Richmond Newspapers, Inc., supra,* as the talisman for all that is "wrong" with our system of justice. "Access is now unlimited," they claim. They contend that the commitment to government in the "sunshine" requires unlimited access, and authorizes the televising of criminal trials regardless of the impact on the accused's right to a fair and impartial trial. Not satisfied with access rights equal to that of the public in general, the "surrogates" continue to lobby judges to "open up" the Courtrooms to their equipment.

Recently, attorney Alan B. Morrison questioned the wisdom of *this* Court's continued ban on television cameras in the courtroom and suggested that because, " . . . the [Supreme] Court sits for fewer than 40 days a term . . . [and] there are only 200 seats for the general public . . .," access could and should be increased by "a simple solution . . . televising the proceedings." "Televising Supreme Court Actions", *New York Times,* Sept. 29, 1980, §A at 19.[4] Give the "surrogates" an inch, and they'll "take a mile."

III.

THE MERE PRESENCE OF TELEVISION AND STILL PHOTOGRAPHIC CAMERAS DURING A CRIMINAL TRIAL IS INHERENTLY PREJUDICIAL AND DETRACTS FROM ITS BASIC PURPOSE, THUS DENYING THE DEFENDANT HIS RIGHT TO A FAIR AND IMPARTIAL TRIAL.

The Appellee and all *Amici,* except the Conference of Chief Justices, (hereinafter referred to as "CCJ"), baldly assert that Appellants received a fair trial or that televised criminal trials do not operate to deny the accused his right to a fair trial.[5] No evidence, no testimony, and no sociological or psychological studies are offered in support of their position.[6] No effort is made to refute or rebut the Appellants' socio-psychological studies. The only response offered by Appellee is that Appellants failed to demonstrate the requisite level of pervasive pretrial publicity so as to be entitled to relief in this Court.

Appellee and *Amici* have missed the point. This is *not* a publicity case. This case involves the narrow but Constitutionally significant question of the effect of electronic and still media's presence on the Defendant's Sixth Amendment right when the Defendant objects to in-court coverage of his case, regardless of pretrial publicity.

A. *Estes v. Texas,* 381 U.S. 532 (1965) Revisited.

All opposing briefs which addressed this issue concluded that *Estes, supra,* was not a mandate to bar television cameras from the courtroom. Yet, all *Amici* and the Appellee overlooked the fact that this Court, in several opinions in *Richmond Newspapers, Inc.,* cited *Estes* rather than receding from it. Appellee claims, in its Brief at 39, that Appellants ". . . made absolutely no effort, *as is their duty,* to seek less stringent remedial measures than exclusion of the camera and sequestration of the jury." Appellants have *no* such duty under either Federal or State Constitutional or Statutory

[4] It is interesting to observe that despite the claims of Appellee and *Amici* that televising trials and judicial proceedings generally are not "disruptive", and further, that modern television cameras are unobtrusive, neither Appellee nor the many media *Amici* have filed a motion with this court to televise the oral arguments in this case (*See,* page 9, *infra*).

[5] *See, e.g.:* Appellee's Br. at 26-56; States' Attorneys' General's Br. at 38, (hereafter "SAG"); Columbia Broadcasting System, Inc.'s Br. at 11-21, (hereafter, "CBS"); Florida News Interests' Br. at 18-28, (hereafter "FNI"); Community Television Foundation of South Florida, Inc.'s Br. at 26-27, (hereafter "PBS"); Radio Television News Directors Association's Br. at 16-20, (hereafter "RTNDA").

[6] The words "evidence", "testimony", and "studies" are used in all opposing briefs, but as will be shown *infra,* Appellee and *Amici* are "blowing in the wind".

law. The presiding trial judge has that responsibility. The Court, not the defendant, controls the conduct of the trial. Appellee alleges in its Brief at 54 that ". . . defendants have erroneously sought an absolute right to exclude the public through its 'surrogate' the electronic media *without* any Record showing that alternatives were inadequate." Appellants are perplexed. It is clear that Appellee did not read the brief that Appellants submitted to this Court. *Nowhere,* in the trial proceedings below, did the Appellants seek to exclude the public.

Estes, supra, is, and remains, Appellants contend, a mandate for the proposition that when a defendant *objects* to the presence of electronic media, the equipment ought to be excluded. Appellee's Brief at 28, n. 13, is grossly inaccurate. Objections *were* raised (and overruled) to the presence of television cameras in *Diggs,*[7] and the other cases cited there. Even the Attorneys General of the sixteen States which joined in the *Amicus* Brief filed by Wisconsin Attorney General Bronson C. LaFollette, conceded that *"a trial televised with the defendant's consent raises different fair trial questions than one televised without the defendant's consent."* (SAG Br. at 8, n. 1).

Several *Amici* argue that present technology has improved, and that the state of television is such that the day envisioned by Mr. Justice Harlan in *Estes v. Texas, supra,* 381 U.S. at 595-596, and by Mr. Justice Stewart, 381 U.S. at 604, has arrived. While Appellants have conceded that *physical* disruption is not the issue *sub judice,* the fact of the matter is, human nature has not changed since 1965.

[7]*Diggs* is the so-called "McDuffie" case which is referred to in Appellant's Br. at 51, n.28; Appellee's Br. at 102-104, and FNI's Br. at 21-22. Media is no doubt proud of its role in the aftermath of the televising of selected portions of the Diggs trial, and the seemingly inexplicable verdict. (*See,* pages 18-19, *infra*).

The "technological improvements" argument as a basis for televising criminal trials is interesting for an additional reason. Despite the extravagant claims of Appellee (Br. at 85-86), RTNDA (Br. at 7), CBS (Br. at 24) and SAG (Br. at 14-18), that the new television cameras ". . . weigh only 18 to 20 pounds, and are about one-seventh the size of the old studio camera" [used in *Estes*] (CBS Br. at 24), no *Amicus* had the temerity to file a motion in this Court to demonstrate (during oral argument) these cameras and the "state of the art." Certainly this Courtroom could unobtrusively accommodate a camera which occupies but two square feet of floor space. *Id.,* at 24.

B. Television is Different and Causes Witnesses and Jurors to Act, and React, Differently

In response to Appellant's socio-psychological studies, Appellee refers to articles which appeared in the American Bar Association Journal. (Appellee's Br. at 98-99). Appellee also relies on a short synopsis of a paper prepared by Kermit Netteberg[8] in partial fulfillment of a doctoral degree at the University of Minnesota. The "research" was funded in part by the National Association of Broadcasters,[9] which is one of the *Amicus* on the RTNDA brief filed herein.

An analysis of the study itself, rather than the author's synopsis, indicates its lack of reliability as "evidence" for this Court. The author states unequivocally that *"research* has not shown a significant adverse impact of television on courtroom participants." *Id.,* at 469 [emphasis added, footnote omitted]. The basis for that statement is a series of articles written by media people and lawyers. The article itself is replete with *non sequiturs* and serious deficiencies in terms of "research" and "fact-finding" as those concepts are

[8]Mr. Netteberg is currently an Assistant Professor of Journalism at Andrews University, Berrien Springs, Michigan.

[9]*See,* Netteberg, *Does Research Support the Estes Ban on Cameras in the Courtroom?,* 63 Judicature 467 (May 1980).

generally understood in the legal (and academic) world. Sweeping generalities and incredible conclusions are reported as "fact" and adopted by the Appellee as "proof". Appellee overlooked the author's observations that the Florida study[10] (OSCA) ". . . suffered from several methodological flaws, including extreme simplicity in instrumentation and the rush which the Florida Court's deadline imposed upon the researchers." *Id.*, at 472. Interestingly, to Mr. Netteberg, the fact that 80% of the Wisconsin judges and 77% of the Florida judges ". . . thought there was no incompatibility between television and fair trials," *Id.*, did not rise to the level of a constitutionally significant number of negative responses (*i.e.*, 20% and 23%, respectively).[11]

Perhaps, however, the most incredible aspect of Appellee's reliance on the Netteberg article is Attorney General Jim Smith's failure to comprehend that the author concluded, "[w]hile these surveys are more generalizable than case studies, they still *cannot be used as evidence to draw casual* [sic] *conclusions.*" *Id.* [emphasis added].

The *Amici* dismiss the issue of witness and juror impact with the argument that because the majority favors, or does not object to, televising, it is Constitutionally acceptable. That contention begs the question. The Florida News Interests Brief, authored by Talbot D'Alemberte (who is the architect of the televised criminal trial rule and lead counsel for Post-Newsweek Stations of Florida, Inc.) challenges Appellants to answer the question, "What difference in impact [on witnesses and jurors], for instance [is there] between sketch artists and cameras?" (FNI Br. at 27)(footnote omitted). There is a significant difference. At least, the Fifth Circuit Court of Appeals has so held in *United States v. Columbia Broadcasting Systems, Inc.*, 497 F.2d 102, 105 (5th Cir. 1974). There, the Court stated, "[w]e are not persuaded, however, that the impact of being sketched for later publication can be equated with the *uniquely prejudicial impact of telecasting.*" [emphasis added]. Lead counsel in *Columbia Broadcasting Systems, Inc., supra*, was Talbot D'Alemberte.

The issue is not whose interpretation of the statistics should prevail. The States' Attorneys General's Brief at 18-38 discusses the results of the Wisconsin experience with distraction and/or disruption of jurors, witnesses and judges. Having examined, very carefully, the underlying Wisconsin Report,[12] certain observations are in order:

1. The Wisconsin Report suffers from the same congenital defects and inadequacies that have been attributed to the Florida OSCA survey.

2. Apparently no attorneys specializing in criminal law were on the Wisconsin Committee,[13] but there were press and media representatives.

3. Attorney General LaFollette's repeated assertion that "the experiment was successful" is purely subjective.

[10]The Florida study is analyzed in great detail in Appellants' initial Brief at Point IV-C.

[11]Mr. Netteberg even apologized for the fact that only 1/3 of the Wisconsin trial judges responded to the questionnaires.

[12]A copy has been lodged with the Clerk of this Court by *Amicus*. The full title of the document is "Report of the Supreme Court Committee to Monitor and Evaluate the Use of Audio and Visual Equipment in the Courtroom", (April 1, 1979).

[13]This is perhaps an appropriate place to respond to the FNI Br. at 5, n.4. The undersigned did *not* participate, *per se*, in the Florida Rule making procedure. The Florida Rule developed despite resistance from all organized bar groups. The undersigned, as counsel for Appellants, *opposed* the rule, and was never offered an opportunity to "suggest" different rules. The only suggestion that the undersigned counsel would have made was "exclude cameras when the defendant objects". That position was made clear in appellate litigation in Florida.

Similarly, the casual use of the word "evidence" in his brief ought to be offensive to the trial bar.

4. The statement that "[t]elevised trials should not be banned at this early juncture when relatively few people have actually participated in one",[14] offered as a justification for continued violation of basic Constitutional rights, is *reductio ad absurdum*.

5. According to General LaFollette, community pressures on jurors are the same whether the trial is televised or not.[15] Again, that is not accurate. Television news gives very limited, highlighted (therefore often unbalanced) news reporting. This format makes television news little more than a "headline" service. How is the viewing audience expected to understand a jury's apparent inconsistent verdict when only the sensational parts of the trial are shown? *See also,* pages 18-19, *infra*.

6. The States' Attorneys General's Brief concludes that based on the Wisconsin study, trial participants were "not significantly distracted".[16] This is not accurate.[17] An examination of the Wisconsin Report establishes the contrary.[18] One Wisconsin Judge was quick to point out that televising trials made him ". . . more selective in [the] choice of neckties each morning . . ." (Wisconsin Report at 24). Perhaps the litigants would have fared better if the Judge had spent that extra time reviewing the trial briefs!

---

[14]SAG brief at 14.

[15]*Id.*, at 22.

[16]*Id.*, at 23-35.

[17]*See,* Regan and Cheng, *Distraction and Attitude Change: A Resolution,* 9 Journal of Experimental Social Psychology 138 (1973).

[18]Pertinent excerpts from the Wisconsin Report are found in the Appendix to the Reply Brief (ARB) at 3-10.

While lawyers may debate the issue of witness distraction *ad infinitum,* at least one Court-appointed psychiatrist, called upon to testify in a Wisconsin criminal case, had some rather telling observations which support Appellants' contention. Dr. John Mulvaney's responses to pertinent questions were as follows:

> To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras distract you in giving your testimony?
>
> Oh, I suppose to some degree. I felt it was not just me. It had an effect on the entire proceeding. I had a negative feeling. The proceeding is more important than the publicity. Newspaper and TV people had a detrimental effect; and not just in the courtoom [sic]. I was not in favor of it. I didn't think people should be on exhibit. It's enough of a circus without making it public.
>
> * * * * *
>
> If you had a choice, would you have preferred to testify with or without (a) television cameras, (b) radio equipment, and (c) still cameras in the courtroom?
>
> Without. I feel my [appearance] was an obligation to the psychiatric community and I was not interested in demonstrating for publicity. TV makes it a public exhibition.
>
> What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the fairness of the trial?
>
> You would have to ask the jury. I don't know what affect [sic] it had on the questions that were asked me; ask the prosecutor and the defense attorney.
>
> Over-all what is your general evaluation of the use in the courtroom of (a) television cameras, (b) radio

equipment, and (c) still cameras?

> It doesn't have to be there. The court doesn't have to justify to the public that it is doing right; it doesn't have to apologize to the public. I don't think putting witnesses with instability will make them more stable. It may be a disservice. When a witness has a problem with stability, it won't make him more comfortable.

Wisconsin Report, Appendix I, p.19.

Finally, the States' Attorneys General's Brief, in attempting to establish that televising criminal trials *promotes* witness recollection and thus improves witness testimony, relies on what it labels ". . . a scientific study simulating courtroom conditions . . ." (SAG Br. at 29). The phrase, "simulating courtroom conditions", conjures up the presence of a Judge, (wearing a black robe), with opposing counsel, bailiffs and other courtroom personnel in attendance, and that the witnesses were made aware that their "testimony" was under oath, subject to the penalties of perjury. This study was not even close in its effort to "simulate" a courtroom setting, nor was it "scientific".

The study[19] was conducted by a journalism professor at the University of Wisconsin who employed thirty-six volunteer students (hardly your "average" witnesses). The students were seated in the center of a large room[20] and shown a two minute film describing a German post office in West Berlin. After viewing the film, each student was asked questions about what he or she had seen. The students were divided into three groups. One-third knew they were being televised and could see the camera; one-third knew they were being televised but could not see the cameras. The third group was not subjected to any camera whatsoever.

Before being asked to view the film in question, the students were told the study was an attempt to assess the effectiveness of different types of media presentations. The first two groups were also told, *in advance*, of the presence of the camera. Thus, groups one and two *knew* they were being televised while they were observing an event. Hence, the conclusion that witnesses who know they are being televised while they are observing something recollect facts better, is not surprising. Obviously groups one and two made a conscious effort to remember what they were being shown so they could recollect it better. In real life, most witnesses "happen" on the scene, and then weeks, months, or even years later are called upon to recollect events, facts, faces, etc. Unless a potential witness knows today that he is a witness to something, and knows that his present conduct is being recorded, and further, he is told he is going to be "tested" on it in the future, the study is meaningless. In short, the study hardly simulated courtroom conditions, much less real life! Reliance by Appellee and *Amici* on the Hoyt study is preposterous.

C. Continued Television Coverage of Trials is Likely to Erode the ". . . fundamental conception of what a trial should be." *Estes, supra*, 381 U.S. at 580 (Mr. Chief Justice Warren Concurring)

The purpose of a criminal trial is to see that justice is done. Justice for the victim, society, the system *and* the accused. Television interferes with that purpose. "[T]he courts are playing with social dynamite. Television changes everything it touches, and there is no guarantee that the courts are any more immune than the National Football League." Reeves, "Courtrooms: How Public", *The Post* [West Palm Beach, Florida], May 28, 1980, §A, at 19.

---

[19] Hoyt, *Courtroom Coverage: The Effects of Being Televised*, 21 Journal of Broadcasting, 487 (1977).

[20] As opposed to being seated in the "witness 'stand' ".

The erosion, or survival, of the jury system in criminal cases, at least, may well depend on the treatment it receives at the hands of the press. Appellants are not unlike David, standing on the Coastal Plain of the Promised Land.[21] No less than thirty-one special interest media groups have joined forces, all proclaiming a right superior to that of the system's life's blood. Without citing any real "evidence",[22] these special interest groups may well prevail, may well dictate which constitutional guarantee is superior, unless this Court "draws the line" as a matter of public policy, so that we return to the fundamental purpose of a trial, i.e., the search for the truth so that justice may be done.

Witnesses called to Court are often reluctant to testify. Witnesses are not anxious to have their pictures taken and/or their faces broadcast. *Amici* contend that televising trials will promote higher standards of justice; witnesses are likely to come forward — offer to testify — right in the middle of a trial (PBS Br. at 21). "[P]erjury and other misconduct will be deterred." *Id.* The author of that sentence, as brilliant and highly respected a lawyer as he may be, simply does not understand the *criminal* trial system.[23]

Most people are not happy about being in Court, much

[21] I *Samuel* 17:4.

[22] In 1768, Mr. Justice Blackstone defined evidence as ". . . that which makes clear or ascertains the truth of the very fact or point in issue. . . ." Commentaries, III, 367. No 'study' or item cited as 'evidence' by Appellee or *Amici* would ever be admitted into any Federal, or Florida, Court of law under the prevailing decisional or statutory rules of evidence.

[23] Can *Amici* really be serious? Imagine this scenario: In the third day of trial, counsel for Defendant reports to the Court, "Your Honor, I have a new witness." Or, "Your Honor, I move for a mistrial." The lawyer continues, "It seems, Your Honor, last night while watching television, a citizen realized he was a witness to this alleged crime, and he has exculpatory evidence for my client." The variations on the scenario are as limitless as man's imagination. The likelihood of a person coming forward as a witness because he or she has seen a criminal trial in progress is minimal indeed.

less relaxed and self-assured. Fifteen years ago, Judge M. Ray Doubles wrote:

> Timid and nervous as they may be about talking in public, the human nature of the average person is that he be not photographed for public display. Such an ordeal, without question, would not only hamper such a witness in his recollection and ability to accurately give his testimony, but his demeanor on the witness stand would reflect adversely upon the weight of his testimony in the minds of the jury to the disadvantage of the party for whom his testimony is given.
>
> It is no answer to such a person that the camera itself is hidden in a booth outside the walls of the courtroom. The fact that he knows he is being televised would be sufficient to unnerve him. Nor is it an answer, as provided in the Colorado Canon, that no such witness shall be photographed over his express objection. This requires him to take the affirmative [sic] and register a protest in advance in order to protect himself from such an ordeal. He may very well feel that to register such a protest labels him as a weakling of some sort, and pride may prevent him from doing so.
>
> At the other extreme is the danger inherent in the testimony of the witness who is not only willing but anxious to be televised as he gives his testimony. He is a willing actor, and his concern will be with his effectiveness as an actor rather than compliance with his oath to tell the truth and nothing but the truth.
>
> Furthermore, there is the juror to consider. He is summoned and required to serve, unless excused, irrespective of his desires or the inconvenience it may cause him. But here again, he is summoned to listen,

> ponder and render judgment — not to participate in a glamour contest. In his work as a juror he should be afforded an environment in which he can concentrate on his task as a juror, and not be concerned as to whether his frown is doing an injustice to his naturally photogenic features, or whether his crooked tie and ruffled hair are the butt of jokes, around the TV screen at Joe's Beer Tavern or the Country Club.

Doubles, *A Camera in the Courtroom*, 22 Wash. and Lee L.Rev. 1, 14 (1965).

What high standard of justice is promoted by offering a different form of "entertainment" to the average American household? *Amici* and Appellee argue that televising the Midnight Mass,[24] naturalization proceedings,[25] concerts and operas, *inter alia*,[26] or even the Pope's Coronation, does not detract from the solemnity of those occasions, and therefore, it is perfectly acceptable to televise criminal trials. The logic of that assertion escapes Appellants.

Regardless of media's disclaimer of responsibility[27] in connection with the tragic aftermath of the "McDuffie" verdict, others have linked the rioting in Miami to the highly selective and sensationalized television reporting of in-courtroom scenes.[28] Attorney and Harvard Law Professor, Eric Salzman, producer of the television show, "CBS Reports: The McDuffie Trial", undertook a serious effort to understand the McDuffie case, the verdict and its impact on the community. Salzman observed that at first he thought

[24]PNI Br. at 11, n.19.

[25]Appellee Br. at 61.

[26]PBS Br. at 12-14.

[27]*See*, FNI Br. at 21-22; Appellee's Br. at 102-104.

[28]*See, for example*, the *sworn* testimony of City of Miami (Florida) Police Chief, Kenneth I. Harms, before the Governor's Special Commission (investigating the causes of the May 1980 riots) on July 8, 1980, found in ARB at 10-11; *see also*, Appellants' Brief at 51, n.28.

the not guilty verdict in McDuffie was a "red-neck" decision. "Salzman Changes Mind About 'Red-Neck' Decision", *Miami News*, August 27, 1980, §B, at 5. Because of the riots, Salzman studied the trial and the verdict. Salzman ". . . had to forage through the video tapes of no fewer than eight television stations before [he] could compile footage of the trials. He found no one had a complete record . . . . It was cut off at the whim of the cameramen or the directors." *Id.* Then Salzman read the entire 2,500 page transcript of the trial. *Id.* Eventually, having read the entire trial transcript and completing his investigation, he understood what we, as criminal trial attorneys, understand. The verdict was "correct" based on the "system" and the evidence.[29]

The community did not have the benefit of gavel-to-gavel coverage. The media elected to broadcast in 30-60-90 second clips, the State's witnesses demonstrating how the defendants beat the victim, the medical examiner describing the fatal wounds, and gross pictures of McDuffie's injuries. Joann Hooker, "CBS Reports: The McDuffie Trial", *Miami News*, August 27, 1980, §B, at 5. The "surrogates" did not televise the hour-after-hour of relentless and damaging cross-examination of the State's witnesses by the defendants' attorneys, nor did media broadcast any of the fatal gaps in the State's case. Little wonder, then, at the community's inability to understand the acquittal.

The "surrogates'" claim, that "public television's broadcast coverage of judicial proceedings is programming of great social value",[30] is, under these circumstances, sheer hypocrisy. Appellants do not contend that public television is

[29]Salzman also observed that, in his opinion, the verdict was a result of a ". . . series of miscalculations by the Dade County State Attorney's Office." *Miami News*, August 27, 1980, §B, at 5. Florida State University College of Law Professsor, Ken Vinson, came to a similar conclusion. *See*, "McDuffy Verdict Was 'Justice' ", *Tallahassee Democrat*, June 9, 1980, §A at 4.

[30]PBS Br. at 7-23; see also, RTNDA Br. at 10-11.

"utterly without redeeming social value", rather, in the context of a defendant's right to a fair and impartial trial, it obviously "lacks serious literary, artistic, political or scientific value".[31]

D. There Is No Constitutional Basis to Justify Televising a Criminal Trial[32]

The accused's Sixth Amendment Right to a fair and impartial trial has a preferred position in criminal proceedings. *Estes v. Texas, supra; Sheppard v. Maxwell,* 384 U.S. 333 (1966); *United States v. Tijerina,* 412 F.2d 661 (10th Cir. 1969). Nothing in the several opinions in *Richmond Newspapers, Inc., supra,* suggests anything to the contrary.

Even if televising criminal trials "promotes First Amendment *interests*", as argued by all four of the special interest media "surrogates",[33] that is still insufficient justification to deny the accused his individual Constitutional *rights*. If ". . . a purported [international] treaty obligation of the United States Government cannot override an individual Constitutional right", *In re Geisser v. United States,* No. 79-3869, Slip op. at 248 (5th Cir., Oct. 10, 1980)[citing *Geisser v. United States,* 513 F.2d 862, 869, n. 11 (5th Cir. 1975)(citing *Reid v. Covert,* 354 U.S. 1 (1957)], how can this Court, consistent with its obligation to the Constitution, derogate Appellants' Sixth Amendment *right* to that of a First Amendment *claim*? All the media *Amici* missed the point. Because television is different, *United States v. Columbia Broadcasting System, Inc., supra,* and because human nature is what it is, even if televising a trial fosters First Amendment interests, where a defendant objects

[31] *Cf., Miller v. California,* 413 U.S. 15 (1973).

[32] Appellee and four *Amici* (CBS, CCJ, PBS and RTNDA) have raised the issue of State's Rights. Appellants' response to that issue is found at Point V, *infra.*

[33] CBS Br. at 4-11; FNI Br. at 3-6; PBS Br. at 27-29; RTNDA Br. at 9-16.

to the presence of electronic or still photographic equipment in the courtroom, the Constitution requires that the accused be given the benefit of the doubt. Under our system of justice, as imperfect as it may be, " 'tis far better to err in favor of a guilty person than it is to err against an innocent one." Televising, political, administrative and even legislative proceedings is different than televising a criminal trial. The public will not be "better" informed by 30-second newsclips of a rape victim pointing at the defendant; instead, the victim will suffer greater humiliation. Furthermore, if, for any reason (including insufficiency of evidence) the defendant were to be acquitted, his unwanted television notoriety will follow him to his grave.

Who will be the humiliated and embarrassed victim's "surrogate"? Who will pick up the gauntlet for the acquitted defendant? What if, while promoting its own Nielsen ratings by sensationalizing the news, the media (even inadvertently) breaches the jury's integrity, thereby destroying its ability to function fairly and impartially, with the result that an innocent person gets convicted? Who will be *his* champion?[34]

Amicus PBS contends that Appellants are not entitled to relief because of the alleged lack of "facts to substantiate their claim that the mere presence of a television camera in the courtroom adversely affects witnesses and jurors". (PBS Br. at 26). Counsel for PBS has overlooked the sociological and psychological studies relied upon in Appellants' initial brief. The Constitutional question turns on subconscious considerations. Asking a witness or a juror the question, "Will being on television [subconsciously] bother you?" is an

[34] "In trial by battle, clerks, infants, children, and those over sixty years of age were from the first allowed to employ 'champions,' who fought in their stead; and subsequently the right to employ champions was extended to all litigants. Down to the Statute of Westminster I, 1275, c. 41, the champion was obliged to swear to his belief in the truth of the case set up by his principal, and, if it could be proved that he had sworn falsely, he was liable to lose a hand or a foot." Jowitt & Walsh, *Dictionary of English Law,* 342 (1959).

exercise in futility. If we knew how to consciously measure the subliminal, we would have little need for psychologists, psychiatrists, psychotherapists and sociologists.

Amicus RTNDA offers the most novel argument for continuation of the rule: " . . . [p]hotographers and electronic journalists [are now] on a par with print reporters in their ability to communicate through their respective media." (Br. at 15). There, then, is the real basis for the "surrogate's" efforts to override the accused's Constitutional right, economic competition. Next, the copy editors and the typesetters will clamor to have their equipment in the Courtroom. Perhaps the solution is to simply move the trial — lock, stock and barrel — to the television station or to the newspaper's plant.

Regardless of the "window dressing" arguments advanced by *Amici* States' Attorneys General and States' Chief Justices, no organized bar group or professional legal society has taken a position in support of continuing the "experiment". To the contrary, in addition to the *Amici* briefs filed by the American College of Trial Lawyers and the California State Public Defender's Association, *et. al.*, the National Association of Criminal Defense Lawyers has taken a firm and unremitting stand against the use of cameras and recording equipment in all criminal trials.[35]

Equally important is the position taken by Milwaukee County (Wisconsin) District Attorney, E. Michael McCann, ". . . [who is] profoundly committed to the position that cameras should be excluded from the court when vetoed by the defendant."[36] Mr. McCann's commitment to the Constitutional rights of the accused is consistent with the highest legal and ethical responsibility imposed by our system

[35]*See,* ARB at 11-12.

[36]Mr. McCann's position is clearly stated in a remarkably candid letter addressed to Appellants' counsel which is reprinted, in its entirety, in ARB at 13-14.

on a prosecuting attorney. Mr. McCann's office has previously sought, in an application to this Court, to prevent the televising of a criminal trial in an effort to protect the rights of the accused, and witnesses, in order to assure that "justice" would be served.[37] It is remarkable that the Attorney General of the State of Wisconsin would press for televising criminal trials, even over a defendant's objection, while those who enforce the law on a daily basis, in his own State, oppose the presence of television equipment in the courtroom.

IV.

PERMITTING ELECTRONIC MEDIA AND STILL PHOTOGRAPHIC COVERAGE DURING A CRIMINAL TRIAL OVER THE DEFENDANT'S OBJECTION, ON BALANCE, DENIES THE ACCUSED DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT.

The States' Attorneys General's Brief concedes the "nub" of the question. Where a defendant objects to the presence of television equipment, "different" Constitutional questions are raised than where there is no objection. (SAG Br. at 7, n. 1). As Appellee correctly points out in its Brief at 111, n. 44, in twenty years Colorado ". . . has never had a trial declared constitutionally unfair because of the mere presence of a television camera . . . ." That is because Colorado *requires the consent of the defendant!*[38]

This country was founded on the concept that

[37]*See, State of Wisconsin v. Mendoza,* United States Supreme Court Misc. No. A-840 (Application for stay of trial proceedings pending filing of Petition for writ of Certiorari, Denied by Mr. Justice Stevens on April 5, 1978).

[38]*See,* Colorado Code of Judicial Conduct, Canon 3(A)(7)-(10), Colo.Rev.Stat., Vol. 7A (Court Rules), Appendix to Chapter 24; and RTNDA Br. at A-5.

government derived its ". . . just Powers from the Consent of the Governed . . ." Declaration of Independence, July 4, 1776. Appellee and *Amici* would have this Court brush aside, in fact ignore, that basic precept. Appellants contend that having refused consent, thereby declining to freely and voluntarily waive their Constitutional rights, they have been denied due process of law.

The fact that Appellants cannot measure or quantify the prejudice *sub judice* is immaterial. ". . . [T]he concept of due process of law is not final and fixed . . ." *Rochin v. California*, 342 U.S. 165, 170 (1952).

As reluctant as this Court may be to reverse the convictions of Appellants,[39] the Due Process Clause compels that result where there has been a violation of the guarantee of fairness in a criminal trial.[40] *See, e.g., Tumey v. Ohio*, 273 U.S. 510 (1927); *Betts v. Brady*, 316 U.S. 455 (1942); *cf., Gideon v. Wainwright*, 372 U.S. 335 (1963); *Estes v. Texas, supra.; Sheppard v. Maxwell, supra.; Griffin v. People of the State of Illinois*, 351 U.S. 12 (1956).

Appellants' contention, in a nutshell, is that where a defendant objects to the presence of electronic and still photographic equipment, they must be excluded from his trial or there is a *per se* violation of his right to due process of law.[41]

[39]Mr. Justice Stewart stated it thusly, ". . . it is not the function of this Court to determine innocence or guilt, much less to apply our own subjective notions of justice." *Bumper v. North Carolina*, 391 U.S. 543, 550-551, n.16 (1968).

[40]Appellee's and CBS' reliance on *Spencer v. Texas*, 385 U.S. 554 (1967), is misplaced. *Spencer* dealt with the constitutionality of a Texas Rule of Criminal *Procedure*, as opposed to the *substantive* rule *sub judice*.

[41]Conversely, where a defendant fails to object, and where such waiver is free and voluntary, he ought not be heard to complain.

A. A Denial of Due Process of Law in Cases Involving the Publicity of Criminal Matters May Be Found Even Without an Affirmative Showing of Actual Prejudice.

Appellee and two *Amici*, CBS and RTNDA, contend that Appellants are not entitled to reversal of their convictions because they are not able to point to *specific* prejudice. CBS argues Appellants' case was "routine". (CBS Br. at 17-21). It is not unusual that the "black and white" record fails to communicate the true flavor of a case. Gone are the personalities, tensions and pressures. Missing is the "roar of the greasepaint, the smell of the crowd." No matter whose version of the facts this Court adopts,[42] the case, the crimes, and the manner in which Appellants were detected are hardly "routine".[43] The presence of the television cameras, even for just a portion of the trial, established the "newsworthiness" of the case.[44]

An interesting comparison may be found in the *Estes* case. There, the *pretrial* motions were televised extensively, because media was concerned, at least in part, by Estes'

[42]Appellants stand on their version of the facts. Of all the many counsel in this case at this point, only one, the undersigned, was present in the trial court. Appellants contend their version of the facts is accurate, notwithstanding the assertions of CBS in its Brief at 20-21, n.43 and 48. The trial court made it quite clear to trial counsel that the latter "had better 'clean up' the record". App. at 9. And, the trial judge initially said he would give a specially requested instruction regarding witnesses not watching television (App. p. 7), but later that day, when again requested, declined to do so (App. p. 14). Finally, prospective juror Warren did agree, at first, that if a camera was in the courtroom, there was "something special" about the case (App. 9).

[43]*See* Appellee's Br. at 84, n.28, detailing the local newspapers' coverage of Appellants' trials and tribulations.

[44]CBS' suggestion in its Brief at 18, n.35, that the case was not newsworthy because television stations did not cover the motion to suppress is absurd. In fact, the reason there was no television equipment in the courtroom at the time of the motion to suppress was because by the time the television stations found out about the hearing, it was over!

efforts to preclude live coverage. *See, Estes v. Texas, supra.*, 381 U.S. at 535-536. The only live telecasting of *Estes'* trial itself was the closing arguments of the prosecutor and the return of the jury's verdict. *Id.*, at 591, n. 1, and 608. Thus, in *Estes*, there actually was even less "demonstrable" prejudice. Appellants contend that the very nature of the problem makes "testing" and "measuring" impossible. Thus, a *per se* rule[45] is the only workable solution.

In a rather extraordinary statement, CBS asserts that because of the public's familiarity with, and acceptance of, television today, ". . . there is no sound basis for presuming that any significant adverse psychological effects on jurors, witnesses or other participants occur." (CBS Br. at 15). That statement is totally unsupported by CBS. Not a single item of evidence, not a single psychological study is offered in support of that conclusion, nor could there be, for that statement is totally contrary to human nature. It is as if argument of counsel has been elevated to evidence!

Finally, contrary to Appellee's and *Amici's* assertions, this Court has indeed fashioned *per se* rules when necessary

[45]Appellants urge this Court to adopt a rule which would allow the *accused* (not the "surrogate") to be the primary judge of whether his trial should be televised. Where a defendant does not object, but a witness, juror or other participant does, then the trial judge should have the discretion to make such decisions as are consistent with the objector's individual rights, and the public's right to know, as well as the press' (reasonable) right of access in news gathering activities. Interestingly, Hillsborough County, Florida Circuit Court Judge Morton J. Hanlon proposed to the Florida Constitutional Revision Commission, on August 5, 1977, that the question of televising trials be put on the State's Referendum Agenda for inclusion in the Florida Constitution. This Commission declined to put the matter on the State ballot. In fact, the proposal never got out of committee. *Amicus* FNI's attorney, Talbot D'Alemberte, was chairman of the Florida Constitutional Revision Commission at the time.

to protect an individual's fundamental Constitutional rights.[46]

Amicus CBS contends that the Due Process Clause only protects an individual where there is a defect in, or impediment to, "fundamental fairness in fact-finding." (*See*, CBS Br. at 10, n. 20, and cases cited therein). Appellants agree. That is their very argument. The presence of television and still photographic equipment in a courtroom over their objection gives rise to a departure from fundamental fairness in the fact-finding process.

B. The Failure of the Florida Supreme Court to Conduct Scientifically Reliable and Constitutionally Valid Studies to Determine the Effects of Televising Criminal Trials Fatally Taints the Appellants' Convictions.

Appellee and several *Amici* claim that the Florida

[46]*See, e.g., Gilbert v. California*, 388 U.S. 263, 273 (1967) (violation of Sixth Amendment right to counsel at post-indictment lineup at which defendant is present results in the automatic exclusion of that identification); *see also, United States v. Wade*, 388 U.S. 218 (1967); and *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (no incarceration permitted unless defendant has been afforded right to counsel at his prosecution); *see also, Gideon v. Wainwright*, 372 U.S. 335 (1963); and *Miranda v. Arizona*, 384 U.S. 436, 444-445, 467-476 (1966) (confessions obtained during custodial interrogation are inadmissible in State and Federal criminal trials if certain procedural safeguards have not been observed, or if the suspect has failed to make a knowing, intelligent, and voluntary waiver of his Fifth Amendment rights before confessing); and *Casteneda v. Partida*, 430 U.S. 482, 492-493 (1977) (denial of equal protection to try defendant under indictment returned by Grand Jury from which all persons of defendant's race or color have been intentionally excluded by the State solely on the basis of race or color); *see also, Swain v. Alabama*, 380 U.S. 202 (1965); and *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975) (jury selection system that operates to exclude women from jury duty does not provide fair cross section of community, and hence violates Sixth Amendment); *Peters v. Kiff*, 407 U.S. 493, 504 (1972) (white may object on Sixth Amendment grounds to the exclusion of blacks in jury selection system although no prejudice shown); *see also, Duren v. Missouri*, 439 U.S. 357, 359, n.1 (1979).

experiment was "carefully designed and cautiously conducted,"[47] that Florida "carefully evaluated the possibilities of prejudice to defendant's rights, both when it authorized the experiment . . . and when it established a permanent rule,"[48] and finally, that "Florida adopted the rule allowing access only after lengthy and deliberate proceedings."[49]

Those broad statements are totally unsupported by the facts. First, according to the Docket Sheet in the Florida Supreme Court in connection with the Rule change,[50] only eight trial judges filed reports regarding televised trials during the one year experimental period.[51] Second, no records were kept of the number of criminal trials televised, the number of criminal trials not televised, the number of defendants who objected, the number who did not; nor were any records kept of the number of defendants whose televised trials resulted in acquittals, convictions or mistrials, as opposed to those defendants whose trials were not televised. Third, absolutely no sworn testimony or adversary hearings were ever conducted by Florida Supreme Court.[52] *Cf., In re Hearings concerning Canon 35 of the Canons of Judicial Ethics,* 296 P.2d 465 (Colo. 1956). Finally, suggestions *before,* during and after the experimental period made to the Florida Supreme Court that experts in the fields of psychology and sociology be utilized, were totally ignored.[53]

[47]SAG Br. at 6-14.

[48]RTNDA Br. at 19-20.

[49]FNI Br. at 6-15.

[50]*In re: Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764 (Fla. 1979) [Florida Supreme Court Case No. 46,835].

[51]There are 286 Circuit Court trial judges in Florida. Only *8* responded to the Florida Supreme Court's invitation to file a "report". Of the 8 reports, only 2 favored televising criminal trials (Baker and Green). One was somewhat neutral (Mounts) and the other 5 (Sholtz, Smith, Pate, Hanlon and Richardson) were largely opposed to the rule.

[52]If there were such hearings which included *testimony,* the results are not filed with the Clerk of the Florida Supreme Court.

[53]*See,* ARB at 15-22; *see also,* Appellants' Brief at 42, and the Appendix thereto, AB-11.

Perhaps, the most significant response to Appellee's and *Amici's* contention, however, is found in the knowledge that the Florida Supreme Court could have, and should have, formulated a meaningful study *before* it embarked on this uncharted course. See, ARB at 18, 20-21. The failure to have done so implicates the Due Process Clause even without a showing of specific, measurable prejudice.

C. The "In House" *Post Hoc* Office of the State Administration (OSCA) Survey Commissioned and Relied Upon By the Florida Supreme Court to Sustain the Experiment in Televising Criminal Trials is Constitutionally Deficient and "Scientifically Unacceptable".

D. A Close Analysis of the Survey Establishes That There is a Constitutionally Significant Number of Witnesses and Juror Respondents Whose Acts, Conduct, Behavior, Self-Perception and Role in Televised Trials Were Affected by the Presence of Electronic and Still Photographic Equipment.

E. Due Process of Law Compels Closing the Courtroom to the Camera's Eye.

Appellants rely on the arguments in their Initial Brief on Points C, D, and E.

V.

NEITHER THE APPELLEE'S NOR *AMICI'S* BRIEFS JUSTIFIES THE CONTINUED TELEVISING AND PHOTOGRAPHING OF CRIMINAL TRIALS IN PROGRESS OVER A DEFENDANT'S OBJECTION.

A. The Media *Amici* Represent Special Interests, and Are Not the Public's "Surrogate".

This Court has a duty to the Constitution, and to the Appellants' right to a fair and impartial trial. The *Amici* briefs reflect special interests seeking to divert this Court from its duty. RTNDA's Brief, for example, urges this Court to continue the experiment because of the ". . . rich variety of approaches in terms of the technical specifications . . ." *Id.*, at 24. How that serves as a logical basis for continuing to televise a criminal trial over the accused's objection is beyond comprehension. It has been reported that in the past ten years, "[c]rime certainly brought out the worst in broadcasting in its day-by-day exploitation on both the news and entertainment segments of the [television] schedule." Barrett & Sklar, *The Eye of the Storm: The Alfred I. DuPont-Columbia University Survey on Broadcast Journalism*, 20 (1980).

The media is not bound by, nor married to, their Code of Ethics. For if it were, then "[j]ournalists at all times [*would*] show respect for the dignity, privacy, *rights*, and well-being of people encountered in the course of gathering and presenting news."[54] Presumably media does strive for accuracy and objectivity. However, in reporting, the media rarely considers the impact that even a "straight"[55] news story has on a defendant's right to be tried by a particular jury which has been painstakingly selected by both prosecution and defense counsel. See, *United States v. Williams, supra.*

Media's efforts at "self-policing" have been largely unsuccessful. Television in particular has been responsible for the growth of a new area of tort law, "broadcast liability". See, Perlman & Marks, *Broadcast Negligence: Television's Responsibility for Programming*, Trial (August 1980). This, then, is the "surrogate" in which Appellee and the States' Attorneys General would have us place our trust.

[54]Code of Ethics of the Society of Professional Journalists [*see* subsection on "Fair Play"].

[55]A "straight" news story is one devoid of editorializing or commentary. *United States v. Williams*, 568 F.2d 464, 466, n.1 (5th Cir. 1978).

Finally, the Appellee and media claims of the "surrogates' " role as an educator,[56] can neither be taken seriously, nor serve as a basis to override individual Constitutional rights.[57] That argument is met by the Report of Palm Beach County Circuit Judge Thomas E. Sholts, previously provided to the Court.[58] Judge Sholts stated:

> The media claims the right to take still photographs, to tape and broadcast testimony and to televise trials because it wishes to educate the public. *I doubt the intellectual integrity of the media's position in making its request to change Canon 3A(7).*[59] [emphasis added].

B. Traditional Adherence to Federalism is Insufficient Justification for Continuing the "Experiment" in Televising Criminal Trials.

How true it is, "politics makes strange bedfellows." The distinguished former Attorney General of the United States, Griffin B. Bell, argues on behalf of the Conference of Chief Circuit Justices, that this Court ought not interfere with the rights of the individual states.[60] Several media *Amici*[61] press that same argument, in one form or another, along with Appellee, who mentioned it in passing.[62] Ironically, that issue is only obliquely raised by the seventeen States which joined in the States' Attorneys General's Brief.[63]

[56]*See* Appellee's Br. at 104-111; FNI Br. at 20-21; PBS Br. at 12-13.

[57]*See* Appellee's Br. at 111 (Defendant has a superior right to a fair trial).

[58]SAG Br. at 8, n.2.

[59]"Report to the Florida Supreme Court Regarding the Use of Audio-Visual Equipment During the Mark Hermann Murder Trial," at 15. Other observations by Judge Sholts are equally telling. He confirms virtually every argument advanced by Appellants. *Id.*, at 16-21.

[60]CCJ Br. at 4-14.

[61]CBS Br. at 10, n.20; RTNDA Br. at 27-29; PBS Br. at 23-25.

[62]Appellee's Br. at 112-117.

[63]SAG Br. at 4-6.

The sudden movement towards, and interest in, the principles of "Federalism" are obviously tied to Mr. Justice Rehnquist's dissenting opinion in *Richmond Newspapers, Inc. v. Virginia, supra,* 100 S.Ct. at 2842-2844. This issue was never raised before at trial, or at any State appellate proceeding. A variation on this theme of "federalism" is the abortive attempt to apply the "Pullman Abstention Doctrine".[64] These arguments fall far short of the mark.

In the first place, we are *not* dealing with an issue involving State Court procedure, hence, Appellee's reliance on those cases cited in its Brief at pages 112-113 is misplaced. None of those cases[65] are relevant to the issue *sub judice,* nor are any of the cases which concern "abstention".[66]

Moreover, Appellants do not quarrel with the notion that States should be left free to "experiment" in social and economic areas as suggested by Mr. Justice Stevens in

[64]Appellees Br. at 113, and CCJ Br. at 7, n.11.

[65]*County Court of Ulster County, New York v. Allen,* U.S. , 99 S.Ct. 2213 (1979) (New York statutory presumption valid), *Wainwright v. Sykes,* 433 U.S. 72 (1977) (decision below based on adequate state grounds); *Henderson v. Kibbe,* 431 U.S. 145 (1977) (mere erroneous jury instruction by itself not valid grounds for collateral attack on State Court judgment); *Whalen v. Roe,* 429 U.S. 589 (1977); *Murphy v. Florida,* 421 U.S. 794 (1975); *Broadrick v. Oklahoma,* 413 U.S. 601 (1973) (*Broadrick* reiterated the principle that Constitutional rights are personal and may not be raised by third parties. How then does the media litigate the "public's right to know"?); *Williams v. Florida,* 399 U.S. 78 (1970) (six-man unanimous jury in noncapital case approved); *Spencer v. Texas,* 385 U.S. 554 (1967) (State Rule of Procedure not fundamentally unfair); and *Beck v. Washington,* 369 U.S. 541 (1962) (record established that Grand and Petit juries were not biased despite pervasive pretrial publicity).

[66]*Stone v. Powell,* 428 U.S. 465 (1976) (Federal Courts will not entertain State *habeas corpus* convictions where there has been a full opportunity to present Fourth Amendment claims); *O'Shea v. Littleton,* 414 U.S. 488 (1974) (abstention doctrine applies absent irreparable harm); *Younger v. Harris,* 401 U.S. 37 (1971) (Federal Court will not interfere with pending State criminal cases absent bad faith or harassment); or *Railroad Commission of Texas v. Pullman Company,* 312 U.S. 496 (1941) ("Pullman Abstention Doctrine").

Whalen v. Roe, 429 U.S. 589, 597-598, n. 20 (1977). Provided, of course, no individual personal Constitutional right is lost during the experiment. What Appellee and *Amici* fail to appreciate, however, is that the televised criminal trial rule is neither a social, nor economic, experiment. It is, instead, an ill-advised experiment in "living" jurisprudence, the effects of which, at best, are unknown, and at worst, disastrous.

Former Attorney General Bell dismisses Appellants' arguments as ". . . a parade[67] of speculative horribles to fight phantom issues." (CCJ Br. at 12, n. 23). That "speculative" parade marched through Miami, without a permit, in the wake of the McDuffie verdict. The issue was real, not illusory, to Adelita Green. *See, Green v. State,* 377 So.2d 193 (Fla. 3d DCA 1979) (cert. granted by the Florida Supreme Court, Case No. 57,398). Parades are for circuses which is what cameras make of the courtroom.

When one argues for victory, and not for truth, he may be assured of just one ally, the devil himself, and that is to whom the "dues will be paid" unless this Court ends the experiment.

C. Neither the Application of the "Government In The Sunshine" Concept, Nor the Expenditure of Public Funds Justifies the Violation of Fundamental Individual Rights.

Finally, it is argued that Florida's commitment to "Government In The Sunshine"[68] and the expenditure of public money for educational television,[69] justify televising criminal trials over a defendant's objection. Both propositions border on the ridiculous when measured against

[67]"A parade is a large public procession, usually including a marching band and of a festive nature, held in honor of an anniversary, a person, an event, etc., and accompanied by marching band music." *Random House Dictionary of English Language,* 1045 (Unabridged Ed., 1967).

[68]FNI Br. at 15-20; PBS Br. at 23-25.

[69]PBS Br. at 7-23.

the Constitutional rights of the accused in the framework of our system of criminal justice.

It is well known, medically, that too much sun can cause skin cancers. The "surrogates" do not care what "disease" they visit upon the public figure, nor do they care what ". . . tattoo [they leave] on the epidermis." *Carlisle v. State*, 176 So. 862, 864 (Fla. 1937). Regardless of the effect on the accused, the nightly news "must go on". Florida's commendable commitment to "open government" ought not be extended to the point where it devours individual Constitutional rights. Florida's Courts are, and will remain, open to the public, even if Appellants prevail. Only the television and still photographic equipment will be barred. News reporters and the public alike will continue to have access to the courtroom.

How does televising a criminal trial over the defendant's objection ". . . afford the accused greater protection than the Federal Constitution requires"? (PBS Br. at 26, footnote omitted). How does the expenditure of millions of dollars on public broadcasting justify televising a criminal trial over a defendant's objection? So what if public television now reaches millions of households daily? What do *Sesame Street* and *Mr. Roger's Neighborhood* (PBS Br. at 12, n. 14), have to do with a defendant's rights to a fair and impartial trial, and Due Process of Law? As Dean Erwin N. Griswold wrote:

> A courtroom is not a stage; and witnesses and lawyers, and judges and juries and parties, are not players. A trial is not a drama, and is not held for public delectation, or even public information. It is held for the solemn purpose of endeavoring to ascertain the truth; and very careful safeguards have been devised out of the experience of many years to facilitate that process.[70]

[70]*The Standards of the Legal Profession: Canon 35 Should Not Be Surrendered*, 48 ABA Journal 615, 616 (July 1962).

Former Attorney General Bell argues, ". . . that under the Federal system, states are given broad latitude to experiment in solving problems." (CCJ Br. at 7). What problems have televising a trial over a defendant's objection solved?

CONCLUSION

Appellants' case presents no apparent conscious prejudice. However, there are other cases, pending and yet to be tried, which will present different and even greater degrees of measurable prejudice. The mere fact that there is no "litmus paper" test to measure the subconscious effect of televised criminal trials, is insufficient justification to deny the relief sought, or to decline to fashion meaningful guidelines for the bench, the bar and the public. Whatever affects one man directly, affects all men indirectly.[71]

John Donne, the distinguished and revered 16th Century English poet said it far more succinctly:

> No man is an island entire of itself; every man is part of the main . . . Any man's death diminishes me because I am involved in mankind, and therefore never send to know for whom the bell tolls; it tolls for thee.

This Court has a Constitutional obligation to "sound the death knell", to "toll the bell", to put an end to this ill-advised experiment in criminal justice.

Respectfully submitted,

JOEL HIRSCHHORN, P.A.
By: Joel Hirschhorn, Esquire
742 Northwest 12th Avenue
Miami, Florida 33136
(305) 324-5320
Counsel for Appellants

[71]An unsolicited letter filed in The Florida Supreme Court by "ordinary" citizens sums up Appellants' argument rather well. It is printed in its entirety in ARB at 23.

Appendix
to
Reply Brief

INDEX TO APPENDIX

INDEX TO APPENDIX (continued)

REPORT OF THE [WISCONSIN] SUPREME COURT COMMITTEE TO MONITOR AND EVALUATE THE USE OF AUDIO AND VISUAL EQUIPMENT IN THE COURTROOM

(APRIL 1, 1979)

(EXCERPTS)

A. RE: STATE v. DILLABAUGH

1. Remarks of Court Observer:

* * * * *

The movie camera could be heard by the observer just before the rail, but only during very quiet pauses. The shutters of the still cameras were clearly audible throughout the trial. *Id.*, at 7.

* * * * *

All wanted photographs of the 5-year-old complainant who was to take the stand after the recess.

* * * * *

There had been some problem the day before with the microphones on the counsel's table picking up defense counsel-client and co-counsel-counsel conversations. Apparently, if the volume of a home television set was turned up high enough, these conversations could be understood. *Id.*, at 8.

* * * * *

While the defendant was testifying, his attorney objected to the fact that the defendant was being photographed with

one of the exhibits (the paddle used in the alleged battery) in his hand. He objected, for the record, that the prosecutor had made his client pose in a manner "calculated for picture taking and improper." *Id.*, at 9.

* * * * *

2. Remarks of Trial Judge:

What, if any, influence do you think the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras had on you during the trial?

I was conscious of their presence, although I couldn't hear the camera shutters, for instance. They had an indirect effect in that a large courtroom with good acoustics was used, which made it easier to hear the witnesses. The cameras made me more aware of my posture, so I sat erect much of the time.

* * * * *

Did the presence in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras produce more letters, telephone calls, et cetera, than you usually receive?

No, there were some comments from acquaintances who had seen me on TV, but I don't get many calls or letters about cases anyway.

What, if any, impact do you think the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras had on the witnesses?

They were more apprehensive, nervous, scared. The fact that it was a full courtroom with a lot of activity may have combined with the presence of the cameras to cause this. *Id.*, at 11.

* * * * *

What, if any, effect did the use of (a) television cameras, (b) radio equipment, and (c) still cameras have on the behavior of counsel?

The cameras affected them in their unconscious actions, in the same way the cameras affected me — little things like sitting up instead of slouching down. *Id.*, at 12.

* * * * *

Overall, what is your general evaluation of the use of (a) television cameras, (b) radio equipment, and (c) still cameras, in the courtroom?

Basically, I don't believe in them. If I were charged with a crime, I would not want it to be televised or photographed.

Everything went beautifully in this case, but this wasn't a serious enough case. There will be trouble with cameras in the courtroom in other cases.

If the defendant had been convicted, I would have been criticized for not sequestering the jury. As it was, they probably watched themselves on TV at night during the trial. *Id.*, at 13.

* * * * *

3. Remarks of Defense Attorney:

* * * * *

To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras distract you from the tasks at hand during the trial?

The still cameras were too loud, there was too much movement and jockeying for position by the still photographers, especially during dramatic moments when there was a distracting flurry of activity by the photographers.

The television cameras in the hallway outside followed the jurors entering and leaving the jury room, and I think that this had an undue influence on the jurors, giving them almost a celebrity status. *Id.*, at 14.

* * * * *

What effect, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras have on the jury?

There was unnecessary filming of them when they were not in the jury box. This placed an undue influence on the jury, and they may have been caught up in the drama of the thing. The cameras, TV and still, could have affected their judgment and distracted them from their duty. *Id.*, at 15.

* * * * *

4. Remarks of Prosecutor:

* * * * *

To what extent, if any, did (a) television cameras, (b) radio equipment, and (c) still cameras distract you from the tasks at hand during the trial?

The clicking of the still cameras was distracting. *Id.*, at 17.

* * * * *

What overall advantages, if any, do you ascribe to the use in the courtroom of (a) television cameras, (b) radio equipment, and (c) still cameras?

The nightly replay was helpful.

My only concern with cameras is their effect on reluctant or frightened witnesses. Testifying in public is hard enough without putting their performance on television. *Id.*, at 19.

* * * * *

B. RE: TIIE McCOY MURDER CASE

1. Remarks of News Director for Commercial Television Station:

* * * * *

All in all, I saw the jury distracted from their concentration on testimony perhaps once or twice during the entire proceeding; and only one or two jurors at each of those times. *Id.*, at 26.

* * * * *

2. Remarks of Trial Juror:

One juror wrote: "I would just as soon see cameras in court discontinued. It was neither a good or bad experience for me." He also said that his wife received a number of calls on seeing him on television, and he expressed the fear that in some cases those could be crank calls. *Id.*

* * * * *

C. THE TRIAL OF RICHARD TODD BUCK

1. Remarks of Observer:

* * * * *

Judge Holz, however, claimed that the cameras simply add an extra burden on the judge in an already difficult situation, for example, an important murder trial . . . The defense and prosecution both agreed that they would rather try a case without cameras in the courtroom. Their rationale, however, differed. The prosecutor claimed that media coverage puts the trial in the public eye. For that reason, he claimed, the jury is reluctant to return a harsh verdict. He further complained that camera use automatically gives defense counsel an issue for appeal. Defense, on the other hand, claimed that the notoriety of a covered trial makes the jury more reluctant to return a lenient verdict. *Id.*, at 29.

* * * * *

In response to the questions as to whether the use of cameras resulted in more letters, telephone calls, etc. than he usually receives, the judge responded, "definitely." He also thought that the cameras have "a noticeable effect" on the witnesses. *Id.*, at 30.

* * * * *

In his responses to the questions put to him by our observer, defense counsel Shellow asserted that the presence of cameras in the courtroom distracted him from the tasks at hand during the trial "regularly." As to whether the presence of cameras affected the strategy of litigation, Mr. Shellow declared that "it affected the basic decision of whether we would have the defendant take the stand in the case." He also expressed the opinion that the cameras had "an obvious effect on one witness, . . . who was extremely distraught while testifying in front of the cameras." *Id.*, at 31.

* * * * *

Our observer points out that defense counsel did not argue for a not guilty verdict at any time during the proceedings, and

that the verdict of manslaughter rather than second degree murder was regarded as a victory for the defense. When asked whether he thought the use of cameras had an effect on the fairness of the trial, Mr. Shellow responded, "Certainly. Prosecutor Sosney was obviously responding to camera use during the trial." Finally, Mr. Shellow indicated that he would have preferred to try the case without cameras in the courtroom, asserting that the practice "unfairly prejudices the jury. Distorts fact finding. Only one juror during the voir dire was candid enough to admit that the cameras might have affected him. The others were 'less than candid,' when they claimed their use would have no effect."

In his responses, defense counsel Glynn said that the cameras distracted him "on occasion," that the presence of cameras affected the choice of exhibits offered into evidence, because of the sensitivity of matters at issue, and he declared that "we changed examination strategy" because of the presence of cameras in the courtroom. *Id.*, at 31-32.

Mr. Sosney [the prosecutor] did not believe that the use of cameras had any effect on the length of the trial, but when asked whether it had any effect on the outcome of the trial, he responded: "It is difficult to speculate. Yet, jurors must feel unusual because of the uniqueness of media coverage." In response to the question as to whether the cameras affected the fairness of the trial, the prosecutor replied: "If anything, it is unfair to the state's interest and to the people of Wisconsin. The cameras made conscientious people reluctant to pull the trigger." Asked whether, if he had a choice, he would have preferred to try the case with or without the cameras in the courtroom, Mr. Sosney replied: "The use of cameras is not only unfair to the people of Wisconsin, it adds an unneeded expense to the trial of cases. For example, the jurors were sequestered in this case, when they otherwise would not have been." Finally, in response to the query as to whether the use of cameras had any overall advantages, our observer quotes the

prosecutor as follows: "*None.* There is not a need for the extra coverage allowed by the use of cameras. The media are there only to present sensational issues to the public, not to satisfy the public's need to know. This is well illustrated by the manner in which the cameras have been used up to this time." *Id.*, at 33.

GOVERNOR'S DADE COUNTY
ADVISORY COMMITTEE

DADE COUNTY COURTHOUSE
73 W. Flagler
Miami, Florida

July 8, 1980
6:00 o'clock p.m.

EXCERPT OF
KENNETH I. HARMS
CHIEF OF POLICE.

THEREUPON:

KENNETH I. HARMS

was called as a witness, and, after having been first duly sworn, was examined and testified as follows:

BY MR. BLOCK:

Chief, for the record, will you please give us your official title?

BY CHIEF HARMS:

Chief of Police of the City of Miami Police Department.

* * * * *

BY MR. BLOCK:

Are you suggesting, and don't let me put words in your mouth, that the media had anything to do with causing the riots?

BY CHIEF HARMS:

I most certainly am.

BY MR. BLOCK:

Are you suggesting that the media's coverage of the McDuffie trial contributed to the riots, the disturbances, or the rebellion?

BY CHIEF HARMS:

Absolutely.

Understand that this is a prospective that I am sharing with you, and this is based on the fact that I am a lifelong resident of Dade County, and I have been involved with the Criminal Justice System here within this community for in excess of twenty years. It is a professional judgment and it is a personal judgment.

* * * * *

NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS

[Officers and seal omitted]

RESOLUTION

OF THE

ANNUAL GENERAL MEMBERSHIP
BUSINESS MEETING

WHEREAS, traditionally cameras and recording devices have been excluded from courtrooms in virtually all jurisdictions, and

WHEREAS, the members of the National Association of Criminal Defense Lawyers, Inc., as a group of persons regularly involved in the trial of criminal cases believe that the use of such devices at present could tend to impair the integrity of jury trials because of potential and as yet undetermined effects upon witnesses, jurors, defendants, judges and lawyers, and

WHEREAS, there do not at present appear to be any corresponding benefits to be derived from introduction of such devices into trial courtrooms, now therefore,

BE IT RESOLVED, that the National Association of Criminal Defense Lawyers, Inc. declares its opposition to the use of cameras and recording equipment in all criminal trials.

/s/ C. ANTHONY FRILOUX, JR.
President

OFFICE OF DISTRICT ATTORNEY
MILWAUKEE COUNTY
E. Michael McCann District Attorney

[Seal of Office and address omitted]

October 10, 1980

Mr. Joel Hirschhorn
Attorney at Law
742 Northwest 12 Avenue
Miami, FL 33136

Re: *Chandler v. Florida and State of Wisconsin v. James Ray Mendoza*

Dear Mr. Hirschhorn:

Jon Genrich has kept me closely posted as to the correspondence between you and him. As you know, we are profoundly committed to the position that cameras should be excluded from the court when vetoed by the defendant.

Please feel free to use any of the materials forwarded to you by this office in any manner in which you would feel useful.

I also wish to assure you of my belief after seeing a number of instances where cameras appeared in court that justice is not well served by the admission of television cameras to the courtroom.

As an elected official, I can fully appreciate the unique opportunities for political advancement provided to a district attorney or judge by having cameras cover a notorious case. I for one firmly believe that the presence of cameras in a celebrated case inevitably obliquely or directly applies pressure to a juror to deliver a verdict of guilty. I profoundly

respect the jury system and do not casually ascribe pusillanious expectations to citizens sitting in judgment on another citizen. At the same time, my experience of human nature observed from fifteen years in the working pits of a prosecutor's office convinces me that some sensitive jurors may experience unstated pressures from the presence of the cameras. A defendant is entitled to have all jurors free from any extraneous pressure other than the oath which they take.

I note that an amicus brief has been filed by a number of Attorneys General supporting the cameras in court concept. In the abstract, from the often halcyon upper reaches of an Attorney General's office, the proposal may seem attractive from a "right to know" approach. At the same time, I know Mr. La Follette personally and have always found him to be a man of exceptional commitment to justice. I strongly suspect that were he to be privy to some of the excesses I have already witnessed by cameramen in the court he would change his position on the issue.

The local media has uniformly opposed our position. We neither seek nor curry anyone's favor by our continued stand in favor of the defendant's right to a fair trial. John Donne said it best when he noted that no man is an island. I weep when any man's right to a fair trial is tolled for I do not doubt that with that tolling every man's right is lost.

Sincerely yours,

/s/ E. MICHAEL McCANN
E. Michael McCann
District Attorney

RICHARD C. McFARLAIN
Attorney at Law

[Address and office notation of receipt omitted]

June 8, 1977

The Honorable Alan C. Sundberg
Justice, Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32304

RE: Cameras in the Courtroom — Noise Level of Camera Clicks

Dear Mr. Justice Sundberg:

Please refer to Hon. C. Gary Williams' letter to you dated June 1, 1977.

So we have come to this. Apparently the argument has foundered to the point of whether the "Miami Herald" can stop Nikons cricking in court or whether this can be overcome by the use of a blimp. I have always been big on blimps myself; the bigger they are the more I like them.

May I suggest as a compromise that Nikons be allowed to use blimps provided that they have a cap over the lens to insure the blimp gives no distortion to the photograph. To give Leicas equality, they too should remain covered and may use blimps (dirigibles for the larger ones) if they wish.

I trust the recipients of this letter will signify their support or nonsupport in the usual manner in this unusual case and that this issue will be resolved quickly.

The questions remain, however, of; 1) what we are going to do to stop the television industry from turning judges green

when they run their clips on the evening news; 2) can trial judges wear pastel robes in an attempt to counterbalance this perfidious move towards the greening of the judiciary; and who gets the residuals?

Respectfully,

/s/ RICHARD C. McFARLAIN
Richard C. McFarlain

DR. HELEN PENNER ACKERMAN, ED.D.
Licensed Psychologist

[Address and Florida Supreme Court Clerk's notation of filing omitted.]

December 16, 1977

Justices
Supreme Court of the State of Florida
Tallahassee, Florida 32304

Dear Sirs:

I have enclosed a copy of a comment which will be published in a professional psychological journal. Also enclosed is a copy of a letter to me from Dr. Joseph Sanders of the American Psychological Association. I do wish to suggest that as you evaluate the role of the television camera in the courtroom,

you consider having input from the Florida Psychological Association and its members. Thank you for considering comments from professional organizations.

Sincerely,

/s/ HELEN ACKERMAN
Helen Ackerman

Law Offices

McFARLAIN AND BOBO

[Firm members names, address and telephone number omitted.]

June 14, 1978

Joel Hirschhorn, Esq.
Hirschhorn and Freeman
742 Northwest 12th Avenue
Miami, Florida 33136

Dear Mr. Hirschhorn:

Thank you for your letter of June 9. I truly regret missing your oral argument in the recent Cameras in the Courtroom case, but was tied down with the end of the legislative session.

You inquire regarding the use of Professors Miller and Brigham. Justice Sundberg tried to arrange some kind of academic review by those gentlemen, as well as people at the University of Florida, but, to the best of my knowledge, nothing came of it. He may now be in a position to have some professorial unit study the results so far, but I have not asked him.

I did attend a "viewing" in the basement of the Supreme Court which the Court attended as well as counsel for the television station, where a station was showing what was supposed to be highlights of the year. It was as dismal a performance as I have ever seen, and several of the members of the Court were amused at the results. Other than that, all I know of what has been happening is that Judge Baker, who loves show biz, is writing learned memos on how marvelous the Zamora trial was, and other judges who are hot to trot to put on greasepaint and try the case, are using whatever influence they have to convince the court that this whole thing is marvelous.

An attempt or two has been made to pull the rug out from under me as counsel for the Bar in this case. Judith Kreeger, whose firm represents some television interests in Miami, is Chairman of a Bar Committee, that, unbeknownst to me, sat in judgment on this issue. I wrote her a letter, copy enclosed, but it didn't do any good, though she read it to the committee. It is my understanding they ended up with a tie vote and are in a quandary now, which is a good place for a Bar Committee on this subject.

I encourage you in your work. I have no objection to your using any correspondence of mine. I do fear that the camel now has his nose under the flap of the tent and pretty soon the hump is going to be in with him and we are all going to be out in the cold in the desert while TV runs the show.

With best wishes, I am

Very truly yours,

/s/ RICHARD C. McFARLAIN
Richard C. McFarlain

ALICE M. PADAWER-SINGER, Ph.D.
130 East 67 Street
New York, N.Y. 10021

(212) 737-7897

July 7, 1978

J. Hirschhorn, Esq.
Hirschhorn & Freeman, P.A.
742 Northwest 12th Avenue
25 West Flagler Street
Miami, Florida 33136

Dear Mr. Hirschhorn:

As you know, I have conducted various studies of jurors in courts, including the Free Press-Fair Trial Study and decision

making in the twelve-vs.-six-Member Juries under Unanimous vs. Non-Unanimous Juries.

As per your report, I am enclosing the last article published which summarizes some of my studies. This article was written at the invitation of the American Trial Lawyers Association-Rosco Pound Foundation Annual Meeting in 1977.

I am enclosing my vita for your information re other publications. I have been invited to organize a conference for judges at the American Bar Association Conference on August 8, 1978 from 9:30 A.M. to 12 Noon, and will present research data.

I believe that it is imperative that a study evaluating the effects of TV cameras in court on the behavior of participants in a trial should be conducted before one can give a blanket approval or disapproval. It is important to ascertain under what circumstances should trials be televised and/or what modifications in televising should be included in a decision to allow cameras in court. I am most interested in directing and conducting such a study.

Please keep me informed.

Sincerely yours,

/s/ ALICE M. PADAWER-SINGER
Alice M. Padawer-Singer

Department of
COMMUNICATION

The University of Michigan
Ann Arbor, Michigan 48109

7 August 1980

Joel Hirschhorn, P.A.
Attorney at Law
742 Northwest 12th Avenue
Miami, Florida 33136

Dear Joel:

Enclosed, as you requested, are copies of several documents related to my proposed *controlled* experiment on the issue of cameras in the courtroom. Included are a description of the experiment, an abstract of the proposed study, and correspondence with various members of the judiciary in Indiana and Michigan. I have been trying for several years (first in Indiana and now in Michigan) to get approval from the state supreme courts for the study. Tentative approval from the chief justice of Indiana was withdrawn after I secured the cooperation of trial judges.

My proposed study would differ from so-called "experiments" conducted or under way in several states in two fundamental and significant respects. (1) Other variables or factors would be held constant while the crucial or independent variables to be tested (such as the presence or absence of cameras) would be manipulated or changed. (2) Aspects of the behavior of trial participants under those differing conditions would be actually and reliably measured.

To the best of my knowledge, none of the pilot programs masquerading as "experiments" in various states has measured the behavior of trial participants (with cameras absent and present) in a scientifically valid manner. With a very few notable and more sophisticated exceptions, the

procedure with most of those so-called "experiments" has been merely to allow the cameras in the courtroom, and then *ask* various participants whether they were affected by the cameras. Such a procedure is inadequate, laughable, or both. Surely most attorneys *and* journalists have had the experience of questioning a person who would say one thing in public and the exact opposite in private.

As you know, the research for my doctoral dissertation on the issue of cameras in the courtroom is complete, but the data are yet to be analyzed and the document written. In the dissertation, I will examine several aspects of two sensational murder trials in Indianapolis. Defendants for the same crimes were granted separate trials; television cameras had access to one of the trials and were excluded from the other. Although the findings will be interesting, they are not ready and they will not be definitive. Although those two trials provided an opportunity for a study far more rigorous than most of those being referred to as "experiments" elsewhere, too many variables remained uncontrolled. The data must be cautiously interpreted.

I regret that I cannot provide you (and others) with some scientifically valid data that clearly show what impact and presence of cameras has on trial participants. But I am cheered by the fact that no one else can either. Such data, to the best of my knowledge, do not exist.

Yours sincerely,

/s/ DALTON LANCASTER
Dalton Lancaster
Assistant Professor

[Handwritten letter addressed to]
Judges: Supreme Court — Florida
[bearing the stamp,] " Filed: Dec. 5, 1978
Clerk, Supreme Court"

Gentlemen:

We sincerely hope that you will have the integrity to forbid televising in courtrooms.

Television is primarily an entertainment medium, and it is unjust to bring anyone to trial in its eye.

As for Justice — she should remain blindfolded — not have one eye peeking at TV cameras. Lawyers, and some judges may enjoy acting in front of TV, but the person on trial should not be under that added strain.

It will be a sad day indeed if Florida adds courtroom trials to its tourist attractions.

Sincerely,

/s/ MR. AND MRS. J. W. LIVINGSTON
522 Shell Point
Fort Myers, Florida 33908

Nov. 20 '78

Exhibit 26

POTENTIAL WITNESSES WHO RELUCTANTLY COOPERATE IN CRIMINAL LITIGATION AND WOULD NOT DO SO IF THEY ANTICIPATED TELEVISION COVERAGE

1. Rape and other sexual offense victims.
2. Older witnesses.
3. Witnesses (particularly women) living alone.
4. Victims of particularly violent crimes.
5. Prostitutes, addicts, transients and other subculturals.
6. Closet homosexuals and others who lead dual lives.
7. Reputable persons and agencies who may be embarrassed by disclosure of matters which are simply incidental to the trial,(e.g., banks, hospital, medical, corporate employees).
8. Child witnesses who are deterred by cautious parents.
9. Witnesses who fear reprisals.
10. Witnesses who fear being made fool of by some cross-examiner.
11. Witnesses in domestic crimes.
12. Confederates and co-defendants.