FAIR TRIAL—FREE PRESS—A STATE CONSTITUTIONAL RIGHT OF ACCESS TO PRETRIAL HEARINGS—*State v. Williams* and *State v. Koedatich*, 93 N.J. 39, 459 A.2d 641 (1983)

In 1976 the United States Supreme Court held in *Nebraska Press Association v. Stuart*[1] that a "gag order" prohibiting members of the press from publishing information revealed at a criminal pretrial hearing was unconstitutional under the first amendment.[2] Ever since that decision, members of the bench and bar have striven to find an alternative to such a prior restraint which will provide criminal defendants with an unbiased jury without violating the first amendment. In heavily publicized criminal cases, the defense or the prosecution occasionally will request that a judicial proceeding be closed to the press in order to avoid any unnecessary publicity which may prejudice the jury against the defendant. A motion to close the court requires the trial court to strike a delicate balance. On the one hand, the defendant seeks to protect his sixth amendment guarantee of a fair trial by an impartial jury.[3] On the other hand, the press and public wish to exercise their right to attend proceedings of public interest. This right of access is guaranteed by the first amendment.[4] While closure furthers the defendant's interest in protecting his sixth amendment right to a fair trial, it runs squarely into the first amendment rights of the press and public. A trial court seldom is presented with a more direct conflict between constitutional rights.

In two companion cases, *State v. Williams* and *State v. Koedatich*,[5] the New Jersey Supreme Court enunciated guidelines for New Jersey courts to follow when evaluating closure applications. The decision in *Williams* and *Koedatich* is significant because of its unique approach to the closure issue. The court based its holding on both

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[1] 427 U.S. 539 (1976).

[2] *Id.* at 570. The Court noted that "once a public hearing has been held, what transpired there could not be subject to prior restraint." *Id.* at 568.

[3] U.S. CONST. amend. VI states:

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

Id.

[4] Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

[5] 93 N.J. 39, 459 A.2d 641 (1983).

federal and state constitutional grounds, and extended the right of access at criminal proceedings to include pretrial hearings.[6] Additionally, the court adopted a standard of proof for closure applications which never had been enunciated by the United States Supreme Court.[7]

The defendants in *Williams* and *Koedatich* were both charged with murder, a capital offense in New Jersey,[8] and both cases generated a substantial amount of publicity throughout the defendants' respective communities. In *Williams*, the defendant's court-appointed attorney asked the court to close the defendant's bail hearing.[9] Representatives of the local press intervened and asked to be heard on the closure application.[10] After a hearing had been held, the trial court denied the defendant's motion.[11] The defendant subsequently was denied leave to appeal to the Appellate Division of the Superior Court, and applied to the New Jersey Supreme Court for emergency relief.[12] The state supreme court granted the defendant leave to appeal and ordered that the bail hearing be held *in camera* and that the transcripts be impounded pending a more thorough analysis of the issues presented.[13]

In *Koedatich* the defendant moved that the court close his probable cause hearing.[14] Various members of the press contested the motion, and the court ultimately denied the defendant's application.[15] During the pendency of the defendant's motion for leave to appeal to the appellate division, the supreme court directly certified the case for its consideration, and allowed the hearing to be closed until it rendered its opinion in the two companion cases.[16]

The ultimate decision of the court was that the first amendment right of access applied to pretrial hearings as well as to trials.[17] While

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[6] *Id.* at 59, 459 A.2d at 651.

[7] *Id.* at 69 n.17, 459 A.2d at 657 n.17.

[8] N.J. STAT. ANN. § 2C:11-3 provides that under certain circumstances a person guilty of homicide may be sentenced to the death penalty.

[9] *Williams*, 93 N.J. at 48, 459 A.2d at 646.

[10] *Id.* at 49, 459 A.2d at 646.

[11] *Id.*

[12] *Id.*

[13] *Id.* The court had originally stayed the bail hearing. After leave to appeal had been granted, the stay was lifted and the court ordered the hearing to proceed *in camera*. The transcript of this hearing was to be sealed until the court decided the case. *Id.*

[14] *Id.* at 50, 459 A.2d at 646.

[15] *Id.*

[16] *Id.* at 51, 459 A.2d at 647; *see also supra* note 13 and accompanying text.

[17] *Williams*, 93 N.J. at 59, 459 A.2d at 651; *see supra* text accompanying note 6.

the court recognized that this right of access was not absolute, it found a presumption that criminal pretrial hearings would be open to the public. In balancing the constitutional interests at stake, the court held that a criminal defendant could overcome this presumption only upon a clear showing that an open hearing would present a "realistic likelihood of prejudice" to the defendant's fair trial guarantee.[18] The court further held that closure could be ordered only where less burdensome alternatives would not adequately protect the defendant.[19] The court relied on both the state and federal constitutions in adopting its balancing test.[20]

The *Williams* decision was not the first to deal with the closure issue; the United States Supreme Court had confronted similar issues in recent years. In *Gannett Co. v. DePasquale*,[21] members of the press objected, on both first and sixth amendment grounds, to an order barring themselves and the public from attending a pretrial suppression hearing. The Court held that the sixth amendment "right to a speedy and *public* trial" was a right which belonged to the accused, and not to the public at large.[22] Thus, the press did not have any right of access to trials via the sixth amendment.[23] The majority felt that prejudicial pretrial publicity could result in irreparable damage to a defendant's right to an impartial jury, and that closure was the most effective means of avoiding this problem.[24] Without deciding whether the first amendment guaranteed a right of access to the defendant's suppression hearing, the majority concluded that even if such a right did exist, the trial court had properly balanced it against the defendant's guarantee of an impartial jury.[25]

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[18] *Williams*, 93 N.J. at 63, 459 A.2d at 653-54.

[19] *Id.*, 459 A.2d at 654.

[20] *Id.* at 70 n.17, 459 A.2d at 654 n.17. "[T]he balancing test here prescribed is one that conforms to our own State Constitution and, we believe, is fully compatible with the First Amendment." *Id.*

[21] 443 U.S. 368 (1979).

[22] *Id.* at 381 (emphasis added in text).

[23] *Id.* at 387. The Court reviewed the history of public trials at common law and found that there was a presumption in favor of open judicial proceedings embodied within the sixth amendment, stating that "[t]here is no question that the Sixth Amendment permits and even presumes open trials as a norm." *Id.* at 385. The Court concluded, however, that public trials were not required by the sixth amendment. It further added that even if a right of access were contained in the sixth amendment, it did not embrace pretrial hearings. Relying upon "substantial evidence," the Court indicated that the public had no right to attend pretrial proceedings at common law. *Id.* at 387.

[24] *Id.* at 378-79.

[25] *Id.* at 392. "For even assuming, arguendo, that the First and Fourteenth Amendments may guarantee such access in some situations, a question we do not decide, this putative right was given all appropriate deference by the state nisi prius court in the present case." *Id.*

Chief Justice Burger, who joined the majority opinion, wrote separately to emphasize that the Court's decision only applied to pretrial hearings, and not to trials. The Chief Justice recognized the important public interest in open trials, but found no such interest for pretrial proceedings.[26] He believed that open pretrial hearings presented a grave threat to a criminal defendant's fair trial guarantee.[27]

Justice Powell joined the majority opinion but also wrote separately.[28] He believed that both the public and the press enjoyed a first amendment right of access to attend the defendant's hearing, but that such a right was not absolute.[29] He found that the trial court had correctly balanced the competing interests in allowing the hearing to be closed.[30] Justice Rehnquist, also concurring,[31] stated that he would have decided the first amendment question which was expressly left open by the Court.[32] He disagreed with Justice Powell, and argued that the first amendment did not contain any right of access for the public or the press.[33] According to Justice Rehnquist, the closure issue was not of a constitutional dimension, and was a matter better left to the sound discretion of the trial court.[34]

The dissent in *Gannett* took the position that the sixth amendment guaranteed an open and public trial.[35] Justice Blackmun, writ-

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[26] *Id.* at 394 (Burger, C.J., concurring).

[27] *Id.* at 396 (Burger, C.J., concurring).

[28] *Id.* at 397 (Powell, J., concurring).

[29] *Id.* at 397-98 (Powell, J., concurring). "It is limited both by the constitutional right of defendants to a fair trial, and by the needs of government to obtain just convictions and to preserve the confidentiality of sensitive information and the identity of informants." *Id.* at 398 (citation omitted).

[30] *Id.* at 403 (Powell, J., concurring). Justice Powell stated that the press should be given an opportunity to be heard on any motion to close the court. "At this hearing, it is the defendant's responsibility as the moving party to make some showing that the fairness of his trial likely will be prejudiced by public access to the proceedings." *Id.* at 401. The press would then have the opportunity to show that alternatives other than closure would adequately safeguard the defendant's right to a fair trial. *Id.* He found, as the majority had, that the lower court had followed these procedures and concluded that the granting of closure was not error. *Id.* at 403 (Powell, J., concurring).

[31] *Id.* at 403 (Rehnquist, J., concurring).

[32] *Id.* at 404 (Rehnquist, J., concurring); *see supra* note 25.

[33] *Gannett*, 443 U.S. at 405 (Rehnquist, J., concurring). "[T]his Court emphatically has rejected the proposition advanced in Mr. Justice Powell's concurring opinion . . . 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." *Id.*

[34] *Id.* at 406 (Rehnquist, J., concurring).

[35] *Id.* at 432-33 (Blackmun, J., concurring in part, dissenting in part).

ing for the dissent, analyzed the history[36] and function[37] of open trials at common law and found that the sixth amendment embodied the same concerns.[38] He concluded that the sixth amendment's guarantee of a "public trial" favored an open proceeding.[39] The dissent further found that a suppression hearing was within the ambit of the sixth amendment's public trial guarantee because it was the "close equivalent" of a trial.[40] Thus, the dissent concluded that suppression hearings should also be open to the public and press.[41] Justice Blackmun noted, however, that this presumption might be overridden where a criminal defendant could show that closure presented a "substantial probability" of jury bias.[42] The dissent did not address whether the first amendment, as opposed to the sixth, prohibited closure.[43]

The subsequent decision of the Supreme Court in *Richmond Newspapers, Inc. v. Virginia*[44] manifested a doctrinal shift in the Court's approach to the closure issue. In *Richmond Newspapers*, the Court reversed a state court's decision to close a criminal defendant's trial.[45] Relying on the historical basis for open criminal trials[46] as well as on their functional value,[47] Chief Justice Burger's plurality opinion

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[36] *Id.* at 418-27 (Blackmun, J., concurring in part, dissenting in part).

[37] *Id.* at 427-32 (Blackmun, J., concurring in part, dissenting in part).

[38] *Id.* at 427 (Blackmun, J., concurring in part, dissenting in part).

[39] *Id.* at 439 (Blackmun, J., concurring in part, dissenting in part).

[40] *Id.* at 436 (Blackmun, J., concurring in part, dissenting in part).

[41] *Id.*

[42] *Id.* at 440 (Blackmun, J., concurring in part, dissenting in part). To meet this burden, the defendant would have to show as a "substantial probability" that his fair trial right would suffer "irreparable damage," that any alternatives to closure would be inadequate, and that closure would be effective. *Id.* at 441-42 (Blackmun, J., concurring in part, dissenting in part).

[43] *Id.* at 447 (Blackmun, J., concurring in part, dissenting in part). "To the extent the Constitution protects a right of public access to the proceeding, the standards enunciated under the Sixth Amendment suffice to protect that right. I therefore need not reach the issue of First Amendment access." *Id.*

[44] 448 U.S. 555 (1980).

[45] *Id.* at 581.

[46] *Id.* at 564-69. Chief Justice Burger, the author of the plurality opinion, first outlined the historical development of open trials from the common law and concluded that "the historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open." *Id.* at 569.

[47] *Id.* at 569-73. The Chief Justice emphasized the "therapeutic value" of open trials. *Id.* at 569. Open criminal trials increased public awareness of the system, discouraged vigilantes, and enhanced public scrutiny. *Id.* at 570-73. The plurality went on to note the importance of the media as "surrogates for the public" in this educative role. *Id.* at 573; *see also* Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) ("A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field . . . . The press

held that the first amendment implicitly guaranteed to the public and the press a right to attend criminal trials.[48] As the lower court had failed to consider a less burdensome alternative to closure, the Supreme Court held that closure was improper.[49] Although there was no majority opinion in *Richmond Newspapers*, seven members of the Court[50] agreed that there was a first amendment right of access to criminal trials,[51] but that this right was not absolute.[52]

The Court's historical and functional approach to the closure issue was given a new dimension in *Globe Newspaper Co. v. Superior Court*.[53] In *Globe Newspaper*, the Massachusetts Supreme Judicial Court had interpreted a state statute to require mandatory closure in sex offense trials during the testimony of minor victims.[54] In finding the Massachusetts statute unconstitutional, Justice Brennan's majority opinion reiterated the two features of the first amendment right of access: the long history of open trials, and their functional value.[55] The majority noted that the right of access was not absolute, but indicated its preference for open trials by holding that closure would be justified only by a "compelling governmental interest . . . narrowly tailored to serve that interest."[56] The Court found that the state's asserted interest in protecting minors from trauma and embarrassment was indeed compelling, but that nevertheless, mandatory clo-

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does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.").

[48] *Richmond Newspapers*, 484 U.S. at 580. The plurality relied on the first amendment freedoms of speech, press, and assembly. *Id.* at 577.

[49] *Id.* at 580-81.

[50] Justice Powell did not participate in the decision and Justice Rehnquist dissented, believing that nothing in the Constitution prohibited a state from closing a criminal trial. *Id.* at 606 (Rehnquist, J., dissenting).

[51] *Id.* at 580 (Burger, C.J., joined by White and Stevens); *id.* at 585 (Brennan, J., concurring, joined by Marshall); *id.* at 599 (Stewart, J., concurring); *id.* at 604 (Blackmun, J., concurring).

[52] *Id.* at 581 n.18 (Burger, C.J., joined by White and Stevens); *id.* at 588 (Brennan, J., concurring, joined by Marshall); *id.* at 600 (Stewart, J., concurring); *id.* at 603-04 (Blackmun, J., concurring).

[53] 457 U.S. 596 (1982).

[54] *Id.* at 601-02. Prior to trial, the defendant had objected to closure of the trial. *Id.* at 599. The Massachusetts Supreme Judicial Court interpreted the state statute to require mandatory closure during testimony by minors notwithstanding the fact that the defendant opposed closure. *Id.* at 601-02.

[55] *Id.* at 605-06.

[56] *Id.* at 606-07.

sure was impermissible.[57] Justice O'Connor concurred in the judgment of the Court, yet wrote separately to emphasize her belief that the right of access applied only to criminal trials.[58]

Chief Justice Burger, the author of the plurality opinion in *Richmond Newspapers*, dissented.[59] He disagreed with the majority's broad interpretation of *Richmond Newspapers*, and noted the absence of any historical basis for open testimony by minor victims of sex crimes.[60] The dissent believed that, because the interests of the state were compelling,[61] the *Richmond Newspapers* test had been met,[62] and a minimal impact upon first amendment rights was reasonable under the circumstances.[63]

While the Supreme Court was deciding the extent of the right of access to judicial proceedings, the New Jersey courts were struggling with the same issue. In *State v. Allen*,[64] the New Jersey Supreme Court reviewed a trial court's order prohibiting the publication of inadmissible testimony obtained during evidentiary hearings.[65] The New Jersey Supreme Court, relying upon *Nebraska Press Association v. Stuart*,[66] held these orders unconstitutional because the press had an absolute right to report on testimony offered in open court.[67] Recognizing that the defendants' rights to fair trials were at stake, the court suggested alternatives to the use of "gag orders."[68] One alternative

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[57] *Id.* at 607-08.

> In short, [the statute] cannot be viewed as a narrowly tailored means of accomodating [sic] the State's asserted interest: That interest could be served just as well by requiring the trial court to determine on a case-by-case basis whether the State's legitimate concern for the well-being of the minor victim necessitates closure. Such an approach ensures that the constitutional right of the press and public to gain access to criminal trials will not be restricted except where necessary to protect the State's interest.

Id. at 609.

[58] *Id.* at 611 (O'Connor, J., concurring).

[59] *Id.* at 612 (Burger, C.J., dissenting). He was joined by Justice Rehnquist, the only dissenter in *Richmond Newspapers*. *See supra* note 50.

[60] *Globe Newspaper*, 457 U.S. at 614 (Burger, C.J., dissenting) (citing *Richmond Newspapers*, 448 U.S. at 573).

[61] *See supra* note 57 and accompanying text.

[62] *Globe Newspaper*, 457 U.S. at 616 (Burger, C.J., dissenting).

[63] *Id.* at 619-20 (Burger, C.J., dissenting).

[64] 73 N.J. 132, 373 A.2d 377 (1977).

[65] *Id.* at 135, 373 A.2d at 378.

[66] *See supra* notes 1-2 and accompanying text.

[67] *Allen*, 73 N.J. at 140, 373 A.2d at 380; *see supra* note 2.

[68] *Allen*, 73 N.J. at 141-42, 373 A.2d at 381-82. Among the alternatives listed were: sequestration of the jury, clear jury instructions, and the use of *in camera* proceedings. *Id.*

suggested was to hold the hearings *in camera* upon the defendants' consent.[69] The court noted that such a procedure might be subject to constitutional infirmities, and stated in dicta that even if it were permissible, it would have to be used with caution.[70] The court advised that closure would be proper only when less burdensome alternatives were unavailable and only upon a "clear showing of a serious and imminent threat to the integrity of the trial."[71]

Justice Pashman's concurring opinion noted that *in camera* proceedings were suspect.[72] Although the constitutionality of closure had not yet been determined by the United States Supreme Court, Justice Pashman emphasized that both historical and first amendment considerations were implicated in any decision to close a trial.[73] Justice Schreiber also concurred, defending the constitutionality of *in camera* proceedings.[74] He concluded that *in camera* proceedings were a permissible means of safeguarding a criminal defendant's sixth amendment rights.[75]

The closure alternative suggested in *Allen* was not followed by the lower courts in New Jersey. In *State v. Joyce*[76] the defendants moved that the trial court exclude the press from a pretrial hearing in

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[69] *Id.* at 142, 373 A.2d at 382. The defendant's consent would be necessary in order to safeguard his sixth amendment right to a public trial. *See supra* text accompanying note 22.

[70] *Allen*, 73 N.J. at 143-45, 373 A.2d at 382-83.

> Against this course must be balanced the concept that court proceedings should be subject to public scrutiny and that the public has a right to expect that criminal trials will be conducted in open court . . . . It has been suggested that this may be a constitutional requirement.
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> From the standpoint of the press, the *in camera* procedure, while not a direct restraint, arguably achieves the same result by more subtle means and becomes in effect a prior restraint on the news-gathering ability of the press.

Id. at 144, 373 A.2d at 382-83 (citations omitted).

[71] *Id.* at 145, 373 A.2d at 383. The court also stated that where a defendant's fair trial guarantee was likely to be threatened by prejudicial publicity, the trial court could utilize other alternatives to closure. *Id.*

> In such circumstances, the trial court has available additional means such as (a) adjournment of the trial to allow public attention to subside, (b) change of venue, (c) foreign jury, (d) searching questioning of prospective jurors to screen out those infected by pretrial publicity and, (e) emphatic and clear instructions to the jury to decide the issues only on evidence presented in open court.

Id.

[72] *Id.* at 166-68, 373 A.2d at 393-95 (Pashman, J., concurring).

[73] *Id.* at 167, 373 A.2d at 394 (Pashman, J., concurring). Interestingly, Justice Pashman's approach was similar to that later employed by the Supreme Court in *Richmond Newspapers*. *See supra* notes 46-47 and accompanying text.

[74] *Allen*, 73 N.J. at 170, 373 A.2d at 395 (Schreiber, J., concurring).

[75] *Id.* at 178, 373 A.2d at 400 (Schreiber, J., concurring).

[76] 160 N.J. Super. 419, 390 A.2d 151 (Law Div. 1978), *aff'd sub nom.* State v. De Bellis, 174 N.J. Super. 195, 413 A.2d 986 (App. Div. 1980).

order to protect their right to a trial by an impartial jury.[77] The court denied the defendants' motion, noting that it had other alternatives to consider prior to trial when the jury had not been empanelled.[78] Questioning the constitutionality of closure, the trial judge decided to allow the defendants a more extensive *voir dire*.[79] The trial court believed that the defendants' assertion of prejudice was speculative, while the first amendment implications were definite and concrete.[80]

In *State v. Hannah*,[81] the trial court had ordered that all pretrial hearings be held *in camera* in order to avoid any prejudicial publicity before trial.[82] The appellate division reversed the closure order because the trial court had not offered any factual basis for such an order.[83] Based upon the United States Supreme Court's holding in *Gannett Co. v. DePasquale*[84] and the New Jersey Supreme Court's suggestion in *State v. Allen*,[85] the court found that three conditions must be met in order to justify closure: a threat of prejudice, the absence of other, less intrusive alternatives, and a narrowly drawn closure order.[86] The court concluded that none of these conditions had been met.[87]

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[77] *Id.* at 423, 390 A.2d at 152.

[78] *Id.* at 424, 390 A.2d at 153.

[79] *Id.* at 426, 390 A.2d at 154. The trial court felt that under such circumstances closure would be unnecessary unless all other alternatives were unavailable. *Id.*

[80] *Id.* at 428, 390 A.2d at 155. The speculative nature of the defendant's claim was demonstrated by a Postscript added to the trial court's opinion:

> *POSTSCRIPT*: This opinion was completed after the jury was selected. It is interesting to note that what at the outset appeared as an explosive confrontation between the First and Sixth Amendment rights, when put to the acid test of reality, fizzled like a pricked balloon. Of the 102 prospective jurors *voir dired* only three read or heard anything about the case, even though the newspapers and radio stations carried almost daily reports of the [pretrial] hearing which lasted six days, and several of the newspaper accounts bore what some would term sensational headlines.

Id. at 430, 390 A.2d at 156.

[81] 171 N.J. Super. 325, 408 A.2d 1349 (App. Div. 1979).

[82] *Id.* at 327, 408 A.2d at 1350.

[83] *Id.* at 330, 408 A.2d at 1352.

[84] 443 U.S. 368 (1979); *see supra* notes 21-43 and accompanying text.

[85] 73 N.J. 132, 373 A.2d 377 (1977); *see supra* notes 64-75 and accompanying text.

[86] *Hannah*, 171 N.J. Super. at 331-32, 408 A.2d at 1352.

> (1) There must be a "clear showing of a serious and imminent threat to the integrity of the trial.". . . Mr. Justice Powell, in his concurring opinion in *Gannett v. DePasquale*,. . . stated that a defendant seeking closure must "make some showing that the fairness of his trial will likely be prejudiced by public access to the proceedings."
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> (2) The court must first consider all available alternatives and conclude they are not feasible or proper under the circumstances.
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> (3) The order of closure should be no more extensive than the circumstances fairly require.

Id. (citations omitted).

[87] *Id.* at 332, 408 A.2d at 1352-53.

This evolving body of state and federal law persuaded the New Jersey Supreme Court to address the closure issue directly in *State v. Williams*.[88] In *Williams*, the court tried to strike the proper balance between the first amendment right of access and the sixth amendment guarantee of an impartial jury. The court was confronted with a question which had not been decided in any of the previous cases—specifically, whether the first amendment right of access applied to pretrial hearings.[89] A further problem was presented in that no clearly defined standards existed for the courts to apply in reviewing closure applications.[90] The court resolved both matters in an authoritative manner, relying upon both the state and federal constitutions for its decision.

Justice Handler, writing for the majority, noted that there recently had been "major developments" in the law regarding closure of the courts.[91] The *Williams* majority acknowledged that the United States Supreme Court had never extended the first amendment right of access to pretrial hearings.[92] Utilizing the Supreme Court's historical and functional approach to closure, the majority concluded that such an extension was logical.[93] The court pointed to the increased importance of pretrial proceedings in the modern criminal process and concluded that open hearings furthered important "institutional values."[94] The court also relied on the "unbroken tradition" of con-

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[88] 93 N.J. 39, 459 A.2d 641 (1983).

[89] *See supra* text accompanying note 25.

[90] *See Williams*, 93 N.J. at 69-70 n.17, 459 A.2d at 657 n.17; *see also infra* notes 172-74 and accompanying text.

[91] *Williams*, 93 N.J. at 47, 459 A.2d at 645.

[92] *Id.* at 51-52, 459 A.2d at 647.

[93] *Id.* at 58, 459 A.2d at 651.

[94] *Id.* at 54, 459 A.2d at 648.

> Conducting pretrial criminal proceedings in an atmosphere of secrecy is offensive to the general public and undermines the public trust essential to an effective judicial system . . . . In addition to kindling public misperception and eroding public confidence, closure of significant pretrial proceedings perpetuates general ignorance and cuts off public knowledge necessary to a full understanding of the criminal justice system . . . . Conversely, the openness of pretrial hearings in criminal cases fosters an informed public "discussion of governmental affairs." . . . Open proceedings contribute to the public's knowledge and encourage a general appreciation of the administration of criminal justice.

Id. at 54-55, 459 A.2d at 648-49 (citations omitted).

ducting such hearings in open court.[95]

The majority, however, did not confine its analysis of the right of access to the Federal Constitution. Justice Handler found the state constitution to be an alternative basis for such a right at the pretrial stages.[96] The court recognized that the United States Supreme Court cases finding a right of access under the Federal Constitution had dealt only with trials.[97] The *Williams* majority found that article 1, paragraph 6 of the state constitution[98] embodied the same analytical principles regarding a right of access as did the first amendment.[99] The majority concluded once again that both history and logic dictate that the state constitutional right of access embraces pretrial hearings.[100]

The majority recognized that the right of the public and of the press to attend criminal proceedings did not "exist in a vacuum" and therefore had to be balanced against a defendant's right to a fair trial and an impartial jury.[101] The court emphasized that the defendant's right was essential under both the federal and state constitutions.[102]

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[95] *Id.* at 55, 459 A.2d at 649. The majority conceded that the history of openness for pretrial proceedings was not "centuries old." *Id.* Nevertheless, the majority concluded that pretrial proceedings historically were open to the public and the press. *Id.* "The near uniform practice in the federal and state court systems has been to conduct pretrial criminal proceedings in open court." *Id.*

[96] *Id.* at 57, 459 A.2d at 650. "In the absence of a definitive Supreme Court determination on this question, we consider the State Constitution as an alternative basis for the public's right of access to the pretrial stages of a criminal prosecution." *Id.* (footnote omitted).

[97] *Id.* "Although we firmly believe that the federal constitutional right of access extends to criminal pretrial proceedings, we acknowledge that the Supreme Court in *Richmond Newspapers* and *Globe Newspaper* carefully confined its decisions to the criminal trial itself." *Id.*

[98] N.J. CONST. art. I, para. 6 provides in pertinent part: "No law shall be passed to restrain or abridge the liberty of speech or of the press." *Id.*

[99] *Williams*, 93 N.J. at 58, 459 A.2d at 651. The majority found it unnecessary, however, to decide whether the state constitutional right was more extensive than the right recognized under the Federal Constitution.

> In defining the basis and character of this significant state constitutional right, we need not decide whether the provisions of the State Constitution require more extended protection of expressional freedoms in this context than the First Amendment as we have interpreted it under the guidance of the *Richmond Newspapers* and *Globe Newspaper* decisions.

Id. at 58-59, 459 A.2d at 651.

[100] *Id.* at 59, 459 A.2d at 651.

[101] *Id.*

[102] *Id.* at 60-61, 459 A.2d at 652. *Compare* Sheppard v. Maxwell, 384 U.S. 333 (1966) (sixth amendment guarantee to impartial jury is essential to fair trial) *with* State v. Jackson, 43 N.J. 148, 157-58, 203 A.2d 1, 6 (1964) (triers of fact must be " 'as nearly impartial' 'as the lot of humanity will admit' "), *cert. denied*, 379 U.S. 982 (1965).

Emphasis also was placed on the requirement of impartiality in capital cases.[103] Thus, the majority concluded that the court's role was to ease this "tension" between the conflicting constitutional guarantees of fairness and access by enunciating a standard for the courts to apply.[104] The majority found, however, that the judiciary's duty to provide impartial juries[105] usually could be satisfied without resorting to closure.

The *Williams* majority concluded that all hearings presumptively were open to the public and to the press.[106] In order to protect the defendant's right to a fair trial by an impartial jury, a balancing test was established for the New Jersey courts to utilize in ruling on all pretrial closure applications. To overcome the presumption of openness, a defendant must show clearly that pretrial publicity presents a "realistic likelihood of prejudice."[107] Once the defendant meets this burden, the trial court then must determine whether closure is the only alternative which adequately will protect the defendant's rights.[108] The defendant[109] thus would have to produce sufficient evidence to show that extensive publicity might influence jurors in their decisions.[110] The court asserted that the defendant was in the best position to produce such evidence because he would be most aware of such publicity and its adverse impact.[111]

In assessing the likelihood of jury bias, the courts were directed to consider all of the surrounding circumstances, including the probable

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[103] *Williams*, 93 N.J. at 61, 459 A.2d at 652. "The death penalty is a categorical imperative for trial fairness." *Id.*

[104] *Id.* at 62, 459 A.2d at 653. The court was aware of the need for a definitive standard.

> We must determine the standards to be applied by trial courts in balancing, on the one hand, the constitutional right of public access to criminal pretrial proceedings and, on the other, the constitutional right of a defendant to a fair trial before impartial jurors. We consider the key to the solution of this difficult and delicate problem to be the central role of the court itself in ensuring the integrity of the judicial process, which includes the proper accommodation of these contesting constitutional interests.

Id.

[105] *Id.* at 63, 459 A.2d at 653.

[106] *Id.*

[107] *Id.*, 459 A.2d at 653-54.

[108] *Id.*

[109] *Id.* at 64, 459 A.2d at 654. In a footnote the court noted that a prosecutor or even the court might seek closure under appropriate circumstances. *Id.* at 64 n.8, 459 A.2d at 654 n.8.

[110] *Id.* at 64, 459 A.2d at 654. A defendant would have to produce evidence of extensive prejudicial publicity prior to the hearing which, accompanied by the anticipated publicity for the hearing, would be likely to "create bias in the minds of potential jurors." *Id.*

[111] *Id.*

scope and impact of any adverse publicity.[112] The majority emphasized that the issues and evidence to be presented in the proceeding for which closure is sought would be particularly significant in assessing the likelihood of prejudice.[113] The court further noted that the dangers of juror bias were especially acute in capital cases because a bifurcated trial presents possibilities of prejudice to two different juries.[114] If it is determined that pretrial publicity will be both extensive and prejudicial to the defendant, the trial court then must determine whether any other alternatives are feasible.[115] The alternatives suggested by the majority were: larger pools of potential jurors;[116] changes of venue;[117] more extensive *voir dires*;[118] and cautionary instructions to jurors.[119]

In order to ensure fairness and uniform application of the court's balancing test, certain procedures were to be observed by the trial courts.[120] Members of the press were to be given notice and an oppor-

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[112] *Id.*

[113] *Id.* at 64-65, 459 A.2d at 654.

[114] *Id.* at 65, 459 A.2d at 654-55. Under New Jersey's homicide statute, the issues of guilt and punishment are tried separately. *See* N.J. STAT. ANN. § 2C:11-3(c)(1)(West 1982). Thus, it is possible that two different juries will decide different aspects of the case. *Williams*, 93 N.J. at 65 n.9, 459 A.2d at 654-55 n.9.

[115] *Williams*, 93 N.J. at 66, 459 A.2d at 655.

[116] *Id.* at 67, 459 A.2d at 655. "The court should explore the feasibility of augmenting the pool of eligible jurors in the vicinage, and should consider the practicability of using citizens from beyond the particular vicinage to serve as potential jurors, the use of so-called 'foreign jurors.' " *Id.* at 67, 459 A.2d at 655 (footnote omitted). The court noted that the use of foreign jurors might in certain cases implicate a defendant's right to be tried by a jury of his peers. *Id.* at 67 n.12, 459 A.2d at 655-56 n.12. Additional problems presented were that the New Jersey Court Rules permitted only an assignment judge to appoint foreign jurors, R. 3:14-2, and that a defendant's peremptory challenges were reduced from 20 to five when foreign juries were used, R. 1:8-3(d). In order to encourage the use of foreign jurors as an alternative to closure, the *Williams* majority suspended those rules. *Williams*, 93 N.J. at 67 n.12, 459 A.2d at 655 n.12.

[117] *Williams*, 93 N.J. at 67 & n.13, 459 A.2d at 655-56 & n.13. The court noted that changes of venue were difficult to obtain because of the court's holding in State v. Wise, 19 N.J. 59, 115 A.2d 62 (1955), which held that clear and convincing proof of juror bias was required in order to grant a change of venue. The court overruled this decision in order to allow a change of venue where the trial judge concluded that it was necessary to avoid a realistic likelihood of prejudice. *Williams*, 93 N.J. at 67-68 n.13, 459 A.2d at 656 n.13.

[118] *Id.* at 68-69, 459 A.2d at 656. The court noted that trial judges should give special attention to the proposed questions of attorneys on *voir dire*. *Id.* The trial court would also be allowed to excuse jurors for cause more willingly in favor of the defendant, especially in capital cases. *Id.*

[119] *Id.* at 69, 459 A.2d at 656. The court noted that the use of cautionary instructions as an effective means of eliminating jury bias was subject to some debate. *Id.* at 68-69 n.16, 459 A.2d at 656 n.16.

[120] *Id.* at 71-73, 451 A.2d at 657-59. The court made it clear that its opinion did not intend to resolve every contingency which might arise in a closure application. It therefore ordered that the procedure followed for closure applications would be a continuing course of study by the

tunity to be heard on all closure applications.[121] The trial court, in its discretion, would be permitted to close sensitive portions of the closure hearing in order to protect the defendant's rights.[122] Finally, the trial court would be compelled to disclose its findings in order to facilitate appellate review.[123] The *Williams* majority noted that in the cases before the court, closure of the two hearings had been allowed pending the court's ultimate decision.[124] In light of its decision, the court vacated its earlier orders and decided that the impounded transcripts should be made available to the public and to the press.[125]

Justice Schreiber was the lone dissenter in *Williams*.[126] He disagreed with the balancing test enunciated by Justice Handler and argued that the majority had not given proper weight to the defendant's interest in a fair trial.[127] Justice Schreiber's interpretation of the closure cases decided by the United States Supreme Court was vastly different from that of the *Williams* majority. Justice Schreiber viewed *Globe Newspaper* as a very narrow decision because the defendant in *Globe Newspaper* actually had opposed closure.[128] He asserted that *Globe Newspaper* merely was concerned with a state statutory policy and not with the defendant's sixth amendment guarantee of a fair trial by an impartial jury.[129] Justice Schreiber, relying upon Justice Ste-

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Supreme Court's Committee on the Criminal Rules of Procedure and the Committee of Judges on Capital Causes. *Id.* at 71 & n.18, 459 A.2d at 657-58 & n.18.

[121] *Id.* at 72-73, 459 A.2d at 658. The parties allowed to participate on the closure application would be determined by the court in its sole discretion. *Id.* at 72, 459 A.2d at 658; *see also* United States v. Criden, 675 F.2d 550, 557-60 (3d Cir. 1982). "[S]ome notice must be given that is calculated to inform the public that its constitutional rights may be implicated in a particular criminal proceeding." *Id.* at 559. The Third Circuit resolved the notice issue by requiring the district court to enter motions for closure on the case docket "sufficiently in advance of any hearing" so as to provide members of the public and of the press an opportunity to present any objections to closure. *Id.*

[122] *Williams*, 93 N.J. at 73, 459 A.2d at 659. The court noted that closing the closure hearing would not be a commonplace event. "By this direction, we intend no more than to emphasize the discretionary authority of the trial judge to ensure that the potentially prejudical material is not prematurely revealed before the meritorious issue itself can be resolved." *Id.* (citing *Globe Newspaper*, 457 U.S. at 609 n.25).

[123] *Id.* at 73, 459 A.2d at 659. The court emphasized that this is extremely important when judicial notice is taken or the court relies on its own expertise. *Id.*

[124] *See supra* notes 13, 16 and accompanying text.

[125] *Williams*, 93 N.J. at 74, 459 A.2d at 659.

[126] *Id.* (Schreiber, J., dissenting).

[127] *Id.* Justice Schreiber felt that the majority should have been more sensitive to the rights of defendants in capital cases. *Id.*

[128] *See supra* note 54 and accompanying text.

[129] *Williams*, 93 N.J. at 76, 459 A.2d at 660 (Schreiber, J., dissenting).

wart's opinion in *Gannett Co. v. DePasquale*, argued that a defendant only need show a "reasonable probability of prejudice" to justify closure.[130]

Justice Schreiber objected to the *Williams* majority's test for a number of reasons. He felt that requiring a defendant to show "clearly" a "realistic likelihood" of prejudice placed an unfair burden on the defendant.[131] While the majority had stated that the standard of proof on a closure application was a mere preponderance of the evidence,[132] Justice Schreiber argued that the use of the word "clearly" had the practical effect of changing the defendant's burden to a "clear and convincing" standard.[133] Justice Schreiber also asserted that the defendant's burden would be increased substantially if the defendant were required to prove the inadequacy of every other alternative to closure.[134] The Justice argued that once the defendant had met his burden of proof, closure was justified.[135] He insisted that those objecting to closure should logically have the burden of providing an effective alternative.[136]

Finally, Justice Schreiber objected to the majority's use of the state constitution as an alternative basis for its decision.[137] He argued that if the first amendment itself guaranteed a right of access to pretrial hearings, the majority did not need to resort to the state

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[130] *Id.* at 76, 459 A.2d at 660 (Schreiber, J., dissenting). Justice Handler had earlier disputed the contention of Justice Schreiber that *Gannett* had set any standard for closure and noted that the "reasonable probablity" test was merely a quotation from the holding of the trial court in that case. *Id.* at 69 n.17, 459 A.2d at 657 n.17.

[131] *Id.* at 77, 459 A.2d at 661 (Schreiber, J., dissenting).

[132] *Id.* at 71 n.17, 459 A.2d at 657 n.17.

[133] *Id.* at 77, 459 A.2d at 661 (Schreiber, J., dissenting). "[T]o say that one must be clearly satisfied that a fact has been proven by a preponderance of the evidence is simply another way of saying that the evidence must clearly and convincingly produce a firm belief in the existence of the fact." *Id.* Justice Schreiber concluded that the majority's contention that the defendant's burden of proof was a mere preponderance of the evidence, *see supra* note 132 and accompanying text, was a "distinction without a difference." *Williams*, 93 N.J. at 77, 459 A.2d at 661 (Schreiber, J., dissenting). He asserted that the majority's use of the word "clearly" would result in the application of a "clear and convincing" standard by trial courts. *Id.* at 77-78, 459 A.2d at 661 (Schreiber, J., dissenting).

[134] *Williams*, 93 N.J. at 79, 459 A.2d at 662 (Schreiber, J., dissenting). Justice Schreiber questioned whether under the majority's standard, the defendant had this burden. *Id.* at 79 n.4, 459 A.2d at 662 n.4 (Schreiber, J., dissenting). He noted, however, that this burden clearly was not on the public and the press. *Id.*

[135] *Id.* at 79, 459 A.2d at 662 (Schreiber, J., dissenting). He argued that once a "realistic likelihood of prejudice" had been demonstrated, closure presumptively was valid. *Id.*

[136] *Id.*

[137] *Id.* at 80, 459 A.2d at 662 (Schreiber, J., dissenting).

constitution at all.[138] If, however, the first amendment did not guarantee such a right, he asserted that the use of the state constitution as an alternative basis was meaningless.[139] A state constitutional right of access could not by itself override the minimum protection guaranteed to all criminal defendants by the sixth amendment.[140] Justice Schreiber concluded that the balance in such a case would depend on the weight of the sixth amendment and that this was a determination to be made by the United States Supreme Court, not the states.[141]

The significance of the New Jersey Supreme Court's opinion in *Williams* lies in its unique approach to the closure issue. As the first amendment right of access had not been explored fully by the United States Supreme Court, the *Williams* majority was compelled to confront two unanswered questions. It first had to determine whether the right of access was applicable to pretrial proceedings. It also had to decide the appropriate standard to be applied by the lower courts when balancing the conflicting interests of the public and the press against those of criminal defendants. Most importantly, the court had to determine whether the state constitution independently guaranteed a pretrial right of access and demanded a particular showing before closure could be ordered. Ultimately, the state constitution had a significant impact upon the resolution of these two issues. In fact, these issues were inextricably entwined with the state constitutional issue.

The implications of a decision based on state constitutional guarantees are manifest. The United States Supreme Court does not possess appellate jurisdiction of cases decided upon "adequate and independent" state grounds.[142] The New Jersey Supreme Court decides the

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[138] *Id.*

[139] *Id.*

[140] *Id.*

> [I]f there is no federal First Amendment right to attend these pretrial proceedings, the validity of a state constitutional right would depend on the extent and nature of the defendant's federal Sixth Amendment constitutional right, as explicated and to be explicated by the Supreme Court. Defining the press' state constitutional right is of little moment without knowing the pull and impact of the defendant's federal constitutional right.

Id.

[141] *See supra* note 140.

[142] 28 U.S.C. § 1257 (1976) provides appellate jurisdiction for the United States Supreme Court to review state court decisions. The Supreme Court has no jurisdiction, however, when the state court decision is based upon an interpretation of state law which is sufficient to support the state court's holding. *See* Klinger v. Missouri, 80 U.S. 257 (1871); *see also* Murdock v. City of Memphis, 87 U.S. 590 (1874). The dual bases for the doctrine of adequate and independent state

weight to be given to its state constitutional guarantees,[143] and the United States Supreme Court ultimately assesses the minimum requirements of the Federal Constitution.[144] By virtue of the supremacy clause, anything which falls below the federally guaranteed minimum is unconstitutional.[145] If the state constitution provides a truly independent basis for a particular decision by a state court, however, the Supreme Court may not even review the case to correct errors in the state court's interpretation of the Federal Constitution.[146]

In extending the right of access to pretrial proceedings, the *Williams* majority adopted the analysis which had been employed by the United States Supreme Court in *Richmond Newspapers* and *Globe Newspaper*.[147] Thus, the *Williams* court correctly concluded that the "institutional value" of open pretrial hearings was justified by both "logic and experience."[148] While many questions were left unanswered by *Richmond Newspapers* and *Globe Newspaper*, it became clear that the boundaries of this first amendment right of access would be determined by its historical basis and functional value. The historical and functional components of the right of access will sometimes be diametrically opposed to one another. At this point, a functional view of the right of access is necessary to preserve the structural role of the first amendment, and the functional rather than the historical analysis

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grounds are "[r]espect for the independence of state courts, as well as avoidance of rendering advisory opinions." Michigan v. Long, 103 S. Ct. 3469, 3475 (1983). *See generally* Comment, *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1331-33 (1982).

[143] State v. Johnson, 68 N.J. 349, 353 n.2, 346 A.2d 66, 68 n.2 (1975); *see also* Prune Yard Shopping Center v. Robins, 447 U.S. 74, 81 (1980) (each state has "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution"). *See generally* Brennan, *State Constitution and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

[144] *See* Comment, *supra* note 142, at 1333-34.

[145] U.S. CONST. art. VI, cl. 2 provides:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.; *see also* Comment, *supra* note 142, at 1334. "[S]tate constitutions may always be used to supplement or expand federally guaranteed constitutional rights, but may never be used to undermine or infringe them. Federal law sets a minimum floor of rights below which state courts cannot slip." *Id.*

[146] Herb v. Pitcairn, 324 U.S. 117, 126 (1945).

[147] *Williams*, 93 N.J. at 58, 459 A.2d at 651.

[148] *Id.* at 57, 459 A.2d at 650.

should determine whether a *pretrial* proceeding should be open to the public and the press.[149] Historically, criminal pretrial proceedings have been open to the public and the press,[150] and modern criminal procedure favors open pretrial hearings.[151] If the history of open pretrial proceedings is not as extensive as that of open trials, it is essentially because many pretrial hearings are relatively modern innovations.[152] Further, a pretrial right of access does not require any drastic change in the judicial system. As historical considerations are an important component of the right of access,[153] a pretrial presumption of openness need not apply to proceedings which traditionally have been closed. The right of access, therefore, would not jeopardize the secrecy of grand jury proceedings.[154] Further, the right of access would not apply to proceedings which are not adjudicative because these proceedings do not enjoy the tradition of openness shared by most other pretrial proceedings.[155] Functionally, open pretrial pro-

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[149] *See* United States v. Criden, 675 F.2d 550, 555 (1982) ("*Richmond Newspapers* relies in part on history to find a first amendment right of access to criminal trials. We do not think that historical analysis is relevant in determining whether there is a first amendment right of access to pretrial criminal proceedings"); *accord* Comment, *Free Press—Fair Trial: A Proposal to Extend the Right of Access to Encompass Pretrial Proceedings*, 52 U. CIN. L. REV. 524, 535-36 (1983). This historical and functional approach has introduced both static and dynamic concepts to the first amendment right of access. The static component of the right of access requires historical evidence of an open proceeding. Closure would be improper only when a particular proceeding had traditionally been open to the public and the press. The dynamic component of the right of access requires a functional analysis of first amendment values. If the goals of the first amendment would be furthered by an open proceeding, then closure would be improper.

[150] *See* Fenner & Koley, *Access to Judicial Proceedings: To* Richmond Newspapers *and Beyond*, 16 HARV. C.R.-C.L. L. REV. 415, 434 (1981); *see also Williams*, 93 N.J. at 55-56 & n.6, 459 A.2d at 650 & n.6 (*Williams* majority noted New Jersey courts were particularly steeped in tradition of openness for pretrial criminal proceedings). *But see Gannett*, 443 U.S. at 387-91 (majority concluded "[c]losed pretrial proceedings have been a familiar part of the judicial landscape in this country. . . .").

[151] *See Williams*, 93 N.J. at 55 & n.5, 459 A.2d at 649 & n.5 (listing practices of various federal and state courts).

[152] *See* United States v. Criden, 675 F.2d 550, 555 (1982) ("[T]here was no counterpart at common law to the modern suppression hearing."); *see also* Fenner & Koley, *supra* note 150, at 434 & n.97 (modern pretrial proceedings traditionally are open to public and are closed only for "reasons of efficiency rather than secrecy, and because the public has not sought access").

[153] *Cf.* Press-Enterprise Co. v. Superior Court, 52 U.S.L.W. 4113 (U.S. Jan. 18, 1984). *Press-Enterprise* was decided subsequent to the New Jersey Supreme Court's decision in *Williams*. In *Press-Enterprise* the United States Supreme Court found closure of the jury *voir dire* in a capital case to be impermissible. The Court relied heavily upon the historical evidence favoring an open *voir dire*. *Id.* at 4114-15. The Court apparently considered the *voir dire* to be part of the criminal trial, and thus did not address the application of the historical analysis to pretrial proceedings. *See supra* note 149 and accompanying text.

[154] *See* Fenner & Koley, *supra* note 150, at 434.

[155] *See id.* (pretrial depositions and interrogatories characterized as nonjudicial and no right of access to such proceedings was necessary until part of public record at judicial proceeding).

ceedings promote the same goals furthered by open trials. Public scrutiny guarantees the accountability of the entire criminal process.[156] Publicity serves as an implicit check on the judicial system, which is essential to a democratic system of government.[157] Open hearings promote public trust in the system.[158] When a decision of enormous public interest is made prior to trial, the public or the press must be present in order to understand and to evaluate the decision.[159] Allowing press coverage of pretrial proceedings also fosters education of the public at large.[160] With the vastly increased importance of pretrial proceedings in the modern criminal justice system, the functional value of open pretrial proceedings is equivalent to that of open trials.[161]

The *Williams* majority's extension of the right of access to the pretrial stages promotes the dynamic structural objectives of the first amendment without infringing on those of the sixth amendment. Assuming that open pretrial hearings do increase the likelihood of juror bias, this danger may be avoided by resorting to one of the many alternatives to closure. A defendant's fear of juror bias should be assuaged by an exhaustive *voir dire*.[162] Obviously, any claim of juror bias which is made before the jury has been empanelled is speculative at best,[163] because a realistic appraisal of the effect of any adverse

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[156] *See Richmond Newspapers*, 448 U.S. at 569 & n.7 (quoting J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827)); *id.* at 595 (Brennan, J., concurring); *see also* Fenner & Koley, *supra* note 150, at 435-36.

[157] *See Richmond Newspapers*, 448 U.S. at 596 (Brennan, J., concurring).

[158] "Secrecy is profoundly inimical to this demonstrative purpose of the trial process." *Richmond Newspapers*, 448 U.S. at 595 (Brennan, J., concurring); *see also* Fenner & Koley, *supra* note 150, at 435.

[159] *See* Fenner & Koley, *supra* note 150, at 435.

[160] *Richmond Newspapers*, 448 U.S. at 572; *id.* at 587-88 (Brennan, J., concurring). The press reports on a variety of matters which most citizens are unable to observe firsthand. Thus, members of the press function "as surrogates for the public." *Id.* at 573.

[161] *See* United States v. Criden, 675 F.2d 550, 555-57 (1982) ("[T]he same societal interests and structural arguments that mandated a first amendment right of access to criminal trials in *Richmond Newspapers* apply with equal force to pretrial criminal proceedings."); *see also* Fenner & Koley, *supra* note 150, at 435-37.

[162] *See Allen*, 73 N.J. at 161, 373 A.2d at 391 (Pashman, J., concurring). *See generally Joyce*, 160 N.J. Super. at 427, 390 A.2d at 154.

[163] *See Joyce*, 160 N.J. Super. at 428, 390 A.2d at 155.

> Before this court could conclude that the presence of the news media during the [pretrial] hearing will result in prejudice to defendants and violate their Sixth Amendment rights, the court would have to speculate as to the existence of several facts: the information which the news media will actually disseminate; that prospective jurors will actually read the information in newspapers or hear it on radio or

publicity cannot be made until the jurors are examined in open court.[164] At that time, the judge and the parties would be aware of the scope and character of any publicity, and then could rationally determine its true impact on potential jurors.[165]

Although the existence of a pretrial right of access was an open question at the federal level,[166] the *Williams* majority relied heavily on the state constitution as an alternative basis for its decision.[167] The "logic and experience" of the New Jersey courts were thus integral factors in the court's decision to extend the right of access to the pretrial stages. Notwithstanding the court's supposition that the Federal Constitution necessitated a pretrial right of access, the majority posited that such a right was justified independently by the state constitution.[168] Thus, the majority's creation of a pretrial right of access would appear to be insulated from United States Supreme Court review and protected from the nuances of subsequent decisions of that Court.[169] This, however, is not the case because the Supreme Court has not indicated the minimum guarantees of the first and sixth amendments during the pretrial stages. The Court eventually may indicate that one of these interests deserves greater weight during pretrial proceedings. The New Jersey Constitution cannot adequately protect the federally guaranteed minimum until the Supreme Court has enunciated the extent of these interests during the pretrial stages. As the Supreme Court has not yet indicated the scope of these interests, it is impossible to determine whether New Jersey's pretrial right of access is based upon "adequate and independent" state grounds.[170]

> television accounts; that the information disseminated will be prejudicial, and that the prejudicial information will infect or influence the minds of the jurors to such an extent that they will be unable to render a fair and just verdict based solely upon evidence offered during the trial.

Id.

[164] *See id.*

[165] *Id.*

[166] *Williams*, 93 N.J. at 51-52 & n.3, 459 A.2d at 647 & n.3. Only Justice Powell had recognized a pretrial right of access under the first amendment, see *Gannett*, 443 U.S. at 397 (Powell, J., concurring), while Chief Justice Burger expressly rejected any notion of a pretrial right of access. *Id.* at 394-97.

[167] *See supra* note 96 and accompanying text.

[168] *Williams*, 93 N.J. at 69-70 n.17, 459 A.2d at 657 n.17.

[169] *See supra* notes 142-44 and accompanying text.

[170] *See* Comment, *supra* note 142, at 1411-12.

> The federal Constitution also imposes significant ceilings. The sixth amendment right to a fair trial, for example, may constrain an attempt to increase access to pretrial proceedings. Such access might impair a defendant's rights if the press published damaging information before a jury could be sequestered. For this reason,

The *Williams* majority wanted to provide guidance for lower courts in evaluating closure applications. Thus, a definitive standard was essential. Since the United States Supreme Court had not promulgated a definitive standard for balancing the competing interests of fairness and openness,[171] the *Williams* majority decided to enunciate a standard in accordance with the New Jersey Constitution. Significantly, the majority did not adopt any of the balancing tests which previously had been proposed by the various courts and commentators. All of these tests would require a defendant to make some showing of a possibility of prejudice, but the differences are more than a matter of semantics. One test would have required a defendant to show that an open proceeding would pose a "reasonable likelihood" of danger to his fair trial guarantee before closure could be ordered.[172] Another test would have required the defendant to show that there would be a "substantial probability" of juror bias because of the open proceeding.[173] A third test would have required the defendant to show that an open proceeding presented a "clear and present danger" to his right to a fair trial.[174] The New Jersey Supreme Court instead required

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some state courts have cited the federal Constitution as a bar to expansive interpretations of state constitutional press rights.

Id. (footnotes omitted).

If the United States Supreme Court finds that there is a pretrial right of access under the Federal Constitution, then New Jersey's pretrial right of access is constitutionally permissible. If, however, the United States Supreme Court finds that there is no pretrial right of access under the Federal Constitution, then New Jersey's pretrial right of access must be analyzed to determine whether it is based on "adequate and independent" state grounds. If the New Jersey courts could adequately protect a defendant's sixth amendment interest while allowing a pretrial right of access under the state constitution, then New Jersey's pretrial right of access presumably would be based on "adequate and independent" state grounds.

[171] The "compelling governmental interest" standard enunciated in *Globe Newspaper*, 457 U.S. at 606-07, and repeated in Press-Enterprise Co. v. Superior Court, 52 U.S.L.W. 4113, 4115-16 (U.S. Jan. 18, 1984), only indicates that some showing must be made before closure can be ordered. It does not indicate what measure of prejudice must be shown by the party seeking closure before a "compelling governmental interest" has been demonstrated.

[172] Proposed Amendments to the Federal Rules of Criminal Procedure, 91 F.R.D. 289 (Prelim. Draft 1981). Proposed Rule 43.1 (b) (1) would allow closure upon a showing "that there is a *reasonable likelihood* that dissemination of information from the proceeding would interfere with the defendant's right to a fair trial by an impartial jury." *Id.* at 365-66 (emphasis added). This standard is similar to that apparently endorsed by the *Gannett* majority, a "reasonable probability" test. *Cf. Gannett*, 443 U.S. at 393.

[173] *See supra* note 42 and accompanying text.

[174] II AMERICAN BAR ASSOCIATION STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE 8-3.2, at 8.35 commentary (2d ed. 1980). This was the standard which was sought in *Koedatich* (the companion case to *Williams*) by intervenor Newark Morning Ledger Company, Publisher of the Star-Ledger. Brief of Newark Morning Ledger Company, Publisher of the Star-Ledger at 36-38, State v. Koedatich, 93 N.J. 39 (1983).

a defendant to show clearly that the open proceeding would produce a "realistic likelihood" of prejudice. The operative words in each of these tests would require a defendant to meet a different burden, but it is impossible to assess quantitatively the difference between each test. The precise wording of these tests is unimportant. Rather, what is most significant is the fact that each test applies a presumption of openness which a defendant must rebut. It is the strength of this presumption which determines how far a defendant must go before the presumption has been rebutted. Requiring a defendant to show clearly that an open proceeding poses a "realistic likelihood" of juror bias represents a strong presumption in favor of open proceedings.

This presumption of openness in the balancing process favors first amendment interests, but it is not based on the preferred status of the first amendment.[175] Rather, it is based on common sense and logic. A closed courtroom presents a direct infringement on first amendment rights while an open courtroom rarely presents a threat to a criminal defendant's sixth amendment rights. It is unwise to subordinate the first amendment to the sixth amendment on the basis of a highly speculative assertion of juror bias. While first amendment interests always are present in a decision to close a judicial proceeding, such is not the case with sixth amendment rights. A defendant first must demonstrate that his sixth amendment rights are in jeopardy before any balancing test may be invoked. While the "realistic likelihood" standard of *Williams* is by no means the definitive standard, it does represent a strong presumption in favor of the first amendment which is essential to the analysis.

This presumption in favor of the first amendment also affects the burden of proof as to the availability of alternatives to closure. There has been a split of authority as to whether the defendant should have to show the unavailability of alternatives to closure, or whether the

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[175] While the first amendment has been found to enjoy a preferred status in the scheme of constitutional liberties, *see, e.g.*, Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943), it should enjoy no such status when balanced against a criminal defendant's sixth amendment rights.

> The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other. . . . [I]f the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined to do.

Nebraska Press, 427 U.S. at 561 (Burger, C.J.). *But see Richmond Newspapers*, 448 U.S. at 563 (Chief Justice Burger curiously referring to defendant's superior sixth amendment right in closure cases).

public and press should demonstrate affirmatively the availability of such alternatives.[176] Since competing interests are at stake once the defendant has demonstrated a threat of prejudice, the first and sixth amendment interests should be allowed to coexist whenever possible. Simply showing a threat of prejudice does not make closure presumptively valid.[177] Closure of the court is a drastic measure which should not to be utilized unless it is the only available alternative. The defendant, as the moving party, should show that all other alternatives would be ineffective or the trial court should determine the same before closure can be ordered. The *Williams* court chose the latter course.[178]

The standards adopted by the *Williams* majority were based on a "confluence" of federal and state constitutional guarantees,[179] but these standards cannot rest on "adequate and independent" state grounds. Closure presents a constitutional conflict between a defendant's rights and the rights of the public and of the press. In balancing these constitutional guarantees, a trial court must assess the weight to be given to each constitutional interest. Viewed from this perspective, closure may be considered a sliding scale with the first and sixth amendments at opposite ends. Any standard adopted by a court represents a mark upon this sliding scale which, when met, will justify closure of the court. Where this mark will be made on the scale depends on the strength of the presumption in favor of the first amendment. Obviously, any movement toward one end of the scale operates as a movement away from the opposite end. As there are federal as well as state interests at either end of the spectrum, the supremacy clause dictates that only federal movement is permissible. Any movement by the states has the potential of affecting federal rights at either end of the scale. While states may expand their own constitutional guarantees, they may not accomplish this result at the

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[176] *Compare Gannett*, 443 U.S. at 442-43 (Blackmun, J., dissenting) (placing burden on defendant to show unavailability of alternatives) *with Williams*, 93 N.J. at 79, 459 A.2d at 662 (Schreiber, J., dissenting) (placing burden on those objecting to closure to show availability of alternatives to closure).

[177] *See, e.g.*, Press-Enterprise Co. v. Superior Court, 52 U.S.L.W. 4113, 4116 (U.S. Jan.18, 1984) ("Absent consideration of alternatives to closure, the trial court could not constitutionally close the *voir dire*."). *But see* Comment, *supra* note 149, at 540 (stating that even when alternatives would be ineffective, closure would be improper and defendant would have to be acquitted).

[178] *Williams*, 93 N.J. at 66, 459 A.2d at 655.

[179] *Id.* at 51, 459 A.2d at 647.

expense of federally guaranteed rights.[180] This is equally true in closure cases.[181]

When a state resorts to its state constitution in a closure case, it extends dual rights to each of the parties. Thus, in *Williams* the defendant had both federal[182] and state[183] guarantees of a fair trial by an impartial jury. Conversely, the press had both federal[184] and state[185] guarantees of a right of access. When it adopted the "realistic likelihood" test in *Williams*, the New Jersey Supreme Court not only balanced the conflicting state constitutional guarantees, but also impliedly attributed the same weight to each of their federal counterparts. If a "realistic likelihood of prejudice" is required to overcome the presumption of openness for judicial proceedings in New Jersey, a defendant's sixth amendment rights obviously are implicated. The court's balancing test in *State v. Williams* thus has the potential of reducing a criminal defendant's rights guaranteed under the Federal Constitution.[186] If the United States Supreme Court adopts a different standard than did the court in *Williams*, then the "realistic likelihood" test must be modified.[187]

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[180] *See supra* note 145 and accompanying text.

[181] *See supra* note 170.

[182] U.S. CONST. amend. VI; *see Williams*, 93 N.J. at 60-62, 459 A.2d at 652-53.

[183] N.J. CONST. art. I, para. 10; *see Williams*, 93 N.J. at 60-62, 459 A.2d at 652-53.

[184] *Globe Newspaper*, 457 U.S. at 596; *Richmond Newspapers*, 448 U.S. at 575-76.

[185] N.J. CONST. art. I, para. 6; *see Williams*, 93 N.J. at 58-59, 459 A.2d at 650-51.

[186] *See supra* note 170. Since the Supreme Court has not enunciated a definitive standard for evaluating closure applications, it is impossible to determine the weight which must be given to a criminal defendant's sixth amendment rights in balancing the conflicting interests in a closure application. The balancing process is confused further by the fact that the Supreme Court has never extended the first amendment to include pretrial hearings. Until the Court addresses these issues, it is impossible to evaluate the *Williams* "realistic likelihood" test under federal constitutional standards.

[187] The majority "acknowledge[d] the possibility that the federal constitution will be interpreted in a manner more restrictive of the right of access to pretrial criminal proceedings than that required by our State Constitution and our interpretation of the federal constitution." *Williams*, 93 N.J. at 71 n.19, 459 A.2d at 658 n.19. The majority hinted, however, that such circumstances might not demand that the "realistic likelihood" test would have to be abandoned.

> If this eventuality should arise, we do not believe that the balancing test and the standards designed to implement that test as announced in this opinion would be imperiled. To the extent that our own Constitution accords a more expansive right of access to pretrial hearings than may eventually be determined by the Supreme Court, we are confident that the defendant's countervailing right to a fair trial can still be preserved and will remain uncompromised. *Cf. PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (state's more expansive right of public access to private shopping center not violative of taking clause of Fifth Amendment or due process clause of Fourteenth Amendment).

Id. at 71 n.19, 459 A.2d at 658 n.19.

The *Williams* decision points out the need for further guidance in this area. Hopefully, the United States Supreme Court soon will resolve the ambiguities surrounding closure—specifically, the appropriate standard, its applicability to pretrial proceedings, and the propriety of using state constitutional rights in the balancing process. While the decision in *State v. Williams* was based on sound logic and reasoning, it does not represent the final word on the subject for the New Jersey courts. Although the New Jersey Supreme Court tried to base its decision on "adequate and independent" state grounds, it clearly did not. A state decision cannot be "adequate" in the area of closure, much less "independent," until the United States Supreme Court indicates the minimum guarantees of the Federal Constitution. Until that time, however, the New Jersey Supreme Court's decision in *State v. Williams* and *State v. Koedatich* represents an intelligent response to the problem.

Timothy M. Donohue

The *Williams* majority's apparent reliance upon *PruneYard* is misplaced. Obviously *Prune Yard* did not give state courts the power to narrow the scope of rights guaranteed by the Federal Constitution. *PruneYard* merely allowed the states to define "property rights" in the first instance under the fifth amendment. *See* PruneYard Shopping Center v. Robins, 447 U.S. 74, 94 (1980) (Marshall, J., dissenting); *cf. id.* at 84.

The *Williams* majority apparently recognized the fact that the enunciation of federal standards by the United States Supreme Court might require abandonment of the "realistic likelihood" test.

> If, contrary to our expectation, experience indicates that the rights of defendants to a fair trial by an impartial jury are not sufficiently protected by the test that we have adopted today, the test may, of course, be modified by this Court in order to provide for a more satisfactory balance between the constitutional concerns of openness and fairness.

Williams, 93 N.J. at 72 n.19, 459 A.2d at 658 n.19.