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NEWS AT 11

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The Maryland Legislature banned television cameras from Maryland's criminal courtrooms in 1981. Md. Code, Crim. Proc. §1-201. The ban, an affront to the constitutional rights of Maryland's Citizens, ended an eighteen month study of cameras in our courtrooms implemented on January 1, 1981 by the Court of Appeals. This study began soon after the United States Supreme Court held, in *Chandler v. Florida*, 449 U.S. 560 (1981), that allowing a televised trial over the objections of two cops-gone-bad, on trial for robbery, was not a violation of the defendants' constitutional rights to a fair trial. Following *Chandler* dozens of other states instituted their own studies and today, thirty-four states permit cameras in their criminal courtrooms absent a finding that their presence will deny a defendant a fair trial.

Chandler was not the first time the Court considered the constitutionality of cameras in the criminal courtroom. In 1962, Billie sol Estes, the wheeler-dealer con man with strong ties to then U.S. Senator Lynden Baines Johnson, was convicted of fraud and sentenced to 15 years imprisonment. Estes appealed on the grounds that he was deprived of his due process rights under the Fourteenth Amendment because his trial had been televised and broadcast. *Estes v. Texas*, 381 U.S. 532 (1965). The Court agreed with Mr. Estes in large part because the presence of TV crews and news photographers led to "considerable disruption of the hearings." As Justice Clark described the proceedings:

At least 12 cameras were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and counsel tables...the activities of the television crews and news photographers led to considerable disruption of the hearings.

Justice Clark, writing for a majority of five justices began with an analysis of the Sixth Amendment, holding that the right to a fair trial, an open trial, is a right that belongs to the accused; not to the news media, and by extrapolation, the public. Justice Clark balanced the importance of a free press, able to report trial events, with the need for the judicial system to provide fair trials. Justices Stewart, Black, Brennan and White dissented.

This tension between the right to a fair trial and the right of the public to learn what happens at trial was reported by Chief Judge David Sentelle of the U.S. Court of Appeals for the District of Columbia Circuit:

All judges recognize the tension between this duty and the rights owed to the public in general, and news media in particular, to disseminate information concerning such trials. In the United States, this tension is enhanced by the primacy of the constitutional protection of freedom of the press under our First Amendment.

Hon. David B. Sentelle, *The Courts and the Media*, 48-SEP Fed. Law. 24, 25 (2001).

In *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) the Court acknowledged that, "[n]either in the Constitution nor in contemporaneous writings do we find that the conflict between these two important rights was anticipated, yet it is inconceivable that that authors of the Constitution were unaware of the potential conflicts between the right to an unbiased jury and the guarantee of freedom of the press." Ironically, in 1950, Maryland was center stage in a pre-TV era case holding a Maryland radio station in contempt because of its pre-trial radio broadcast. The Court did not reverse the order, but a dissenting Justice Frankfurter wrote, "one of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there." *Maryland v. Baltimore Radio Show*, 338 U.S. 912 (1950).

Nonetheless, in *Estes* the majority opinion held that in a criminal case it was unconstitutional for cameras to be present in the courtroom because they deprived the defendant of his right to a fair trial. This, the Court concluded, was the direct result of the adverse impact that cameras have on witnesses as well as judges, who are "subject to the same psychological reactions as laymen." This observation, Justice Clark wrote, is especially true where judges need to be reelected by the voters and would find it "difficult to remain oblivious to the pressures that the news media can bring to bear on them both directly and through the shaping of public opinion." This myopic observation ignored the impact of the newspaper reporter's pad and pencil. The Court, in essence, imposed a blanket ban on cameras without any discussion whatsoever concerning how a trial judge could allow cameras, maintain the dignity of the proceedings, create broad public access to trials and assure a fair trial, all of which occurred in *Chandler*.

Chandler was a criminal trial covered by the electronic media. Following a pilot program, Florida's Code of Judicial Conduct was amended to permit "electronic media and still photography coverage of judicial proceedings, subject to the control of the presiding judge and to implementing guidelines placing on trial judges' obligations to protect the fundamental right of an accused in a criminal case to a fair trial."

Mr. Chandler and his co-defendant, whose trial was televised over their objections, urged the Court to read *Estes* as holding that the act of televising a criminal trial is inherently a denial of their due process rights and that *Estes* is a *per se* constitutional rule to that effect. The Court refused to find *Estes* as standing for a *per se* ban:

... our condemnation of televised criminal trials is not based on generalities or abstract fears. The record in this case presents a vivid illustration of the inherent prejudice of televised criminal trials and supports our conclusion that this is an appropriate time to make a definitive appraisal of television in the courtroom. If appellants' reading of *Estes* were correct, we would be obliged to apply that holding and reverse the judgment under review.

Chandler, 449 U.S. at 570 (citation omitted).

In his concurring opinion Justice White wrote that *Estes* did indeed impose a *per se* ban if the defendant objects.

Justice Burger's *Chandler* opinion held that an absolute ban on cameras in the courtroom can not be justified on the basis that their use *may* pose a danger to the fair trial rights of a defendant. Although a juror might be prejudiced by a newspaper's coverage of a trial, that risk hardly justified a ban on newspaper reporters in the courtroom. The same level of risk is also present with cameras in the courtroom, and the holding recognized that the presence of that risk did not justify an outright ban on cameras, especially considering a judge's ability to control the media. In all cases, a defendant retains the right to establish that the presence of cameras (or other media) violates, or compromises, his right to a fair trial. If the media compromises that constitutional right, an appellate court should reverse the conviction pursuant to *Estes*, which was not overruled by *Chandler*. Maryland's Attorney General filed an *amicus* brief in support of Florida's pro-camera position and its right to experiment.

The *Chandler* appellants failed to meet their burden to establish they had not received a fair trial. In *Estes* at least twelve cameras were present. In Florida, use of technology in the courtroom was strictly limited by an order of the Florida Supreme Court. Only one camera was present whose location was fixed throughout the trial. Jurors could not be filmed, and recording of bench and attorney conferences was banned. Film canisters and lenses could not be changed during trial. Finally, the trial judge had the discretion to ban the coverage of certain witnesses, such as minors, the

victims of sexual assault or informers. The Florida guidelines “place[d] on trial judges positive obligations to be on guard to protect the fundamental right of the accused to a fair trial.”

The Court opined:

Whatever may be the “mischievous potentialities [or broadcast coverage] for intruding upon the detached atmosphere which should always surround the judicial process,” *Estes*, at present no one has been able to present empirical data sufficient to establish that the mere presence of the broadcast media inherently has an adverse impact on that process.

Chandler, 449 U.S. at 578 (citation omitted).

Between the dates *Estes* and *Chandler* were heard by the Court technology had changed. Cameras, by 1980, were no longer bulky, and did not require numerous technicians or intrusive lighting as were present during Mr. Estes’ trial. Cameras are far less obtrusive today; they are not even noticeable.

The Court’s ruling was very narrow, holding only that because it has no supervisory authority over state courts, its review was confined to whether a constitutional violation had occurred. It concluded that “the Constitution does not prohibit a state from experimenting with the program authorized by [the Florida Supreme Court].” While the Court approved the use of cameras in the criminal courtroom, reserving the right to hold that their use may, on a case by case basis, violate a defendant’s fair trial rights, it did not hold that a state was *required* to allow cameras in the courtroom and it went so far as to quote a decision of the Florida Supreme Court to the effect that neither the Sixth or First Amendments mandate entry of electronic media into judicial proceedings. *In Re: Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764 (1979).

Some Supreme Court justices have expressed a personal dislike of cameras in the courtroom and likely this bias has helped to solidify their opposition to a ruling that would require the admittance of broadcast media even absent a showing that its presence will result in an unfair trial. Justice Kennedy said, “[a] number of people would want to make us a part of the national entertainment network.” Justice Souter testified before Congress, “the day you see a camera come into our courtroom, its going to roll over my dead body.” Justice Scalia remarked that there “is not a chance” cameras would be allowed to film the proceedings of the Supreme Court. Still, some Justices are in favor. Justice Brennan said, “I feel strongly that we should allow television and radio broadcasts of our proceedings.” Justice Frankfurter was a fan of the broadcast media and hoped that the “news media would cover the Supreme Court as thoroughly as it did the World Series.” Justice Stevens has said it would be worth trying television coverage of the proceedings.

The electronic broadcast pendulum will swing the other way, considering that it started at *Estes* and has swung through *Chandler*. Chief Justice Roberts has suggested he is open to giving cameras a test; Justice Alito, when he sat on the Third Circuit Court of Appeals, encouraged the use of cameras. Senator Arlan Specter has introduced two bills to allow the proceedings of the Supreme Court to be televised, one in 2000, the other in 2006. He said in 2000, "I do believe the day will come when the Supreme Court of the United States will be televised. That day will come and it will be decisively in the public interest so the public will know the magnitude of what the Court is deciding and its role in our democratic process."

When next the Court takes up the question of whether cameras must be permitted in the courtrooms, there compelling reasons exist for it to decide that the Constitution says "yes", and perhaps those Justices who have spoken in favor of cameras in the Supreme Court will champion the decision.

A decision to permit cameras, absent an articulated finding on the record of prejudice, should begin with an affirmation of the Court's earlier decision in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), where it held that the public *and press* are guaranteed the right to attend criminal trials under the First and Fourteenth Amendments. They may only be excluded by an overriding interest articulated in findings.

The historical evidence of the evolution of the criminal trial in Anglo-American justice demonstrates conclusively that at the time this Nation's organic laws were adopted, criminal trials both here and in England had long been presumptively open, thus giving assurances that the proceedings were conducted fairly...and discouraging perjury, the misconduct of participants, or decisions based on a secret bias or partiality. In addition, the significant community therapeutic value of public trials was recognized....To work effectively, it is important that society's criminal process "satisfy the appearance of justice."

Richmond Newspapers, Inc., 448 U.S. at 556 (citation omitted).

Following this would be an acknowledgement of the reversal in roles and importance played by print and electronic media, particularly in light of the finding articulated in *Richmond Newspapers* that "[t]he freedoms of speech, press and assembly, expressly guaranteed by the First Amendment, share a common purpose of assuring freedom of communication on matters relating to the functioning of the government."

Everyone has the right to attend trials, but not everyone can. People have disabilities, distances can be great and seats in a courtroom limited. It is incumbent on the media to report to the citizenry what occurs in our courts. The only media that has

been given admission to the courtroom as a matter of right is the print media, and this is unfortunate for the public because most newspapers are a shell of what they once were. Budget cuts have resulted in reduced staff and loss of experienced court reporters; newspaper readership has substantially declined. According to Scarborough Research, in 1999 42% of adults between 18 and 24 read the newspaper. By 2005, that percentage fell to 35. *Project For Excellence in Journalism, the State of the News Media 2007: An Annual Report on American Journalism* (2007). Today, people are much more likely to get their news by electronic means than by print. A 2006 survey rated local television news as the most popular news destination, with 65% of respondents indicating that they got their news from local television. *The Radio & Television News Directors Foundation (RTNDF), Future of the News Survey* (2006).

Other than cases where it can be established that closure is needed for a fair trial, the Justices should revisit, and overrule, *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) in which they held that the Sixth Amendment does not give the media access to a hearing when the defense and prosecution agree the hearing should be closed. *Gannett* is reviewable for two reasons. First, it explicitly left open the question of whether the media has a right under provisions of the Constitution other than the Sixth Amendment to attend trials. Second, it is a poorly written opinion, criticized as "cloudy", "confusing", "unclear", "incoherent" and "a muddle", as echoed by Justice Blackmun's concurring opinion in *Richmond Newspapers, Inc.* in which he wrote that the Court simply got it wrong.

The Court's ultimate ruling in *Gannett*, with such clarification as is provided by the opinions in this case today, apparently is now to the effect there is no *Sixth* Amendment right on the part of the public – or the press – to an open hearing on a motion to suppress. I, of course, continue to believe that *Gannett* was in error, both in its interpretation of the Sixth Amendment generally, and in its application to the suppression hearing, for I remain convinced that the right to a public trial is to be found where the Constitution explicitly placed it – in the Sixth Amendment.

The views of constitutional scholars such as Akhil Reed Amar and Alan Hirsch should be considered by the Court. Amar, a constitutional law professor at Yale, and Hirsch, a professor at Hartwick College, argue that the Sixth Amendment is the public's right and not only the defendant's; it was intended by the Framers to promote both the public good and protect the rights of a defendant:

The fundamental point is simply this: the jury trial is not just by the people, but for them as well. If so, it is not for the defendant (or the government) to waive. That perspective seems sound in theory. In practice, the Supreme Court has held otherwise...

AKHIL REED AMAR & ALAN HIRSCH, FOR THE PEOPLE WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS 118 (Simon & Schuster 1998).

Despite the reluctance to date of the Supreme Court to extend trial coverage to the broadcast media, some state courts have done so. The Supreme Court of Albany County, New York, in 2000, struck down a state statute, similar to Maryland's, that banned all broadcast coverage of trials. Hearing argument that the fix should be left to the legislature, the Court held:

If [the statute] is no longer constitutional, it is for the Courts to say so, not to defer to a political body where the nuances of politics can lead and have led to unnecessary inaction.

People v. Boss, 701 N.Y.S.2d 891 (2000).

The Court observed that in year 2000, 48 states had some form of audio-visual coverage in the courtroom and 37 televised trials. New York, like Maryland, imposed an absolute ban, as the Court held, "not from scholarly debate but rather...the failure of the Legislature to maximize the press and public's legitimate constitutional access to the courts." The Court also considered that a ten year experiment had allowed cameras in the courtroom and established that the concerns of the United States Supreme Court regarding fair trial rights could be met, and that a presumptive right to televise trials existed. Thus, it struck down the statute as unconstitutional. Five months later, the County Court of New York, Monroe County, did the same. *People v. Santiago*, 712 N.Y.S.2d 244 (2000).

It is likely that the Supreme Court will reconsider whether media access applies not to just the print media, but also to the broadcast media. The *Chandler* court ruled that a fair trial is achievable in the presence of cameras, therefore there is simply no valid reason to treat broadcast media as the stepchild of the First Amendment and differently than print. A judge can control the courtroom and Maryland can promulgate guidelines as did Florida. Maryland's ban, if challenged, should not pass constitutional muster as it appears driven by bias against and fear of broadcast media and not from "scholarly debate." Until one of these events occurs, Maryland citizens will have to wonder whether Maryland's courtrooms are like Judge Judy's.

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