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Casenote: Fair Trial / Free Press

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ity to consider the character of the defendant and the circumstances surrounding the offense as a necessary part of the procedure leading to the imposition of the death sentence.

Thus the Supreme Court, which had invalidated death sentences imposed under a jury's unfettered discretion in *Furman*, held that the lack of exercise of any jury discretion is equally unconstitutional when imposing the death sentence. Carefully guided discretion exercised by the sentencing authority is required.

As a result of these decisions, it appears that Art. 27, §413, MD. ANN. CODE (1976 Repl. Vol.), contains a mandatory death penalty law which is unable to withstand a constitutional challenge. *See Woodson* and *Roberts*, supra. Under this section, a conviction for any one of the eight enumerated categories of first degree murder results in a mandatory death sentence. Under the statute, no consideration of the individual circumstances surrounding the defendant and the offense may enter into the sentencing process. Consequently, the statute violates the "Cruel and Unusual Punishment" Clause. Maryland can, of course, amend its law to conform with the approved standards in *Gregg, Proffitt, Jurek*, or the Model Penal Code and thereby enact a constitutionally valid capital punishment law.

Fair Trial/ Free Press

by Lindsay Schlottman

It had been a typical Saturday evening on October 18, 1975 in the farming town of Sutherland, Nebraska—until word began to spread of a mass murder. Towspeople were frightened as the search for the murderer began. Local, regional and even national reporters flooded the area, adding to the panic and confusion. Finally, early Sunday morning, a suspect named Charles Erwin Simants was arrested and charged with six counts of murder. Mr. and Mrs. Henry Kellie, their son David, and three grandchildren lay dead. The charges were amended later to include sexual assault.

Rumors began circulating of a confession by Simants. Because of his concern that Simants' trial be free of prejudicial publicity, the County Judge entered a restrictive order on October 22 banning full news coverage of the public preliminary hearing until a jury could be impaneled. Several press and broadcast associations, publishers, and individual reporters moved for leave to intervene in the state District Court, asking that the order imposed by the County Court be vacated. The District Judge granted this motion to intervene, and then entered his own restrictive order on October 27, detailing items not to be reported. The

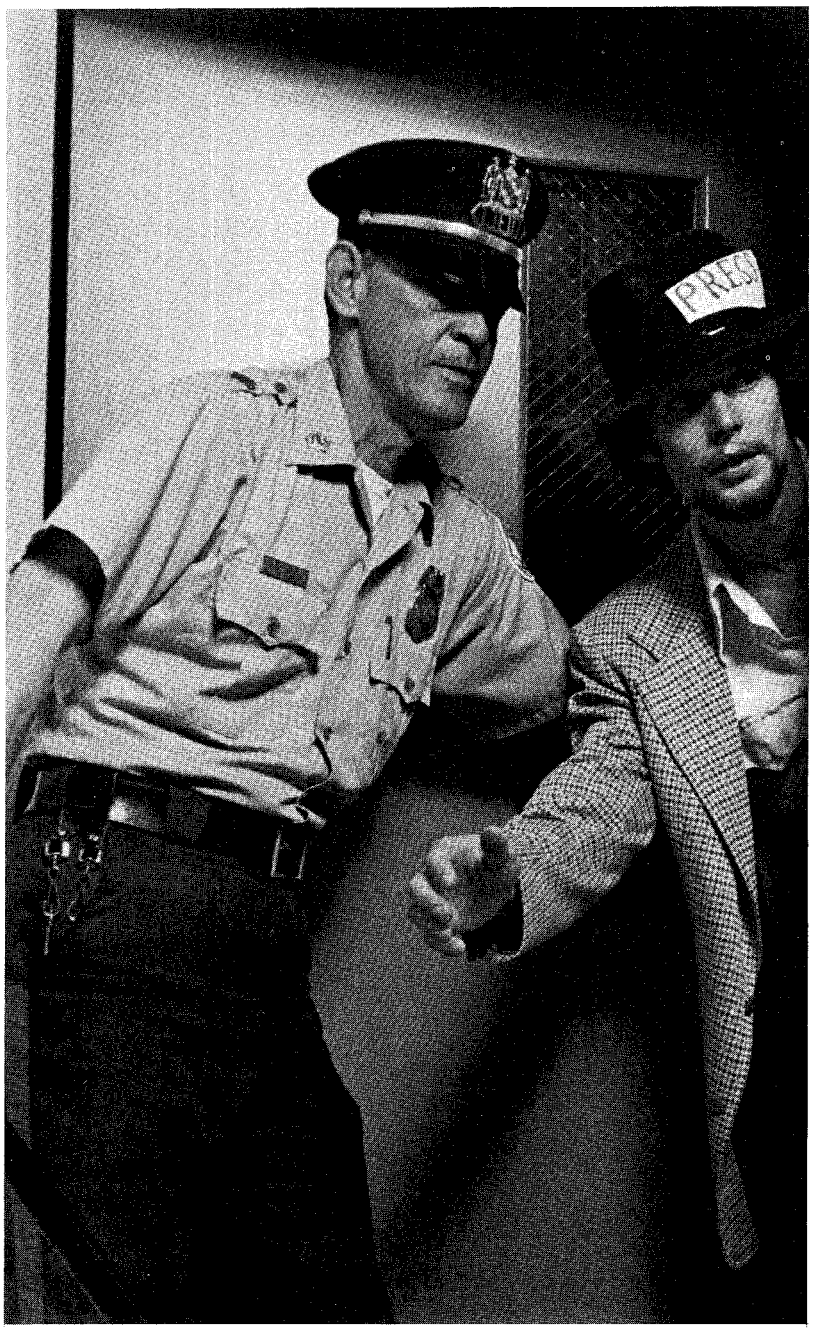

photo by Chris Michael

state Supreme Court modified the District Judge's order on December 2, prohibiting reporting of only three matters: "(a) the existence and nature of any confessions or admissions made by the defendant to law enforcement officers, (b) any confessions or admissions made to any third parties, except members of the press, and (c) other facts 'strongly implicative' of the accused." *Nebraska Press Association v. Stuart*, 96 S.Ct. 2791, 2796 (1976).

The press associations, et al. appealed to the United States Supreme Court, which granted certiorari to decide whether this order of the state court violated the constitutional guarantee of freedom of the press.

On June 30, 1976, the United States Supreme Court ruled unanimously that the restrictive order of the state Supreme Court was an unconstitutional violation of the First Amendment. While this decision does not completely disallow "gag orders", it nearly does so. Chief Justice Burger delivered the opinion for the Court, first reviewing the historical background of First Amendment/Sixth Amendment clashes. He noted that drafters of the Constitution and the Bill of Rights "were intimately familiar with the clash of the adversary system and the part that passions of the populace sometimes play in influencing potential jurors." *Id.* at 2797. Yet, liberty of humankind has been viewed as essentially dependent upon the freedom of the press.

The Sixth Amendment guarantee of trial by an impartial jury is threatened when "sensational" cases are involved. The modern news media communicates instantly and pervasively. In highly publicized trials this often makes it difficult to find jurors who are without fixed opinions as to the guilt or innocence of the defendant. The trial judge can help guarantee a fair trial by taking " 'remedial measures that will prevent the prejudice at its inception.' " *Nebraska v. Stuart, supra* at 2800, quoting *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966). Such measures may include conducting a particularly careful voir dire; continuing or transferring the case; sequestering the jury; emphatically and clearly instructing the jurors; ordering prosecutors, police, court officials and attorneys not to discuss the case publicly; or even ordering a new trial. Yet, "pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." *Nebraska v. Stuart, supra* at 2800. The Supreme Court has focused many times on means other than restrictive gag orders which ensure that a defendant receives a fair trial by an impartial jury.

The First Amendment guarantee of a free press has been interpreted by the Supreme Court as affording special protection against court orders that impose a prior restraint on free speech. Although freedom of speech and freedom of the press are not considered absolute rights by the Court, a prior restraint of these freedoms comes to the Supreme Court with a " 'heavy presumption' against its constitutional validity." *Id.* at 2802, *citing Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418-20 (1971). A court issuing a restrictive order thus has a heavy burden to bear each time it seeks to place a prior restraint upon speech. Indeed, "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska v. Stuart, supra* at 2802. Speech is chilled; publications held in abeyance for even a few days lose their impact and relevance. Effective criminal judicial administration in particular is actually enhanced by a free press.

"The press 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." *Id.* at 2803, *quoting Sheppard v. Maxwell, supra* at 350. Against this background of the tension between First and Sixth Amendment rights, the Supreme Court decided the present case.

The Court was persuaded that the trial judge's determination (that pre-trial publicity might impair Simants' right to a fair trial) was reasonable; however, the Court pointed out that his conclusion "as to the impact of such publicity was of necessity speculative, dealing as he was with factors unknown and unknowable." *Nebraska v. Stuart, supra* at 2804. No express findings were made by the trial court as to whether alternatives to the gag order would suffice. Even the state Supreme Court only implied that such alternative measures might not be adequate. Prior restraint is an extreme measure to be taken only when the alternative measures will not protect the defendant's Sixth Amendment rights.

Practical problems also exist in using prior restraint as a means of protecting the defendant's rights.

"The dilemma posed underscores how difficult it is for trial judges to predict what information will in fact undermine the impartiality of jurors, and the difficulty of drafting an order that will effectively keep prejudicial information from prospective jurors." *Id.* at 2806.

Courts issuing gag orders have limited jurisdictions; news reporters outside of the jurisdiction are not bound by such orders. Also, information that isn't obviously prejudicial at first glance may later emerge as irreparably damaging to the defendant's right to an impartial jury. Finally, it is questionable whether rumors spread by word of mouth are more or less prejudicial than news reports. In short, given these and other practical difficulties, it is not clear that prior restraint would have protected Simants' rights under the Sixth Amendment.

The Supreme Court reviewed the language of the order itself and concluded that the order was not supportable on that basis. First, the order prohibited the reporting of events at a public hearing, which is clearly unconstitutional. Second, the prohibition of the publication of facts "strongly implicative" of Simants is vague and overbroad, rendering it impermissible under the Constitution.

In its conclusion, the Supreme Court again recognized the adverse impact that pre-trial publicity can have on a defendant's trial. Yet, alternative measures do exist to alleviate this danger. The state court did not demonstrate the "probability" that pre-trial publicity would gravely affect Simants' right to an impartial jury. Prior restraint requires a degree of certainty in determining this probability.