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Casenotes: Criminal Law — Constitutional Law
— Intervention — Media May Intervene in
Criminal Cases to Contest Orders Restricting
Publicity. *News American v. State*, 294 Md. 30, 447
A.2d 1264 (1982)

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CRIMINAL LAW — CONSTITUTIONAL LAW — INTERVENTION — MEDIA MAY INTERVENE IN CRIMINAL CASES TO CONTEST ORDERS RESTRICTING PUBLICITY. *News American v. State*, 294 Md. 30, 447 A.2d 1264 (1982).

The criminal cases of George and Willie Green for murder, robbery, and related offenses received considerable media attention in the Baltimore area.¹ In response to the publicity, the defendants filed a motion for an order to prohibit prosecutors from discussing the cases with the media.² The News American Division of The Hearst Corporation (News American)³ filed a petition requesting that it be heard in opposition to the defense motion.⁴ The Criminal Court of Baltimore City⁵ granted News American's petition to intervene and, after hearings, entered a "gag order" restricting public comment by trial participants.⁶ News American filed an expedited appeal from the gag order and the defendants cross-appealed from the order allowing the newspaper to intervene.⁷ The court of special appeals held that News American could not intervene in the criminal cases, and dismissed News American's appeal.⁸ In a unanimous decision, the Court of Appeals of Maryland reversed the dismissal, and held that a party alleging injury to its first amendment rights may intervene in a criminal action to challenge a proposed or existing restrictive order.⁹

While the majority of jurisdictions permit certain third parties to intervene as of right or by permission in civil proceedings,¹⁰ the procedure to be used by third parties to contest orders of a criminal court is a

1. *News American v. State*, 294 Md. 30, 32, 447 A.2d 1264, 1265 (1982).

2. *Id.*

3. News American publishes a daily Baltimore newspaper.

4. *Id.* News American alleged that the proposed order would cause it "irreparable injury" and that it had the duty and right to gather and publish the news. *Id.* at 32-33, 447 A.2d at 1265-66.

5. Effective January 1, 1983, the Criminal Court of Baltimore City became the Circuit Court of Baltimore City.

6. *News American v. State*, 294 Md. 30, 33, 447 A.2d 1264, 1266 (1982). In general, a gag order forbids a person from disseminating information. Gag orders may be directed at the media, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1979) (held invalid), or at other persons. The order at issue was directed at court personnel, attorneys, and witnesses in the Greens' trials. See *News American v. State*, 49 Md. App. 422, 423-24 n.1, 431 A.2d 1387, 1388 n.1 (1981) (reprinting gag order), 294 Md. 30, 33 n.2, 447 A.2d 1264, 1266 n.2 (1982) (noting typographical error in reproduced version).

7. *News American v. State*, 294 Md. 30, 33, 447 A.2d 1264, 1266 (1982).

8. *News American v. State*, 49 Md. App. 422, 427, 432, 431 A.2d 1387, 1389, 1392 (1981), *rev'd*, 294 Md. 30, 447 A.2d 1264 (1982).

9. *News American v. State*, 294 Md. 30, 45, 447 A.2d 1264, 1272 (1982). Prior to the decision of the court of appeals, the Greens' trials concluded and the gag order expired. *Id.* at 34, 447 A.2d at 1266. The court of appeals did not address the merits of the gag order, but dismissed the question as moot. *Id.* at 38, 447 A.2d at 1268; see *infra* notes 33-34 and accompanying text.

10. See, e.g., FED. R. CIV. P. 24; MD. R.P. 208. See generally Shreve, *Questioning Intervention as of Right—Toward a New Methodology of Decisionmaking*, 74 Nw. U.L. REV. 894, 897 n.14 (1980) (listing state intervention provisions).

subject of controversy in both federal and state courts. Although the primary issue in a criminal case is the guilt or innocence of the defendant, orders of a criminal court often affect the rights of third parties. The effect of such an order upon the rights of a nonparty is especially apparent when the order restricts trial publicity or access.¹¹ Among the procedures used by third parties to vindicate their rights are petitions for extraordinary writs,¹² actions for declaratory or injunctive relief,¹³ and motions filed directly in criminal proceedings.¹⁴

In the federal courts, a nonparty may file a motion in a criminal case to assert an interest in,¹⁵ or prevent disclosure of,¹⁶ seized property. As to whether a nonparty can intervene in a criminal case for other purposes, the federal courts are divided. The United States Courts of Appeals for the Third and Fifth Circuits recognize the right of interested nonparties to participate in criminal trials. The Fifth Circuit has permitted representatives of the media to contest orders which limit public access to exhibits, documents, or evidence in a criminal case.¹⁷ The procedure employed by the nonparties, while not termed

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11. *See, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (order closing criminal trial violated first and fourteenth amendment rights of press and public to attend criminal trials); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (order restraining media from disseminating facts implicating the accused held invalid as a prior restraint of speech and publication). *See generally* *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (statute mandating closure during victim's testimony in certain sex offense cases violated the press' and public's right of access to criminal trials); *Bezanson, The New Free Press Guarantee*, 63 VA. L. REV. 737 (1977); *Fahring, Charting a Course from the Free Press to a Fair Trial*, 12 SUFFOLK U.L. REV. 1 (1978).
 12. *E.g.*, *United States v. Sherman*, 581 F.2d 1358, 1360-61 (9th Cir. 1978); *Central S.C. Chapter, Soc'y of Professional Journalists v. Martin*, 556 F.2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); *see also* *United States v. Chagra*, 701 F.2d 354, 360 n.14 (5th Cir. 1983) (collecting cases).
 13. *State v. Bianchi*, 92 Wash. 2d 91, 593 P.2d 1330 (1979).
 14. *E.g.*, *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 425 (5th Cir. 1981); *United States v. Gurney*, 558 F.2d 1202 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978). Additional mechanisms for contesting gag orders include a trial participant's motion to modify or dissolve the gag order, financed by interested media, or a direct appeal from an order, without an appearance in the trial court. *See* *United States v. Chagra*, 701 F.2d 354 (5th Cir. 1983) (appeal from closure order). For a discussion of procedures used by third parties to contest criminal trial orders, see *Rendleman, Free Press—Fair Trial: Review of Silence Orders*, 52 N.C.L. REV. 127 (1973).
 15. *See* *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931); *FED. R. CRIM. P.* 41(e).
 16. *See* *United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980).
 17. *See* *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423 (5th Cir. 1981) (media challenged order prohibiting court personnel and parties from releasing to the public certain audiotapes that had been admitted into evidence); *United States v. Gurney*, 558 F.2d 1202 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978) (press challenged order denying access to exhibits and documents identified or in evidence in a criminal trial).

"intervention," involved filing a petition in the criminal court.¹⁸ The Third Circuit, in *United States v. Schiavo*,¹⁹ permitted members of the press to contest and appeal an order prohibiting the publication of extrajudicial statements. The right of the press or interested members of the public to intervene in criminal proceedings to contest motions seeking closure of pretrial proceedings was recognized in two subsequent Third Circuit decisions.²⁰ The Fourth Circuit, however, has held that a nonparty may not intervene in a criminal proceeding to contest a gag order.²¹ The basis of this holding was that no procedural rule provided for such intervention, and that the intervention would introduce collateral issues and disrupt the criminal trial.²² The Ninth Circuit has concluded that mandamus, rather than intervention, should be used by third parties seeking to challenge orders of a criminal court.²³

State courts are also divided as to the propriety of third party intervention in a criminal proceeding. Those states forbidding intervention have relied on the lack of nonparty interest in the determination of the defendant's guilt or innocence,²⁴ the unnecessary burden on criminal litigation,²⁵ and the absence of a procedural rule or statute.²⁶ Despite the absence of a procedural rule, the Supreme Court of Virginia allowed intervention in a criminal trial for the purpose of contesting a closure order.²⁷ Although Maryland lacks a procedural rule providing for intervention in a criminal case,²⁸ a nonparty may file a motion or petition in a criminal case to recover seized property.²⁹ Thus, proceed-

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18. *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 425 (5th Cir. 1981); *United States v. Gurney*, 558 F.2d 1202, 1205 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978).
 19. 504 F.2d 1 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 1096 (1974).
 20. *United States v. Criden*, 675 F.2d 550 (3d Cir. 1982); *United States v. Cianfrani*, 573 F.2d 835 (3d Cir. 1978), *overruled on other grounds Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).
 21. *Central S.C. Chapter, Soc'y of Professional Journalists v. United States Dist. Court*, 551 F.2d 559 (4th Cir. 1977).
 22. *Id.* at 563, 565.
 23. *United States v. Brooklier*, 685 F.2d 1162 (9th Cir. 1982); *United States v. Sherman*, 581 F.2d 1358 (9th Cir. 1978).
 24. *E.g.*, *Gannett Pacific Corp. v. Richardson*, 59 Hawaii 224, 580 P.2d 49 (1978); *State v. Bianchi*, 92 Wash. 2d 91, 593 P.2d 1330 (1979).
 25. *E.g.*, *State v. Simants*, 194 Neb. 783, 236 N.W.2d 794 (1975), *rev'd on other grounds sub nom. Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *State v. Bianchi*, 92 Wash. 2d 91, 593 P.2d 1330 (1979).
 26. *See Gannett Pacific Corp. v. Richardson*, 59 Hawaii 224, 580 P.2d 49 (1978).
 27. *Richmond Newspapers, Inc. v. Commonwealth*, 222 Va. 574, 281 S.E.2d 915 (1981); *accord Keene Publishing Corp. v. Cheshire County Superior Court*, 119 N.H. 710, 406 A.2d 137 (1979).
 28. Intervention is provided for in civil actions, MD. R.P. 208, in "special proceedings" such as adoption and attachment, MD. R.P. 1(a), and in various administrative proceedings, *e.g.*, MD. ADMIN. CODE tit. 08, § 13.09.40K (1981). For a discussion of intervention in state administrative proceedings, see Adams, *State Administrative Procedure: The Role of Intervention and Discovery in Adjudicatory Hearings*, 74 Nw. U.L. Rev. 854, 885-93 (1980).
 29. MD. ANN. CODE art. 27, § 551(b)-(c) (1982); *see also Novak v. State*, 195 Md. 56, 72 A.2d 723 (1950) (decided prior to passage of section 551).

ings which involve nonparties and are civil in nature³⁰ have been entertained in Maryland criminal courts.

In *News American v. State*,³¹ the issues before the court of appeals were whether intervention was the proper procedure for *News American* to use in asserting its interests in the criminal case, and whether the gag order violated its rights of freedom of speech and press and right of access to information concerning judicial proceedings.³² The court dismissed *News American's* substantive contentions as moot.³³

The procedural question of the propriety of *News American's* intervention in the criminal cases was, however, within an exception to the mootness doctrine.³⁴ The *News American* court held that a nonparty can intervene in a criminal case to contest a proposed or existing restrictive order.³⁵ Judge Rodowsky, writing for a unanimous court, noted that a trial judge should consider alternative methods of protecting the fair trial rights of the accused before issuing an order restricting publicity.³⁶ The court reasoned that a procedure which allows the press to be heard upon motion in a criminal case has the advantage of presenting the issues directly to the trial judge rather than to an appellate court.³⁷ In addition, the court in *News American* noted that the procedure gives the trial judge an opportunity to hear the arguments of an advocate of the first amendment, since the request for a restrictive order is typically made by a defendant, and the state has little incentive to oppose the request.³⁸

In addressing the contention that nonparty participation would

30. See *State v. Strickland*, 42 Md. App. 357, 359, 400 A.2d 451, 452 (1979) (merely because motion is filed in criminal court does not change civil character of proceedings arising from the motion).

31. 294 Md. 30, 447 A.2d 1264 (1982).

32. *Id.* at 33, 447 A.2d at 1266.

33. *Id.* at 38, 447 A.2d at 1268. The court noted that the gag order had expired upon the termination of the Greens' criminal trials. *Id.* In refusing to apply an exception to the mootness doctrine, the court examined recent Supreme Court decisions and concluded that any determination of the press' right of access to information would depend upon the circumstances present in an individual case. *Id.* at 36-39, 447 A.2d at 1267-69 (reviewing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982)); *cf. Mann v. State's Attorney*, — Md. —, —, 486 A.2d 124, 129-30 (1983) (media had no first amendment right to interview incompetent prisoner over counsel's objection). Thus, a decision on the merits of the particular gag order before the court would not "establish a rule of future conduct" so as to warrant a decision despite mootness. See *News American*, 294 Md. at 39, 447 A.2d at 1269.

34. *News American*, 294 Md. at 39, 447 A.2d at 1269. The court reasoned that the issue of the route to be taken by the press in challenging orders closing pretrial hearings, closing trials or portions thereof, and sealing records of court proceedings would likely recur. *Id.*

35. *Id.* at 45, 447 A.2d at 1272.

36. *Id.* at 44, 447 A.2d at 1272.

37. *Id.*

38. *Id.* at 44-45, 447 A.2d at 1272; see *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 608 (1976) (Brennan, J., concurring) ("Prosecutors would often acquiesce in [motions seeking restrictive orders] to avoid jeopardizing a conviction on appeal.").

disrupt the progress of criminal cases, the *News American* court placed two restrictions upon the right to intervene in criminal proceedings. First, the right to intervene is available only at the instance of one who asserts a violation of his arguably existing³⁹ first amendment rights. Second, intervention is limited to the issues relating to the proposed or existing restrictive order.⁴⁰ The court reasoned that nonparty participation in a criminal case, with these limitations, would be less disruptive than a separate action for mandamus, an injunction, or declaratory relief.⁴¹ Finally, the *News American* court concluded that the absence of a rule of procedure permitting intervention in criminal cases was not fatal to the proposed intervention procedure.⁴²

The *News American* court's preference for a procedure of direct intervention rather than a procedure requiring a separate action is supported by the policies of efficiency and fairness. Intervention is more efficient than a separate action since a separate judge and forum need not be assigned. Moreover, direct intervention in the order-issuing court, rather than review in another trial court, allows the criminal case to proceed without interference since the criminal case need not be stayed pending the outcome of the intervenor's claim.⁴³ The policy of fairness also supports the *News American* court's direct intervention procedure. Since a trial judge initially determines whether and to what extent to impose an order restricting publicity,⁴⁴ he should be well informed so that he may render a fair decision. Direct intervention allows a trial judge to consider both the "fair trial" interests of a defendant and the first amendment interests of an intervenor. After a hearing on a restrictive order, the trial judge will be better able to assess the need for a restriction on public access or comment and the form of

39. The court's choice of the "arguably existing" language appears to be based upon its analysis of *Association of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150 (1970). See *News American*, 294 Md. at 40-41, 447 A.2d at 1269-70. In *Data Processing*, the Court fashioned a test to determine whether a plaintiff has standing to bring an action. One inquiry focuses upon "whether the interest sought to be protected by the complainant is *arguably* within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing*, 397 U.S. at 153 (emphasis supplied). The *News American* court reviewed decisions upholding media standing, and concluded that *News American* had standing to appeal the gag order since its rights were arguably within the zone of interests to be protected by the first amendment. *News American*, 294 Md. at 40-41, 447 A.2d at 1269-70 (reviewing *United States v. Cianfrani*, 573 F.2d 835 (3d Cir. 1978); *United States v. Gurney*, 558 F.2d 1202 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *Central Broadcasting Sys. v. Young*, 522 F.2d 234 (6th Cir. 1975); *Central S.C. Chapter, Soc'y of Professional Journalists v. Martin*, 556 F.2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978)).

40. *News American*, 294 Md. at 45, 447 A.2d at 1272.

41. *Id.*

42. *Id.* (citing *Reyes v. Prince George's County*, 281 Md. 279, 300, 380 A.2d 12, 24 (1977)).

43. See *News American*, 294 Md. at 45, 447 A.2d at 1272.

44. *Sheppard v. Maxwell*, 384 U.S. 333 (1966); see also *News American*, 294 Md. at 44, 447 A.2d at 1272.

any needed restriction.⁴⁵

The *News American* court recognized that limitations on the intervention procedure were necessary to minimize the disruption of a criminal trial, and limited the availability of the procedure to a nonparty who asserts injury to his, at least arguably existing, first amendment rights.⁴⁶ The court's formulation of the limitations leaves at least two questions unresolved. First, whether these limitations are indeed adequate to ensure minimal disruption of a criminal trial. Second, whether and to what extent a trial judge has discretion in granting a third party leave to intervene.

While direct intervention in criminal proceedings by first amendment advocates finds support in both policy and precedent, a problem arises in granting intervenor status to all persons who "assert that [their] own . . . First Amendment rights are, or are about to be, violated."⁴⁷ Since the public has a first amendment right to attend criminal trials,⁴⁸ countless persons are eligible to intervene in a criminal case for the purpose of contesting a closure order.⁴⁹ An additional limitation requiring an intervenor to show that the representation of his interest by existing parties is inadequate⁵⁰ would ensure a minimal amount of disruption.⁵¹ Alternatively, a trial judge can order consolidation of petitions to avoid multiplicity of parties and duplication of

45. See *Journal Newspapers v. State*, 54 Md. App. 98, 110, 456 A.2d 963, 970 (issues to be addressed in *News American* type hearing include the efficacy of alternate measures short of closure order, gag order, or order sealing records, to prevent prejudice, *i.e.*, change of venue and voir dire), *aff'd sub nom.* *Buzbee v. Journal Newspapers*, 297 Md. 68, 465 A.2d 426 (1983).

46. *News American*, 294 Md. at 45, 447 A.2d at 1272. While the phrase "at least arguably existing first amendment rights" would seem to expand the availability of the intervention procedure by allowing persons to claim an "arguable" infringement, it is actually a limitation. By using this language, the *News American* court seems to emphasize that standing is a prerequisite to intervention. See *supra* note 39.

47. *News American*, 294 Md. at 45, 447 A.2d at 1272.

48. *Press-Enterprise Co. v. Superior Court*, 104 S. Ct. 819 (1984) (voir dire of jurors presumed open); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). Some courts have recently concluded that the public has a first amendment right to attend certain pretrial proceedings, *e.g.*, *United States v. Brooklier*, 685 F.2d 1162 (9th Cir. 1982); *United States v. Criden*, 675 F.2d 550 (3d Cir. 1982); *Buzbee v. Journal Newspapers*, 297 Md. 68, 465 A.2d 426 (1983), and civil trials, *e.g.*, *Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir. 1983). *But cf.* *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) (sixth amendment's guarantee to the accused of a public trial does not give the press or public a right of access to a pretrial suppression hearing).

49. While *News American* involved a challenge to a gag order, the court noted that the intervention procedure it developed was equally applicable to media challenges of closure orders and orders sealing records. *News American*, 294 Md. at 39, 447 A.2d at 1269.

50. *Cf.* MD. R.P. 208(a) (intervention in civil cases).

51. The standing limitation may effectively curtail the availability of the right to intervene so that an additional limitation of inadequate representation will be unnecessary. See *supra* notes 39, 46.

effort.⁵²

The *News American* court did not indicate the degree of discretion a trial judge has in determining whether to grant leave to intervene to an applicant who asserts injury to his first amendment rights. An interpretation in favor of broad discretion would be consistent with the court's intent to minimize disruption of the criminal proceedings.⁵³ Thus, if a trial judge finds that the intervention would in fact be less disruptive than a separate action for mandamus, or declaratory or injunctive relief, the motion should be granted. Conversely, when multiple intervention threatens the progress of a criminal trial, the motion should be denied. In addition, a trial judge would have the discretion to limit the length of a hearing on a restrictive order if it threatens a defendant's right to a speedy trial.

A further question raised by *News American* is whether a potential intervenor will learn of a proposed restrictive order so as to intervene to contest the order.⁵⁴ For intervention to take place, interested parties must have notice of the proposed order.⁵⁵ Although the court failed to provide for notice in its intervention procedure, possible methods of providing notice could include docketing of motions seeking restrictive orders⁵⁶ and retaining a list of persons requesting notice.

As a result of *News American*, the Court of Appeals of Maryland has clarified the procedure to be used by the press in contesting orders of a criminal court that restrict public comment or trial access. The availability of the procedure is limited to persons who assert that their first amendment rights are injured by the order. Further limitations, such as a requirement that an intervenor show that his interests are inadequately represented, or broad judicial discretion in granting leave

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52. *Cf.* Office of Communication v. FCC, 359 F.2d 994 (D.C. Cir. 1966) (suggesting measures to limit disruption caused by "public interest" intervenors in agency proceedings).
 53. *Journal Newspapers v. State*, 54 Md. App. 98, 456 A.2d 963, *aff'd sub nom.* *Buzbee v. Journal Newspapers*, 297 Md. 68, 465 A.2d 426 (1983), suggests that a trial judge has discretion in permitting media intervention. In *Journal Newspapers*, several newspapers petitioned the Circuit Court of Montgomery County to intervene in criminal cases to contest certain proposed orders restricting access to pre-trial proceedings, "gagging" trial participants, and sealing records. The court scheduled a hearing and "permitted the requested interventions and listened to argument from all sides." *Journal Newspapers*, 54 Md. App. at 106, 456 A.2d at 967.
 54. *Cf.* *Journal Newspapers v. State*, 54 Md. App. 98, 456 A.2d 963, *aff'd sub nom.* *Buzbee v. Journal Newspapers*, 297 Md. 68, 456 A.2d 426 (1983). In *Journal Newspapers*, an accused filed various motions for orders restricting publicity. The court of special appeals noted that "[a]t some point, the local press found out about what had occurred" and petitioned to intervene in the case. *Journal Newspapers*, 54 Md. App. at 105, 456 A.2d at 967.
 55. *Richmond Newspapers, Inc. v. Commonwealth*, 222 Va. 574, 281 S.E.2d 915 (1981).
 56. *See* *United States v. Criden*, 675 F.2d 550 (3d Cir. 1982) (court, using supervisory powers, required docketing of motions to close pretrial proceedings to afford interested members of the public an opportunity to intervene).

to intervene, may later prove to be necessary to ensure minimal disruption of a criminal trial and secure a defendant's right to a speedy trial. In addition, trial courts should be sensitive in providing notice to interested members of the press and public who may choose to take advantage of the intervention procedure.

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