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Recent Developments: Baltimore Sun Co. v. Colbert: Courtroom Closure Presumptively Violative of First and Fourteenth Amendments Absent Specific Findings Showing Prejudice Towards Defendant

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did not involve the imposition of liability based upon the content of speech. *Cohen*, 111 S. Ct. at 2520-21. Drawing instead upon *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), Justice Blackmun argued that in those cases where imposition of liability was based upon the content of speech, the state's interest in protecting its citizens had been found insufficient to remove such expressions from First Amendment protection. *Cohen*, 111 S. Ct. at 2521. The Minnesota Supreme Court decision made it clear, he concluded, that the state's interest in enforcing its promissory estoppel doctrine was far from compelling. *Id.* at 2522.

Justice Souter, in a dissent joined by Justices Marshall, Blackmun, and O'Connor, argued that the case did not fall within the line of cases cited by the majority which held the press to laws of general applicability. *Id.* He instead suggested compliance with the Court's methodology in earlier cases such as *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), where it was found necessary to "articulate, measure, and compare the competing interests involved in any given case to determine the legitimacy of burdening constitutional interests . . ." *Cohen*, 111 S. Ct. at 2522. According to Justice Souter, the public interest in being better informed and thus more prudently self-governed was paramount to the state's interest in enforcing a newspaper's promise of confidentiality. He admitted, however, that were *Cohen*'s identity of less public concern, liability might not be constitutionally prohibited. *Id.* at 2523.

The Supreme Court's holding in *Cohen* will undoubtedly affect how reporters deal with their informants. Newspapers now have legal incentives to not disclose the identity of a confidential source, even when that person's identity is itself newsworthy. More importantly, this decision demonstrates the Court's reluctance to expand the boundaries of the news

media's First Amendment privileges.

- Jason Shapiro

Baltimore Sun Co. v. Colbert:
**COURTROOM CLOSURE
PRESUMPTIVELY VIOLATIVE
OF FIRST AND FOURTEENTH
AMENDMENTS ABSENT SPECIFIC
FINDINGS SHOWING
PREJUDICE TOWARDS
DEFENDANT.**

In *Baltimore Sun Co. v. Colbert*, 593 A.2d 224 (Md. 1991), the Court of Appeals of Maryland held that the public and media cannot be excluded from a preliminary criminal hearing without first being provided with an opportunity to argue against such closure. The court further held that all findings of fact supporting the courtroom closure and the sealing of the transcript must be made on the record.

Tyrone Michael Colbert was indicted for first degree murder and other related criminal charges. The State notified the defendant of its intention to seek the death penalty or alternatively, life without parole. Prior to trial, Colbert filed a motion to enforce a prior plea bargain agreement with the State.

At the hearing on the motion, Colbert requested that the hearing be closed to the public. The State objected to the closure because of the public's right to know about the subject matter. Nevertheless, the trial court held that the defendant's rights to a fair trial outweighed the public's right to be present at the hearing. A reporter for the Baltimore Sun Company ("Sun") also objected to the closure. The Sun reporter argued the paper had a constitutional and common law right to attend the hearings. The court stated that it would re-open the hearing when counsel for the Sun arrived. The court then ordered exclusion of everyone from the hearing, except for the parties and counsel.

Counsel for the Sun was unable to gain immediate access to the hearing, but when counsel was allowed into the

courtroom, the judge refused to re-open the hearing. Counsel for the Sun then requested that the nature of the hearing be disclosed and the records of the proceedings be provided. When counsel's requests were denied, the Sun appealed the ruling, arguing that it had a constitutional and common law right to attend pretrial hearings and to examine pleadings. *Id.* at 227. The Court of Appeals of Maryland granted certiorari prior to consideration by the court of special appeals to determine two questions.

The court first addressed the issue of whether prior notice of a courtroom closure during a pretrial proceeding in a criminal case is required and whether an opportunity to oppose such closure is required. Second, the court determined whether the lower court violated the First and Fourteenth Amendments to the United States Constitution and Article 40 of the Maryland Declaration of Rights in its hearing and sealing of the closure motion. *Id.* at 226.

The court began its analysis by stating that there is a general presumption of openness in criminal trial proceedings as guaranteed by the First and Fourteenth Amendments to the United States Constitution. *Id.* at 227 (citing *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 573 (1980)). In concluding that the trial court erred in the present case, the court of appeals relied on a two-prong test developed in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986). *Colbert*, 593 A.2d at 228. The court stated the test as first, "whether the place and process have historically been open to the press and general public[,]" and second, "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* (quoting *Press Enterprise*, 478 U.S. at 8). Applying *Press Enterprise*, the court recognized that if the two-prong test is satisfied, there is a qualified right of access to a judicial pretrial proceeding, based on the First and Fourteenth Amendments

and on the Maryland Declaration of Rights. *Colbert*, 593 A.2d at 228 (quoting *Buzbee v. Journal Newspaper*, 465 A.2d 426 (Md. 1983)). The court further stated that the function of the judicial process is influenced by public access. *Id.* The court observed that access to pretrial proceedings allows the public to "evaluate the work of trial judges, prosecutors and public defenders in the criminal justice system." *Id.*

The court, nevertheless, recognized that the right of access to pretrial proceedings is not absolute. *Id.* The court emphasized that there are limited circumstances where a defendant's right to a fair trial outweigh the constitutional presumption of openness. *Id.* The court reasoned that closure should be considered on a case-by-case basis and the public should be given an opportunity to question their exclusion. *Id.* The court further determined that a motion for closure should be docketed prior to the hearing to provide adequate notice to oppose the motion. *Id.* at 229. The court stated that in situations where advance notice is impracticable, any individuals in the courtroom should be given a reasonable opportunity to oppose the closure. *Id.*

In the present case, the trial court ruled on the closure motion before arguments in opposition were heard. *Id.* As a result, the court of appeals determined that notice and reasonable opportunity to oppose the closure were not provided, thus violating the public's and the media's constitutional rights. *Id.*

The court reasoned that the party seeking closure must persuade the court that their rights will be infringed upon by an open hearing, and that there are no reasonable alternatives to closure. *Id.* Additionally, the court emphasized that when a defendant asks for closure under the Sixth Amendment right to a fair trial, the specific findings by the court must be made on the record. *Id.* at 230. Under this fair trial argument, the trial court

should consider the extent of publicity the case has and will receive after a public hearing. *Id.* In addition, the trial court must specifically determine that closure is the only reasonable way to protect the defendant's right to a fair trial. *Id.* The court further added that if there are any alternatives to closure which will protect the defendant's rights, these alternatives must be employed prior to closure. *Id.*

The court next addressed an inherent problem at the hearing of a motion to close. The court considered the situation arising when the moving party informs the court of the reasons to close and the sensitive nature of the information sought to be protected has necessarily been revealed. To avoid this problem, the court reasoned that the trial court must receive sensitive evidence in private, but on the record. *Id.* Further, the court agreed that the sensitive portions of the record may be sealed but only as long as reasonably necessary. *Id.*

Because in the present case the trial court granted the motion to close before making the required specific findings, the court determined that the trial court's statement that Colbert could only be afforded a fair trial by closure was not supported by any facts. *Id.* Therefore, the trial court erred in closing the hearing and sealing all portions of the record. The court opined that the trial judge could have heard the sensitive evidence in private and sealed only that part protecting the public's right of access to the records. *Id.* When sealing records, the court explained that the closure must be narrowly tailored and that the interests protected must be articulated and supported by specific findings. *Id.*

In reaching its conclusion, the court of appeals balanced First Amendment rights of public access in criminal cases against the defendant's Sixth Amendment rights to a fair trial. As a result, the public will be excluded only when the defendant's right to a

fair trial cannot be protected. However, the burden on trial judges is now heavier both in giving the media an opportunity to be heard prior to closure and in specifically articulating the grounds for closure. Also on a broader scale, the opinion has reinforced the right of media access to criminal trials as guaranteed by the First and Fourteenth Amendments.

- Bruce D. Hechmer

Federated Department Stores v. Le: EMPLOYER POTENTIALLY LIABLE TO ITS EMPLOYEE FOR TORTIOUS CONDUCT OF A CO-EMPLOYEE.

In *Federated Department Stores v. Le*, 595 A.2d 1067 (Md. 1991), the Court of Appeals of Maryland held that the Maryland Workers' Compensation Act permits employees to sue employers under common law in cases where an employee deliberately injures a co-employee. In so holding, the court expanded the liability of Maryland employers for injuries to their employees.

Federated Department Stores, doing business as Bloomingdales, employed Thach Le as a salesperson. On the morning of April 11, 1983, he left his briefcase in an employee store-room. Upon his return to the store-room, he was asked to accompany a security guard to the security office. The Regional Director of Security, Suzanne Spahr, was there waiting for Le. Spahr accused Le of attempting to steal a calculator which was in his briefcase. Although he denied the allegation, Le claims that Spahr forced him to sign a prepared confession before she would allow him to leave the room. Federated terminated Le shortly thereafter. Le asserted that he later learned that Mrs. Spahr had framed him. Le sued Federated Department Stores for damages, charging Federated with false arrest, intentional infliction of emotional distress, and defamation.

Federated filed a motion for sum-