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**Stephens Media v. Dist. Court,
125 Nev. Adv. Op. No. 63 (Dec. 24, 2009)¹**

**CONSTITUTIONAL LAW—PRESS’S FIRST AMENDMENT RIGHT OF ACCESS TO
JUROR QUESTIONNAIRES**

Summary

Review of a motion regarding two issues of first impression: (1) determining whether petitioners met the proper procedure whereby the press may file a motion to intervene in a criminal case when seeking access to juror questionnaires, and (2) whether district courts must publicly disclose juror questionnaires.

Disposition/Outcome

The Court answered the first question by holding that the petitioners’ petition for extraordinary writ relief in the form of either a writ of prohibition or a writ of mandamus was proper only under the guise of a writ of mandamus so long as the legal issues were not moot. The Court further held the legal issues in this case were not moot and therefore procedurally proper when considered for review. The Court answered the second question in the positive by concluding that the press presumptively has a First Amendment right of access to all criminal proceedings (juror questionnaires included).

Factual and Procedural History

The September 8, 2008 scheduled criminal trial of Orenthal James Simpson and Charles Stewart for various criminal offenses attracted a great deal of press coverage due to the notoriety stemming from Simpson’s past criminal and civil trials for the murders of his ex-wife, Nicole Simpson, and her lover, Ron Goldman. On September 3, 2008 the district court issued a Decorum Order whereby the court forbade the media from publishing the name, address, or description of any prospective juror. Additionally, the court’s Decorum Order provided for a sample copy of the juror questionnaire only after a jury was seated for the case.

Stephens Media LLC dba Las Vegas Review Journal and The Associated Press (collectively “the press”) filed an emergency application to intervene in regards to the Decorum Order’s position on juror questionnaires. Specifically, the press sought access to a blank jury questionnaire before oral voir dire, along with copies of questionnaires filled-out by those jurors ultimately chosen to hear the case. The district court held a hearing in regard to the application and summarily denied the press’s application to intervene, proposing that Nevada law forbids intervention in criminal cases. Additionally, the district court dismissed the First Amendment right to access juror questionnaires argument by stating that the potential for a tainted jury was too great to warrant the press’s access. Specifically, the district court feared that potential jurors would view the blank juror questionnaire before voir dire and contrive answers to those questions in order to position themselves on the jury. Furthermore, the district court disallowed the press’s access to completed juror questionnaires because the district court promised jurors that the juror questionnaires were under seal and therefore confidential. Subsequent to the dismissal, the press challenged the district court’s decision by filing an emergency petition for

¹ By John L. Ward

writ of prohibition or mandamus. After the jury rendered its verdict, the district court released redacted copies of the selected jury's completed questionnaires.

Discussion

Initially, the Court defined writs of prohibition² and writs of mandamus³ in order to better classify the press's challenge. Additionally, the Court described the potential for it issuing an extraordinary writ "where there is not a plain, speedy and adequate remedy [at law]."⁴

Procedural Determination

The Court described the press's challenge as a request for an extraordinary writ of mandamus, concluding that the only way to challenge a district court's refusal to allow an application for interference was through an extraordinary writ because the district court's determination was not an appealable order. Additionally, the Court held that a writ of mandamus is only proper in review of cases with live controversies, and that if the legal issues involved in an action were rendered moot by subsequent events then the Court had no power to review the case. However, the Court held it can review a non-live controversy under these circumstances: (1) if the issue will likely arise again, and (2) if the challenged action was too brief in duration to encompass full litigation before its natural expiration.

Here, the Court found the specific controversy in this case would normally be considered moot because the district court had already withheld the juror questionnaires from the press. However, the Court still held review of this issue proper because (1) a contest where the media demands access to juror questionnaires will likely arise again given the media's inquisitive nature into high-profile cases; and (2) the full constitutional implications of juror-questionnaire-closure is unlikely to be fully litigated before the expiration of voir dire proceedings.

Additionally, the Court noted that writs of mandamus are usually reviewed under a manifest abuse of discretion standard; however, here, the court held that when the issue in an action is drawing the line between unconditionally-protected speech and legitimately-regulated speech, the standard of review is *de novo*.

Presumption of Full-Disclosure for Voir Dire Materials

The Court found that the First Amendment implicitly guarantees the public access to criminal proceedings. As a proxy of the public, the press too is allowed access to criminal proceedings. This right is historically recognized because criminal trials were open to the public and open-jury selection is a part of American jurisprudence—concepts the colonists transported from sixteenth-century England. Furthermore, the Court held that the First Amendment's right of access encompasses juror questionnaires because these questionnaires are merely used to facilitate and expedite the voir dire process and are not a separate and distinct proceeding.

The Court held that jury questionnaires are presumptively subject to disclosure—this presumption can only be overcome if the district court can articulate specific findings as to why closure is necessary and narrowly tailored to protect countervailing interests to public access.

² A writ of prohibition prevents a district court that is already performing judicial functions outside of its jurisdiction from doing so. *Sonia F. v. Dist. Ct.*, 125 Nev. ___, 215 P. 3d 705, 707 (2009).

³ A writ of mandamus "compel[s] the performance of an act which the law requires as a duty resulting from an office or where discretion has been manifestly abused or exercised arbitrarily or capriciously." *Redeker v. Dist. Ct.* 122 Nev. 164, 167, 127 P.3d 520, 522 (2006).

⁴ *American Home Assurance Co. v. Dist. Ct.*, 122 Nev. 1229, 1234, 147 P.3d 1120, 1124 (2006).

The Court specifically adopted the U.S. Supreme Court’s *Press-Enterprise II* balancing test,⁵ which states that a district court may deny access to jury questionnaires only after it “(1) make[s] specific findings, on the record, demonstrating that there is a substantial probability that the defendant would be deprived of a fair trial by the disclosure of the questionnaires and (2) consider[s] whether alternatives to total suppression of the questionnaires would have protected the interest of the accused.”⁶

A district court must therefore balance a criminal defendant’s Sixth Amendment right to a fair trial with the press’s First Amendment right of access. The Court noted the U.S. Supreme Court’s position that because the Bill of Rights were not prioritized in any order of importance, it is not appropriate for subsequent courts to prioritize them. This non-prioritization prevents the Sixth Amendment from inherently outweighing the First Amendment in a balancing test.

The first prong of the *Press-Enterprise II* balancing test requires a district court to make explicit findings to support its closure order along with a finding that there exists a *substantial* probability that a defendant will be deprived of a fair trial if the press had access to the criminal proceedings (in this case, questionnaires). The Nevada Supreme Court noted that the U.S. Supreme Court was skeptical of prior restraint on speech based solely on the risk of unfair prejudice to a jury pool. The Nevada Supreme Court adopted such skepticism, finding that every high-profile case risks jurors prejudging a criminal defendant—the Court held such prejudgment did not substantially deprive a defendant of a fair trial. Indeed, both Courts thought the press’s continued presence could not prevent twelve people from faithfully carrying out their duty as jurors. Here, the district court merely leveled a basic concern that jurors would not be candid if they had a copy of a juror questionnaire prior to voir dire. The Court found this concern insufficient to outweigh the First Amendment’s presumption of openness because the district court made no specific findings of fact to support its order.

The second prong of the *Press-Enterprise II* balancing test requires a district court to consider alternatives to closure before pursuing it. The Court held that the district court failed to consider any alternatives before forbidding the press’s access to the questionnaires. However, for the purposes of future decisions, the Court listed a few alternatives to blanket closure of a blank juror questionnaire and a completed questionnaire.

As an alternative to forbidding public disclosure of a blank questionnaire, the Court suggested that a district court judge remove a suspicious juror for cause if the judge truly feared a juror was answering questions during voir dire falsely so as to ensure his seat on the jury.

As an alternative for forbidding public disclosure of a completed questionnaire, the Court suggested that district court judges should forewarn all potential jurors that their statements made during voir dire and in their questionnaires may be subject to public disclosure and any deeply sensitive question may be asked and answered *in camera* with counsel present and on the record. This *in camera* questioning will reduce the risk of unnecessary closure of voir dire proceedings as only those deeply personal questions will be removed from public access due to privacy concerns.

The Court also reviewed whether the redacted versions of the juror questionnaires the district court gave to the press satisfied the balancing test. The Court held that the redacted questionnaires did not satisfy the balancing test because the district court did not base its redactions on any specific finding or discernible criteria.

⁵ *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 14 (1986).

⁶ *State ex rel. Beacon Journal v. Bond*, 781 N.E.2d 180, 191 (Ohio 2002)

Conclusion

The First Amendment encompasses the right of public access to criminal proceedings—criminal proceedings include juror questionnaires. All criminal proceedings are presumptively open to the public unless a court can document why a defendant would be deprived of a fair trial because of such access, and the court considers less drastic alternatives to total suppression of any document/proceeding. No blanket statement, generalization, or conjecture is capable of outweighing the press's First Amendment right of access to criminal proceedings.