

Open Courts and Fair Trials: Control of High-Profile Cases

PAUL RIDGEWAY
FEBRUARY 2025

1



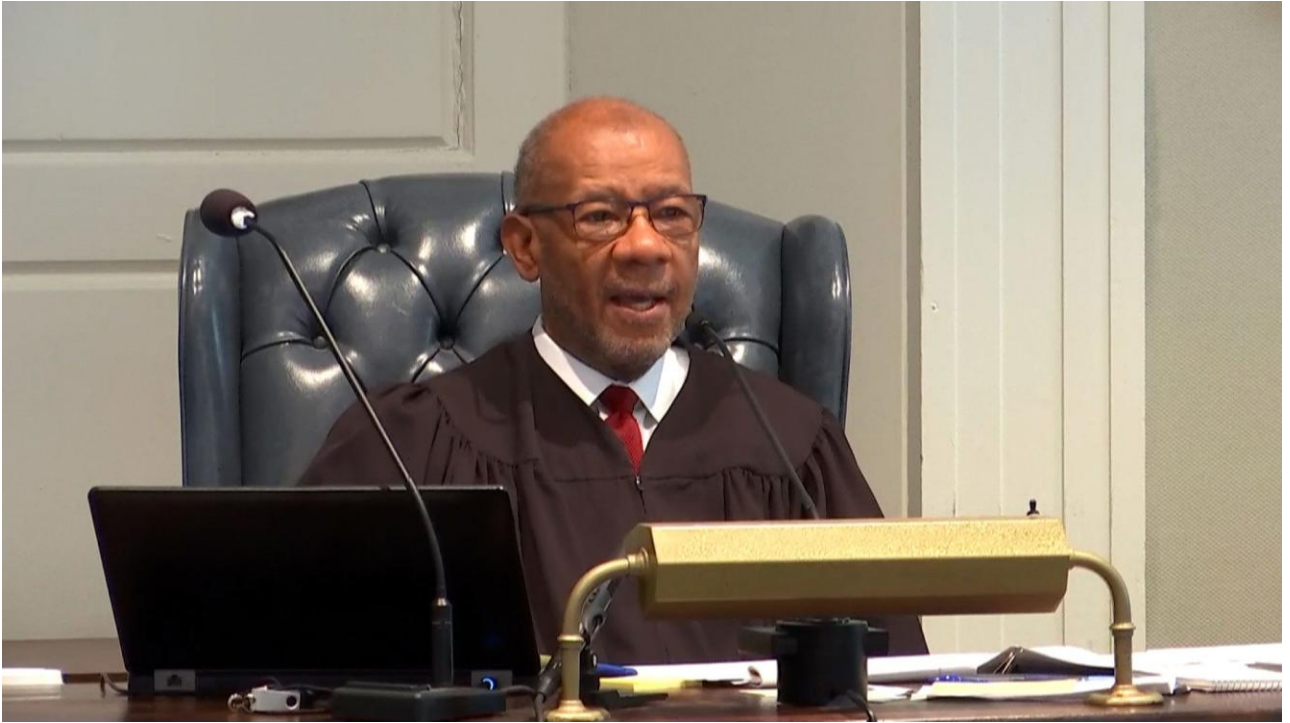
2



3



4



5

Closing the Courtroom

6

[W]hen a case is a 'sensational' one tensions develop between the right of the accused to trial by an impartial jury and the rights guaranteed others by the First Amendment.

Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976)

7

What does the 1st Amendment protect?

- ▶ The right of the public (and press) to attend criminal trials is implicit in the guarantees of the First Amendment.
Richmond Newspapers, Inc. v. Va., 448 U.S. 555 (1980)
- ▶ This right of access also applies to preliminary hearings in criminal cases. *Press-Enterprise Co. v Superior Court of Cal., 478 U.S. 1 (1986)*

8

A Qualified Right

- ▶ The right of access is a **qualified right**.
- ▶ Proceedings may be closed when findings are made that closure is **essential to preserve higher values** and is **narrowly tailored** to serve that interest. *Press-Enterprise Co. v. Superior Court of Cal.*, 478 U.S. 1 (1986)

9

Right to Access v Right to Fair Trial

- ▶ If the higher-value interest is the defendant's right to a fair trial, findings in support of closure must show:
 1. There is **substantial probability** that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent, and
 2. **Reasonable alternatives** cannot protect the defendant's right (*Press-Enterprise Co.*, *supra*)

10

Sixth Amendment Right to a Public Trial

- ▶ Sixth Amendment provides for a public trial (and suppression hearings) for the benefit of the accused
- ▶ Any closure of a suppression hearing or trial (or portion thereof) must meet the following test:
 1. Party seeking to close hearing must advance an **overriding interest**
 2. Closure must be **no broader than necessary** to protect interest
 3. Trial court must consider reasonable **alternatives**
 4. Trial court must make **adequate findings** to support closure
- ▶ *Waller v Georgia*, 467 U.S. 39 (1984)

11

- ▶ If you close a proceeding over the defendant's objection and in violation of the defendant's Sixth Amendment rights, that is **structural error**. *Weaver v Mass.*, 582 U.S. 286 (2017)

12

Statutory Authority – closing courtroom

- ▶ Evidence Rule 412 (Rape Shield)
- ▶ G.S. 15-166 – testimony of victim in rape or sex offense case
- ▶ G.S. 15A-1034 – access may be limited in criminal case to protect safety of those present
- ▶ Even when authorized by statute, prior to closing courtroom, make a record finding facts and setting out higher value being preserved and that less restrictive alternatives have been considered

13

May you seal the exhibits?

[illegible]

14

Right of Access to Court Records

- ▶ Press and public have common law qualified right of access to court records
- ▶ Access may be denied when essential to preserve higher values and restriction is narrowly tailored.
- ▶ Opportunity must be afforded to voice objection
- ▶ The judicial officer's decision to seal, or to grant access, is subject to review under an abuse of discretion standard.
- ▶ *Baltimore Sun Co. v. Goetz*, 886 F.2d 60 (4th Cir. 1989)
- ▶ See further: *Doe v. Doe*, 263 N.C. App. 68 (2018)

15

Media Access to the Courtroom

16



17

Chandler v Florida, 449 U.S. 560 (1981)

- ▶ A trial is a public event and that what transpires in an open courtroom is public property
- ▶ Coverage of all other branches of government exists and informs the public and makes representatives of government act more responsibility
- ▶ Our courts are an immensely important part of our government. In a democracy, no portion of government should be a mystery.
- ▶ Absent a showing of prejudice of constitutional dimensions to appellants, Court would not limit media coverage of criminal trial.

18

NC Code of Judicial Conduct, Canon 3.A(7)

- ▶ A judge should **exercise discretion** with regard to permitting broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during civil or criminal sessions of court or recesses between sessions, pursuant to the provisions of Rule 15 of the General Rules of Practice for the Superior and District Courts

19

Rule 15 of the General Rules of Practice (1992)

Allows

- ▶ Media coverage of public judicial proceedings
- ▶ But presiding judge has authority to prohibit or terminate coverage in the courtroom and adjacent corridors

Prohibits

- ▶ Audio pickup of bench conference, counsel-counsel conferences, attorney-client discussions
- ▶ Coverage of police informants, minors, undercover agents, relocated witnesses, sex crime victims and families
- ▶ Coverage of jurors at any stage. Judge must so inform jurors.

20

NCPI-Crim. 100.15 – Instructions re Cameras and Microphones in Courtroom

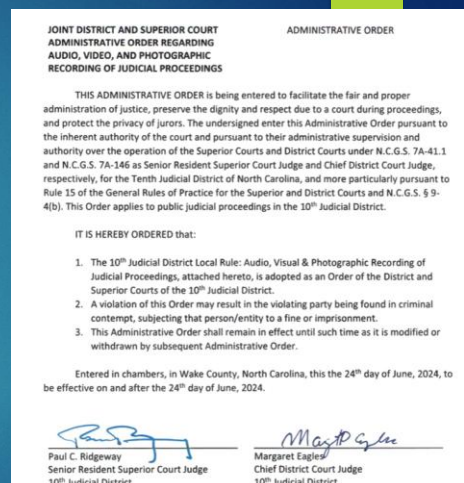
Before I speak to you concerning jury selection, I wish to mention the matter of possible news media coverage of this trial.

You may have noticed T.V. or camera equipment in the courthouse. Media coverage of jurors is expressly prohibited at any portion of the proceeding, including that portion in which a jury is selected. The cameramen and the photographers are not permitted to take pictures of you.

Therefore, you should not even consider whether this trial, or a portion of it, will be covered by the media by any of the means I have mentioned. It will not affect you personally, or the trial, so I urge you to put that matter out of your mind.

21

- ▶ Local Rule or Order
- ▶ Prohibits any recording of judicial proceeding unless permitted by judge (courtrooms & corridors)
- ▶ If permitted, restrictions consistent with Rule 15 (jurors, minors, etc.)
- ▶ Prohibits recording of bench conferences & counsel communications
- ▶ Process for obtaining prior approval
- ▶ Pooling arrangement
- ▶ Camera/recorder responsible for knowing and obeying order – contempt sanctions



22

Practical tips for handling media

- ▶ Don't be too quick to ban – Allowing recording/camera can prevent reporting errors and reduce confusion – “All courts shall be open”
- ▶ Cultivate savvy camera person familiar with Rule 15, local rules and courtroom decorum expectations
- ▶ Media Room – Allow a separate media room for video/audio feed for pooling
- ▶ Key Exhibits – Encourage parties to prepare copies for media

23

Control of the Courtroom



- ▶ Canon 3(A)(2) A judge should maintain order and decorum in proceedings before the judge.
- ▶ G.S. 15A-1034(a) The presiding judge may impose reasonable limitations on access to the courtroom when necessary to ensure the orderliness of courtroom proceedings or the safety of persons present

24

Preparation is Key. Meet with your Team

Clerk, TCA & Senior Resident

- ▶ Expanded jury pool
- ▶ Questionnaires & Rules handouts for jurors
- ▶ Space – courtroom size, media space, technology availability
- ▶ Courtroom seating plan
- ▶ Designating media liaison (TCA, TCC)
- ▶ Preparing Clerk staff for onslaught of information requests

Security / County Sheriff

- ▶ More officer in courtroom and around courthouse
- ▶ Enhanced searches at entry
- ▶ Security of all entrances, perimeter
- ▶ Juror safety & privacy issues – travel, secured entry & exit
- ▶ Witness & custodial defendant safety
- ▶ Defendant's entry point from jail
- ▶ Evacuation & active shooter plan
- ▶ Traffic & media truck control

25

Other tools:

- ▶ Sequestration of witnesses G.S. 15A-1225; NC R. Evid. 615
- ▶ Removal of a disruptive defendant G.S. 15A-1032

§ 15A-1032. Removal of disruptive defendant.

(a) A trial judge, after warning a defendant whose conduct is disrupting his trial, may order the defendant removed from the trial if he continues conduct which is so disruptive that the trial cannot proceed in an orderly manner. When practicable, the judge's warning and order for removal must be issued out of the presence of the jury.

(b) If the judge orders a defendant removed from the courtroom, he must:

- (1) Enter in the record the reasons for his action; and
- (2) Instruct the jurors that the removal is not to be considered in weighing evidence or determining the issue of guilt.

A defendant removed from the courtroom must be given the opportunity of learning of the trial proceedings through his counsel at reasonable intervals as directed by the court and must be given opportunity to return to the courtroom during the trial upon assurance of his good behavior. (1977, c. 711, s. 1.)

26

Removal of disruptive spectator

- ▶ G.S. 15A-1033: The judge in his/her discretion may order any person other than the defendant removed from a courtroom when his/her conduct disrupts the conduct of the trial.

27

Conduct of spectators in the courtroom



28

Spectator conduct

- ▶ **Nature of the conduct** – how many spectators involved; visible to jurors, organized or spontaneous, intention to influence jury
- ▶ **Remedy** – removal of spectator, covering or obscuring message, curative instruction to jury, mistrial
- ▶ In deciding whether to intervene and what intervention is appropriate, the trial court's paramount concerns must be the protection of the defendant's fundamental right to a fair trial and the court's obligation to preserve order and decorum in the courtroom.

29

- ▶ "The court is not a public hall for the expression of views, nor is it a political arena or a street. It is a place for trial of defined issues in accordance with law and rules of evidence, with standards of demeanor for court, jurors, parties, witnesses and counsel. All others are absolutely silent nonactors with the right only to use their eyes and ears".
- ▶ "No court should tolerate a vocal outburst by a spectator on the ground that the spectator had a First Amendment right to express his or her views on the proceedings. The court similarly should not entertain such concerns when the spectator conduct is nonverbal." *People v. Nelson*, 27 N.Y.3d 361 (2016)

30

Limiting Extrajudicial Statements



31

Prior restraints on speech - Media

- ▶ Prior restraints on speech are presumptively unconstitutional
- ▶ To be valid, a prior restraint on publication must be based on factual findings that:
 1. Publicity is likely to affect jurors and the right to a fair trial;
 2. Lesser measures such as a change in venue, continuance, or voir dire have been considered and will not mitigate risk; and
 3. The order will actually work to keep prejudicial information from jurors
- ▶ And, even then, there is nothing that proscribes the press from reporting events that transpired in the courtroom

32

Article 22A.

Prohibited Orders.

§ 7A-276.1. Court orders prohibiting publication or broadcast of reports of open court proceedings or reports of public records banned.

No court shall make or issue any rule or order banning, prohibiting, or restricting the publication or broadcast of any report concerning any of the following: any evidence, testimony, argument, ruling, verdict, decision, judgment, or other matter occurring in open court in any hearing, trial, or other proceeding, civil or criminal; and no court shall issue any rule or order sealing, prohibiting, restricting the publication or broadcast of the contents of any public record as defined by any statute of this State, which is required to be open to public inspection under any valid statute, regulation, or rule of common law. If any rule or order is made or issued by any court in violation of the provisions of this statute, it shall be null and void and of no effect, and no person shall be punished for contempt for the violation of any such void rule or order. (1977, c. 711, s. 3.)

33

§ 5A-11. Criminal contempt.

(a) Except as provided in subsection (b), each of the following is criminal contempt:

- (5) Willful publication of a report of the proceedings in a court that is grossly inaccurate and presents a clear and present danger of imminent and serious threat to the administration of justice, made with knowledge that it was false or with reckless disregard of whether it was false. No person, however, may be punished for publishing a truthful report of proceedings in a court.

(b) No person may be held in contempt under this section on the basis of the content of any broadcast, publication, or other communication unless it presents a clear and present danger of an imminent and serious threat to the administration of criminal justice.

(c) This section is subject to the provisions of G.S. 7A-276.1, Court orders prohibiting publication or broadcast of reports of open court proceedings or reports of public records banned. (1977, c. 711, s. 3; 1994, Ex. Sess., c. 19, s. 1; 2011-307, s. 6.)

34

Restrain the speech of trial participants - Lawyers

- ▶ First amendment does not prohibit discipline of a lawyer for remarks that create a substantial likelihood of material prejudice to the trial. *Gentile v State Bar of Nevada*, 501 U.S. 1030 (1991)

35

Professional Conduct - Lawyers

- ▶ Rule 3.6: A lawyer who is participating or has participated in the investigation or litigation of a matter **shall not make an extrajudicial statement** that the lawyer knows or reasonably should know **will be disseminated** by means of public communication and will have a **substantial likelihood of materially prejudicing an adjudicative proceeding in the matter**
- ▶ [A] lawyer **may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity** not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is reasonably necessary to mitigate the recent adverse publicity.

36

Professional Conduct - Prosecutors

- ▶ Rule 3.8(f): The prosecutor in a criminal case shall . . . except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, **refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused** and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

37

Code of Judicial Conduct

- ▶ **A judge should abstain from public comment about the merits of a pending proceeding in any state or federal court dealing with a case or controversy arising in North Carolina or addressing North Carolina law and should encourage similar abstention on the part of court personnel subject to the judge's direction and control.** This subsection does not prohibit a judge from making public statements in the course of official duties; from explaining for public information the proceedings of the Court; from addressing or discussing previously issued judicial decisions when serving as faculty or otherwise participating in educational courses or programs; or from addressing educational, religious, charitable, fraternal, political, or civic organizations.

38

Restricting speech of Defendant



- ▶ U.S. v. Trump, 88 F.4th 990 (D.C. Cir. 2023)
- ▶ People v Trump (NY 2024)
- ▶ Generally prohibited statements attacking or criticizing prosecutors, court staff or witnesses
- ▶ In both cases, trial courts found made findings that the former President's speech posed a significant and immediate risk that:
 1. witnesses would be intimidated or otherwise unduly influenced by the prospect of being themselves targeted for harassment or threats;
 2. attorneys, public servants, and other court staff would themselves become targets for threats and harassment, and
 3. inflammatory extrajudicial statements impeded the orderly administration of justice.

39

Restricting Speech: All trial participants

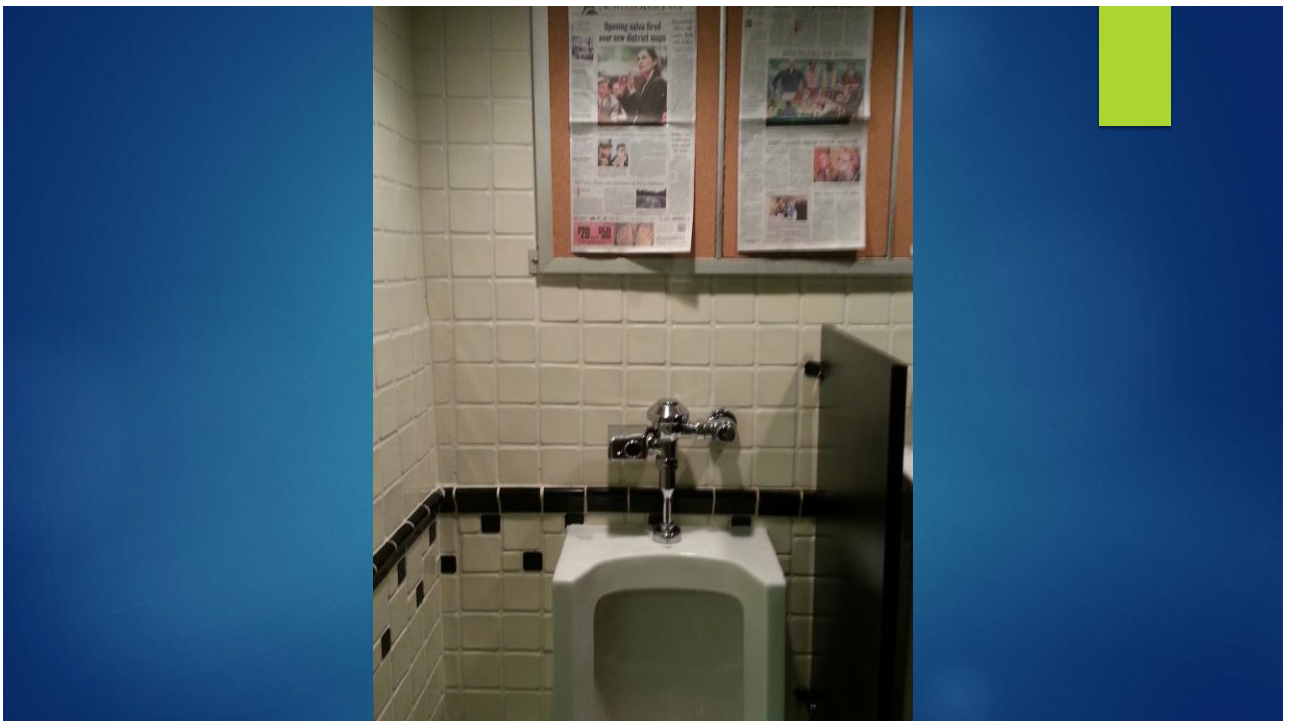
- ▶ *Beaufort Co. Bd. Of Ed v. Beaufort Co. Bd. Of Comm'rs*, 184 N.C. App. 110 (2007) – Order forbidding parties & attorneys from communicating with media about proceedings
- ▶ As prior restraints, gag orders are subject to strict and rigorous scrutiny under the First Amendment. The party asserting validity of the order must establish: (1) a clear threat to the fairness of the trial; (2) such threat is posed by the actual publicity to be restrained; and (3) no less restrictive alternatives are available to rebut the presumptive unconstitutionality of gag orders.
- ▶ Gag orders, like other prior restraints on speech, are not unconstitutional per se, but are presumptively unconstitutional as violative of the First Amendment, and are repugnant to the basic values of an open society.

40

Key Takeaways

- ▶ 1st and 6th Amendments – right to open courts and public trials
- ▶ Right is not absolute – may yield to overriding interest if restriction is narrowly tailored
- ▶ Before a criminal trial or any portion may be closed, party seeking closure must advance overriding interest, court must consider reasonable alternatives and make adequate findings. No broader than necessary
- ▶ Common law right of access to court records – access may be denied if essential to preserve higher values and restriction is narrow
- ▶ Court can control courtroom by excluding certain individuals from trial and imposing limitations on access
- ▶ Prior restraint of speech is presumptively unconstitutional but not absolute

41



42