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CRIMINAL LAW — PUBLICITY OF PROCEEDINGS: STUMBLING BLOCKS TO CLOSURE DURING CHILD VICTIM'S TESTIMONY

Ernest Klem was convicted, following two jury trials, on two counts of gross sexual imposition with a child under fifteen years of age.[1] Due to a hung jury, the first trial did not return a verdict.[2] The second trial resulted in a conviction.[3] Klem's adopted son was the victim of the gross sexual imposition offenses.[4] Although the child had testified in a completely open and public courtroom during the first trial, the state requested that the courtroom be cleared at the second trial to facilitate the child's testimony and to avoid embarrassing and distracting him.[5] The defendant informed his attorney that he objected to having the courtroom cleared, however, the defendant's attorney stated at the bench that he had no grounds for such an objection.[6] Consequently, the courtroom was cleared except for court personnel, attorneys, jurors, the parties, and a public media reporter.[7] Following his conviction, the defendant sought a new trial on the grounds that the trial court abused its discretion and committed several errors. The errors claimed included the trial court's exclusion of the public during the child's testimony when findings adequate to support closure

1. State v. Klem, 438 N.W.2d 798, 799-800 (N.D. 1989). The two counts of gross sexual imposition involved engaging in a sexual act with a person less than 15 years old and sexual contact with a person less than 15 years old, both violations of section 12.1-20-03 of the North Dakota Century Code. *Klem*, 438 N.W.2d at 799 & n.1. *See* N.D. CENT. CODE § 12.1-20-03 (1985 & Supp. 1989)(statute indicating the elements of gross sexual imposition).

2. *Klem*, 438 N.W.2d at 800 n.3.

3. *Id.* at 799-800. The North Dakota Supreme Court subsequently reversed and remanded the second trial of Klem. *Id.* at 803.

4. *Id.* at 799. At the time of the second trial, the boy was eleven. Jury Trial Transcript at 552, State v. Klem, 438 N.W.2d 798 (N.D. 1989)(No. 01-CR87).

5. *Klem*, 438 N.W.2d at 799-800. The North Dakota Supreme Court quoted the following dialog between the trial court and counsel for the state:

> "MR. TESSIER: Because this is of a sensitive nature may I ask that the Courtroom be cleared of all extraneous personnel? It may be very distracting and very embarrassing for him in front of all these people and the people in the Courtroom may inhibit the testimony.
> "THE COURT: Any objections?
> "[Klem's Attorney]: As the Court has stated, it's my client's case and I would like to discuss that with him.
> "THE COURT: Please do.
> "[Klem's Attorney]: Excuse me, Your Honor. I'm sorry, he does object. I don't have any grounds to object however.
> "THE COURT: Very well. I think I will clear the Courtroom. Let's go back and put it on the record."

Id. at 799.

6. *Id.* at 799. The state argued on appeal that since no grounds for objection were offered at trial, the subsequent objection was invalid and unreviewable. *Id.* at 799-800. However, the North Dakota Supreme Court ruled that any "articulated objection" was sufficient response to an unsupported and untimely motion to close the trial. *Id.* at 800.

7. *Id.* at 799.

had not been made, and evidence supporting closure had note been advanced.[8] Klem asserted that the exclusion of the public under such circumstances deprived him of his sixth amendment right to a public trial.[9] The state maintained that Klem did not preserve the issue for review because no grounds for an objection were offered at trial.[10] Commenting on the motion for a new trial, the trial court indicated that failure to state the grounds for an objection at the time of the closure should alone have been sufficient cause for denying a new trial.[11] The trial court further noted that any possible error was harmless because the sensitive nature of the case, as well as the age of the victim, the psychological and emotional pressures on the child, and the circumstances of a previous mistrial, clearly warranted closure.[12] Additionally, the court noted that the trial had not been completely closed because a member of the public media had remained, and other persons would have been allowed to remain if the defendant had so requested.[13] On appeal, the North Dakota Supreme Court reversed the district court conviction and remanded the case for a new trial.[14] The supreme court *held* that before closing a trial dur-

8. *Klem*, 438 N.W.2d at 803-04. The defendant raised four other issues on appeal including: 1) whether the trial court abused its discretion in failing to excuse for cause two jurors who had been exposed to pretrial publicity and did not state unequivocally that they could be impartial; 2) whether the court erred in failing to submit to the jury the issue of whether the prompt reporting requirement of § 12.1-20-01(3) of the North Dakota Century Code had been met; 3) whether the court erred in permitting a witness to express an opinion that a child was not "contaminated" when this opinion actually meant that the child was telling the truth; and 4) whether the court abused its discretion in excluding the polygraph evidence favorable to the defendant. *Id.*

9. *Id.* at 799.

10. *Id.* at 799-800. The North Dakota Supreme Court held that Klem's objection was sufficient under the circumstances of an unsupported and untimely motion by the state for closure. *Id.*

11. Transcript of Motions Hearing at 2, State v. Klem, 438 N.W.2d 798 (N.D. 1989)(No. 01-CR87). The North Dakota Supreme Court emphasized the impact of surprise to the defendant, due to the timing of the request for closure, in excusing the faultiness of the objection. *Klem*, 438 N.W.2d at 800.

12. Transcript of Motions Hearing, *supra* note 11, at 3-5. The trial court's post trial rationalization that its ruling in favor of closure would have been the same if it had held a hearing and made findings was found unavailing by the North Dakota Supreme Court. *Klem*, 438 N.W.2d at 802. The supreme court ruled that the hearing and findings must be made before closure of the trial. *Id.*

13. Transcript of Motions Hearing, *supra* note 11, at 5-6. The North Dakota Supreme Court ruled that the presence of the news reporter might have satisfied the public's first amendment right to attend criminal trials, but it did not satisfy the defendant's sixth amendment right to a public trial. *Klem*, 438 N.W.2d at 801.

14. *Klem*, 438 N.W.2d at 803. In his dissent in *Klem*, Chief Justice Erickstad argued that the case should have been remanded for a hearing on the public trial issue and no new trial should have been granted unless the hearing indicated it was warranted. *Klem*, 438 N.W.2d at 803 (Erickstad, C.J., dissenting). Because the dissent would not have remanded for a new trial directly on the basis of the public trial issue, the dissenting opinion also evaluated the remaining four issues. *Id.* at 808 (Erickstad, C.J., dissenting). See *supra* note 8 for a list of the four remaining issues raised on appeal in *Klem*. On the first of the remaining four issues, regarding juror partiality, the dissent found that a juror's partiality

ing a child witness' testimony, the court must conduct a hearing and make findings showing that the child needs protection.[15] Furthermore, the supreme court ruled that the trial court must show it considered alternatives to closure and that any closure would be no broader than necessary to protect the child.[16] *State v. Klem*, 438 N.W.2d 798 (N.D. 1989).

Since before the days of the Norman conquest of England the judiciary has evinced a strong preference for open and public trial.[17] Scholars may debate why such a preference developed, but its firm establishment since antiquity seems undisputed.[18] In

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was a question of fact for the trial court. *Klem*, 438 N.W.2d at 811. A trial court's resolution of that question is properly presumed correct and should not be reversed unless the trial court clearly abused its discretion. *Id.* The dissent did not find, in its review of the record, that the trial court had abused its discretion in interpreting the jurors' responses and consequent refusal to dismiss the challenged jurors for cause. *Id.*

On the second of the remaining issues relating to the prompt reporting requirement, the defendant argued that there was a dispute regarding when the offense was reported because a doctor's report stated the year of the alleged offense at 1984 instead of 1985. *Klem*, 438 N.W.2d at 811. An accurate reporting date was important for statute of limitation purposes. *Id.* The dissent found there was no actual dispute regarding the time since the testimony of the doctor explained that the 1984 date on the doctor's report was an error, and all witnesses agreed on the date. *Id.*

The third remaining issue dealt with the admission of evidence on the subject of testimonial contamination. *Id.* The dissent found the doctor's explanation of how a child witness' testimony can be contaminated by leading questions, together with the doctor's opinion that this had not happened to the child in this case, were properly admitted. *Klem*, 438 N.W.2d at 812.

On the final issue, regarding the exclusion of the polygraph evidence, the dissent noted that polygraph test results are not ordinarily admissible in North Dakota criminal trials unless the parties have stipulated to their admissibility. *Id.* at 813. The parties made no stipulation in this case. *Id.* The dissent also indicated that the defense failed to offer foundation evidence indicating that the polygraph test was accepted as reliable by the scientific community. *Id.*

In conclusion, the dissent indicated that the case should be reassigned to a district court judge from outside the district who had no prior contact with the case to encourage a new and independent review of the issue. *Klem*, 438 N.W.2d at 813. Hence, if the new court concluded that the public was properly excluded, a new judgment of conviction should be entered. *Id.*

15. *Klem*, 438 N.W.2d at 801-02. The test for closure as formulated by the United States Supreme Court provides:

> [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

Id. at 801 (quoting Waller v. Georgia, 467 U.S. 39, 48 (1984)).

16. *Klem*, 438 N.W.2d at 801.

17. *See* Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 564-65 (1980)(Supreme Court reversed a trial court's ruling to close a murder trial). In an opinion in which Chief Justice Burger announced the judgment of the court, he summarized the history of Anglo-American criminal jurisprudence, citing the works of numerous legal scholars. *Richmond Newspapers*, 448 U.S. at 558, 564-73. He concluded, "[f]rom this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice." *Id.* at 573.

18. *See Richmond Newspapers*, 448 U.S. at 558-73 (summary of the development and history of public trials in English and American legal history). *See also* Note, *The First*

America, this ancient precedent solidified into a constitutional right — the sixth amendment to the United States Constitution which provides: "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ."[19] Through the fourteenth amendment, this right applies to the states.[20] This constitutional right to a public trial is intended to protect the accused from unjust prosecution and to assure that participants perform their functions fairly and responsibly, knowing they are under public scrutiny.[21] The United States Supreme Court has also endorsed a proposition asserting that, in addition to benefiting the accused, open trials benefit the public in several ways.[22] First, public attendance at criminal proceedings assures the public that

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Amendment Right of Access to Sex Crime Trials, 22 B.C. L. REV. 361, 366-67 (1981)[hereinafter Note, *Right of Access*](mapping a common law right of access to criminal trials); Note, *The First Amendment and Mandatory Courtroom Closure in Globe Newspaper Co. v. Superior Court: The Press' Right, the Child Rape Victim's Plight*, 11 HASTINGS CONST. L.Q. 637, 640-41 (1984)[hereinafter Note, *Courtroom Closure*](restating the history of the public trial from *Richmond Newspapers* and citing additional sources in agreement with that history); Supreme Court Review, *Sixth Amendment-Public Trial Guarantee Applies to Pretrial Suppression Hearings*, 75 J. CRIM. L. AND CRIMINOLOGY 802, 806-07 & n.40 (1984)[hereinafter, Supreme Court Review, *Public Trial Guarantee*](summarizing United States Supreme Court opinions that discuss the history of public trials in America). While the preference for open criminal trials may indeed be well established, an argument has been made that an exception to this preference is equally well established for sex crime trials. *See* Comment, *Globe Newspaper Co. v. Superior Court*, 11 HOFSTRA L. REV. 1353, 1363-65 & nn. 85, 86, 91 (1983)[hereinafter Comment, *Globe Newspaper*](documenting circumstances limiting traditional access to criminal trials and suggesting the existence of an historical preference for closure during trials of sex crimes involving minors).

19. *See* U.S. CONST. amend. VI. The sixth amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id.

20. Gannett Co. v. DePasquale, 443 U.S. 368, 379 (1979).

21. *Id.* at 380. The United States Supreme Court in *Gannett* reaffirmed that the sixth amendment public trial protection is to ensure fair trials in which the accused is not unjustly condemned. *Id.* at 380. The Court discussed the scope and importance of this right during its determination of whether or not a defendant may compel a private trial. *Id.* at 382-83. In *Gannett*, following the disappearance during a fishing trip of a suburban Rochester, New York man, the petitioner's two local newspapers carried extensive coverage of the investigation, the evidence, police theories, and the arrest and history of the defendants. *Id.* at 371-75. The defense counsel argued that the defendants' ability to receive fair trials was jeopardized by the publicity, hence, the public and press should be excluded from the suppression hearing. *Id.* at 375. With no objections offered, the defense motion was granted by the trial court. *Id.* The following day an employee of the petitioner newspaper sought access to the transcript and a hearing on the matter was scheduled. *Id.* Citing "probability of prejudice," the trial judge refused to change his order. *Id.* at 376. The decision was appealed, eventually gaining certiorari to the United States Supreme Court which reversed the trial court. *Gannett*, 443 U.S. 368, 376-77.

22. *Id.* at 383. *See also* Note, *Right of Access*, *supra* note 18, at 365-66 (claiming that public trials serve numerous political and educational functions and that the public has a substantial interest in access to criminal trials).

the laws are being enforced and the justice system is functioning properly.[23] Second, even for those members of the public who do not attend, simply knowing that anyone may attend and see for themselves that appropriate standards of fairness are being maintained enhances their confidence in criminal proceedings.[24] The resulting appearance of fairness serves a therapeutic function in society, providing an outlet for emotion and reaction, especially where the criminal act caused public outrage and provoked a public desire to retaliate.[25] Closed proceedings, the Supreme Court has indicated, eliminate that outlet for public outrage and could frustrate public desire to see that an offender is made to account for his actions.[26] Finally, the Court indicated that open proceedings may encourage higher quality testimony and induce otherwise unknown witnesses to come forward.[27]

However, the Supreme Court did not find any constitutionally guaranteed public right to attend criminal trials in the sixth amendment.[28] The Justices stated in 1979 that, "[r]ecognition of an independent public interest in the enforcement of Sixth Amendment guarantees is a far cry . . . from the creation of a constitutional right on the part of the public."[29] Nevertheless, the following year, the court found implicit in the first amendment to the United States Constitution a constitutional public right to attend criminal trials.[30]

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23. Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508-09 (1984)[hereinafter Press-Enterprise I].

24. *Id.* at 508.

25. *Id.* at 508-09. *See also* Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 570 (1980)(stating open trials serve a therapeutic function).

26. *Press-Enterprise I*, 464 U.S. at 508-09.

27. *Gannett*, 443 U.S. at 383.

28. *Id.* Although *Gannett* involved the closure of a pre-trial hearing, the United States Supreme Court opinion indicated the holding applied to public access to criminal trials as well. *Id.* at 391. *See* Note, ***Right to Access***, *supra* note 18, at 369-70 (stating the rejection of a sixth amendment public access right, while contained in dicta and not distinguishing between pre-trial and trial closures, heavily burdened any future attempts to recognize such a right).

29. *Gannett*, 443 U.S. at 383. The Supreme Court recognized that the public has an important and traditional interest in open proceedings and a defendant has a constitutional sixth amendment right to a public trial. *Id.* at 382-83. The Supreme Court's plurality opinion in *Gannett*, however, found no constitutional public right to attend trials. *Id.* at 383-84. Justice Powell alone believed a first amendment right to attend trials existed, but agreed closure was appropriate in the Gannett case because even such a constitutional right is limited by the government's need to protect confidential information, the defendant's interest in a fair trial, and the government's interest in convictions. *Gannett*, 443 U.S. at 397-98 (Powell, J., concurring).

30. *Richmond Newspapers*, 448 U.S. at 580. At the beginning of the fourth trial for murder, after three mistrials, the defendant requested the proceedings be closed. *Id.* at 559. The request for closure was granted, and following a hearing, the trial court denied Richmond Newspapers' motion to vacate. *Id.* at 561. Upon appeal to the United States Supreme Court, the Court determined there was, implicit in the first amendment, a constitutional right granted to the public to attend criminal trials. *Id.* at 580.

The first amendment provides, "[c]ongress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble. . . ."[31] The Supreme Court explained that free speech includes the freedom to listen, to receive ideas and information.[32] Without protecting a right to seek out and gather information and news, the first amendment could not protect freedom of the press.[33] Similarly, the right to communicate regarding the happenings of a trial would have little meaning if the opportunity to observe the proceedings could be arbitrarily denied.[34] Further, pointing out that people may assemble to listen, observe, and learn and that the exercise of first amendment rights are limited by traditional time, place, and manner restrictions, the Court indicated that a trial courtroom is a public place where people have a right to assemble.[35]

Despite the logical reasons supporting the right to a public trial, public access may hinder a fair trial, such as when news coverage of a pretrial suppression hearing leads to an extensive buildup of prejudicial publicity.[36] Public access may also conflict with other important interests, such as the government's need to protect confidential and secret information, the identity of informants,[37] or a child witness.[38] While the Supreme Court acknowledged in 1979 that some interests may limit the scope of the

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Consequently, the Supreme Court reversed the lower court, noting, "Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." *Richmond Newspapers*, 448 U.S. at 581.

31. *See* U.S. CONST. amend I. The first amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.* The first amendment applies to the states through the fourteenth amendment. *Richmond Newspapers*, 448 U.S. at 575.

32. *Richmond Newspapers*, 448 U.S. at 576 (Burger, C.J., plurality opinion). Although *Richmond Newspapers* was a plurality decision, a majority of the court recognized a first-amendment-based public right of access. *See* Note, *Courtroom Closure*, *supra* note 18, at 647-48 (summarizing the various opinions in *Richmond Newspapers*, 448 U.S. 554, and indicating that only one justice failed to recognize a constitutional public right of access).

33. *Richmond Newspapers*, 448 U.S. at 576 (Burger, C.J., plurality opinion). While a majority of the court did recognize a public right of access to criminal trials based on the first amendment, the justices disagreed regarding the scope and foundation of the right within the first amendment. *See* Note, *Right of Access*, *supra* note 18, at 372-74 (analyzing the differing first amendment foundations recognized in the various *Richmond Newspapers* opinions); Note, *Courtroom Closure*, *supra* note 18, at 647-50 (discussing, first, the foundation of the public access right and, second, the scope of that right as recognized by the various opinions).

34. *Richmond Newspapers*, 448 U.S. at 576-77.

35. *Id.* at 578. *See also* Note, *Right of Access*, *supra* note 18, at 373-74 (characterizing the right to assemble to watch criminal trials as a conventional first amendment analysis in contrast with a new recognition of a right to gather information).

36. *Gannett*, 443 U.S. at 375, 394.

37. *Id.* at 398 (Powell, J., concurring).

38. *Richmond*, 448 U.S. at 600 n.5 (Stewart, J., concurring).

public trial right,[39] a test for balancing those interests was not provided until 1982 in *Globe Newspaper Co. v. Superior Court.*[40]

Globe was a rape trial in which the victims were minors.[41] The trial was closed pursuant to a Massachusetts statute which provided

> [a]t the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, . . . the presiding justice shall exclude the general public from the courtroom, admitting only such persons as may have a direct interest in the case.[42]

Relying on this statute, the lower court ordered the trial closed, and despite objections from the Globe Newspaper Company, the newspaper was denied access to the courtroom.[43] The Globe Newspaper Company sought relief from this order by appealing to the Supreme Judicial Court of Massachusetts.[44] The Supreme Judicial Court dismissed the Globe Newspaper Company's appeal, but ruled that closure was mandatory under the Massachusetts statute only during the minor victim's testimony.[45] The court stated that further closure would be left to the trial judge's discretion.[46]

The Globe Newspaper Company appealed to the United States Supreme Court.[47] Ultimately, the Supreme Court held that

39. *See Gannett*, 443 U.S. at 393-94 (Court affirmed closure where decision was based on balancing competing societal issues) and *Id.* at 397-98 (Powell, J., concurring)(discussing possible limits on public access to criminal trials); *Richmond*, 448 U.S. at 600 n.5 (Steward, J., concurring)(considerations that might justify closure). *See also* Note, *Right of Access, supra* note 18, at 374 (stating that the entire Supreme Court recognized the public trial right was not absolute).

40. 457 U.S. 596 (1982).

41. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 598 (1982). In *Globe*, the defendant was charged with "forcible rape and forced unnatural rape" of three teenage girls. *Id.*

42. *Id.* at 598-99 n.1. *See* MASS. GEN. LAWS ANN. ch. 278, § 16A (West 1981).

43. *Globe*, 457 U.S. at 599.

44. *Id.*

45. *Id.* at 600.

46. *Globe*, 457 U.S. at 600. The Supreme Judicial Court of Massachusetts did not render an opinion until after the conclusion of the trial and ruled on the merits because of the importance of the issue. *Id.* The court determined that section 16A of Chapter 278 of the Massachusetts General Laws was intended to encourage child victims of sexual offenses to come forward and to protect them from psychological harm, thereby preserving their ability to testify. *Id.* Therefore, the court reasoned, closure was mandatory only when the minor victims were testifying and that closing other portions was a matter of judicial discretion. *Id.*

47. *Globe*, 457 U.S. at 601. The United States Supreme Court remanded for consideration in light of recently decided *Richmond Newspapers*, 448 U.S. 555 (1980). *Globe*, 457 U.S. at 601. Upon remand, the Massachusetts court adhered to its position, not

the Massachusetts statute violated the first amendment, and the Court reversed the decision of the Massachusetts Supreme Judicial Court.[48] While the Supreme Court agreed that protecting minor victims of sex crimes and encouraging them to testify were compelling interests, those interests did not justify mandatory closure of a courtroom.[49] The test for determining when closure of a criminal trial would be appropriate was whether closure is "necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."[50] Mandatory closure, the Court concluded, was not "narrowly tailored" because closure might not be necessary in all cases.[51] The Supreme Court then set forth a narrowly tailored approach that required a case-by-case analysis, weighing factors such as "the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and interests of parents and relatives."[52]

The Supreme Court provided further guidance on the ques-

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reading *Richmond Newspapers* to require invalidation of section 16A of chapter 278 of the Massachusetts General Laws. *Globe*, 457 U.S. at 601-02. Further, the Massachusetts court pointed out that the important interests advanced of encouraging child victims of sex crimes to come forward and protecting them from psychological harm when they testify at trial "would be defeated if a case-by-case determination were used." *Id.* (quoting Globe Newspaper v. Superior Court, 383 Mass. 838, 851, 423 N.E.2d 773, 779 (1981)). The case again returned to the United States Supreme Court which reversed the Massachusetts Supreme Judicial Court and ruled that section 16A of chapter 278 of the Massachusetts General Laws was unconstitutional. *Globe*, 457 U.S. at 602.

48. *Globe*, 457 U.S. at 610-11.

49. *Id.* at 607-08.

50. *Id.* at 607.

51. *Globe*, 457 U.S. at 609. The United States Supreme Court commented that the state's legitimate interest could be served by requiring a case-by-case determination of whether the state's concern for the well-being of the child witness necessitated closure. *Id.* Further, the court faulted the commonwealth because "no empirical support" was offered to show that mandatory closure would increase the number of victims coming forward to cooperate. *Id.*

52. *Globe*, 457 U.S. at 608. Three Justices registered strong dissents in *Globe*. *Id.* at 612, 620. One dissent pointed out the anomaly that results when minors charged with rape automatically receive more protection than the minor victims of rape. *Id.* at 612 (Burger, C.J., dissenting). Chief Justice Burger noted that historically our society has made great efforts to protect minors charged with crime. *Id.* But, he further noted, though states may mandate the closing of all proceedings in order to protect a 17-year-old charged with rape, they may not require the closing of even part of a criminal proceeding in order to protect the innocent child rape victim. *Id.* at 612. Another dissenting Justice stated that the question of the constitutionality of the Massachusetts statute was premature because the statute, as interpreted by the Supreme Judicial Court of Massachusetts, had never been applied. *Globe*, 457 U.S. at 623 (Stevens, J., dissenting). This second dissenting opinion further noted that "the Massachusetts Supreme Judicial Court narrowly construed — and then upheld in the abstract — the statute that the trial court had read to mandate the closure of the entire trial." *Id.* at 620. The statute as interpreted by the Supreme Judicial Court had never been applied in an actual controversy. *Id.* Therefore, the dissent viewed the question as a hypothetical and the majority opinion as providing no guidance in resolving the conflicting interests. *Id.* at 621, 623. *See also* Comment, *Globe Newspaper*, *supra* note 18, at 1359 (analysis of Chief Justice Burger's dissent in *Globe* indicating that the dissent is of particular interest because the Chief Justice was the author of the majority opinion in *Richmond Newspapers*, 448 U.S. 554, upon which the majority in *Globe* relied).

tion of when a courtroom proceeding may be closed in its discussion in *Press-Enterprise Company v. Superior Court of California*, (*Press-Enterprise I*).[53] In *Press-Enterprise I*, the trial court closed the preliminary jury examination proceedings in a trial involving the rape and murder of a teenager.[54] The closure was not for the protection of a minor, however, but rather to insure juror candor and to protect both the jurors' right to privacy and the defendant's right to a fair trial.[55] Although some sensitive and private areas of the jurors past experiences were discussed during the six weeks of jury examination proceedings, only three days out of those six weeks were open to the public.[56]

In *Press-Enterprise I*, the Supreme Court applied and expanded the *Globe* test.[57] The Court restated the test as follows: "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[58] The Supreme Court required clear articulation of the interest and specific findings to facilitate review.[59] Applying the expanded test to the facts in *Press-Enterprise I*, the Supreme Court determined that the trial court's findings were insufficient to show that the two compelling interests, the defendant's right to a fair trial and the prospective jurors' privacy rights, were threatened by an open proceeding.[60] Further, even had there been adequate findings, the trial court had not considered whether there were alternatives available to adequately guard those interests.[61] With-

53. 464 U.S. 501 (1984).

54. Press-Enterprise v. Superior Court, 464 U.S. 501, 503 (1984)(*Press-Enterprise I*).

55. *Id.* at 503-04. Both counsel for the defendant and the prosecutor agreed that closure and sealing of the transcript was proper. *Id.* at 504.

56. *Id.* at 503-04. The trial judge stated that "while most of the information is dull and boring, some of the jurors had some special experiences in sensitive areas that do not appear to be appropriate for public discussion." *Id.* at 504.

57. *Press-Enterprise I*, 464 U.S. at 509-10 (Chief Justice Burger, author of a strong dissent in *Globe*, 457 U.S. at 607, delivered the opinion).

58. *Press-Enterprise I*, 464 U.S. at 510. The *Globe* test stated, "Where . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Globe*, 457 U.S. at 606-07.

59. *Press-Enterprise I*, 464 U.S. at 510. In *Press-Enterprise I*, the United States Supreme Court indicated that the trial judge should have explained why the information was sensitive and entitled to privacy and why the closure order was not limited to that information. *Id.* at 513.

60. *Id.* at 510-11. In addition to making findings showing the state's asserted interests were threatened by an open proceeding, the trial judge should explain why the matter under discussion or contained in the transcript is entitled to privacy. *Id.* at 513.

61. *Press-Enterprise I*, 464 U.S. at 511. When a closure order was requested, the trial judge could have required a prospective juror to make an affirmative request that personal information not be disclosed. *Id.* at 512. A concurring opinion suggested that a court should be required to show that any closure order constitutes "the least restrictive means available for protecting compelling state interests." *Id.* at 520 (Marshall, J., concurring).

out considering alternatives, the Supreme Court found, no conclusion that closure was warranted could possibly be drawn.[62]

Within a few months of the *Press-Enterprise I* decision, the Supreme Court again addressed the issue of closing proceedings to the public in *Waller v. Georgia*,[63] in which a suppression hearing was closed to protect people who were not on trial at the time.[64] Unlike *Globe*[65] and *Press-Enterprise I*,[66] the objection to closure in *Waller* came from the defendant and triggered an analysis in terms of the sixth amendment rather than the first amendment.[67] In *Waller*, the Supreme Court unanimously concluded the requirements for closure were the same regardless of whether the right affected was found in the first amendment or the sixth amendment.[68] The Court first quoted the test from *Press-Enterprise I* for determining when a criminal proceeding could be closed.[69] After emphasizing the importance of the sixth amendment and the benefit provided to the defendant by open trials, the Court restated the requirements that must be met to properly close a criminal proceeding.[70] The party seeking closure "must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceedings, and it must make findings adequate to support the closure."[71]

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62. *Id.* at 511.
63. 467 U.S. 39 (1984).
64. Waller v. Georgia, 467 U.S. 39, 42 (1984). With court authority, wiretaps had been placed on phones, revealing a large lottery operation which involved gambling on the volume of the New York Stock Exchange. *Id.* at 41. The petitioners were indicted along with 35 others. *Id.* Trials were held separately and the prosecutor was concerned that wiretap evidence relating to those persons not yet on trial could be tainted and legally not admissible in future prosecutions. *Id.* at 42.
65. 457 U.S. 596 (1982).
66. 464 U.S. 501 (1984).
67. *Waller*, 467 U.S. at 42 n.2, 43. The court agreed that the public trial guarantee of the sixth amendment applied to a pretrial suppression hearing as well as a trial. *Id.* at 47.
68. *Waller*, 467 U.S. at 44-46. *See generally* Comment, *Public Trial Guarantee, supra* note 18 (analysis of the Waller opinion criticizing the unpredictability of the test and lack of guidance in identifying an "overriding interest").
69. *Waller*, 467 U.S. at 45. In *Press-Enterprise I*, the Court stated the test as follows: "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise I*, 464 U.S. at 510.
70. *Id.* at 48.
71. *Id.* Protecting the privacy interest of persons and protecting information from unnecessary publication that could render it inadmissible under state law could be an overriding interest sufficient to support the closure of a hearing. *Id.* However, in advancing this interest, the state in *Waller* was not specific in explaining whose privacy interest was in danger of being infringed, how it would be infringed, which portions of the tapes could infringe it, and which portion of the evidence consisted of tapes. *Id.* Further, the court did not consider alternatives such as obtaining more information in private and only closing those portions of the hearing which endangered the interest advanced. *Id.* at

The *Waller* Court also addressed the issue of appropriate relief when a proceeding was improperly closed.[72] Concluding that the defendant need not show specific prejudice if the trial was improperly closed, the Court nevertheless ruled that a new trial was not necessary unless a new and public suppression hearing rendered substantially different results.[73]

In *Press Enterprise Co. v. Superior Court of California*, (*Press-Enterprise II*),[74] unlike *Waller*,[75] the defendant requested a closed suppression hearing and the media challenged denial of access.[76] The Supreme Court applied the test from *Press-Enterprise I*[77] and pointed out that the same considerations which led the Court to apply the first amendment public right of access to criminal trials in *Richmond Newspapers*[78] and *Globe*,[79] and to the jury selection process in *Press-Enterprise I*[80] led the Court to conclude that this first amendment right also applied to the preliminary hearing in *Press-Enterprise II*.[81]

The historical preference for open criminal proceedings was an important consideration of the United States Supreme Court in recognizing a public right of access to court proceedings in criminal cases.[82] However, as Chief Justice Burger stated in his dissent in *Globe*, "[i]t would misrepresent the historical record to state that there is an 'unbroken, uncontradicted history' of open proceedings in cases involving the sexual abuse of minors."[83] Early

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48-49. Additionally, the United States Supreme Court observed that the Georgia Supreme Court's post hoc assertion, that the trial court had balanced the petitioners' right to a public hearing against the privacy rights of others, could not solve the deficiencies of the trial court's record. *Id.* at 49 n.8.

72. *Waller*, 467 U.S. at 49.

73. *Id.* at 49-50. The Supreme Court held that if essentially the same evidence was suppressed in a subsequent hearing, then, a new trial would be a windfall for the defendant and not serve the public interest. *Id.* at 50.

74. 478 U.S. 1 (1986).

75. 467 U.S. 39 (1984).

76. Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1, 3-5 (1986)[hereinafter *Press-Enterprise II*]. The defendant, a nurse accused of murdering 12 patients, requested the preliminary hearing be closed to protect his right to a fair trial because the case had attracted national publicity. *Id.*

77. 464 U.S. 501 (1984).

78. 448 U.S. 555 (1980).

79. 457 U.S. 596 (1982).

80. 464 U.S. 501 (1984).

81. *Press-Enterprise II*, 478 U.S. at 9-10.

82. *Id.* at 8.

83. *Globe*, 457 U.S. at 614. *See* Note, *Courtroom Closure*, *supra* note 18, at 658 & n. 163 (citing the Chief Justice's dissent and summarizing the lower court decisions used to support his view); Comment, *Globe Newspaper*, *supra* note 18, at 1363-65 & nn. 65, 86, 91 (documenting circumstances limiting traditional access to criminal trials and suggesting the existence of an historical preference for closure during trials of sex crimes involving minors). An example of such limiting circumstances is a Mississippi Supreme Court case indicating that the trial court had discretion to exclude all persons except those necessary to

cases in the United States indicate that portions of the public routinely were excluded to protect society's morals.[84]

Over time the attitudes in American society changed and were reflected in the courts as judges shifted emphasis from the protection of the child spectator at a trial involving sexual misconduct to a concern for protecting the child witness and victim.[85] By closing trials to the general public, the courts of several states hoped to reduce the trauma to the child victim by sparing them the embarrassment, humiliation, shame, or fear that could result

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conduct the trial in prosecutions for adultery, rape, fornication, sodomy, and crimes against nature. *Sallie v. State*, 155 Miss. 547, __, 124 So. 650, 651 (1929).

84. *See* Note, ***Right of Access***, *supra* note 18, at 363 (citing examples from the late 1800's and early 1900's approving exclusion of the public from criminal trials where the evidence was considered likely to damage public morality). *See also* Green v. State, 135 Fla. 17, __, 184 So. 504, 506-07 (1938)(rape of 15-year-old girl; "if there is any testimony which might be revolting to ladies or others, they will have to retire;" "[t]he mere fact that some witness may be called who is not willing to testify freely in regard to certain facts before spectators is not sufficient"); Lancaster v. State, 168 Ga. 470, __, 148 S.E. 139, 142 (1929)(rape trial; "all trials are normally and properly open to the public, except where, in the court's discretion, the evidence tends to debauch the morals of the young"); State v. Smith, 90 Utah 482, __, 62 P.2d 1110, 1115 (1936)(statutory rape case; "a regard to public morals and public decency would require that at least the young be excluded from hearing and witnessing the evidences of human depravity which the trial must necessarily bring to light").

85. *See Globe*, 457 U.S. 596, 598, 600 (challenging closure mandated by statute to protect child witnesses); United States *ex rel.* Latimore v. Sielaff, 561 F.2d 691, 694 (7th Cir. 1977), *cert. denied*, 434 U.S. 1076 (1978)(rape of 21-year-old woman: "[p]rimary justification for [closure] lies in protection of the personal dignity of the complaining witness"); Harris v. Stephens, 361 F.2d 888, 891 (8th Cir. 1966) *cert. denied*, 386 U.S. 964 (brutal rape of a 23-year-old woman; closing was a "frequent and accepted practice when the lurid details of such a crime must be related by a young lady"); Geise v. United States, 262 F.2d 151, 157 (9th Cir. 1958), *reh'g denied*, 265 F.2d 659 (9th Cir. 1959), *cert. denied*, 361 U.S. 842 (1959)(rape of eight-year-old child where two other witnesses were ages seven to eleven; court may close to protect a child witness from embarrassment caused by testifying to delicate or revolting facts)(quoting with approval U.S. v. Geise, 158 F. Supp. 821, 824 (D. Alaska, 1958), *reh'g denied* 167 F. Supp. 775 (D. Alaska, 1958), *aff'd*, 262 F.2d 151 (9th Cir. 1958)); United States v. Kobli, 172 F.2d 919, 922-23 (3rd Cir. 1949)(youthful spectators may be excluded when evidence contains scandalous or indecent matters, however, "whatever may have been the view in an earlier and more formally modest age, "adults could not be excluded on the grounds of public morality; but where the prosecuting witness was "of such tender years as to be seriously embarrassed in giving her testimony" before spectators, the judge may order closure); State v. Smith, 123 Ariz. 243, __, 599 P.2d 199, 205 (1979)("protection of the dignity of the complaining witness in a rape case is a substantial justification for excluding spectators"); State v. Purvis, 157 Conn. 198, __, 251 A.2d 178, 182 (1969), *cert. denied*, 395 U.S. 928 (1969)(rape of 16-year-old child); Beauchamp v. Cahill, 297 Ky. 505, __, 180 S.W.2d 423, 424 (1944)(contributing to the delinquency of a 15-year-old girl; judge had power to exclude the young and protect a child witness by excluding spectators); Commonwealth v. Blondin, 324 Mass. 564, 87 N.E.2d 455 (1949), *cert. denied*, 339 U.S. 984 (1950)(rape of 16-year-old child); State v. Schmit, 273 Minn. 78, __, 139 N.W.2d 800, 805-07 (1966)(order excluding spectators except news reporters during a trial for carnal knowledge was error; protection of public morals was dubious in light of newspaper coverage, and mere embarrassment of an adult witness was insufficient justification); State *ex rel.* Baker v. Utecht, 221 Minn. 145, __, 21 N.W.2d 328, 331 (1946), *cert. denied*, 327 U.S. 810 (1946)(where evidence relates to indecent or immoral matters, the judge may exclude children and also exclude spectators to alleviate the embarrassment of a child witness); State v. Holm, 67 Wyo. 360, __, 224 P.2d 500, 508 (1950)(in trial regarding the statutory rape of a 14-year-old child, court excluded spectators due to age of witness and nature of case).

from revealing such experiences to a large crowd of strangers.[86] Further, trial courts often reasoned that in addition to sparing the chid victim from further injury, courtroom closure would improve the child's testimony because the child would more freely communicate the information.[87] Closure might also increase the frequency with which child victims and their families would cooperate with the justice system by agreeing to testify and go through the ordeal of a trial.[88]

In a 1909 North Dakota case, *State v. Nyhus*,[89] the trial court closed the trial of a defendant accused of raping a young girl.[90] However, members of the jury, officers of the court, parties, witnesses, and other persons the parties had requested to stay were allowed to remain.[91] Although he offered no objections at trial, the defendant appealed claiming he had been denied the right to a public trial.[92] The North Dakota Supreme Court emphasized the importance of the public trial right, noting that this right was

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86. *See* Note, ***Right of Access***, ***supra*** note 18, at 363-64 (interests favoring closure of a sex crime trial); Note, *Courtroom Closure*, *supra* note 18, at 642-43 (protecting victims in a sex crime trial); Comment, *Globe Newspaper: No Shield for the Child Witness*, 15 U. WEST L.A. L. REV. 109, 110-11 (1983)[hereinafter Comment, *Child Witness*](history of closure to protect child witnesses).

87. *See* Hogan v. State, 191 Ark. 437, __, 86 S.W.2d 931, 932 (1935)(frightened and embarrassed 10-year-old rape victim failed to testify effectively before crowded courtroom audience; judge properly ordered the courtroom cleared on the basis that the crowded courtroom interfered with the orderly administration of justice); State v. Workman, 14 Ohio App. 3d 385, 471 N.E.2d 853, 860 (Ohio App. 1984)(courtroom cleared of unnecessary people during testimony of nervous and soft-spoken witnesses under ten years of age in order to spare them embarrassment and eliminate excess noise); State v. Damm, 62 S.D. 123, __, 252 N.W. 7, 10 (1934)(13-year-old rape victim became embarrassed, disturbed and began crying while being questioned by the state; the court ordered the courtroom cleared of spectators, except for a newspaper reporter, for the remainder of the child's testimony); Mosby v. State, 703 S.W.2d 714, 716 (Tex. Ct. App. 1985)("The protection of witnesses from embarrassment or intimidation so extreme that it would traumatize them or render them unable to testify is a state interest sufficiently weighty to justify partial or complete; exclusion of the public"). *See also supra* notes 85-86 for additional cases and commentaries on closure for the protection of child witnesses.

88. *See* Commonwealth v. Hobbs, 385 Mass. 863, __, 434 N.E.2d 633, 638 (1982)("Exclusion of the public protects witnesses' ability to testify by removing a source of fear, confusion, and distraction, and may encourage victims to report and prosecute crimes").

89. 19 N.D. 326, 124 N.W. 71 (1909).

90. State v. Nyhus, 19 N.D. 328, 329, 124 N.W. 71, 72 (1909). The defendant was charged with rape in the first degree upon a female less than 14 years of age. *Id.* at 328, 124 N.W. at 71.

91. *Id.* at 329, 124 N.W. at 72. In making the closure order, the trial court noted that the *Nyhus* case involved what was "commonly known as scandalous matter." *Id.* at 329, 124 N.W. at 72.

92. *Nyhus*, 19 N.D. at 329, 124 N.W. at 72. The North Dakota Supreme Court noted that except for an inference from the fact that the closure order was enforced, the record did not show that anyone seeking admission to the courtroom was excluded or that the defendant desired anyone's presence. *Id.* at 329-30, 124 N.W. at 72. Nevertheless, the defendant claimed enforcement of the closure order deprived him of a public trial. *Id.* at 329-30, 124 N.W. at 71-72.

created to benefit the accused by preventing secret trials.[93] However, the court further explained that the public trial right was qualified and could be limited by such aspects as seating capacity, maintaining orderly conduct in the courtroom, and the exclusion of children during discussions of matters then considered immoral.[94] Concluding that "public" was the equivalent of "not secret," the North Dakota Supreme Court in *Nyhus* found no prejudicial error was committed because the defendant was not restricted as to the number of people he could request to remain in the courtroom.[95] Significantly, throughout the opinion, the primary concern was the propriety of allowing members of the public, especially children, to hear the testimony, rather than concern for the child victim's welfare.[96]

North Dakota case law then apparently remains silent on the issue until a 1980 case indicated that limitations on the right of the public to attend trials still included the size of the courtroom and the need to prevent disturbances and dangerous situations.[97] The North Dakota Supreme Court also identified other limitations on the public's right to attend trials: preventing excessive dissemination of important information during crucial times, insuring a fair trial and just convictions, and preserving the confidentiality of informants and sensitive information.[98] The court cited section 27-01-02 of the North Dakota Century Code, which dictates that the sittings of every court are to be public to allow any citizen to attend but also provides that the judge may use discretion to

93. *Nyhus*, 19 N.D. at 330-31, 124 N.W. at 72. According to the North Dakota Supreme Court, the public trial provisions of the state's Constitution were enacted to prevent public prosecutors or courts from engaging in the evils of secret trials. *Id.* at 330, 124 N.W. at 72. However, public trials in the literal sense were never construed to have been granted. *Id.* at 331, 124 N.W. at 72. Rather, the public trial provisions are held to be subject to reasonable construction. *Id.* at 331, 124 N.W. at 72.

94. *Nyhus*, 19 N.D. at 331, 124 N.W. at 72, 73.

95. *Nyhus*, 19 N.D. at 331-34, 124 N.W. at 73-74. The North Dakota Supreme Court intended that only children and those persons who were truly curiosity seekers be excluded. *Id.* at 332-33, 124 N.W. at 73-74.

96. *See id.* at 331-32, 124 N.W. at 73-74 (discussion of public morals, decency, and motives for attending). Closing the courtroom to protect public morals was apparently common at that time. *See* Note, *Right of Access*, *supra* note 18, at 363 (examples of closing to protect public morals in cases from the 1890's); Note, *Courtroom Closure*, *supra* note 18, at 641-42 (citing an 1897 Michigan opinion, *People v. Yeager*, 113 Mich. 228, 71 N.W. 491 (1897), that sought to protect public morality).

97. KFGO Radio v. Rothe, 298 N.W.2d 505, 512-13 (N.D. 1980). *KFGO* involved the right of access of news media to a state's attorney inquiry into a possible felony act causing death. *Id.* at 507.

98. *Id.* at 512-13. Despite the occurrence of important justifications for closing a criminal proceeding, the North Dakota Supreme Court indicated in response to an appeal of an order denying a defendant's request for closure, that a defendant does not have an absolute right to compel a private trial. State v. LaFontaine, 293 N.W.2d 426, 427 (N.D. 1980).

exclude spectators during the trial of cases of a "scandalous or obscene nature."[99]

In 1983 the news media challenged the closing of a preliminary hearing in a murder case and sought a supervisory writ from the North Dakota Supreme Court.[100] The North Dakota Supreme Court emphasized the difference between a preliminary hearing and a trial and indicated that the constitutional provisions requiring open courts did not apply with the same force and effect to pretrial proceedings as they did to trials.[101] The court explained that while preliminary proceedings generally should be open, where there was a substantial likelihood that the defendant's right to a fair trial before an impartial jury would be jeopardized, closure would be justified.[102]

Again, in 1986, the news media challenged the closure of a pretrial proceeding.[103] The North Dakota Supreme Court upheld its 1983 ruling on this issue and expanded its discussion of the competing values, including a lengthy footnote explaining the various societal interests advanced by open proceedings.[104] The supreme court then set out the procedure that a trial court must follow in order to properly close a preliminary examination.[105] Citing both *Waller* and *Press-Enterprise I*, the court held the following: 1) bare assertions of counsel would be insufficient and the judge should perform an independent evaluation of the anticipated evidence and adverse publicity that could harm the defendant's right

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99. *KFGO*, 298 N.W.2d at 513. *See* N.D. CENT. CODE § 27-01-02 (Supp. 1989)(when persons may be excluded from public court proceedings). The statute does not clearly indicate whether the original intent of the clause allowing exclusion of spectators during proceedings involving scandalous or obscene matters was for the protection of public morals, as in the 1909 *Nyhus* case, or for the protection of the victim. N.D. CENT. CODE § 27-01-02 (Supp. 1989). *See Nyhus*, 19 N.D. at 331-33, 124 N.W. at 73-74 (concern for the protection of public morals). However, the court in *KFGO* may have harbored a concern for the protection of children when, after citing the North Dakota Statute on closure, it commented on the legitimate closure of juvenile courts. *KFGO*, 298 N.W.2d at 513 (citing N.D. CENT. CODE § 27-01-02 (Supp. 1989)).

100. Dickinson Newspapers, Inc. v. Jorgensen, 338 N.W.2d 72, 74 (N.D. 1983). The defendant was charged with four counts of murder and one count of attempted murder. *Id.* Upon agreement with the state's attorney, the defendant requested the closing of the preliminary hearing. *Id.*

101. *Id.* at 75.

102. *Id.* at 79. The North Dakota Supreme Court noted that pretrial publicity of inadmissible evidence could destroy the defendant's right to a fair public trial. *Id.*

103. Minot Daily News v. Holum, 380 N.W.2d 347, 348 (N.D. 1986). The defendants, charged with murder, robbery, and felonious restraint, requested the closure of the preliminary examination. *Id.*

104. *Id.* at 349. The court listed six societal interests advanced by open proceedings: 1) promoting discussion of governmental affairs; 2) promoting public confidence in and respect for the judicial system; 3) providing a therapeutic outlet for community concern, hostility, and emotion; 4) checking corrupt practices; 5) enhancing the performance of the persons involved; and 6) discouraging perjury. *Id.* at 349 n.3.

105. *Id.* at 349.

to a fair trial; 2) the trial court must consider alternatives; 3) any closure must be narrowly tailored, excluding people only to the extent necessary to protect the right to a fair trial; 4) the trial court must make and articulate findings to support closure; and 5) the public must be provided with adequate notice and the opportunity to be heard on motions to close preliminary examinations.[106]

In *State v. Klem*,[107] the North Dakota trial court's concern was for the child victim's welfare and ability to testify in an open trial.[108] The trial judge ordered the courtroom cleared of all but a select group of people in order to protect these interests.[109] The North Dakota Supreme Court recognized an important interest in safeguarding a minor victim's welfare, but ruled that the closure in this case improperly deprived the defendant of a public trial.[110] The court did not rule that closure during a child victim's testimony was never justified.[111] Rather, the court espoused the position that protecting such victims was an important interest and may justify closure in certain instances.[112]

In explaining its position, the supreme court first reviewed the strong preference for public trials in both North Dakota and the nation.[113] Further, the court emphasized the benefit public trials provide to the accused and indicated that though a public trial was not an absolute right, any motion to close a criminal proceeding must show an overriding interest that would likely be prejudiced

106. *Id.* at 350. *Cf. Waller v. Georgia*, 467 U.S. 39 (1984) and Press-Enterprise Co. v. Superior Court of Cal., 464 U.S. 501 (1984).

107. 438 N.W.2d 798 (N.D. 1989).

108. *Klem*, 438 N.W.2d at 799, 802. *See also* Transcript of Motions Hearing, *supra* note 11, at 3-5 (indicating psychological and emotional pressures on the child warranted closure).

109. *Klem*, 438 N.W.2d at 799, 802. *See also* Transcript of Motions Hearing, *supra* note 11, at 3-5 (trial court's explanation after trial that closure was necessary to facilitate the child's testimony).

110. *Klem*, 438 N.W.2d at 800. Without meeting the requirements of a hearing and findings before closing the trial, the trial court erred and violated the defendant's sixth amendment right to a public trial. *Id.* at 802 (citation omitted).

111. *Id.* at 801. The North Dakota Supreme Court noted that *Globe* recognized that protecting a minor victim's welfare was a compelling interest, but that a particularized determination showing the child needed protection was also required. *Klem*, 438 N.W.2d at 801.

112. *Klem*, 438 N.W.2d at 802. The North Dakota Supreme Court cited two examples from other states where the trial court failed to make adequate findings to support closure during a minor victim's testimony. *Id.* at 801-02. *See* State v. Hightower, 376 N.W.2d 648, 649-50 (Iowa Ct. App. 1985)(spectators excluded during testimony of 10-year-old; reversed because the prosecutor failed to articulate an overriding interest in danger of being prejudiced and adequate findings to support closure); People v. Holveck, 171 Ill. App. 3d 38, __, 52 N.E.2d 1073, 1076, 1083 (1988), *appeal granted*, 122 Ill. 2d 585, 530 N.E.2d 256 (1988)(courtroom closed during testimony of six-year-old; reversed because the record did not reflect that the trial court had balanced the conflicting interests and evaluated the factors necessary to override the defendant's sixth amendment public trial right).

113. *Klem*, 438 N.W.2d at 800.

without closure.[114] In addition, the court pointed out that a motion to close a trial to the public should ordinarily be made before trial.[115]

The North Dakota Supreme Court referred to *Press-Enterprise I*[116] which requires that an overriding interest be based on clearly articulated findings which show that the requested closure is both essential and narrowly tailored to serve that interest.[117] The North Dakota Supreme Court also quoted the test for closure as articulated in *Waller*[118] which indicated that an overriding interest must be one in danger of prejudice and that the court must consider reasonable alternatives to closure.[119]

The North Dakota Supreme Court in applying the test for closure found that the state's midtrial motion failed to provide specific facts adequate to justify closure.[120] The supreme court recognized that protection of a minor victim can qualify as an overriding interest, but the trial court did not make the necessary particularized determination that the child witness in *Klem* needed protection.[121] The supreme court stated, "There was no hearing, no weighing of competing interests, and no findings to support closure."[122]

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114. *Id.* at 800 (citing Douglas v. Wainwright, 739 F.2d 531 (11th Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985)(court closed during testimony of key witness in a love triangle murder case)).

115. *Klem*, 438 N.W.2d at 800. *See* N.D.R. CRIM. P. 17.1 (directions for an omnibus hearing and pretrial conference). Rule 17.1 provides that the court should ascertain whether any party intends to make additional motions at the hearing. N.D.R. CRIM. P. 17.1(b). Any pretrial motion which is not made at that omnibus hearing will be deemed waived unless adequate information was not available to make the motion. N.D.R. CRIM. P. 17.1(b).

116. Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984)(Press-Enterprise I). The United States Supreme Court ruled that the trial court improperly closed the preliminary jury examination proceedings in a trial involving the rape and murder of a teenager. *Id.* at 502, 510-11. The Court set forth the requirements for overcoming the presumptions of openness in criminal proceedings. *Id.* at 510.

117. *Klem*, 438 N.W.2d at 801.

118. Waller v. Georgia, 467 U.S. 39, 48 (1984)(trial court improperly closed a suppression hearing over defendant's objection). The United States Supreme Court ruled that the same requirements established to close a proceeding against the public's first amendment right of access applied when the challenge to closure was based instead on the defendant's sixth amendment right to a public trial. *Id.* at 45-48.

119. *Klem*, 438 N.W.2d at 801.

120. *Id.* at 800. The North Dakota Supreme Court explained that a movant must show that he is entitled to the relief sought and that mere assertions of counsel are insufficient to meet the threshold burden of showing the existence of an overriding interest that can only be protected by closure. *Id.*

121. *Klem*, 438 N.W.2d at 801. The North Dakota Supreme Court indicated a "particularized determination" required weighing such factors as the child's psychological maturity, understanding, and desires, as well as the interests of the child's relatives. *Id.* at 802.

122. *Id.* at 801. The North Dakota Supreme Court indicated that the requirement of findings is not simply to provide the reviewing court with something to review, but to demonstrate that the trial court did weigh the competing interests. *Id.*

In addition, the North Dakota Supreme Court discussed the significance of allowing a news media person to remain in the courtroom.[123] The court noted that while the reporter's presence might have satisfied the public's first amendment right of access, it did not satisfy the defendant's sixth amendment right to a public trial.[124] The majority concluded that noncompliance with the closure requirements as enunciated in *Waller*[125] constituted reversible error.[126] The harmless error rule was not applied in *Klem* because the court could not measure the intangible loss to society or the effect of the error on the trial.[127]

Finally, the supreme court addressed the explanation offered after the fact by the trial court to justify closure and deny the defendant's motion for a new trial, by pointing out that such an after-the-fact attempt to justify closure by the Georgia Supreme Court was exactly what *Waller* invalidated.[128] The North Dakota Supreme Court summarized its position by stating, "Without having weighed evidence as to such factors as the child victim's psy-

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123. *Klem*, 438 N.W.2d at 801.

124. *Id.* In considering a supervisory writ requesting reversal of a closure order, the Wisconsin Supreme Court observed that the trial court attempted to reconcile the competing concerns of the public's rights and the victim's rights when it closed a preliminary examination regarding the sexual assault of a minor to the public but not to the press. State v. Circuit Court for Manitowoc County, 141 Wis. 2d 239, __, 414 N.W.2d 832, 834 (1987). The Wisconsin Supreme Court noted that despite an attempt to balance the competing interests, a factual basis of specific findings supporting closure in this case and utilizing the factors set out by the United States Supreme Court was, nevertheless, missing. *Manitowoc*, 141 Wis. 2d at __, 414 N.W.2d at 839. Additionally, the Wisconsin Supreme Court held that the trial court should articulate why the presence of the press would not infringe on the victim's interests, while the public's presence would be an infringement. *Id.* at __, 414 N.W.2d at 839.

125. 467 U.S. at 45.

126. *Klem*, 438 N.W.2d at 801. Several state courts have accorded with the majority in *Klem*, and have found that an error in the public trial guarantee required a new trial. *Hightower*, 376 N.W.2d at 650 (trial court erred in closing courtroom during testimony of ten-year-old victim of sexual abuse); *Holveck*, 171 Ill. App. 3d at __, 524 N.E.2d at 1083, 1085 (1988)(courtroom improperly closed to all public except the media during testimony by six-year-old victims of sexual abuse); People v. Romain, 137 A.D.2d 848, 848, 525 N.Y.S.2d 313, 313 (1988)(court committed reversible error by closing courtroom during the testimony of an undercover officer when no prior hearing had been held). In comparison, the Rhode Island Supreme Court found that even if the trial judge "failed to touch all bases" in ordering closure, a careful consideration of the entire record indicated that any error was harmless and no new trial was required. State v. Fayerweather, 540 A.2d 353, 354 (R.I. 1988). In *Fayerweather*, the defendant was on trial for the molestation of a four-year-old. *Fayerweather*, 540 A.2d at 354. Although only a hearing on the child's competency to testify was held in *Fayerweather*, the Rhode Island Supreme Court found that the record clearly indicated that the interest advanced was important and was likely to be harmed without restricting the number of people present when the child testified. *Id.* Further, the court noted that the trial judge had considered the child's age, lack of understanding of the nature of the crime, and psychological immaturity, and that his limited closure reflected a consideration of alternatives as required in Rhode Island. *Id.*

127. *Klem*, 438 N.W.2d at 802. The court stated that a defendant need not prove specific prejudice in order to obtain relief for a violation of his or her public trial right. *Klem*, 438 N.W.2d at 802-03 (citing *Waller*, 467 U.S. at 49).

128. *Klem*, 438 N.W.2d at 801.

chological maturity and understanding, his desires, and the interests of his parents and other relatives, the trial court's statements do not constitute the kind of 'particularized determination in individual cases' required."[129] Therefore, the court remanded *Klem* for a new trial, requiring the trial court to conduct a hearing and make appropriate findings in accordance with the expressed requirements if the state again sought closure.[130]

The dissent in *Klem*[131] agreed that the trial court erred in excluding the public during the child's testimony without a hearing and findings as required by *Waller*.[132] The dissent also agreed that specific prejudice need not be proved.[133] However, the dissent would have remanded for a hearing and an opportunity to make findings.[134] If the court made findings justifying closure and concluded that the persons who were excluded could properly be excluded, then a new trial would be a windfall for the defendant.[135] Further, the dissent would have reassigned the case to a new district court judge from a different judicial district to facilitate a fresh and independent view of the relevant facts and the issue involved.[136]

Klem clearly indicates that parties seeking closure to protect a child witness or facilitate the child's testimony face a difficult task. While closure to protect child witnesses is not prohibited, considerable stumbling blocks lie in that path.[137] This may be one factor

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129. *Klem*, 438 N.W.2d at 802 (citing *Globe*, 457 U.S. at 611 n.27). Other state courts which have dealt with the question of closure during a minor victim's testimony have also found that merely referring to the "sensitive nature" of the testimony was not sufficient to deny the defendant's constitutional right to a public trial. *Hightower*, 376 N.W.2d at 650 (trial court erred in closing courtroom during testimony of ten-year-old victim of sexual abuse). Further, citing an "unnerving effect" or the desire to "make the unpleasant experience of testifying as pleasant as possible" was also not adequate. *Holveck*, 171 Ill. App. 3d at __, 524 N.E.2d at 1083 (courtroom improperly closed to all public except the media during testimony by six-year-old victims of sexual abuse).

130. *Klem*, 438 N.W.2d 798, 803.

131. 438 N.W.2d at 803 (Erickstad, C.J., dissenting).

132. *Klem*, 438 N.W.2d at 803 (Erickstad, C.J., dissenting). *See Waller*, 467 U.S. at 48 (requiring findings adequate to demonstrate the necessity of closure).

133. *Klem*, 438 N.W.2d at 807 (Erickstad, C.J., dissenting).

134. *Klem*, 438 N.W.2d at 808 (Erickstad, C.J., dissenting). The position that a new trial is not necessary unless a hearing indicated that those persons excluded were improperly excluded is similar to the position taken in *Waller*. *See Waller*, 467 U.S. at 50 (suppression hearing improperly closed without adequate findings and the Supreme Court determined a new trial was not required unless a new, public suppression hearing resulted in the suppression of material evidence not suppressed in the first trial, or in a material change in the parties positions). However, in *Waller*, though the suppression hearing was closed, the case was tried to the jury in open court. *Waller*, 467 U.S. at 40, 43.

135. *Klem*, 438 N.W.2d at 808 (Erickstad, C.J., dissenting).

136. *Id.*

137. *See Klem*, 438 N.W.2d at 802-03 (North Dakota Supreme Court holding that failure to comply with the closure requirements set forth in the United States Supreme Court opinions was reversible error).

contributing to the search for alternatives by both state legislatures and legal scholars.[138] Nevertheless, if closure is deemed the best route in a particular case, the party seeking closure must show how and why the child would be injured.[139] This showing should utilize factors such as the child's age and psychological maturity, his or her understanding and desires, the nature of the crime, and the interests of the child's parents and relatives.[140] The party seeking closure must also show that the closure is "no broader than necessary" by explaining exactly who should be excluded and why.[141] Reasonable alternatives must be considered; therefore, the reasons other alternatives are not suitable should be clearly articulated along with supporting facts.[142]

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138. *See* N.D.R. EVID. 803(24)(cited at N.D.R. OF COURT ANN. (1990-91)):

> (24) Child's State About Sexual Abuse. An out-of-court statement by a child under the age of 12 years about sexual abuse of that child or witnessed by that child is admissible as evidence (when not otherwise admissible under another hearsay exception) if:
>
> (a) The trial court finds, after hearing upon notice in advance of the trial of the sexual abuse issue, that the time, content, and circumstances of the statement provide sufficient guarantees of trustworthiness; and
>
> (b) The child either:
>
> (i) Testifies at the proceedings; or
>
> (ii) Is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.

Id. See also Whitcomb, *Child Victims in Court: The Limits of Innovation*, 70 JUDICATURE 90 (1986)(lists and discusses measures attempted to reduce stress and trauma of child witnesses including closed circuit television, videotaped statements, hearsay exceptions, modification of physical environment, and support techniques such as a guardian ad litem to prepare and accompany the child); Kuzins, *The Child Witness*, 11(8) CALIF. L. 24 (1988)(review of a videotape demonstration urging judges and lawyers to modify their courtroom behavior to accommodate child witnesses). Even if the courtroom is closed to the general public, many people may still be present since the closure may be "no broader than necessary." *Waller*, 467 U.S. at 48. Further, the child must still face the defendant and cross examination. *See* Coy v. Iowa, 487 U.S. 1012 (1988)(discussion of issues involved with the confrontation clause of the sixth amendment).

139. *Klem*, 438 N.W.2d at 801-03. *See also Waller*, 467 U.S. at 48 (party seeking closure must advance an overriding interest which is likely to be prejudiced).

140. *Klem*, 438 N.W.2d at 801-02. *See Globe*, 457 U.S. at 608 (listing some of the factors to be weighed in determining if a child witness is in need of protection).

141. *See Klem*, 438 N.W.2d at 801 (citing *Waller*, 467 U.S. at 48, holding that closure be no broader than necessary to protect the overriding interest). *See also* State v. Circuit Court for Manitowoc County, 141 Wis.2d 239, __, 414 N.W.2d 832, 839 (1987)(trial court erred in failing to articulate why allowing members of the press to remain would not infringe on the compelling interest of protecting the child witness while allowing the public to remain would be an infringement).

142. *See Klem*, 438 N.W.2d at 801 (citing the requirements from *Waller*); *Waller*, 467 U.S. at 48 (indicating reasonable alternatives must be considered and findings made to support any closure); *Press-Enterprise I*, 464 U.S. at 510 (indicating findings must be articulated specifically enough for a reviewing court to determine whether the closure was proper).