IN THE SUPREME COURT OF GUAM
TERRITORY OF GUAM

GUAM PUBLICATIONS, INC.,
a Guam Corporation
Petitioner,

vs.

SUPERIOR COURT OF GUAM
Respondent,

vs.

PEOPLE OF THE TERRITORY OF GUAM
and BEAU BRUNEMAN,
Real Parties in Interest.

Supreme Court Case No. WRM 96-001
Superior Court Case No. CF0081-96/CF0218-96

OPINION

Filed: October 29, 1996

Cite as: 1996 Guam 6

Petition for Writ of Mandamus and for Declaratory Relief
Argued and Submitted on October 16, 1996
Agana, Guam

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BEFORE: PETER C. SIGUENZA, Jr., Chief Justice, JANET HEALY WEEKS, and MONESSA G. LUJAN, Associate Justices.

SIGUENZA, C.J.:

[1] Guam Publications, Inc., the publisher of the Pacific Daily News (the "PDN"), petitions this Court for a writ of mandamus directing the inferior court to cease closure of proceedings except for good cause. The Real Parties in Interest, the People of the Territory of Guam (the "People") and Beau Bruneman (the "Defendant"), oppose petitioner's request for relief.

[2] The PDN contends that because the press has a qualified right to attend criminal proceedings, closure of a pre-trial conference without notice to the press and the opportunity to object was improper. Petitioner further asserts that procedures are needed to guide the lower courts in future cases. We agree. Accordingly, we grant the writ of mandamus and remand with directions.

FACTUAL AND PROCEDURAL HISTORY

[3] The defendant, Beau Bruneman, is charged with Aggravated Murder, Aggravated Felony Murder, and two counts of Criminal Sexual Conduct in Superior Court cases CF0081-96 and CF0218-96.

[4] The following facts are not disputed by the parties. On August 22, 1996, these cases were docketed at 3:00 PM for pre-trial conferences before Judge Alberto C. Lamorena, III. The docket did not indicate the hearing was closed to either the public or press nor did it indicate a motion for closure was scheduled. At the call of the case, attorneys for both the People and Defendant approached the bench for a private conference with the trial judge. The conversation was not audible by others present in the courtroom, including the reporter employed by the PDN. The sidebar conference was then moved and continued to the court's chambers. This relocation was neither announced nor explained to those present in the courtroom. After concluding the chamber discussion, the judge did not return to the bench nor did he provide subsequent findings as to why the hearing required closure. In addition, petitioner was not given access to the recording of the bench conference and learned that "no audible tape, if tape at all" was available for review.

[5] Based on the brief submitted by the People, both discovery and evidentiary matters were discussed at the bench conference and in chambers. Specifically, the People represent that preliminary findings of scientific tests conducted on physical evidence were provided to defense counsel under seal.

[6] Although present in the courtroom, the PDN reporter made no objection to the bench conference or later when the discussion was moved to the court's chambers. The PDN asserts that under the circumstances of the hearing, the opportunity to object was not available to the reporter. It was represented at oral argument however that the PDN's legal counsel later spoke with the trial court judge regarding the case and this particular hearing. At that time, legal counsel learned discovery was turned over to defense counsel under seal and an order memorializing this procedure was forthcoming. We do not know if this order was ever issued.

[7] The Court is presented with two issues: 1) Whether the mandamus relief sought by the PDN is the appropriate remedy under the circumstances of this case; and 2) Whether the trial court used proper procedures when it effectively closed the court.

[8] This Court reviews de novo whether mandamus relief is the appropriate remedy in a particular case. *Seattle Times v. United States District Court for the Western District of Washington,* 845 F.2d 1513, 1515 (9th Cir. 1988).

[9] The Court initially finds that petitioners such as Guam Publications, Inc. have standing to seek review by writ of mandamus of orders denying them access to proceedings or to sealed documents. *United States v. Brooklier,* 685 F.2d 1162 (9th Cir. 1982). Because this case presents issues capable of repetition yet evading review, the controversy is not moot. *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 100 S.Ct. 2814 (1980).

ANALYSIS

[10] Mandamus relief is an extraordinary remedy employed in extreme situations. *Levine v. United States District Court for Central District of California*, 764 F.2d 590, 593 (9th Cir. 1985)(citing *Clorox Corp. v. United States District Court*, 756 F.2d 699, 700 (9th Cir.1985)). It is used "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Bauman v. United States District Court*, 557 F.2d 650, 654 (9th Cir 1977)(citations omitted).

[11] Mandamus will issue under the following guidelines: 1) The party seeking the writ has no other adequate means, such as direct appeal, to attain the relief he or she desires; 2) The petitioner will be damaged or prejudiced in a way not correctable on appeal; 3) The court's order is clearly erroneous as a matter of law; 4) The court's order is an oft-repeated error, or manifests a persistent disregard of the rules; and 5) The court's order raises new and important problems, or issues of law or first impression. *Bauman*, 557 F.2d at 654-655. Because all of these particular standards may not be relevant or applicable to a particular case, its disposition will require balancing the pertinent guidelines. *Id.*

[12] Clearly, the first and second factors support issuance of the writ herein. The petitioner is not a party to the case and therefore, lacks the ability to appeal. *Seattle Times*, 845 F.2d at 1515; See also *United States v. Sherman*, 581 F.2d 1358, 1360-1361 (9th Cir. 1978). In addition, the fifth factor also favors writ relief. Although both federal and state courts have previously addressed the closure of proceedings, we consider this issue for the first time. The fourth factor is neutral and favors neither party. Although this controversy occurred only once in this particular litigation, the issue has been previously examined independently by several judges of the Superior Court. *People of the Territory of Guam v. Francis Gill and Thomas Andersen*, CF0119-90 (Superior Ct. of Guam, Decision and Order issued October 1, 1990); *People of the Territory of Guam v. Edward Glenn Demapan*, CF0149-95 (Superior Ct. of Guam, November 8, 1995) (As a result of objection, trial court conducted hearing on right of access held by the press). Thus, the crucial factor is whether the court's order is clearly erroneous as a matter of law. We now address this issue

[13] A presumption exists that the press and public have the right of access to criminal proceedings and documents. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814 (1980); *CBS, Inc. v. United States District Court for the Central District of California*, 765 F.2d 823, 825 (9th Cir. 1985). When this right of access becomes an issue in a particular proceeding, two considerations must be addressed: 1) whether the place and process has historically been open to the press and general public;[1] and 2) whether public access plays a significant positive role in the functioning of the particular process in question. *Press Enterprise Company v. Superior Court of California for the County of Riverside*, 478 U.S. 1, 106 S.Ct. 2735, 2740 (1986)(*Press Enterprise II*).

[14] Although the right of access may attach to a particular proceeding, it is not absolute. *Press Enterprise II*, 106 S.Ct. at 2740; *Associated Press v. United States District Court for the Central District of California*, 705 F.2d 1143, 1145 (9th Cir. 1983). The presumption of openness may be overcome and result in closure of proceedings. Based on demonstrated findings, closure will occur in order to preserve higher values and if narrowly tailored to serve that interest. *Press Enterprise Company v. Superior Court of California for the County of Riverside*, 464 U.S. 501, 104 S.Ct. 819, 824 (1984)(*Press Enterprise I*).

[15] In situations where the defendant's right to a fair trial conflicts with the right of access, the burden rests on the party seeking closure to "establish that the procedure is strictly and inescapably necessary in order to protect the fair-trial guarantee." *Brooklier*, 685 F.2d at 1167; *Associated Press*, 705 F.2d at 1145. A party meets his burden when three separate substantive tests are satisfied. *Brooklier*, 685 F.2d at 1167. First, there must be a substantial probability that irreparable damage to a defendant's fair-trial right will result from a public proceeding. Second, there must be a substantial probability that alternatives to closure

[1] As to pretrial procedures, if no common law counterpart can be found, the First Amendment should be interpreted in light of current values and conditions; societal interests rather than historical analysis should determine the applicability of the amendment to such proceedings. *Brooklier*, 685 F.2d at 1170 (citations omitted).

will not protect adequately the defendant's right to a fair trial. Third, a substantial probability must exist that closure will be effective in protecting against the perceived harm. *Id.*

[16] Finally, two procedural prerequisites must also be satisfied before entering an order closing the procedures: 1) those excluded from the proceeding must be afforded a reasonable opportunity to state their objections; and 2) the reasons supporting closure must be articulated in findings. *Brooklier* 685 F.2d at 1168. The reasons should be specific enough so a reviewing court may determine whether the closure order was properly entered. *Press-Enterprise I*, 104 S.Ct. at 824.

[17] It is apparent from the filed briefs and oral argument that the inferior court did not follow procedural prerequisites similar to those articulated in *Brooklier*. First, the court did not provide an opportunity to object to those present in the courtroom. The reporter's opportunity to object was lost as a result of the manner in which the proceeding was conducted. The concealed discussions prevented the press from discerning the need to challenge the proceeding let alone articulate an objection. Moreover, this pre-trial conference was held open to the public. The judge took the bench and the case was called while the press was present. Under these circumstances, the reporter acted reasonably by anticipating findings by the court to be announced. Courtroom decorum and orderly case management, in fact, demand such restraint.[2]

[18] The court also did not comply with the second *Brooklier* prerequisite. A record was not generated nor did the court articulate reasons in support of closure. The failure to create a record of the bench conference or to document findings in support of sealing documents preclude adequate review. Consequently, this Court cannot determine, and need not determine, whether the lower court addressed the substantive issues outlined above.

[19] Closing the proceeding without articulating findings in support of such action and the failure to provide an opportunity to object by those present is clearly erroneous as a matter of law. We conclude that the third factor supports issuance of the writ.

[20] All factors under the mandamus test, with the exception of the fourth, support issuance of the writ. We therefore grant petitioner's request for mandamus relief and order the inferior court to cease closing future proceedings unless substantive findings are properly articulated in support of closure and procedural prerequisites are followed.

[21] We also order the inferior court to conduct a hearing and determine whether the sealed documents should be made available to the public and press. The hearing and all subsequent hearings shall be conducted in accordance with the substantive issue outlined above and the procedural guidelines set forth below:

1. If time permits, a written motion to close proceedings or seal documents shall be filed in advance of the proceeding. We require the lower court to calendar motions to close proceedings on the docket. Thus, the media will be given the opportunity to timely object and file appropriate motions, if necessary. If time does not permit, oral motions to close proceedings shall be made in open court prior to the proceeding for which closure is sought.
2. Members of the public objecting to closure at that time shall be afforded a reasonable opportunity to state objections.
3. If necessary, the court will conduct an in camera hearing to determine the need foreclosure.
4. If the court orders closure, attorneys for the public would be prohibited from discussing information that is the subject of the closure order.

[2] In our view, the discussions at issue took place within the context of a hearing held open to the public. This opinion, therefore, should not be read to say that "bench conferences" or "in chamber" meetings are subject to public viewing. We need not and do not address this issue.

5. The court will make a record of its findings in any decision to close proceedings. In addition, we order the trial court to ensure that private conferences held at the bench are properly recorded for review purposes.

6. When parties agree to seal documents, a motion should be filed along with the stipulation. The court shall then articulate findings in support or denial of such action.