

Cable News Network, Inc., Capitol Cities/ABC, Inc., CBS, Inc., and National
Broadcasting Company, Inc., Appellants v. United States of America and Michael K.
Deaver, and consolidated case

No. 87-5245

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

263 U.S. App. D.C. 66; **824 F.2d 1046**; 1987 U.S. App. LEXIS 10103; 14 Media L. Rep.
1334

July 15, 1987, Argued
July 15, 1987, Filed

SUBSEQUENT HISTORY: Writ of certiorari denied Deaver v. Cable News Network,
Inc., 484 U.S. 914, 98 L. Ed. 2d 218, 108 S. Ct. 261, 1987 U.S. LEXIS 4314 (1987)

PRIOR HISTORY: [**1] Appeal from the United States District Court for the District
of Columbia, Civil Action No. 87-096. On Motions for Summary Reversal.
United States v. Deaver, 1987 U.S. Dist. LEXIS 16920 (D.D.C., June 22, 1987)

COUNSEL: Timothy B. Dyk, Kevin T. Baine and David E. Kendall were on Appellants'
motions for summary reversal.

Whitney North Seymour, Jr., Herbert Miller, Jr., Randall J. Turk and Stephen L. Braga
were on Appellees' oppositions to Appellants' motions for summary reversal.

JUDGES: Starr and Silberman, Circuit Judges, and McGowan, Senior Circuit Judge.

OPINION BY: PER CURIAM

OPINION

[*1047] We have for resolution a motion by several representatives of the news media
which are seeking to cover and report on an ongoing criminal trial. They seek summary
reversal of an order entered by the District Court on July 14, 1987, denying their request
that *voir dire* of prospective jurors be conducted in open court.

The events that gave rise to this motion began with the distribution by the District Court
of a questionnaire containing approximately forty questions to prospective jurors. The
responses to these questionnaires raised concerns on the part of the trial judge that many
questions involved matters of personal privacy. On the basis of this concern, the District
Judge [**2] refused appellants' request for open *voir dire*, determining instead that *voir
dire* examinations would be conducted *in camera* save for any prospective jurors who

elected to be questioned in open court. At the same time, the court ruled that transcripts of the examinations and completed copies of the questionnaires would be made public as soon as possible, with redactions limited to those matters that the judge specifically found entitled to protection from public disclosure and dissemination.

The District Court accordingly advised the venire members that, although it would hold as much of the proceedings in public as possible, it would leave to the discretion of each juror whether he or she would be questioned in open court or *in camera* on matters in the questionnaire. Those individuals willing to be questioned publicly were directed to leave their names with the marshal and to return at that time to the jury lounge. Those who preferred questioning in private were asked to remain seated. Five of the approximately thirty prospective jurors volunteered to be questioned in open court.

I

Appellants contend that the District Court's actions in closing the *voir dire* proceedings [**3] violate the standards for limiting public and press access to criminal *voir dire* enunciated by the Supreme Court in *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 78 L. Ed. 2d 629, 104 S. Ct. 819 (1984). We agree and therefore reverse.

The *Press-Enterprise* Court made it abundantly clear that the process of juror selection in a criminal trial is of vital importance not only to the accused but more broadly to the criminal justice system and the public. After reviewing the rich history and tradition of open criminal proceedings in English and American courts, the Court concluded that "the open trial . . . plays as important a role in the administration of justice today as it did for centuries before our separation from England." *Id.* at 508. In articulating the safeguards necessary to protect the "value of openness" in criminal proceedings, *id.*, the Court borrowed from its holding two [*1048] years previously in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 73 L. Ed. 2d 248, 102 S. Ct. 2613 (1982):

The circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one. Where . . . the State attempts to deny the [**4] 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.

Id. at 606-07, quoted in *Press-Enterprise*, 464 U.S. at 509-10. Echoing this passage from *Globe Newspaper*, the *Press-Enterprise* Court held squarely that in the *voir dire* setting "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." *Id.* at 510.

In reaching this conclusion, the *Press-Enterprise* Court set out three conditions necessary to establish that closure of the *voir dire* is justified. First, trial courts must make findings that an open *voir dire* proceeding threatens either the defendant's Sixth Amendment right

to a fair trial or a prospective juror's privacy interests. *Id.* at 511. Second, in order to "minimize the risk of unnecessary closure" trial courts should require prospective jurors to make "affirmative request[s]" for private *voir dire* examination. *Id.* at 512. Finally, trial [**5] courts must consider whether alternatives to closure are available that will adequately protect the interests of prospective jurors. *Id.* at 511.

We are obliged to conclude that the holding of *Press-Enterprise* requires reversal of the District Court's ruling in this case. In addition, we are persuaded that the merits of appellants' motion are so clear that summary reversal is appropriate. *See, e.g., Sills v. Bureau of Prisons*, 245 U.S. App. D.C. 389, 761 F.2d 792, 793 (D.C. Cir. 1985); *United States v. Glover*, 235 U.S. App. D.C. 194, 731 F.2d 41, 42 (D.C. Cir. 1984) (per curiam); *Walker v. Washington*, 201 U.S. App. D.C. 82, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), *cert. denied*, 449 U.S. 994, 101 S. Ct. 532, 66 L. Ed. 2d 292 (1980).

II

The District Court's order fails to meet any of the three conditions articulated in *Press-Enterprise* for closure of *voir dire*.

First, the District Court had no evidence in the record and made no findings that public interrogation of any individual member of the *voir dire* would "touch[] on deeply personal matters that [the juror] has legitimate reasons for keeping out of the public domain." *Press-Enterprise*, 464 U.S. at 511. Indeed, the District Court expressly declined to make such findings:

It is not possible [**6] for me to exercise discretion in any objective fashion as to what is or is not to be private. Things are private simply because they are private to people. Not on any objective standard. What is sensitive, personal information for each of these [prospective] jury members is a matter which is entirely within their own hearts. They have to decide what is personal, . . . and I have to trust to their judgment in deciding whether or not they can . . . reveal the information that they are being asked to reveal. Excerpt of Proceedings, *United States v. Deaver*, Cr. No. 87-096 at 10 (D.D.C. July 14, 1987). On the basis of this reasoning, the District Court, having determined that certain *voir dire* questions "deal[t] with matters which are sensitive, personal, private information," *id.* at 12, left to the prospective jurors' absolute discretion whether *voir dire* on matters covered by the questionnaire would take place in public or *in camera*.

To be sure, the District Court could reasonably have concluded that certain questions contained in the questionnaire may, in individual cases, have called for responses of the "deeply personal" sort contemplated by *Press-Enterprise*. [**7] The trial court believed that no objective standard was available to guide his determination as to [*1049] whether a juror's request for private questioning about a particular matter was appropriate. But *Press-Enterprise* is to the contrary; it requires the trial court to determine whether a juror's request is "legitimate." 464 U.S. at 511. The *Press-Enterprise* Court recognized that in the case before it some questions, although appropriate to pose to prospective jurors, by their nature might have "give[n] rise to legitimate privacy interests of those persons." *Id.* at 512. Nonetheless, this fact alone was insufficient to justify

closure, because the trial court had not balanced the particular interests in privacy expressed by individual jurors against what the Court described as the "value of openness." *Id.* The District Court in this case likewise failed to make individualized findings that specific jurors had compelling reasons for wishing to keep private responses to particular questions which, in each case, outweighed the value to the public of an open *voir dire*. The *Press-Enterprise* Court made clear that without such findings, sufficiently detailed to permit review [**8] at the appellate level, it is "not possible to conclude that closure [is] warranted." *Id.* at 511 (footnote omitted).

Second, the District Court did not, as *Press-Enterprise* demands, "requir[e] the prospective juror[s] to make an affirmative request" for an *in camera voir dire* interview. *Id.* at 512. (Such a request could, as movants concede, be made in writing.) This requirement, the *Press-Enterprise* Court made clear, is necessary to "ensure that there is in fact a valid basis for a belief that disclosure infringes a significant interest in privacy." *Id.* The District Court, in our view, stood this requirement on its head by permitting prospective jurors to elect closed *voir dire* simply by remaining mute. If anything, this procedure facilitated closure based on possibly insignificant privacy interests, precisely the prospect the "affirmative request" requirement aims to avoid.

Third, the District Court acted apparently without considering alternatives that might minimize the degree of closure. *Cf. id.* at 513. By way of obvious example, the District Court could have conducted *voir dire* in open court, responding to individual expressions of specific [**9] concern over particular questions by permitting interrogation *in camera* where warranted under prevailing law. Although *Press-Enterprise* expressly contemplates a procedure of this sort, the record discloses no consideration of such an alternative in this case. *See* Excerpt at 3.

III

In sum, the District Court failed to abide by the standards set forth in *Press-Enterprise* for closing *voir dire* proceedings in criminal cases. The order of the District Court is therefore reversed. *Voir dire* proceedings henceforth shall be conducted in accordance with this opinion. Mandate shall issue forthwith.

It is so ordered.