

**EL VOCERO DE PUERTO RICO (CARIBBEAN INTERNATIONAL NEWS
CORP.), ET AL., PETITIONERS v. PUERTO RICO, ET AL.**

No. 92-949

SUPREME COURT OF THE UNITED STATES

508 U.S. 147; 113 S. Ct. 2004; 124 L. Ed. 2d 60; 1993 U.S. LEXIS 3191; 61 U.S.L.W.
3769; 21 Media L. Rep. 1440; 93 Cal. Daily Op. Service 3585; 93 Daily Journal DAR
6138

May 17, 1993, Decided

PRIOR HISTORY: ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF PUERTO RICO.

DISPOSITION: Certiorari granted; 132 D.P.R. (1), reversed.

DECISION: Puerto Rico rule, providing that accused felon's preliminary hearing shall
be held privately unless accused requests otherwise, held invalid under free speech clause
of Federal Constitution's First Amendment.

OPINION: PER CURIAM.

Under the Puerto Rico Rules of Criminal Procedure, an accused felon is entitled to a
hearing to determine if he shall be held for trial. P. R. Laws Ann., Tit. 34, App. II, Rule
23 (1991). A neutral magistrate presides [**2005] over the hearing, *People v. Opio*
Opio, 104 P. R. R. (4 Official Translations 231, 239) (1975), for which the defendant has
the rights to appear and to counsel, Rules 23(a), (b). Both the prosecution and the
defendant may introduce evidence and cross-examine witnesses, Rule 23(c), and the
defendant may present certain affirmative defenses, *People v. Lebron Lebron*, 116 P. R.
R. (16 Official Translations 1052, 1058) (1986). The magistrate must determine whether
there is probable cause to believe that the defendant committed the offense charged. Rule
23(c) provides that the hearing "shall be held privately" unless the defendant requests
otherwise.

Petitioner Jose Purcell is a reporter for petitioner *El Vocero de Puerto Rico*, the largest
newspaper in the Commonwealth. By written request to respondent District Judges, he
sought to attend preliminary hearings over which they were to preside. In the alternative,
he sought access to recordings of the hearings. After these requests were denied,
petitioners brought this action in Puerto Rico Superior Court seeking a declaration that
the privacy provision of Rule 23(c) violates the First Amendment, applicable to the
Commonwealth through the Fourteenth Amendment, n1 and an [***64] injunction
against its enforcement. Petitioners based their claim on *Press-Enterprise Co. v. Superior*
Court of Cal., County of Riverside, 478 U.S. 1, 92 L. Ed. 2d 1, 106 S. Ct. 2735 (1986),

which addressed a California law that allowed magistrates to close preliminary hearings quite similar in form and function to those held under Rule 23 if it was reasonably likely that the [*149] defendant's ability to obtain a fair hearing would be prejudiced. *Id.*, at 12, 14. Applying the "tests of experience and logic," *id.*, at 9, of *Globe Newspaper Co. v. Superior Court of County of Norfolk*, 457 U.S. 596, 73 L. Ed. 2d 248, 102 S. Ct. 2613 (1982), *Press-Enterprise* struck down the California privacy law on the grounds that preliminary criminal hearings have traditionally been public, and because the hearings at issue were "sufficiently like a trial," 478 U.S. at 12, that public access was "essential to their proper functioning," *ibid.*

----- Footnotes -----

The Free Speech Clause of the First Amendment fully applies to Puerto Rico. *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 331, n.1, 92 L. Ed. 2d 266, 106 S. Ct. 2968 (1986).

----- End Footnotes -----

In affirming the dismissal of petitioners' suit, a divided Supreme Court of Puerto Rico found that *Press-Enterprise* did not control the outcome because of several differences between Rule 23 hearings and the California hearings at issue there. App. to Pet. for Cert. 129. n2 It thus proceeded to determine the constitutionality of Rule 23 hearings by application anew of the *Globe Newspaper* tests. The court concluded that closed hearings are compatible with the unique history and traditions of the Commonwealth, which display a special concern for the honor and reputation of the citizenry, and that open hearings would prejudice defendants' ability to obtain fair trials because of Puerto Rico's small size and dense population.

----- Footnotes -----

Specifically, the court addressed the Commonwealth's burden of proof, the rules governing the parties' access to, and presentation of, certain evidence, the fact that an indictment follows, rather than precedes, the preliminary hearing, and the ability of the prosecution to present the matter *de novo* before a higher court in cases where the magistrate finds no probable cause. App. to Pet. for Cert. 112-129.

----- End Footnotes -----

The decision below is irreconcilable with *Press-Enterprise*: for precisely the reasons stated in that decision, the privacy provision of Rule 23(c) is unconstitutional. n3 The distinctions drawn by the court below are insubstantial. In fact, *each* of the features cited by *Press-Enterprise* in support of the finding that California's preliminary hearings were "sufficiently [*150] like a trial" to require public access is present here. Rule 23 hearings [**2006] are held before a neutral magistrate; the accused is afforded the rights to counsel, to cross-examination, to present testimony, and, at least in some instances, to

suppress illegally seized evidence; n4 the accused is bound over for trial only upon the magistrate's finding probable cause; in a substantial portion of criminal cases, the hearing provides the only occasion for public observation of the criminal [***65] justice system; n5 and no jury is present. Cf. 478 U.S. at 12-13.

----- Footnotes -----

n3 The Court of Appeals for the First Circuit has since found this provision unconstitutional. See *Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311 (1992).

n4 The admissibility of illegally seized evidence apparently is an open question in Puerto Rico law. See App. to Pet. for Cert. 107.

n5 See *id.*, at 204-205 (Hernandez Denton, J., dissenting).

----- End Footnotes-----

[**LEdHR1C] [1C]Nor are these commonalities coincidental: As the majority noted, the Rule's drafters relied on the California law at issue in *Press-Enterprise* as one source of Rule 23. App. to Pet. for Cert. 93, n.26. At best, the distinctive features of Puerto Rico's preliminary hearing render it a subspecies of the provision this Court found to be infirm seven years ago. Beyond this, however, the privacy provision of Rule 23(c) is more clearly suspect. California law allowed magistrates to close hearings only upon a determination that there was a substantial likelihood of prejudice to the defendant, yet the *Press-Enterprise* Court found this standard insufficiently exacting to protect public access. 478 U.S. at 14-15. By contrast, Rule 23 provides no standard, allowing hearings to be closed upon the request of the defendant, without more.

[**LEdHR1D] [1D] [**LEdHR5] [5]The Puerto Rico Supreme Court's reliance on Puerto Rican tradition is also misplaced. As the Court of Appeals for the First Circuit has correctly stated, the "experience" test of *Globe Newspaper* does not look to the particular practice of any one jurisdiction, but instead "to the experience in that *type* or *kind* of hearing throughout the United States" *Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311, 323 (1992) (emphasis in original). The established and widespread tradition of open preliminary hearings among the [*151] States was canvassed in *Press-Enterprise* and is controlling here. 478 U.S. at 10-11, and nn. 3-4.

[**LEdHR6] [6]The concern of the majority below that publicity will prejudice defendants' fair trial rights is, of course, legitimate. But this concern can and must be addressed on a case-by-case basis:

"If the interest asserted is the right of the accused to a fair trial, the preliminary hearing shall be closed only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights." *Id.*, at 14.

[***LEdHR1E] [1E]The petition for certiorari is granted and the judgment of the Supreme Court of Puerto Rico is

Reversed.

REFERENCES: [Return To Full Text Opinion](#)

16A Am Jur 2d, Constitutional Law 504; 21 Am Jur 2d, Criminal Law 418; 75 Am Jur 2d, Trial 212

9 Federal Procedure, L Ed, Criminal Procedure 22:1313, 22:1314

23A Am Jur Pl & Pr Forms (Rev), Trial, Form 86

1 Am Jur Trials 303, Controlling Trial Publicity

USCS, Constitution, Amendment 1

L Ed Digest, Constitutional Law 939

L Ed Index, Exclusion from Courtroom; Pretrial Publicity

ALR Index, Exclusion from Courtroom; Pretrial Publicity

Annotation References:

First Amendment freedom of speech or press as giving news media right of access to criminal proceedings-- Supreme Court cases. 92 L Ed 2d 797.

Pretrial publicity in criminal case as affecting defendant's right to fair trial--federal cases. 10 L Ed 2d 1243.

Right of accused to have press or other media representatives excluded from criminal trial. 49 ALR3d 1007.

Right of person accused of crime to exclude public from preliminary hearing or examination. 31 ALR3d 816.

Exclusion of public during criminal trial. 48 ALR2d 1436.