

KQED, INC., PLAINTIFF, v. DANIEL B. VASQUEZ, WARDEN OF SAN QUENTIN PRISON, DEFENDANT.

NO. C 90-1383 RHS

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

1991 U.S. Dist.

June 7, 1991, Decided
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COUNSEL: FOR PLAINTIFF: TURNER & BRORBY, SAN FRANCISCO, CALIFORNIA, BY: WILLIAM BENNETT TURNER, ESQ., BETH S. BRINKMAN, ESQ.

FOR DEFENDANT: OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, SAN FRANCISCO, CALIFORNIA, BY: KARL S. MAYER, ESQ., PAUL D. GIFFORD, ESQ., DEPUTY ATTORNEYS GENERAL.

JUDGES: SCHNACKE

OPINION BY: ROBERT H. SCHNACKE

OPINION

FRIDAY, JUNE 7, 1991, Oral Decision

WELL, THERE ARE TWO MATTERS IN THIS CASE THAT PRESENTLY SEEM TO BE MOOT. ONE OF THEM IS THE PROHIBITION OF PAPER AND PENCIL AND SKETCH ARTISTS IN THE EXECUTION AREA. THE WARDEN APPEARS TO HAVE CHANGED HIS MIND ABOUT THAT AND I'M NOT AT ALL SURE THAT THAT PRESENTLY NEEDS ANY ATTENTION.

AND SIMILARLY THE MOST RECENT INDICATION THAT ALL PRESS WILL BE EXCLUDED, AGAIN, APPEARS TO BE SOMETHING THAT THE WARDEN REALLY HAS NEVER TAKEN SERIOUSLY, BUT IT IS A MATTER THAT I WANT TO GIVE SOME ATTENTION TO.

ON EITHER OF THESE, CLAIMS HAS BEEN FORMALLY ABANDONED, BUT I GET THE STRONG IMPRESSION THAT NEITHER OF THOSE REGULATIONS IS INTENDED TO BE APPLIED.

IN ANY EVENT I'M SATISFIED THAT NO ADEQUATE JUSTIFICATION HAS BEEN SHOWN FOR EITHER RESTRICTION IF THEY ARE INTENDED TO BE APPLIED. THE USE OF PENCIL AND PAPER WHILE APPARENTLY IT IS FORBIDDEN IN SOME PRISONS AND IN OTHER PRISONS APPARENTLY THE PENCIL AND PAPER ARE SUPPLIED BY THE PRISON ITSELF. IT'S REALLY HARD TO SEE THAT PENCIL AND PAPER PRESENT ANY KIND OF AN IMPEDIMENT OR RISK THAT JUSTIFIES SUCH A RULE.

MAY WELL BE THAT THERE OUGHT TO BE A LAW AGAINST SKETCH ARTISTS BECAUSE OF THE HORRIBLE THINGS THEY DO TO ME AT LEAST, BUT I DON'T THINK THAT'S A REAL BASIS FOR SUPPORTING THE CONTENTION. THE WARDEN REALLY DOESN'T EVEN TRY TO JUSTIFY THE REGULATION DESIGNED TO EXCLUDE ALL PRESS ACCESS.

WE'VE BEEN SUPPLIED WITH AN EXTREMELY INTERESTING AND EXHAUSTIVE HISTORY OF EXECUTIONS IN CALIFORNIA. AND PLAINTIFF HAS GIVEN PRESS CLIPPINGS GOING BACK FOR A HUNDRED YEARS OR SO AND THEY TELL A FASCINATING STORY.

BUT THE ONE THING THEY TELL IS THAT WHETHER WE'VE HAD PUBLIC OR PRIVATE EXECUTIONS IN CALIFORNIA, THE PRESS HAS ALWAYS BEEN THERE. AND THE FIRST AMENDMENT MAKES IT PRETTY CLEAR THAT IT'S PRETTY IMPORTANT TO HAVE A PROCESS OF NEWS GATHERING IN OUR COUNTRY.

AND WHILE THE RIGHTS OF THE PRESS OBVIOUSLY AREN'T UNLIMITED, THEY'RE CERTAINLY TO BE RESPECTED TO WHATEVER EXTENT THAT DON'T INTRUDE UPON OTHER RIGHTS.

UNTIL THE WARDEN'S EDICT, WHICH MAY HAVE BEEN MORE EMOTIONAL THAN RATIONAL, THE MEDIA HAD ACTUALLY BEEN GIVEN SPECIAL CONSIDERATION AT EXECUTIONS. MEDIA REPRESENTATIVES HAVE CONSTITUTED THE LARGEST SINGLE GROUP AMONG THE WITNESSES IN THE CHAMBER AREA.

SPECIAL FACILITIES HAVE BEEN PROVIDED OUTSIDE THE AREA WHERE ACCESS IS AVAILABLE TO RADIO AND TELEVISION AND TO VERY LARGE NUMBER OF MEDIA REPRESENTATIVES. AND THE RECORD AND THE CASE FAILS TO SHOW THERE HAS EVER BEEN ANY UNTHWART ACTIVITY BY ANY PRESS REPRESENTATIVE AND I CAN SEE NO VALID REASON PRESENTED WHY THE LONG AND TRADITIONAL PRACTICE OF ADMITTING THE PRESS SHOULDN'T BE CONTINUED.

WHETHER THE PRESS HAS AN ACTUAL RIGHT BY REASON OF LONG AND CONTINUED USAGE TO ATTEND MAY BE QUESTIONABLE, BUT IT DOES APPEAR TO ME THAT WHEN THERE HAS BEEN SUCH A LONG CUSTOM AND

PRACTICE, WHEN IT HAS ACCOMMODATED THE PRESS AND WHEN IT HAS NOT BEEN SUSCEPTIBLE TO OR HAS NOT CAUSED ANY INTRUSION OF ANY SORT ON THE PROCESSES OF THE EXECUTION, THAT IT WAS PROBABLY IRRATIONAL AND UNREASONABLE AND CAPRICIOUS TO BAR THE PRESS AT THIS POINT.

WE DO HAVE THE QUESTION PRESENTED OF THE METHOD OF SELECTING THE MEDIA WHO WILL ATTEND AS WITNESSES OR THE REPRESENTATIVES OF THE MEDIA. AN OBJECTION HAS BEEN MADE TO THE METHOD THAT WAS USED IN CONNECTION WITH THE PLANNED EXECUTION OF MR. HARRIS.

THE PLAINTIFF APPARENTLY SUSPECTED THAT THERE HAS BEEN SOME CHICANERY INVOLVED IN WHAT THEY INITIALLY ALLEGED TO BE THE SUBSTITUTION OF THE SACRAMENTO UNION FOR THE SACRAMENTO BEE. THE EVIDENCE INDICATED THERE WAS NO ACTUAL SUBSTITUTION. THE SACRAMENTO BEE HAS NEVER BEEN NAMED AS A WITNESS AND THE UNION WAS SIMPLY PUT IN SO THAT THE SACRAMENTO AREA HAD REPRESENTATION.

THE METHOD USED BY THE STATE APPEARS TO BE A PERFECTLY SENSIBLE ONE. THEY HAVE ASSIGNED A LARGE NUMBER OF WITNESS SPACES TO THE MEDIA. THEY'VE ESTABLISHED RULES THAT ACCOMMODATE THE NATIONAL WIRE SERVICES, ALL OF THE AREAS OF THE STATE WITH SOME PARTICULAR EMPHASIS ON THE AREA WHERE THE CRIME WAS COMMITTED.

THEY'VE PROVIDED FOR REPRESENTATION BY RADIO AND BY TELEVISION AND IT DOES APPEAR THAT A RATIONAL ATTEMPT HAS BEEN MADE TO PROVIDE AS BROAD ACCESS AS IS APPROPRIATE FOR ALL SEGMENTS OF THE MEDIA.

THE CHOICES THAT WERE MADE WERE IN ACCORDANCE WITH THE PRINCIPLES OF SELECTION. THEY PROVIDED ACCESS TO A FAIR CROSS SECTION OF THE MEDIA. I CAN FIND NOTHING WRONG WITH EITHER THE METHOD OF SELECTION OR THE PRACTICE THAT HAS OCCURRED IN THE HARRIS SITUATION IN SELECTING THE MEDIA REPRESENTATIVES.

OBVIOUSLY, THERE HAS TO BE SOME ARBITRARY DECISION MADE AS TO EACH MEDIA WITNESS WHO IS TO ATTEND. EVERYBODY THAT WANTS TO BE THERE CAN'T BE ACCOMMODATED AND CHOICES HAVE TO BE MADE. BUT IT IS PERFECTLY RATIONAL TO LEAVE THOSE CHOICES TO THE ADMINISTRATION OF THE PRISON.

AND I SEE NOTHING WRONG WITH THE WARDEN GETTING OPINIONS FROM OTHERS, WHETHER IT BE FROM A REPRESENTATIVE OF THE GOVERNOR'S

OFFICE, COMMUNICATIONS DEPARTMENT OR ANYONE ELSE WHO IS KNOWLEDGEABLE ABOUT THE NATURE AND RANGE OF MEDIA COVERAGE IN PREPARING THE LIST OF MEDIA THAT ARE TO ATTEND.

THE ACTUAL WITNESSES WHO ATTEND ARE DESIGNATED BY THE PARTICULAR NEWSPAPER, OR RADIO, OR TELEVISION STATION, OR WIRE SERVICE, NOT BY THE WARDEN. ALTHOUGH, THE WARDEN DOES HAVE A RIGHT OF VETO, BUT THERE IS NOTHING THAT I CAN SEE IN THE SELECTION PROCESS THAT IS ANYWAY UNREASONABLE. AND I FIND THAT THE SELECTION PROCESS IS TOTALLY APPROPRIATE.

WHILE NEWS GATHERING IS CERTAINLY PROTECTED BY THE CONSTITUTION, THE RIGHT, AS I SAY, ISN'T AN ABSOLUTE RIGHT. IT'S WELL SETTLED THAT THE PRESS HAS A RIGHT OF ACCESS TO WHATEVER THE PUBLIC HAS A RIGHT TO, BUT IT HAS NO SPECIAL RIGHT OF ACCESS AND NO RIGHT THAT'S NOT AVAILABLE TO THE PUBLIC GENERALLY.

IN OUR COURTS WHICH ARE CONSTITUTIONALLY MANDATED TO CONDUCT PUBLIC TRIALS, THE PRESS AND THE PUBLIC ARE ENTITLED TO EQUAL ACCESS. BUT NEITHER THE PUBLIC NOR THE PRESS HAVE BEEN FOUND TO HAVE THE RIGHT TO BRING CAMERAS, STILL OR TELEVISION, INTO A COURTROOM.

INDEED, UNTIL A VERY RECENT DETERMINATION TO ALLOW LIMITED TESTING OF TELEVISION IN A FEW FEDERAL COURTROOMS, ALL FEDERAL COURTROOMS ARE UNDER A MANDATE FROM THE SUPREME COURT NOT TO DO SO.

IN CALIFORNIA QUITE CLEARLY EXECUTIONS AREN'T PUBLIC. CALIFORNIA PENAL CODE SECTION 3605 IMPOSES CLEAR LIMITS ON THE PERSONS WHO ARE TO ATTEND. WHILE AS I'VE SAID EARLIER, THE PRESS CAN'T BE ARBITRARILY EXCLUDED, THAT DOESN'T MEAN THAT MEDIA ATTENDANCE MAY NOT BE SUBJECT TO REASONABLE LIMITATIONS.

A GREAT MANY REASONS IN THE CASE, VARIOUS CASES THAT HAVE COME UP IN CONNECTION WITH MEDIA ATTENDANCE AT COURT TRIALS HAVE BEEN ADVANCED FOR EXCLUDING CAMERAS. SOME MAY VERY WELL QUESTION HOW COMPELLING THOSE REASONS ARE.

BUT IT'S SUFFICIENT TO SAY THAT WHATEVER EXCLUSIONS ARE APPROPRIATE FOR A PUBLIC HEARING SUCH AS A COURT TRIAL, OUGHT TO BE MORE COMPELLING THAN THOSE THAT ARE NEEDED TO EXCLUDE THEM FROM A PRIVATE EXECUTION.

THE WARDEN IS DESIGNATED UNDER CALIFORNIA LAW TO OPERATE AND CONTROL THE PRISON AND TO SUPERVISE EXECUTIONS. THESE ARE

QUESTIONS AND ACTIVITIES THAT REQUIRE THE EXPERTISE OF PEOPLE WHO ARE TRAINED IN SUCH MATTERS. IT'S REALLY NOT A PLACE FOR INTRUSION BY WELL-MEANING AMATEURS.

WE HEARD FROM A NUMBER OF WARDENS AND THEY ALL AGREE THAT MANAGING A PRISON ISN'T AN EASY TASK. THEY ALL AGREE THAT THE INTERNAL TENSIONS THAT ARE CREATED BY A LARGE NUMBER OF CRIMINALS COMBINED IN CLOSE QUARTERS PRESENTS, IN THE BEST OF TIMES, A WIDE RANGE OF PROBLEMS AND DANGERS.

AND AS THEY'VE POINTED OUT IT'S PARTICULARLY TRUE AT TIMES OF EXECUTIONS. THEY ALL AGREE THAT THE PRISON POPULATION BECOMES EXTREMELY TENSE, HOSTILE AND AGGRESSIVE DURING THE PERIOD SURROUNDING ANY PLANNED OR ACTUAL EXECUTION.

THE WARDENS WERE UNANIMOUS IN THE FACT THAT NONE HAS EVER PERMITTED CAMERAS AT AN EXECUTION. THERE'S NO EVIDENCE THAT ANY PRISON ANYWHERE HAS EVER PERMITTED CAMERAS IN THE UNITED STATES.

ALTHOUGH, WE WERE REFERRED TO ONE REPORTER WHO ON ONE OCCASION SECRETLY CONCEALED A CAMERA, I BELIEVE, ON HIS LEG, IN VIOLATION OF PRISON RULES. ALL BUT ONE OF THE WARDENS WHO TESTIFIED PRESENTED A NUMBER OF REASONS WHY CAMERAS OUGHT TO BE EXCLUDED.

FIRST OF ALL, THE PRISON PERSONNEL WHO PARTICIPATE IN THE EXECUTION PROCESS FREQUENTLY WANT THEIR IDENTITIES CONCEALED. THEY FEAR, AND APPARENTLY WITH SOME JUSTIFICATION, THAT HARM MAY COME TO THEMSELVES OR TO THEIR FAMILIES IN RETALIATION FROM THE PRISONERS, OR THEIR ASSOCIATES, OR FROM GANGS, OR FROM ANY ELEMENT OF THE PUBLIC THAT IS POSSIBLY HYSTERICALLY OFFENDED BY THE FACT OF THE EXECUTION, AND THE PRISON PERSONNEL DESERVE PROTECTION.

THEY MIGHT WELL BE DISCLOSED, THEIR IDENTITIES REVEALED BY A CAMERA IN THE AREA AT THE TIME OF AN EXECUTION, AND NO RATIONAL WAY APPEARS TO PREVENT CAMERAS THAT ARE THERE FROM GETTING EITHER INTENTIONALLY OR INADVERTENTLY PHOTOGRAPHS OF THE PRISON PERSONNEL.

THE WITNESSES TO EXECUTIONS THE WARDEN FURTHER POINTED OUT AREN'T ALLOWED TO BRING WITH THEM ANY HEAVY OBJECTS OF ANY SORT WHICH MIGHT CREATE ANY KIND OF A THREAT TO OTHERS. CAMERAS OBVIOUSLY ARE SUCH HEAVY OBJECTS. TELEVISION CAMERAS HEAVIER THAN STILL CAMERAS IN MANY CASES.

THE SECURITY OF PRISONS IS SOMETHING THAT, AS I SAY, HAS TO BE LEFT TO THE PEOPLE WHO ARE RESPONSIBLE FOR DEALING WITH THE PROBLEMS THAT ARISE IF SECURITY IS BREACHED AND PRISONS VERY JEALOUSLY GUARD THEIR RIGHT TO MAINTAIN SECURITY.

PEOPLE ENTERING THE PRISON OR EVEN THE PRISON GROUNDS ARE SUBJECT TO SEARCH AND STRICT LIMITATIONS. AND THE WARDEN IS REALLY NOT REQUIRED TO TRUST ANYBODY. IT'S NO ANSWER TO SAY THAT PRESS REPRESENTATIVES ARE ALL NICE PEOPLE AND THAT THEY NEVER CAN DO ANYTHING IRREGULAR OR IRRATIONAL, BUT THAT CAN BE SAID ABOUT A LOT OF OTHER PEOPLE, TOO.

AND THE PRISONS HAVE LEARNED THAT IT IS NECESSARY THAT ALL PEOPLE BE SUBJECT TO THE SAME SECURITY REGULATIONS IN ORDER TO MAINTAIN THE SECURITY THAT THEY FIND NECESSARY. IN CALIFORNIA WE HAVE A GAS CHAMBER, IT'S GLASS ENCLOSED AND IT'S SEALED DURING THE EXECUTION PROCESS, IT'S FILLED WITH A LETHAL GAS.

NOW, ANY HEAVY OBJECTS STRIKING THE CHAMBER COULD CONCEIVABLY CAUSE A LEAKAGE OF THAT GAS INTO THE WITNESS AREA OR VERY LEAST A THREAT OF CREATING A FEAR OF POSSIBLE BREAK IN THE SEAL WHICH WOULD REQUIRE SOME LONG DELAY OR EXAMINATION OF THE CHAMBERS THAT WOULD MAKE IT DIFFICULT TO CARRY ON THE EXECUTION EXPEDITIOUSLY.

SOME OF THE WARDENS HAD A REAL FEAR THEY EXPRESSED THAT THE CIRCULATION OF A PHOTOGRAPH OF AN EXECUTION WITHIN THE PRISON EVEN AFTER THE TIME OF THE EXECUTION, AND MORE SERIOUSLY THE DISPLAY ON TELEVISION OF A LIVE BROADCAST OF THE EVENT WITHIN THE PRISON, COULD SPARK SEVERE PRISONER REACTION THAT MIGHT BE DANGEROUS TO THE SAFETY OF PRISON PERSONNEL.

MR. PROCUNIER, FORMALLY A WARDEN AT SAN QUENTON, WAS THE ONLY PERSON WHO EVER HAD RESPONSIBILITIES IN CONNECTION WITH PRISON OR WITH EXECUTIONS WHO INDICATED ANY DOUBTS ABOUT THE RISK INVOLVED IN CAMERAS IN THE EXECUTION CHAMBER.

HE TESTIFIED THAT HE HAD NOT AT ANY OF THE PRISONS, AND HE'S BEEN AT A GREAT MANY OF THEM, HE'S MOVED FROM ONE TO ANOTHER AND HAD SIGNIFICANT POSITIONS IN EACH OF THEM, NEVER IN ANY OF THOSE PRISONS HAS HE EVER PERMITTED CAMERAS TO BE PRESENT AT AN EXECUTION.

WHEN HE WAS ASKED WHY, HE SAID "NO ONE EVER ASKED." APPARENTLY HE ENCOUNTERED PRESS FAR LESS AGGRESSIVE THAN THEY SEEM TO

HAVE BECOME LATELY, AT LEAST. BUT MORE SIGNIFICANTLY WHEN HE WAS ASKED HOW MUCH RISK HE WOULD TOLERATE IN THE EXECUTION PROCEDURE, HE SAID FLATLY "NONE."

IT'S INTERESTING THAT WHEN MR. PROCUNIER WAS A WARDEN AT SAN QUENTON HE WAS NOT AS SOLICITOUS OF MEDIA RIGHTS AS HE APPEARED TO BE AT THIS TRIAL. HE IMPOSED A RULE PROVIDING THAT PRESS AND OTHER MEDIA INTERVIEWS WITH SPECIFIC INDIVIDUAL PRISONERS WILL NOT BE PERMITTED, FLATLY PROHIBITING IT.

HE SAID SUCH A RULE WAS NECESSARY FOR PRISON SECURITY. THE MATTER WAS TAKEN TO THE UNITED STATES SUPREME COURT AND THE UNITED STATES SUPREME COURT AGREED WITH HIM, THAT SUCH A RULE WAS A VALID AND NECESSARY RULE TO MAINTAIN PRISON SECURITY.

IN MY VIEW PRISON OFFICIALS ARE THE EXPERTS. THEIR REASONABLE CONCERNS MUST BE ACCOMMODATED AND I FIND THAT THE CONCERNS THAT THEY HAVE EXPRESSED ARE REASONABLE.

THEY NOT UNREASONABLY SEE RISKS IN PERMITTING CAMERAS IN AND I AGREE WITH MR. PROCUNIER NO RISK SHOULD BE TOLERATED. PROHIBITION OF CAMERAS STILL OR TELEVISION FROM THE EXECUTION WITNESS AREA IS A REASONABLE AND LAWFUL REGULATION.

NOW, I PRESUME FOR PURPOSES OF THIS CASE THAT THE PRESS DOES HAVE MORE RIGHTS IN WITNESSING AN EXECUTION THAN EVERY OTHER WITNESS. THAT ASSUMPTION MAY BE OPEN TO SERIOUS DISPUTE. AFTER ALL THE STATUTE PERMITS ONLY THE ATTENDANCE OF WITNESSES. THE RIGHT OF A WITNESS IS SIMPLY TO WITNESS.

IT DOESN'T NECESSARILY ENCOMPASS THE RIGHT TO RECORD IN ANY OTHER FASHION THAN IN THE MIND WHAT IS WITNESSED. BUT MY ASSUMPTION I THINK IS REASONABLE, THAT THE PRESS DOES HAVE SPECIAL RIGHTS AND I BASE THAT ON MY FINDING THAT THE CUSTOM AND USAGE HAS IMPLIED RIGHTS THAT MIGHT NOT OTHERWISE HAVE BEEN THERE FROM THE START.

SHOULD BE NOTED THERE IS NO CUSTOM OR USAGE IN CALIFORNIA OR ELSEWHERE THAT REQUIRES CAMERAS IN THE EXECUTION CHAMBER.

SO IN SUMMARY IF THE ISSUES OF EXCLUSION OF ALL OF THE PRESS AND PROHIBITION OF PENCIL AND PAPER FROM MEDIA REPRESENTATIVES ARE STILL BEFORE THE COURT, I FIND BOTH PRACTICES ARE UNREASONABLE.

ON THE MAIN OR REMAINING ISSUES I FIND THAT THE METHOD OF SELECTING MEDIA REPRESENTATIVES IS REASONABLE AND

APPROPRIATE. AND FINALLY PLAINTIFFS HAVE FAILED TO PROVE THAT
THE WARDEN MAY NOT EXCLUDE CAMERAS FROM THE EXECUTION
WITNESS AREA