

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1967

September Term, 2003

ELIZABETH JONES

v.

STATE OF MARYLAND ET AL.

and

WIDEN PARKER

v.

STATE OF MARYLAND ET AL.

Galbraith,
Jackson,
Cameron, Andrew R.
(Ret., Specially
Assigned),

JJ.

Opinion by Galbraith, J.

All Concur

Filed: September 17, 2003

Respondent Maryland Criminal Court Judge Michael Murphy entered orders prohibiting appellants Elizabeth Jones and Widen Parker from engaging in various conduct regarding the trial of Dastir Firdaus (who is not a party to this action). Jones was ordered to restrain from making extra-judicial comments to the press regarding certain aspects of the trial. Parker, a reporter, was ordered not to solicit comment from Jones until the conclusion of Firdaus's second trial. We agreed to hear these expedited appeals jointly to decide whether the entry of such orders below violated the limitations placed on Respondent by the First Amendment to the United States Constitution. We hold that the orders did not run afoul of the First Amendment.

I. Factual Background

The facts of this case have been stipulated. Appellant Widen Parker is an investigative reporter for Channel 17 WCBN news in Baltimore, Maryland. Appellant Elizabeth Jones was a juror in the first criminal trial of Dastir Firdaus, an African American Muslim prosecuted for first-degree murder in the death of Officer Jimmy Weatheby of the Baltimore City Police Department. The murder trial of Firdaus concluded when the trial judge declared a mistrial because of a hopelessly deadlocked jury. At the conclusion of that trial, presiding judge Michael Murphy asked the prosecution if they intended to retry Firdaus for Weatheby's murder. When the prosecutors answered in the affirmative, Judge Murphy issued the "gag order" that gives rise to this appeal. Judge Murphy's order stated:

In order to preserve the rights of the state and the Defendant to a fair trial in the retrial of this case, all trial participants in this concluded trial, including all jurors, are hereby prohibited from speaking to the media or speaking in any other public context about any aspect of the factual or legal issues considered in this trial. All reporters or other

media representatives are hereby prohibited from contacting any juror in this trial for the purpose of soliciting any comment or information from a juror concerning any aspect of the jury's deliberations or the jury's assessment of any evidence in this trial. Violation of this order shall be punishable as contempt of court.

At the trial of Firdaus for first-degree murder, many of the facts were not in dispute. It was established that a paid police informant provided police with information that Firdaus was a member of a local drug gang and that there was a quantity of heroin stored in his apartment for the purposes of resale. The police, acting on this information, obtained a search warrant, and a team of four heavily armed officers approached Firdaus's apartment at approximately 2 a.m. on the evening in question. It also was undisputed that Officer Weatheby was the first member of the police team to enter Firdaus's apartment and that as he entered he was killed by a gunshot fired by Firdaus from an unlicensed 9 millimeter semi-automatic handgun. Firdaus's bullet struck Weatheby in the head, thus avoiding his bulletproof vest and killing him almost instantaneously. In the course of the raid, the police team discovered and impounded a substantial amount of heroin and approximately \$70,000 in cash.

There is, however, an irreconcilable conflict between the police and defense versions of what transpired immediately prior to and immediately after the shooting of Officer Weatheby. Whether Firdaus is guilty of first-degree murder depends entirely on which version of those critical events the finder of fact deems accurate. At the trial, the three surviving members of the police raiding team testified that when they arrived at Firdaus's apartment, they pounded loudly on the door, loudly announced they were police officers and they had a search warrant, and loudly demanded that Firdaus admit them to the apartment. When they received no response, they used a "door ram" to smash open

the door. Officer Weatheby then stepped into the open doorway and was immediately struck by the single shot fired from within the darkened apartment. The other officers quickly sprayed a large amount of gunfire into the apartment through the open door without actually entering the apartment. At that point, according to the police, Firdaus shouted that he wanted to surrender and he threw his handgun out onto the floor in plain view of the police. Firdaus was taken into custody and emergency medical help was summoned for Officer Weatheby. The search of the apartment was completed, resulting in the discovery of the \$70,000 in cash on the kitchen table and a quantity of heroin concealed in a kitchen cabinet.

In contrast to this police version of the events surrounding their entry of the apartment, Firdaus testified that the police did not knock or otherwise signal their presence at the door and did not in any way identify themselves or indicate they were there to execute a search warrant. According to Firdaus he was sitting at the kitchen table counting and bagging the \$70,000 in small bills when the apartment door was suddenly “kicked in.” Because he assumed he was being robbed by a rival gang (a common occurrence among the drug dealers in the neighborhood), he grabbed his handgun from the table, stepped into the darkened entry hall, and fired at a shadowy figure in the doorway that appeared to be holding some sort of an assault rifle. When the rest of the police team fired into the apartment, identified themselves, and indicated they had a search warrant, Firdaus immediately shouted out his desire to surrender and tossed his weapon out into view.

Md. Code Ann., Criminal Law § 2-201(a)(1) provides: “A murder is in the first degree if it is: (1) a deliberate, premeditated, and willful killing...” If the police version

of events is believed, Firdaus's shooting of Officer Weatheby was, in all likelihood, a deliberate, premeditated (even though only briefly), and willful killing of a police officer that satisfies the standard set forth in § 2-201(a)(1). If convicted, Firdaus will face either a life sentence in prison or the death penalty. *Id.* at § 2-201(b)(1). If Firdaus's version of events is believed – that when he shot Officer Weatheby, he believed he was under personal attack by an unknown, armed intruder, that his life was in immediate danger, and that his only effective line of self-defense was to fire at the intruder – Firdaus would probably not be guilty of first-degree murder, although conviction on some lesser charge might still be appropriate. Unfortunately, there are no witnesses to the events other than the three surviving police officers and Firdaus.

After a week of jury deliberations, the foreman reported there was no chance of reaching a unanimous verdict. The jury was hopelessly deadlocked on the question of whether Firdaus should be found guilty of first-degree murder. An *Allen* charge proved unavailing, and on September 9, 2003, the court declared a mistrial. It then asked the prosecutor whether the state intended to re-indict Firdaus, and subsequently entered the order that is the source of this appeal.

Widen Parker immediately sought out Elizabeth Jones and asked her to join him and Channel 17 News in a motion to vacate the gag order. Parker had access to the juror questionnaire forms that the prosecution and defense used to pick the jury for the first trial. Parker accurately deduced – based largely on her background – that Jones was likely to have been among the jurors holding out for a verdict of not guilty. Once contacted by Parker, Jones accepted Parker's offer. Attorneys for the parties immediately filed the motion to vacate, and Judge Murphy held a hearing on the matter the following

day, September 10th. The motion was based on the theory that the gag order violated Jones's and Parker's rights under the free speech and free press clauses in the First Amendment.

Elizabeth Jones is a widowed African American mother of a fourteen-year-old son. She testified at the hearing that since the death of her husband four years ago, she has been a resident of publicly subsidized housing in the same section of Baltimore where the ill-fated police raid on Firdaus's apartment took place. She testified that gangs dominate the streets and public housing complexes, that gang violence and related street crime is a constant fact of her everyday life, and that she lives in constant fear that she or her son will become a victim of the criminal culture that surrounds them.

Jones also testified, however, that the Baltimore police seem to have responded to these conditions by adopting a heavy-handed "shoot first and ask questions later attitude" that routinely results in the harassment of ordinary citizens and numerous incidents of excessive force. Invariably, Jones testified, the victims of these regular police excesses are African American. Recently, she recalled, on a trip home from his after-school job, Jones's son was stopped and frisked by police officers for no apparent reason. She testified that she feels that she and her son are "under siege ... not only by the drug dealers, but by the police as well." According to Jones, the police in her neighborhood are excessively brutal in their dealings with individuals who the police suspect are part of the criminal gang culture in her area. She reported several incidents where it was suspected that police officers had beaten or otherwise abused suspected gang members in order to get information. She testified that it was common knowledge that police broke into drug suspects' homes with little or no warning in order to prevent suspects from

disposing of contraband during delays in the police entry. According to Jones's statement, several homes or apartments in her area had even been subjected to such raids as a result of police error or erroneous information provided to the police.

Because of her long experience with common police tactics in her neighborhood, Jones indicated that she was inclined to believe Firdaus's version of the events surrounding the entry of the police into his apartment. She went on to state, however, that even if the police version happened to be accurate in this particular case, the only way to focus public attention on police tactics in African American neighborhoods was to refuse to convict in cases like Firdaus's until the police revised their practices. She testified that on both of these points, she strongly and irreconcilably differed from the majority of the Firdaus jurors. According to Jones, the white middle class backgrounds of most of the other jurors made them entirely too trusting of the police and made them unable to understand her perspective. Jones testified that she wanted to give the proposed interview to Parker because she felt it was her civic duty to use her visibility as a juror in the Firdaus case to focus the attention of the general public on police tactics in African American neighborhoods in Baltimore.

Appellant Parker testified that if the gag order were removed, he would interview Jones and broadcast the interview on his weekly investigative series. He felt that Jones would have important things to say about the Baltimore City Police and the "state of police enforcement in Maryland." Parker asserted: "In today's society, people rely on the media for information about the activities of government. Without reporters, no one would know what was going on in the community around them. The press must be free to report, so that others will be free to exercise their rights."

The record of the hearing before Judge Murphy on the motion to vacate his gag order establishes several facts. The discrepancies between Firdaus's version of what happened and the police version are irreconcilable. The trial of Firdaus attracted intense and widespread media coverage because of general underlying racial tension in Baltimore and because of long-standing tension between the Baltimore police and the African American community. Public reaction to the killing of Officer Weatheby tends to divide generally along racial lines with whites mostly expressing confidence in the police version of events and blacks widely voicing the suspicion that the police were not careful to make sure that any occupants of Firdaus's apartment were aware that they were police officers executing a search warrant. The Firdaus defense attorneys at the trial used the classic tactic of "putting the police on trial," attacking common police tactics in African American neighborhoods as a way of reinforcing Firdaus's testimony about the course of events surrounding his shooting of Officer Weatheby.

At the conclusion of the hearing on the motion to vacate, Judge Murphy announced several findings. Judge Murphy found that Jones's proposed statements to Parker would further inflame racial tensions in general and would tend to harden the division along racial lines between those who believed the police and those who believed Firdaus (or at least disbelieved the police). According to Judge Murphy, the hardening of these race-based views of the Firdaus case would make it virtually impossible to empanel an unbiased jury for the second trial of Firdaus. Judge Murphy also found that the media attention to the original trial had been so widespread, and the media attention to the proposed Jones interview probably would be so widespread, that a change of venue could not escape the prejudicial pretrial publicity. Thus, he concluded that the gag order as

applied to Parker and Jones was essential to protect the right of Firdaus and the State to a fair retrial as guaranteed by the Sixth Amendment. Judge Murphy therefore denied the motion to vacate his previous order. From this decision, Jones and Parker appeal.

II. Discussion

The legality of the order under the Maryland Constitution or any other Maryland law is not at issue. Further, the parties stipulate that the order prohibits Jones and Parker from engaging in the proposed conduct and do not challenge the order on vagueness grounds. Thus, we turn to the heart of the appeal. The matter before us is easily resolved. The Sixth Amendment to the United States Constitution guarantees that “[i]n 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...” The United States Supreme Court declared in the seminal case *Neb. Press Ass’n v. Stuart* that this guarantee is “the most fundamental of all freedoms.” 427 U.S. 539, 585 (1976). That is, the fair trial guarantee is essential to the preservation and enjoyment of all other rights, providing a necessary means of safeguarding personal liberties against government oppression. *Id.* at 586.

Appellants urge us to ignore this fundamental precept of American jurisprudence. Instead, they argue, the freedoms of speech and of the press preserved in the First Amendment somehow “trump” the right to a fair trial by an impartial jury imbedded in the Sixth. They argue that the orders involved in this case are prior restraints, which cannot withstand constitutional scrutiny.

This is a conclusion with which we cannot concur. When he entered the orders, Judge Murphy made several findings. He noted that this case has received widespread

local as well as national attention. He recognized this case has garnered intense, frenzied, and divisive media coverage. Most notably, Judge Murphy found that the versions of events surrounding Officer Weatheby's slaying offered by the prosecution and the defense were irreconcilable. Based on these findings, it was reasonable for Judge Murphy to conclude that if a juror in the first trial were to speak out publicly against police tactics, public opinion would most likely tip in favor of the version that particular juror adopted. That is, the court's ability to ensure a fair retrial would be substantially impaired. As Judge Murphy was in a much better position than us to make this finding, we will defer to his ruling.

Judge Murphy also found that to ensure a fair retrial, there was no alternative to a gag order. The widespread attention given the case made any less restrictive alternative unavailable. It is the trial court's duty and responsibility to protect a criminal defendant's right to a fair trial. Judge Murphy's decision is consistent with that duty. The lower court's decision to deny the motion to vacate is hereby

Affirmed. All concur.

IN THE COURT OF APPEALS OF
MARYLAND

No. 04

September Term, 2003

ELIZABETH JONES

v.

STATE OF MARYLAND ET AL.

and

WIDEN PARKER

v.

STATE OF MARYLAND ET AL.

Bedoya, C.J.
Roland
Craig
Choi
Trammell
Weatherholt
Belford,

JJ.

Opinion by Belford, J.
Bedoya, C.J., Trammell and Choi, JJ. dissent

Filed: September 30, 2003

This case comes to us from the Court of Special Appeals. That court declared that certain orders issued by Baltimore City Criminal Court Judge Michael Murphy did not violate the First Amendment to the United States Constitution. Because of the effect that decision had on the ability of both Appellants to engage in activities arguably protected by the First Amendment, we granted certiorari and agreed to hear this appeal on an expedited basis. For the reasons set forth below, the decision of the Court of Special Appeals is affirmed.

The facts of this case as summarized by the Court of Special Appeals are adopted herein by reference. The orders were issued immediately after a murder trial in which the jury deadlocked on the issue of whether the defendant, Dastir Firdaus, was guilty of first-degree murder for his shooting of Officer Jimmy Weatheby of the Baltimore City Police Department. The gag order prohibits the trial participants – specifically including discharged jurors such as appellant Jones – from speaking to the media before Firdaus can be retried by the State. It additionally prohibits reporters such as appellant Parker from seeking out and interviewing any discharged juror about “any aspect of the jury’s deliberations or the jury’s assessment of any evidence” in Firdaus’s first trial. Both Appellants assert that the order violates the Free Speech and Free Press Clauses of the First Amendment to the federal constitution.

The order as applied to both of the appellants is constitutional, despite the dissent’s misunderstanding of the Supreme Court’s holding in *Neb. Press Ass’n v. Stuart*, 427 U.S. 539 (1976). With regard to the order as applied to Parker, the dissent makes much ado about nothing in insisting that the press’ ability to report on criminal proceedings is absolutely protected. The order in this case is merely a restriction on

sources of information available to the press, and not a prohibition on the actual publication of any information already in the possession of the media. Thus, *Neb. Press* is inapposite. Similarly, the dissent's reliance on *New York Times Co. v. United States*, 403 U.S. 713 (1971) (“*The Pentagon Papers Case*”), is misplaced. The nearly insurmountable presumption against the constitutionality of prior restraints on publication simply is not operative here. Again, the order with respect to appellant Parker merely prohibits certain news gathering activities, not the publication of information already in the possession of the media.

The State's interest in the fair administration of justice and its inability to ensure the same by any other means is sufficient to justify the entry of the order against Parker. Given the national attention received by this trial, coupled with the advent of internet news services and twenty-four-hour cable news coverage, the remedial techniques previously relied upon by other courts to minimize the impact of spectacular pretrial publicity are insufficient. We will not disturb Judge Murphy's findings on this issue.

Moreover, the power of the court to prevent press contact with jurors at the completion of a trial is well established. In *United States v. Harrelson*, 713 F.2d 1114 (5th Cir. 1983), the Supreme Court noted that the First Amendment right to gather news is neither absolute nor does it provide journalists with special privileges denied other citizens. 713 F.2d at 1116. Indeed, an order restricting contact with jurors is consistent with the constitution if it is entered to prevent a threat to the administration of justice. Judge Murphy found that such an order was necessary, and the Court of Special Appeals was correct in holding that he did not abuse his power on this point. For all of the foregoing reasons, we conclude the order is constitutional as to appellant Parker.

Because appellant Jones is a “trial participant,” analysis of Jones’s free speech claim is governed by the Supreme Court’s decision in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). In *Gentile*, the Supreme Court held that sanctions imposed on attorneys representing trial defendants could be justified under a lower standard of judicial review than that articulated in *Nebraska Press*. *Id.* at 1063. In so holding, the Supreme Court emphasized the intimate knowledge that trial participants possess. The public presumes, for example, that lawyers possess intimate knowledge about their cases. The public is easily swayed into believing what they are told by someone who appears to have “inside knowledge.” To prevent this danger, a trial participant’s speech may be restricted under a less demanding standard than that required by *Nebraska Press* for restrictions on the press who are not trial participants.

To enter a gag order against a trial participant, a court need only find a reasonable likelihood that his or her speech will endanger the guarantee of the Sixth Amendment. Once the detailed requisite finding is made on the record, the Court may enter an order detailing exactly what trial participants may say publicly. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 n.18 (1984); *U.S. v. Tijerina*, 412 F.2d 661, 666-67 (10th Cir. 1969). Judge Murphy did exactly this. He determined it was probable, given the attention the case received, that public comments on jury deliberations, on the evidence presented at trial, or on any other element of the trial would make it impossible to impanel a jury that could consider Firdaus’s second trial deliberately and impartially according to the dictates of the Sixth Amendment. Again, we do not challenge this conclusion and accordingly affirm the Court of Special Appeals decision as to Jones.

In a creative attempt to avoid the implications of *Gentile* on Jones's free speech claim, both Parker and Jones have argued that the gag order prohibiting Jones's speech unconstitutionally impairs the protected right of the press to report on court proceedings. Because we have already held that the order directly prohibiting Parker's solicitation of comment from Jones does not violate freedom of the press, we need not consider this novel argument that Jones's right to speak is protected, in spite of *Gentile*, by some constitutional right of the press to gather news. *See Branzburg v. Hayes*, 408 U.S. 665, 681 (1972); *but see KPNX Broadcasting Co. v. Superior Court*, 678 P.2d 431 (1984).

For the foregoing reasons, the decision of the Court of Special Appeals is *affirmed* in all respects.

Trammell, J. with whom Bedoya, C.J. and Choi, J. join, dissenting :

The question presented, and which the majority seems to avoid, is whether Judge Murphy's order conflicts with the federal constitution, specifically the First Amendment clauses protecting freedom of speech and freedom of the press. The problem presented has deep roots in our nation's history. Volumes of American jurisprudence are dedicated to the irreducible tension between the freedoms of speech and press guaranteed by the First Amendment and the right to a fair trial guaranteed by the Sixth Amendment. A court in a case such as this one is forced to balance the interests in a fair trial on the one hand against the interest in free speech and free press on the other, and to determine the point at which a gag order becomes impermissible. The order with respect to Jones is a prior restraint on speech, traditionally viewed as unconstitutional. *Near v. Minnesota*, 283 U.S. 697 (1931). The order with respect to Parker impairs the ability of the press to gather information and opinion, an essential prerequisite to the exercise of the freedom of the press to publish and an essential element of the press' duty to inform the public. The order as to Parker is for all practical purposes the equivalent of a "prior restraint" on the ability of the press to publish information of substantial importance to an informed public. Based on the U.S. Supreme Court's decision in *Neb. Press Ass'n v. Stuart*, 427 U.S. 539 (1976) and other applicable case law, the orders issued by the respondent trial judge on these facts exceed the limits placed by the First Amendment on his authority.

The Sixth Amendment to the United States Constitution guarantees that "[i]n 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 ...". Thus, the Sixth Amendment, made applicable to the states through the Due Process

Clause of the Fourteenth Amendment, is essentially the right to a fair trial by a panel of impartial, indifferent jurors. This right is essential to the preservation and enjoyment of all other rights, providing a necessary means of safeguarding personal liberties against government oppression. *Id.* at 586.

However, the First Amendment to the United States Constitution secures other rights that are at least as fundamental. The First Amendment's unequivocal command that "Congress shall make no law ... abridging the freedom of speech, or of the press ..." has been applied through the Fourteenth Amendment to invalidate restraints on political speech imposed by the States. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254 (1964). Commentary and reporting on the criminal justice system is political speech at the core of the First Amendment, for the operation and integrity of that system is of crucial importance to citizens concerned with the administration of government. *Neb. Press Ass'n*, 427 U.S. at 587. Reporting, criticism, and debate about the workings of the justice system contribute to public understanding of the rule of law and to comprehension of the system's proper function. The Firdaus case has been surrounded by political controversy since its inception, and Jones has every right to comment on the current political atmosphere in her community. Moreover, as clearly indicated by the record below, appellant's proposed speech goes beyond the trial itself. Appellant Jones's proposed speech is a bitter indictment of what she perceives to be prevalent techniques of law enforcement.

This is not to say that the press is free to report as they wish in all cases. The Supreme Court has held that in some extraordinarily publicized cases, trial courts may take steps to limit pretrial publicity, because such publicity creates an atmosphere that

threatens a defendant's right to an impartial jury. *See Sheppard v. Maxwell*, 384 U.S. 333 (1966). In *Sheppard*, the Supreme Court overturned the criminal conviction of Sam Sheppard, who was found guilty of bludgeoning his pregnant wife, Marilyn, to death in the upstairs bedroom of their lakeshore home. *Id.* at 336. The press coverage of the trial included several flagrant episodes. These episodes, all strongly implicative of Sheppard's guilt, included the front-page headline "But Who Will Speak for Marilyn?," a story labeling Sam Sheppard as being a "Dr. Jekyll and Mr. Hyde" character, and a story that stated that Sheppard impregnated his mistress. *Id.* at 346-48. The Court concluded that though a responsible press has always been regarded as a handmaiden of effective judicial administration, *Id.* at 349, legal trials are not to be won or lost through various media outlets. *Id.* at 351.

This case does not rise to the level of misconduct presented in *Sheppard*. For a gag order to be valid, the suppressed expression must create a "clear and present danger" or a "serious or imminent threat" to a defendant's ability to receive a fair trial. *Neb. Press Ass'n*, 427 U.S. at 562; *Levine v. U. S. Dist. Court*, 764 F.2d 590, 595 (9th Cir. 1985). In addition, the order must be carefully drawn, and cannot be upheld if reasonable alternatives are available that have a lesser impact on First Amendment freedoms. *Id.* The order in the instant case fails to meet these operative standards. Statements that pose a threat to the fairness of a trial must be specific, not general. There must be much more than a possibility or a "reasonable likelihood" that speech will create unfairness in the future. It must be a "serious and imminent threat" of a specific nature, the remedy for which can be narrowly tailored in an injunctive order. *See generally Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991).

We question whether any prior restraint on speech or the press can survive such scrutiny. In *New York Times v. United States*, 403 U.S. 713 (1971) (“*The Pentagon Papers Case*”), the Supreme Court held that the New York Times and the Washington Post could not be restrained from publishing a top secret Pentagon document that was highly critical of America’s involvement in the Vietnam conflict. Justice Hugo Black scoffed at the notion that, despite the First Amendment’s emphatic command, the Judiciary could “make laws enjoining publication of current news and abridging freedom of the press in the name of ‘national security.’” It is uncontested that the Executive has the power under Article II to preside over the country’s international affairs. If he cannot restrain the press in the name of “national security,” then surely the Judiciary may not restrain the press in the name of “due process.” *See also United States v. Sherman*, 581 F.2d 1358 (9th Cir. 1978) (holding that oral order that “everyone stay away from the jurors” violated the constitution).

The State argues that given that the national news coverage being given this trial – not to mention the even wider publicity due to internet news services and twenty-four-hour cable news coverage – the remedial techniques previously relied upon by other courts to minimize the impact of spectacular pretrial publicity are insufficient. The government argues that neither a change of venue nor a continuance would have any redeeming effects. However, despite these profound changes in modern news coverage, we do not believe that the government has demonstrated that all other available means of assuring a fair trial would be unavailing in this case. The record on this point consists almost entirely of Judge Murphy’s conclusory statements that other measures would not

work in this case because of mix of the extraordinary racial tensions and media attention surrounding the Firdaus murder case.

The lower standard of justification imposed by the Supreme Court in *Gentile v. State Bar of Nevada* is not applicable to the order against appellant Jones in this case because she is not a lawyer for either side of the case, and she does not have a vested interest in the outcome of a retrial. *Id.* She is not a “trial participant” under the authority of *Gentile. Id.* Thus, the likelihood that appellant Jones is attempting to affect the outcome of the government’s anticipated retrial or fashion her statements to leave a lasting impression on potential jurors is minimal at best. In any event, Jones’s speech cannot threaten Firdaus’s ability to receive a fair trial. If her comments will tip the scale of public opinion, the record indicates the imbalance will most assuredly favor Firdaus. Because the Sixth Amendment vests a right in the *defendant* to a fair trial, and not the *State*, it cannot be said that Jones’s freedom to comment conflicts with the Sixth Amendment right to a fair trial.

The majority is correct that at least one federal circuit has upheld an order that the media must refrain from interviewing jurors after a trial. *See U.S. v. Harrelson*, 713 F.2d 1114 (5th Cir. 1983). In that case, the defendant was accused of murdering a United States District Court judge. After the conviction, the trial judge entered an order that “No person may make repeated requests for interviews or questioning after a juror has expressed his or her desire not to be interviewed.” Because that order was intended to ensure the safety of each juror and to protect the discharged jurors from undue harassment by the media, the Fifth Circuit Court of Appeals decided that the First Amendment was not violated by a limit on the number of requests a reporter may make to

an individual juror. However, that case provides no authoritative guidance in this case where a discharged juror actively seeks to publish her views through an interview with an interested reporter. By no stretch can this order, as applied to Parker and Jones, be viewed as an attempt to protect Jones from intrusive and disruptive media pressures.

For the foregoing reasons, we would hold that the Baltimore City Criminal Court's order is unconstitutional at least as applied to these two Appellants. We respectfully dissent.

**IN THE
SUPREME COURT OF THE UNITED STATES**

No. VU-SUP 2003

**Elizabeth Jones
Petitioner**

**Widen Parker
Petitioner**

v.

and

v.

**State of Maryland Et Al.
Respondent**

**State of Maryland Et Al.
Respondent**

October 2, 2003

Case Below

_____ A.2d _____ (Md. Ct. Spec. App. 2003)
_____ A.2d _____ (Md. 2003)

Petition for writ of certiorari to the Court of Appeals of Maryland is **GRANTED**.

The issues before the Court are:

- (1) Whether the September 10th, 2003 Baltimore City Criminal Court order as applied to Elizabeth Jones violates the First Amendment under the circumstances presented in this case; and
- (2) Whether the September 10th, 2003 Baltimore City Criminal Court order as applied to Widen Parker violates the First Amendment under the circumstances presented in this case.

Arguments will be heard on an expedited basis. The interests of Petitioners Elizabeth Jones and Widen Parker are closely allied as original Plaintiffs in this case. Jones and Parker shall present argument first.

TABLE OF AUTHORITIES

This is a list of cases that you may find helpful. You are not required to cite to every one of these cases in your brief or your oral argument. Additional points will not be awarded for the highest number of citations. Nor are you limited to these cases (the problem is not “canned”). The only limit on your ability to research the issues presented by the problem is that you may not communicate with any person other than your Moot Court Competition partner about the problem. Such a communication with anyone, students and non-students-alike, will be treated as a violation of the Honor Code.

GOOD LUCK!

Near v. Minnesota, 283 U.S. 697 (1931).

Craig v. Harney, 331 U.S. 367 (1947).

Wood v. Georgia, 370 U.S. 375 (1962).

New York Times v. Sullivan, 376 U.S. 254 (1964).

Zemel v. Rusk, 381 U.S. 1 (1964).

Estes v. Texas, 381 U.S. 532 (1965).

Sheppard v. Maxwell, 384 U.S. 333 (1966).

United States v. O'Brien, 391 U.S. 367 (1968).

New York Times Co. v. United States, 403 U.S. 713 (1971).

Branzburg v. Hayes, 408 U.S. 665 (1972).

Pell v. Procunier, 417 U.S. 817 (1973).

Neb. Press Ass'n v. Stuart, 427 U.S. 539 (1976).

Press-Enterprise Co. v. Superior Court of Cal., 464 U.S. 501 (1984).

Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984).

Gentile v. State Bar of Nev., 501 U.S. 1030 (1991).

Mu'Min v. Virginia, 500 U.S. 415 (1991).

Burson v. Freeman, 504 U.S. 191 (1992).

United States v. Tijerina, 412 F.2d 661 (10th Cir. 1969).

CBS Inc. v. Young, 522 F.2d 234 (6th Cir. 1975).

Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975).

United States v. Sherman, 581 F.2d 1358 (9th Cir. 1978).

In Re The Express News Corp., 695 F.2d 807 (5th Cir. 1982).

United States v. Harrelson, 713 F.2d 1114 (5th Cir. 1983).

Levine v. U. S. Dist. Court, 764 F.2d 590, 595 (9th Cir. 1985).

United States v. Ford, 830 F.2d 596 (6th Cir. 1987).

United States v. Antar, 38 F.3d 1348 (3rd Cir. 1994).

United States v. Cutler, 58 F.3d 825 (2nd Cir. 1995).

In Re Morrissey, 168 F.3d 134 (4th Cir. 1999).

United States v. Brown, 218 F.3d 415 (5th Cir. 2000).

United States v. Brown, 250 F.3d 907 (5th Cir. 2001).

KPNX Broadcasting Co. v. Superior Court, 678 P.2d 431 (Ariz. 1984).

Tenn. v. Carruthers, 35 S.W.3d 516 (Tenn. 2000).

Cape Publ'ns, Inc. v. Braden, 39 S.W.3d 823 (Ky. 2001).

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