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JUDICIAL REMEDIES/CONSTITUTIONAL LAW—Mandamus and the Permissible Scope of Review/Closure of a Preliminary Hearing. State of Wyoming ex rel. Feeney v. District Court of the Seventh Judicial District, 607 P.2d 1259 (Wyo. 1980), rehearing denied 614 P.2d 710 (Wyo. 1980).

In November of 1979 two men were scheduled to appear before a county court commissioner for a preliminary hearing on the charge of murder. A motion was made to close the preliminary hearing to members of the public in order to avoid pretrial publicity, which might later threaten the accused men's rights to a fair trial.[1] The presiding commissioner ordered the defending and prosecuting attorneys to present argument on the motion at an *in camera* hearing. He also refused to allow an attorney representing a local television and radio station to appear at this hearing to argue on behalf of the public's and the press's interest in maintaining open judicial proceedings.[2] Following the hearing the commissioner announced his decision to close the preliminary hearing in a terse "Media Notification",[3] and outlined his reasons in a decision letter that was distributed only to the parties present at the preclosure hearing.[4]

The local television and radio station then petitioned the state district court for a writ of mandamus. It alleged that the commissioner had abused his discretion in violation of the station's constitutional rights, and asked the district court to order the commissioner to conduct an open preliminary hearing.

The district court judge found that he had jurisdiction over this controversy and ordered the commissioner either to hold an open preliminary hearing or to appear at a show-

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1. U.S. CONST. amend. VI.
2. State *ex rel.* Feeney v. Dist. Ct. of the Seventh Judicial Dist., 607 P.2d 1259, 1271-1272 (Wyo. 1980) (Raper, C. J., dissenting), *reh. den.* 614 P.2d 710 (Wyo. 1980).
3. Media Notification, State v. Steve Little, Criminal Action No. 580-79, Docket No. 9836; State v. Mike Howell, Criminal Action No. 581-79, Docket No. 9835; County Court of Natrona County, Wyoming, November 13, 1979.
4. Decision Letter Re: Defendants [sic] Joint Motion to Enjoin and Restrict Notification of Appearances and Preliminary Hearing and Other Court Matters to the Public Media, State v. Steve Little, and State v. Mike Howell, *supra* note 3.

cause hearing in district court.[5] The hearing was held and the judge found that the commissioner had in fact abused his discretion and ordered that the preliminary hearing be conducted in open court.[6]

The commissioner then, petitioned the Wyoming Supreme Court for a writ of prohibition. He claimed that the district judge had exceeded his jurisdiction by issuing an order that directly infringed upon the commissioner's exercise of judicial discretion.[7]

On March 13, 1980 the supreme court held that, once a presiding officer has determined that an open preliminary hearing could pose a threat of prejudicial pretrial publicity, the decision to close that hearing properly lies within his judicial discretion.[8] Moreover, since the writ of mandamus could not be used to control judicial discretion,[9] the writ of prohibition would be issued to protect the integrity of a judicial officer, whose exercise of discretion has been threatened by the actions of another court in excess of its jurisdiction.[10]

Former Chief Justice Raper dissented and stated that the commissioner had abused his discretion by failing to adhere to the standards for a pretrial closure order, adopted by the supreme court in previous cases.[11] Furthermore he took strong exception to the majority's apparent unwillingness to use mandamus as a means of policing these standards. Justice Rooney also dissented and stated that the district judge had jurisdiction to entertain the writ of mandamus and that the issue of whether he had exercised that juris-

5. Writ of Mandamus: State *ex rel.* Harriscope Broadcasting Corp. d/b/a KTWO Radio and Television v. Peter J. Feeney, Civil Action No. 48396, Dist. Ct. of the Seventh Judicial Dist., Wyoming, November 13, 1979.
6. Findings, Conclusions, Orders Ruling on Motion to Dismiss and Judgment: Civil Action No. 48396, Dist. Ct. of the Seventh Judicial Dist., Wyoming, December 12, 1979.
7. A second petition for a writ of prohibition was filed on behalf of Mike Howell, one of the two original criminal defendants. The two petitions were consolidated by order of the supreme court. State *ex rel.* Feeney v. District Court of the Seventh Judicial Dist., *supra* note 2, at 1262.
8. *Id.* at 1264.
9. *Id.* at 1263-64. *See* WYO. STAT. § 1-30-102 (1977).
10. *Id.* at 1268.
11. *Id.* at 1268-70 (Raper, C.J., dissenting).

diction properly could be better settled on appeal rather than by resort to the extraordinary remedy of prohibition.[12]

On April 23, 1980 the supreme court denied a request for a rehearing of this case and issued a further opinion. The court repeated its earlier holding and emphasized that the only issue properly before the court in this case was whether the decision to close a preliminary hearing lay within the discretion of the presiding officer. The court never reached the issue of the commissioner's alleged abuse of discretion, for the scope of review on a writ of mandamus was limited to this sole issue of discretion.[13] Former Chief Justice Raper again dissented and criticized the majority's narrow application of mandamus, which failed to distinguish an attempt to control judicial discretion illegally from a legitimate insistence that discretion be exercised without abuse.[14] Justice Rooney joined in this dissent and filed a statement.[15]

This case presents several difficult questions. Whenever a judicial proceeding is closed to the public over the timely objection of the press, the issue of judicial censorship arises. This issue may be framed in terms of the public's right to be informed or in terms of the press's right to acquire information, but the question that must always be faced is whether the circumstances of a particular case justify such a judicial intrusion upon the traditional principles of a free press under the protection of the first amendment. However, in this case the Wyoming supreme court simply said that such an issue was not properly before the court and instead based its opinion on a narrow reading of the mandamus statutes. Such an approach, which elevates procedural form over the consideration of an important constitutional issue, is fairly ironic in the face of the same court's quite proper and often repeated concern for the preservation of the criminal defendants' sixth amendment rights.

12. *Id.* at 1277-78 (Rooney, J., dissenting).
13. State *ex rel.* Feeney v. Dist. Ct. of the Seventh Judicial Dist., *supra* note 2, at 614 P.2d 710, 713.
14. *Id.* at 714 (Raper, C. J., dissenting).
15. *Id.* at 716 (Rooney, J., dissenting).

This note will begin by analyzing the various opinions that this case has spawned, starting with the commissioner's "secret" decision letter and culminating with the final supreme court opinion denying a rehearing. This analysis will be followed by a discussion of judicial closure that will attempt to identify the competing interests which have been identified in similar cases. The focus will then shift to consider the extraordinary writs of mandamus and prohibition, as they have been applied historically and in this case. This note will also consider whether any alternative courses were available, which might have allowed the court to reach the merits of this case without becoming entangled in sterile peripheral issues.

INITIAL DECISIONS: THE COMMISSIONER AND THE JUDGE

In his decision letter the commissioner began by stating that he viewed this case "as a Sixth Amendment [sic] case and not a Free Press/Fair Trial issue."[16] *Gannett v. DePasquale*,[17] a recent United States Supreme Court decision, was cited as holding that "there is no constitutional public right to access",[18] which should be considered in determining how best to protect a defendant's right to a fair trial. The commissioner also cited an earlier Wyoming case, *Williams v. Stafford*.[19] In this case the Wyoming Supreme Court adopted a strict set of standards to guide judicial officers in determining whether to close a pretrial hearing. Briefly summarized, these standards provide:

> 1) that access to court proceedings should be limited only in exceptional circumstances; 2) that pretrial proceedings should be open, unless the presiding officer determines that the dissemination of information from an open pretrial proceeding would create a clear and present danger to the fairness of the trial, and that the prejudicial effect of such

16. Decision Letter, *supra* note 4, at 1.
17. Gannett v. DePasquale, 443 U.S. 368 (1979) [Hereinafter cited in text as *Gannett*].
18. Decision Letter, *supra* note 4, at 1.
19. Williams v. Stafford, 589 P.2d 322 (Wyo. 1979) [Hereinafter cited in text as *Williams*].

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> information cannot be avoided by any reasonable alternative means; 3) that the hearing on the proposed closure order should itself be closed to the public in order to avoid the inadvertant dissemination of the prejudicial information; and 4) that a proper record should be kept, establishing a factual basis for the court's decision to grant or deny the motion for closure.[20]

The rest of the commissioner's letter was devoted to a discussion of the many dangers to trial fairness that a defendant must face in an open preliminary hearing. Evidence may be offered to establish probable cause, although it may be inadmissible at trial on the ultimate issue of the defendant's guilt.[21] In this situation the commissioner concluded that closure of the preliminary hearing was the only means by which he could fully insulate these defendants from the danger of prejudicial pretrial publicity.

When this case arrived in district court on the writ of mandamus, the district judge first held that his jurisdiction over this matter had been established by *Williams v. Stafford.*[22] Although the judge agreed with the commissioner that *Gannett* had not found a constitutional right of public access to pretrial proceedings, he noted that the Supreme Court had not barred actions for the relief sought here, nor had it said that individual states could not impose stringent standards of their own, so long as the criminal defendant's right to a fair trial was not compromised.[23]

The judge then examined the record of the closure hearing in light of the standards adopted in *Williams* and found that:

> there was no indication that the commissioner had sought the voluntary cooperation of the press in delaying the dissemination of potentially prejudicial information; there was nothing in the record to support the conclusion that this was a truly

20. *Id.* at 325-326.
21. Decision Letter, *supra* note 4, at 2. *See* WYO. R. CRIM. PRO. 7(b).
22. Decision Letter Re: State *ex rel.* Harriscope Broadcasting Corp. v. Peter J. Feeney, *supra* note 5, at 1. *See also* Williams v. Stafford, *supra* note 19, at 324-25.
23. *Id.* at 2.

"exceptional case", which would require closure; and there was no evidence that the commissioner had considered reasonable alternative means, such as the sealing of documentary exhibits.[24]

Upon these findings, the district court judge concluded that the commissioner had a duty to conduct an open preliminary hearing and that his failure to do so was an abuse of discretion for which the writ of mandamus would lie.

THE SUPREME COURT'S ANALYSIS

The majority's analysis of this case began with a consideration of whether the district court had jurisdiction over the issue in controversy. Mandamus is defined by statute in Wyoming and it is expressly provided that the writ "may require an inferior tribunal to exercise its judgment or to proceed to discharge any of its functions but *it cannot control judicial discretion.*[25] Thus, the court held that the writ was unavailable to obtain an expeditious review of any decision involving the exercise of judicial discretion.[26]

The court then considered whether the decision to close a preliminary hearing was an act of discretion. Citing *Williams*, the court held that this decision was in fact an act involving the exercise of judicial discretion.[27] Under this definition the writ of mandamus would lie to compel an open preliminary hearing, only if there was no evidence of any possible threat to a defendant's fair trial rights. In this case the court held that the possibility of evidence being made public at an open preliminary hearing, which might not be admissible at trial, was a sufficient threat to the defendants' fair trial rights to confer discretion upon the commissioner.[28]

Next the court evaluated the rights of the press and public under both the Wyoming and the United States con-

24. *Id.* at 2.
25. WYO. STAT. § 1-30-102. [Emphasis added].
26. State *ex rel.* Feeney v. Dist. Ct. of the Seventh Judicial Dist., *supra* note 2, at 607 P.2d 1259, 1264.
27. *Id.*
28. *Id.* at 1265.

stitutions. The court held that the closure order was not a prior restraint of protected first amendment rights,[29] and cited *Gannett* as holding that the public had only an "interest" in open pretrial proceedings, that did not rise to the level of an independent constitutional right of access.[30] Moreover, since the criminal defendant had no right to compel a closed hearing over the objection of the prosecution and/or the presiding officer,[31] any public interest was adequately protected by the actual participants to the litigation.[32]

Summarizing its holding, the court wrote that once the commissioner's discretion had come into play on the issue of protecting the defendants' fair trial rights from prejudicial pre-trial publicity, "this discretion cannot be tested by mandamus unless the doctrine . . . and the statute . . . must submit to overriding constitutional rights of strangers to the pretrial proceedings."[33] Thus the writ of mandamus was not available as a vehicle to review the commissioner's alleged abuse of discretion. The court concluded that the writ of prohibition would lie against the district court since the judge had exceeded his jurisdiction by issuing the writ of mandamus. The supreme court said that this course was dictated by the necessity of protecting the commissioner from an illegal attempt to interfere with the proper exercise of his judicial discretion.[34]

In his dissent former Chief Justice Raper stated that, while mandamus should not be used to control judicial discretion, the statute should not be construed to "authorize abuse of discretion."[35] He argued that since the supreme court had adopted standards for pretrial closure in *Williams* that were intended to guide officers in the exercise of their discretion, the district court clearly had jurisdiction to review the decision to close this preliminary hearing to deter-

29. *Id.* at 1266.
30. *Id.*
31. Gannett v. DePasquale, *supra* note 17, at 382.
32. State *ex rel.* Feeney v. Dist. Ct. of the Seventh Judicial Dist., *supra* note 2, at 607 P.2d 1259, 1266-67.
33. *Id.* at 1267.
34. *Id.* at 1267-68.
35. *Id.* at 1268 (Raper, C. J., dissenting).

mine whether those standards had been strictly applied. The district judge had found that the commissioner had violated those standards, and therefore the writ of mandamus was a proper remedy to vacate the closure order.[36] The former Chief Justice particularly criticized the commissioner's decision to exclude the press's legal representative from the preclosure hearing.[37] In conclusion, he wrote "there was no application of the approved standards for closure, and thus the closing was arbitrary and an abuse of discretion."[38]

Justice Rooney based his dissent upon the principle that a writ of prohibition should only be used to test whether a court has the jurisdiction to proceed to a legal resolution of the issue before it, not whether the court has exercised its jurisdiction properly.[39] Since the district court had jurisdiction to entertain the writ of mandamus under the *Williams* decision, he felt that the supreme court should not use the extraordinary writ of prohibition to reach the issue of whether the district court had improperly exercised that jurisdiction in this particular case, when the same issue could be raised by appeal.[40]

When this issue returned to the supreme court on a petition for a rehearing, the court reaffirmed its basic holding that the decision to close a preliminary hearing necessarily involved an act of judicial discretion. Therefore, it could not be reviewed "upon the wings of a writ of mandamus."[41] The court limited its holding to this principle and stated that it had not even considered "whether Commissioner Feeney had or had not properly conformed to the standards of *Williams*."[42] Thus, the issue before the court was not whether the commissioner had abused his discretion, but rather whether under the facts of this case he had "*a right to exercise discretion.*"[43]

36. *Id.* at 1269-70 (Raper, C. J., dissenting).
37. *Id.* at 1271-72 (Raper, C. J., dissenting).
38. *Id.* at 1276 (Raper, C. J., dissenting).
39. *Id.* at 1277 (Rooney, J., dissenting). *See also* 63 AM. JUR. 2d *Prohibition* § 31 (1972).
40. *Id.* at 1278 (Rooney, J., dissenting).
41. State *ex rel.* Feeney v. Dist. Ct. of the Seventh Judicial Dist., *supra* note 2, at 614 P.2d 712.
42. *Id.* at 713.
43. *Id.* at 713. [Emphasis by the court].

Former Chief Justice Raper renewed his dissent and wrote that "[b]efore the question of discretion can even be considered, there must be a proper hearing, which there was not; and there must be evidence presented upon which to base closure, applying the ABA standards adopted by this court in *Williams v. Stafford*, which there was not."[44] According to this evaluation, the district judge had not attempted to control the exercise of another judicial officer's discretion, but rather had acted to correct a gross abuse of discretion for which mandamus was the only effective remedy.[45]

THE DECISION TO CLOSE: A COMPARISON OF SEVERAL CASES

An inherent tension exists between the United States Constitution, which guarantees every criminal defendant the right to a "speedy and public trial, by an impartial jury,"[46] and the tradition of open judicial proceedings, supported by the principle that "justice cannot survive behind walls of silence."[47] In recent years this tension has been heightened by the public media's vigorous assertion of a right of access to judicial proceedings under the free press and free speech guarantees of the first amendment.[48] Courts are keenly aware of the potential ability of an unrestrained and irresponsible press to vilify a particular defendant to the ultimate prejudice of his right to due process under law, especially when a defendant has been charged with an unusually vicious or sensational crime.[49] The Supreme Court has said that, although convictions that have been obtained in the tainted atmosphere of pretrial publicity may be reversed on appeal, such "reversals are mere pallitives; the cure lies in those remedial measures that will prevent the prejudice at its inception."[50] However, these remedies

44. *Id.* (Raper, C. J., dissenting). [Citations omitted].
45. *Id.* at 715-16 (Raper, C. J., dissenting).
46. U.S. CONST. amend. VI.
47. Sheppard v. Maxwell, 384 U.S. 333, 349 (1966).
48. U.S. CONST. amend. I.
49. *See* Sheppard v. Maxwell, *supra* note 47, and Irwin v. Doud, 366 U.S. 717 (1961).
50. Shepard v. Maxwell, *supra* note 47, at 363.

must be balanced by the realization that public confidence in our legal system rests largely upon the ability of every citizen to satisfy himself that those individuals who administer the law in his name have done so correctly, competently and responsibly.[51] The importance of the press's ability to collect and disseminate this necessary public information should not be lightly dismissed.[52]

A court clearly has the power to limit public access to judicial proceedings, whenever it has determined that such actions are necessary to protect a defendant's rights. In fact the court has an affirmative duty to exercise this power, especially when an unrestrained press threatens to destroy the essential dignity of the judicial process by reducing the proceedings to the level of a public spectacle.[53]

However, the courts do not enjoy an entirely free hand in determining just how to police the coverage of their proceedings. For example, prior restraints or "gag orders" have been generally condemned as violations of the first amendment.[54] Before a court can impose such restraints, it must conduct a prior hearing and inquire into the nature of any attendant publicity. The court must weigh the publicity's potential for prejudice, consider whether any alternative measures might be available to mitigate the danger of such prejudice, and finally evaluate just how effective such a restraint would actually be.[55] The thrust of these opinions charges the courts with a dual responsibility not only to protect the criminal defendant's rights, but also to do so in a manner that does not sweep too broadly or compromise the importat public interest in maintaining an open system of justice.

In Wyoming the issue of a pretrial closure first arose in the case of *Williams v. Stafford*, when representatives of the press petitioned the supreme court for a writ of prohibition, voiding the decision of a justice of the peace to close a

51. Crowley v. Pulsifer, 137 Mass. 392, 394 (1884); Gannet v. DePasquale, *supra* note 17, at 397-98 (Powell, J., concurring).
53. *See* Shepard v. Maxwell, *supra* note 47, at 357.
54. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).
55. *Id.* at 562-67.

bail hearing. The court held that prohibition would not lie under the circumstances, but that the writ of mandamus would lie, "if any remedy [was] in fact justified."[56] The court acknowledged that "access to court proceedings should be limited only in exceptional circumstances" and adopted a set of standards to guide judicial officers in future decisions involving pretrial closure.[57] However, the court declined to apply these standards in the immediate case, since the justice of the peace had had no such standards to measure her actions, when she originally exercised her discretion and ordered the bail hearing closed.[58] Thus the court ultimately denied the press's request for relief.[59]

Throughout this opinion the court displayed an awareness that the decision to close a pretrial hearing must involve "*a balancing* of the public's right of access to information . . . and the defendant's right to a fair trial."[60] The need to show extraordinary circumstances, the adoption of a set of standards and the demand for a proper record in all future closure hearings all indicate a belief that open proceedings should be the norm and that closure should be authorized only on those rare occasions, when nothing else will adequately protect a defendant's right to a fair trial. Although the court declined to review the actions of the justice of the peace in this case, because "there were no extant standards to either guide her or *against which we, as a reviewing court,* [*could*] *test her discretion,*"[61] such standards were now in place, and in the future reviewing courts would be responsible to see that these standards were applied and followed.

In *Gannett v. DePasquale* the United States Supreme Court considered the issue of closure in the context of a pretrial suppression hearing. The Court held that the sixth amendment's guarantee of a public trial inures solely to the benefit of the criminally accused.[62] Therefore members of

56. Williams v. Stafford, *supra* note 19, at 324.
57. *Id.* at 325-26. *See* text accompanying note 20 *supra*.
58. *Id.* at 327.
59. *Id.* at 328.
60. *Id.* at 327. [Emphasis added].
61. *Id.* [Emphasis added].
62. Gannett v. DePasquale, *supra* note 17, at 379-81.

the public had no constitutional right under the sixth and fourteenth amendments to insist upon access to a pretrial hearing, which has been closed to protect a defendant's right to a fair trial.[63]

The petitioners in *Gannett* also staked a claim to a right of access under the first and fourteenth amendments. The Court declined to rule on this issue, but did note *in arguendo* that, if any such right did exist, it had been "given all appropriate deference by the state *nisi prius* court."[64] Justice Powell departed from the majority on this point and in his concurring opinion held that the press did indeed have a constitutionally protected interest in being present at the pretrial suppression hearing under the first amendment.[65] Although Justice Powell concluded that this interest did not rise to the level of an absolute right, nevertheless, he identified three factors that he considered critical to his review of this case. First, the trial court had considered reasonable alternatives to closure and had found them to be inadequate to the task of protecting the defendants' rights. Second, the order itself had been tailored to protect the defendants' substantive rights with a minimum of excess. Third, representatives of the press had been given an opportunity to appear before the court in order to voice their objections to the proposed closure order.[66] Under these circumstances the petitioner's interest had not been unreasonably or arbitrarily infringed, and so Justice Powell concurred with the majority.[67]

In *Gannett* the Supreme Court acknowledged the existence of certain constitutional limits that must be considered

63. *Id.* at 391.
64. *Id.* at 392. The Court specifically noted that despite the failure of the press to make a contemporaneous objection the trial court had given the press' legal representative an opportunity to object to the proposed closure order. Thus the Court felt that the trial court must have recognized a "putative" right of access, and therefore that the subsequent decision to close the suppression hearing was only taken after this right had been balanced against the defendants' rights.
65. *Id.* at 397 (Powell, J., concurring). This constitutional interest does not arise from any special status of the press as such. Rather it is founded upon the role of the press as a public agent, collecting and disseminating information for the public's benefit. *See* Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974) (Powell, J., dissenting).
66. *Id.* at 400-01 (Powell, Jr., concurring).
67. *Id.* at 403 (Powell, J., concurring).

and respected in any decision to close a pretrial hearing.[68] While the Court declined to recognize a first amendment right of access, it commended the trial court for extending some degree of protection to this putative right. Indeed Justice Powell specifically based his concurrence upon a close examination of the record, which established to his satisfaction that the trial court had properly balanced the interests of the public against the rights of the defendants. The four dissenting justices stated that the public did have a right to open judicial proceedings under the sixth amendment and would have imposed a strict and necessary standard upon any decision to close a pretrial hearing.[69] A common theme emerges from these opinions. The decision to close a pretrial suppression hearing should not be taken lightly, for the court must strike a very delicate balance. Moreover, all these opinions endorse the use of a preclosure hearing at which all interested parties, including the press, have an opportunity to present arguments for or against the motion to close. The public's interest must be respected at least to this extent.

Applying the principles of *Williams* and *Gannett* to the facts of the instant case, several serious inconsistencies appear. These inconsistencies go to the heart of the commissioner's initial decision to close the preliminary decision and leave serious questions about his ability to strike the kind of balance between the public's interest and the defendants' rights that these previous decisions appear to call for.

First, the commissioner spoke in his decision letter of the "many dangers" to the defendants' fair trial rights that could arise at an open preliminary hearing.[70] In particular he expressed his concern about an affidavit which consisted largely of hearsay. While admissible at the preliminary

68. The exact character and full extent of these constitutional limits is somewhat unclear due to the number of opinions filed (four opinions concurring and one concurring in part and dissenting in part) and to the alternative first amendment and sixth amendment analyses employed by the several members of the Court. However, only Chief Justice Burger and Justice Rehnquist held that there was no public interest in open pretrial proceedings under either theory.
69. *Id.* at 432-40 (Blackmun, J., concurring in part and dissenting in part).
70. Decision Letter, *supra* note 4, at 1-2.

hearing,[71] this evidence would likely be subject to exclusion at trial. The commissioner obviously felt that, if he received this material in open court, the resultant publicity could prejudice the entire trial process. While the commissioner cannot be faulted for his deep concern about the effects of such information upon the defendants' fair trial rights, the problem would appear to be inherent in the nature of the preliminary hearing, as established by the Wyoming Rules of Criminal procedure. This then raises the possibility that any preliminary hearing may be closed, whenever the state intends to introduce evidence whose admissibility at trial is questionable. The door would then be open to numerous and repeated closures that would make a mockery of the supreme court's holding that "access to court proceedings should be limited only in exceptional circumstances."[72]

The commissioner also wrote of his apprehension that pretrial dissemination of prejudicial information could make this case reversible on appeal.[73] However, the line of cases that initially established the trial court's responsibility to protect a defendant and to protect his rights to due process arose in cases where the antics of an irresponsible, uncontrolled press threatened to turn the courtroom into a circus,[74] or where the coverage attendant to a particular crime has had a demonstrable impact upon the "impartiality" of the local jury pool.[75] The Supreme Court has also said that "[t]aken together, [the] cases demonstrate that publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial."[76] Thus the mere threat of adverse publicity should not be a sufficient basis for the peremptory exclusion of the press, unless other complicating factors are present.

Finally, the commissioner refused to allow the press to be represented by counsel at the preclosure hearing. His

71. WYO. R. CRIM. P. 7(b). "The finding of probable cause may be based upon hearsay evidence in whole or in part."
72. Williams v. Stafford, *supra* note 19, at 325.
73. Decision Letter, *supra* note 4, at 2.
74. Shepard v. Maxwell, *supra* note 47.
75. Irwin v. Doud, *supra* note 49.
76. Nebraska Press Ass'n v. Stuart, *supra* note 54, at 554.

reasons for this decision do not appear in his decision letter. While the Wyoming supreme court did say in *Williams* that "[t]he portion of the pretrial proceeding involved in the determination of closure shall, itself, be closed to the public,"[77] there is no evidence that this ban was intended to include the legal representatives of the press. Moreover, the *Gannett* decision was based partially upon the fact that the trial court had in fact allowed just such a appearance without compromising the defendant's sixth amendment rights.[78] Any decision to close a judicial proceeding bears heavily upon the press's ability to acquire important public information and through this upon the general public's right to be reasonably informed. At the very least a closure order imposes a delay of indeterminate length upon the availability of information about the courts and their functions. Such a "delay", supported as it is by the full weight and authority of the state, raises sensitive issues of censorship.[79] The commissioner's decision to exclude the legal representative of the press from the preclosure hearing only heightens the potential for abuse.

However, the Wyoming supreme court never reached these issues, because it determined that this case was controlled not by constitutional considerations but rather by a studied application of the Wyoming mandamus statutes. In so doing, it chose to leave these issues unsettled for the present moment in favor of a more limited procedural approach. This note will now consider this approach.

THE WRIT OF MANDAMUS AND THE EXERCISE OF JUDICIAL DISCRETION

In Wyoming the writ of mandamus will not lie to review or test an act of judicial discretion.[80] This rule has been incorporated into the literal language of the Wyoming mandamus statutes, which provide that the writ "cannot control judicial discretion."[81] Thus the several complex issues of this

77. Williams v. Stafford, *supra* note 19, at 326.
78. *See* text accompanying notes 64-67, *supra.*
79. Nebraska Press Ass'n v. Stuart, *supra* note 54, at 560.
80. Marsh v. State Board of Land Comm'rs, 7 Wyo. 478, 53 P. 292, 295 (1898).
81. WYO. STAT. § 1-30-102 (1977).

case were reduced to one question of deceptive simplicity: Was the decision to close the preliminary hearing an act within the commissioner's judicial discretion? The court held that the decision had been "formulated through the proper exercise of [the commissioner's] discretion,"[82] and therefore the writ of mandamus could not lie in this jurisdiction.

The application of this rule depends largely upon the meaning attached to the phrase, "judicial discretion".[83] The exercise of judicial discretion may be limited by principles and rules of law, and the failure to conform to such accepted principles may amount to no exercise of discretion at all, but rather may be an "abuse of discretion,"[84] manifesting an open disregard for a legally charged duty. In such a case some jurisdictions will allow mandamus to lie not to control the exercise of discretion, but rather to "confine the lower tribunal to the sphere of its discretionary powers."[85]

This concept can be illustrated by a recent South Dakota case, which presented many of the same issues that were before the Wyoming supreme court in the instant case. In *Rapid City Journal Company v. Circuit Court of the Eighth Judicial Circuit*[86] members of the press petitioned the supreme court for a writ of mandamus, after a circuit judge had ordered the closure of a preliminary hearing and had refused to consider the press's request for a preclosure hearing. An earlier case had held that such a hearing was a

82. State *ex rel.* Feeney v. Dist. Ct. of the Seventh Judicial Dist. *supra* note 2, at 607 P.2d 1259, 1267.

83. Discretion, legal and judicial: "These terms are applied to the discretionary acts of a judge or court, and mean discretion bounded by the rules and principles of law, and not arbitrary, capricious, or unrestrained. . . . It is a legal discretion to be exercised in discerning the course prescribed by law and is not to give effect to the will of the judge but to that of the law." BLACK'S LAW DICTIONARY 419 (5th ed. 1979).

84. Abuse of discretion "is synonymous with a failure to exercise a sound, reasonable, and legal discretion. . . . A discretion exercised to an end or purpose not justified by and clearly against reason and evidence. Unreasonable departure from considered precedent and settled judicial custom, constituting an error of law. BLACK'S LAW DICTIONARY 10 (5th ed. 1979). *See* Eager v. Derwitsch, 68 Wyo. 251, 264, 232 P.2d 713 (1951).

85. 52 AM. JUR. 2d *Mandamus* § 310 (1970).

86. Rapid City Journal Company v. Circuit Court of the Eighth Judicial Circuit, 286 N.W.2d 125 (1979).

prerequisite to the closure of trial proceedings,[87] but the circuit judge had concluded that this holding did not apply to a motion to close a pretrial proceeding.[88] The supreme court did not try to review his decision to close the preliminary hearing, for mandamus will not lie to control the exercise of judicial discretion in South Dakota any more than it will in Wyoming.[89] Instead the court simply ordered the circuit judge to conduct an open preliminary hearing, unless and until he conducted a proper preclosure hearing at which the press could be represented.[90] The discretion of the circuit judge was not compromised. The decision to close or not to close was left in his hands. The supreme court simply ordered him to discharge his legal duties in a manner consistent with precedent and established principles of law.

The writ of mandamus lies to compel "the performance of an act which the law specially enjoins as a *duty*."[91] In *Rapid City Journal* the South Dakota supreme court found a duty in the circuit judge's responsibility to conduct a proper preclosure hearing and his failure to discharge this duty voided his initial decision to close the preliminary hearing. However, the supreme court did not attempt to substitute its collective judgement for that of the circuit judge, for, if he proceeded to conduct a proper preclosure, then the ultimate decision to grant or deny the motion for closure would be within his discretion and would be reviewable only on appeal.

In *State ex rel. Feeney* the district court found that "the requirements for closure of a pretrial hearing have not been met,"[92] and therefore simply ordered that the preliminary hearing should be held in open court. Thus, while the commissioner had determined that an open preliminary

87. Rapid City Journal Co. v. Tice, Jr., 283 N.W.2d 563, 568 (1979). "Those present in the courtroom when a motion for closure is made must be afforded notice and a hearing prior to the trial court's ruling on the motion."
88. Rapid City Journal Co. v. Circuit Court of the Eighth Judicial Circuit, *supra* note 86, at 126.
89. Heintz v. Moulton, 55 S.D. 95, 225 N.W. 54 (1929).
90. Rapid City Journal Co. v. Circuit Court of the Eighth Judicial Circuit, *supra* note 86, at 126.
91. S.D. COMP. LAWS ANN. § 21-29-1. The Wyoming statute uses the same language. *See* WYO. STAT. § 1-30-102 (1977).
92. Findings, Conclusions, Orders Ruling on Motion to Dismiss and Judgment, *supra* note 6, at 2.

hearing would pose an unreasonable threat to the defendants' fair trial rights, the district judge apparently felt that he could impose his personal evaluation upon the facts as they appeared in the record, and thereby supersede the commissioner's judgment. However, mistaken or not, the commissioner's decision to close the preliminary hearing was clearly within the area of his judicial discretion, charged as he was with the responsibility of protecting the fair trial rights of the two men in the custody of his court.

Perhaps a more limited attack upon the commissioner's preclosure procedure would have been more fruitful. Under *Gannett* the commissioner had a duty to conduct a proper hearing at which all interested parties could be represented. At least in this one area he should have had no discretion. Although this approach would not have guaranteed an open preliminary hearing, since the ultimate decision to close or not to close would remain within the commissioner's discretion, nevertheless the press's interest would be represented by counsel of their own choice, thus assuring that the commissioner would be presented reasoned arguments against the proposed closure or in favor of less restrictive measures. The supreme court has put its faith in the actual litigants to represent and protect the public's interest,[93] but it is at least questionable whether any prosecutor will strenuously resist a defendant's motion to close a hearing, when in reality he has nothing to gain and everything to lose, even if he were successful.

The Wyoming supreme court has reserved any question of alleged abuse of discretion, until that question can be presented on appeal.[94] However, the court does not address the question of how the press should prosecute such an appeal as a non-party to the original action and without a record of the proceedings below. Certainly the "Media Notification", issued by the commissioner to announce his decision to close the preliminary hearing, could not form the basis for such

93. State *ex rel.* Feeney v. Dist. Ct. of the Seventh Judicial Dist., *supra* note 2, at 607 P.2d 1259, 1266.
94. State *ex rel.* Feeney v. Dist. Ct. of the Seventh Judicial Dist., *supra* note 2, at 614 P.2d 710, 713.

an appeal, except perhaps for vagueness.[95] An improper closure order immediately and irreversibly harms the public's interest in open judicial proceedings, yet no one may appear in court to represent this interest, while the court itself need not publish its findings and conclusions until some such time as it may determine to be proper. Moreover, since pretrial closure orders generally involve only a temporary "delay" in the eventual publication and dissemination of public information, by the time an appeal can be perfected, an empty victory will likely be the best remedy available to a media appellant, soothing to the ego but devoid of any real substance.[96]

THE WRIT OF PROHIBITION: A QUESTION OF JURISDICTION

The writ of prohibition has been generally defined as "one which commands the person or tribunal to whom it is directed not to do something which, by the suggestion of the relator, the court is informed he is about to do."[97] The emphasis is on restraining the inferior tribunal in order to prevent the exercise of powers that go beyond the legal scope of its jurisdiction. The Wyoming supreme court has previously held that "the writ of prohibition is only available if the lower court does not have subject-matter jurisdiction or, having such jurisdiction, it exceeds the scope thereof,"[98] but it has also been held that "a mistaken exercise of jurisdiction or of its acknowledged powers by an inferior court will not justify resort to the extraordinary remedy of prohibition."[99]

95. Media Notification, *supra* note 3. "After hearing the Defendant's Motion for Closure of the Preliminary Hearing in the Natrona County Court. I have prepared a decision letter closing from the public the preliminary hearing, the record of the closure hearing, the court file and the decision letter containing findings of fact and conclusions of law until further order of the court or until they can be released at a future time, without the effect of prejudicial pretrial publicity to the Defendant's right to an impartial jury."
96. State *ex rel.* Feeney v. Dist. Ct. of the Seventh Judicial Dist., *supra* note 2, at 614 P.2d 710, 715-16. (Raper, C. J., dissenting).
97. 63 AM. JUR. 2d *Prohibition* § 2 (1972).
98. Williams v. Stafford, *supra* note 19, at 324.
99. State *ex rel.* Weber v. Municipal Court of the Town of Jackson, 567 P.2d 698, 700 (Wyo. 1977).

In *State ex rel. Feeney* the supreme court held that "the issuance by the district court of its writ of mandamus against Commissioner Feeney was in excess of its subject-matter jurisdiction,"[100] and therefore subject to the writ of prohibition. Yet both the state constitution and the applicable statutes clearly give the district courts the authority to issue writs of mandamus.[101] The district court made a determination that the commissioner in this case had a duty to hold an open preliminary hearing and issued a mandate to that effect. If this determination was wrong or mistaken, then the proper remedy should have been an appeal.[102] In any case the district court had entered its decision and its action was complete; nothing was left to restrain.[103] Thus the majority's decision to use prohibition in this fashion directly contravenes the general rule that the writ should not lie, if the petitioner has an adequate remedy at law.[104]

CONCLUSION

In this case the supreme court has strained to avoid the serious constitutional issues that are implicit in any court's decision to close its doors to the public. While not disagreeing with the basic premise that "[m]andamus cannot be utilized to test the abuse of discretion of a lower court judicial officer,"[105] there is no reason to defer to the discretion of a judicial officer, when uncontradicted facts clearly show that he has neglected to conduct a proper hearing in arriving at his decision. Under this holding any time a judge, court commissioner or justice of the peace invokes his powers of "discretion", the press and the public shall be peremptorily excluded without even an opportunity to be heard. Such license has nothing in common with judicial discretion.

100. State *ex rel.* Feeney v. Dist. Ct. of the Seventh Judicial Dist., *supra* note 2, at 607 P.2d 1259, 1268.
101. WYO. CONST. art. 5, § 10. WYO STAT. § 1-30-102 (1977).
102. State *ex rel.* Feeney v. Dist. Ct. of the Seventh Judicial Dist., *supra* note 2, at 607 P.2d 1259, 1277-78. (Rooney, J., dissenting).
103. *See* Williams v. Stafford, *supra* note 19, at 324. "The function of a writ of prohibition is to prevent action and not to undo that which has already been done."
104. State *ex rel.* Sheehen v. Dist. Ct. of the Fourth Judicial Dist., 426 P.2d 431, 437 (Wyo. 1967).
105. State *ex rel.* Feeney v. Dist. Ct. of the Seventh Judicial Dist., *supra* note 2, at 614 P.2d 710, 713.

The constitutional issues that the Wyoming supreme court refused to consider in *State ex rel. Feeney* will not disappear by themselves, and the United States Supreme Court has not spoken its last words on the issue of pretrial closure. In *Richmond Newspapers, Inc. v. Virginia*[106] the Court considered whether a trial judge could constitutionally order the closure of a criminal trial at the request of a defendant, unopposed by the prosecution but "without any demonstration that closure is required to protect the defendant's superior right to a fair trial, or that some other overriding consideration requires closure."[107] Chief Justice Burger's plurality opinion held that "[a]bsent an overriding interest articulated in findings," the first amendment requires that the trial of a criminal defendant be open to the public.[108] While this case may be factually distinguished from the pretrial contexts of *Gannett, Williams* and *State ex rel. Feeney*, it establishes a first amendment right of access to the criminal trial itself. Justice Stevens, concurring with the Chief Justice, declared quite simply that "an arbitrary interference with access to important information is *an abridgement of the freedom of speech and of the press protected by the First Amendment.*"[109]

Thus the first amendment right of access, that the Court initially declined to recognize in *Gannett*,[110] was accorded considerable protection within the context of the trial itself. Whether this right of access could or should be extended to protect the public press's interest in open pretrial hearings was not decided in this case. Justice Stewart, who wrote the majority opinion in *Gannett*, expressly reserved this issue in his concurring opinion.[111] In any case, the Wyoming supreme court's declaration, that "the public . . . has no constitutional right under the First or Sixth amendments to the United States Constitution . . . to have

106. Richmond Newspapers, Inc. v. Virginia, ___ U.S. ___, 100 S.Ct. 2814 (1980).
107. *Id.* at 2821.
108. *Id.* at 2830.
109. *Id.* at 2831 (Stevens concurring). [Emphasis added].
110. *Id.* at 2840 (Stewart concurring). In this opinion Justice Stewart correctly noted that only Justices Powell and Rehnquist reached the first amendment issue in Gannett. *See* notes 63-67 and accompanying text, *supra*.
111. *Id.* at 2840 (Justice Stewart concurring).

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free access to such preliminary-hearing proceedings,"[112] may prove to be premature.

The Supreme Court has recognized that the remedy of appeal cannot adequately protect a defendant's right to a fair trial. It should be equally apparent that the reversal of a closure order on appeal cannot fully protect the public's interest in open judicial proceedings from the potential abuses inherent in this decision.

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112. State *ex rel.* Feeney v. Dist. Ct. of the Seventh Judicial Dist., *supra* note 2.

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