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STATE OF WASHINGTON

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No. 83645-1

SUPREME COURT
OF THE STATE OF WASHINGTON

TACOMA NEWS, INC. d/b/a THE NEWS TRIBUNE,

Petitioner,

v.

THE HONORABLE JAMES D. CAYCE, KING COUNTY JUDGE,

Respondent.

PETITIONER TACOMA NEWS INC'S REPLY BRIEF

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TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT..... 1

B. FACTS..... 3

C. ARGUMENT 4

 1. Respondent Fails To Address *Press-Enterprise Co.*'s First Amendment Analysis..... 4

 2. The Proceeding Was Not Mere Discovery 5

 3. A Writ of Mandamus Is Appropriate In This Case10

 4. The Action Is Not Moot, and Even If It Was, This Court Should Still Consider the Action.....14

 5. The Writ of Mandamus Is Not Targeted At a General Course of Conduct15

D. CONCLUSION.....16

TABLE OF AUTHORITIES

Cases

<i>Buehler v. Small</i> , 115 Wn. App. 914, 64 P.2d 78 (2003).....	9
<i>Clark County Sheriff v. Dept. of Soc. & Health Svcs</i> , 95 Wn.2d 445, 626 P.2d 6 (1981).....	16
<i>Dreiling v. Jain</i> , 151 Wn.2d 900, 93 P.3d 861 (2004)	14
<i>Enterprise Co. v. Superior Court</i> , 478 U.S. 1 (1986).....	2
<i>Palm Beach Newspapers, Inc. v. Burk</i> , 504 So.2d 378 (Fla. 1987).....	6, 7
<i>Press-Enterprise Co. v. Superior Court</i> , 478 U.S. 1 (1986).....	4
<i>Seattle Times Co. v. Ishikawa</i> , 97 Wn.2d 30, 640 P.2d 716 (1982).....	10, 11, 14
<i>Seattle Times v. Eberharter</i> , 105 Wn.2d 144, 713 P.2d 710 (1986).....	9
<i>Seattle Times v. Rhinehart</i> , 467 U.S. 20 (1984)	7
<i>State v. Pierre</i> , 111 Wn.2d 110, 759 P.2d 383 (1988).....	8
<i>Walker v. Munro</i> , 124 Wn.2d 402, 879 P.2d 920 (1994).....	16
<i>Wheeler v. S. Birch & Sons Const. Co.</i> , 27 Wn.2d 325, 178 P.2d 331 (1947)	3

Other Authorities

U.S. CONST. amend. VI 8

Rules

CR 26(b)(1)..... 6

CR 32(a)(3)(D)..... 8

CrR 4.6..... 4

CrR 4.6(c)..... 8

A. SUMMARY OF ARGUMENT

Respondent asserts that this is a case based on appearances. Brief of Respondent (“Resp. Br.”) at 15. The News Tribune could not agree more. The outward appearance of an open judicial process is the cornerstone to the public’s acceptance of our administration of justice. Transparency is so critical that it is not merely set forth through the words of judicial decisions or codified in various statutes. Instead, our State Constitution separately and distinctly addresses this point in article I, § 10, by declaring that “Justice in all cases shall be administered openly”

While Judge Cayce analogizes the event occurring on September 21, 2009, to a private discovery deposition solely between the parties, this is an incorrect framing of the issue—these are not the facts of this case. Judge Cayce, acting in a judicial capacity, presided over preservation testimony in a public courtroom and made various rulings on the evidence presented. There was no law cited to explain why the public and press were prohibited from attending. In fact, Respondent has still yet to offer any explanation whatsoever for why the public and the press were excluded from the proceeding in question.

While The News Tribune cited the required First Amendment substantive analysis set forth in *Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986), Respondent does not address this analysis in his brief. The result of that analysis was that there was a constitutionally protected right to attend the proceedings. Courtrooms are typically and historically open to the public, as are the court's rulings on the examination of a central witness. These points are not refuted by Respondent.

Ultimately, this was no ordinary criminal prosecution. The defendant was a publicly elected Superior Court Judge for the State of Washington. The charges leveled were of a felony caliber. On September 21, 2009, both the presiding judge and the parties believed that the central witness to the prosecution's case was unlikely to testify live at trial. The defendant was thus afforded his fundamental constitutional right to confront his accuser at that time.

This is indeed a case about appearances. Respondent, a Superior Court Judge, presided over a trial in which a fellow Superior Court Judge was accused of serious, albeit embarrassing, criminal conduct. Sandwiched like bookends on both sides of this examination were proceedings upon which Judge Cayce agrees that the public had a constitutional right to attend. Nonetheless, without articulating any

justification, Respondent ordered that the live examination of the central witness occur behind closed courtroom doors.

Because there was no legal basis to close the courtroom on September 21, 2009, The News Tribune respectfully requests that this Court issue a Writ of Mandamus.

B. FACTS

There are a few factual points that are centrally relevant. First, the immunity hearing that occurred prior to Pfeiffer's testimony took place before the same court staff as Pfeiffer's testimony. Clerk's Papers ("CP") at 69. Irrespective of who paid for her time, the court reporter was serving as an officer of the court during all proceedings.¹

Second, on September 16, 2009, Judge Cayce limited the preservation testimony of Pfeiffer to matters already known by the parties. VRP (9/16/09) at 5.

Third, Judge Cayce presided over the examination of Pfeiffer, in the courtroom, ruling on the evidence. Hillman Decl. at ¶ 22.

Fourth, Judge Cayce closed the courtroom, excluding the public and the press, without engaging in any form of constitutional analysis. VRP (9/21/09) at 11-14.

¹ *Wheeler v. S. Birch & Sons Const. Co.*, 27 Wn.2d 325, 329, 178 P.2d 331 (1947) (affirming that court reporters are "an officer of the court, appointed by the court,

Fifth, on September 24, 2009, both the prosecuting attorney and defense counsel made clear that they objected to the production of the portion of the transcript containing Pfeiffer's testimony until this Court rules. Supplemental Beck Decl., Ex. A.²

C. ARGUMENT

1. Respondent Fails To Address *Press-Enterprise Co.'s* First Amendment Analysis

Respondent argues that the proceeding at issue was simply a discovery deposition and, therefore, the state and federal constitutions are not implicated. Citing CrR 4.6 and superficially labeling this event a discovery deposition is not the correct analysis. Instead, the United States Supreme Court has made clear that under the First Amendment the "label" given to an event does not resolve the question of whether there is a constitutional right of access. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise Co. II*"). The First Amendment requires a two-pronged consideration. *Id.* at 8. The first consideration is whether the "place" and the "process" are historically open to the press and public. *Id.* The second is whether public access is significant to the process at issue. *Id.*

and responsible to the court and the court alone") (quoting and agreeing with statement from appellant's brief).

² Petitioner has filed a motion to supplement the record with this fact.

The News Tribune cited the *Press-Enterprise Co. II* analysis in its Opening Brief. Brief of Petitioner (“Pet. Br.”) at 14-15. There, The News Tribune explained that the place—a courtroom—is a location historically open to the public. Likewise, the process at issue—one where a judge rules on the examination of a witness in a courtroom—is also traditionally open to the public. On the second consideration, public access to the live examination of a central witness is undeniably important.

Respondent does not apply the First Amendment as required by *Press-Enterprise Co. II*. Instead, the entire argument advanced is based the label of “discovery” to the event. As the United States Supreme Court made clear, the label given to a proceeding does not determine whether that proceeding is subject to the First Amendment. When the analysis required by *Press-Enterprise Co. II* is undertaken, it is apparent that the proceeding on September 21, 2009 was not merely private discovery and the protections afforded under both the United States Constitution and the Washington State Constitution are implicated.

2. The Proceeding Was Not Mere Discovery

A close look at the situation reveals that there were fundamental and significant differences between this proceeding and

a typical discovery deposition. Probably most important was the location and who was present. Here, the proceedings occurred in a courtroom before a robed Superior Court judge.

Moreover, substantively, what occurred was not merely discovery. This was the taking of perpetuation testimony for the sole purpose of showing the examination at trial. It was not a discovery deposition where the scope is only limited to matters that appear "reasonably calculated to lead to the discovery of admissible evidence." CR 26(b)(1). This is clear from the record as Judge Cayce confined the attorneys to inquiring into matters that were already known. VRP (9/16/09) at 5. This is important because one of the primary rationales for providing the public with only limited access to discovery materials is that the issues discussed and inquired about in discovery are often wide-ranging. *Palm Beach Newspapers, Inc. v. Burk*, 504 So.2d 378, 382 (Fla. 1987). As the Florida Supreme Court explained:

We summarize the rationale of *Seattle Times* as follows. The discovery rights of parties under modern practice is very broad. Discovery may be had on any non-privileged matter which is relevant to the subject matter of the pending action. It is not limited to evidence which will be admissible at trial so long as the information sought is reasonably calculated to lead to the discovery of admissible evidence. There is no distinction drawn between private information and that to which no

privacy interests attach. Discovery rules permit extensive intrusion into the affairs of both parties and non-parties and discovery may be judicially compelled. Liberal discovery produces information which may be irrelevant to the trial and which, if publicly released, would be damaging to the reputation and privacy of both parties and non-parties.

Id.

By limiting the testimony to matters already known and proceeding with the examination as if it was trial, none of the concerns articulated in *Palm Beach* are present. VRP (9/16/09) at 5. In fact, the substance of Pfeiffer's testimony was already set forth in a previously filed interview and subsequent declaration. CP at 36, 39.

Additionally, there is an important distinction between discovery that is limited to the parties and when evidence is brought before a judge for consideration. In fact, this is the exact rationale supporting the limited right of access recognized by the Supreme Court in *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984). This is also the same distinction drawn out in *Palm Beach*, where the court indicated that what made discovery depositions different for constitutional purposes is that there is no judge present, no rulings, and no adjudications of any sort. 504 So. 2d at 384. Although Respondent asserts that The News Tribune "makes too much of this quote," Resp. Br. at 24 fn.8, this was not mere *dicta* from the *Palm Beach* case. To the contrary, it

is the core rationale that supports the United States Supreme Court's decision in *Seattle Times v. Rhinehart*. Once matters come before the Court, they are no longer easily labeled as merely discovery.

Furthermore, when the trial court judge presides over the examination of a witness and makes rulings on that examination, there are real impacts. For instance, when the trial judge sustains an objection, the attorney will not inquire into the area further. If the video perpetuation testimony is used at trial, then these rulings will stand. Moreover, even if the witness testifies live at trial, it is naive to suggest that the court's rulings during a prior hearing would have no impact on the attorneys' and witnesses' trial behavior.

Finally, far from a cursory happening, at the time it occurred, the examination of Pfeiffer was one of the most quintessential elements of our criminal justice system. *See, e.g., State v. Pierre*, 111 Wn.2d 110, 759 P.2d 383 (1988) ("The right to confront one's witnesses is a fundamental right in our criminal justice system"). That Pfeiffer ultimately testified in an open trial is of little relevance.³

³ Respondent notes that "[a]ny deposition in a civil lawsuit may be used at trial if the witness fails to appear for trial." Resp. Br. at 26 (citing CR 32(a)(3)(D)). However, in a criminal action, "[n]o deposition shall be used in evidence against any defendant who has not had notice of and an opportunity to participate in or be present at the taking thereof." CrR 4.6(c); *see also* U.S. CONST. amend. VI. Thus, the presumed purpose of the pre-trial examination of Pfeiffer was to protect a criminal defendant's fundamental constitutional right. Any assertion that the public does not have a right and interest in viewing such a proceeding is dubious.

Respondent's position presumes that the public and the press have no right to attend a vital segment of a criminal proceeding in a county courtroom simply because the court labels that proceeding a deposition. This Court should reject his contention.

Respondent's brief cites a number of cases including *Seattle Times v. Eberharter*, 105 Wn.2d 144, 713 P.2d 710 (1986), and *Buehler v. Small*, 115 Wn. App. 914, 64 P.2d 78 (2003). Resp. Br. at 21. The News Tribune distinguished these same cases in its opening brief. Pet. Br. at 19. *Eberharter* deals with a search warrant affidavit in an unfiled criminal case where there is a distinct set of case law governing this issue and no historical right of access to such search warrants. *Buehler* is a Court of Appeals decision where the focus was not on the issue of public trial or open courts. There was no discussion or consideration concerning when it is appropriate to close a judicial proceeding. For the reasons previously stated, these authorities are not persuasive.

Here, The News Tribune does not suggest that whenever a witness is subject to examination before a judge, the press has an absolute and unqualified right to attend. There must, however, be a

constitutional analysis to determine when it is acceptable under both the federal and state constitutions to exclude the press and public, particularly where the proceeding is one in which a criminal defendant's fundamental rights are at issue. This analysis exists in *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982), and Judge Cayce erred by refusing to apply this framework.

3. A Writ of Mandamus Is Appropriate In This Case

Judge Cayce had a duty to apply the *Ishikawa* analysis before closing the courtroom. Accepting exclusion from the courtroom and hoping that Pfeiffer would testify at trial, or asking for a transcript under the Public Records Act ("PRA"), are plainly inadequate remedies.

Initially, Respondent misstates the requirement that a public official have a "clear" duty to act.⁵ However, even under that erroneous standard, Judge Cayce, for the reasons already stated, had a duty to consider the requirements set forth in *Ishikawa*, before

⁵ Respondent argues that the application for a writ of mandamus should be dismissed because Respondent had no "clear legal duty" to engage in an analysis of the *Ishikawa* factors. Resp. Br. at 18-19. This is not the standard by the plain meaning of law cited by Respondent. Even if this were the standard, it is met here.

Specifically, Respondent writes: "A writ of mandamus is a means for compelling a state official 'to comply with the law when the claim is clear and there is a duty to act.'" *Id.* (quoting *In re Dyer*, 143 Wn.2d 384, 398, 20 P.3d 907 (2001)). Respondent then extrapolates the following "element" from that statement, which he contends Petitioner must satisfy: "(1) the party subject to the writ is under a clear duty to act." Resp. Br. at 19. Obviously, a clear claim and a duty to act is different from a requirement of a "clear duty to act." Indeed, there would be little need for writs of mandamus if they were only permitted where the duty of state officials was clear.

closing the courtroom. The remaining portions of this section explain why trial attendance and the PRA are not acceptable alternatives.

a. *Attending a Potential Trial Is Not an Alternative*

Judge Cayce argues that The News Tribune had a speedy and adequate alternative to filing for writ of mandamus in that the paper could attend Hecht's subsequent trial. Resp. Br. at 26. This argument shows a fundamental misunderstanding of the issue presented in this action. As a threshold point, this Court in *Ishikawa* acknowledged that a writ of mandamus is the appropriate legal mechanism to challenge a courtroom closure. *Ishikawa*, 97 Wn.2d at 35 ("Mandamus by an original action in this court is a proper form of action for third party challenges to closure orders in criminal proceedings."). In *Ishikawa*, the interested media participants certainly also had the right to attend a potential subsequent trial; however, this did not foreclose the court from concluding that a writ was appropriate. This case is no different.

More fundamentally, The News Tribune's interest in attending the September 21, 2009, proceedings was the real concern that no subsequent trial would actually occur due to a plea bargain or that Pfeiffer would not testify live even if a trial did occur.

Furthermore, observing an edited version of a video tape is simply no substitute for viewing live testimony. The mannerisms of the participants during the examination are not shown on video. The focus of the videographer will be on the witness, not the judge presiding or the counsel inquiring. The video, if shown at trial, would also not accurately represent what actually occurred during the examination. As the prosecuting attorney acknowledged during the September 16, 2009 hearing, the typical practice when showing a video perpetuation deposition to the jury is to edit the examination. VRP (9/16/09) at 2 (describing the typical manner in which perpetuation videotaped testimony is edited and noting that “you can delete out any objections and answers and things that the court rules are not admissible.”). Thus, if there even was a trial, the preservation video tape is not the same as observing what actually occurred during the live examination.⁶

If this Court were to conclude that subsequent attendance at trial was sufficient, then there would be absolutely no remedy for an unconstitutional court closure. This result was rejected by the *Ishikawa* court holding that a writ of mandamus action is the appropriate mechanism to seek adjudication on a court closure.

⁶ It is also not contemporaneous with the event, a point important to media such as The News Tribune.

b. *The Public Records Act Is Not an Alternative*

Respondent's contention that seeking a copy of the transcript under the PRA is a speedy and adequate remedy is unpersuasive for similar reasons as discussed above.

First, a copy of the transcript is no substitute for being present during the actual proceeding.

Additionally, at the time, the parties objected to the production of the transcript. Respondent strongly implies that the prosecuting attorney would have disseminated a copy of this transcript if asked under the PRA. Resp. Br. at 27. However, three days after the hearing at issue both the prosecuting attorney and Hecht's attorney made clear that they objected to the release of Pfeiffer's testimony until this Court rules. Supplemental Beck Decl., Ex. A.

On this same issue, Respondent asserts that the prosecuting attorney was free to release the transcript because the proceedings were not "sealed." Resp. Br. at 27. This position is curious. If in fact

the transcript from the proceeding was not sealed, then it is rather inconsistent to argue that there was a basis to close the courtroom in the first instance. Under Washington law, the exact same requirements are present for closing a courtroom as for sealing a document. *Ishikawa*, 97 Wn.2d at 37-39 (outlining requirements for court closure); *Dreiling v. Jain*, 151 Wn.2d 900, 915, 93 P.3d 861 (2004) (adopting *Ishakawa* requirements for sealing court records). Moreover, it is doubtful that many attorneys would feel free to disseminate a transcript from a closed proceeding without prior court approval.

For these reasons, the PRA does not provide a speedy and satisfactory alternative to the writ of mandamus.

4. The Action Is Not Moot, and Even If It Was, This Court Should Still Consider the Action

Respondent contends that the circumstances are so unique as to be of little use to others and unlikely to recur. Resp. Br. at 16. This analysis is incorrect.

The case is not moot. Hecht has appealed his criminal conviction. CP at 76. Without commenting on the merits of his appeal, there is certainly the real potential for a new trial. While the scenario at issue may not reappear with the exact same facts, as Respondent suggests is required, it is by no means inconceivable that Pfeiffer's

preservation testimony will again be required based on the same concern that he will not appear.

Even assuming, *arguendo*, that the action is moot; the Court should still consider the matter. To decline would effectively foreclose any meaningful opportunity for The News Tribune, and parties similarly affected in the future, to seek a remedy for an unconstitutional court closure. It is entirely plausible that Washington courts will again be confronted with requests to close proceedings that are not typical trials. This Court's guidance will be helpful both to judges and parties seeking access to Washington's courtrooms so that this situation is not repeated. Therefore, even if this matter were moot, this Court should still resolve the dispute.

5. The Writ of Mandamus Is Not Targeted At a General Course of Conduct

While the facts of this case may be unique, the relief requested is specific. An in-court examination of a central witness was conducted by counsel and presided over by Judge Cayce. The court ruled on objections during the examination. Hillman Decl. at ¶ 22. This situation is not one where a writ of mandamus directing a general course of conduct is sought. *Walker v. Munro* is distinguishable because The News Tribune is not simply asking a public official to

“adhere to the requirements of the Washington State Constitution.”⁸
124 Wn.2d 402, 407, 879 P.2d 920 (1994). To the contrary, the relief
sought is specific and precise—release of the transcript of the closed
proceeding and order the trial court to engage in an *Ishikawa* analysis
before closing the courtroom to the press and public.

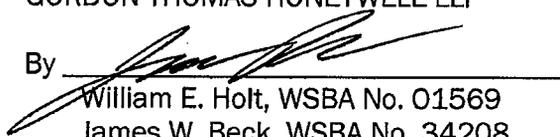
D. CONCLUSION

For the reasons set forth above and in its opening brief, The
News Tribune respectfully requests that this Court issue the requested
Writ of Mandamus.

Dated this 12th day of February, 2010.

Respectfully submitted,

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⁸ Notably, immediately after the passages cited by Respondent, this Court stated:
“This does not mean that a writ cannot issue in regards to a continuing violation of a
duty. Where there is a specific, existing duty which a state officer has violated and
continues to violate, mandamus is an appropriate remedy to compel performance.”
Walker, 124 Wn.2d at 408. This Court went on to explain its decision in *Clark County
Sheriff v. Dept. of Soc. & Health Svcs*, 95 Wn.2d 445, 626 P.2d 6 (1981), noting that
the writ affirmed was sufficiently specific. *Id.* The *Clark County* writ “ordered the
Director to receive at the reception center inmates of the Clark County Jail convicted
of a felony and committed to a state penal institution by the Superior Court for Clark
County.” *Id.* This is arguably less precise and more demanding than the writ
requested here and has a far greater impact on the future conduct of a state actor.

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 6th day of February, 2010, I did serve true and correct copies of the foregoing via electronic mail by directing delivery to and addressed to the following:

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