

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.

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STATE OF WASHINGTON
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**BRIEF OF RESPONDENT
THE HONORABLE JAMES D. CAYCE**

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A. ISSUES PRESENTED

1. Under Const. art. 1, § 10 and the First Amendment to the U.S. Constitution, is a deposition in a criminal case an open judicial proceeding when the party conducting the deposition schedules it in an empty courtroom due to the witness's in-custody status, and the trial judge, upon request and for the parties' convenience, agrees to be present to rule on potential objections in person rather than via telephone?

2. Is Petitioner's request for a writ of mandamus aimed at future trial court proceedings in a criminal case moot where the trial has concluded and judgment and sentence entered?

3. Is Petitioner entitled to a writ of mandamus compelling a trial judge to order access to a video deposition and transcript that was neither filed with the court nor admitted into evidence when Petitioner has the available remedies of attending trial and observing the deposition witness's testimony, and submitting a public records request to the State for a copy of the deposition materials?

4. Is Petitioner entitled to a writ of mandamus where the application seeks relief aimed at a general course of conduct in future trial court proceedings that may never occur?

5. Is Petitioner in a mandamus action entitled to costs and statutory fees when the Respondent, a visiting trial judge in a criminal

prosecution, is purely a nominal party and has no personal stake in this Court's resolution of Petitioner's issues?

B. FACTS

1. Nature of the Case

This case involves an original action against a state officer under Const. art. IV, § 4, RCW 2.04.010 and RAP 16.2. Petitioner is the Tacoma News Tribune. Respondent is the Honorable James Cayce, a King County superior court judge.

Petitioner asks this Court to issue a writ of mandamus directing Respondent to order the Attorney General's Office to produce a written transcript and videotaped testimony of a pretrial deposition it conducted in a recently completed criminal prosecution, *State v. Michael Andrew Hecht*, Pierce County Cause No. 09-1-01051-1.

The deposition was not introduced at trial; it is not in the Respondent's possession, nor is it in the court file. To Respondent's knowledge, Petitioner has never simply asked the Attorney General for a copy of the deposition transcript and video, even though the Attorney General acknowledges the records are subject to the Public Records Act, chapter 42.56 RCW.

Petitioner also asks this Court to direct Respondent to keep all similar deposition proceedings in the trial open to the public unless the

press and public first receive notice of the deposition and Respondent complies with the requirements of *Seattle Times v. Ishikawa*¹ for closing court hearings.

There are no similar depositions scheduled to occur in the criminal case. In fact, the trial is over and judgment and sentence has been entered. Petitioner's requested relief will only apply if the criminal conviction handed down in the case is reversed, a new trial ordered, and one of the parties conducts a deposition under circumstances similar to those described below.

2. State v. Hecht

On February 27, 2009, the State charged Michael Andrew Hecht, a then-sitting Pierce County superior court judge, with one count of harassment, a class C felony, and one count of patronizing a prostitute, a misdemeanor. CP 1-2 (Information).

Pursuant to RCW 43.10.232, the Attorney General agreed to initiate and conduct the prosecution of the case at the request of the Pierce County Prosecuting Attorney's Office. Additionally, because the Pierce County superior court bench had a conflict of interest, Respondent, a King County superior court judge, presided over the case as a visiting judge

¹ *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982) (establishing factors for determining when court hearing may be closed to the public).

pursuant to RCW 2.08.150. Declaration of John Hillman (9/28/09)
(Hillman Dec.) at ¶ 4 (page 2).²

3. The State's Pretrial Deposition of Witness Joseph Pfeiffer

Trial in the case was originally set for June 8, 2009, but was later continued to September 8, 2009. Hillman Dec. ¶ 5. Because Judge Hecht was charged with paying an individual named Joseph Pfeiffer for sex in 2008, Pfeiffer was one of the State's primary witnesses. CP 1-2; CP 4; Hillman Dec. ¶ 6. Pfeiffer was also a witness to the threat that formed the basis of the felony harassment charge against Hecht. CP 4.

On August 25, 2009, after many unsuccessful efforts to locate Pfeiffer and serve him with a subpoena, the State moved for and was granted a material witness warrant for Pfeiffer's arrest. CP 66, ¶ 23 (lns 5-8); Hillman Dec. ¶ 7.

However, the State was still unable to locate Pfeiffer and serve the arrest warrant prior to trial, and on September 8, 2009, moved for a continuance. CP 59 -67. Respondent granted the State's motion and continued the trial to October 12, 2009. Hillman Dec. ¶ 8.

On September 15, Pfeiffer was arrested in West Olympia on the material witness warrant and transported to the Pierce County Jail. An

² The Declaration of John Hillman was attached as an exhibit to the State's Memorandum Re: Mandamus Action Against State Officer, filed with this Court on September 28, 2009.

Olympia attorney, Robert Quillian, was appointed to represent him.

Hillman Dec. ¶ 9.

At a hearing on September 16, Respondent set bail for Pfeiffer at \$75,000 pending trial. Hillman Dec. ¶ 10; VRP (9/16/09) 8 (lns 22-24). Respondent also heard the State's CrR 4.6 motion to preserve Pfeiffer's testimony by deposition. Hillman Dec. ¶ 10. In the event of Pfeiffer's release, the State was concerned that he would not remain in contact with the State or appear at trial. CP 59-67. Respondent granted the motion and entered the State's proposed order setting Pfeiffer's deposition for 9:00 am on September 21, 2009. Hillman Dec. ¶ 10; Respondent's 1/8/10 Supplemental CP ____ (Motion for Order for Deposition of Witness Joseph Robert Pfeiffer at 4). Respondent also indicated that he would reconsider Pfeiffer's bail after the deposition. Hillman Dec. ¶ 10; VRP (9/16/09) 3-4 (lns 19-25 and 1-2), and 8 (lns 22-24).

In light of Pfeiffer's in-custody status, the assistant attorney general representing the State contacted Pierce County superior court administration and asked if there was an empty courtroom he could use for that deposition. According to counsel, he "determined to hold his deposition in a courtroom only because witness Pfeiffer was in jail and it was most convenient for the jail staff to transport Pfeiffer to a courtroom and maintain custody of him there." (Emphasis in original.) Hillman Dec.

¶ 11. The assistant attorney general knew "from past experience that the Pierce County Jail is connected to most of the courtrooms in the courthouse by secure tunnels, hallways, and doors." *Id.*

The State also indicated on the record at the September 16 hearing that it was looking for an available room in the courthouse to hold the deposition. VRP (9-16-09) 8 (Ins 6-13). At defense counsel's request, Respondent agreed to make himself available for the deposition:

THE COURT: Deposition in the morning and I think the --

MR. FRICKE [Defense Counsel]: Where's that going to be?

THE COURT: You will have [sic] make arrangements.

MR. HILLMAN [The State]: I will make those arrangements. Pursuant to the court rule, I will provide Mr. Fricke with notice of the place of the deposition and it will be I think obviously have to be here in [sic] Pierce County courthouse, given his custody status, so he knows the address. I will just have to let him know the courtroom once I have an opportunity to communicate with superior court administration.

THE COURT: And it may be a jury room or something.

MR. FRICKE: Is your Honor going to be here?

THE COURT: I don't know.

MR. FRICKE: Well, if we are going to do this and that has that potential, I think the court should be present. That's my preference. Always been when two weeks ago whatever I suggested that I would want the court there for any preservation dep, I am consistent with that.

THE COURT: All right, I will make myself available. . .
VRP (9-16-09) 8 (Ins 2-24).

After the September 16 hearing, the assistant attorney general secured an empty courtroom for the deposition. He also hired a private court reporting firm to record the deposition, both by video and stenographic means. Hillman Dec. ¶ 13. The assistant attorney general notified Pierce County superior court administration, the Pierce County Jail, Respondent, Pfeiffer's court-appointed attorney, and defense counsel of the date, time and location of the deposition. *Id.*

The Pierce County superior court normally provides a court reporter for all court hearings (but not for depositions). Hillman Dec. ¶ 14. Superior court administration contacted the assistant attorney general and expressed concern that it may not have a court reporter available to record the follow-up bail hearing due to staffing issues. Therefore, the assistant attorney general agreed to have the private court reporter perform that service as well, if necessary to avoid delay. *Id.*

On September 21, 2009, before the deposition began, Respondent heard several motions in the case in open court, including the State's motion to grant transactional immunity to Pfeiffer. VRP (9-21-09) 5 – 6. Because no superior court official reporter was present, the State's private court reporter recorded the hearing. Hillman Dec. ¶s 15-16.

At that point, defense counsel asked Respondent to close the courtroom. VRP (9-21-09) 7 (lns 14-15). After discussing the request with both counsel, Respondent observed that because the parties were not in trial and the deposition may not be admissible at trial, it would be proper to preclude non-parties (aside from Mr. Quillian, Pfeiffer's attorney) from attending. VRP (9-21-09) 9 (lns 10 -20); Hillman Dec. ¶ 17. Nevertheless, at the State's suggestion, Respondent allowed the courtroom doors to remain open and agreed to take up the issue of excluding non-parties should any non-parties arrive. VRP (9-21-09) 9 (lns 6 -20). Respondent summarized the protocol as follows:

THE COURT: All right. I think that is the best approach. But we're certainly not in trial. This may or may not be admissible at trial. And I think I can close the courtroom and would probably intend to, although, if the press showed up, I'd give them an opportunity, or if the public showed up and wanted to weigh in on this, I would give them an opportunity to try to convince me otherwise. But at this point the doors are open, there's no sign, and a moot issue unless someone does come. And certainly Mr. Quillian has a right to be here.

Id.

The deposition began shortly after 9:30 a.m. and the parties went off the record. CP 69; VRP (9-21-09) 7 (lns 11-13). At 1:30 p.m., shortly before its conclusion, a reporter for Petitioner and attorney James Beck entered the courtroom. VRP (9-21-09) 11-12. Respondent explained to Mr. Beck that a deposition was taking place. *Id.* Defense counsel objected

to the presence of Beck and the reporter at the deposition. *Id.* Respondent gave Mr. Beck the opportunity to argue against excluding non-parties from the deposition. VRP (9-21-09) 12-14.

MR. HILLMAN [The State]: Your Honor, I think it's kind of an unusual issue and I'll defer to your discretion, but I would ask that if the defendant's making that motion that he also waive his right to a public trial, at least for this deposition.

MR. FRICKE [Defense Counsel]: This is -- I'm not -- obviously this is not the trial, so -- and I'm not going to waiver that right.

THE COURT: Waive your right to a public deposition, if there is any right to a public deposition?

MR. FRICKE: If there is any right. I'm asking that the only people, as I stated earlier, that are in this courtroom are those necessary for purposes of this. Otherwise, I'd ask that we move it to a law office and it won't be an issue.

THE COURT: And then since we are in a courtroom, if we were in a law office, I wouldn't ask the individuals that have just come in if they wish to weigh in on this, but do either of you have any position with respect to whether you should be allowed to stay or not?

MR. BECK: Yes, Your Honor. This is James Beck on behalf of the News Tribune. This is -- *Ishikawa v. Seattle Times* I think governs this. This is a proceeding in open court. There's five factors the Court must consider.

THE COURT: But let's talk about what this is. What -- what is this hearing?

MR. BECK: It's -- we're in open court, so it's testimony of a witness.

Id.

THE COURT: Are depositions open to the public?

MR. BECK: You Honor, this is not a deposition, as I understand it. It's a court presiding over a witness in open court. If it's – if the judge is going to be – Your Honor is going to be presiding over the same witness in another room in this courthouse, I don't see how that changes matters either.

THE COURT: Well, for instance, we get calls at the office when the attorneys are in the middle of a deposition. Is that open to the public because the judge is involved?

MR. BECK: Your Honor, I think this proceeding here today is a court proceeding subject to *Ishikawa*.

Id.

After Petitioner's counsel had finished, Respondent stated that the deposition was not open to the public and directed counsel and the reporter to leave the courtroom. *Id.* Preprinted signs indicating that the courtroom was closed were then posted on the courtroom doors. Hillman Dec. ¶ 25. The deposition resumed and was concluded shortly after counsel and Petitioner's reporter departed. *Id.*

As soon as the deposition ended, the assistant attorney general personally removed the signs from the doors. He then went into the hallway outside the courtroom to look for counsel and the reporter to advise that they could reenter if they wished to observe the bail hearing that would follow. *Id.* The assistant attorney general did not find them

and neither appeared when the Court reconvened in open session approximately 20 minutes later. *Id.*

4. Petitioner's Writ of Mandamus Action

On September 23, 2009, Petitioner filed this Supreme Court action seeking a writ of mandamus commanding Respondent to do two things:

(1) "Order the production of a copy of the complete proceedings from the hearing, including a transcript of the proceedings and a copy of the videotaped testimony"; and

(2) "[K]eep all similar proceedings in the trial of this matter open to the public unless the press and public first receive notice of the hearing requirements of *Seattle Times v. Ishikawa* are satisfied."

On October 1, 2009, this Court denied Petitioner's motion for an emergency hearing.

5. State v. Hecht Concludes

In the meantime, *State v. Hecht* proceeded to trial. On October 19, 2009, Pfeiffer took the stand and testified for approximately two hours. His testimony was extensively covered by the press, including by Petitioner. See "*Witness testifies that Hecht paid him for sex,*" The News

Tribune, October 20, 2009.³ Pfeiffer's deposition transcript and video were not introduced at trial.

On October 28, 2009, the jury convicted Hecht on both harassment and patronizing prostitution counts. CP 70, 72. Judgment and sentence was entered on November 19, 2009. CP 79 - 93.

On December 12, 2009, Hecht filed a notice of appeal with Division II of the Court of Appeals. CP 76.

C. SUMMARY OF ARGUMENT

"Discovery in criminal cases is governed by the Superior Court Criminal Rules." *State v. Gonzales*, 110 Wn.2d 738, 743, 757 P.2d 925 (1988) (citing CrR 4.5, 4.6 and 4.7). CrR 4.6(a) authorizes the trial court to order the deposition of a witness if (1) the witness may be unable to attend or prevented from attending the trial, (2) the witness's testimony is material, and (3) taking the witness's testimony is necessary to avoid a failure of justice.⁴ CrR 4.6 (c) provides that "[a] deposition [authorized under subsection (a)] shall be taken in the manner provided in civil actions." Depositions in civil actions are conducted pursuant to CR 30.

³ The article may be viewed online at <http://www.thenewtribune.com/news/local/story/922279.html>.

⁴ The Rule should be read in combination with CrR 13(a), which permits a witness's deposition to be taken, by order of the court, if the testimony of the witness is material and it appears probable that the witness will not voluntarily appear at the trial.

There is nothing in CrR 4.6 that designates the deposition of a prospective witness as a public proceeding. On the contrary, once the requisite threshold showing under CrR 4.6(a) is satisfied, the Rule leaves it up to the party taking the deposition to set the time and location, requiring only that the party furnish reasonable advance written notice. CrR 4.6(b).

CrR 4.6(c) instructs that the deposition "shall be taken in the manner provided in civil actions." Civil depositions are not open public proceedings. Pursuant to CR 30(h)(6) "[a]ll counsel and parties shall conduct themselves in depositions with the same courtesy and respect for the rules that are required in the courtroom during trial." (Emphasis added). As in civil depositions, the trial court may be asked to rule on objections or referee issues that arise while the deposition is occurring. *See e.g.*, CR 30 (c) (superior court judge may make telephone rulings on objections made during depositions). The court also may be called to rule upon the proper use of the deposition and its admissibility at trial. CrR 4.6(d) and (e).

In this case, Respondent authorized the State to depose two other witnesses, also pursuant to CrR 4.6. CP 69 (Pfeiffer); Hillman Dec. ¶ 32 (two other witnesses). Like Pfeiffer, the two other witnesses were also homeless, but unlike Pfeiffer, they were not in custody. The depositions

of the other two witnesses were set for a conference room in the Attorney General's Seattle office, which is closed to the public. Hillman Dec. ¶ 32.

Petitioner does not claim that it had a constitutional right to appear at the Attorney General's office and attend those depositions. Rather, Petitioner claims that because Pfeiffer's deposition happened to be conducted in an empty courtroom and Respondent agreed to be present to rule on objections in person rather than by telephone, the deposition transformed into a judicial hearing open to the public. From this premise, Petitioner argues that it could not be told to leave the deposition without Respondent first weighing the five factors for closing a courtroom during a public hearing articulated in *Seattle Times v. Ishikawa*.⁵ Accordingly,

⁵ Those factors are:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Seattle Times v. Ishikawa, 97 Wn.2d at 36-39; see also *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

Petitioner seeks a writ of mandamus ordering Respondent to require the State to provide Petitioner with copies of the video and transcript, and ensure that "all similar proceedings" in the now completed case remain open unless the requirements of *Seattle Times v. Ishikawa* are satisfied.

Petitioner's claim is based solely on appearances. Because Petitioner happened to enter at the end of a deposition being held in a courtroom, Petitioner assumes Respondent was conducting a judicial hearing in the case. The factual record rebuts this assumption, and as a matter of law, Petitioner's claim fails for several reasons.

First, Petitioner's request for relief directed at "all similar proceedings" in *State v. Hecht*, should be dismissed as a moot and purely abstract proposition.

Second, Petitioner cannot satisfy the requirements for obtaining a writ of mandamus. Respondent did not have a clear legal duty to apply the *Ishikawa* factors because a pretrial deposition is not a proceeding that implicates Petitioner's constitutional rights to access judicial proceedings. Petitioner also has plain, speedy and adequate remedies available to it in lieu of mandamus relief: Petitioner was able to attend the trial and view Mr. Pfeiffer's testimony as it was presented to the jury, and it may also make a public disclosure request to the State for the deposition and transcript. Lastly, Petitioner's request for relief as to all similar

proceedings in this case is aimed at a general course of conduct to which mandamus does not apply.

D. ARGUMENT

1. Petitioner's Request for Relief Directed at Future Similar Proceedings in *State v. Hecht*, if any, Should be Dismissed as a Moot and Purely Abstract Proposition.

It is a general rule that cases involving only moot questions or abstract propositions should be dismissed. *Hart v. Department of Social and Health Services*, 111 Wn.2d 445, 447, 759 P.2d 1206 (1988) (quoting *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)).

Petitioner seeks relief that is moot and abstract in nature. Specifically, Petitioner asks the Court to direct Respondent to ensure that any future proceedings in the case remain open unless closure is justified under *Ishikawa*. On its face, this request is moot because the trial is over and judgment and sentence has been entered. There are no future proceedings.

Respondent counters that the fact pattern forming the issue in this case could arise if Judge Hecht's conviction is overturned on appeal and a new trial is ordered. Even then, however, the issue would only come up if: (a) one of parties moved for leave to take a deposition under CrR 4.6; (b) Respondent granted the motion; (c) the witness was in-custody; (d) the

party taking the deposition secured an available courtroom in which to conduct it; and (e) the trial judge agreed to rule on objections in person rather than via telephone.

The term "abstract" is defined as:

1. Considered apart from concrete existence: an abstract concept.
2. Not applied or practical; theoretical: *See Synonyms at theoretical*.
3. Difficult to understand; abstruse: *abstract philosophical problems*.
4. Thought of or stated without reference to a specific instance: *abstract words like truth and justice*.

The American Heritage Dictionary of the English Language, Third Edition, at 8 (Houghton Mifflin Company 1996).

Petitioner's requested relief as to possible future similar proceedings fits squarely within this definition and should be dismissed.

As a fallback, Petitioner next argues that even if the relief it seeks is moot, this case nonetheless falls within the exception to the general rule involving matters of continuing and substantial public interest. *Sorenson*, 80 Wn.2d at 558.

Three factors must be considered when determining whether the requisite degree of public interest exists: (1) the public or private nature of the question presented, (2) the need for an authoritative determination to provide future guidance for public officers, and (3) the likelihood of future recurrences of the issue. *In re Eaton*, 110 Wn.2d 892, 895, 757 P.2d 961 (1988). A fourth factor, the "level of genuine adverseness and

the quality of advocacy of the issues," may also be considered. *Hart*, 111 Wn.2d at 448.

Even assuming for argument's sake that the State's deposition of Mr. Pfeiffer's involves a matter of public interest under factor (1), Petitioner plainly cannot satisfy factors (2) and (3). The circumstances in this case are so unique and fact specific as to be of little use to others, and there is little likelihood of these same facts recurring. Depositions are only allowed in criminal cases if the relevant criteria in CrR 4.6(a) are satisfied. Once authorized most depositions occur in a private place not open to the public and outside the presence of the trial judge; the facts in this case are the exception, not the norm.

Accordingly, the exception cited by Petitioner does not apply in this instance.

2. The Writ Application in this Case should be Dismissed Because Petitioner Cannot Satisfy the Requirements for Obtaining Mandamus Relief.

Mandamus is an extraordinary remedy and will not lie to compel a general course of official conduct. *Walker v. Munro*, 124 Wn.2d 402, 407-408, 879 P.2d 920 (1994). A writ of mandamus is a means for compelling a state official "to comply with law when the claim is clear and

there is a duty to act."⁶ *In re Dyer*, 143 Wn.2d 384, 398, 20 P.3d 907 (2001). "The writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It must be issued upon affidavit on the application of the party beneficially interested." RCW 7.16.170.

Based on the above, Petitioner must satisfy three elements before a writ will issue: (1) the party subject to the writ is under a clear duty to act, RCW 7.16.160; (2) the applicant has no "plain speedy and adequate remedy in the ordinary course of law," RCW 7.16.170; and (3) the applicant is beneficially interested.

- a. Respondent did not have a clear legal duty to engage in an analysis of the *Ishikawa* factors because Pfeiffer's pretrial deposition did not implicate Petitioner's constitutional rights to access judicial proceedings and court records.

- i. Const. article I, section 10.

Article I, section 10 of the Washington State Constitution provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay."⁷ This provision guarantees the public and the press a right of access to judicial proceedings and court documents in both civil

⁶ RCW 7.16.160 authorizes issuance of a writ of mandamus:

"[B]y any court, except a district or municipal court, to any inferior tribunal . . . or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station ..."

and criminal cases. *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2004). It applies to trials, pretrial hearings, transcripts of pretrial hearings or trials, exhibits introduced at pretrial hearings and voir dire proceedings. *Seattle Times v. Eberharter*, 105 Wn.2d 144, 155, 713 P.2d 710 (1986); *State v. Brightman*, 155 Wn.2d 506, 122 P.3d 150 (2005) (voir dire proceeding). The right of access also applies to summary judgments and other dispositive motions that adjudicate the substantive rights of the parties, like a full trial. *Dreiling*, 151 Wn.2d at 910, 918 (motion to terminate shareholder derivative action with the scope of article I, section 10).

Conversely, this Court has declined to find a right of access in matters that are not trials or pretrial hearings or do not involve documents introduced into the record:

As this information [obtained in discovery] does not become part of the court's decision making process, article I, section 10 does not speak to its disclosure. However the same cannot be said for materials attached to a summary judgment motion. Summary judgment effectively adjudicates the substantive rights of the parties, just like a full trial. Accordingly, when previously sealed discovery documents are attached in support of a summary judgment motion, they lose their character as the raw fruits of discovery.

(Emphasis added.) *Dreiling*, 151 Wn.2d at 909-910.

⁷ A related provision, Article I, section 22, guarantees criminal defendants the right to a speedy, public trial.

In *Eberharter*, likewise, this Court found no public right of access to judicial proceedings relating to the criminal investigatory process, such as search warrant affidavits in unfiled criminal cases. *Eberharter*, 105 Wn.2d at 156-57. See also, *Buehler v. Small*, 115 Wn. App. 914, 921, 64 P.2d 78 (2003) (no constitutional right to access a judge's notes as they were not part of any case record and did not constitute transcripts of criminal proceedings or exhibits).

Petitioner attempts to distinguish *Eberharter* by arguing that the public historically has not had the same access rights to search warrant affidavits as it has for court hearings. Br. of Petitioner at 19. However, this argument falsely assumes that the State's deposition of Mr. Pfeiffer was a court hearing. A deposition is not a judicial proceedings open to the public, and Respondent's willingness to be present and rule on objections in person rather than via telephone does not otherwise make it so.

ii. The First Amendment

The First Amendment to the U.S. Constitution gives the public and the press a presumptive right of access to criminal jury trials. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) . This right has been extended to include many aspects of the judicial process. See, e.g. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 106 S.Ct.2735, 92, L.Ed.2d 1 (1986) (“ *Press-Enterprise II* ”)

(finding First Amendment right of access to transcripts of pretrial suppression hearings); *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (“*Press-Enterprise I*”) (voir dire of potential jurors); *United States v. Simone*, 14 F.2d 833 (3rd Cir. 1994) (post-trial hearings to examine allegations of juror misconduct); *United States v. Smith*, 776 F.2d 1104 (3rd Cir. 1985) (bills of particulars in support of indictments); *United States v. Criden*, 675 F.2d 550 (4th Cir. 1982) (pre and post-trial proceedings).

However, the United States Supreme Court, like this Court, has recognized the difference between discovery obtained by the parties in preparing their case, and the introduction of that information into the case itself. In *Seattle Times v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), a defamation case, the defendant Seattle Times sought extensive discovery which the plaintiff opposed on the grounds that the discovery violated his First Amendment rights. The trial court granted a motion to compel discovery but also issued a protective order prohibiting the Times from publishing, disseminating, or using the information in any way except where necessary to prepare for and try the case. The order did not apply to information that the Seattle Times might gather outside the discovery process. The United States Supreme Court reviewed this

Court's decision upholding the protective order. In finding no First Amendment violation, the Supreme Court stated:

[P]retrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law. Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.

Seattle Times, 467 U.S. at 36 (emphasis added) (citations omitted).

Although *Seattle Times*, unlike the present case, involved a civil suit and dealt with the validity of a protective order, its rationale has been found applicable to criminal prosecutions in at least one other jurisdiction and to the issue of access by the press to discovery proceedings. See *Palm Beach Newspaper, Inc. v. The Honorable Richard Bryan Burk*, 504 So. 2d 378 (1987).

In *Palm Beach*, a local newspaper sought to attend pretrial depositions and to obtain unpublished transcripts of the depositions over the objection of both the prosecutor and the accused in an attempted murder case. Citing *Seattle Times*, the Florida Supreme Court held that the press had no First Amendment right to attend a deposition in a criminal case, reasoning as follows:

A deposition is nothing more than a statement of a witness taken under oath in accordance with the rules. As the *Seattle Times* Court said, "[l]iberal discovery is provided for the sole purpose of

assisting in the preparation and trial, or the settlement of litigated disputes.' Open access would not serve this purpose. The discovery rules are aimed at protecting the rights of the parties involved in the judicial proceeding and of non-parties who are brought into the proceedings because of purported knowledge of the subject matter. Transforming the discovery rules into a major vehicle for obtaining information to be published by the press even though the information might be inadmissible, irrelevant, defamatory or prejudicial would subvert the purpose of discovery..."

(Citation omitted). *Palm Beach Newspapers*, 504 S.2d at 384.⁸

Applying the foregoing authorities here, the State's deposition of Mr. Pfeiffer did not implicate Petitioner's state or federal constitutional rights to access judicial proceedings for several reasons.

First, just as pretrial depositions in a civil trial are not open to the public at common law, there is no indication that such proceedings have historically been treated any differently in the criminal context. On the contrary, CrR 4.6 contemplates a process that is available to the "parties." *See e.g.*, CrR 4.6(a) (the court may "upon motion of a party and notice to the parties order that ... testimony be taken by deposition"). Petitioner is not a "party" to the criminal prosecution.

⁸ Petitioner cites a quote in *Palm Beach* where the Florida court appears to assume that a judge may never be present at nor asked by the parties to rule on objections during a deposition. Br. of Petitioner at 13 (citing *Palm Beach* at 384). Petitioner makes too much of this quote. Our court rules specifically permit judicial involvement in a deposition at the parties' initiative. CR 30 (c). The *Palm Beach* court did not address whether such involvement, when permitted, transforms the deposition into a judicial proceeding.

Second, the purpose of discovery is to assist counsel in preparation and preserving evidence for trial, particularly where, as here, there is a legitimate concern that the witness may not appear or be available. The discovery process is not intended to serve as a vehicle for obtaining information to be disseminated by the press even though the information may be inadmissible, irrelevant, defamatory, prejudicial and never utilized in the trial. Consistent with this Court's right of access decisions, Petitioner's right in this case is not implicated unless and until the video deposition is admitted into evidence.

Third, the location of a deposition does not alter its fundamental character as a process that solely involves the parties and the witness who has been brought into the proceedings because of his or her knowledge of the facts. In this case, there were common sense reasons for holding the deposition in the Pierce County courthouse. That plus Respondent's willingness to be present to rule on possible objections does not convert the deposition into a judicial hearing open to the public. Such a conclusion elevates form over substance.

For the above reasons, Respondent did not have a clear legal duty to conduct an analysis of the *Ishikawa* factors in this instance because Pfeiffer's pretrial deposition did not implicate Petitioner's right to access judicial proceedings and court records.

- b. Petitioner has a plain, speedy and adequate remedy in the ordinary course of law for obtaining Mr. Pfeiffer's testimony.

Petitioner has two plain, speedy and adequate remedies available to it in this case in lieu of seeking a writ of mandamus. First, Petitioner has the right to attend any trial in *State v. Hecht* and watch Mr. Pfeiffer testify in whatever form it is presented to the jury. Petitioner in fact exercised this right by sending one of its reporters and publishing a story on the proceedings for its readers.

Petitioner draws significance to the fact that the deposition in this case served to preserve testimony for possible use at trial, unlike discovery depositions in civil litigation where the parties may be unaware of what the witness will say. Br. of Petitioner at 13. This argument misses the point. Any deposition in a civil lawsuit may be used at trial if the witness fails to appear for trial. *See* CR 32(a)(3)(D) (deposition may be used by any party for any purpose if court finds that party offering the deposition has been unable to procure witness's attendance by subpoena). However, neither criminal nor civil depositions are open public proceedings. *See* CR 30(h)(6) (requiring counsel and parties to conduct themselves in depositions with the same courtesy and respect for the rules that are required in the courtroom during trial).

Petitioner also has another remedy. Petitioner is free to submit a public records request for the video and transcript with the State under chapter 42.56 RCW.⁹ The State has acknowledged that both are subject to the provisions of the Act. *See State's Memorandum Re: Mandamus Action Against State Officer*, at 9. In response, Petitioner argues that the State cannot provide the records without modifying Respondent's order closing the proceedings. Br. of Petitioner at 10. That is incorrect. Respondent never entered an order sealing the video and transcript. In fact, neither were filed with the court or offered as an exhibit at trial. Accordingly, Petitioner has a remedy that it simply has failed to exercise.

Based on the above, a writ of mandamus would be improper in this case.

- c. Petitioner's request for relief as to all similar proceedings in this case, if any, is aimed at a general course of conduct to which mandamus does not apply.

In its petition, Petitioner further requests the Court to issue a writ of mandamus directing Respondent "to keep all similar proceedings in the trial of this matter open to the public unless the press and public first receive notice of the hearing and the requirements of *Seattle Times v. Ishikawa* are satisfied."

⁹ It is worth noting that Petitioner never actually made this request to Respondent when it sought to observe Pfeiffer's deposition.

As noted above, writs are not directed at a general course of conduct. *Walker v. Munro*, 124 Wn.2d 402, 407, 978 P.2d 920 (1994). Expanding on this principle, in *State ex rel. Taylor v. Lawler*, 2 Wn.2d 488, 490, 98 P.2d 658 (1940), the Court stated:

The jurisdiction given to this court by the state constitution in Art. IV, § 4, to issue writs of mandamus to state officers, does not authorize it to assume general control or direction of official acts.

Instead, the remedy of mandamus contemplates the necessity of indicating the precise thing to be done. *Walker*, 124 Wn.2d at 407.

Mandamus will not lie to compel a general course of official conduct, as it is impossible for a court to oversee the performance of such duties. . . It is therefore necessary to point out the very thing to be done; and a command to act according to circumstances would be futile.

Id. at 407-408 (quoting *State ex rel. Pacific Am. Fisheries v. Darwin*, 81 Wash. 1, 12, 142 P. 441 (1914)).

In *Walker*, the petitioners brought an original action in this Court against the secretary of state and other state officials challenging the constitutionality of certain provisions of Initiative 601 under the state constitution. The petitioners requested, among other relief, a writ of mandamus directing the officials "to adhere to the requirements of the Washington State Constitution and to prohibit them from implementing and enforcing Initiative 601." *Walker*, at 407. Citing to the rule against writs directed at general conduct, the Court stated:

It is hard to conceive of a more general mandate than to order a state officer to adhere to the constitution. We have consistently held that we will not issue such a writ.

Id.

Similarly, Petitioner's request here is for a writ directing Petitioner to require all similar proceedings (assuming that any further proceedings occur in the case) to be open unless the requirements for closing a court proceeding are satisfied. A general order regarding theoretical future proceedings is, like the generic mandate dismissed in *Walker*, not the proper basis for issuance of a writ.

4. Respondent is a Nominal Party and Should Not be Assessed Costs.

If the Court determines that a writ should issue in this matter, RAP 16.2(g) states that "[c]osts are determined and awarded as provided in Title 14." RAP 14.2 provides that "[a] party who is a nominal party only will not be awarded costs and will not be required to pay costs." (Emphasis supplied.) The Rule further states that "[a] 'nominal party' is one who is named but has no real interest in the controversy."

In this case, Respondent is a named party because, in a mandamus proceeding, Petitioner is required to do so. However, Respondent has no real interest in the outcome of this proceeding and respectfully requests that he not be assessed statutory costs and fees. *See also, State ex rel. Middlebrook v. Reid*, 17 Wn. 267, 49 P.517 (1897) (where writ of

mandamus granted costs should not go against judge absent willful misconduct or dereliction of duty).

E. **CONCLUSION**

For the foregoing reasons, Respondent respectfully requests that Petitioner's application for a writ of mandamus be dismissed with prejudice.

DATED this 13th day of January, 2010.

RESPECTFULLY submitted,

By: 
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