No. 83645-1

ALEXANDER, J. (dissenting)—I entirely disagree with the decision the majority reaches in this case. In my view, we should grant the writ of mandamus that The News Tribune seeks. I reach this decision because the Tribune had a right to attend the deposition of Joseph Pfeiffer pursuant to a provision in our state constitution, article I, section 10, which says, in pertinent part, that "[j]ustice in all cases shall be administered openly."

In the instant case, the judge presiding over the taking of Pfeiffer's deposition was clearly endeavoring to do justice but, unfortunately, he did not do so openly. I say that even though I agree with the majority that most routine depositions, whether taken in a criminal or civil case, are not covered by the aforementioned constitutional provision. The instant deposition was not, however, routine. Strong support for that assertion is found in the fact that the deposition was presided over by the assigned visiting superior court judge, James Cayce, in a courtroom of the Pierce County Superior Court that had been set aside for that day's proceedings relating to the case of *State v. Hecht*, No. 09-1-01051-1 (Pierce County Super. Ct., Wash. Nov. 19, 2009).

By way of background, it should be noted that immediately prior to the deposition being taken, Judge Cayce entertained the State's request to grant Pfeiffer transactional immunity. Following Judge Cayce's ruling on the State's immunity request, the attorney for the State of Washington asked the judge to preside over Pfeiffer's deposition. Joseph Pfeiffer was clearly not an ordinary witness, the record making it clear that he was a key witness in the case against then-Pierce County Superior Court Judge Michael Hecht. Pfeiffer's importance is demonstrated by the fact that at that time he was residing in the Pierce County jail pursuant to a material witness warrant. It is abundantly clear that it was the intent of the parties that this deposition should be taken in order to preserve Pfeiffer's testimony for trial, there being a concern that if Pfeiffer was released from jail prior to trial he might not appear at trial. Indeed, Judge Cayce had earlier granted a motion authorizing the taking of the deposition and had scheduled it for the date and time at which the deposition was actually taken.

During the deposition, which took place in the same courtroom in which the hearing on transactional immunity had just taken place, Judge Cayce remained on the bench in his judicial robe. He also ruled on objections that were made during the direct examination and cross-examination of Pfeiffer. Furthermore, Judge Cayce defined to some extent the parameters of the examination of Pfeiffer and advised counsel that if it was necessary, another deposition could be arranged.

Hecht's defense counsel contended that, notwithstanding the fact that this deposition was a "preservation deposition," it should be closed to the public. Verbatim

Report of Proceedings (Sept. 21, 2009) at 7. Counsel asserted that "no one has a right, as far as the public goes or press goes, to be there when you're doing witness interviews during the course of an investigation." *Id.* Although the State, represented by Assistant Attorney General John Hillman, expressed concerns about closing the proceeding, the trial judge agreed with defense counsel that the deposition should not be open to the public.

The trial judge erred in so ruling. This deposition was taken for the purpose of preserving the testimony of a witness for trial, and the trial judge who presided over it did so in a public courtroom ruling on objections as they were registered.[1] Although the deposition was not published at trial, if Pfeiffer had failed to appear at trial to give testimony, the deposition could and most likely would have been offered. If that had occurred, the rulings on objections that the trial judge made during the deposition would stand. This proceeding, in sum, had all the earmarks of a court session at which justice was being administered. At the very least, the proceeding at which the deposition was taken was a de facto court proceeding and it should have been open so that members of the public and the press who were present could hear Pfeiffer's testimony and observe the demeanor of the witness and the actions of the trial participants, including

[1]The majority says that the deposition was taken in a courtroom for the "convenience of the jail staff" and that it could have been "held in a law office." Majority at 11. Perhaps it could have been taken in a law office or some location other than the Pierce County courthouse, although I am doubtful that any law office would welcome having a deposition of an incarcerated individual taken on its premises. Furthermore, I am certain that a superior court judge would not be present at and preside over a deposition at such a location.

the trial judge. Unfortunately, the deposition did not take place in public. Because it did not, the only remedy this court can provide to the public for what is a violation of the aforementioned provision in our constitution is to mandate a release of the transcript of Pfeiffer's deposition testimony. This is what we should do.[2]

The majority asserts that the materials The News Tribune seeks are not court records and, thus, not obtainable in this mandamus action, because Judge Cayce does not have physical possession of the deposition transcript or videotape. Although it would be rare for a superior court judge to have permanent physical possession of a court record, I trust that the majority would agree with me that pursuant to article IV, section I of the state constitution, the judicial power of the State is vested in the Supreme Court and superior courts. I submit, therefore, that all of the courts' records are in the constructive possession of the judges of those courts. That being the case, officers of the court, such as attorneys, court reporters, or clerks of court, when in possession of court records are, in essence, the alter ego of the judge and would be obligated to produce those records when the judge is required to do so. This view is

[2]The majority indicates that "[e]ven assuming a violation, . . . [t]he [court]room was closed to the public for only a few minutes, thus only a short portion of the transcript and videotape would have to be provided." Majority at 24 n.9. While the majority correctly observes that the reporter and the lawyer for The News Tribune entered Judge Cayce's courtroom after the deposition proceeding had commenced, and were allowed to argue against continued courtroom closure, Judge Cayce had indicated prior to the commencement of the deposition that "it would be proper to exclude nonparties." Majority at 3-4. The fact that Judge Cayce offered The News Tribune the opportunity to seek reversal of his previous ruling does not alter the fact that the deposition was closed at the outset and remained so throughout the proceeding.

certainly consistent with Washington court rules relating to access to court records, notably GR 31, which provides that it is the policy of the courts to facilitate access to court records. GR 31(a). Subsection (b) of that same rule indicates that the rule applies to all court records regardless of physical form. The record of a deposition taken under the auspices of a superior court judge certainly falls within that rule.

Nothing I have said in this dissent should be construed as a pronouncement that a trial court may never close a proceeding that is ordinarily open to the public. Any court proceeding can be closed for a good reason, but only after the trial court considers and appropriately applies the so-called *Ishikawa* factors. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982). From the record before us, it is apparent that these factors were never discussed or considered before the instant court session was closed.

I dissent.

AUTHOR:
Justice Gerry L. Alexander

WE CONCUR:
Richard B. Sanders, Justice Pro Tem.