Plea to open hearing. . .

(Continued from A-1)

believe the girls are alive and that Summers knows where they are.

Kennedy was assigned the case after Guhin challenged the impartiality of Judge David Aarons. A defendant has the right to disqualify one judge from hearing his case if the defendant believes it will not be heard fairly.

Bierschbach based his argument on a July U.S. Supreme Court decision in Richmond Newspapers Inc. vs. the Commonwealth of Virginia. The high court overturned lower court decisions that allowed the closure of a trial.

Although that case involved a trial, not pre-trial proceedings, Bierschbach argued that "it appears to be the opinion of leading scholars," that the Richmond case means "any proceeding is open to the public."

"Four justices make references to the situation that make clear that any part of the proceedings is open to the public and the press," he said.

He contended that a preliminary hearing is covered by the high court's decision and that one should only be closed if it can be shown that a defendant's constitutional right to a fair trial would be lost.

For a closure and gag order to be valid, Bierschbach said, a hearing must be held on whether the presence of the public and press at a hearing would prevent a fair trial.

Responding to Bierschbach's arguments, Kennedy said he was "inclined to agree" that the state law is unconstitutional.

"It's overbroad," he said, and the court should be required to find that some danger exists that would impede a fair trial.

But, he said, "my responsibility is constitutional rather than statutory."

Kennedy said that while he had "no difficulty accepting the constitutional right of access (for the press)" to report on governmental affairs, he also believes he has a responsiblity to ensure that a defendant enjoys his constitutional right to a fair trial.

"It is fairly easy to observe that the continued absence of the little girls can continually arouse the passions of readers," he said, adding that the case "is the kind of fact situation that the public has interest in."

Prospective jurors probably would be following the case, he said, resulting in a "significant danger" that would make it hard to find objective jurors.

He pointed out that a preliminary hearing tends to be a "one-sided procedure," and that information published in news stories would be negative toward the defendant.

As for holding a hearing to determine whether a defendant's rights would be violated by having an open hearing, Kennedy said harmful facts could be aired then and "the cat would already be out of the bag" even if it were determined the hearing should be closed.

In addition, he said he was concerned about "allowing an environment to be created that would jeopardize a conviction . . . that would be irresponsible."

Besides, he said, his order would only delay reporting on the hearing, not prevent it forever.

Transcripts of the hearing would be filed among court records soon after its conclusion.

But Bierschbach contended that the availability of transcripts "repudiates your argument about future prejudice of jurors."

He said the newspaper could do, a bit later, what Kennedy was concerned about — print information gleaned from the transcripts before the trial.

He added, however, that transcripts are a poor substitute for observing courtroom proceedings.

Chief Deputy District Attorney Joseph Canty, who is prosecuting the case, had said Tuesday he did not object to the hearing being open.