

Extension of a Criminal Defendant's Right to a Public Trial: Access to the Courtroom During the Jury Charge

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EXTENSION OF A CRIMINAL DEFENDANT'S RIGHT TO A PUBLIC TRIAL: ACCESS TO THE COURTROOM DURING THE JURY CHARGE

The sixth amendment of the United States Constitution guarantees a criminal defendant the right to a public trial.¹ The two

¹ U.S. CONST. amend. VI. The right to a public trial is firmly imbedded in our legal system. Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381, 381 (1932). "First among the essential attributes of fairness is the requirement that a criminal trial be public." B. SCHWARTZ, *CONSTITUTIONAL LAW—A TEXTBOOK* 215 (1972). The constitutional guarantee of a public trial embodied in the sixth amendment applies to the entire trial; closure of a portion of the trial may be violative of the right. *See, e.g., State v. Lawrence*, 167 N.W.2d 912, 916 (Iowa 1969) ("public trial" encompasses entire trial from impanelling of jury to rendering of verdict).

The due process clauses of the fifth and fourteenth amendments have also been used to sustain the right to a public trial. In *Levine v. United States*, 362 U.S. 610 (1960), the Court held that the public trial guarantee of the sixth amendment was inapplicable in a contempt proceeding. *Id.* at 616. The right is so deeply rooted in common law, however, that it was held to apply through the due process clause of the fifth amendment. *Id.* Similarly, in *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), the Supreme Court held that a defendant in a criminal contempt proceeding must be afforded a public trial under the due process clause of the fourteenth amendment. *See also United States ex rel. Mayberry v. Yeager*, 321 F. Supp. 199, 204 (D.N.J. 1971) (denial of public trial to defendant violates due process clause of fourteenth amendment); *United States v. Lopez*, 328 F. Supp. 1077, 1087 (E.D.N.Y. 1971) (public trial guaranteed by fifth amendment due process clause).

Although there is some authority to the contrary, it is generally agreed that the sixth amendment guarantee of a public trial applies solely for the benefit of the defendant. In *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), the Supreme Court held that the sixth amendment does not give the public the right to attend criminal trials. "The Constitution nowhere mentions any right of access to a criminal trial on the part of the public; its guarantee, like the others enumerated, is personal to the accused." *Id.* at 379-80. However, in *United States v. Cianfrani*, 573 F.2d 835 (3d Cir. 1978), it was held that the sixth amendment does give the public a right of access to criminal trials, as it was found that the sixth amendment carries a "strong presumption" of public access to pretrial hearings. *Id.* at 853-54. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), apparently settled any ambiguities by holding that while the sixth amendment gives the public no right of access, the right is guaranteed by the first amendment. *Id.* at 580. The Supreme Court has continued to hold to the position taken in *Richmond Newspapers*. *See, e.g., Waller v. Georgia*, 467 U.S. 39, 44-45 (1984) (approving *Richmond Newspapers* construction of first amendment which guarantees right of access to criminal trials for press and public).

From early times, criminal defendants have been afforded the right to a public trial. *See Radin, supra*, at 382. *See also E. JENKS, THE BOOK OF ENGLISH LAW* 91 (1932) ("one of the most conspicuous features of English Justice, that all judicial trials are held in open court, to which the public have free access, . . . appears to have been the rule in England

motivating forces behind this right are safeguarding the defendant's right to be dealt with fairly,² and instilling a sense of public trust in our judicial system.³ The right to an open trial is not absolute, however, and may be limited at the discretion of the trial judge.⁴ Closure of the courtroom has been justified in order to protect witnesses,⁵ avoid prejudice to either of the parties,⁶ and pre-

from time immemorial"); F. POLLACK, *THE EXPANSION OF THE COMMON LAW* 31-32 (1904) ("[h]ere we have one tradition [public trials], . . . which has persisted through all changes"); T. SMITH, *DE REPUBLICA ANGLORUM* 79 (1565) ("as many as be present" may hear witnesses during trial).

The common law practice of allowing the public to attend trials was incorporated into the sixth amendment. See 1 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 129 (1971).

² *Estes v. Texas*, 381 U.S. 532, 538-39 (1965). See also *Richmond Newspapers*, 448 U.S. at 569-71 ("[a public trial] gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality").

³ See *Waller v. Georgia*, 467 U.S. 39, 46 (1984); *Rovinsky v. McKaskle*, 722 F.2d 197, 199 (5th Cir. 1984); *United States v. Lopez*, 328 F. Supp. 1077, 1087 (E.D.N.Y. 1971).

⁴ See *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-99 (1978); *Estes v. Texas*, 381 U.S. 532, 548 (1965); *United States ex rel. Orlando v. Fay*, 350 F.2d 967, 970-71 (2d Cir. 1965), *cert. denied*, 384 U.S. 1008 (1966).

In *United States v. Rios Ruiz*, 579 F.2d 670 (1st Cir. 1978), the court held that the right to a public trial was not absolute, and that it was within the discretion of the trial court to remove uniformed police officers from the courtroom in order to mitigate their effect on the jury. *Id.* at 674-75. Similarly, in *United States v. Eisner*, 533 F.2d 987 (6th Cir.), *cert. denied*, 429 U.S. 919 (1976), the court held that "[t]he right to a public trial is not absolute but rather must be balanced against other interests which might justify the closing of the courtroom to the public." *Id.* at 993.

In *People v. Jelke*, 308 N.Y. 56, 123 N.E.2d 769 (1954), the New York Court of Appeals held:

The public trial concept has, however, never been viewed as imposing a rigid, inflexible straitjacket on the courts. It has uniformly been held to be subject to the inherent power of the court to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses, and generally to further the administration of justice.

Id. at 63, 123 N.E.2d at 772.

The right to a public trial may also be waived by the defendant. See *United States v. Sorrentino*, 175 F.2d 721 (3d Cir.) (defendant's rights not violated because he had consented to exclusion of public), *cert. denied*, 338 U.S. 868 (1949). See also *Hutchins v. Garrison*, 724 F.2d 1425 (4th Cir.) (defendant waived his sixth amendment right by voluntarily assenting to closure), *cert. denied*, 464 U.S. 1065 (1983); *Martineau v. Perrin*, 601 F.2d 1196 (1st Cir. 1979) (defendant waived his right to public trial when he failed to object to closure).

⁵ See *United States ex rel. Lloyd v. Vincent*, 520 F.2d 1272 (2d Cir.), *cert. denied*, 423 U.S. 937 (1975); *Boyd v. LeFevre*, 519 F. Supp. 629 (E.D.N.Y. 1981); *United States ex rel. Maisonet v. La Vallee*, 405 F. Supp. 925 (S.D.N.Y. 1975).

In *Vincent*, the court held that the exclusion of the public during the testimony of police undercover agents was proper, as a justified protection of the confidentiality of the officers. *Vincent*, 520 F.2d at 1275.

The exclusion of segments of the public may also be justified in order to protect the

serve order in the court.⁷ In furtherance of the fair administration of justice, a trial judge may decide to close only a particular phase of a trial.⁸

A common procedure in both state and federal courts is to lock the courtroom doors during the charge to the jury, prohibiting additional entrants during that segment of the trial.⁹ Such closure

integrity of trials by preventing the intimidation of witnesses. *See United States ex rel. Orlando v. Fay*, 350 F.2d 967 (2d Cir. 1965), *cert. denied*, 384 U.S. 1008 (1966). The Second Circuit held that the exclusion of certain individuals was justified in order to prevent the intimidation of a government witness. *Id.* at 972. *See also United States ex rel. Bruno v. Herold*, 408 F.2d 125 (2d Cir. 1969) (exclusion of certain individuals was justified to prevent intimidation of witness), *cert. denied*, 397 U.S. 957 (1970).

Closure may also be justified to prevent the witness from being embarrassed. *See, e.g., United States ex rel. Latimore v. Sielaff*, 561 F.2d 691 (7th Cir. 1977) (exclusion of public during testimony of rape victim was valid), *cert. denied*, 434 U.S. 1076 (1978).

⁶ *See United States v. Rios Ruiz*, 579 F.2d 670 (1st Cir. 1978); *United States ex rel. Laws v. Yeager*, 448 F.2d 74 (3d Cir. 1971), *cert. denied*, 405 U.S. 967 (1972); *United States ex rel. Mayberry v. Yeager*, 321 F. Supp. 199 (D.N.J. 1971).

In *Rios Ruiz*, the court upheld the trial judge's expulsion of three uniformed policemen because there was a proper concern with the effect their presence would have on the jury. *Rios Ruiz*, 579 F.2d at 674-75. In *Laws*, the expulsion of a witness' mother was upheld because it was determined that her presence would inhibit the witness' testimony. *Laws*, 448 F.2d at 80.

⁷ *See Snyder v. Coiner*, 510 F.2d 224, 230 (4th Cir. 1975); *United States ex rel. Orlando v. Fay*, 350 F.2d 967, 970 (2d Cir. 1965), *cert. denied*, 384 U.S. 1008 (1966); *Boyd v. LeFevre*, 519 F. Supp. 629, 633-34 (E.D.N.Y. 1981).

In addition to preserving order, a closure may be justified to avoid overcrowding or to protect spectators. *See, e.g., Lancaster v. United States*, 293 F.2d 519, 519 (D.C. Cir. 1961) (right to public trial not denied where public excluded during showing of obscene film); *United States v. Kobli*, 172 F.2d 919, 922-23 (3d Cir. 1949) (exclusion due to courtroom space constraint justified if limited to those seeking entry beyond capacity).

⁸ *See United States v. Romano*, 684 F.2d 1057, 1065 (2d Cir.), *cert. denied*, 459 U.S. 1016 (1982); *Hayes v. United States*, 296 F.2d 657, 668 (8th Cir. 1961), *cert. denied*, 369 U.S. 867 (1962).

In *Hayes*, the court held that the defendant was not deprived of his constitutional right to an open trial because closure of a pretrial hearing was justified. *Hayes*, 296 F.2d at 668. In *Romano*, the court upheld the closure of the courtroom during the jury charge. *Romano*, 684 F.2d at 1065.

⁹ *See Romano*, 684 F.2d at 1065; *Latzer v. Abrams*, 602 F. Supp. 1314 (E.D.N.Y. 1985); *People v. Venters*, 124 App. Div. 2d 57, 511 N.Y.S.2d 283 (1st Dep't 1987).

Approximately half of the jurisdictions in this country lock the courtroom doors during the charge. Two New York attorneys, Partick M. Wall, Esq. and Oren Root Jr., Esq., conducted a telephone survey of criminal defense lawyers throughout the United States as to whether the courtroom is closed during the jury charge in their respective jurisdictions. The following totals show the results of that survey in each of five categories:

- local courts: never closed - 27; rarely closed - 7; varies - 2; generally closed - 4; always closed - 18
- federal courts: never closed - 29; rarely closed - 2; varies - 7; generally closed - 3; always closed - 17

People v. Olmo, N.Y.L.J., Dec. 2, 1982, at 11, col. 6 (Sup. Ct. N.Y. County). For the full

has been justified as a "hoary and time honored" tradition¹⁰ and seeks to avoid jury distraction during a critical phase of the trial.¹¹ However, many jurisdictions regularly lock the courtroom doors during the jury charge without undertaking a determination as to whether an interest would likely be prejudiced by allowing the trial to remain open.¹²

It has been suggested that locking the doors of the courtroom during the jury charge, absent a factual determination showing the necessity for closure, deprives defendants of their sixth amendment rights. This Note will discuss the validity of the procedure with respect to the sixth amendment, and will review recent case law while focusing on the inconsistencies in federal and state deci-

results of the Wall-Root survey, see Brief for Appellant, app. at 10, *People v. Venters*, 124 App. Div. 2d 57, 511 N.Y.S.2d 283 (1st Dep't 1987) (No. 28386).

The right to a public trial is secured, however, by a majority of the states either by constitution or by statute. See, e.g., N.Y. JUD. LAW § 4 (McKinney 1983). Section 4 states in pertinent part: "[t]he sittings of every court within this state shall be public, and every citizen may freely attend the same." *Id.* The right to a public trial in New York is also guaranteed by N.Y. CIV. RIGHTS LAW § 12 (McKinney 1983) ("[i]n all criminal prosecutions, the accused has a right to a speedy and public trial"). See also *In re Oliver*, 333 U.S. 257, 268 nn.18-20 (1948) (list of state constitutions, statutes, and cases which guarantee the right in the respective states).

The right to a public trial has been held to be applicable to state criminal prosecutions through the due process clause of the fourteenth amendment. See *Gannett Co. v. DePasquale*, 443 U.S. 368, 391-92 (1979); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

¹⁰ See *Venters*, 124 App. Div. 2d at 58, 511 N.Y.S.2d at 283.

¹¹ See *Romano*, 684 F.2d at 1065. The court found that, "[l]ocking the door while the charge was read was a reasonable limitation to ensure that the jury was properly instructed without distraction." *Id.* See also *Renfro v. State*, 49 Ala. App. 713, 718, 275 So. 2d 692, 696 (1973) (closure during charge is reasonable in order to instruct jury without distraction). *But see Venters*, 124 App. Div. 2d at 59-60, 511 N.Y.S.2d at 284 (questioning validity of courtroom closure to avoid jury distraction). In *Olmo*, N.Y.L.J., Dec. 2, 1982, at 11, col. 6 (Sup. Ct. N.Y. County 1982), an unreported decision, the defendant moved to keep the doors open during the charge. The New York Supreme Court reviewed the applicable case law, both from state and federal courts, and found that:

[t]he argument that a closed courtroom during the charge to the jury is required to prevent the distraction of the jury lacks merit. Carried to its logical conclusion, the "prevention of distraction" rationale [could] be advanced to justify closing trials in their entirety. No one could contend, however, that such a practice is constitutionally permissible. Singling out the instructions to the jury as particularly requiring the absence of distraction does not withstand analysis Allowing the courtroom doors to remain unlocked during the charge poses no threat whatever to the integrity of the proceedings. The traditionally held belief that the public, in entering or leaving the courtroom, may distract the jury's attention, cannot justify the extraordinary measure of locking out all who wish to enter.

Id. at 12, col. 1. Accordingly, the court affirmed the motion, and allowed the doors to remain open during the charge. *Id.*

¹² *Venters*, 124 App. Div. 2d at 58, 511 N.Y.S.2d at 283. See also *supra* note 9.

sions in New York. Finally, it will be suggested that jurisdictions which continue to close the courtroom during the jury charge, without the prerequisite factual determination, should abandon such practices in order to effectuate an efficient and workable national standard as mandated by the Supreme Court.

CONSTITUTIONAL CLOSURE STANDARD

Recent Supreme Court cases have developed a standard to be employed by courts in determining whether a closure is a reasonable exercise of judicial discretion.¹³ In *Richmond Newspapers, Inc. v. Virginia*,¹⁴ the trial judge closed the courtroom to prevent the public from distracting the jury and the press from publishing information that might prejudice the jury.¹⁵ Relying on an historical analysis of the right to an open trial, the Supreme Court held that a portion of a trial which has been historically open to the public carries a "presumption of openness," and may be closed only if there is "an overriding interest articulated in the findings."¹⁶ Subsequent cases have deviated from this approach, however, and have placed greater emphasis on the first amendment right of access

¹³ See *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

¹⁴ 448 U.S. 555 (1980).

¹⁵ *Id.* at 561. The defendant in *Richmond Newspapers* was facing his fourth trial for murder, because the first trial had been reversed on appeal, and two subsequent retrials had ended in mistrials. *Id.* at 559. Upon commencement of the trial, the Virginia trial court granted the defendant's motion to close the trial to the public. *Id.* at 560. At the time, no objection was made by the prosecutor, the appellant newspaper company, or two of its reporters who were present in the courtroom. *Id.* The appellant later made a request for a hearing to vacate the closure order, which was granted by the trial judge. *Id.* At the hearing, the appellant asserted that closure should not be granted without consideration as to whether less drastic alternatives were available. *Id.* The trial judge denied the motion, and closed the courtroom. *Id.* at 561. The defendant was later found not guilty. *Id.* at 561-62. The court granted the appellant's motion to intervene *nunc pro tunc*, but the Virginia Supreme Court dismissed their mandamus and prohibition petitions, and denied their appeal from the closure order. *Id.* at 562.

¹⁶ *Id.* at 581. The Court made an extensive review of the history of open trials, both in England and in the United States, *id.* at 564-80, and concluded that criminal trials carry a "presumption of openness." *Id.* at 573.

The Court held that the first amendment rights of free speech and free press give the public the right of access to places traditionally open to the public, such as criminal trials. *Id.* at 575-77. The standard set by the Court focused on whether or not that phase of the trial in question had been traditionally open to the public. *Id.* See generally Cox, *Foreward: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1 (1980); Note, *Confusion in the Courthouse: The Legacy of the Gannett and Richmond Newspapers Public Right of Access Cases*, 59 S. CAL. L. REV. 603 (1986) [hereinafter Note, *Confusion in the Courtroom*].

and its significance to a particular phase of the trial.¹⁷

In *Press-Enterprise Co. v. Superior Court*,¹⁸ the trial court, attempting to prevent the press from influencing the jury, permitted the public to attend only three days of a six week *voir dire* proceeding.¹⁹ After the jury was empaneled, Press-Enterprise requested a release of the transcript of the proceeding, but the motion was denied by the trial judge in order to protect the privacy of the jurors.²⁰ The Supreme Court reversed this decision, thereby extending the guarantee of a public trial to *voir dire* proceedings.²¹

¹⁷ See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 611 (1982) (Massachusetts statute mandating closure during testimony of minor victim of sexual abuse violates first amendment); *Rovinsky v. McKaskle*, 722 F.2d 197, 199 (5th Cir. 1984) (*in camera* hearing on state's motion to restrict cross-examination of prosecution witness violated first and sixth amendments); *Associated Press v. District Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) (closure order in criminal proceeding denies constitutional right of access which is product of functional analysis); Note, *Confusion in the Courthouse*, *supra* note 16, at 611-18 (Supreme Court has moved from historical-functional analysis to strict functional analysis based on first amendment); Note, *Evaluating Court Closure After Richmond Newspapers: Using Sixth Amendment Standards to Enforce a First Amendment Right*, 50 GEO. WASH. L. REV. 304, 315-22 (1982) (right of access under first amendment should be guided by sixth amendment); Comment, *Constitutional Law—Public's First Amendment Right of Access to Pre-trial Bail Hearings Limited by the Defendant's Sixth Amendment Fair Trial Guarantee—In re Globe Newspaper Co.*, 19 SUFFOLK U.L. REV. 129 (1985). *But cf.* *Douglas v. Wainwright*, 714 F.2d 1532, 1540 (11th Cir. 1983) (protecting witness involved in "love triangle" from embarrassment is sufficient to support closure order since right of access is limited); *Cox*, *supra* note 16, at 20-23 (main focus of *Richmond Newspapers* line of cases is right to public trial, not first amendment right of access).

¹⁸ 464 U.S. 501 (1984).

¹⁹ *Id.* at 503-05. Before the *voir dire* examination of prospective jurors, petitioner, Press-Enterprise, moved that the hearing be opened to the press and the public. *Id.* at 503. The state opposed the motion, arguing that an open hearing would hinder the process and violate the prospective juror's right of privacy. *Id.* at 504. The trial judge denied the motion, and permitted the petitioner to attend the "general" but not the "individual" *voir dire* proceedings. *Id.* The proceedings lasted six weeks, but only three days were open to the public. *Id.* at 503. At the end of the proceedings, petitioner requested a copy of the complete transcript of the *voir dire*, but the court denied the motion in order to protect the juror's right of privacy. *Id.* at 504. The defendant was subsequently convicted and sentenced to death. *Id.* The petitioner then appealed for a writ of mandamus to compel the trial court to release the transcript and vacate the closure of the *voir dire*. *Id.* at 504-05. The petition was denied, and the California Supreme Court denied the subsequent request for a hearing. *Id.* at 505.

²⁰ *Id.*

²¹ *Id.* at 513. The Court reviewed the history of open trials, and outlined their value to both the parties and the public. *Id.* at 506-09. The Court held that the "presumption of openness" was not rebutted since there was no showing that an open proceeding threatened either the interest of the defendant or the privacy of the jurors. *Id.* at 510-11. Furthermore, the Court held that even if there had been a valid justification for closing the proceedings, the trial court "failed to consider whether alternatives were available to protect the interests of the prospective jurors that the trial court's orders sought to guard. Absent consideration of alternatives to closure, the trial court could not constitutionally close the *voir dire*." *Id.* at

The Court focused on the functional aspects of an open trial and held that criminal trials have a presumption of openness which may be overcome only by the finding of an "overriding interest" warranting closure.²² Furthermore, a closure order must be narrowly tailored to those interests sought to be protected.²³ The Court emphasized that even if such an "overriding interest" were found, "[a]bsent consideration of alternatives to closure, the trial court could not constitutionally close the *voir dire*."²⁴

The standard enunciated in *Press-Enterprise* has been employed in subsequent cases defining the constitutional right to an open trial. In *Waller v. Georgia*,²⁵ the defendant moved to suppress evidence obtained from a wiretap which the state intended to employ in its prosecution under the Racketeer Influenced and Corrupt Organizations Act ("R.I.C.O.").²⁶ The state moved to close the pretrial suppression hearing to the public, seeking to avoid unnecessary publicity which it alleged would render the information inadmissible as evidence.²⁷ The trial judge closed the hearing over the defendant's objections.²⁸ Again, the Supreme Court reversed, holding that the defendant's sixth amendment right to a public trial applied to pretrial suppression hearings.²⁹ Unlike *Press-Enterprise* and *Richmond Newspapers*, which focused on the first

511. See generally Survey, *Constitutional Law—Constitutional Guarantees of Open Public Proceedings in Criminal Trials Extend to Voir Dire Examination of Potential Jurors*—*Press-Enterprise Co. v. Superior Court*, 14 U. BALT. L. REV. 359 (1985).

²² *Press-Enterprise*, 464 U.S. at 510.

²³ See *id.* at 511 n.10.

²⁴ *Id.* at 511.

²⁵ 467 U.S. 39 (1984).

²⁶ *Id.* at 41. Court-authorized wiretaps had revealed a large lottery operation and resulted in the subsequent indictment of the defendants. *Id.* at 42. The defendants were acquitted of charges under the Racketeer Influenced and Corrupt Organizations Act ("R.I.C.O."), but were convicted under other Georgia gambling statutes. *Id.* at 43.

²⁷ *Id.* at 41-42.

²⁸ *Id.* at 42. The state also alleged that the wiretap evidence could injure uninterested persons who were not on trial. *Id.* Although the hearing lasted seven days, only two and one-half hours were spent listening to the tapes. *Id.* Only one person who was not indicted was mentioned in the tapes. *Id.* at 42-43. Consequently, the Georgia Supreme Court affirmed the decision. *Id.* at 43.

²⁹ *Id.* at 43. The Court stated that under the sixth amendment, any closure of a suppression hearing over the objections of the accused must meet the following tests:

the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

Id. at 48.

amendment right of access, the *Waller* Court based its decision on the criminal defendant's personal sixth amendment right to an open trial, stating that the "explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public."³⁰ *Waller*, therefore, extended the "overriding interest" standard to criminal defendants who object to a closed courtroom based upon the protections of the sixth amendment.³¹

CLOSURE DURING THE JURY CHARGE IN NEW YORK

It is submitted that the standard enunciated by the Supreme Court in *Press-Enterprise* requires that, prior to ordering a closure of the courtroom during the jury charge, a trial judge must determine whether an overriding interest warranting such closure exists. However, in *United States v. Romano*,³² the United States Court of Appeals for the Second Circuit upheld a closure order even though the trial judge failed to find such an overriding interest.³³ In *Romano*, the defendants were on trial for conspiratory violations under R.I.C.O.³⁴ The trial judge closed the courtroom during the jury charge, notwithstanding the defendants' contention that their constitutional right to a public trial was violated.³⁵ On Appeal, the Second Circuit held that the defendants' claim was "frivolous," and affirmed the conviction.³⁶ The court asserted that "[l]ocking the door while the charge was read was a reasonable limitation to ensure that the jury was properly instructed without

³⁰ *Id.* at 46. In *Globe, Richmond Newspapers*, and *Press-Enterprise*, the Supreme Court developed the "overriding interest" standard to determine whether the public has a constitutional right of access to trials under the first amendment. See *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984). After adopting this test, the Court applied it to a criminal defendant who sought an open trial under the sixth amendment. *Waller v. Georgia*, 467 U.S. 39, 45 (1984). The *Waller* Court reaffirmed the holding in *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), which held that unlike the first amendment right of access, the sixth amendment guarantee of a public trial is a personal right of the defendant. See Note, *Confusion in the Courthouse*, *supra* note 16, at 616.

³¹ See *supra* note 30.

³² 684 F.2d 1057, 1057 (2d Cir. 1982).

³³ *Id.* at 1065.

³⁴ *Id.* at 1059. The defendants were convicted in federal district court of conspiracy to violate R.I.C.O. *Id.* At trial, the courtroom doors were locked during the jury charge. *Id.* at 1065. The defendants appealed, alleging deprivation of their constitutional right to a public trial. *Id.*

³⁵ *Id.*

³⁶ *Id.* at 1065-66.

distraction."³⁷ Despite the subsequent holdings in *Press-Enterprise* and *Waller*, the Second Circuit has not found it necessary to reconsider *Romano*.

The *Romano* decision has been criticized by both federal and state courts which places considerable doubt on its applicability within the Second Circuit.³⁸ In *Latzer v. Abrams*,³⁹ Judge Glasser of the United States District Court for the Eastern District of New York stated that, "[t]he holding in *Romano* may deserve reconsideration by the Second Circuit in light of two recent decisions of the Supreme Court [*Waller* and *Press-Enterprise*]."⁴⁰ Furthermore, the judge questioned whether the avoidance of jury distraction is a compelling justification for closure.⁴¹ Judge Glasser did say, however, that if the closure were at issue, he would feel constrained to dismiss the claim by virtue of the holding in *Romano*.⁴²

³⁷ *Id.* at 1065. The court found that the closure was reasonable since "[m]embers of the public were permitted to be and were present . . . during the charge. . . . Indeed, no one even tried to enter the courtroom while the doors were locked." *Id.* at 1065-66 (citations omitted). The court based its determination on language from *Richmond Newspapers*:

our holding today does not mean that the First Amendment rights of the public and representatives of the press are absolute. Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets . . . so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial.

Id. at 1065 (citations omitted) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 n.18 (1980)).

³⁸ See *Latzer v. Abrams*, 602 F. Supp. 1314, 1322 n.11 (E.D.N.Y. 1985); *People v. Venters*, 124 App. Div. 2d 57, 59-60, 511 N.Y.S.2d 283, 284 (1st Dep't 1987); *People v. Olmo*, N.Y.L.J., Dec. 2, 1982, at 11, col. 6 (Sup. Ct. N.Y. County).

³⁹ 602 F. Supp. 1314 (E.D.N.Y. 1985). In *Latzer*, a state inmate, who had been convicted of sodomy in the second degree, filed a petition for a writ of habeas corpus. *Id.* at 1314. He asserted three claims in support of his petition, including the denial of his constitutional right to a public trial when the trial court locked the doors during the jury charge. *Id.* at 1314-15.

⁴⁰ *Id.* at 1322 n.11. The court granted petitioner a writ of habeas corpus on other grounds, and addressed the public trial issue in dictum. *Id.* at 1321-22.

Judge Glasser reviewed the relevant Supreme Court decisions, and expressed his doubts as to the validity of *Romano* in light of the Court's subsequent holdings. *Id.* at 1322 n.11. The judge construed *Richmond Newspapers* and *Press-Enterprise* to hold that a court may be closed when, "that control [closure] is exercised so as not to deny or unwarrantedly abridge . . . the opportunities for the communication of thought and the discussion of public questions immemorally associated with resort to public places." *Id.* (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 n.18 (1980)). Judge Glasser questioned whether the judge's charge to the jury gave rise to a significant opportunity "for the communication of thought and the discussion of public questions." *Id.*

⁴¹ *Id.* at 1322 n.11. The judge stated, "[i]f, as held in *Romano*, the avoidance of any jury distraction justified the closure, may the courtroom be locked to assure that a jury is not distracted during the crucial testimony of a principal witness?" *Id.*

⁴² *Id.*

The *Romano* decision may be distinguished, however, since it preceded the Supreme Court's establishment of the "overriding interest" standard.⁴³ The previous standard, in use at the time of *Romano*, was the historical analysis employed by *Richmond Newspapers*, which focused on whether the portion of the trial in question was historically open to the public.⁴⁴ *Romano* is easily reconcilable with the *Richmond Newspapers* standard as the jury charge had not been historically open to the public; in fact, the charge had been traditionally closed in many federal and state courts.⁴⁵ The closure order would not comport with the "overriding interest" standard, however, because the trial judge neither performed a factual determination of the need for keeping the public out, nor considered any alternatives to closure.⁴⁶ Although the analysis employed by the *Romano* court has not been reconsidered, it is suggested that in light of the subsequent holdings in *Press-Enterprise* and *Waller*, it should be re-assessed to incorporate the increased protection provided a criminal defendant under the "overriding interest" standard.

A. *The Venters Decision*

A majority of jurisdictions outside New York have held that locking the doors during the jury charge is unwarranted.⁴⁷ Re-

⁴³ See *Waller v. Georgia*, 467 U.S. 39, 48 (1984) (overriding interest likely to be prejudiced needed to justify closure); *Press-Enterprise v. Superior Court*, 464 U.S. 501, 510 (1984) (presumption of openness only overcome by overriding interest). *But see Romano*, 684 F.2d 1057, 1065 (2d Cir. 1982) (closing doors during jury charge is reasonable to prevent distractions).

⁴⁴ See *Richmond Newspapers, Inc. v. Georgia*, 448 U.S. 555, 564-75 (1980). See also *Press-Enterprise*, 464 U.S. at 505-08; *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982).

⁴⁵ See *People v. Venters*, 124 App. Div. 2d 57, 59, 511 N.Y.S.2d 283, 284 (1st Dep't 1987).

⁴⁶ See *Waller*, 467 U.S. at 48; *Press-Enterprise*, 464 U.S. at 510-11.

⁴⁷ See *Renfroe v. State*, 49 Ala. App. 713, 275 So. 2d 692 (1973). In *Renfroe*, the court upheld the closure of the courtroom because it did not result in total exclusion of the public; those present in the courtroom prior to the charge were allowed to remain. *Id.* at 718, 275 So. 2d at 696.

In *People v. Buck*, 46 Cal. App. 2d 558, 116 P.2d 160 (1941), the closure was upheld because the defendant failed to object in the trial court. *Id.* at 560-61, 116 P.2d at 162.

In *McKibben v. State*, 187 Ga. 651, 2 S.E.2d 101 (1939), the trial judge charged the jury in the jury room, with only himself, the jury, and the parties present. The defendant excepted on the basis that he was denied a public trial. *Id.* at 652, 2 S.E.2d at 102. The court held that the exception is without merit because members of the public could have entered without restraint. *Id.*

In *State v. Lawrence*, 167 N.W.2d 912 (Iowa 1969), the trial court, during a recess,

cently, in *People v. Venters*,⁴⁸ the Appellate Division, First Department, of the Supreme Court of New York held that such a closure violated the defendant's right to a public trial.⁴⁹ In *Venters*, the defendant was on trial for robbery in the second degree and was subsequently convicted.⁵⁰ The trial court denied the defendant's request that the courtroom doors remain unlocked during the charge, holding that the closure was necessary in order to avoid distracting the jury.⁵¹ This decision was not based on any factual findings concerning possible jury distraction, nor did the court consider any alternatives to closure.⁵²

The Appellate Division reversed the conviction, holding that such a closure "does not pass constitutional or statutory muster."⁵³ Writing for the majority, Justice Wallach found that although the

closed the courtroom and read the charge. *Id.* at 913. The Iowa Supreme Court held that the closure violated the defendant's right to a public trial. *Id.* at 919. The court has also held that the defendant's right to a public trial was not infringed when the trial court locked the door during the charge, since access to the courtroom was available by ringing a doorbell at the main door. See *State v. Gibb*, 303 N.W.2d 673, 679-80 (Iowa 1981).

In *People v. Micalizzi*, 223 Mich. 580, 194 N.W. 540 (1923), the Michigan Supreme Court reversed a murder conviction on the ground that the defendant was deprived of his right to a public trial. *Id.* at 585, 194 N.W. at 542. The court held that the right applies during the charge to the jury, and warned, "[i]f a portion of the trial may be conducted behind barred doors, it may all be conducted behind barred doors." *Id.*, 194 N.W. at 541.

⁴⁸ 124 App. Div. 2d 57, 511 N.Y.S.2d 283 (1st Dep't 1987).

⁴⁹ *Id.* at 58, 511 N.Y.S.2d 283.

⁵⁰ *Id.*

⁵¹ See *id.* at 58-59, 511 N.Y.S.2d at 283-84. Absent an objection to closure by the defendant, courts may consider the right to a public trial to be waived. See *Martineau v. Perrin*, 601 F.2d 1196 (1st Cir. 1979).

⁵² See *Venters*, 124 App. Div. 2d at 60, 511 N.Y.S.2d at 284. The court noted that closure of the courtroom during the jury charge is customary procedure in New York. *Id.* at 58, 511 N.Y.S.2d at 283.

⁵³ *Id.* The Appellate Division held that under the sixth and fourteenth amendments to the United States Constitution, the New York Civil Rights Law § 12, and the New York Judiciary Law § 4, see *supra* note 9, the closure of the courtroom was invalid. *Id.*

Justice Lynch, in dissent, called closure of the courtroom during the charge "a long-established custom aimed solely at better jury comprehension of the law." *Id.* at 61, 511 N.Y.S.2d at 285 (Lynch, J., dissenting). The dissent asserted that because there were no controlling state decisions on point, that court should affirm the closure on the authority of *Romano*:

The majority casually dismisses this case [*Romano*] by observing that a lower Federal court Judge in *Latzer v. Abrams* . . . mused that "in light of *Waller* . . . and *Press-Enterprise* . . . *Romano* might 'deserve reconsideration' by the Second Circuit". It is worthy of note that the Judge himself did not find *Waller* and *Press-Enterprise* distinguishing and he followed *Romano*. It is also worthy of note that the Second Circuit has not reconsidered *Romano*. I, like the *Romano* court, find the defendant's claim frivolous.

Id. (Lynch, J., dissenting) (citations omitted).

right to a public trial is not absolute, the closure in this case failed to satisfy the standards of openness established by the Supreme Court.⁵⁴ The court stated that while the prevention of jury distraction is an important concern, it does not satisfy "the overriding interest" test so as to justify closure.⁵⁵ Justice Wallach also noted that the trial court failed to consider any reasonable alternatives before denying the defendant's request.⁵⁶ The court held, therefore, that the practice of locking the courtroom doors during the jury charge is not justified under the standard enunciated by *Press-Enterprise* and *Waller*, and thus violated the defendant's constitutional right to a public trial.⁵⁷

B. Adoption of the Venters Analysis

In contrast to the analysis employed in *Romano*, it is submitted that the *Venters* court properly applied the "overriding interest" standard in determining whether the courtroom doors should remain open during the jury charge. The rationale that closure is needed to prevent jury distraction lacks merit because viable alternatives are available.⁵⁸ If necessary, part of the charge can be re-

⁵⁴ *Id.* at 60, 511 N.Y.S.2d at 284-85. The court reviewed *Waller* and *Press-Enterprise*, and determined that the "presumption of openness" had not been overcome as no "overriding interest" existed to justify closure. *Id.* at 59-60, 511 N.Y.S.2d at 284-85.

⁵⁵ *Id.* at 59-60, 511 N.Y.S.2d at 284. Justice Wallach asserted that although *Romano* held that the prevention of jury distraction justified closure, "the authority of *Romano* on this point is now suspect." *Id.* at 59, 511 N.Y.S.2d at 284.

⁵⁶ *Id.* "Obviously, there are 'reasonable alternatives' short of total closure that may be adopted by the trial court to prevent the distraction of the jury while the charge is underway. For example, a court officer may be stationed outside the door to insure unobtrusive entry by visitors." *Id.* at 59 n.2, 511 N.Y.S.2d at 284 n.2.

⁵⁷ *Id.* at 59-60, 511 N.Y.S.2d at 284-85. The court further held it irrelevant that there was no showing during the charge that members of the public, who were outside the courtroom, were prevented from entering, since "unjustified closure is reversible error per se." *Id.* at 60, 511 N.Y.S.2d at 284.

A majority of the courts that have reviewed the issue have held that the denial of the defendant's right to a public trial is prejudicial in and of itself, and there is no need to show prejudice in order to obtain redress. *See, e.g., Martineau v. Perrin*, 601 F.2d 1196, 1198 (1st Cir. 1979) (showing prejudice not necessary for reversal of conviction not had in public proceedings); *United States v. Eisner*, 533 F.2d 987, 993 (6th Cir. 1976) (prejudice is implied when court improperly excludes public); *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 608 (3d Cir. 1969) (defendant invoking constitutional guarantee of public trial need not show prejudice). *But see United States ex rel. Orlando v. Fay*, 350 F.2d 967, 972 (2d Cir. 1965) ("[w]e conclude that no violation of due process occurred as Orlando has made no showing that he was prejudiced by the trial judge's exclusion of the spectators").

⁵⁸ The "overriding interest" standard espoused by the Supreme Court in *Press-Enterprise* and *Waller* dictates that a court may exclude the public only with a factual showing of compelling necessity. *Waller v. Georgia*, 467 U.S. 39, 45 (1984); *Press-Enterprise Co. v. Su-*

read to the jury.⁵⁹ Additionally, court personnel can prevent spectators from acting in such a manner as to divert the attention of jurors.⁶⁰ The guarantee of a public trial is so vital to our constitutional system of justice that it should only be limited in extreme or compelling circumstances; it is submitted that the prevention of jury distraction does not rise to such a compelling level.

CONCLUSION

The Supreme Court has declared that a criminal defendant's right to a public trial may only be limited under very compelling circumstances. A trial judge has the discretion to impinge on this right only upon the finding of an overriding interest warranting closure. Even if such an interest is found, the closure order must be no broader than is necessary to protect that interest, and the trial court must consider reasonable alternatives. Unfortunately courts continue to limit access to the trial during the jury charge in order to prevent jury distraction. Closure of the courtroom during the jury charge, without a valid justification for doing so, is a deprivation of a criminal defendant's sixth amendment rights. The purposes underlying the right to a public trial can only be accomplished by a discontinuance of the practice.

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perior Court, 464 U.S. 501, 510 (1984). While the avoidance of jury distraction is an interest to be considered, it is neither a compelling necessity nor an "overriding interest." *See Venters*, 124 App. Div. 2d at 59-60, 511 N.Y.S.2d at 284-85; *People v. Olmo*, N.Y.L.J., Dec. 2, 1982, at 11, col. 6 (Sup. Ct. N.Y. County). *See also United States v. Romano*, 684 F.2d 1057, 1065 (2d Cir. 1982) (barring entry a reasonable limitation to avoid jury distraction during charge).

Furthermore, alternatives to closure must be considered before exclusion of the public will be deemed to be justified. *See Press-Enterprise*, 464 U.S. at 511. Absent such consideration, the defendant will be denied the right to a public trial, even if an "overriding interest" is present. *See id.*

⁵⁹ *See Olmo*, N.Y.L.J., Dec. 2, 1982, at 11, col. 6. In *Venters*, the judge expressed his belief that there exist reasonable alternatives to closure during the charge. 124 App. Div. 2d at 59 n.2, 511 N.Y.S.2d at 284 n.2. "For example, a court officer may be stationed outside the door to insure unobtrusive entry by visitors. Furthermore, it would be within the discretion of the presiding judge to require members of the public present in the courtroom to remain until the charge is concluded." *Id.*

⁶⁰ *See id.*