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**The Right to a Public Trial**

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This May, the Court of Appeals decided *People v Reid* (_NY3d_ [2023) and *People v Muhammad* (_NY3d_ [2023]). Both cases addressed the defendant's claim that his right to a public trial had been violated. Both cases were decided in the defendant's favor and reaffirm the Court's unwillingness to erode this important constitutional right.

**Background**

The right to a public trial is unique in that it is both a personal and a public right. The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right to a … public trial." Conversely, courts have held that the First Amendment creates an implicit right of access *for the public* to criminal trials (*Richmond Newspapers v Virginia*, 448 U.S. 555 [1980]).

"Public trials and fair trials are not strangers," explained the Court in *People v Jones* (47 NY2d 409 [1979]). Courts have reasoned that public trials encourage witnesses to come forward, discourage perjury, and, ultimately, promote public confidence in the judicial system. And, while courts have consistently held that the right is not unqualified, there is a presumption of openness that is "not easily overcome" (*People v Colon*, 71 NY2d 410 [1988]).

In *Waller v Georgia* (467 U.S. 39 [1984]) the Supreme Court required the presence of the following factors for closure to be valid:

(1) The party seeking closure must advance an *overriding interest* that is *likely* to be *prejudiced*;
(2) the closure must be *no broader than necessary* to protect the interest;
(3) the court must *consider reasonable alternatives*; and
(4) the court must *make findings* to support the closure.

For sure, each factor is important, but the overwhelming majority of cases turn on prongs one and three. Parties seeking closure will often fail either to advance a compelling interest or to demonstrate a likelihood of prejudice. Additionally, courts granting the application routinely fail to consider alternatives.

**Overriding Interest**

Prosecutions involving undercover officers (who hope to remain undercover) are perhaps the most common reason for closure (*see People v Echevarria*, 21 NY 1 2013]). Hearings conducted for this purpose are commonly referred to as *Hinton* hearings (see *People v Hinton*, 31 NY2d 71 [1972]). Naturally, one would expect courts to find that the safety of a testifying witness

constitutes an overriding interest. But, the People must also show that the interest is *likely* to be prejudiced -- the so-called nexus requirement. To that end, testimony concerning "associates of defendant or targets of investigation likely to be present in the courtroom, or to threats received" is necessary. Additionally, to satisfy prong two, the closure should only occur during the undercover's testimony.

Sex crimes involving child victims can implicate similar interests. In *People v Scullark*, exclusion of the defendant's family during the victim's testimony in a sexual abuse 2nd prosecution was deemed proper (23 AD3d 216 [1st Dept 2005]). During the original trial, the family member's behavior had caused the victim to breakdown on the stand, resulting in a mistrial (*Id.*, at 217). In seeking closure, the People called the victim's psychiatrist to testify that if compelled to testify before them again, the victim would likely break down again.

Because of the number of people involved, jury selection, especially for high-profile cases, can also lead to potential violations. Plainly, the safety and impartiality of the jurors, if imperiled, can constitute an overriding interest. More often though, the trial court's desire to pack as many members of the venire as possible into court, to the exclusion of the public, will result in error (*Presley v Georgia*, 558 U.S. 209 [2010]). Simply asserting a generic risk of safety or taint will not suffice. "If broad concerns of this sort were sufficient to override defendant's constitutional right to a public trial, a court could exclude the public from jury selection almost as a matter of course" (*Presley*, at 215). Courts considering closure during jury selection must articulate a better, and more specific, concern.

**Consider Alternatives**

Convictions are also reversed because trial courts fail to consider reasonable alternatives. In the context of jury selection, the Supreme Court suggested that "some possibilities include reserving one or more rows for the public; dividing the jury venire panel to reduce courtroom congestion; or instructing prospective jurors not to engage or interact with audience members" (*Presley*, at 215). Indeed, trial courts are required to consider alternatives to closure "even when they are not offered by the parties" (*Presley*, at 214). Where the closure is for safety or intimidation reasons, courts should consider admonishing the audience, or only removing those responsible for the concern.

***People v Reid*** **(_NY3d_ [2023])**

"You've gotta come in with something."

-Seth Seegert

In this homicide prosecution, the trial court closed the proceedings to the public after it was revealed that members of the audience had taken photographs of the courtroom and posted them on Instagram with the caption, "Free Dick Wolf" -- which, apparently, was the defendant's street name, and not an overture to the famed producer of Law & Order and Miami Vice. The trial court also noted that members of the audience had been menacing court staff.

The Court of Appeals found that avoiding intimidation of witnesses and jurors is an overriding interest, but here there was no showing that the photos were meant to do so -- they only depicted the defendant being escorted by court officers. The Court also found the menacing claim lacked specificity, both as to which audience members were doing it and in terms of what the conduct was. "The mere possibility that an interest might be compromised by open court testimony does not justify abridgment of defendant's constitutional right to a public trial" (Reid, at 6). Implicit in this is the Court's conclusion that the People did not come in with something.

The trial court's decision to close the proceedings completely was also problematic. The court could have confiscated cell phones, admonished the audience, or identified and excluded its most fractious members. By opting for a more sweeping measure, the trial court failed to (1) tailor its remedy (prong two), and (2) consider alternatives (prong three).

***People v Muhammad* (_NY3d_ [2023])**

This case was also a homicide prosecution, but, unlike *Reid*, the court was not closed on the motion of a party. Instead, the trial court had a policy forbidding the public from entering or leaving the court during live testimony. On the third day of trial, spectators began arriving before testimony began and surrendered their phones in the hall (which was also a policy of the court). They then waited, without any indication from court staff that they were cleared to enter. The direct examination of a witness was conducted, concluded, and the cross examination commenced, all before the prosecutor learned of the exclusion and alerted the court. The defendant's motion for a mistrial was denied following an evidentiary hearing.

The People argued that the closure was temporary, inadvertent, and not the product of an affirmative act (see *People v Colon*, 71 NY2d at 416). The Court disagreed, reasoning that the public was excluded because of two affirmative acts. First, the trial court created the policy. Second, it delegated enforcement of the policy to its staff. They, in turn, did not communicate that the public was permitted to enter. It was not the public's responsibility to ask, said the Court.

While *Muhammad* did not directly rule on the propriety of the trial court's policy, it was aporetic of it. The Court said, "our holding should not be interpreted as an endorsement of the trial judge's general policy prohibiting ingress and egress during witness testimony" (*Id*., at 12).

**Attachment**

The right applies to all phases of trial, including *voir dire* (*Presley v Georgia*, 558 U.S. 209 [2010]; *Press-Enterprise Co. v Superior Court of Cal., Riverside County*, 464 U.S. 501 [1984]). Courts have also extended the right to pre-trial suppression hearings (*Waller*, 467 U.S. at 44-47).

**Preservation**

The Court of Appeals requires preservation of public trial claims (*People v Alvarez*, 20 NY3d 75 [2012]). *Alvarez* noted that they have consistently done so, and rejected the defense argument that they constitute a mode of proceedings error. Accordingly, counsel should alert the trial court to a potential violation as soon as possible. No special legal language is necessary: "Judge, I believe my client's right to a public trial has been violated and I'm asking for a mistrial," is perfectly adequate. What is most important is that counsel make a clear factual record of the nature and extent of the closure -- particularly where it is not the product of a formal motion.

**Remedy**

If the right is abridged during trial, the remedy is almost always a mistrial (or reversal on appeal). A violation "is not subject to harmless error analysis and 'a per se rule of reversal irrespective of prejudice is the only realistic means to implement this important constitutional guarantee'" (*People v Martin*, 16 NY3d 607, 613 [2011], *quoting People v Jones*, 47 NY2d 409, 417 [1979]). Where the violation occurs during a pre-trial suppression hearing, only the hearing would need to be redone (*Waller*, 467 U.S. at 49-50). Assuming the suppression ruling is the same -- and it is difficult to imagine that it would not be -- then the trial verdict will not be disturbed.

**Public Right**

The public's First Amendment right is largely coextensive with the defendant's Sixth Amendment right. The analysis applied by courts -- the *Waller* test -- is identical. Of course, the only remedy available for a violation of the public right would be injunctive relief in favor of the excluded individual(s). Courts have declined to view the right so expansively as to declare that there is a constitutional right to have cameras in the courtroom (*Courtroom Tel. Network LLC v State of New York*, 5 NY3d 222 [2005]). And, while the Fist and Sixth Amendment claims can often be viewed as two sides of the same coin, consider that they can also conflict with one another. In *Matter of Associated Press v Bell* (70 NY2d 32 [1987]) the *defendant* sought closure of his pre-trial *Huntley* hearing. He argued that media coverage of testimony concerning his confession would subsequently compromise his right to an impartial jury. The court acknowledged that that was possible but concluded that because the defendant did not identify any anticipated testimony that had not already been reported on, a public hearing was not likely to infringe on his right to a fair trial.

**Final Thought**

As seen, cases interpreting the right to a public trial tend to involve recurring themes. Closure is typically sought for reasons like sensitive witnesses or testimony, safety considerations, heightened media attention, courtroom congestion, and individual court policies. Attorneys handling any case that may proceed to trial (or even a suppression hearing) should always be cognizant of the right, but those with cases involving the above considerations should be particularly vigilant.