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Sixth Amendment--Public Trial Guarantee Applies to Pretrial Suppression Hearings

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SIXTH AMENDMENT—PUBLIC TRIAL GUARANTEE APPLIES TO PRETRIAL SUPPRESSION HEARINGS

Waller v. Georgia, 104 S. Ct. 2210 (1984).

I. INTRODUCTION

In *Waller v. Georgia*,[1] the Supreme Court held that the sixth amendment guarantee of a public trial for criminal defendants applies to suppression hearings.[2] This Note will first examine the important policy considerations that underlie the right to a public trial. Next, it will examine the *Waller* decision in light of these policies. Then, it will argue that although the Court correctly decided *Waller*, the Court's test for ascertaining the constitutionality of closure orders is ambiguous. Finally, this Note will advance more specific guidelines for trial courts to utilize in deciding the propriety of closure orders in suppression hearings.

II. THE FACTUAL AND PROCEDURAL BACKGROUND

In 1982, a Georgia trial court convicted petitioners Guy Waller, Clarence Cole, and thirty-five others of commercial gambling and communicating gambling information in violation of Georgia statutory law.[3] The Georgia authorities obtained evidence of the gambling activities through the use of court authorized wiretaps and search warrants.[4] Prior to the trial of Petitioners and thirteen others, Petitioners moved to suppress the wiretaps and evidence seized in the searches, arguing that the warrants authorizing the wiretaps lacked probable cause and were based on overly general information, and that the searches were indiscriminate, exploratory, and general.[5] The state moved to exclude the public from the sup-

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1 104 S. Ct. 2210 (1984).

2 *Id.* at 2216.

3 *See* Waller v. State, 251 Ga. 124, 124, 303 S.E.2d 437, 439 (1983), *rev'd*, 104 S. Ct. 2210 (1984) (citing GA. CODE ANN. §§ 26-2703, -2706 (1983)). Petitioners, along with hundreds of others, participated in a telephone lottery scheme in which they gambled on the volume of stocks and bonds traded on the New York Stock Exchange. *Id.* at 124, 303 S.E.2d at 439.

4 *Waller*, 104 S. Ct. at 2212.

5 *Id.* at 2213.

pression hearing, contending that the prosecution would introduce evidence at the hearing that would violate the privacy of persons other than the defendants, thereby making the evidence inadmissible at trial under Georgia statutory law.[6] Sitting without a jury, the trial court ruled that the publication of wiretap evidence relating to persons not then on trial would prevent its use in future prosecutions.[7] Consequently, the trial judge closed the suppression hearing to all persons except witnesses, court personnel, the parties, and their lawyers.[8]

The suppression hearing lasted seven days.[9] For less than two and one-half hours, the prosecutor played wiretap tapes containing names of persons not then on trial.[10] At the close of the hearing, the trial judge suppressed ten boxes of evidence containing documents that were personal and non-crime related.[11]

Following their conviction by jury in open court, Petitioners appealed to the Georgia Supreme Court,[12] claiming, *inter alia*, that the closure of the suppression hearing violated the standards for closure orders promulgated in a previous Georgia Supreme Court case, *R.W. Page Corp. v. Lumpkin*.[13] In *Lumpkin*, the court, applying the Georgia constitutional mandate that criminal defendants "shall have a public . . . trial,"[14] ruled that closure orders must be narrowly drawn and strictly construed in favor of open hearings.[15] Additionally, the court held that a court may enter a closure order only if it also enters written findings of fact fully articulating alternatives to closure considered by the trial court, and the reasons why such

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6 *Id.* (citing the Georgia Code of 1981, § 16-11-64(b)(8) (1982)). The Georgia statutory provision is now embodied in GA. CODE ANN. § 26-3004(k) (1983):

> Any publication of the information or evidence obtained under a warrant issued hereunder other than that necessary and essential to the preparation of and actual prosecution for the crime specified in the warrant shall be an unlawful invasion of privacy under this Chapter, and shall cause such evidence and information to be inadmissible in any criminal prosecution.

Id.

7 *Waller*, 104 S. Ct. at 2213.

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.* The Court did not indicate whether the trial judge suppressed any portions of the intercepted telephone conversations.

12 Waller v. State, 251 Ga. 124, 126, 303 S.E.2d 437, 441 (1983).

13 249 Ga. 576, 292 S.E.2d 815 (1982).

14 *Id.* at 578, 292 S.E.2d at 819 (citation omitted).

15 *Id.* at 580, 292 S.E.2d at 820. In *Lumpkin*, the court noted that alternatives to closure would include jury sequestration, change of venue, postponement of trial, searching voir dire, and clear and emphatic instructions to the jury to consider only evidence presented in open court. *Id.* at 580 n.8, 292 S.E.2d at 820 n.8 (citing Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 563-64 (1976)).

alternatives would not afford the movant an adequate remedy.[16]

The Georgia Supreme Court dismissed the petitioners' contention that the court's closure order violated the holding in *Lumpkin*, stating that because the petitioners' hearing took place prior to *Lumpkin*, the procedural requirements established in that case did not apply.[17] The court also held that the trial court did not violate the petitioners' sixth amendment right to a public trial.[18] Finding that information contained in the tapes that the prosecution presented at the hearing "would tend to violate the privacy of others and might prejudice other potential defendants,"[19] the court affirmed the trial court's balancing of the petitioners' right to a public hearing against the privacy rights of others.[20]

III. The Supreme Court's Decision

In a unanimous decision, the Supreme Court reversed the Georgia Supreme Court and remanded the case,[21] holding that a defendant's sixth amendment right to a public trial applies to a suppression hearing and that the trial court had failed to give proper weight to sixth amendment concerns.[22]

Writing for the Court, Justice Powell characterized the case as presenting the Court with three questions: First, does a defendant's sixth amendment right to a public trial extend to a suppression hearing conducted prior to the presentation of evidence to the jury? Second, if so, did the trial court violate that right in the present case? Third, if so, what is the appropriate remedy?[23]

Citing a number of recent Supreme Court cases that establish a first amendment right of access to judicial proceedings on the part of the press and the public,[24] the Court held that the appropriate

16 *Id.* at 580, 292 S.E.2d at 820. The court also stipulated that closure orders must provide that the closed portion of the hearing be reported, transcribed, and made available to the public and media as soon as the prejudicial effects that precipitated the closure no longer exist. *Id.* at 580-81, 292 S.E.2d at 820.

17 Waller v. State, 251 Ga. at 127, 303 S.E.2d at 441.

18 *Id.* at 127, 303 S.E.2d at 441.

19 *Id.* at 126, 303 S.E.2d at 441.

20 *Id.* at 127, 303 S.E.2d at 441.

21 *Waller*, 104 S. Ct. at 2217.

22 *Id.* at 2214.

23 *Id.*

24 *Id.* at 2214-15 (citing Press-Enterprise Co. v. Superior Court, 104 S. Ct. 819 (1984) (public's first amendment right of access to judicial proceedings applies to voir dire proceedings); Globe Newspaper Co. v. Superior Court, 458 U.S. 596 (1982) (Massachusetts law providing for the exclusion of general public from trials of specified sexual offenses involving victims under age of eighteen is unconstitutional limitation of public's first amendment right of access to criminal trials); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (press and public have qualified first amendment right

test for deciding the constitutionality of closure orders entered in suppression hearings over the objection of the defendant is promulgated in *Press-Enterprise Co. v. Superior Court*.[25]

In *Press-Enterprise*,[26] a newspaper company attacked the constitutionality of a trial court's decision to close the voir dire portion of a trial for the rape and murder of a teenage girl.[27] Focusing on first amendment values and prior case law, the Court held that the voir dire portion of a criminal trial is presumptively open to the public, and that this

> presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.[28]

The Court in *Waller* applied the *Press-Enterprise* test for reviewing the constitutionality of closure orders entered in suppression hearings.[29] Recognizing that it had decided *Press-Enterprise* and the other cited cases according to first amendment concerns, the Court nevertheless emphasized that "there can be little doubt 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]

Applying the *Press-Enterprise* test to the facts of *Waller*, the Court observed that the interest advanced by the Georgia Supreme Court, protecting the privacy of persons not before the court,[31] "under certain circumstances . . . may well justify closing portions of a suppression hearing to the public."[32] In *Waller*, however, the state

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of access to criminal trials)). The Court also cited Gannett v. DePasquale, 443 U.S. 368 (1978), in which a majority of the Justices concluded that the public had a qualified constitutional right to attend pretrial suppression hearings. *Waller*, 104 S. Ct. at 2215. *See Gannett*, 443 U.S. at 397 (Powell, J., concurring) (basing right on first amendment); *id.* at 406 (Blackmun, J., joined by Brennan, White, and Marshall, JJ., concurring in part and dissenting in part) (basing right on sixth amendment). The *Waller* Court pointed out that each of the cited cases made clear that the right to an open trial may give way to other rights or interests, such as the defendant's right to a fair trial, or the government's interest in preventing disclosure of sensitive information. *Waller*, 104 S. Ct. at 2215.

25 *Waller*, 104 S. Ct. at 2215 (citing Press-Enterprise Co. v. Superior Court, 104 S. Ct. 819 (1984)).

26 104 S. Ct. 819 (1984).

27 *Id.* at 821.

28 *Id.* at 825.

29 *Waller*, 104 S. Ct. at 2216.

30 *Id.* at 2215.

31 Waller v. State, 251 Ga. at 126-27, 303 S.E.2d at 441.

32 *Waller*, 104 S. Ct. at 2216.

failed to specify whose privacy interests the evidence might infringe, how the evidence would infringe those interests, what portion of the wiretap tapes might infringe those interests, and what portion of the evidence consisted of the tapes.[33] Therefore, the trial court's findings in support of closure were too broad and general to afford a reviewing court an adequate basis for ascertaining whether the closure order was properly entered, and the closure itself was "far more extensive than necessary."[34] Additionally, the Court found that the trial court had failed to consider alternatives to closure.[35]

The Court remanded the case and ordered the state to conduct a new suppression hearing at which time the state court should reconsider the closure issue.[36] The Court stipulated that the trial court should consider conditions at the time of the new hearing and weigh only those interests that continue to justify closure.[37] The Court ordered the trial court to admit the public to significant portions of the new suppression hearing unless the state substantially alters the evidence presented to support the wiretaps and searches.[38]

IV. Discussion and Analysis

A. The Right to a Public Trial

The sixth amendment states, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."[39] This concept of the public trial dates back to ancient common law traditions.[40] More recently, however, courts and legal scholars have ad-

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33 *Id.*

34 *Id.* at 2217.

35 *Id.* at 2216-17. The Court noted that two possible alternatives to closure would be "directing the government to provide more detail about its need for closure, in camera if necessary, and closing only those parts of the hearing that jeopardized the interests advanced" by the state. *Id.* at 2217.

36 *Id.* at 2217. Although agreeing with the "consistent view of the lower federal courts that the defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public trial guarantee," *id.* (citing Levine v. United States, 362 U.S. 610, 627 n.* (1960) (Brennan, J., joined by Douglas, J., dissenting); Douglas v. Wainwright, 714 F.2d 1532, 1542 (11th Cir. 1983), *cert. granted*, 104 S. Ct. 3575 (1984)), the Court in *Waller* declined to order a new trial. *Waller*, 104 S. Ct. at 2217. It reasoned that if a new suppression hearing resulted in "essentially the same evidence being suppressed," a new trial would be a "windfall" for the defendant and contrary to the public interest. *Id.*

37 104 S. Ct. at 2217.

38 *Id.*

39 U.S. Const. amend. VI.

40 *See generally* Radin, *The Right to a Public Trial*, 6 Temp. L.Q. 381 (1932). Radin indicates that the first mention of the public trial guarantee appears to have been in *De Republica Anglorum* by Sir Thomas Smith, who, referring to the jury, noted that anyone

vanced various societal and individual interests that the public trial protects.[41] For instance, open trials advance society's interest in the clearing up of truth.[42] Additionally, the open trial insures that " 'if the judge be *partial*, his partiality and injustice will be evident to bystanders.' "[43]

In addition to fostering society's interest in both seeking truth and an impartial judiciary system, the public trial guarantee protects " 'all persons accused of crime—the innocently accused, that they may not become the victim of an unjust prosecution, as well as the guilty, that they may be awarded a fair trial.' "[44] Justice Harlan highlighted this emphasis on the right to a public trial as a benefit to the accused in *Estes v. Texas*,[45] in which he stated, "the right of 'public trial' is not one belonging to the public, but one belonging to the accused."[46]

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might hear what witnesses said in criminal trials. *Id.* at 382. Later, in 1670, Sir Matthew Hale also wrote that criminal trials were open to the public. *Id.* According to one writer, early Anglo-Saxon criminal trials were "open air meetings of the freemen who were bound to attend them." *See* Gannett v. DePasquale, 443 U.S. 368, 419 (1978) (Blackmun, J., concurring in part and dissenting in part) (quoting F. POLLOCK, THE EXPANSION OF THE COMMON LAW 140 (1904)). Following the Norman Conquest, when English courts established the jury trial, open criminal trials persisted, such that "by the 17th Century, the concept of the public trial was firmly established under the common law." *Gannett*, 443 U.S. at 420 (Blackmun, J., concurring in part and dissenting in part).

The acceptance of a right to a public trial in the American colonies came "largely through the influence of the common law writers [such as Coke, Hale, and Blackstone] whose views shaped the American Legal System." *Id.* at 424 (Blackmun, J., concurring in part and dissenting in part). The first colonial charter emphasized the right of the public rather than of the accused to attend trials. *Id.* The Pennsylvania Frame of Government of 1682, one of "the most influential of the colonial documents regarding the protection of individual rights," stipulated that all trials be open to the public. *Id.* at 424-25 (Blackmun, J., concurring in part and dissenting in part) (citing B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 130, 140 (1971)). Prior to the passage of the Bill of Rights, the Pennsylvania Declaration of Rights of 1776, the Virginia Declaration of Rights, and the Vermont Constitutional Declaration of Rights all contained a provision stipulating that criminal trials be open to the public. *Gannett*, 443 U.S. at 425-26 (Blackmun, J., concurring in part and dissenting in part).

41 *See infra* notes 44-49 and accompanying text.

42 Gannett v. DePasquale, 443 U.S. at 421 (Blackmun, J., concurring in part and dissenting in part) (citing M. HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 343, 345 (6th ed. 1820)).

43 *Id.* at 422 (Blackmun, J., concurring in part and dissenting in part) (quoting M. HALE, *supra* note 42, at 344 (emphasis in original)). *See also In re* Oliver, 333 U.S. 257, 270 (1948) (right to public trial is a "safeguard against any attempt to employ our courts as instruments of persecution" because "[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power").

44 *In re* Oliver, 333 U.S. at 270 n.25 (quoting People v. Murray, 89 Mich. 276, 286, 50 N.W. 995, 998 (1891)).

45 381 U.S. 532 (1965).

46 *Id.* at 588 (Harlan, J., concurring).

A majority of Justices gave constitutional weight to this view in *Gannett v. DePasquale*,[47] which concerned a closure order entered during a pretrial suppression hearing. Rejecting the petitioner's argument that the sixth amendment conferred a right to attend judicial proceedings on the press and public, the Court held that the right to a public trial is "personal to the accused," and exists for the benefit of the accused.[48]

Despite its view that the right to a public trial belongs to the accused, the *Gannett* Court did concede the existence of an independent public interest in the enforcement of this right:

> There can be no blinking the fact that there is a strong societal interest in public trials. Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously, and generally give the public an opportunity to observe the judicial system.[49]

Thus courts and legal scholars have struggled to balance the rights and interests of the accused and the public in open judicial proceedings. Those interests often conflict, and *Waller v. Georgia* represents the Supreme Court's most recent effort to resolve that conflict.

B. THE *WALLER* DECISION

In *Waller*, the Court once again discussed society's various interests in preserving the right to a public trial. It recognized that the open trial discourages both abuse of judicial power[50] and perjury.[51] The Court emphasized, however, that "the central aim of a criminal

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47 443 U.S. 368 (1979).

48 *Id.* at 379-80.

49 *Id.* at 383 (citing Estes v. Texas, 381 U.S. 532, 583 (1965) (Warren, C.J., concurring)). Justice Blackmun's dissent in *Gannett* also stressed that the right to a public trial serves important societal functions. Judges, prosecutors, and police officials are often elected and the main source of information on their official performance is the open trial. *Id.* at 428 (Blackmun, J., concurring in part and dissenting in part). The right to an open trial reflects "the notion deeply rooted in the common law that 'justice must satisfy the appearance of justice.'" *Id.* at 412 (Blackmun, J., concurring in part and dissenting in part) (quoting Levine v. United States, 362 U.S. 610, 616 (1960)). Open trials therefore help to maintain public confidence in the judicial system by allowing the citizenry to observe the workings of the court. *Id.* at 429 (Blackmun, J., concurring in part and dissenting in part). Additionally, the open trial plays "an important role as an outlet for community concern, hostility and emotions" so that "members of the community are less likely to act as self-appointed law enforcers or vigilantes." Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1178 (3rd Cir. 1980).

50 *Waller*, 104 S. Ct. at 2215.

51 *Id.*

proceeding must be to try the accused fairly,"[52] and that a public trial protects this right of the accused.[53] The Court noted that these policies and rights have special force with respect to suppression hearings because suppression hearings determine what evidence will be admitted at trial and therefore have a direct effect on the verdict.[54]

As previously noted, the Court in *Waller* held that the test promulgated in *Press-Enterprise*[55] is the proper standard for ascertaining the constitutionality of closure orders entered in suppression hearings.[56] Thus, the Court held that:

> [T]he 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 closure.[57]

The procedural requirement of this test seems to present no difficulties to a trial court considering closure. The test clearly stipulates that the trial judge is to articulate which "overriding interests" overcome the defendant's presumed right to an open trial, and also to make specific findings that indicate the basis for the closure order.

In promulgating this test, however, the Court has provided little guidance to lower courts regarding the nature of an "overriding interest."[58] Thus trial judges are left to formulate their own definitions of an "overriding interest." Under such circumstances, the *Waller* test may cause trial judges to close judicial proceedings for reasons that do not sufficiently outweigh the strong societal interests weighing in favor of open trials. Therefore, this vague standard may create unnecessary delays in criminal trials because defendants will appeal closure orders on the grounds that the interest cited does not override their interest in a public trial.

In light of the difficulties that the *Waller* test places upon trial courts, a more appropriate test should be one that defines public policy considerations that justify closure of judicial proceedings. G. Michael Fenner and James L. Koley have identified four categories

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52 *Id.*

53 *Id.*

54 *Id.* at 2215-16.

55 104 S. Ct. 819 (1984).

56 *Waller*, 104 S. Ct. at 2216.

57 *Id.*

58 See *In re* Herald Co., 734 F.2d 93, 99 (2d Cir. 1984), for a discussion of various standards enunciated by the Supreme Court in deciding the constitutionality of closure orders.

of possible justifications for closure: 1) fair administration of justice; 2) national security; 3) protection of confidential investigative information; and 4) legally protected state and private confidences.[59]

The first justification concerns the defendant's sixth amendment right to a fair trial.[60] The defendant's interest in an impartial jury would override the guarantee to a public trial if the "publicity generated at an open pre-trial proceeding will prejudice the jury pool against the defendant."[61] Likewise, the defendant's interest in a fair trial also may override the public trial guarantee when the trial court cannot compel witnesses to testify in an open courtroom.[62] In either situation, the trial court must recognize that "the central aim of a criminal proceeding must be to try the accused fairly."[63] Therefore, the defendant's right to a fair trial would override other societal interests in open trials, and the trial court should close the proceeding to the public.

Fenner and Koley next assert that national security interests also may justify closing judicial proceedings.[64] Courts have invoked national security as a justification for curbing first amendment rights,[65] and similar policy considerations would dictate closure of a suppression hearing to protect national security. National security is an "interest which can justify infringement of the 'almost insurmountable protection' [that the first amendment provides] against prior restraints."[66] Because the first and sixth amendments are equally protective of the open trial,[67] when national security inter-

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59 Fenner & Koley, *Access to Judicial Proceedings: To Richmond Newspaper and Beyond*, 16 HARV. C.R.-C.L. L. REV. 415, 415-44 (1981).

60 *Id.* at 440 (citing Gannett v. DePasquale, 443 U.S. 368, 378-87 (1978)).

61 *Id.* at 441.

62 *Id.* Such a contingency might occur if "a witness' fear of retaliation or a psychological block against relating . . . facts in public" prevents that witness from testifying in open court. *Id.*

63 104 S. Ct. at 2215. As one court noted, "There is little to be gained by admitting the public to pretrial proceedings in order to promote the appearance of fairness if the very presence of the public makes a fair trial impossible." *In re* Globe Newspapers Co., 729 F.2d 47, 53 (lst Cir. 1983). Likewise, Justice Blackmun noted in his dissent in *Gannett* that the sixth amendment's "presumption in favor of open proceedings . . . does not require that all proceedings be held in open court when to do so would deprive a defendant of a fair trial." *Gannett*, 443 U.S. at 439 (Blackmun, J., concurring in part and dissenting in part).

64 Fenner & Koley, *supra* note 59, at 441.

65 *Id.* at 441-42 n.134 (citing Haig v. Agee, 453 U.S. 280, 308-09 (1981); New York Times Co. v. United States, 403 U.S. 713, 726 (1971) (Brennan, J., concurring); Near v. Minnesota, 283 U.S. 697, 716 (1931)).

66 *Id.* at 442 n.133 (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587 (1980) (Brennan, J., concurring in the judgment)).

67 *Waller*, 104 S. Ct. at 2215.

ests are strong enough to overcome the first amendment right of access to judicial proceedings, such interests will likewise override the defendant's sixth amendment right to a public trial.

Protection of confidential investigative information from public dissemination is the third interest that may override first and sixth amendment presumptions in favor of open hearings.[68] "Public policy considerations may support confidentiality . . . to the extent that the effectiveness of a lawful investigative technique depends on keeping details from those investigated . . . ."[69] This interest may be especially compelling in the context of a suppression hearing because the court may find itself scrutinizing the details of ongoing investigations.[70]

The final category of interests that may justify closure of a suppression hearing over the defendant's objections comprises "important state and private confidences recognized by law . . . [such as] trade secrets and an individual's right to privacy."[71] For example, Title III of the Omnibus Crime Control and Safe Streets Act of 1968[72] regulates the interception and disclosure of wire and oral communications; one of its purposes is to protect the privacy of such communications.[73] Thus, a trial court might find that the privacy interests of people implicated through intercepted communication override first and sixth amendment rights of public trials and hearings.

It is important to note that the presence of interests in one or more of these four categories does not necessarily warrant the finding that such interests will override the guarantee of a public trial.[74] "[T]he presumption of openness must be overcome on the facts of each particular case . . . ."[75] These four categories, however, would enable a trial court to more easily identify an interest as overriding or not, and thus reduce long and costly delays due to appeals of closure orders.

V. Conclusion

The Court's decision in *Waller*, that a trial court may not close a

68 Fenner & Koley, *supra* note 59, at 443 (citing Gannett v. DePasquale, 443 U.S. 368, 398 (1979) (Powell, J., concurring); United States v. Bell, 464 F.2d 667 (2d Cir. 1972)).

69 *Id.* at 443.

70 *Id.*

71 *Id.* (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 600 n.5 (1980) (Stewart, J., concurring in the judgment)).

72 18 U.S.C. §§ 2510-2520 (1970 & Supp. 1985).

73 United States v. Cianfrani, 573 F.2d 835, 855 (3d Cir. 1978).

74 Fenner & Koley, *supra* note 59, at 444.

75 *Id.*

suppression hearing over the objection of the defendant unless the trial judge satisfies the *Press-Enterprise* test, is correct given the important societal policies that the open trial serves. Nevertheless, the Court's stipulation that an interest must be overriding before closure can occur may cause confusion on the part of the trial courts. Fenner and Koley's four categories provide trial courts with a clearer guide to what may constitute an overriding interest. Such guidance will insure that the defendant's right to public trial and society's interest in insuring the existence of that right are not curtailed unless sufficiently countervailing interests present themselves.

In combination with the *Waller* requirements—that the closure be narrowly tailored to serve the overriding interest, that the trial court consider alternatives to closure, and that the trial court make and articulate findings adequate to support closure—this four-category approach to determining when an interest is sufficiently overriding to justify closure will insure that courts do not arbitrarily sacrifice first and sixth amendment rights to open suppression hearings.

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