CLOSED COURTROOMS: SIXTH AMENDMENT AND PUBLIC TRIAL RIGHT IMPLICATIONS

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Within the pantheon of constitutional liberties, a criminal defendant's right to a public trial is singularly significant. It is embedded in our fiber as Americans and synonymous with fairness for courts to be open and their proceedings transparent. Despite its seemingly obvious nature, public trial jurisprudence can sometimes feel like a dramatically unsettled area of law and presents unique, nuanced litigation challenges both at the district court and appellate levels.

Part One of this article examines the origins of the right to a public trial. Part Two analyzes appellate review standards in public trial violation cases, the various categories of courtroom closures, and the triviality doctrine.

In its conclusion, this article suggests best practices to counter courtroom closure claims and avoid reversals based on public trial right violations.

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I. ORIGINS OF THE RIGHT TO A PUBLIC TRIAL

The public examination of witnesses was already "a common feature" of law in the Roman Empire when Hadrian served as emperor from 117 to 138 C.E.[1] However, throughout history, trials, or their functional equivalent, have been shrouded in secrecy or resulted in other severe limitations on the rights of the accused. These instances show the importance of both the public and a criminal defendant's right to an open court.

During the Spanish Inquisition, the preliminary examination of the accused, the questioning of witnesses, and the trial of the accused were conducted in secret.[2] In England, court proceedings required public access to "moots," which later evolved into juries, consisting of "the freemen of the community."[3] In the eleventh century, the jury transformed into a small group of individuals, but "the public character of the proceedings, including jury selection, remained unchanged."[4] As early as the sixteenth century, jurors in England were selected openly in the presence of judges, the prosecutor, and the accused.[5]

In sixteenth century England, the Star Chamber and the Commission for Causes Ecclesiastical "focused its attention on uncovering Roman Catholic conspiracies against the monarchy and the Church of England."[6] While some authorities argue that Star Chamber trials were public, like the Inquisition, witnesses were exam-

1. Harold Shapiro, *Right to a Public Trial*, 41 J. CRIM. L. & CRIMINOLOGY 782, 782 (1951).

2. *In re* Oliver, 333 U.S. 257, 268 n.21 (1948) (citing Max Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381, 389 (1932)).

3. Press-Enterprise Co. v. Superior Ct. of Cal., 464 U.S. 501, 505 (1984).

4. *Id.* at 506.

5. *Id.* at 507 (quoting THOMAS SMITH, DE REPUBLICA ANGLORUM 96 (1565) (Alston ed. 1906)).

6. United States v. Gecas, 120 F.3d 1419, 1448–49 (11th Cir. 1997) (observing that Puritans left England for Plymouth Colony in 1620 partly because of the Star Chamber).

ined privately, as was questioning of the accused.[7] In sixteenth century France, King Louis XV's monarchy employed *lettres de cachet*, literally letters stamped or embossed with the king's signature or seal that ordered an individual to "be forthwith imprisoned or exiled without a trial or an opportunity to defend himself."[8] "In the eighteenth century they were often issued in blank to local police" and "Louis XV is supposed to have issued more than 150,000 lettres de cachet during his reign."[9]

These historical examples seem oppressive now but prove the benefits of open courts and how secrecy provided fertile ground for seeds of abuse to grow. Legal scholar Jeremy Bentham appreciated the value that publicity played in restraining judicial abuse, calling it the "soul of justice,"[10] and emphasized the significant role that publicity played as an important check on judicial arbitrariness.[11]

The presumption of public jury selection later debuted in colonial American proceedings.[12] Many of the thirteen colonies enacted laws requiring jury selection to occur in open court.[13] For example, late-eighteenth-century statutes in North Carolina and Delaware showed a jury selection process similar to the jury

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7. *In re Oliver*, 333 U.S. at 268 n.21 ("The secrecy of the ecclesiastical courts and the civil law courts was often pointed out by commentators who praised the publicity of the common law courts."), n.22.

8. *Id.* at 269 n.23.

9. *Id.* (italics omitted).

10. *See* Gannett Co. v. DePasquale, 443 U.S. 368, 422 (1979) (Blackmun, J., dissenting) ("Bentham stressed that publicity was 'the most effectual safeguard of testimony, and of the decisions depending on it; it is the soul of justice; it ought to be extended to every part of the procedure, and to all causes.'") (quoting JEREMY BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 67 (1825)).

11. *In re Oliver*, 333 U.S. at 271 (quoting 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827)).

12. Press-Enterprise Co. v. Superior Ct. of Cal., 464 U.S. 501, 508 (1984) (discussing accounts on the need for bystanders at trials following the Boston Massacre).

13. *Id.* ("public jury selection was the common practice in America when the Constitution was adopted.").

wheel employed today.[14] Like Bentham, Founding Fathers Alexander Hamilton and John Adams saw public proceedings as a necessary safeguard against potential corruption.[15] Although never discussed during the debate on the Sixth Amendment,[16] Americans explicitly incorporated these sentiments and enshrined public trials as a constitutional right.[17]

As of 1948, when the Supreme Court decided *In re Oliver*, it stated it was "unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country."[18] *In re Oliver* dealt with a quirk of Michigan law that allowed for a "one-man grand jury" investigation to be conducted by a state circuit judge.[19] In performance of these duties, the judge summoned a witness as part of an alleged gambling and corruption investigation and questioned him, under oath, and in "secret in accordance with the traditional grand jury

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14. In both states, jurors' names were placed in a box and then drawn in open court. United States v. Williams, 974 F.3d 320, 382 (3d Cir. 2020) (Restrepo, J., dissenting) (first citing JAMES DAVIS, COMPLETE REVISAL OF ALL THE ACTS OF ASSEMBLY, OF THE PROVINCE OF NORTH-CAROLINA, NOW IN FORCE & USE 549 (1773); and then citing 2 LAWS OF THE STATE OF DELAWARE 1073 (Samuel & John Adams eds. 1797)).

15. *Id.* (quoting THE FEDERALIST NO. 83, at 463 (Alexander Hamilton) (P.F. Collier ed., 1901)) ("Founding Fathers believed that public court proceedings provided safeguards integral to the nascent republic. . . . [J]ury selection was viewed as a 'double security' against corruption that would require a person to 'corrupt both the court and the jury.'"); *id.* (quoting John Adams, *Novanglus; or, A History of the Dispute with America from Its Origin, in 1754, to the Present Time*, *in* THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 152, 199 (C. Bradley Thompson ed., 2000)) ("[D]raw[ing] [jurors] by chance out of a box in open town meeting best secured against a possibility of corruption of any kind . . . having seen with their own eyes, that nothing unfair ever did or could take place.") (internal quotations omitted).

16. *Shapiro*, supra note 1, at 783.

17. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial"); Levine v. United States, 362 U.S. 610, 616 (1960) (holding that "due process demands appropriate regard for the requirements of a public proceeding"). The right to a public trial is incorporated to the States by the Fourteenth Amendment. *See* Waller v. Georgia, 467 U.S. 39 (1984).

18. *In re* Oliver, 333 U.S. 257, 266 (1948).

19. *Id.* at 258.

method."[20] The judge concluded that the witness's story did not "jell" and "immediately charged him with contempt, immediately convicted him, and immediately sentenced him to sixty days in jail."[21] The Supreme Court held that this abrupt change from grand jury proceeding to trial without an abatement in secrecy violated the defendant's right to a public trial on due process grounds.[22] Due process under the Fourteenth Amendment meant that the defendant could not be sentenced to prison without first having had a public trial.[23] In a prescient observation on an issue that would recur frequently in future cases, the Supreme Court noted that "without exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense may be charged."[24]

The benefits of having open courts are legion. Public proceedings: (1) provide an appearance of fairness;[25] (2) discourage bias or partiality in judicial rulings or prosecutorial conduct; (3) discourage perjury by requiring witnesses' assertions to be tested in public; (4) encourage witnesses who may not know they have relevant information to testify; (5) allow for rebuttal witnesses to counter false testimony; (6) provide the court, parties, and witnesses with scrutiny that fosters a stricter sense of conscientiousness in performing their duties; (7) instill confidence in the justice system; (8) educate the public about the legal system;[26] (9) allow victims of the crime, family members, or others effected

20. *Id.* at 258–59.

21. *Id.* at 259.

22. *Id.* at 272–73.

23. *Id.* at 273.

24. *Id.* at 271–72.

25. Offutt v. United States, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice.").

26. *See* Gannett Co. v. DePasquale, 443 U.S. 368, 383 (1979); United States v. Cianfrani, 573 F.2d 835, 847–48, 852–53 (3d Cir. 1978) (citing legal commentators Blackstone and Wigmore).

to observe and speak;[27] and (10) have "significant community therapeutic value."[28]

The Sixth Amendment right to a public trial is a misnomer since the right is not limited to trials; it applies to suppression hearings[29] and voir dire,[30] which, as we will see below, is the stage where closures and exclusions often occur. Moreover, while the Sixth Amendment right to a public trial is "personal to the accused,"[31] several Supreme Court justices observed that the public has a separate, societal interest in open proceedings.[32] Therefore, while a defendant has a firmly rooted right to a public trial, "there is no constitutional guarantee of a closed trial at the defendant's request"[33] and both Justices Powell and Blackmun described the burdens that a defendant must show to obtain a closed trial as "a strict and inescapable necessity for closure."[34]

Public trial rights are also grounded in the First Amendment. In *Richmond Newspapers, Inc.*, the Supreme Court expanded the scope of the public trial right doctrine by holding that "the right to attend criminal trials is implicit in the guarantees of the First Amend-

27. *Gannett Co.*, 443 U.S. at 428 (Blackmun, J., dissenting); *see also* 18 U.S.C. § 3771(a)(2)–(4) (affording crime victims the rights, inter alia, to timely notice of any public court proceeding, to not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding, and to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding).

28. Richmond Newspapers v. Virginia, 448 U.S. 555, 570 (1980).

29. Waller v. Georgia, 467 U.S. 39, 42 (1984).

30. *See generally* Presley v. Georgia, 558 U.S. 209 (2010); Press-Enterprise Co. v. Superior Ct. of Cal., 464 U.S. 501 (1984); United States v. Gupta, 699 F.3d 682, 685 (2d Cir. 2011).

31. *Gannett Co.*, 443 U.S. at 380; *see also* Faretta v. California, 422 U.S. 806, 848 (1975) (Blackmun, J., dissenting); Estes v. Texas, 381 U.S. 532, 583 (1965) (Warren, C.J., concurring).

32. *Gannett Co.*, 443 U.S. at 406 (Blackmun, J., dissenting); Craig v. Harney, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in the court room is public property.").

33. United States v. Powers, 622 F.2d 317, 323 (8th Cir. 1980).

34. *See Gannett Co.*, 443 U.S. at 400 (Powell, J., concurring); *see id.* at 440–43 (Blackmun, J., dissenting).

ment."[35] The Supreme Court reasoned that included in the freedom of speech was "some freedom to listen" since the First Amendment protects the right to receive information and ideas.[36] This means that the First Amendment prohibits "government from summarily closing courtroom doors."[37] However, this "does not mean that the First Amendment rights of the public and representatives of the press are absolute" and trial judges may "impose reasonable limitations on access."[38] In their concurring opinion, Justices Brennan and Marshall observed the practical reality of the "finite physical capacity" of courtrooms.[39] The justices noted that, on those occasions, "the constitutional demands of a fair trial" may "sometimes justify limitations upon the unrestricted presence of spectators in the courtroom."[40] But even in those circumstances, "representatives of the press must be assured access."[41]

The First and Sixth Amendments confer constitutional rights to the public and the defendant, respectively. However, whether these rights are mutual or exclusive is unclear. The Supreme Court observed, "[t]he extent to which the First and Sixth Amendment public trial rights are coextensive is an open question, and it is not necessary here to speculate whether or in what circumstances the reach or protections of one might be greater than the other."[42]

II. COURTROOM CLOSURES

The balancing of how this plays out in real time, at trial, presents a potential minefield on appeal where

35. Richmond Newspapers v. Virginia, 448 U.S. 555, 580 (1980) (quoting Branzburg v. Hayes, 408 U.S. 665, 681 (1972)).

36. *Id.* at 576.

37. *Id.*

38. *Id.* at 581 n.18.

39. *Id.* at 600 (Brennan, J. & Marshall, J., concurring).

40. *Id.*

41. *Id.* at n.3.

42. Presley v. Georgia, 558 U.S. 209, 213 (2010).

the court is often deprived of an accurate record of what transpired at trial that led to a closure. For example, a spectator turned away from a courtroom by a deputy in a hallway or conflicting accounts of whether the courtroom door was locked may lead to problematic judicial fact-finding on whether a closure actually occurred. These factual circumstances inform how courts determine whether a closure actually occurred; whether it was partial, complete, constructive, or trivial; or whether only certain individuals were excluded from court.[43] The role of the government, however, is clear: Federal prosecutors "may not move for or consent to the closure of any [judicial] proceeding without the express prior authorization of the Deputy Attorney General."[44]

Parties seeking to affirmatively close courtroom proceedings are required to make a preliminary showing. In *Waller*, the Supreme Court held that such parties "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."[45] *Waller* arose from a Georgia state RICO prosecution that involved wiretaps.[46] The prosecutor requested that the suppression hearing be closed since playing the wiretaps could taint evidence for use in future prosecutions.[47] The Court granted the government's request over objection, and the seven-day suppression hearing was "closed to all persons other than witnesses, court personnel, the parties, and the law-

43. "Whether a closure is total or partial . . . depends not on how long a trial is closed, but rather who is excluded during the period of time in question." United States v. Thompson, 713 F.3d 388, 395 (8th Cir. 2013). A complete closure involves excluding all persons from the courtroom for some period while a partial closure involves excluding one or more, but not all, individuals for some period. Judd v. Haley, 250 F.3d 1308, 1316 (11th Cir. 2001).

44. DEP'T OF JUSTICE, JUSTICE MANUAL § 9-5.150 (2018); *see also* 28 C.F.R. § 50.9(d) (2014).

45. Waller v. Georgia, 467 U.S. 39, 48 (1984).

46. *Id.* at 41.

47. *Id.* at 42.

yers."[48] Only two and a half hours of wiretap recordings were played during the course of the suppression hearing.[49]

The Supreme Court found the trial court's findings to be "broad and general" and insufficient to "justify closure of the entire hearing."[50] The trial court was faulted for not: (1) considering alternatives to closure of the entire hearing; (2) directing the government to provide additional details about its need for the closure; and (3) "closing only those parts of the hearing that jeopardized the interests advanced."[51] The case was remanded for a new suppression hearing and to decide what portions, if any, must be closed.[52]

Waller set the standard for all future courtroom closure cases, providing a roadmap for courts to follow when addressing whether proceedings should be closed to the public.

A. The Gordian Knot: Review of Public Trial Violations

There are several applicable standards of review for Sixth Amendment public trial right violations. In *Waller*, the Supreme Court agreed that a defendant is not required to prove specific prejudice in order to obtain relief for a public trial right violation.[53] This makes a violation of the right to a public trial, a "structural error, *i.e.*, an error entitling the defendant to automatic reversal without any inquiry into prejudice."[54] The "defining feature of a structural error is that it 'affect[s] the framework within which the trial proceeds,' rather

48. *Id.*

49. *Id.*

50. *Id.* at 48.

51. *Id.* at 48–49.

52. *Id.* at 50.

53. *Id.* at 49; *see also* United States v. Kallas, 814 F. App'x 198, 201 (9th Cir. 2020) (quoting United States v. Withers, 638 F.3d 1055, 1063 (9th Cir. 2011)) ("A total courtroom closure for a non-trivial duration, without first complying with the requirements of Supreme Court precedent, is structural error that 'warrant[s] habeas relief without a showing of specific prejudice.'").

54. Weaver v. Massachusetts, 137 S. Ct. 1899, 1905 (2017).

than being 'simply an error in the trial process itself.'"[55] Structural errors are rare and found "only in a 'very limited class of cases.'"[56] These include: (1) the complete denial of counsel;[57] (2) a biased trial judge;[58] (3) racial discrimination in grand jury selection;[59] (4) denial of self-representation at trial;[60] (5) a defective reasonable doubt instruction;[61] and (6) the right to a public trial.[62] Despite the importance of this class of errors, "the term 'structural error' carries with it no talismanic significance as a doctrinal matter" and "means only that the government is not entitled to deprive the defendant of a new trial by showing that the error was 'harmless beyond a reasonable doubt.'"[63] Therefore, if the error is structural, preserved, and the issue is raised on direct appeal, a defendant is "generally entitled to 'automatic reversal' regardless of the error's actual 'effect on the outcome.'"[64]

This is only true, however, if the violation is objected to at trial, otherwise, the claim is forfeited and plain error applies.[65] Under this standard, there must be an "'error' that is 'plain' and that 'affects substantial rights.'"[66] Even if these three prongs are met, "the decision to correct the forfeited error [rests] within the sound discretion of the court of appeals, and the court should not exercise that discretion unless the error 'seriously affect[s] the fairness, integrity or public reputa-

55. *Id.* at 1907 (quoting Arizona v. Fulminante, 499 U.S. 279, 310 (1991)).

56. Neder v. United States, 527 U.S. 1, 8 (1999) (quoting Johnson v. United States, 520 U.S. 461, 468 (1997)).

57. Gideon v. Wainwright, 372 U.S. 335, 345 (1963).

58. Tumey v. Ohio, 273 U.S. 510, 523 (1927).

59. Vasquez v. Hillery, 474 U.S. 254, 263 (1986).

60. McKaskle v. Wiggins, 465 U.S. 168, 174 (1984).

61. Sullivan v. Louisiana, 508 U.S. 275, 279 (1993).

62. Waller v. Georgia, 467 U.S. 39, 39 (1984).

63. Weaver v. Massachusetts, 137 S. Ct. 1899, 1910 (2017) (quoting Chapman v. California, 386 U.S. 18, 24 (1967)).

64. *Id.* (citing Neder v. United States, 527 U.S. 1, 7 (1999)).

65. Johnson v. United States, 520 U.S. 461, 466 (1977) (applying plain error standard to unpreserved claims of structural error); *see also* Fed. R. Crim. P. 52(b).

66. United States v. Olano, 507 U.S. 725, 732 (1993).

tion of judicial proceedings.'"[67] "[T]here is a question as to whether the third prong of the plain error test is met automatically in cases of structural error,"[68] but it often is in the context of courtroom closures.[69] Several courts have applied plain error review to unpreserved claims of a public trial violation.[70] This deprives a defendant of the temptation to remain silent at trial hoping for a guaranteed automatic reversal[71] and incentivizes contemporaneous objections.[72]

There is a third way: the waiver doctrine. If forfeiture is the failure to make the timely assertion of a right,[73] waiver is the "intentional relinquishment or abandonment of a known right."[74] Aside from structural and plain error review, courts have applied waiver to public trial right claims.[75]

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67. *Id.* (quoting United States v. Young, 470 U.S. 1, 15 (1985)).

68. United States v. Anderson, 881 F.3d 568, 573 (7th Cir. 2018).

69. United States v. Williams, 974 F.3d 320, 382 (3d Cir. 2020) (quoting Weaver v. Massachusetts, 137 S. Ct. 1899, 1905 (2017)) ("It is thus no surprise that the Supreme Court classifies courtroom closures 'as a structural error' that generally 'entitl[es] the defendant to automatic reversal.'").

70. *See, e.g.*, United States v. Negrón-Sostre, 790 F.3d 295, 301 (1st Cir. 2015); United States v. Cazares, 788 F.3d 956, 966 (9th Cir. 2015); United States v. Gomez, 705 F.3d 68, 74–75 (2d Cir. 2013).

71. *Anderson*, 881 F.3d at 572 (observing that plain error "prevents the subversion of the trial process that would result if an unpreserved structural error were interpreted as guaranteeing an automatic reversal. In such a scenario, defense counsel would have an incentive to ignore the error and allow the trial to proceed to conclusion, with the knowledge that the defendant has a free pass to a new trial if the outcome is not favorable.").

72. Puckett v. United States, 556 U.S. 129, 134 (2009) ("And of course the contemporaneous-objection rule prevents a litigant from 'sandbagging' the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor.").

73. United States v. Olano, 507 U.S. 725, 733 (1993).

74. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

75. *See, e.g.*, United States v. Candelario-Santana, 834 F.3d 8, 21 n.3 (1st Cir. 2016); United States v. Christi, 682 F.3d 138, 142 (1st Cir. 2012); Levine v. United States, 362 U.S. 610, 619–20 (1960) ("Due regard generally for the public nature of the judicial process does not require disregard of the solid demands of the fair administration of justice in favor of a party who, at the appropriate time and acting under advice of counsel, saw no disregard of a right, but raises an abstract claim only as an afterthought on appeal."); Singer v. United States, 380 U.S. 24, 35 (1965) (noting that a defendant can waive the right to a public trial); United States v. Hitt, 473 F.3d 146, 155 (5th Cir. 2006) (finding waiver of Sixth Amendment right to a public trial); United States v.

On collateral review, a petitioner raising a public trial right must demonstrate prejudice.[76] Although the right to a public trial is fundamental and "structural," it is not absolute and is "subject to exceptions."[77] Even in *Waller*, the Supreme Court cautioned that "the remedy should be appropriate to the violation."[78]

B. Excluded Individuals, Partial and Constructive Closures

"[T]he benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance."[79] Whereas *Waller* dealt with a complete courtroom closure, on some occasions only certain individuals are excluded. In *Presley*, prior to jury selection the court noticed a lone spectator who was the defendant's uncle.[80] The judge told Presley's uncle that he was not allowed in the courtroom and had to leave that floor of the courthouse entirely.[81] Defense counsel objected to "the exclusion of the public from the courtroom."[82] The judge said that there was no space for them to sit in the audience.[83] When Presley's counsel pressed for "some accommodation," the judge repeated that there was insufficient space and stated that there was "really no need for the uncle to be present during jury selection" and "his uncle cannot sit and intermingle with members of the jury panel."[84] Presley was ultimately convicted but

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Agosto-Vega, 617 F.3d 541, 554 (1st Cir. 2010) (Howard, J., concurring) (finding waiver of the closure a "close call").

76. Weaver v. Massachusetts, 137 S. Ct. 1899, 1910–11 (2017); *see also* Bucci v. United States, 662 F.3d 18, 30 (1st Cir. 2011); Owens v. United States, 483 F.3d 48, 63 (1st Cir. 2007).

77. *Weaver*, 137 S. Ct. at 1909; *see also* United States v. Williams, 974 F.3d 320, 341 (3d Cir. 2020) ("The fact that a type of error has been deemed 'structural' has no independent significance for applying *Olano*'s fourth prong.").

78. Waller v. Georgia, 467 U.S. 39, 50 (1984).

79. *Id.* at 49 n.9.

80. Presley v. Georgia, 558 U.S. 209, 210 (2010).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

moved for a new trial based on the exclusion of the public from voir dire.[85] Presley was able to show that there was space: fourteen prospective jurors could have fit in the jury box, and the remaining twenty-eight would have only taken up one side of the courtroom gallery.[86] The trial judge denied the motion and based his closure ruling on his "discretion," which both the Court of Appeals of Georgia and the Supreme Court of Georgia affirmed.[87] The Georgia Supreme Court held "that trial courts need not consider alternatives to closure absent an opposing party's proffer of some alternatives,"[88] effectively shifting the *Waller* burden from the court to the parties.

In a rare summary disposition,[89] the Supreme Court reversed and found the issue "well settled."[90] According to the Supreme Court, the Georgia trial court did not heed its repeated admonitions to consider alternatives to closure and "to take every reasonable measure to accommodate public attendance at criminal trials."[91] The Supreme Court found nothing in the record that showed that "the trial court could not have accommodated the public at Presley's trial."[92] Several "possibilities" included "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."[93] The Court seemed to take umbrage with the trial court's vague references about the possibility of the venire overhearing prejudicial remarks from Presley's uncle:

85. *Id.*

86. *Id.* at 211.

87. *Id.*

88. *Id.* at 214.

89. Wyrick v. Fields, 459 U.S. 42, 50 (1982) (Marshall, J., dissenting) ("summary reversal is an exceptional disposition" and "should be reserved for situations in which the applicable law is settled and stable, the facts are not disputed, and the decision below is clearly in error.").

90. *Presley*, 558 U.S. at 213.

91. *Id.* at 215.

92. *Id.*

93. *Id.*

"[i]f broad concerns of this sort were sufficient to override a defendant's constitutional right to a public trial, a court could exclude the public from jury selection almost as a matter of course."[94] Although not explicitly referenced in the opinion, the fact that the defendant's uncle was excluded made the closing in *Presley* particularly troublesome.[95]

Presley spawned a number of cases in its wake, several in the First Circuit, which presented both familiar and unique public trial right claims.

In *Agosto-Vega*, family members attempted to enter the courtroom during jury selection when they were stopped by court security officers.[96] When defense counsel raised the issue with the court, the judge replied that "the benches" were "full of jurors."[97] Defense counsel suggested that the jury box be used to seat jurors, which would open a bench for family members.[98] The court expressed concern about "family members touching potential jurors" during selection and indicated that it wanted to keep all of the venire together.[99] The court also stated that there would be no evidence or argument during selection, which indicated the judge's sentiment that "jury empanelment was not part of the process in which it particularly mattered whether Agosto's relatives were present."[100] The courtroom was then closed and no one was permitted entry for jury selection.[101]

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94. *Id.* Justices Thomas and Scalia dissented in *Presley*. *Id.* at 216. They took issue with the summary disposition handling of the case and did not find that *Waller* and *Press-Enterprise I* expressly held that jury voir dire was covered by the Sixth Amendment's Public Trial Clause. *See id.* at 218–19.

95. Smith v. Hollins, 448 F.3d 533, 539 (2d Cir. 2006) ("Under *Waller* and its progeny, courts must undertake a more exacting inquiry when excluding family members, as distinguished from the general public . . . .").

96. United States v. Agosto-Vega, 617 F.3d 541, 544 (2010).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

The First Circuit began by commending the district court for "trying to insulate the jury from improper influences," but noted that "there are higher constitutional values which cannot be overlooked absent exceptional circumstances."[102] The court found that the trial judge could have taken a number of measures to shield the jury while allowing members of the public in court, including allowing spectators in as jurors were excused or admonishing members of the venire about improper contacts.[103] If these remedies remained insufficient, the court "was required to substantiate its actions by specific findings in support thereof," the court wrote, before vacating the defendants' convictions and remanding the case for a new trial.[104]

The *Agosto-Vega* decision included three other noteworthy issues. First, it rejected the government's efforts to distinguish the case from *Presley* based on the size of the courtroom.[105] Courts will likely, therefore, continue to find arguments about insufficient available space for the public unpersuasive. Second, the court reaffirmed the importance of family attendance at criminal trials, as observed by the Supreme Court sixty-two years earlier in *In re Oliver*,[106] by cautioning trial judges not to "minimize the importance of a criminal defendant's interest in the attendance and support of family and friends" since "[t]o say the least, this support is ineffective in absentia."[107] Third, and perhaps most importantly, the court upbraided the government for remaining silent while the events unfolded and stated that its suggestion of "alternatives to this extreme outcome might very well have saved us all the need for re-

102. *Id.* at 547.

103. *Id.*

104. *Id.* at 547–48.

105. *Id.* at 547, n.3.

106. *In re* Oliver, 333 U.S. 257, 271–72 (1948) (observing that the "accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged."); *see also* Vidal v. Williams, 31 F.3d 67, 69 (2d Cir. 1994) (observing the Supreme Court's "special concern" for ensuring family attendance at criminal trials).

107. *Agosto-Vega*, 617 F.3d at 548.

peating this exercise."[108] Federal prosecutors would do well to take these last words as a harbinger of the potential for reversal if ever confronted with a courtroom closure issue. In the context of closed courtrooms, government silence is not golden.

Negrón-Sostre is an example of how unintentional courtroom closures—those never explicitly ordered by a court—can result in a new trial even under plain error review.[109] *Negrón-Sostre* dealt with the trial of five individuals who were part of a seventy-four-person drug trafficking conspiracy that operated a full-time "drug market-place" called "La Quince."[110] La Quince sold cocaine, heroin, crack cocaine, marijuana, oxycodone, and alprazolam within 1,000 feet of a public school using a defined hierarchy of leaders, runners, and sellers.[111] La Quince even marketed its wares by distributing "free samples of new drug batches."[112] As the First Circuit aptly described, "[i]n short, Walmart had nothing on La Quince."[113]

After a three-month trial, which the court described as "doomed before it started," the convictions were vacated and the case was remanded for a new trial because of the exclusion of the public during jury selection, an alleged "longstanding practice" by the district court.[114] Several family members and friends of the defendants testified at a post-trial evidentiary hearing

108. *Id.* at 547.

109. *See, e.g.*, Owens v. United States, 483 F.3d 48, 63 (1st Cir. 2007) ("[E]ven if the courtroom was closed because of inattention by the judge, courts have expressed concern in the past where a court officer's unauthorized closure of a courtroom impeded public access."); Walton v. Briley, 361 F.3d 431, 433 (7th Cir. 2004) ("Whether the closure was intentional or inadvertent is constitutionally irrelevant."); Martineau v. Perrin, 601 F.2d 1196, 1200 (1st Cir. 1979) (noting Sixth Amendment concern where marshals locked courtroom doors without authorization); United States v. Keaveny, 181 F.3d 81 (1st Cir. 1999) (per curiam) (unpublished) ("[C]onstitutional concerns may be raised even by a court officer's unauthorized partial exclusion of the public.").

110. United States v. Negrón-Sostre, 790 F.3d 295, 299 (1st Cir. 2015).

111. *Id.* at 299–300.

112. *Id.* at 299.

113. *Id.*

114. *Id.*

along with a court security officer, a deputy U.S. marshal, and defense attorneys.[115] One defendant's sister testified that when she attempted to enter the courtroom during jury selection an unidentified person standing by the door told her that family members were not allowed entry until jury selection was finished.[116] Another defendant's wife testified that a court security officer denied her entry, and her husband's attorney confirmed that "only the lawyers, prosecutors, judge, defendants, and potential jurors were allowed inside," as "usual."[117] Five defense attorneys testified that it was the district court's practice to close the courtroom for voir dire and some admitted they did not object because it was "common practice" and "standard operating procedure."[118] One defense attorney even "admitted that he raised the issue of sealing the room to prevent jurors from leaving."[119] The district court, however, never ordered the courtroom to be sealed.[120] A marshal testified that the courtroom doors were unlocked and he never told anyone that they could not enter.[121] But, a court security officer testified that the court's "tendency" was not to allow family into the courtroom during jury selection due to "space and security."[122]

The district court made five specific factual findings following its evidentiary hearing: (1) all available seats were taken by the seventy-five members of the venire; (2) the courtroom was not locked by order of the court or by the deputy marshal; (3) family and friends were at the courthouse, but "no members of the public entered the courtroom" although "those who attempted to look through the windows in the courtroom door were told to

115. *Id.* at 302–03.
116. *Id.* at 302.
117. *Id.*
118. *Id.* at 303.
119. *Id.*
120. *Id.*
121. *Id.* at 302 (Marshal testifying that "we didn't have space, so I didn't have to tell anybody.").
122. *Id.*

step away from the door;"[123] (4) "neither the court nor the deputy marshal ordered [that] the courtroom be closed;" and (5) "none of the attorneys objected to the courtroom closure."[124] The district court also added that the failure of the family members to enter the courtroom was due to attorneys informing them that entry was not possible during jury selection.[125]

The First Circuit conceded that the case presented a "peculiar posture" since "no party affirmatively sought to close the courtroom," "the district court erroneously found that there was no closure," and the defense attorneys "were partly at fault."[126] However, the circuit court found that since the *Waller* test was "never applied," the first two prongs of plain error were met.[127] The court also found that the error affected the defendants' substantial rights and the fairness, integrity or public reputation of judicial proceedings.[128] The court noted that the "ultimate responsibility" for ensuring public access to the courtroom rested with the district court, which failed to "properly police the public's access."[129]

Similarly, in *Candelario-Santana*, defendants were members of a violent drug trafficking conspiracy that murdered or arranged the murder of at least a dozen individuals.[130] The defendants were charged in a fifty-two-count indictment that included VICAR[131] and RICO[132] offenses.[133] During trial, a witness failed to ap-

123. *Id.* at 303.

124. *Id.*

125. *Id.* at 303–304.

126. *Id.* at 304–305.

127. *Id.* at 305.

128. *Id.* at 305–06.

129. *Id.* at 306; *cf.* United States v. Al-Smadi, 15 F.3d 153, 154 (10th Cir. 1994) ("The denial of a defendant's Sixth Amendment right to a public trial requires some affirmative act by the trial court meant to exclude persons from the courtroom.").

130. United States v. Candelario-Santana, 834 F.3d 8, 15 (1st Cir. 2016).

131. 18 U.S.C. § 1959 (2018) (Violent Crimes in Aid of Racketeering Activity).

132. 18 U.S.C. § 1961–63 (2018) (Racketeer Influenced and Corrupt Organizations).

133. *Candelario-Santana*, 834 F.3d at 16.

pear, was arrested, and brought to court.[134] At trial, a witness expressed fear for himself and his family if he testified against the defendants.[135] After suggestions to use an alias, prohibit the press from releasing the witness's name, or enlisting Witness Security Program measures, the district court settled on a ruse: "a plan where the court security officers would announce to the public that the court was adjourning for the day. The court, however, would then resume with the witness's testimony once the courtroom was vacated."[136] The plan proceeded over the objection of one defense counsel and the agreement of the other.[137] Like in *Agosto-Vega*, the judge's gambit doomed the proceedings before the witness's testimony began. The First Circuit found that the judge's plan "effected a closure" deliberately, despite the fact that the courtroom doors remained unlocked and the courthouse itself remained open.[138] The problem identified by the circuit was not necessarily with the stratagem employed by the district judge, but rather the dearth of identifying and making findings under *Waller*.[139]

The courtroom closure cases of *Agosto-Vega*, *Negrón-Sostre*, and *Candelario-Santana* demonstrate how Sixth Amendment errors can arise clandestinely, exacting extreme outcomes on criminal proceedings, or be based on creative arguments.[140] Fortunately, howev-

134. *Id.* at 20.

135. *Id.* at 21.

136. *Id.* (The court's procedure also allowed the witness "to face away from [the defendant] and to identify him using a photograph.").

137. *Id.* at 21 n.3 (finding waiver of Sixth Amendment right to public trial claim where defense counsel stated, "I don't mind.").

138. *Id.* at 23.

139. *Id.* (citing Waller v. Georgia, 467 U.S. 39, 48 (1984)) ("While we can imagine a scenario with somewhat similar facts in which the district court instead acknowledged and inquired into the witness's concerns, formally found an 'overriding interest' likely to be prejudiced, explored alternatives to closure in full, and narrowly tailored some form of closure to protect that overriding interest, resulting in a constitutionally permissible closure, that is not what occurred here.").

140. *See, e.g.*, United States v. Murillo, 744 F. App'x 378, 379 (9th Cir. 2018) (unpublished) (finding that a brief, non-public hearing related to juror selection

er, not all courtroom closure claims are created equally. Some are of so little moment as to be characterized as "trivial."

C. Triviality Doctrine

The Second Circuit has observed that

> in the context of a denial of the right of public trial, as defined in *Waller*, it does not follow that every temporary instance of unjustified exclusion of the public—no matter how brief or trivial, and no matter how inconsequential the proceedings that occurred during an unjustified closure—would require that a conviction be overturned.[141]

Therefore, although harmless error does not apply and structural error presumes prejudice to preserved public trial right claims, according to the Second Circuit, "[i]t does not necessarily follow, however, that every deprivation in a category considered to be 'structural' constitutes a violation of the Constitution or requires reversal of the conviction, no matter how brief the deprivation or how trivial the proceedings that occurred during the period of deprivation."[142] The court gave the example of the public's exclusion after a hearing that lasted only a few minutes on a matter of no consequence with the judge re-opening court after realizing the mistake.[143] "The contention that such a brief and trivial mistake could require voiding a criminal trial of

did not rise to a Sixth Amendment violation); United States v. Rivera-Rodriguez, 617 F.3d 581, 603 (1st Cir. 2010) (observing that ex parte communications between a judge and jury may raise Sixth Amendment public trial right concerns as a potential constructive courtroom closure); United States v. Williams, 974 F.3d 320, 346–48 (3d Cir. 2020) (noting that seating was limited "due to courtroom capacity" for court personnel, defendants, trial counsel and support staff, and prospective jurors, which extended across an entire phase of the trial, but declining to order new trial under plain error due to length of trial among other issues).

141. Gibbons v. Savage, 555 F.3d 112, 120–21 (2d Cir. 2009).

142. *Id.* at 120.

143. *Id.*

many months duration seems to us unimaginable," wrote the court.[144]

Wherever the doctrine's limits lie, triviality has been repeatedly used to stave off reversals of criminal convictions based on minor (and sometimes lengthier) courtroom closures on Sixth Amendment grounds. In *Gibbons*, a § 2254 appeal, the defendant's mother was the sole spectator present during jury selection in a state court prosecution and was excluded due to the small size of the courtroom, the large size of the venire, and the risk of tainting the jury pool.[145] The mother was allowed entry the next day where the defendant was tried and convicted of rape, incest, and child welfare endangerment.[146] The court held this "event was too trivial to warrant the remedy of nullifying an otherwise properly conducted state court criminal trial."[147]

The triviality doctrine made its debut in an earlier Second Circuit § 2254 case, *Peterson v. Williams*, where the court declined to vacate a conviction based on a temporary courtroom closure during an important part of the proceedings.[148] Peterson was on trial for a drug sale made to an undercover officer.[149] The prosecutor requested that the courtroom be closed before the officer who witnessed the transaction testified for security rea-

144. *Id.* ("Whether the explanation would be that so trivial an exclusion did not constitute a violation of the Sixth Amendment, or that there was a violation but too trivial to justify voiding the trial, we do not know. But we believe that, regardless of which explanation would be given, the result would be to allow the conviction to stand. We must speculate because the Supreme Court has never ruled on such a question."); *see also Williams*, 974 F.3d at 347 (noting that while closure encompassed all of jury selection, the trial spanned approximately two months and involved well over one hundred witnesses).

145. *Gibbons*, 555 F.3d at 114.

146. *Id.* at 113–15.

147. *Id.* at 121.

148. Peterson v. Williams, 85 F.3d 39, 41 (2d Cir. 1996). United States v. Al-Smadi, 15 F.3d 153, 154–55 (10th Cir. 1994), a Tenth Circuit case preceded *Peterson* by two years, but there the court cited to Peterson's Court of Appeals of New York opinion and held that the "brief and inadvertent closing of the courthouse and hence the courtroom, unnoticed by any of the trial participants, did not violate the Sixth Amendment."

149. *Peterson*, 85 F.3d at 41.

sons since he was still doing undercover work.[150] The court agreed, but after the conclusion of the undercover officer's testimony, courtroom personnel neglected to reopen the courtroom door, which remained closed through the defendant's testimony.[151] The Second Circuit acknowledged that the harmless error standard did not apply, but nonetheless held that the closure was too trivial to require that the conviction be vacated.[152] A triviality standard "does not dismiss a defendant's claim on the grounds that the defendant was guilty anyway" or that there was no prejudice; rather, it looks to "whether the actions of the court and the effect that they had on the conduct of the trial deprived the defendant—whether otherwise innocent or guilty—of the protections conferred by the Sixth Amendment."[153] The court delineated that its holding was not based on the fact that the closure was brief, inadvertent, or that "what went on *in camera* was later repeated in open court."[154] It also stated circumspectly that not even a "combination of all three necessarily compels a finding of constitutionality."[155] Rather, the court held that the defendant's Sixth Amendment rights were not violated on the facts of the case, where the closure was "extremely short," "followed by a helpful summation" by the trial judge, and "entirely inadvertent."[156]

In evaluating whether a closure is trivial, the Second Circuit assessed "the values the Supreme Court explained were furthered by the public trial guarantee, focusing on: (1) ensuring a fair trial, (2) reminding the

150. *Id.*; *see also* United States v. Eldridge, No. 18-3294-CR, 2021 WL 2555652, at *1 (2d Cir. June 22, 2021) ("The court's inference that courtroom spectators could have been the source of threats made to witnesses—witnesses who had been named for the first time that morning during trial—was entirely reasonable, and the partial closure reasonably advanced the public interest in preventing further tampering by deterring such conduct or aiding in a subsequent investigation.").

151. *Peterson*, 85 F.3d at 41–42.

152. *Id.* at 41–44.

153. *Id.* at 42.

154. *Id.* at 44.

155. *Id.*

156. *Id.*

prosecutor and judge of their responsibility to the accused and the importance of their functions, (3) encouraging witnesses to come forward, and (4) discouraging perjury."[157]

A number of federal circuits, besides the Second, have adopted the triviality doctrine.[158] In *Anderson*, during trial the judge held court past the time when the courthouse doors were locked for the evening and the defendant claimed that his Sixth Amendment rights were violated since the public could not access the closed courthouse.[159] The Seventh Circuit did not agree and held that the impacted proceedings "were minor in the trial as a whole" and the ability of spectators to attend trial was "limited in scope and short in duration, and at no time did it present a total prohibition on the ability of either the public as a whole or any individual to attend."[160] To the court, the partial closure of the outside doors during relatively minimal proceedings did not implicate "the values of the Sixth Amendment such as ensuring a fair trial, reminding the prosecutor and judge of their responsibility, encouraging witnesses to come forward, and discouraging perjury."[161]

While the triviality doctrine may seem like a second cousin to harmless error, the two approaches differ in that analysis of the former "turns on whether the conduct at issue 'subverts the values the drafters of the Sixth Amendment sought to protect.'"[162]

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157. Gibbons v. Savage, 555 F.3d 112, 121 (2d Cir. 2009) (citing *Peterson*, 85 F.3d at 43).

158. *See, e.g.*, United States v. Anderson, 881 F.3d 568, 576 (7th Cir. 2018); United States v. Greene, 431 F. App'x 191, 195 (3d Cir. 2011) (unpublished); United States v. Perry, 479 F.3d 885, 890 (D.C. Cir. 2007); United States v. Ivester, 316 F.3d 955, 959–60 (9th Cir. 2003); Braun v. Powell, 227 F.3d 908, 918–19 (7th Cir. 2000).

159. *Anderson*, 881 F.3d at 570.

160. *Id.* at 576.

161. *Id.*

162. *Gibbons*, 555 F.3d at 121 (quoting Smith v. Hollins, 448 F.3d 533, 540 (2d Cir. 2006)).

III. CONCLUDING THOUGHTS

Public trial rights have taken on renewed importance as courtrooms across the country have restricted access due to the COVID-19 pandemic, which has already spurred defense Sixth Amendment claims in some districts.[163] This means ensuring a fair process, which includes a constitutional right to a public trial. Absent Deputy Attorney General approval or exempt statutory grounds like the interests of a child,[164] federal prosecutors are directed to oppose courtroom closures.[165] In advocating this position, federal prosecutors should vociferously educate courts about the perils of taking precipitous action on a defendant's and the public's constitutional right to a public trial and the necessity for handling this potentially structural error with care. Great attention to the record for a subsequent court of review, either directly or collaterally, will seldom be regretted. Prosecutors and defense counsel should have *Waller* and a handful of other cases in their trial box at the ready to edify the court about these issues and the fact that the trial judge will bear ultimate responsibility for public access to her courtroom.

The court should also evaluate, consider, and discuss the *Waller* factors on the record, including: (1) the

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163. *See* Chris Villani, *COVID Rules Unlikely To Win Ex-Mayor New Corruption Trial*, LAW360 (May 28, 2021, 3:50 PM), https://www.law360.com/articles/1388829/covid-rules-unlikely-to-win-ex-mayor-new-corruption-trial ("The [criminal] trial took place with 26 socially distanced people in the 2,600-square-foot courtroom, with jurors spaced out in chairs, masks worn by all but the testifying witnesses, and only [defendant's] mother, fiancée and a single media representative allowed in the courtroom while the rest of the public watched on Zoom.").

164. 18 U.S.C. § 3509(e) (2018); *see also* United States v. Yazzie, 743 F.3d 1278, 1290 (9th Cir. 2014) (finding no public trial right in the context of § 3509(e) because the court complied with the *Waller* factors before ordering closure during the children's testimonies).

165. JUSTICE MANUAL *supra* note 44; *see also* 28 C.F.R. § 50.9(e)(5) (2014) (stating that the guidelines do not apply to child victims or witnesses). *But see* 18 U.S.C. § 1967 ("In any proceeding ancillary to or in any civil action instituted by the United States [on RICO charges] under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.").

overriding interest that is likely to be prejudiced advanced by the party seeking to close a public hearing; (2) the scope of the closure to ensure it is no broader than necessary to protect that interest; (3) any reasonable alternatives to closing the proceeding, even if none are suggested by the parties; and (4) specific findings must be made adequate to support the closure.[166] "*Waller* did not distinguish between complete and partial closures of trials."[167]

Generalized concerns about insufficient space, potential taint of a venire, or reliance on the judge's unbridled discretion are likely to present issues on appeal. As one court has noted, "[f]ailure to comply with this procedure will, in nearly all cases, invite reversal."[168]

The triviality doctrine presents a potential lifeline, however. As its name suggests, it has a "narrow application"[169] and should be used sparingly for those incidents that are truly minor. It is unlikely courts will find exclusions of the public for significant portions of the trial to be trivial, particularly on direct review.[170]

Lastly, trial judges seeking to continue criminal proceedings beyond courthouse closing hours "should ensure that members of the public have a means of access to that courthouse"[171] and special concerns and accommodations should be made to ensure access by a defendant's family and friends. An attendant loss of liberty inevitably follows criminal convictions; however,

166. Waller v. Georgia, 467 U.S. 39, 48 (1984); Presley v. Georgia, 558 U.S. 209, 214 (2010).

167. United States v. Simmons, 797 F.3d 409, 413–14 (6th Cir. 2015) ("All federal courts of appeals that have distinguished between partial closures and total closures modify the *Waller* test so that the 'overriding interest' requirement is replaced by requiring a showing of a 'substantial reason' for a partial closure, but the other three factors remain the same.") (quoting Bucci v. United States, 662 F.3d 18, 23 (1st Cir. 2011)).

168. United States v. Gupta, 699 F.3d 682, 690 (2d Cir. 2011).

169. *Id.* at 688.

170. *Id.* at 689–90 ("Whatever the outer boundaries of our 'triviality standard' may be (and we see no reason to define these boundaries in the present context), a trial court's intentional, unjustified closure of a courtroom during the entirety of voir dire cannot be deemed 'trivial.'").

171. United States v. Anderson, 881 F.3d 568, 576 (7th Cir. 2018).

that does not mean fellowship or support should be deprived earlier, while the defendant remains presumed innocent.