09-4738-cr

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-4738-cr

UNITED STATES OF AMERICA,

Appellee,

—v.—

RAGHUBIR K. GUPTA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA ON REHEARING *EN BANC*

PREET BHARARA,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

LEE RENZIN,
JESSE M. FURMAN,
KATHERINE POLK FAILLA,
Assistant United States Attorneys, Of Counsel.

TABLE OF CONTENTS

PAGE

Preliminary Statement. 1

Statement of Facts. 4

A. The Offense. 4

B. The Trial. 4

1. Jury Selection. 4

2. The Evidence, the Verdict, and Sentencing.. 8

C. The *Presley* Remand.. 9

D. The Panel's Decision. 11

1. The Majority Opinion. 12

2. The Dissenting Opinion. 17

ARGUMENT:

The District Court's Exclusion of Spectators from Jury Selection Was Improper But Does Not Warrant Voiding Gupta's Conviction. 20

A. Applicable Law. 21

1. The Sixth Amendment Public Trial Right. . 21

2. The Triviality Exception. 23

B. Discussion.. 30

1. The Closure in this Case Did Not Undermine the Core Values of the Public Trial Clause.. 32

PAGE

2. The Presence of the Venire Members Helped to Safeguard the Values of the Public Trial Guarantee. 38

3. The Case for the Triviality Exception Is Even Stronger Here than It Was in *Gibbons*. 40

4. The Dissent's and Gupta's Criticisms of the Majority Opinion Are Unfounded.. 47

CONCLUSION.. 52

TABLE OF AUTHORITIES

Cases:

ABC, Inc. v. *Stewart*,
360 F.3d 90 (2d Cir. 2004).. 44

Barrows v. *United States*,
15 A.3d 673 (D.C. 2011). 33, 46

Bowden v. *Keane*,
237 F.3d 125 (2d Cir. 2001).. . . . . 24, 27

Braun v. *Powell*,
227 F.3d 908 (7th Cir. 2000). 24, 43

Brown v. *Kuhlmann*,
142 F.3d 529 (2d Cir. 1998).. . . . . *passim*

Carson v. *Fischer*,
421 F.3d 83 (2d Cir. 2005).. . . . . *passim*

PAGE

Commonwealth v. *Cohen*,
456 Mass. 94 (2010). 30, 49

Gibbons v. *Savage*,
555 F.3d 112 (2d Cir. 2009).. . . . . *passim*

Gonzalez v. *Quinones*,
211 F.3d 735 (2d Cir. 2000).. . . . . 24, 26, 27, 28

Hoyt v. *Lewin*,
444 F. Supp. 2d 258 (S.D.N.Y. 2006). 43

Kelly v. *State*,
6 A.3d 396 (Md. Ct. Spec. App. 2010). 33, 38

Levine v. *United States*,
362 U.S. 610 (1960).. . . . . 36, 38, 51

Lugosch v. *Pyramid Co.*,
435 F.3d 110 (2d Cir. 2006).. 44

Morales v. *United States*,
635 F.3d 39 (2d Cir. 2011).. . . . . *passim*

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

Owens v. *United States*, ,
483 F.3d 48 (1st Cir. 2007). 35, 36, 43

People v. *Martin*,
16 N.Y.3d 607 (2011). 30, 49

People v. *Virgil*,
51 Cal. 4th 1210 (2011). 34

PAGE

Peterson v. *Williams*,
85 F.3d 39 (2d Cir. 1996).. . . . . *passim*

Presley v. *Georgia*,
— U.S. —, 130 S. Ct. 721 (2010). . . . . *passim*

Presley v. *State*,
285 Ga. 270 (2009). 22, 23

Presley v. *State*,
706 S.E.2d 103 (Ga. Ct. App. 2011). 35

Press-Enterprise Co. v. *Superior Court of California*,
464 U.S. 501 (1984).. . . . . 21, 22, 30, 39, 43

Smith v. *Hollins*,
448 F.3d 533 (2d Cir. 2006).. . . . . 19, 24, 25, 28, 46

State v. *Sadler*,
193 P.3d 1108 (Wash. Ct. App. 2008).. 49

State v. *Venable*,
986 A.2d 743 (N.J. App. Div. 2010). 46

United States ex rel. Bruno v. *Herold*,
408 F.2d 125 (2d Cir. 1969).. 40

United States v. *Agosto-Vega*,
617 F.3d 541 (1st Cir. 2010). 35

United States v. *Canady*,
126 F.3d 352 (2d Cir. 1997).. . . . . 23, 24

United States v. *Greene*,
431 F. App'x 191 (3d Cir. 2011). 35

PAGE

United States v. *Gupta*,
426 F. App'x 12 (2d Cir. 2011). 3

United States v. *Gupta*,
650 F.3d 863 (2d Cir. 2011).. . . . . *passim*

United States v. *Ivester*,
316 F.3d 955 (9th Cir. 2003). 24

United States v. *Jacobson*,
15 F.3d 19 (2d Cir. 1994).. 9

United States v. *Marcus*,
— U.S. —, 130 S. Ct. 2159 (2010). 23, 34

United States v. *Perry*,
479 F.3d 885 (D.C. Cir. 2007). 24

United States v. *Scott*,
564 F.3d 34 (1st Cir. 2009). 23, 45

United States v. *Smith*,
426 F.3d 567 (2d Cir. 2005).. 24

United States v. *Thomas*,
Nos. 98-1051, 98-1052, 98-1116,
2000 WL 236481 (2d Cir. Feb.14, 2000).. 45

United States v. *Triumph Capital Group, Inc.*,
487 F.3d 124 (2d Cir. 2007).. 24

United States v. *Waters*,
627 F.3d 345 (9th Cir. 2010). 44

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

PAGE

Walton v. *Briley*,
361 F.3d 431 (7th Cir. 2004). 38

Yarborough v. *Keane*,
101 F.3d 894 (2d Cir. 1996).. . . . . 24, 26

Statutes, Rules, & Other Authorities:

U.S. CONST. amend. VI. . . . . *passim*

18 U.S.C. § 2. . . . . 1, 4

18 U.S.C. § 1546. . . . . 1, 4

Fed. R. Crim. P. 33. . . . . 10, 11

Fed. R. Crim. P. 51. 45

United States Court of Appeals

FOR THE SECOND CIRCUIT

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-v.-

RAGHUBIR K. GUPTA,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA ON REHEARING EN BANC

Preliminary Statement

Raghubir K. Gupta appeals from a judgment of conviction, entered on November 10, 2009, in the United States District Court for the Southern District of New York, following a seven-day trial before the Honorable Deborah A. Batts, United States District Judge, and a jury.

Indictment 07 Cr. 177 (DAB) was filed on March 6, 2007, in one count, charging Gupta with preparing and submitting fraudulent immigration documents, in violation of Title 18, United States Code, Sections 1546(a) and 2.

Trial commenced on March 24, 2008, and ended on April 7, 2008, when the jury found Gupta guilty of the one count charged in the Indictment.

On October 26, 2009, the District Court sentenced Gupta to 51 months' imprisonment, to be followed by three years' supervised release. The District Court also imposed a $10,000 fine and a mandatory $100 special assessment.

On December 9, 2009, Gupta filed a motion in the District Court seeking bail pending appeal, which the District Court denied on January 5, 2010. On January 11, 2010, Gupta filed a motion for bail pending appeal in this Court. This Court denied the motion on January 21, 2010.

On January 26, 2010, a week after the Supreme Court's decision in *Presley* v. *Georgia*, — U.S. —, 130 S. Ct. 721 (2010) (per curiam), Gupta filed a motion with this Court seeking a limited remand to supplement the record with respect to the alleged exclusion of spectators from the courtroom during voir dire proceedings at trial. With consent of the Government, this Court granted Gupta's motion by order dated April 29, 2010.

On June 8, 2010, Gupta filed with the District Court a motion for a new trial and a second motion for bail pending appeal, which were based solely on the claim that Gupta's Sixth Amendment right to a public trial was violated by the exclusion of spectators from the courtroom during voir dire.

On June 29, 2010, the District Court made factual findings with respect to this claim by adopting an affidavit of the District Court's Courtroom Deputy. On July 14,

2010, this Court then recalled the mandate and reinstated Gupta's appeal.

On July 26, 2010, the District Court denied Gupta's motions for bail and for a new trial. On July 28, 2010, Gupta filed a motion for bail pending appeal in this Court, which was not contested by the Government. This Court granted the motion on August 19, 2010.

On June 17, 2011, a panel of this Court (Walker, Parker, Hall, JJ.) affirmed Gupta's conviction. Over a dissent by Judge Parker, the Panel held in a published opinion that Gupta was not entitled to a new trial based on a violation of the Sixth Amendment right to a public trial. *See United States* v. *Gupta*, 650 F.3d 863 (2d Cir. 2011) (JA 244-66).[*] In a summary order issued the same day, the Panel unanimously rejected Gupta's other claims on appeal. *See United States* v. *Gupta*, 426 F. App'x 12 (2d Cir. 2011) (JA 267-71).

On June 30, 2011, Gupta filed a petition for rehearing and rehearing en banc (the "Petition") limited to whether he was entitled to a new trial based on a violation of the Sixth Amendment right to a public trial. (JA 272-83). On September 15, 2011, the Court granted Gupta's petition and ordered rehearing en banc.

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[*] "JA" refers to the Joint Appendix filed by the parties in connection with rehearing en banc; "Tr." refers to the trial transcript; "Sent. Tr." refers to the transcript of sentencing; and "PSR" refers to the Presentence Investigation Report prepared by the United States Probation Office in connection with Gupta's sentencing.

Gupta is currently released on bail.

Statement of Facts

A. The Offense

Gupta, an attorney and former judge in India, practiced immigration law, principally out of a small office in Brooklyn, New York, until his arrest in this case. (PSR ¶ 7). Between May 2004 and December 31, 2005, Gupta assisted illegal aliens seeking to qualify for an immigration amnesty program that had certain specified eligibility requirements. (PSR ¶¶ 5, 6). Aware that many of his clients did not meet those eligibility requirements, Gupta caused them to complete applications for the program and to sign them under penalty of perjury, knowing that the applications would or did contain false statements that could have influenced the decisions of the United States Citizenship and Immigration Services ("USCIS"). (PSR ¶¶ 8, 10, 11, 25). In addition, Gupta caused his staff to submit applications that he knew contained false statements to USCIS. (PSR ¶¶ 8, 13). As a result of this conduct, Gupta was arrested and charged with one count of immigration fraud, in violation of Title 18, United States Code, Section 1546(a). (JA 14-16).

B. The Trial

1. Jury Selection

Jury selection began and ended in the space of several hours on a single day, March 24, 2008. (JA 66-206). The process commenced at about 10 a.m. with the distribution of a written two-part questionnaire to prospective jurors.

(JA 67).[*] Before turning to the questionnaires, Judge Batts spoke briefly about the importance of jury duty, the nature and anticipated length of the case, and the process of jury selection. (JA 67-73). She then read aloud the yes-or-no questions in part one of the questionnaire — approximately 75 routine questions relating to the prospective jurors' fitness as impartial jurors. (JA 73-90).[**] Judge Batts instructed the prospective jurors to "follow along" as she read the questions and to "jot down or note" on the questionnaire any question to which the answer was yes. (JA 70). When she finished reading, Judge Batts told the venire to review the questions on the form and announced a seven-minute break. (JA 90).

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[*] The proceedings actually began at about 9:45 a.m. with an extended discussion between the District Court and counsel about unrelated matters. (JA 17-24). Judge Batts then left the bench while the venire panel was assembled. (JA 24). Accordingly, jury selection itself probably started at about 10 a.m., if not later.

[**] Among other things, the District Court asked the venire members whether (1) they had any knowledge of, or familiarity with, the case and the trial participants; (2) they had any experiences with the criminal justice system; (3) they had views of, or experiences with, immigration laws; (4) they had prior jury service; (5) they had been victims of a crime; (6) they had difficulty hearing or speaking English; (7) they would have difficulty following the court's instructions on the law; and (8) they had any biases for or against the Government and law enforcement.

Following the break, Judge Batts instructed her Courtroom Deputy to fill the jury box and the first rows of the courtroom with 32 qualified prospective jurors. (JA 90). To do that, the Courtroom Deputy called out the names of prospective jurors one at a time. (JA 91-154). If a prospective juror had answered yes to any question in part one of the questionnaire, he or she was questioned further by the District Court at sidebar; if a prospective juror had answered no to all questions on the questionnaire, he or she was directed to take the designated seat without any additional questions. (JA 90). This process — during which prospective jurors did not answer a single question in open court — took the rest of the morning. (JA 91-154). In total, the District Court questioned 43 prospective jurors at the sidebar in this manner, without objection from Gupta; of the 43, 11 were dismissed for cause, all on consent of both parties. (JA 97, 105, 108, 110, 134, 142, 143, 147, 148, 151, 152). Neither party made a challenge for cause that was denied by the District Court or to which the other side objected.

After a panel of 32 prospective jurors had been qualified in this manner, the District Court excused most, but not all, of the remaining venire members and then broke for lunch, telling everyone to return at 2:15 p.m. (JA 154-55). When the proceedings resumed, presumably at or shortly after 2:15 p.m., Judge Batts questioned each member of the panel individually. (JA 156). In open court, the District Court turned to part two of the written questionnaire and asked each prospective juror approximately a dozen basic questions about his or her background and

interests. (JA 156-202).[*] The prospective jurors answered these questions in open court as well — the only part of the questioning process that did not take place at sidebar. Judge Batts then invited counsel up to the bench and asked if anyone wanted her to put additional questions to the panelists. (JA 202). Neither counsel requested additional questions and neither counsel moved to strike any of the remaining prospective jurors for cause. (JA 202).

With all questioning of prospective jurors over, the District Court dismissed the venire members who had been told to remain in case there was a need to substitute for one of the 32 qualified prospective jurors. (JA 203). These venire members had been present for, and observed, all of the proceedings up to that point; they did not answer even a single question. Immediately thereafter, the parties exercised their peremptory challenges in the jury room — on the record, but outside the presence of anyone in the courtroom. (JA 203-05). Neither party objected to the location, and neither party raised an objection to the other's challenges. Upon returning to the courtroom, the Courtroom Deputy announced the members of the jury, who were subsequently impaneled and sworn. (JA 24, 206). The remaining members of the venire panel were then dismissed. (JA 206). It is not clear from the record

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[*] Among other things, the District Court asked each panelist about his or her county of residence; whether he or she rented or owned a home; how far he or she had gone in school; his or her employment, if any; the newspapers and magazines he or she read regularly; and the television shows he or she generally watched.

precisely when jury selection ended, but it was sufficiently early for the District Court to give preliminary instructions to the jury (JA 24-31), for both parties to deliver opening statements (JA 31-49), and for an extended colloquy between the Court and counsel after the jury was dismissed for the day. (JA 49-65). From the beginning to the end of the jury selection process, no objection was asserted by either party to anything that occurred.

2. The Evidence, the Verdict, and Sentencing

Trial resumed the next day with the presentation of evidence. (Tr. 50). Over the course of six more trial days in total, the Government proved Gupta's guilt with various categories of evidence, including (1) the testimony of three of Gupta's former clients and a confidential source who had posed as a client; (2) tape recordings of three meetings between Gupta, on the one hand, and the confidential source and her husband, who had also posed as a client, on the other; and (3) documents, including the alien files and amnesty applications of Gupta's clients and questionnaires created by Gupta that he instructed his clients to fill out with information that he provided to them. (PSR ¶ 9). Gupta did not present a defense case. (Tr. 702).

On April 7, 2008, after only about one-and-a-half hours of deliberation, the jury found Gupta guilty. (Tr. 982-83). On October 26, 2009, the parties appeared before Judge Batts for sentencing. After resolving disputes between the parties that are not relevant here, the District Court calculated Gupta's advisory sentencing range under the United States Sentencing Guidelines to be 41 to 51 months' imprisonment. (Sent. Tr. 9). Judge Batts then

stated that considering the factors set forth in Title 18, United States Code, Section 3553(a) and the facts of the case, there was "no reason" to depart from the Guidelines range. "[I]f anything," she continued, "the fact that [Gupta] is an officer of the court, an attorney who abused his privilege to practice law, a judge for eight years in India who heard both civil and criminal cases, would suggest an upward departure, not a downward one." (Sent. Tr. 15). She then sentenced Gupta to 51 months' imprisonment — at the top of the Guidelines range — followed by three years' supervised release, and imposed a $10,000 fine and a $100 special assessment. (Sent. Tr. 16).

C. The *Presley* Remand

On November 2, 2009, Gupta filed a notice of appeal. On January 20, 2010 — the day after the Supreme Court's decision in *Presley* v. *Georgia*, 130 S. Ct. 721 — Gupta filed a letter raising, for the first time, a claim that the District Court violated his Sixth Amendment right to a public trial by excluding members of the public from the courtroom during jury selection. (JA 215). A week later, Gupta moved to remand the case for supplemental factual findings in light of *Presley* and asked that it be assigned to a different district judge. (JA 213-17). On April 29, 2010, this Court granted the motion to remand for supplemental factual findings, but denied Gupta's request to remand the matter to a different district judge. (JA 223-24). Following the procedures set forth in *United States* v. *Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994), the Court indicated that jurisdiction over the appeal would automatically be restored, without the need for a new notice of appeal, upon

notification to the Clerk of the Court within 14 days of the District Court's decision. (JA 223-24).

On remand, Gupta filed a motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, based solely on the claimed Sixth Amendment violation, and also moved for bail pending appeal. (JA 225-26). In an affirmation submitted in support of these motions, Gupta's counsel stated, in relevant part, that

> [o]n January 20, 2010, the defendant alerted undersigned counsel to the existence of an issue that had arisen in light of a recently issued Supreme Court decision, *Presley* v. *Georgia*, __ U.S. __, 130 S. Ct. 721 (2010). . . . After reading widely publicized news reports of the *Presley* decision, the defendant advised undersigned counsel that his brother, Sudhir ("Sam") Gupta, and his companion, Maria Young, had been instructed by the courtroom deputy to leave the courtroom at the time when prospective jurors were being brought in for jury selection. Counsel, who was in the well of the court with the defendant during jury selection, was not aware that any members of the public had been asked to leave.

(JA 228). In accompanying affidavits, Sudhir Gupta and Maria Young stated that they had been inside the courtroom at the start of trial but had left when asked by a court officer to do so for jury selection. (JA 235-36).

In lieu of an evidentiary hearing, the District Court adopted as its factual findings an affidavit of William Delaney, the District Court's Courtroom Deputy, dated June 16, 2010. (JA 237-40). According to the affidavit, 70 prospective jurors were ordered and sent to the courtroom for jury selection in Gupta's case. (JA 238). "At the Court's direction, in order to accommodate the large number of jurors in the venire panel, and to protect the panel from hearing anything about the case from any member of the public present," Mr. Delaney then "requested that individuals who were not venire panel members leave the courtroom during the jury selection." (JA 238-39). Mr. Delaney "conveyed to those individuals that once jury selection was complete, and there was again space in the public area of the courtroom, they were more than welcome to attend the proceedings." (JA 239).

On July 14, 2010, after Gupta notified the Clerk of this Court to the District Court's adoption of Mr. Delaney's affidavit, the Court reinstated Gupta's appeal. By order dated July 26, 2010, the District Court then denied Gupta's Rule 33 motion and his motion for bail pending appeal, on the ground that reinstatement of the appeal had divested the District Court of jurisdiction. (JA 241-42).

D. The Panel's Decision

On appeal, Gupta argued that the District Court's exclusion of spectators from the courtroom during voir dire violated his Sixth Amendment right to a public trial and required vacatur of his conviction. In response, the Government conceded that the exclusion was improper under the Supreme Court's test for courtroom closure during a criminal trial, but maintained that Gupta was not

entitled to a new trial. In particular, relying on decisions of this Court recognizing a "triviality exception" to the Sixth Amendment's public trial guarantee — including *Gibbons* v. *Savage*, 555 F.3d 112 (2d Cir.), *cert. denied*, 130 S. Ct. 61 (2009), which had applied that exception to a courtroom closure during jury selection — the Government contended that exclusion of spectators from voir dire under the particular circumstances of this case did not warrant disturbing Gupta's conviction. The case was argued on March 7, 2011. In a published opinion issued on June 17, 2011, a majority of the Panel rejected Gupta's Sixth Amendment argument. Judge Parker dissented.[*]

1. The Majority Opinion

Judge Hall wrote the majority opinion, which was joined by Judge Walker. The majority acknowledged, as the Government had conceded, that the District Court's reasons for excluding spectators were insufficient to justify closure of the courtroom under the applicable test, as the Supreme Court's decision in *Presley* made abundantly clear. *See* 650 F.3d at 866-67. But, the majority concluded, that was not the end of the analysis, as this Court had long recognized a "triviality exception" to the public trial guarantee, and nothing in *Presley* had affected that precedent. *See id.* at 867, 871-72. Quoting from *Peterson* v. *Williams*, 85 F.3d 39 (2d Cir. 1996), the case in which the Court "first identified" the triviality excep-

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[*] As noted above, the Panel unanimously rejected Gupta's other arguments on appeal in a summary order issued the same day. (JA 267-71). Those issues are not relevant to this rehearing en banc.

tion, the majority explained that a "'triviality standard, properly understood, . . . is very different from a harmless error inquiry'" in that it "'does not dismiss a defendant's claim on the grounds that the defendant was guilty anyway or that he did not suffer prejudice or a specific injury.'" 650 F.3d at 867 (quoting *Peterson*, 85 F.3d at 42) (original internal quotation marks omitted). "'It looks, rather, 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.'" *Id.* (quoting *Peterson*, 85 F.3d at 42).

The majority observed that under *Peterson* and its progeny, the applicability of the triviality exception turns on a fact-specific inquiry into whether the closure "'undermine[d] the values the Amendment is aimed to protect.'" *Id.* (quoting *Carson* v. *Fischer*, 421 F.3d 83, 92-93 (2d Cir. 2005)). Relying on the Supreme Court's decision in *Waller* v. *Georgia*, 467 U.S. 39, 46-47 (1984), the Court had identified four "core values protected by the Sixth Amendment" in *Peterson*: "'1) to ensure a fair trial; 2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions; 3) to encourage witnesses to come forward; and 4) to discourage perjury.'" *Gupta*, 650 F.3d at 867 (quoting *Peterson*, 85 F.3d at 43). "If a courtroom closure subverts these values," the majority explained, "it violates the Sixth Amendment, but if the closure is consistent with these values, it is trivial and does not implicate a defendant's right to a public trial." *Id.* (citing *Morales* v. *United States*, 635 F.3d 39, 43 n.7 (2d Cir. 2011)). Significantly, the "focus" of the analysis is on "what *transpired* during the

closed proceedings" and the "particular facts" of a given case. *Id.* at 869 & n.3 (emphasis in original). "[A]pplication of the triviality exception," the majority stressed, "requires a fact-specific analysis of the unique circumstances in a given case to determine whether a particular exclusion implicates a defendant's public trial right." *Id.* at 869 n.3.

Applying these well-established principles to Gupta's case, the Court concluded that the exclusion of spectators from the brief voir dire was "too trivial" to warrant a new trial. In particular, the majority found Gupta's case materially indistinguishable from *Gibbons*, in which the Court had applied the triviality exception to the exclusion of spectators from a substantial portion of jury selection. *See id.* at 868-69. The majority reasoned that here, as in *Gibbons*, the third and fourth public trial values — encouraging witnesses to come forward and discouraging perjury — "were not implicated" because the closed proceedings "were limited to voir dire." *Id.* at 868. And here, as there, the first and second values — ensuring a fair trial and reminding the prosecutor and judge of their responsibility to the accused and the importance of their functions — were also "not implicated because 'nothing of significance happened'" during the closure to which spectators would otherwise have been privy. *Id.* (quoting *Gibbons*, 555 F.3d at 121). Among other things, the Court noted that the District Court's initial inquiry of each prospective juror took place at sidebar and thus "would not have been audible to members of the public" anyway. *Id.* at 868-69. Moreover, "no objections were made to any of the challenges, and no jurors were dismissed without the consent of both parties." *Id.* at 869.

Thus, the majority concluded that there was a "striking similarity," and certainly "no material difference," between "what transpired during the excluded proceedings in *Gibbons* and in the instant case." *Id.* at 869 & n.3. "Indeed," the majority stated, "the only actual difference is that in the instant case, the parties exercised their peremptory challenges while the proceedings were closed," which had not occurred in *Gibbons*. *Id.* at 869. But this difference was immaterial, the Court reasoned, because the parties here exercised their peremptory challenges "outside the presence of the venire" — so "even if Gupta's brother and [girlfriend] had been in the courtroom, they would not have been able to observe these challenges." *Id.* The Court acknowledged also that "the exclusion in *Gibbons* was limited to the first afternoon of voir dire, and not, as in the instant case, to all of the voir dire proceedings," but concluded that this distinction did not "warrant[] a different outcome." *Id.* As the Court explained, the holding in *Gibbons* was not "limited to situations involving a partial, as opposed to a complete closure, of the voir dire proceedings." *Id.* Instead, "[t]he focus" of the analysis in *Gibbons* was on "what *transpired* during the closed proceedings. And because what transpired during voir dire in *Gibbons* did not implicate the values underlying the public trial guarantee, and because voir dire in *Gibbons* and the instant case are substantially identical, we see no reason to reach a different conclusion." *Id.* The Court noted as well that neither Gupta nor the dissent had "identified any specific events which occurred during voir dire here that are distinguishable from *Gibbons*." *Id.* at 869 n.3.

After concluding that Gupta's case was controlled by *Gibbons*, the majority identified "a broader, institutional reason that the exclusion here was trivial": the fact that "voir dire, by its very nature, is always 'subject to contemporaneous review in the forum of public opinion,' because the venire is drawn from the public itself." *Id.* at 869-71 (citation omitted) (quoting *In re Oliver*, 333 U.S. 257, 270 (1948)). The majority acknowledged that a defendant's right to a public trial "unquestionably extends to voir dire" and that the presence of the venire alone was therefore not "sufficient to safeguard the public trial guarantee." *Id.* at 870-71 & n.4. Nevertheless, the Court reasoned that the presence of the venire was at least a "factor" in the analysis because "in many cases the presence of the venire as a public witness safeguards the two relevant values of the public trial guarantee — ensuring a fair trial and reminding the prosecutor and judge of their responsibility to the accused and the importance of their functions" *Id.* at 871. "Indeed," the Court concluded, "there is little basis to presume that the impartial, public citizens comprising a venire would be any less vigilant in ensuring that the voir dire was fair and that the judge and the prosecutor remained cognizant of their responsibilities as would ordinary spectators observing the voir dire from the back of the courtroom." *Id.*

For these reasons, the Court held that, while the exclusion of Gupta's brother and girlfriend from the courtroom during voir dire was unjustified, "the exclusion was too trivial to implicate Gupta's Sixth Amendment right to a public trial." *Id.* at 872. Notably, the Court repeatedly emphasized that its decision was limited to the "particular facts" of Gupta's case and expressly cautioned

against "extrapolat[ing]" its holding "beyond the narrow confines defined in [its] opinion." *Id.* at 869 n.3. In particular, the majority noted that its opinion "may not be read as relieving trial courts of their burden of satisfying" the test for courtroom closure "to the extent they intend to exclude the public from voir dire." *Id.* at 872 n.6. The Court warned that "[t]here very well may be instances in which such an exclusion violates [the test] and does not fall within the triviality exception, thus implicating the defendant's Sixth Amendment rights to the point that the judgment must be vacated. We hold only that under the particular circumstances presented here, this was not the case." *Id.*

2. The Dissenting Opinion

In his dissent, Judge Parker did not express disagreement with the majority's view that the Court's long-established "triviality exception" survived the Supreme Court's decision in *Presley*. Nor did he take issue with the Court's prior decision in *Gibbons*, which he cited approvingly. *See id.* at 873-74 (Parker, J., dissenting). Nevertheless, he concluded that application of the triviality exception to what he characterized as "an undisclosed, complete, unrequested, and intentional closure of an entire voir dire" was "inconsistent with Supreme Court law" and "insults the values inherent in the Sixth Amendment." *Id.* at 872. Judge Parker argued that the Court's prior decisions, including *Gibbons*, made clear that the triviality exception "applies only rarely and to truly trivial closings." *Id.* at 874. In his view, the "undisclosed" closure of the courtroom "for the entirety of jury selection" did not qualify. *Id.* "A trial judge's undisclosed exclusion of the public from

jury selection, without the knowledge or assent of the accused or the lawyers," he reasoned, "seriously undermines the basic fairness of a criminal trial and the appearance of fairness so essential to public confidence in the system." *Id.*

Instead of analyzing the four "core values" underlying the public trial guarantee identified in *Peterson* and its progeny, the dissent criticized the majority for offering "[a]s a purported justification for the closure . . . that the closure was brief and 'nothing of significance happened' during that time." *Id.* at 875 (quoting *id.* at 868-69 (majority opinion)). Judge Parker elaborated:

> [The majority is] correct that the closure lasted for only several hours, but what happened during that time was *the entire process of selecting a jury*. From the judge's introductory remarks through the empaneling of the jurors, the courtroom was closed to Gupta's family and to the public. Every day, in courts across this Circuit, juries are chosen in unremarkable proceedings that last but a few hours. The majority's holding suggests that all such proceedings are inconsequential and can permissibly be closed to the public.

Id. at 875-76 (emphasis in original). "Even more disturbing," Judge Parker continued, the majority's "logic has no apparent end. Many cross-examinations, arguments to the court, statements to jurors, and instructions to defendants and to counsel are not especially long. Now, apparently, the summary exclusion of the public from such proceed-

ings can be excused so long as what occurred . . . was brief and 'nothing of significance happened.'" *Id.* at 876 (quoting *id.* at 868-69 (majority opinion)).

The dissent also took issue with the majority for its alleged "assert[ion] that the closure was justified because the public *was* present in the courtroom for voir dire — in the form of the potential jurors." *Id.* (citing *id.* at 868-71 (majority opinion)). "The long-established tradition of open voir dire," Judge Parker reasoned, "contemplates ensuring that members of the general public, *external to the judicial process*, have the opportunity to observe the proceedings." *Id.* (emphasis in original). Jury selection "is neither 'public' nor 'open,'" he argued, "if the only members of the public allowed to attend are those who, having received juror summonses, are required to be there and part of the judicial process itself." *Id.* The dissent contended that if the presence of potential jurors "were sufficient to 'safeguard[]' the values underlying the Sixth Amendment," as it read the majority to suggest, "it would seem that spectators could always be excluded." *Id.* (quoting *id.* at 870-71 (majority opinion)). Noting that this Court had expressed a "'strong devotion to the preservation of [a defendant's] right to have family and friends present at his trial,'" Judge Parker maintained also that the majority ignored "the fact that the potential jurors sitting in the courtroom did not (of course) include Gupta's brother and girlfriend, who had been forced to leave." *Id.* (quoting *Smith* v. *Hollins*, 448 F.3d 533, 539 (2d Cir. 2006)).

ARGUMENT

The District Court's Exclusion of Spectators from Jury Selection Was Improper But Does Not Warrant Voiding Gupta's Conviction

The Panel majority was correct to affirm Gupta's conviction despite the District Court's good-faith error in excluding spectators from the courtroom during voir dire. This Court has long and repeatedly held that an improper courtroom closure does not warrant the drastic remedy of overturning a conviction if, based on the particular facts of the case, the error did not subvert the core values of the Sixth Amendment public trial guarantee. A careful evaluation of what actually occurred during the period of closure in this case, and whether spectators would have been privy to what occurred had they been allowed to remain, reveals that the error here was of that type. Given the particular circumstances of the case — including, but not limited to, the absence of any disputes or objections during voir dire, the significant proportion of the proceedings that justifiably and without objection occurred at sidebar or in the jury room, the availability of both a stenographic transcript and the jury questionnaire used by the District Court, and the presence of 70 impartial spectators to the proceedings in the form of the prospective jurors themselves — the Panel majority was correct in holding that the closure, although improper, did not subvert the values underlying the public trial right. In light of that, overturning Gupta's conviction would do little to advance the purposes of the Sixth Amendment public trial right and would merely be a windfall for Gupta.

A. Applicable Law

1. The Sixth Amendment Public Trial Right

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . public trial." U.S. CONST. amend. VI. The right to a public trial is not absolute, however, and "may give way in certain cases to other rights or interests." *Waller* v. *Georgia*, 467 U.S. at 45. In *Waller*, the Supreme Court identified four factors for courts to apply before excluding the public from any stage of a criminal trial. *See id.* at 48. First, "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced." *Id.* Second, "the closure must be no broader than necessary to protect that interest." *Id.* Third, "the trial court must consider reasonable alternatives to closing the proceeding." *Id.* And fourth, the court "must make findings adequate to support the closure." *Id.*; *accord Presley*, 130 S. Ct. at 724; *Gibbons*, 555 F.3d at 116; *cf. Press-Enter. Co.* v. *Superior Court of Cal.*, 464 U.S. 501, 510 (1984) (adopting these factors in evaluating whether a courtroom closure during voir dire was consistent with the First Amendment).

In *Presley*, the Supreme Court applied the four *Waller* factors to evaluate a courtroom closure during voir dire of prospective jurors. *See* 130 S. Ct. at 723-24. Over the defendant's objection, the trial court in *Presley* had excluded the defendant's uncle from the courtroom during jury selection, citing insufficient space in the courtroom and the need to prevent the uncle from "intermingl[ing]" with prospective jurors. *Id.* at 722. On appeal, the Supreme Court of Georgia rejected Presley's argument that this

violated his Sixth Amendment public trial right. The Court found, with respect to the first *Waller* factor, that the trial court had an "'overriding interest in ensuring that potential jurors heard no inherently prejudicial remarks from observers during voir dire.'" *Id.* at 723 (quoting *Presley* v. *State*, 285 Ga. 270, 272 (2009)). With respect to the third factor, the Court ruled "that 'Presley was obliged to present the court with any alternatives that he wished the court to consider.'" *Id.* (quoting *Presley* v. *State*, 285 Ga. at 273). When a defendant does not offer any alternatives, the Georgia Supreme Court held, "'there is no abuse of discretion in the court's failure to sua sponte advance its own alternatives.'" *Id.* (quoting *Presley*, 285 Ga. at 274).

In a per curiam opinion summarily reversing that decision, the United States Supreme Court held that the Georgia court had "contravened" the United States Supreme Court's "clear precedents" on courtroom closure. *Id.* at 722. Relying on *Waller* and *Press-Enterprise Company*, the Court explained that its precedents required trial courts "to consider alternatives to closure even when they are not offered by the parties." *Id.* at 724. "Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials," the Court stated, and "[n]othing in the record shows that the trial court could not have accommodated the public at Presley's trial." *Id.* The Court went on to express doubt about whether closure of the courtroom during voir dire was also justified by an "overriding interest," but ultimately declined to rule on the issue "because even assuming, *arguendo*, that the trial court had an overriding interest in closing voir dire, it was still incumbent upon [that court] to consider all reasonable alternatives to

closure. It did not, and that is all this Court needs to decide." *Id.*

The Supreme Court did not address whether Presley was entitled to the remedy of a new trial, but remanded to the Georgia Supreme Court for further proceedings "not inconsistent" with its opinion. *Id.* In earlier cases, however, the Supreme Court had made clear that violation of the Sixth Amendment public trial right is a "structural error" — that is, an error that affects "the framework within which the trial proceeds, such that it is often difficult to assess the effect of the error." *United States* v. *Marcus*, — U.S. —, 130 S. Ct. 2159, 2164-65 (2010) (citing *Waller*) (brackets, citations, and internal quotation marks omitted). As a result, where a defendant preserves the issue by contemporaneously objecting to the courtroom closure, as Presley did, *see* 130 S. Ct. at 722, violation of the public trial right is not subject to harmless error analysis, *see, e.g.*, *Waller*, 467 U.S. at 49-50 & n.9; *Gibbons*, 555 F.3d at 119; *cf. United States* v. *Scott*, 564 F.3d 34, 37 (1st Cir. 2009) (holding that an unpreserved public trial claim is reviewed only for plain error). "If it were," this Court has explained, "little or nothing would remain of the right because the presence or absence of public spectators rarely, if ever, will affect the result of a trial, at least in a manner that is perceptible." *Gibbons*, 555 F.3d at 119; *accord United States* v. *Canady*, 126 F.3d 352, 364 (2d Cir. 1997).

2. The Triviality Exception

Although a preserved public trial claim is not subject to harmless error review, this Court recognized over 15 years ago that "even an unjustified closure may, on its

facts, be so trivial" that voiding a conviction would be unwarranted. *Peterson*, 85 F.3d at 40. Since *Peterson*, several other Circuits have followed this Court's lead, even calling its approach "wise and widely-accepted," *United States* v. *Ivester*, 316 F.3d 955, 959-60 (9th Cir. 2003), and "thoughtful and helpful," *Braun* v. *Powell*, 227 F.3d 908, 919 (7th Cir. 2000); *see also, e.g.*, *United States* v. *Perry*, 479 F.3d 885, 890-91 (D.C. Cir. 2007) (relying heavily on *Peterson*). Moreover, this Court itself has reaffirmed the existence of a "triviality exception" to the public trial right no fewer than 11 times. *See, e.g.*, *Gupta*, 650 F.3d at 867; *id.* at 973-75 (Parker, J., dissenting) (agreeing that there is a triviality exception); *Morales* v. *United States*, 635 F.3d at 43-45 & n.7; *Gibbons*, 555 F.3d at 120-21; *United States* v. *Triumph Capital Group, Inc.*, 487 F.3d 124, 134-35 (2d Cir. 2007); *Smith* v. *Hollins*, 448 F.3d at 540-41; *United States* v. *Smith*, 426 F.3d 567, 572 (2d Cir. 2005) (Parker, J.); *Carson* v. *Fischer*, 421 F.3d at 92-93 (Parker, J.); *Bowden* v. *Keane*, 237 F.3d 125, 129 (2d Cir. 2001); *Gonzalez* v. *Quinones*, 211 F.3d 735, 737 (2d Cir. 2000); *Brown* v. *Kuhlmann*, 142 F.3d 529, 534, 544 (2d Cir. 1998); *United States* v. *Canady*, 126 F.3d at 363-64.[*] Indeed, the Court has gone so far as to say that it

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[*] In *Triumph Capital Group*, the Court held that the triviality standard applies to other types of structural error too. *See* 487 F.3d at 135 ("The triviality standard is equally applicable to bans on attorney-defendant communication."); *cf. Yarborough* v. *Keane*, 101 F.3d 894, 897 & n.1 (2d Cir. 1996) ("We see no reason to suppose that in giving . . . examples [of structural error in *Arizona* v. *Fulminante*, 499 U.S. 279 (1991)], the Supreme Court

is "unimaginable" 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." *Gibbons*, 555 F.3d at 120.

As Judge Calabresi explained in *Peterson*, "[a] triviality standard, properly understood, . . . is . . . very different from a harmless error inquiry." 85 F.3d at 42. That is because the triviality standard "does not dismiss a defendant's claim on the grounds that the defendant was guilty anyway or that he did not suffer 'prejudice' or 'specific injury.'" *Id.* Instead, "[i]t 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." *Id.* Thus, since *Peterson*, to determine whether a particular closure is significant enough to void an otherwise valid conviction, the Court has looked to the four core values underlying the public trial guarantee: "1) to ensure a fair trial; 2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions; 3) to encourage witnesses to come forward; and 4) to discourage perjury." *Id.* at 43 (citing *Waller*, 467 U.S. at 46-47); *see, e.g.*, *Morales*, 635 F.3d at 43 n.7; *Gibbons*, 555 F.3d at 120-21; *Smith*, 448 F.3d at 540; *Carson*, 421 F.3d at 92-93; *Brown* v. *Kuhlmann*, 142 F.3d at 534-37. Triviality "is gauged by the degree to

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meant that a trivial violation of the particular right would also require *per se* reversal.").

which a particular closure undermines" these values. *Morales*, 635 F.3d at 43 n.7.*

Significantly, the inquiry does not turn on how important the closed portion of the trial was as a matter of abstract principle. Instead, it demands a careful evaluation of "the particular circumstances" involved and a close "examination of all the details" of what actually "occurred" during the closure to which spectators would have been privy had they not been excluded. *Gibbons*, 555 F.3d at 121; *see, e.g.*, *Morales*, 635 F.3d at 44-45; *Carson*, 421 F.3d at 93-94; *Gonzalez*, 211 F.3d at 737; *Peterson*, 85 F.3d at 41-44; *see also Yarborough* v. *Keane*, 101 F.3d at 897 ("To determine whether an error [requires *per se* reversal], we must look not only at the right violated, but also at the particular nature, context, and significance of the violation."). In addition, "[t]riviality is not determined by any one factor, such as the duration of the closure or its effect on the outcome of the proceeding." *Morales*, 635 F.3d at 43 n.7. Instead, it depends on "a number of factors, including [the closure's] duration; whether the public can learn (through transcripts, for example) what transpired

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* Although the Court has long recognized the "triviality exception," it has not resolved "the metaphysical question" of whether a sufficiently trivial error is "not a deprivation of a constitutional right" or is "a violation of a constitutional right, but, in spite of the inapplicability of the harmless error rule, too trivial to justify vacating" the conviction. *Gibbons*, 555 F.3d at 121. Either way, the Court has reasoned, "the result would be to allow the conviction to stand." *Id.* at 120.

while the trial was closed; whether the evidence presented during the courtroom closure was essential, or whether it was merely cumulative or ancillary; and whether selected members of the public were barred from the courtroom, or whether all spectators were precluded from observing the proceedings." *Bowden*, 237 F.3d at 129-30 (citations and footnote omitted).

Notably, applying this multi-factored and fact-intensive approach, the Court has made clear that the triviality exception may apply even where spectators have been excluded from "one of the most important portions of the trial." *Gibbons*, 555 F.3d at 121 (referring to *Peterson*). Thus, for example, the Court has applied the exception to a courtroom closure during the testimony of the defendant himself, *see Peterson*, 85 F.3d at 41-44; *see also Brown*, 142 F.3d at 541 (stating that *Peterson* involved a closure "during the testimony of . . . one of the most significant trial witnesses"); during the testimony (which lasted for three days) of an informant who had set up the drug deal for which the defendant was on trial and had identified the defendant in a lineup, *see Carson*, 421 F.3d at 85-87; during the testimony of a police officer regarding his encounter with the defendant using an alias linking him to the charged crime, *see Brown*, 142 F.3d at 532-33; during the testimony of a police chemist in a drug case, *see Gonzalez*, 211 F.3d at 739; and during a substantial portion of voir dire, *see Gibbons*, 555 F.3d at 120-21; *cf. Morales*, 635 F.3d at 43-45 (holding that counsel's failure to object to the closure of the courtroom during a portion of voir dire was not unreasonable). By contrast, the Court has refrained from applying the exception where the closure occurred during the "crux" of the prosecution's

case. *Smith*, 448 F.3d at 540-41 (courtroom closed for the testimony of two undercover police officers who "provided the great bulk of the trial testimony" against the defendant, one of whom "was the principal prosecution witness" and "the *only* witness to identify [the defendant] as having been involved in the [crime]"); *accord Gonzalez*, 211 F.3d at 738 (courtroom closed for "the testimony of the primary prosecution witness — the only witness who made a positive identification of the defendant as a participant in the [crime]").

The Court's decision in *Gibbons* is particularly instructive — and not merely because, like this case, it involved a courtroom closure during voir dire. In *Gibbons*, the trial court closed the courtroom to spectators during the first day of trial, which consisted of the start of jury selection, and instructed the sole spectator who was present — the defendant's mother — to leave. *See* 555 F.3d at 114. The trial court explained that it was closing the courtroom because of the small size of the courtroom; the large number of venire members; and the desire not to have prospective jurors sitting in close proximity to spectators, especially to a relative of the defendant. *See id.* The defendant objected and proposed alternative measures, but the trial court rejected them. *See id.* After he was convicted and exhausted his state appeals and state habeas, the defendant filed a federal habeas petition claiming violation of his public trial right. The District Court denied the petition. *See id.* at 115. On appeal, this Court held — as the Supreme Court would in *Presley* the next year — that the trial court had failed to satisfy the *Waller* requirements before closing the courtroom. *See id.* at 117-19. The Court

also held, however, that the violation was "too trivial to justify vacating Gibbons's conviction." *Id.* at 121.

The Court reasoned that, given the "particular circumstances" of the case and what actually occurred to which spectators would have been privy had they not been excluded, the courtroom closure did not "subvert" the four core values underlying the public trial guarantee enough to warrant a new trial. *Id.* Specifically, the Court found that the "third and fourth values" — encouraging witnesses to come forward and discouraging perjury — were "not implicated by voir dire because no witnesses testified." *Id.* As for the "first and second values" — ensuring a fair trial and reminding the prosecutor and judge of their responsibility to the accused and the importance of their functions — "limiting presence at the voir dire proceedings to only the attorneys, judge, defendant, and prospective jurors for one afternoon did not subvert these values." *Id.* As the Court explained:

> Even if the trial judge had not excluded Gibbons's mother from the courtroom, she would not have been able to watch a significant portion of what occurred during that afternoon session because the private interviews of individual jurors as to their reasons for inability to serve were justifiably conducted . . . out of the hearing and sight of the other jurors. Further, nothing of significance happened during the part of the session that took place in the courtroom. The judge read the indictment, asked questions of a few jurors, and provided administrative

> details on what the jurors should expect if chosen. No prospective jurors were excused except with the consent of both parties. No peremptory challenges were made, and no objections were asserted by either party to anything that occurred. The next morning, when voir dire resumed, Gibbons's mother was allowed to watch the proceedings.

Id. Accordingly, the Court held, "[a]lthough the closure was not justified" under *Waller*, it was "too trivial to warrant the remedy of nullifying an otherwise properly conducted . . . criminal trial." *Id.*; *cf. Morales*, 635 F.3d at 44-45 (holding that the failure of counsel to object to the exclusion of spectators from one morning of voir dire, during which peremptory challenges were made, was not unreasonable in part because "these challenges are seldom, if ever, registered within earshot of spectators, so the public was not precluded from witnessing anything to which it otherwise would have been privy").

B. Discussion

As these reasonable and well-established principles make clear, the issue in this case is not whether jury selection in the abstract is an important or a trivial part of a criminal trial. There is no question that it is "a matter of importance, not simply to the adversaries but to the criminal justice system." *Press-Enter. Co.*, 464 U.S. at 505. Nor is the issue whether closure of a courtroom for the entirety of voir dire *can* entitle a defendant to a new trial. There is no question that it can. *See, e.g.*, *People* v. *Martin*, 16 N.Y.3d 607, 613 (2011); *Commonwealth* v. *Cohen*, 456 Mass. 94, 108-09 (2010). Instead, the issue is

whether the District Court's good-faith error in excluding spectators from voir dire in *this* case, an error made before both *Gibbons* and *Presley* were decided, was too trivial to void an otherwise proper conviction — considering not merely what actually occurred during the period of closure, but specifically the extent to which spectators would have been privy to what occurred had they been allowed to remain. Evaluating the particular circumstances of this case against the four core values underlying the public trial guarantee — in accordance with this Court's sound precedents — there is no basis to question the Panel majority's conclusion that the District Court's error was indeed trivial.[*]

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[*] In an amicus brief filed in support of reversal, the Center on the Administration of Criminal Law at New York University (the "Center") argues that the triviality exception is inconsistent with the Supreme Court's structural error doctrine. Gupta himself has never made this argument, however, so it should not be considered by the Court. In any event, the argument — which has not been adopted by any court — is also without merit. The Supreme Court cases upon which the Center relies are in no way inconsistent with the existence of a triviality exception, and they certainly do not reject the doctrine in clear enough terms for this Court to discard 15 years of consistent precedent — including precedent that postdates those Supreme Court decisions. *See Gibbons*, 555 F.3d at 120 (noting that the Supreme Court "has never ruled" on the existence of a triviality exception to the right to a public trial). Moreover, if the Center is correct, then "every temporary instance of unjustified exclusion of the

1. The Closure in this Case Did Not Undermine the Core Values of the Public Trial Clause

Crucially, the starting point of the analysis required by *Peterson* and its progeny is a careful evaluation of what a spectator would have been privy to had he or she been in the courtroom during the period of closure in this case. As the Panel majority correctly found here, such a spectator would have been privy to very little. First, in the morning, a spectator would have missed Judge Batts's brief and largely generic introductory remarks about the importance of jury service, the process of jury selection, and the nature of the charges, as well as her reading of the questions on part one of the jury questionnaire. (JA 67-154). But those remarks were not very significant in their own right, and some of them (for instance, her description of the charges and her discussion of the presumption of innocence and the Government's burden of proof) were repeated later in the case (Tr. 932, 951-55), when the proceedings were open to the public. *Cf. Peterson*, 85 F.3d at 43 (relying on the fact that the defendant's testimony was largely repeated during the defense summation, when the courtroom was open, as a factor weighing in favor of triviality). Moreover, witnessing these portions of the proceedings would have added little to what a spectator could have

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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." *Id.* This Court has rightly called that prospect "unimaginable." *Id.*

learned from a reading of the transcript or a review of the jury questionnaire itself. Second, in the afternoon, a spectator would have missed the District Court's questioning of some prospective jurors regarding their backgrounds and interests. (JA 156-202). But that questioning lasted not much more than an hour in total, and perhaps less, and revealed relatively limited information about each prospective juror. In addition, a transcript of it too would have been available to anyone interested.

Significantly, a spectator would *not* have heard the venire members questioned about their fitness to serve as jurors — because all such questioning took place, justifiably and without objection, at the sidebar. *Cf. Barrows* v. *United States*, 15 A.3d 673, 681 (D.C. 2011) (holding, after *Presley*, that exclusion of spectators from voir dire did not affect the fairness of the proceeding in part because "spectators would not have been able to hear the questions that the court, the prosecutor, and appellant posed, or the exchanges with each prospective petit juror"); *Kelly* v. *State*, 6 A.3d 396, 426 (Md. Ct. Spec. App. 2010) (holding that a courtroom closure during voir dire was trivial in part because spectators "would not have been privy to much of what occurred; a significant portion of the proceedings involved questioning of individual jurors at the bench, a procedure that typically cannot be heard by spectators in the courtroom"). Nor would a spectator have been privy to the exercise of peremptory challenges — because, consistent with common practice and also without objection, the parties exercised their challenges in a brief proceeding that took place in the jury

room.[*] And finally, a spectator would not have witnessed any disputes (between the parties or between a party and the court), any objections to anything that occurred, or any dismissals of jurors without the consent of both parties. Because there was none.

Given these "particular circumstances," *Gibbons*, 555 F.3d at 121, the Panel majority was right to hold that the District Court's erroneous closure of the courtroom during jury selection was too trivial to warrant overturning Gupta's conviction.[**] As the majority found, and the

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[*] Gupta did not challenge the District Court's questioning of jurors at sidebar or the exercise of peremptory challenges outside the courtroom for good reason. *See, e.g.*, *Morales*, 635 F.3d at 44 (noting that peremptory challenges "are seldom, if ever, registered within earshot of spectators"); *Gibbons*, 555 F.3d at 121 ("[T]he private interviews of individual jurors as to their reasons for inability to serve were justifiably conducted in an adjacent room out of the hearing and sight of the other jurors."). Further, any claim of error arising from these procedures would be reviewable only for plain error and would fall short. If there was any error, it was certainly not "clear or obvious." *United States* v. *Marcus*, 130 S. Ct. at 2164 (internal quotation marks omitted). Nor did it "seriously affect[] the fairness, integrity or public reputation of judicial proceedings." *Id.*; *see, e.g.*, *People* v. *Virgil*, 51 Cal. 4th 1210, 1238 (2011) (holding that questioning jurors at sidebar did not violate the right to a public trial).

[**] The Panel was also plainly right in holding that *Presley* left this Court's jurisprudence on the triviality

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exception intact. *See* 650 F.3d at 871-72. Judge Parker made clear that he too believes the triviality doctrine survived *Presley*, *see id.* at 873-74 (Parker, J., dissenting), and Gupta did not renew his argument on this point in the Petition. Moreover, every court that previously recognized the exception to address the issue since *Presley* has held that the exception continues to exist. *See, e.g.*, *United States* v. *Greene*, 431 F. App'x 191, 195 (3d Cir. 2011) (unpublished) ("Courts have continued to conduct triviality analyses in the wake of *Presley*'s holding that the Sixth Amendment extends to voir dire proceedings."). On remand in *Presley* itself, the Court of Appeals of Georgia did rule that Presley was entitled to a new trial, *see Presley* v. *State*, 706 S.E.2d 103 (Ga. Ct. App. 2011), but the Court did not address the applicability *vel non* of the triviality exception, as it was not argued by the State.

In *United States* v. *Agosto-Vega*, 617 F.3d 541, 547-48 (1st Cir. 2010), the First Circuit vacated a conviction in light of *Presley*, but it concluded that it did not need to reach the question of whether there is a triviality exception. *See id.* at 548 (citing *Gibbons*); *see also Gupta*, 650 F.3d at 872 n.5 (noting that *Agosto-Vega* did not consider "whether a triviality exception existed post-*Presley*"). Further, *Agosto-Vega* is distinguishable from the present case on its facts because, among other things, the exclusion of spectators there was over the defendant's strenuous objection. *See* 617 F.3d at 544-45, 547. Finally, the First Circuit's approach to these issues even prior to *Presley* was in tension with this Court's precedents. *Compare Gibbons*, 555 F.3d at 120-21, *with Owens* v. *United States*,

dissent did not dispute, two of the four values underlying the public trial guarantee — encouraging witnesses to come forward and discouraging perjury — were plainly not implicated at all, let alone subverted, by the closure because it occurred solely during voir dire, when no witnesses testify. *See id.* And the other two values — ensuring a fair trial and reminding the prosecutors and judge of their responsibility to the accused and the importance of their functions — were not undermined because, at bottom, potential spectators were deprived of seeing only about an hour of actual interaction with prospective jurors and they missed nothing of significance. *Cf. Morales*, 635 F.3d at 44 n.10 (holding that counsel did not act unreasonably in failing to object to exclusion of spectators from voir dire because the proceeding was "essentially one large side bar and nothing which the public would have witnessed orally"). In short, "[t]his is not a case where it is or could be charged that the judge deliberately enforced secrecy in order to be free of the safeguards of the public's scrutiny; nor is it urged that publicity would in the slightest have affected the conduct of the proceedings or their result." *Levine* v. *United States*, 362 U.S. 610, 619 (1960).

Notably, in taking issue with the majority's conclusion, the dissent did not engage in any analysis of the four values underlying the public trial guarantee — as this Court's precedents require. Nor did the dissent attempt to

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483 F.3d 48, 62-63 (1st Cir. 2007) (holding that closure of the courtroom for a day of jury selection did not qualify as "trivial" without considering or evaluating the "values" of the public trial right).

parse the record to determine what actually transpired during the courtroom closure to which a spectator would have been privy — as this Court's precedents also require. Instead, it relied on little more than the undisputed fact that the closure in this case lasted for "*the entire process of selecting a jury*." 650 F.3d at 875 (Parker, J., dissenting) (emphasis in original). That sort of categorical approach to the closure in this case, however, does not do as good a job of measuring whether or how much a particular closure compromises Sixth Amendment values and runs counter to how this Court has analyzed closures in the past. The closure in *Peterson*, for example, was deemed trivial even though it lasted for the entirety of the defendant's testimony, *see* 85 F.3d at 43 — indisputably, "one of the most important portions of the trial." *Gibbons*, 555 F.3d at 121; *see also Brown*, 142 F.3d at 541 ("The closure in *Peterson* took place during . . . one of the most significant trial witnesses."). Similarly, the closure in *Carson* did not warrant a new trial even though it lasted for all three days of the confidential informant's testimony. *See* 421 F.3d at 87. The triviality test, that is, turns on multiple factors and "a fact-specific analysis of the unique circumstances in a given case." *Gupta*, 650 F.3d at 869 n.3. And here, neither the dissent nor Gupta himself did — or could — point to "any specific events" during the voir dire that undermined the values of the public trial right. *Id.*

The dissent also relied heavily on the fact that the District Court's exclusion of spectators was "intentional" and "advertent." 650 F.3d at 872, 875, 876. Although this Court has relied on the inadvertence of a closure as a factor favoring triviality, *see, e.g.*, *Peterson*, 85 F.3d at 44, it is not entirely clear what relevance the intentionality or

inadvertence of a closure has in evaluating the impact of a closure on the defendant's right to a public trial. *See, e.g.*, *Walton* v. *Briley*, 361 F.3d 431, 433 (7th Cir. 2004) ("Whether the closure was intentional or inadvertent is constitutionally irrelevant."); *see also, e.g.*, *Kelly*, 6 A.3d at 407 n.10. In any event, if the remedy of a new trial "is intended to deter unjustified courtroom closures, then the necessity for that remedy should depend on the degree to which it 'could be charged that the judge deliberately enforced secrecy in order to be free of the safeguards of the public's scrutiny.'" *Brown*, 142 F.3d at 541 (quoting *Levine* v. *United States*, 362 U.S. at 619). Here, Judge Batts may have intentionally excluded spectators, but she did so for benign reasons — to make space for the 70 prospective jurors and to avoid tainting the panel (JA 238-39) — not to be free of the safeguards of the public's scrutiny. Moreover, the closure in this case came before *Gibbons* and *Presley* made clear that the District Court's rationales were insufficient to support the closure. At most, therefore, Judge Batts made a "good faith mistake," which does not warrant reversal. *Brown*, 142 F.3d at 541.

2. The Presence of the Venire Members Helped to Safeguard the Values of the Public Trial Guarantee

These considerations alone would support a finding of triviality, but — as the Panel majority observed — application of the triviality exception is supported further by the fact that members of the public *were* present, for all practical purposes, in the form of the venire panel. *See id.* at 870-71. Judge Parker is undoubtedly correct that members of the venire are not altogether "*external to the*

judicial process." *Id.* at 876 (Parker, J., dissenting) (emphasis in original). But venire members — especially those who are never questioned and end up as mere observers of the proceedings, as was the case with several venire members here — are not really full participants in the process either, and they plainly provide some, if not equal, "assurance that established procedures are being followed and that deviations will become known." *Press-Enter. Co.*, 464 U.S. at 508. More importantly, the significance of the public trial guarantee lies to a large degree in the effect on the trial participants of knowing that the public is (or could be) watching. *See, e.g.*, *Waller*, 467 U.S. at 46 & n.4. In that regard, the presence of the venire is significant: As a matter of common sense and human nature, a trial judge and prosecutors are likely to be as "keen[] to a sense of their responsibility and to the importance of their functions" in the presence of venire members as they would be in the presence of observers completely external to the judicial process. *Id.* at 46 (internal quotation marks omitted).

The majority's reliance on the presence of the venire as "a factor" in the triviality analysis, 650 F.3d at 870 n.4, accords not only with common sense, but also with this Court's precedents. In fact, this Court has more than once cited the presence of *actual jurors* as a reason to affirm a conviction notwithstanding exclusion of spectators from the courtroom. *See Carson*, 421 F.3d at 93; *Brown*, 142 F.3d at 536-37. In *Carson*, for example, Judge Parker himself cited "[t]he presence of . . . members of the jury" during the confidential informant's testimony as a factor that "*clearly* safeguarded" the two reasons for the public trial right at issue here. 421 F.3d at 93 (emphasis added);

see id. ("This is not a case like *Oliver* or *Waller*, where the court conducted a hearing in the absence of *jurors and* the public." (emphasis added)). And in *Brown*, the Court held that closure of the courtroom during the testimony of a witness did not warrant a new trial in part "because [the defendant] was tried before a jury composed of fifteen representatives of the community (twelve jurors and three alternates)" and thus his trial "was never completely closed to the public." 142 F.3d at 536. If the presence of actual jurors during the evidentiary portion of trial can "clearly safeguard[]" the two values of the public trial guarantee relevant here, as *Carson* and *Brown* held, it follows *a fortiori* that the presence of mere prospective jurors at least mitigates the extent to which a closure implicates the public trial right during voir dire. Put simply, while the District Court erred in excluding spectators from the courtroom under the *Waller* test, "[t]here was no in camera or secret trial. It was held in a public courtroom with attorneys, court reporters, court attendants and at least *some* outsiders present." *United States ex rel. Bruno* v. *Herold*, 408 F.2d 125, 127 (2d Cir. 1969) (emphasis added).

3. The Case for the Triviality Exception Is Even Stronger Here than It Was in *Gibbons*

Accordingly, reasoning from the first principles underlying this Court's triviality test — principles that were not challenged by the dissent and that remain as sound today as they were when adopted 15 years ago — there is no basis to overturn Gupta's conviction in this case. There is no need to return to first principles, how-

ever, because — as the Panel majority correctly noted — application of the triviality exception is all but compelled by this Court's decision in *Gibbons*. *See* 650 F.3d at 868-69. Here, as in *Gibbons*, "limiting presence at the voir dire proceedings to only the attorneys, judge, defendant, and prospective jurors . . . did not subvert" the values of ensuring a fair trial and reminding the prosecutors and judge of their responsibility to the accused and the importance of their functions. 555 F.3d at 121. Here, as there, the courtroom was closed for only a portion of one day. Here, as there, very few spectators were affected by the courtroom closure. Here, as there, some of what occurred during the relevant time properly took place out of the hearing and sight of the gallery anyway. And here, as there, "nothing of significance happened during the part of the session that took place in the courtroom." *Id.* at 121. No prospective jurors were excused except on consent; no peremptory challenges were exercised in open court; and "no objections were asserted by either party to anything that occurred." *Id.*

To be sure, the voir dire in this case was completed during the period of courtroom closure, while in *Gibbons* it continued into a second day when spectators were permitted to return. *See id.* at 114-15. In addition, the parties here exercised peremptory challenges during the closure, while in *Gibbons* they did not. *See id.* at 121. But as the Panel majority found, *see* 650 F.3d at 869, these differences do not meaningfully distinguish this case for purposes of applying the triviality exception. Indeed, the fact that the District Court in this case managed to complete voir dire in less than one trial day merely underscores that "nothing of significance happened." *Gibbons*, 555

F.3d at 121. That is, jury selection took place expeditiously and without any event — certainly without "any specific events . . . that are distinguishable from *Gibbons*." 650 F.3d at 869 n.3. Nor is the fact that jury selection began in the morning and thus finished before the end of the day, whereas jury selection in *Gibbons* began in the afternoon and thus continued the next morning, a difference of constitutional magnitude; what matters for triviality purposes is what *transpired* during the closure and what transpired (and did *not* transpire) here did not implicate the public trial guarantee enough to void Gupta's conviction. As for the peremptory challenges, the parties in this case exercised them in the jury room, outside the presence of the prospective jurors, so the excluded spectators "would not have been able to watch" anyway. 555 F.3d at 121. Moreover, the parties made their peremptory challenges quickly — the entire process spans fewer than three transcript pages (JA 203-05) — and without any objections.

In fact, if anything, the argument for applying the triviality exception in this case is even stronger than it was in *Gibbons* for at least three reasons. First, whereas the lawyers in *Gibbons* knew that they were free from the gaze of any public observers, the lawyers here had every reason to believe the public *was* present because they were not aware of the closure. (JA 228, 238-39). That is, the public trial guarantee is an effective check on the abuse of power in large part because the participants believe "that every criminal trial is subject to contemporaneous review in the forum of public opinion." *Oliver*, 333 U.S. at 270. Here, all the key participants in the trial save Judge Batts and her Courtroom Deputy did believe that the proceedings were

subject to such review. It follows that the exclusion did nothing to subvert the value of "reminding the prosecutor[s]," let alone the other trial participants, "of their responsibility to the accused and the importance of their functions." *Gibbons*, 555 F.3d at 121; *see, e.g.*, *Hoyt* v. *Lewin*, 444 F. Supp. 2d 258, 272 (S.D.N.Y. 2006) (concluding that the "second value" underlying the public trial guarantee — "to remind the prosecutor and judge of their responsibility to the accused and of the importance of their functions" — was "not undermined" where "neither party had any reason to know" that the courtroom had been closed) *cf. Peterson*, 85 F.3d at 43 ("[S]ince the defendant did not know of the closure and he was the only one to have testified during it, the closure was most unlikely to have encouraged perjury."). At bottom, "[t]here is no reason to believe that [Gupta]'s trial was any less fair, or that the court officers or [prospective jurors] took their roles any less seriously," because of a courtroom closure about which they had no knowledge. *Braun*, 227 F.3d at 919; *cf. Owens* v. *United States*, 483 F.3d at 65 (speculating, in a case where the trial court disclosed its intention to close the courtroom, that the defendant "and the Government might have picked a more impartial jury or asked different questions with local citizenry watching").

Second, the significance of the closure was mitigated further by the extensive paper record of the proceedings. As the Supreme Court has noted, "the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time." *Press-Enter. Co.*, 464 U.S. at 512; *accord Carson*, 421 F.3d at 89 (noting that in evaluating a courtroom closure consider-

ation must be given to "whether the public can learn what transpired while the trial was closed (e.g. through transcripts)"); *see also, e.g.*, *Brown*, 142 F.3d at 535-37 (holding that closure of the courtroom during the testimony of a witness did not require a new trial in part because a transcript "was available to anyone interested in what he had to say when the proceeding was closed"); *United States* v. *Waters,* 627 F.3d 345, 361 (9th Cir. 2010) (calling the defendant's right to a public trial during a pretrial hearing "doubtless important," but observing that "it may have been vindicated by the public availability of a transcript"). Here, not only was a full transcript of the voir dire promptly available to anyone interested in what happened, but much of the proceedings was also based on a written questionnaire read by the District Court and marked up by the prospective jurors — and, as a judicial document, the questionnaire would presumably have been available for the asking as well. *See generally Lugosch* v. *Pyramid Co.*, 435 F.3d 110, 119-20 (2d Cir. 2006). A paper record is not a perfect substitute for public access, *see, e.g.*, *ABC, Inc.* v. *Stewart*, 360 F.3d 90, 95 (2d Cir. 2004), and, by itself, is plainly not sufficient to render any courtroom closing trivial, but it certainly mitigates the effects of a closure on Sixth Amendment interests. The extensive paper record in this case ensured that the proceedings were in fact "subject to contemporaneous review in the forum of public opinion," and thus helped to ensure that the purposes of the public trial guarantee were satisfied. *Oliver*, 333 U.S. at 270.

Finally, whereas the defendant in *Gibbons* (like the defendant in *Presley*) objected to exclusion of his family from the courtroom, *see* 555 F.3d at 114, Gupta said

nothing in connection with the exclusion of his brother and girlfriend in this case. Significantly, while defense counsel submitted affidavits to this Court and to the District Court averring that *he* did not know about the exclusion until the case was on appeal (JA 215, 228), there are at least two reasons to believe that Gupta himself did know about it. First, given his intimate relationship to the two spectators who were asked to leave, it is reasonable to assume that he learned about it at least during the lunch recess — before any prospective juror was questioned in open court and with ample time to cure the problem. Second, it was Gupta who brought the potential Sixth Amendment issue to counsel's attention — and he did so within a single day of the Supreme Court's decision in *Presley*. (JA 215, 228). It is hard to believe that Gupta did that without already knowing about the exclusion of his brother and girlfriend.[*]

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[*] Notably, although the Government suggested that Gupta knew about the closure in its initial brief before the Panel, Gupta did not challenge the claim in his reply brief or in the Petition. As the Government argued in its initial brief, if Gupta (or a member of his defense team other than counsel who submitted the affidavit to the District Court) *did* know about the closure before jury selection ended, then this Court should review Gupta's public trial claim only for plain error. *See* Fed. R. Crim. P. 51(b), 52(b); *see also, e.g.*, *United States* v. *Scott*, 564 F.3d at 37; *United States* v. *Thomas*, Nos. 98-1051, 98-1052, 98-1116, 2000 WL 236481, at *2 (2d Cir. Feb.14, 2000) (unpublished). On plain error review, Gupta's argument would fail because, at a minimum, he could not show that "the error seriously affect[ed] the fairness, integrity or public reputa-

In light of these circumstances, it seems that either Gupta did not care enough about ensuring the presence of his brother and girlfriend to ask them where they were or, if he did learn that they had been excluded, he did not care enough about ensuring their presence to alert his counsel, let alone the District Court. Either way, it makes this Court's "strong devotion to the preservation of an individual's right to have family and friends present at his trial" a non-issue in this case. *Carson*, 448 F.3d at 539; *see, e.g.*, *State* v. *Venable*, 986 A.2d 743, 749 (N.J. App. Div. 2010) (relying on *Gibbons* in holding that exclusion of the defendants' families from the courtroom during voir dire was trivial and citing the absence of an objection as one reason the case was "even stronger" than *Gibbons* "for the conclusion that the exclusion of family members during jury selection does not require a reversal"). More generally, the absence of an objection indicates the lack of a strong subjective interest in having spectators present and thus is an additional factor weighing in favor of triviality.

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tion of judicial proceedings." *Marcus*, 130 S. Ct. at 2164 (internal quotation marks omitted); *see, e.g.*, *Barrows* v. *United States*, 15 A.3d at 681 (rejecting a public trial claim on very similar facts to those here for failure to show plain error). In the Government's view, the Court need not resolve whether plain error should apply because Gupta's arguments fail regardless. If the Court disagrees, however, the Government respectfully submits that a remand would be appropriate to determine if Gupta or another member of his defense team learned about the courtroom closure during trial, when he could have objected or asked the District Court to begin jury selection anew.

See Brown, 142 F.3d at 542 (noting that there is "little purpose" to reversal "when the defendant makes no more than a perfunctory effort to prevent the closure").

In short, the Court's decision in *Gibbons* — a decision cited favorably by *both* the majority and the dissent, *see* 650 F.3d at 868-69; *id.* at 873 (Parker, J., dissenting) — compels the conclusion that the District Court's good-faith error in excluding spectators from voir dire in this case was "too trivial to warrant the remedy of nullifying an otherwise properly conducted . . . criminal trial" and vacating Gupta's conviction. 555 F.3d at 121. Given the "particular circumstances of this case" — including, but not limited to, the absence of any disputes or objections during voir dire, the significant proportion of the proceedings that justifiably and without objection occurred at sidebar or in the jury room, the availability of both a stenographic transcript and the jury questionnaire, and the presence of 70 impartial spectators to the proceedings in the form of the prospective jurors themselves — it simply cannot be said that the values underlying the public trial right were "subvert[ed]" by the District Court's error in this case. *Id.* at 121. Indeed, under "the unique circumstances presented here," *Carson*, 421 F.3d at 85, overturning Gupta's conviction would do nothing to advance the interests of the public, let alone Gupta himself, in a public trial, but would merely be a windfall for Gupta, who was convicted after an entirely fair trial.

4. The Dissent's and Gupta's Criticisms of the Majority Opinion Are Unfounded

Contrary to the dissent's assertions, to reach that conclusion is not to say that the District Court's closure of

the courtroom here "was justified." 650 F.3d at 876 (Parker, J., dissenting). Under *Presley* and *Gibbons*, there is no doubt that the District Court's closure here was improper and unjustified — as the Government has conceded and the majority clearly found. *See id.* at 866-67 (majority opinion). It is merely to say that, in the circumstances of this particular case, the District Court's good-faith error does not warrant the drastic remedy of voiding Gupta's conviction. Nor can the Panel majority's conclusion in this case be interpreted, as Gupta and the dissent both suggest, to be a "declaration" that jury selection is a "trivial" or "inconsequential" proceeding. (JA 280-81). *Cf. Gupta*, 650 F.3d at 876 (Parker, J., dissenting) (stating that "[t]he majority's holding suggests that all [voir dire] proceedings are inconsequential"). Indeed, the majority's decision in this case should no more be interpreted to convey that jury selection itself is trivial or inconsequential than *Peterson* should be interpreted to mean that the testimony of a defendant is trivial or inconsequential or *Carson* should be interpreted to mean that the testimony of a confidential informant who set up the charged crime is trivial or inconsequential. To read the Panel majority's opinion in either of these ways — as justifying the courtroom closure or as a statement that jury selection is trivial and inconsequential — is to misunderstand the nature and goal of the triviality inquiry.

Additionally, the majority's decision does not even remotely suggest that every courtroom closure during jury selection would qualify as trivial, thereby turning an "exception" into the "rule." (JA 276; *see also* JA 280). As the majority made clear, its decision — like *Peterson*, *Gibbons*, and this Court's other triviality exception cases

— turned on "a fact-specific analysis of the unique circumstances" and "particular facts" in this case. 650 F.3d at 869 n.3; *see also id.* (cautioning against "extrapolat[ing]" its holding "beyond the narrow confines defined in [its] opinion"). Had the circumstances been different, the weighing of the four values underlying the public trial guarantee could easily have led to a different result. For example, if voir dire had taken longer than the portion of one day that it took in this case, and the public had been excluded from all of it, there might have been a stronger argument for vacating Gupta's conviction. *Cf. People* v. *Martin*, 16 N.Y.3d at 613 (holding that the triviality exception did not apply to the exclusion of spectators from a voir dire that lasted two full days and involved "extensive questioning of prospective jurors in open court"); *Cohen*, 456 Mass. at 108-09 (holding that the triviality exception did not apply where the public was intentionally excluded from "at least three days of jury selection").

Alternatively, had there had been any meaningful disputes during the proceedings — such as a challenge for cause disputed by one side or the other, an objection to the District Court's rulings or procedures, or a *Batson* challenge — there might have been a more compelling case for requiring a new trial. *Cf. State* v. *Sadler*, 193 P.3d 1108, 1117 (Wash. Ct. App. 2008) (holding that the right to a public trial was violated where the trial court conducted a *Batson* hearing in the jury room because, among other things, "the *Batson* challenge was an integral part of the jury selection process requiring the trial court to make credibility determinations based, at least in part, on the demeanor of the attorney" (internal quotation marks omitted)). And where a defendant objects, thereby indicat-

ing an actual subjective interest in having the public or his family present, it might be harder to call an improper closure trivial. But where, as here, voir dire lasted for only a portion of one day, most of it was conducted at the sidebar, only a few members of the public were excluded, counsel was unaware of the exclusion, the defendant himself either did not notice or did not care about the exclusion (even though it involved family), and nothing of significance happened, improper closure of the courtroom is "too trivial" to disturb an otherwise valid conviction.

For similar reasons, there is no merit to the dissent's suggestion that the majority's decision will lead district courts to conclude that they can exclude spectators from jury selection, let alone "cross-examinations, arguments to the court, statements to jurors, and instructions to defendants and to counsel," without fearing reversal. 650 F.3d at 876 (Parker, J., dissenting). As noted above, in light of *Presley* and *Gibbons* — not to mention the majority opinion in this case itself — there is no longer any doubt that exclusion of spectators from voir dire (absent other reasons that could satisfy the *Waller* test) constitutes a violation of the Sixth Amendment right to a public trial. While Judge Batts did not have the benefit of those decisions at the time of this case, it is hard to imagine going forward that any district judge would intentionally exclude spectators from the courtroom during voir dire in the face of those clear opinions. And it is even harder to imagine a district judge would do so banking on the fortuity that "nothing of significance" would happen during the proceedings. That is, because applicability of the triviality exception turns on what transpires during the period of closure — something that cannot be predicted *ex*

ante — a district judge would have to be reckless, lawless, or both to exclude spectators assuming that a conviction would survive later scrutiny.

Finally, there is no basis to question the Panel majority's holding in this case — as the dissent did — on the ground that it "undermines . . . the appearance of fairness so essential to public confidence in the system." 650 F.3d at 874 (Parker, J., dissenting). In fact, given the circumstances in this case, it is the *reversal* of Gupta's conviction that would threaten to undermine public confidence in the system of justice. The evidence at trial in this case, which lasted seven days, showed overwhelmingly that Gupta operated a brazen scheme to submit false and fraudulent amnesty applications to benefit himself financially. His conduct, and his lack of remorse, earned him a sentence at the top end of the Guidelines range. Reversing his conviction and requiring another trial due to an error that did not "in the slightest . . . affect[] the conduct of the proceedings or their result," *Levine*, 362 U.S. at 619, and certainly did not "turn[]" the proceedings "into an 'instrument[] of persecution,'" *Brown*, 142 F.3d at 536 (quoting *Oliver*, 333 U.S. at 270) (emphasis added), would do more to damage public confidence in the criminal justice system than the District Court's good-faith error possibly could have. *Cf. id.* at 539 ("We should proceed with some caution before ordering such disproportionate relief in a case in which the trial judge did not deliberately enforce [] secrecy in order to be free of the safeguards of the public's scrutiny, and in which the error is not of the sort that risks an unreliable trial outcome and the consequent conviction of an innocent person." (internal quotation marks and citations omitted)).

CONCLUSION

The judgment of conviction should be affirmed.

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November 14, 2011

Respectfully submitted,

PREET BHARARA,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

LEE RENZIN,
JESSE M. FURMAN,
KATHERINE POLK FAILLA,
Assistant United States Attorneys, Of Counsel.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word-processing system used to prepare this brief, there are 13,992 words in this brief.

PREET BHARARA,
United States Attorney for the Southern District of New York

By: JESSE M. FURMAN,
Assistant United States Attorney