CRIMINAL LAW — SIXTH AMENDMENT — SECOND CIRCUIT AFFIRMS CONVICTION DESPITE CLOSURE TO THE PUBLIC OF A VOIR DIRE. — *United States v. Gupta*, 650 F.3d 863 (2d Cir. 2011).

When deciding whether to tolerate trial court errors that infringe on the constitutional rights of criminal defendants, appellate court judges must balance the protection of individual rights against efficiency considerations. Recently, in *United States v. Gupta*,[1] the Second Circuit held that a trial court's closure to the public of the entire voir dire process in a criminal trial was too trivial an infringement of the defendant's Sixth Amendment right to a public trial to warrant any remedy. In so doing, the *Gupta* court altered Second Circuit doctrine by discounting consideration of the characteristics of the trial judge's improper closure of the courtroom[2] and instead giving determinative weight to whether any specific events during the improperly closed proceeding deprived the defendant of his Sixth Amendment protections. Practically, this holding may narrow the recourse available to defendants whose public trial rights are violated. Doctrinally, the holding may bring the Second Circuit's triviality doctrine in line with the harmless error doctrine, putting it in tension with the Supreme Court's precedent that the harmless error doctrine does not apply in the public trial context.

Raghubir Gupta was charged in the U.S. District Court for the Southern District of New York with one count of preparing and filing false immigration documents.[3] At the beginning of jury selection, the trial judge instructed her courtroom deputy to remove those members of the public who were not venire panel members from the courtroom.[4] The courtroom deputy later said that the judge closed the courtroom 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."[5] As a result, Gupta's brother and girlfriend were removed from the courtroom.[6] With the

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[1] 650 F.3d 863 (2d Cir. 2011).

[2] Relevant ex ante factors include whether the closure was intentional, *see, e.g.*, Garey v. United States, No. 5:08-CV-90024-CDL, 2010 WL 2507834, at *18 (M.D. Ga. Mar. 29, 2010) (finding that the closure was "unknown to the trial judge"), the length of the closure, *see, e.g.*, Morales v. United States, 635 F.3d 39, 44 (2d Cir. 2011) (observing that "the closure lasted not much longer than one morning"), and whether the judge excluded all, or only some, members of the public, *see, e.g.*, United States v. Izac, 239 F. App'x 1, 4 (4th Cir. 2007) (noting that the defendant's wife was excluded but that "the courtroom otherwise remained open to the public").

[3] *Gupta*, 650 F.3d at 865.

[4] *Id.* at 865–66.

[5] *Id.* at 866 (citing the affidavit of William Delaney, the courtroom deputy on duty during the first day of Gupta's trial).

[6] *Id.* at 865.

courtroom closed, the court then proceeded through the jury selection process.[7] When members of the public reentered, the jury had been empanelled.[8] At the end of the trial, the jury found Gupta guilty. He was later sentenced to fifty-one months in prison.[9] Gupta appealed, asserting, inter alia, that the closure of the courtroom during the entirety of voir dire violated his Sixth Amendment right to a public trial.[10]

The Second Circuit affirmed Gupta's conviction.[11] Writing for the panel, Judge Hall[12] found that while the trial court's closure of the courtroom during voir dire was improper, the infringement on the defendant's rights was too trivial to warrant a new trial.[13] The court also concluded that the recent Supreme Court decision in *Presley v. Georgia*[14] — which held that the Sixth Amendment public trial right extended to voir dire[15] — did not require the reversal of Gupta's conviction.[16]

In arriving at its holding, the court first determined that the closure of the courtroom throughout voir dire was an error.[17] The court reached this conclusion by applying the Supreme Court's test from *Waller v. Georgia*,[18] which sets forth the factors that must be satisfied to justify a courtroom closure.[19] The court found that the trial judge's justifications for excluding the public from the courtroom were "insufficient to justify a courtroom closure" under *Waller*.[20]

Notwithstanding the fact that the closure of the courtroom was improper, the court found that under the Second Circuit's "triviality exception" the closure did not violate Gupta's Sixth Amendment public trial right.[21] The court explained that the triviality exception differs from harmless error review.[22] The inquiry is not whether the defen-

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7 *Id.*
8 *Id.*
9 *Id.*
10 *Id.*
11 *Id.*
12 Judge Hall was joined by Judge Walker.
13 *Gupta*, 650 F.3d at 868. The court quoted a similar earlier case, *Gibbons v. Savage*, 555 F.3d 112 (2d Cir. 2009), to note that it did not need to "rule on the metaphysical question whether, in view of the triviality of the incident, it was not a deprivation of a constitutional right, or in contrast, it was a violation of a constitutional right." *Gupta*, 650 F.3d at 867 n.1 (quoting *Gibbons*, 555 F.3d at 121).
14 130 S. Ct. 721 (2010).
15 *Id.* at 723–24.
16 *Gupta*, 650 F.3d at 871.
17 *Id.* at 866.
18 467 U.S. 39 (1984).
19 *Gupta*, 650 F.3d at 866.
20 *Id.*
21 *Id.* at 868.
22 *Id.* at 867.

dant "suffer[ed] 'prejudice' or 'specific injury.'"[23] Rather, it asks whether the defendant, guilty or innocent, was deprived of the protections provided by the Sixth Amendment.[24] And, according to the *Gupta* court, those protections were: "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."[25]

Under this framework, the court held that the harm caused by the closure of the courtroom during voir dire was trivial.[26] First, the court determined that the third and fourth values were not implicated because no witnesses testify in voir dire.[27] Second, the court relied on an earlier Second Circuit case, *Gibbons v. Savage*,[28] to hold that the first and second values were not implicated because "nothing of significance happened" during the jury selection process.[29] Responding to the dissent, the court elaborated on this "of significance" criterion, saying that Gupta had not "identified any specific events which occurred . . . which might, as a consequence, suggest that the proceedings were unfair or that the prosecutor and judge were unaware of their responsibility to the accused and the importance of their functions."[30]

The court also said that the harm to Gupta's public trial right was mitigated by the fact that the potential jury members were observing the proceedings and were proxies for the public itself.[31] Finally, the court found that the Supreme Court's decision in *Presley v. Georgia* did not require reversal because the question in *Presley* was whether a judge's closure of the voir dire was wrong at all and did not touch on the triviality doctrine.[32]

Judge Parker dissented forcefully. He began by stating that the majority's determination that the wrongful courtroom closure was trivial "insults the values inherent in the Sixth Amendment."[33] He argued that the Second Circuit's triviality exception applied "only rarely and to truly trivial closings"[34] and was never meant to apply to a situation like this one.[35] He criticized the majority's assertion that the in-

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[23] *Id.* (quoting Peterson v. Williams, 85 F.3d 39, 42 (2d Cir. 1996)).
[24] *Id.*
[25] *Id.* (quoting *Peterson*, 85 F.3d at 43) (internal quotation marks omitted).
[26] *Id.* at 868.
[27] *Id.*
[28] 555 F.3d 112 (2d Cir. 2009).
[29] *Gupta*, 650 F.3d at 868 (quoting *Gibbons*, 555 F.3d at 121).
[30] *Id.* at 869 n.3.
[31] *Id.* at 870–71.
[32] *Id.* at 871.
[33] *Id.* at 872 (Parker, J., dissenting).
[34] *Id.* at 874.
[35] *Id.*

fraction was trivial because "nothing of significance happened,"[36] emphasizing that what happened was "*the entire process of selecting a jury*."[37] Judge Parker further argued that the majority's determination that the potential jury members functioned as proxies for the public was wrong because they were not "external to the judicial process."[38] He concluded by declaring that the majority's opinion "is so self-evidently inconsistent with Supreme Court jurisprudence that I would hope that it becomes the subject of certiorari."[39]

Gupta's reliance on the criterion of whether any specific event "of significance" occurred during the closed proceeding, at the expense of examining the ex ante characteristics of the improper courtroom closure, will likely make it harder for defendants to obtain redress for Sixth Amendment public trial right violations. Whereas, before this ruling, a defendant could have highlighted both the ex ante characteristics of the closure itself and the ex post occurrences during the closure, under *Gupta*'s reasoning only the latter are given significant weight. Yet requiring a showing that the protections of the Sixth Amendment were undermined by reference to specific occurrences presents information problems that systematically prejudice defendants. Trial records upon which appellate judges rely in triviality determinations are likely to be underinclusive of information concerning whether something of significance occurred during the closed court proceeding.[40] Under *Gupta*, this missing information will disproportionately harm defendants because, without evidence that anything significant occurred during the courtroom closure to undermine Sixth Amendment rights, the defendant will lose. The Supreme Court recognized this information problem in *Waller v. Georgia* and consequently rejected the harmless error doctrine in the public trial right context.[41] *Gupta* renders the triviality doctrine akin to the harmless error doctrine and thus comes into tension with *Waller*.

Under *Waller*, denial of a public trial right is a structural error and is not subject to harmless error review.[42] As such, a defendant does

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[36] *Id.* at 875 (quoting *id.* at 868–69 (majority opinion)) (internal quotation marks omitted).

[37] *Id.*

[38] *Id.* at 876 (emphasis omitted).

[39] *Id.*

[40] *See, e.g.*, James Edward Wicht III, *There Is No Such Thing as a Harmless Constitutional Error: Returning to a Rule of Automatic Reversal*, 12 BYU J. PUB. L. 73, 93–94 (1997) (arguing that trial transcripts do not capture the full significance of courtroom events and thus should not be used to weigh the impact of constitutional errors).

[41] Waller v. Georgia, 467 U.S. 39, 49 & n.9 (1984).

[42] *Id.* For a definition and history of harmless error review, see Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 82–88 (1988), which explains that a trial error may sometimes not require reversal under the harmless error doctrine if it "has had no effect on the finding of guilt," *id.* at 86. *See also* Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1180

not have to show actual prejudice to have a conviction overturned; rather, a denial of the public trial right "requires automatic reversal."[43] The Second Circuit carved out an exception to the automatic reversal rule, creating a "triviality doctrine" in *Peterson v. Williams*,[44] where the court looked "to whether the actions of the court and the effect that they had on the conduct of the trial deprived the defendant . . . of the protections conferred by the Sixth Amendment."[45] In practice, this inquiry can be conceptualized as consisting of reliance on two types of criteria: First, the ex ante characteristics of the trial judge's improper closure, such as whether the closure was intentional, for how long the judge closed the courtroom, and whether the judge excluded all members of the public. And second, the ex post criterion of whether any specific event occurred during the closure that undermined the defendant's Sixth Amendment protections.

Prior to *Gupta*, courts often looked to the ex ante characteristics of the trial judge's improper voir dire closure itself as an important metric in determining to what extent the values protected by the defendant's Sixth Amendment public trial right were subverted. In his dissent in *Gupta*, Judge Parker wrote that he had located "eighteen cases in which a federal or state court has found that a closure during voir dire, though improper, was too trivial (or de minimis) to warrant overturning a conviction."[46] Judge Parker noted that "in all of those cases, the closure lasted only for part of voir dire and/or was limited to certain spectators, and in many instances the closure was inadvertent."[47] Although Judge Parker marshaled these cases to show that the closure of an entire voir dire was unprecedented, the cases he collected also show that, in large part, courts held improper closures trivial only when the ex ante characteristics of the closure mitigated the harm to the defendant's Sixth Amendment protections — judged by whether the court was closed intentionally, for how long the judge closed the courtroom, and how many people the judge excluded.[48] The *Gupta* court, however, focused on what happened after the closure, interpreting an earlier case, *Gibbons v. Savage*, as standing for the proposition that "[t]he focus of our [triviality] analysis [is on] what *tran-*

(1995) (tracing the development of the harmless error doctrine and noting its expansion in the domain of both constitutional and nonconstitutional errors).

[43] *Gupta*, 650 F.3d at 873 (Parker, J., dissenting) (quoting Washington v. Recuenco, 548 U.S. 212, 218–19 (2006)) (internal quotation marks omitted).

[44] 85 F.3d 39 (2d Cir. 1996).

[45] *Id.* at 42.

[46] *Gupta*, 650 F.3d at 874 (Parker, J., dissenting).

[47] *Id.*

[48] *See id.* at 875 n.7 (collecting cases). A case that stands out for its incongruence with the other holdings is *Barrows v. United States*, 15 A.3d 673 (D.C. 2011). *Barrows* held that a closure's impact was trivial under plain error review. *Id.* at 681.

spired during the closed proceedings."[49] But *Gibbons* looked to the ex post criterion as *one* of the factors impacting triviality. That court also based its holding on an ex ante characteristic of the closure itself: that the judge had closed the proceeding only "for one afternoon."[50] *Gupta*'s determinative reliance on what happened after the closure is thus a significant expansion of the ex post methodology. The court focused its inquiry there despite the fact that the ex ante characteristics of the *Gupta* closure would have weighed against a triviality finding: the closure was intentional, applied to all members of the public, and lasted for the entire voir dire.[51]

Gupta's effect will be to reduce a defendant's remedies for violations of his public trial right. *Gupta* weakens one of the defendant's two methodological avenues for redress by undercutting his ability to point to the ex ante characteristics of the closure itself to show a violation of his Sixth Amendment right. This erosion of the defendant's ability to remedy a violation is exacerbated by the fact that the remaining avenue — asking whether anything significant occurred — requires appellate courts to have access to information that will often be unavailable.[52] This information problem will systematically prejudice defendants under *Gupta*'s ex post methodology, because when a defendant cannot point to a specific harmful event, he loses. By contrast, under a methodology that also took into account the ex ante criteria, the information regarding the characteristics of the closure itself would typically be available to a reviewing court. Inclusion of these factors under the pre-*Gupta* analysis mitigated the information problem associated with the significant occurrence branch of the inquiry because the former did not overlap fully with the latter and the defendant had an avenue for redress even when information about whether something specific happened to undermine his rights was unavailable.

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[49] *Gupta*, 650 F.3d at 869.

[50] Gibbons v. Savage, 555 F.3d 112, 121 (2d Cir. 2009).

[51] In its triviality inquiry, the court did not *exclusively* rely on the question of whether something specific happened after the closure, but also argued that venire panel members functioned as proxies for the public and mitigated the harm associated with the improper closure. But because venire panel members will always be present during jury selection, the ex post factors will always have determinative effect under *Gupta*'s methodology in the voir dire setting. *See Gupta*, 650 F.3d at 876 (Parker, J., dissenting) ("[I]f the presence of potential jurors were sufficient to 'safeguard[]' the values underlying the Sixth Amendment it would seem that spectators could *always* be excluded." (citation omitted) (second alteration in original) (quoting *id.* at 871 (majority opinion))). Future courts may (or may not) weigh the absence of such "proxies" in non–voir dire proceedings as cutting against a triviality finding, which would mitigate some of the problems associated with *Gupta*'s reasoning in other settings.

[52] *See* Wicht, *supra* note 40, at 94 (noting the information problem and arguing that "requiring the appellate court to determine the effect of a Constitutional error based on the trial transcript [is] similar to asking a movie critic to evaluate a movie based only on the words as written in the screenplay").

The Supreme Court recognized this information problem in *Waller v. Georgia* and consequently rejected the applicability of the harmless error doctrine in the public trial context.[53] A key aspect of the Second Circuit's triviality doctrine that had distinguished it from harmless error was that it looked in part to the ex ante characteristics of the closure itself. Yet *Gupta*'s reasoning, which requires that a specific event "subvert[] the . . . values underlying the public trial guarantee"[54] in order for a defendant to gain relief, effectively abandons the ex ante portion of the inquiry. Therefore, it is very similar to a harmless error inquiry and as a result is in tension with *Waller*. As the *Waller* Court said, "it would be difficult to envisage a case in which [a defendant] would have evidence available of specific injury,"[55] but "[w]hile the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real."[56] As a result, the Supreme Court protected the public trial right by refusing to allow courts to sustain convictions on the ground of harmless error.[57]

An obvious counterargument is that *Gupta*'s ex post methodology is not in tension with *Waller* because *Gupta* looks to whether a specific event subverts "values underlying the public trial guarantee,"[58] whereas *Waller* prohibited only a requirement that the defendant show that the error had an effect on the jury's verdict. But a triviality inquiry requiring that a defendant show that a specific occurrence subverted the values implicated by closure of a voir dire — "ensur[ing] a fair trial" and "remind[ing] the prosecutor and judge of their responsibility to the accused"[59] — will not functionally differ from a harmless error analysis that asks whether the events unfairly contributed to the jury's verdict.[60] Those "values" are in place precisely to protect the defendant from an unfair verdict. When those values are undermined, the defendant is necessarily put at a higher risk of an unfair verdict. And the harmless error doctrine does not require *proof* that an event unfairly contributed to a jury's verdict. The Supreme Court gives the benefit of such uncertainty to the defendant, mandating that "before a federal constitutional error can be held harmless, the court must be

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53 467 U.S. 39, 49–50 & n.9 (1984).

54 *Gupta*, 650 F.3d at 869 n.3.

55 *Waller*, 467 U.S. at 49 n.9 (quoting United States *ex rel.* Bennett v. Rundle, 419 F.2d 599, 608 (3d Cir. 1969)) (internal quotation mark omitted).

56 *Id.*

57 *Id.* at 49–50 & n.9.

58 *Gupta*, 650 F.3d at 869 n.3.

59 *Id.* at 867 (quoting Peterson v. Williams, 85 F.3d 39, 43 (2d Cir. 1996)).

60 *See* Stacy & Dayton, *supra* note 42, at 86 (reasoning that under the Court's harmless error precedent "[i]t follows . . . that the fairness of the trial is not impaired by a constitutional error that has had no effect on the finding of guilt").

able to declare a belief that it was harmless beyond a reasonable doubt."[61] Functionally, both *Gupta*'s triviality doctrine and the harmless error doctrine look to whether a specific event increased the chance that a defendant would suffer an unfair verdict. *Gupta* and *Waller* are thus in tension.

Nevertheless, one might be tempted to argue that *Gupta*'s reasoning is desirable because the public trial right should be subject to harmless error review.[62] But such an argument would be misguided. First, the decision to go against *Waller* and enact a harmless error–like doctrine in the public trial context properly belongs to the Supreme Court and not the Second Circuit.[63] Second, the harmless error doctrine is not well suited to the public trial right because ensuring a correct verdict is only one of the several values protected by that right. As many commentators have noted, the public trial right protects values other than trial accuracy, including First Amendment values and the public's confidence in the judicial system.[64] A harmless error–like standard cannot account for these constitutional injuries.

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[61] Chapman v. California, 386 U.S. 18, 24 (1967).

[62] *Cf.* Steven M. Shepard, Note, *The Case Against Automatic Reversal of Structural Errors*, 117 YALE L.J. 1180, 1185–1214 (2008) (arguing that automatic reversal should never apply to constitutional errors that contribute to a trial's outcome but should be reserved for constitutional errors that have no effect on the outcome).

[63] *Gupta* joins an unfortunate line of cases that undercut *Waller*'s clear enunciation of a structural public trial right by refusing to reverse convictions that occur after improper courtroom closures. *See generally* Daniel Levitas, Comment, *Scaling* Waller*: How Courts Have Eroded the Sixth Amendment Public Trial Right*, 59 EMORY L.J. 493 (2009) (explaining how courts have increasingly found ways to avoid overturning criminal convictions following improper courtroom closures even while the Supreme Court has consistently reiterated the importance of the structural public trial right). Among the techniques that courts have used to avoid enforcing the public trial right are after-the-fact rationales to find closures justified, *see, e.g.*, Bowden v. Keane, 237 F.3d 125, 132–33 (2d Cir. 2001), and expanding the definition of a justified closure to include many new categories, *see* Levitas, *supra*, at 507–09.

[64] *See, e.g.*, Thomas F. Liotti, *Closing the Courtroom to the Public: Whose Rights Are Violated?*, 63 BROOK. L. REV. 501, 550 (1997) (noting the multiplicity of values protected by the public trial right).