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HEADLINE: En Banc Circuit Wrestles With Closing Courtroom to Public

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BODY:

Frustration with cloudy case law and concern over the baseless closing of courtroom proceedings animated lengthy discussion by the U.S. Court of Appeals for the Second Circuit on Wednesday.

For 90 minutes, 15 judges sitting en banc grappled with a case in which a trial judge, without stating her reasons in public, ordered a defendant's family and friends removed from jury selection in violation of the Sixth Amendment right to a public trial.

The judges fired questions at four different lawyers, asking whether closings with no explanation amount to a "structural" violation that affects the fairness of the trial and requires automatic reversal. At issue was the continued viability of case law holding that some closings are so trivial that they do not implicate the Sixth Amendment.

The case is United States v. Gupta, 09-4738-cr, the appeal from the 2008 conviction following a seven-day trial before Southern District Judge Deborah A. Batts (See Profile) of immigration attorney Raghubir K. Gupta for filing fraudulent immigration documents (NYLJ, June 22).

During voir dire, a court officer told Mr. Gupta's brother and girlfriend they must leave the courtroom. Courtroom Deputy William Delaney later submitted an affidavit to the circuit saying that, at Judge Batts' direction, he instructed anyone who was not a prospective juror to leave, in part because of the large number of jurors filling the room and in part to prevent potential jurors from hearing anything about the case from Gupta partisans.

At the time, the Sixth Amendment right to a public trial as outlined by the U.S. Supreme Court in Waller v. Georgia, *467 U.S. 39 (1984)*, a case that extended the right to suppression hearings, had yet to be explicitly extended to voir dire.

Waller requires judges to make specific findings to support a courtroom closure, including that closure is necessary and there is no reasonable alternative.

Under Waller, the Second Circuit has more than once applied a "triviality" exception to the Sixth Amendment and had countenanced much more severe closings than the one in Gupta, including, in one case, a courtroom closed for three days of critical testimony.

But on Jan. 26, 2010, three months after Judge Batts sentenced Mr. Gupta to 51 months in prison, the U.S. Supreme Court issued Presley v. Georgia, *130 S.Ct. 721*, rejecting the exclusion of a defendant's uncle (the only spectator) from the courtroom during voir dire and holding that a trial judge is obligated to consider alternatives to courtroom closure in voir dire as it takes "every reasonable measure to accommodate public attendance at criminal trials."

Mr. Gupta's pending appeal to the Second Circuit was then sent back to Judge Batts on a "Presley remand," and Judge Batts responded with Mr. Delaney's affidavit.

Affidavit in hand, a divided three-judge circuit panel on June 17 held that the exclusion of Mr. Gupta's brother and girlfriend, "though unjustified" was "too trivial" to implicate his right to a public trial.

Judges John M. Walker Jr. (See Profile) and Peter W. Hall (See Profile) were in the majority in holding that the triviality exception is "consistent" with Presley. Judge Barrington D. Parker (See Profile) dissented.

The decision was a controversial one, as a majority of active judges on the circuit voted to rehear the case en banc.

Late Wednesday afternoon, Susan C. Wolfe of Hoffman & Pollok insisted for Mr. Gupta that there was "no intentional closure of jury selection that can comport with the Sixth Amendment."

Almost immediately, Judge Walker asked Ms. Wolfe what would be required if a judge questions every prospective juror in the robing room and then hears peremptory challenges in the robing room.

"Is there any problem with that or does it require Waller findings" for each robing room visit? he asked.

Troubling Record

The record troubled the court because there was no indication that Mr. Gupta's counsel objected to the exclusion, raising the issue of whether he forfeited the objection.

"The defendant was a lawyer," Judge Walker said. "Either he didn't care or, if he did care, he didn't do anything about it."

Mr. Gupta was represented at trial by Jeffrey C. Hoffman, also of Hoffman & Pollok.

Ms. Wolfe said there was no triviality exception and the closing of the courtroom during a critical phase of the proceeding was a "structural" flaw.

When Judge Rosemary Pooler (See Profile) asked whether keeping the jury pool from being tainted was a legitimate concern, Ms. Wolfe agreed it was, but said it did not justify closing the courtroom.

Southern District Assistant U.S. Attorney Katherine Polk Failla argued that Mr. Gupta had indeed waived or forfeited any objection. She defended the viability of the triviality exception-an exception that is applied by considering all of the circumstances.

"Why doesn't closing the entirety of voir dire fail that test?" Judge Gerard E. Lynch (See Profile) asked, especially when voir dire is "a critical stage of the process?"

Judge Lynch also wanted to know, "Why does the right of the defendant turn on whether or not the lawyer objects?"

Examining all the circumstances, Ms. Failla insisted, Mr. Gupta received a fair trial.

She conceded to Judge Richard C. Wesley (See Profile) that the exclusion of the brother and girlfriend was a Waller violation, but insisted that it did not justify a new trial.

"Waller has no sting?" Judge Wesley asked. "Trial judges can simply ignore Waller?"

Ms. Failla said Mr. Gupta's brother and girlfriend missed nothing of consequence-an argument that more than one panelist took exception to-particularly Judge Reena Raggi (See Profile).

"[H]ad the courtroom been open, what anyone would have seen is a judge conducting large parts of a jury selection effectively under closure because she used a questionnaire, because she brought people to sidebar, she took them to the jury room-very little of it was conducted in public," she said. "Why shouldn't the public know that?" and shouldn't "judges be discouraged from doing that by public knowledge of how they're picking juries?"

Judge Lynch derided the government for arguing, in effect, if there were no "fireworks" at the closed proceeding, it does not implicate the Sixth Amendment.

Judge Parker asked what would happen if voir dire was conducted in chambers and there was a sustained Batson challenge-a charge potential jurors were being stricken from the panel because of their race.

"I think that would be difficult to argue that was trivial," Ms. Failla answered.

With Judge Parker telling Ms. Failla, "We have a problem of looking at these records and trying to fashion a coherent body of law," many members of the court wanted the lawyers to suggest a rule they might declare on triviality.

The circuit heard from two amici, Anthony Barkow from the New York University School of Law's Center on the Administration of Criminal Law and Marc A. Fernich, representing the National Association of Criminal Defense Lawyers and the New York State Association of Criminal Defense Lawyers.

Mr. Fernich was blunt, urging the court to adopt a hard-and-fast rule, where "reversal would be automatic" if a violation occurs.

He was pressed hard by the judges if this applied in all cases, including cases where closure is inadvertent or so brief as to be meaningless.

Mr. Fernich made an analogy to the Speedy Trial Act, where judges are required to routinely note whether extensions until the next court proceeding are time not counted against the clock. He said judges could easily and regularly state their reasons in public.

"It's not that hard," he said. "It's not that hard to put a pro forma finding on the record."

Mr. Barkow argued that closing the courtroom is a structural error requiring "per se reversal," and when asked by Judge Hall whether there were any circumstances where a closure is not a structural error, Mr. Barkow answered "yes," because Waller contemplates such occasions.

Judge Lynch asked about whether it would be structural error for a judge, angry that a lawyer was repeatedly late, starts the trial without the lawyer, who then walks in five minutes later.

The answer, Mr. Barkow said, is "yes," because the right to a public trial is in a category of rights not susceptible to harmless error analysis.

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