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HEADLINE: Panel Changes Mind on Excluding Public, Reverses Conviction

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BODY:

A lawyer's immigration fraud conviction has been vacated because of the trial judge's "intentional, unjustified" closure of the courtroom to the public during the entirety of voir dire.

In an unusual move, the original panel at the U.S. Court of Appeals for the Second Circuit reversed itself after the full circuit heard the appeal of attorney Raghubir Gupta en banc and said closing the courtroom during jury selection violated the Sixth Amendment.

Judges John Walker Jr. (See Profile), Barrington Parker (See Profile) and Peter Hall (See Profile) said Southern District Judge Deborah Batts (See Profile) closed the courtroom without making specific findings and stating her reasons for doing so, as required by the U.S. Supreme Court in Waller v. Georgia, *467 U.S. 39 (1984)*.

On March 24, 2008, Gupta's brother, Sudhir Gupta, and his companion, Maria Young, exited Batts' courtroom after her deputy, William Delaney, asked anyone who was not part of the venire to leave.

In an affidavit that Batts adopted in lieu of holding an evidentiary hearing on the matter, Delaney later said the judge instructed him to clear the courtroom of non-venire members in light of the large size of the venire (70 people) and "to protect the panel from hearing anything about the case from any member of the public present."

Gupta was convicted of a single count of immigration fraud and sentenced to four years and three months in prison.

On his appeal, Judges Walker, Parker and Hall initially remanded the case to Batts for fact-finding, but Batts relied solely on the Delaney affidavit.

When the case came back to the circuit, the panel held on June 17, 2011, that the closing of the courtroom was a "trivial" breach of the Sixth Amendment.

But enough judges on the circuit disagreed to warrant rehearing en banc, and 15 judges heard arguments on Dec. 14, 2011. In aggressive questioning for 90 minutes, the judges considered the question of whether the courtroom closure was a "structural" flaw in the proceedings requiring a new trial or whether there existed a "subset" of closings so trivial that they do not violate the Sixth Amendment. (NYLJ Dec. 15, 2011).

The en banc arguments ultimately persuaded the original panel to reconsider its decision.

"After due consideration, and in anticipation of our filing this amended opinion, the in banc court has voted to dissolve itself," Hall wrote in the panel's opinion in United States v. Gupta, 09-4738-cr.

The Waller standard is a four-part test that allows a courtroom to be closed to the public under certain circumstances.

However, to defeat the "presumption of openness," before any member of the public is excluded from any stage of the trial, the party seeking closure must advance an "overriding interest that is likely to be prejudiced," the closure must be no broader than necessary, the court must consider reasonable alternatives to closing, and the trial court "must make findings adequate to support the closure."

Hall said that if a judge fails to follow this procedure, "any intentional closure is unjustified and will, in all but the rarest of cases, require reversal."

Closure Ruled Not 'Trivial'

Hall explained that the reason the government was arguing the closing did not offend the Sixth Amendment was the circuit's own "triviality standard," first articulated in 1996 inPeterson v. Williams, *85 F.3d 39*.

"In prior decisions of this Court, we have suggested that an unjustified closure, under certain and limited circumstances, may not require reversal of the defendant's conviction," he said.

In Peterson, the "triviality standard" was said by the circuit to be "very different from a harmless error inquiry."

"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," the Peterson court said.

But Hall said the circuit has "repeatedly emphasized" that the doctrine has a narrow application. It has been applied to where the trial court closed the courtroom for a few hours during a multi-day voir dire; where a defendant's mother-in-law was excluded during the testimony of a state informant, but other family members were allowed to remain; and where courtroom officers inadvertently kept the public from directly observing the brief testimony of an undercover informant.

On the other hand, he said, the triviality standard was not applied where a defendant's siblings were kept out of the courtroom during the bulk of critical testimony by an undercover agent (NYLJ, May 18, 2006).

The triviality standard, he said, does not apply in Gupta's case.

"Whatever the outer boundaries of this doctrine may be, however, they do not encompass the present case," Hall said. "Here, the district court's intentional, unjustified exclusion of the public for the entirety of voir dire was neither brief nor trivial, and thus violated Gupta's Sixth Amendment right to a public trial."

And it did no good for the government to argue that the voir dire in Gupta lacked contentiousness, for the "public trial right is not implicated solely in discordant situations."

"While a public presence will more likely bring to light any errors that do occur, it is the openness of the proceeding itself, regardless of what actually transpires, that imparts 'the appearance of fairness so essential to public confidence in the system' as a whole," he said.

Susann Wolfe of Hoffman & Pollok represented Gupta.

"I think that they decided the case on the path of least resistance in that essentially it really was a no-brainer," Wolfe said. "By that I mean it wasn't even close on the question of whether the triviality exception should apply --it shouldn't and can't under the circumstances of this case where is was a closure for the entirety of jury selection."

Assistant U.S. Attorney Lee Renzin argued for the government.

Anthony Barkow, now a partner with Jenner & Block, and Courtney Oliva of the Center on the Administration of Criminal Law at the New York University School of Law were amici curiae for Gupta.

Marc Fernich filed for amicus curiae for the National Association of Criminal Defense Lawyers and The New York State Association of Criminal Defense Lawyers in support of Gupta.

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