No. _____

_____

JULIO CRUZ,

Petitioner

vs.

DAVID HALLENBECK,

Respondent.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The Petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*,

Petitioner has previously been granted leave to proceed *in forma pauperis* in the following courts:

United States District Court for the Southern District of New York
New York Supreme Court, Appellate Division, First Department

Petitioner's affirmation or declaration is attached hereto.

Alan S. Axelrod (Counsel of Record)

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Julio Cruz, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You a Month	Spouse	You	Spouse
Employment	$ 2,400	$ 0	$ Same	$ 0
Self-employment	$ 0	$ 0	$ 0	$ 0
Income from real property (such as rental income)	$ 0	$ 0	$ 0	$ 0
Interest and dividends	$ 0	$ 0	$ 0	$ 0
Gifts	$ 0	$ 0	$ 0	$ 0
Alimony	$ 0	$ 0	$ 0	$ 0
Child Support	$ 0	$ 0	$ 0	$ 0
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$ 0	$ 0	$ 0
Disability (such as social security, insurance payments)	$ 0	$ 0	$ 0	$ 0
Unemployment payments	$ 0	$ 0	$ 0	$ 0
Public-assistance (such as welfare)	$ 0	$ 0	$ 0	$ 0
Other (specify): _____	$ 0	$ 0	$ 0	$ 0
Total monthly income:	$ 2,400.	$ 0	$ Same	$ 0

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
Breslin Bar and Grill	16 W 29 st	05-11-17	$ 1,760 11 h hour
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			$
N/A			$
N/A			$

4. How much cash do you and your spouse have? $_____
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Type of account (e.g., checking or savings)	Amount you have	Amount your spouse has
checking and Saving	$ 238. Checking	$ NA
Saving	$ 5,000	$ NA
	$	$ NA

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home N/A
Value NOON

☐ Other real estate
Value NOON N/A N/A

☐ Motor Vehicle #1
Year, make & model N/A NOON
Value _____

☐ Motor Vehicle #2
Year, make & model N/A NOON
Value _____

☐ Other assets
Description N/A
Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
NA	$ 0	$ 0
NA	$ 0	$ 0
NA	$ 0	$ 0

7. State the persons who rely on you or your spouse for support. For minor children, list initials instead of names (e.g. "J.S." instead of "John Smith").

Name	Relationship	Age
NA		
NA		
NA		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	Rent $ 800 a month	$ 0
Are real estate taxes included? ☐ Yes ☑ No Is property insurance included? ☐ Yes ☑ No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	Phone $ 45 a month	$ 0
Home maintenance (repairs and upkeep)	$ 0	$ 0
Food	$ 300 a week	$ 0
Clothing	$ 600 a year	$ 0
Laundry and dry-cleaning	$ 25 a week	$ 0
Medical and dental expenses	$ 200 month	$ 0

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 121 month	$ 0
Recreation, entertainment, newspapers, magazines, etc.	$ NA	$ 0
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 800	$ 0
Life	$ 0	$ 0
Health	$ 200	$ 0
Motor Vehicle	$ 0	$ 0
Other: _____	$ 0	$ 0
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ 0	$ 0
Installment payments		
Motor Vehicle	$ 0	$ 0
Credit card(s)	$ 0	$ 0
Department store(s)	$ 0	$ 0
Other: parole fee	$ 30	$ 0
Alimony, maintenance, and support paid to others	$ 0	$ 0
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$ 0
Other (specify): _____	$ 0	$ 0
Total monthly expenses:	$ 1,151.00	$ 0

1,151.00

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☑ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☑ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☑ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I am unable to pay the costs of this case due to monthly expenses.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: December 16, 2018

(Signature)

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JULIO CRUZ,

Petitioner,

v.

DAVID HALLENBECK, Superintendent, Hale Creek Correctional Facility

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ALAN S. AXELROD
Attorney of Record

THE LEGAL AID SOCIETY
CRIMINAL APPEALS BUREAU
199 WATER STREET
NEW YORK, NEW YORK 10038
212-577-3300

STEVEN BERKO
Of Counsel

An undercover police officer allegedly witnessed petitioner engage in the sale of narcotics. He was arrested and charged with drug-related crimes. Before trial, the State moved to close the courtroom during the testimony of the undercover officer and the court held a hearing. Prior to the hearing, however, the State did not post notice informing the non-present members of the public of the motion, thus depriving them of a meaningful opportunity to object and intervene. The court granted the closure motion, and excluded the public over counsel's general objection to closure.

Questions Presented

1. Whether a closure order, which wrongfully abridges the public's First Amendment rights to attend a criminal trial, necessarily denies a defendant's Sixth Amendment right to a public trial.

2. Whether a criminal defendant may not waive, or forfeit, his right to a public trial, given that he has no entitlement to a private trial.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2018

JULIO CRUZ, *Petitioner*,

v.

DAVID HALLENBECK, Superintendent, Hale Creek Correctional Facility, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Julio Cruz respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit denying petitioner a certificate of appealability (Appendix, Exh. A, A.1) is unreported. The opinion of the District Court for the Southern District of New York (Appendix, Exh. B, A.2-16) is also unreported. The decision of the New York Court of Appeals denying petitioner's application for review of his direct appeal (Appendix, Exh. C, A.17) is reported at 26 N.Y. 3d 1008 (2015). The decision of the New York State Supreme Court, Appellate Division: First Department (Appendix,

Exh. D, A.18) denying petitioner's claim on direct appeal is reported at 130 A.D.3d 504 (1st Dept. 2015).

JURISDICTION

The United States Court of Appeals for the Second Circuit entered its decision on October 17, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution, in relevant part, provides: "Congress shall make no law … abridging the freedom of speech, or of the press."

The Sixth Amendment to the United States Constitution, in relevant part, provides: "In all criminal prosecutions, the accused shall enjoy the right to a … public trial."

The Fourteenth Amendment to the United States Constitution, in relevant part, provides: "nor shall any State deprive any person of … liberty … without due process of law; nor deny any person within its jurisdiction the equal protection of law."

The Antiterrorism and Effective Death Penalty Act ("AEDPA"), in relevant part, provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §§ 2254(d)(1) & (2).

INTRODUCTION

A closure hearing was held prior to trial without the State's having accorded the public its First Amendment entitlement to meaningful notice and an opportunity to be heard. Subsequently, the trial court closed a material portion of petitioner's trial. Petitioner claims on habeas that he consequently lost his Sixth Amendment public trial right because the closure order -- based upon a constitutionally deficient procedure -- was a nullity.

Petitioner's claim turns upon the dual nature of a public trial -- as well as a defendant's Sixth Amendment right, it is also his obligation. As Justice John Paul Stevens observed, "[b]y express command of the Sixth Amendment [a criminal trial] *must* be a 'public trial.'" Houchins v. KQED, Inc., 438 U.S. 1, 36 (1978) (Stevens, J., joined by Brennan and Powell, JJ., dissenting) (emphasis added). Two logical consequences flow

from this duality: (1) a closure order issued in derogation of the public's First Amendment right of access to a defendant's trial necessarily compromises that defendant's Sixth Amendment public trial right; and (2) a defendant may not waive, or forfeit, his right to a public trial, since that would at once compromise the public's First Amendment rights, and at the same time absolve him of his obligation to be tried in public. Richmond Newspapers v. Virginia, 448 U.S. 555 (1980).

In Presley v. Georgia, 558 U.S. 209, 213 (2010), this Court noted that "[t]he extent to which the First and Sixth Amendment public trial rights are coextensive is an open question, and it is not necessary here to speculate whether or in what circumstances the reach or protections of one might be greater than the other." Because petitioner's habeas claim is staked directly upon the intersection of the First and Sixth Amendments, his application to this Court raises the elemental jurisprudential question left unanswered in Presley.

The actions of the trial court, in holding a material portion of petitioner's trial in secret pursuant to a secret hearing, and of the state appellate courts, in refusing to hear petitioner's constitutional claim on grounds of a forfeiture, amount to a self-insulating defiance of bedrock constitutional norms that placed petitioner's trial behind "walls of silence"

beyond which "justice cannot survive." Sheppard v. Maxwell, 384 U.S. 333, 349 (1966).

This Court has recognized that "[f]reedom of access to the courts is a cherished value in our democratic society," Talamini v. Allstate Ins. Co., 470 U.S. 1067, 1070 (1985). But the conduct of the state trial court does grave harm to that value. Where that harm is repeatedly visited upon criminal defendants, both in New York and other jurisdictions, because judges regularly close courtroom doors pursuant to improper procedures, this Court should grant petitioner's application for a writ of certiorari.

STATEMENT OF THE CASE

The State Court Proceedings

Following a jury trial, petitioner was convicted, in Supreme Court, New York County, of criminal sale of a controlled substance in the first degree and related crimes. The court imposed sentence and petitioner is serving the post-release supervision component of his sentence pursuant to the judgment that is the subject of his petition.

The crux of the State's case was the testimony of an undercover police officer, who allegedly witnessed petitioner engage in sales of narcotics. Before trial, the People moved to close the courtroom during the testimony of the undercover

officer, and the court held a closure hearing pursuant to People v. Hinton, 31 N.Y.2d 71 (1972). Prior to the hearing, however, the People did not post notice informing the non-present members of the public of the motion and giving them an opportunity to intervene. The court granted the closure motion, and excluded the public during the undercover officer's trial testimony.

In his brief to the Appellate Division, First Department, petitioner, raised the same claim that he presented in his habeas petition. On July 9, 2015, the Appellate Division, First Department of the New York Supreme Court affirmed the judgment below. People v. Cruz, 130 A.D.3d 504 (1st Dept. 2015). Upon timely application, permission to appeal to the New York Court of Appeals on this issues was denied. People v. Cruz, 26 N.Y.3d 1008 (2015)(Pigott, J.).

The Appellate Division adopted its opinion in People v. Tate, 130 A.D.3d 505 (1st Dept. 2015), a case which raised an identical claim, and affirmed the trial court's closure order, faulting petitioner, inter alia, on grounds of lack of preservation. Alternatively, the court considered and rejected the merits of petitioner's claim. People v. Cruz, 130 A.D.3d 504-505 (1st Dept. 2015). Tate held:

> Defendant did not preserve his claim that, before closing the courtroom during the testimony of an undercover officer in order to protect his identity, the court was required, under the First Amendment, to

> provide the public with notice and an opportunity to be heard on the closure. "[E]rrors of constitutional dimension—including the right to a public trial—must be preserved" (*People v. Alvarez*, 20 N.Y.3d 75, 81, 955 N.Y.S.2d 846, 979 N.E.2d 1173 [2012], cert. denied --- U.S. ---, 133 S.Ct. 2004, 185 L.Ed.2d 867 [2013]). Although defendant asserted his own right to a public trial, that assertion did nothing to alert the court that he wanted it to invent, or import from other jurisdictions, new remedies for the benefit of nonparties, including the "posting" or "docketing" of information about the impending hearing on the closure issue. Defendant's entire argument in this regard is raised for the first time on appeal, and we decline to review it in the interest of justice.
>
> We find that the court's ruling regarding closure constituted a provident exercise of discretion that did not violate[] defendant's right to a public trial or anyone's First Amendment rights.

Tate, 130 A.D.3d at 505-506.

The Habeas Corpus Petition

On November 18, 2016, Mr. Cruz, through counsel, filed a petition for a writ of habeas corpus. Petitioner contended his conviction was in violation of his Sixth Amendment right to a public trial when the trial judge closed the courtroom during the testimony of the undercover officer based upon a closure order that was constitutionally deficient because it was issued pursuant to a Hinton hearing that was held in the absence of notice to the general public.

The District Court's Decision and Order

By Memorandum Opinion and Order of Judge John G. Koeltl, dated May 18, 2018 ["Opinion and Order"], the petition was denied.

The district court, inter alia, found that "the Appellate Division explicitly relied on the [state's] contemporaneous objection rule in denying the petitioner's claim that his Sixth Amendment right had been violated because of the lack of public notice of the Hinton hearing." Opinion and Order at pp. 6-7. The court determined that this ground was "an adequate and independent ground" to deny "petitioner's claim that his Sixth Amendment right to a public trial had been violated by the lack of public notice for the closure hearing." Id., at p. 7. Accordingly, the court ruled that petitioner's claim was procedurally "barred." Id., at pp. 7-8. The court reasoned that New York State's contemporaneous objection rule required that "petitioner should have raised his claim for public notice of the Hinton hearing before that hearing occurred when public notice could have been given and when the Trial Court would have had the opportunity to consider the arguments in support of such an application." Id., at p. 10.

The court enumerated petitioner's arguments as to why New York's contemporaneous objection rule should not apply:

> [P]etitioner argues that there is no specific preservation requirement for [public trial] claims under the Sixth Amendment; that the right to a public trial may only be affirmatively waived and only by the defendant; that the Appellate Division should have considered this violation a "mode of proceedings" error; and that the Appellate Division implicitly ruled on the merits of the constitutional question when it found that the claim fell outside the "mode of proceedings" exception.

Id., at pp. 13-14. But the court turned these argument aside as

> foreclosed by the Second Circuit Court of Appeals decision in Downs [v. Lape, 657 F.3d 97 (2d Cir. 2011)], which found that New York State's contemporaneous objection rule is an adequate and independent state law ground for disposing of a claim that a Sixth Amendment right to a public trial has been violated. 657 F.3d at 10, 108. This Court is, of course, bound by that decision and cannot … simply disregard it.

Id., at p. 14.

In addition to denying the writ, the district court denied petitioner's application for a certificate of appealability. Id., at 15.

Petitioner's Application to the Second Circuit for a Certificate of Appealability

Petitioner sought a certificate of appealability from the United States Court of Appeals for the Second Circuit. In relevant part, petitioner complained, "that he was not in procedural default of his constitutional claim on habeas, and that his claim is meritorious." Petitioner's Memorandum of Law

in Support of Application for a Certificate of Appealability (hereinafter, "Petitioner's Memorandum") at p.8.

As to his merits claim, petitioner submitted that the public's right of access to his trial was compromised by the State's failure to post notice, in petitioner's trial court docket, of its motion to close the courtroom prior to the hearing, thus denying non-present members of the public a meaningful opportunity to exercise their First Amendment rights to object and intervene. The resulting closure order was, thus, invalid and could not serve as a lawful basis for courtroom closure. Petitioner's Memorandum at pp. 13-15.

As to his procedural claim, petitioner elaborated that because a criminal defendant was obligated to have a public trial, that right was not subject to waiver or forfeiture. Moreover, petitioner noted that the state's contemporaneous objection requirement was unfounded because this Court imposed upon trial judges the affirmative duty of guarding the public's right of access to courts. Petitioner's Memorandum at pp. 9-13.

The Second Circuit Decision

The Second Circuit denied petitioner's application for a certificate of appealability. Relying upon, Gonzalez v. Thaler, 565 U.S. 134, 140-41 (2012), the court found that "[a]ppellant has not shown "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling"

that his claim was defaulted in state court. (Appendix A, at A.1).

REASONS FOR GRANTING THE WRIT

A. A CLOSURE ORDER, WHICH WRONGFULLY ABRIDGES THE PUBLIC'S FIRST AMENDMENT RIGHTS TO ATTEND A CRIMINAL TRIAL, NECESSARILY DENIES A DEFENDANT'S SIXTH AMENDMENT RIGHT TO A PUBLIC TRIAL.

Whether a criminal defendant's Sixth Amendment right to attend a criminal trial is coterminous with the public's First Amendment right to be there is a question that this Court has addressed only by necessary implication.

Richmond Newspapers established the principle "that the right to attend criminal trials is implicit in the guarantees of the First Amendment." 448 U.S. at 580. An element of the public's right of access to criminal trials encompasses its First Amendment right to "communicate observations." Richmond Newspapers, 448 U.S. at 576 (emphasis added). But that right is denied to them when a judge closes the courtroom doors, since, of course, the press cannot communicate about something it did not observe. A closure order, therefore, effectively operates as a judicial prior restraint on speech.

The Court defines a prior restraint as "orders that prohibit the publication or broadcast of particular information or commentary orders that impose a 'previous' or 'prior' restraint on speech." Nebraska Press, 427 U.S. at 556. It has recognized that "prior restraints on speech and publication are

the most serious and the least tolerable infringement on First Amendment rights." Id., 427 U.S. at 558. Where a prior judicial restraint on speech bars the press from reporting on court proceedings, the Court has found that the integrity of the judicial process itself was at risk:

> A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny.

Nebraska Press, 427 U.S. at 559-560 (internal quotations marks and citation omitted.) see also Globe Newspapers v. Superior Court for Norfolk County, 457 U.S. 596, 606 (1982) (a right of access case, where the court stated, "Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact finding process, with benefits to both the defendant and society as a whole").

A prior restraint of speech comes before this Court "bearing a heavy presumption against its constitutional validity." Carroll v. President and Commissioners of Princess Anne (hereinafter, "Princess Anne"), 393 U.S. 175, 181 (1968). And, "even where this presumption might otherwise be overcome, the Court has insisted upon careful procedural provisions,

designed to assure the fullest presentation and consideration of the matter which the circumstances permit," so as "to obviate the dangers of a censorship system." Id.

The question becomes whether a trial court's duty to ensure the public's First Amendment rights requires it to determine that the proponent of closure gave actual or constructive notice to the public that its rights were in jeopardy.

In striking down a Massachusetts mandatory closure rule in favor of a case-by-case approach in sex crime cases with juvenile victims, the Court observed: "Of course, for a case-by-case approach to meaningful, representatives of the press and general public must be given an opportunity to be heard on the question of their exclusion." Globe Newspaper Co., 457 U.S. at 609, n.25 (internal quotation marks and citation omitted).

Further, the constitutional imperative of notifying a party affected by a closure order was crystallized by Princess Anne, 393 U.S. at 175, which involved a prior judicial restraint of speech. At issue there was a judicial order, issued ex parte and without prior notice, temporarily restraining petitioners from holding racist public rallies in a Maryland county. The court set aside the order

> because of a basic infirmity in the procedure by which it was obtained. It was issued ex parte, without notice to

> petitioners and without any effort, however informal, to invite or permit their participation in the proceedings.

Id., 393 U.S. at 180. The Court expounded:

> There is a place in our jurisprudence for ex parte issuance, without notice, of temporary restraining orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate.

Id.

The Court also faulted the ex parte proceeding which resulted in the restraining order, thus:

> In the absence of evidence and argument offered by both sides and of their participation in the formulation of value judgments, there is insufficient assurance of the balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication.

Id., 393 U.S. at 183. The consequence, in the words of the Court, was "the reduce[d] possibility of a narrowly drawn order," and the substantial impairment of "the protection which the Amendment seeks to assure." Id., at 184. Indeed, it was the lack of "notice and an opportunity for a hearing to the public and the press" that was the basis of the constitutional injury that plaintiffs complained about in Richmond Newspapers. Richmond Newspapers, 448 U.S. at 563, n. 4.

Where the public has been improperly denied its First Amendment right of access to a criminal trial, the remedy

imposed by this Court has been the vacatur of the improper closure order, as in Richmond Newspapers, 448 U.S. at 555. Logic dictates that the closure order here, a legal nullity as to the public, was also a nullity as to appellant. See Presley, 558 U.S. at 213 ("no legitimate reason … to give one who asserts a First Amendment privilege greater rights to insist on public proceedings than the accused has"), and Waller v. Georgia, 467 U.S. 49, 46 (1984) ("the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public").

B. A CRIMINAL DEFENDANT MAY NOT WAIVE, OR FORFEIT, HIS RIGHT TO A PUBLIC TRIAL, GIVEN THAT HE HAS NO ENTITLEMENT TO A PRIVATE TRIAL.

As a matter of general principle, certain components of a criminal trial simply cannot be waived. As this Court has observed:

> No doubt there are limits to waiver; if the parties stipulated to a trial by 12 orangutans the defendant's conviction would be invalid notwithstanding his consent, because some minimum of civilized procedure is required by community feeling regardless of what the defendant wants or is willing to accept.

United States v. Mezzanato, 513 U.S. 196, 204 (1995) (internal quotations and citation omitted). Thus, for example, whether a trial court has subject-matter jurisdiction is not waivable. See e.g., United States v. Yousef, 750 F.3d 254, 258 (2d Cir.

2014) ("a defendant's plea of guilty … waives all challenges to the prosecution except those going to the court's jurisdiction").

The right to a public trial, like that of subject-matter jurisdiction, is a sui generis trial right that cannot be waived. This was made abundantly clear in Richmond Newspapers 448 U.S. at 555, where there was an agreement between defense counsel, the prosecutor and the trial judge to shut out the public. Certainly, the defense agreement to a closed courtroom in that case cannot be seen as anything but a waiver of the defendant's right to a public trial. Nevertheless, this Court held that such an agreement violated the public's First Amendment rights and vacated the closure order.

Indeed, Richmond Newspapers clarified that the public's First Amendment right to attend a criminal trial lies outside a defendant's will. See Id., 448 U.S. at 576 ("the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted"). Were it otherwise, a criminal defendant would somehow be an agent of the public's right to attend his trial and, thus, could relinquish it as he sees fit. But, of course, he has no such power. See Id., ("although the Sixth Amendment guarantees the accused a right to a public trial, it does not

give a right to a private trial"). It follows that if a defendant has no dominion over the public's First Amendment rights, he cannot give them away. Consequently, a criminal defendant's right to a public trial is not waivable. See also Presley v. Georgia, 558 U.S. 209, 214 (2010) ("[t]he public has a right to be present whether or not any party has asserted the right").

But assuming for the sake of argument that a criminal defendant may lawfully waive his right to a public trial, the question becomes whether a defendant may waive that right by virtue of his trial lawyer's failure to contemporaneously object to its taking.

The ability to waive a right turns on the particular right at stake. Hill, 528 U.S. at 114-115. Express waivers made personally by criminal defendants traditionally have been required in circumstances implicating constitutional rights "which must be exercised or waived at a specific time or under clearly identifiable circumstances, such as the right to plead not guilty, to demand a jury trial, to exercise the privilege against self-incrimination, and to have the assistance of counsel." Barker v. Wingo, 407 U.S. 514, 529 (1972); see also Boykin v. Alabama, 395 U.S. 238, 242 (1969) (trial-related rights of silence, trial by a jury, and right to confront one's

accuser's); and, Brookhart v. Janis, 384 U.S. 1, 7 (1966) (right to plead not guilty to an accusatory instrument).

In New York v. Hill, 528 U.S. 110 (2000), the Court articulated the standard by which it would determine the validity of the waiver of a right that, as here, is fundamental. Neder v. United States, 527 U.S. 1, 8 (1999). To assess the validity of a defendant's waiver of a fundamental right, an appellate court must consider "the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). The court must not presume that the defendant has acquiesced in the loss of his fundamental rights and, thus, should indulge "`every reasonable presumption against waiver.'" Id. Moreover, "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748 (1970).

It follows that under Zerbst, a "waiver" that is not knowing, intelligent and voluntary cannot be effective to surrender the right involved. Thus, where a Zerbst waiver is required, the burden is not on the defendant to object, but on the government to establish the waiver's sufficiency.

Thus, a lawyer's failure to object to the infringement of a defendant's public trial right does not supply a legal basis to conclude that the defendant waived his right. Settled Constitutional doctrine, discussed above, holds that it is a defendant -- and not his lawyer - who is responsible for surrendering such a fundamental constitutional right. It cannot be, for example, that a court even with counsel's "consent" can convict a defendant without a trial, or without a jury trial, and if the defendant's lawyer does not explicitly object he waives his client's appellate rights. Boykin, 395 U.S. at 242. By the same token, a lawyer's failure to object does not waive a defendant's public trial right. It necessarily follows that where the right may not be waived except by a defendant's express statement, neither can it be forfeited simply by a lawyer's failure to contemporaneously object to its infringement.

Though Richmond Newspapers apparently settled the question of waiver and forfeiture long ago, that question has caused conflict between the circuits. Compare, e.g., Walton v. Briley, 361 F.3d 431, 433-34 (7th Cir. 2004) (right to public trial not waived by failure to object to late hour of trial, which effectively precluded public attendance), with U.S. v. Hitt, 473 F.3d 146, 154-55 (5th Cir. 2006) (right to public trial waived by failure to object to closure to public during testimony of

alleged victim). Indeed, different panels within a single Circuit are in disagreement over the question. Compare, e.g., United States v. Alcantara, 396 F.3d 189 (2d. Cir. 2005) (despite lack of contemporaneous objection, Second Circuit vacated plea and sentencing proceedings that were held in chambers without prior notice having been provided to the public) with Cruz v. Hallenbeck, Document 42 (Order denying motion for a certificate of appealability), 18-1662 (2d Cir. 2018) (Second Circuit's decision in the instant case, which endorsed New York State's requirement that counsel lodge a contemporaneous objection to closure). Likewise, State courts of last resort are divided over "whether a defendant's failure to object timely to a trial court's alleged violation of the right to a public trial should be analyzed under the waiver or forfeiture standard." State v. Ndina, 761 N.W.2d 612, 621 (Wis. 2009).

As a consequence of this split of opinion, lower courts have "sought guidance" on the issue, Jocelyn Simonson, The Criminal Court Audience in a Post-Trial World, 127 Harv. L. Rev. 2173, 2219 n.231 (2014), but have been left without direction as this Court has not resolved the matter. See, e.g., State v. Bauer, 851 N.W.2d 711, 716 (S.D. 2014); People v. Vaughn, 821 N.W.2d 288, 296 (Mich. 2012). The unsettled nature of this question of law is a matter of scholarly comment. See e.g.,

Simonson, supra, at 2219 n.231 ("[C]ourts are split over whether a defendant can waive his Sixth Amendment right by failing to object to a known closure."). A reading of the cases considering the question of waiver and forfeiture illustrates that the lower courts are in disarray.

1. Two circuit courts and eleven state high courts have held that a defendant's failure to object to closure affirmatively waives his Sixth Amendment right to a public trial.

The Fifth and Sixth Circuits have held that the failure to object to closure affirmatively waives the defendant's right to a public trial. See United States v. Hitt, 473 F.3d 146, 155 (5th Cir. 2006) ("Where a defendant, with knowledge of the closure of the courtroom, fails to object, that defendant waives his right to a public trial."). Johnson v. Sherry, 586 F.3d 439, 444 (6th Cir. 2009) ("While we agree that the right to a public trial is an important structural right, it is also one that can be waived when a defendant fails to object to the closure of the courtroom."). At least eleven state courts of last resort have adopted similar rules that failure to object affirmatively waives the defendant's Sixth Amendment right to public trial. See Wright v. State, 340 So.2d 74, 79-80 (Ala. 1976); People v. Bradford, 929 P.2d 544, 570 (Cal. 1997); Robinson v. State, 976 A.2d 1072, 1082 (Md. 2009); Stackhouse v. People, 386 P.3d 440 (2015); Commonwealth v. Morganti, 4 N.E.3d 241, 247 (Mass.

2014); People v. Alvarez, 20 N.Y.3d 75, 81 (N.Y. 2012); State v. Beachum, 342 S.E.2d 597, 598 (S.C. 1986), overruled on other grounds by State v. Gentry, 610 S.E.2d 494 (S.C. 2005); Peyronel v. State, 465 S.W.3d 650, 652-654 (Tex. Crim. App. 2015); State v. Butterfield, 784 P.2d 153, 157 (Utah 1989); State v. Pinno, 850 N.W.2d 207, 224-226 (Wis. 2014).

Many of these courts rely on the inapposite decision in Levine v. United States, 362 U.S. 610 (1960), a case decided some twenty years before Richmond Newspapers. There, the Court limited its holding to requiring an objection to the closure of a courtroom to criminal contempt proceedings. But the Court determined that a criminal contempt is not a "criminal prosecution" within the meaning of the Sixth Amendment and, thus, there was no explicitly guaranteed right to a public trial. Instead, the court analyzed the question as one of due process and did not touch on the First Amendment issues that arise as a corollary of a criminal defendant's Sixth Amendment public trial rights. Id., 362 U.S. at 616. Nevertheless, lower courts construe the decision as a holding that the failure to object to a closure of an ordinary criminal proceeding "waive[s] the defendant's right to a public trial," Hitt, 473 F.3d at 155 n.8. This misreading is compounded by a passing parenthetical reference describing Levine in Peretz v. United States, 501 U.S.

923 (1991), which concerned not the public trial right, but a magistrate judge's supervision of voir dire. Id. at 936.

> 2. Five circuits and the high courts of six states and the District of Columbia have held that the failure to object to closure forfeits the defendant's Sixth Amendment claim.

The First, Second, Seventh, Eighth, and Ninth Circuits have all held that the failure to object to the closure of a trial forfeits a defendant's claimed violation of the Sixth Amendment right to a public trial, but does not waive it. See United States v. Espinal-Almeida, 699 F.3d 588, 600 (1st Cir. 2012); United States v. Gomez, 705 F.3d 68, 75 (2d Cir. 2013)[1]; Walton v. Brilley, 361 F.3d 431, 434 (7th Cir. 2014); Charboneau v. United States, 702 F.3d 1132, 1138 (8th Cir. 2013); United States v. Rivera, 682 F.3d 1223, 1232 (9th Cir. 2012). The highest courts of six states and the District of Columbia have likewise found that the failure to object constitutes forfeiture. See Barrows v. United States, 15 A.3d 673, 677 (D.C. 2011); People v. Vaughn, 821 N.W.2d 288, 302 (Mich. 2012); State v. Tapson, 41 P.3d 305, 310 (Mont. 2011); State v. Addai, 778 N.W.2d 555, 570 (N.D. 2010); State v. Bethel, 854 N.E.2d 150, 170 (Ohio 2006); State v. Bauer, 851 N.W.2d 711, 716 (S.D. 2014); State v. Wise, 288 P.3d 1113, 1120 (Wash. 2012). In these

1 This decision cannot be reconciled with Alacantara, 396 F.3d at 189, where the Second Circuit not only reached the public trial issue in the cases of the two appellants that came before it without objection of counsel below, but also sua sponte reached that issue in the case of one appellant, Goiry, who did not even raise it to the Circuit. See Id., 396 F.3d at 194.

jurisdictions, forfeited closure claims are not deemed waived and are at a minimum subject to review for plain error. See Fed. R. Crim. P. 52(b); see also, e.g., Espinal-Almeida, 699 F.3d at 600 ("Because none of the defendants objected to the procedure utilized by the court, our review is for plain error."); Bauer, 851 N.W.2d at 716 ("Because Bauer's trial counsel did not object to the courtroom closure, we review the trial court's actions for plain error."); Vaughn, 821 N.W.2d at 308 ("As a forfeited claim of constitutional error, it can be redressed if the defendant shows that the court's exclusion of members of the public during voir dire was a plain error") (internal quotation marks omitted); Barrows, 15 A.3d at 677 (D.C. 2011) ("We proceed therefore to review appellant's claim under the strictures of the plain-error standard."). Cf., Wise, 288 P.3d at 1121 ("a violation of [the] public trial right is per se prejudicial, even where the defendant failed to object at trial").

Many of these courts emphasize the important distinction between "the failure to assert a right - forfeiture - [and] the affirmative waiver of a right." Vaughn, 821 N.W.2d at 302 relying upon United States v. Olano, 507 U.S. 725, 733 (1993). These courts have explained that failure to object at trial does not evince an "intentional relinquishment or abandonment of a known right." Id. (internal quotation marks omitted). Instead, the "failure to assert a constitutional right ordinarily

constitutes a forfeiture of that right." Id. at 297; accord Gomez, 705 F.3d at 75. These courts have rejected reliance on "dictum" in Peretz that "conflates the concepts of waiver and forfeiture." Vaughn, 821 N.W.2d at 302.

The Seventh Circuit has explained that Supreme Court precedent "does not support" a waiver rule. Walton, 361 F.3d at 433. Judge Bauer, joined by Judges Posner and Easterbrook, concluded that a state prisoner was entitled to federal habeas relief because the closure of his trial violated the Sixth Amendment, although he had not made a contemporaneous objection. The court reasoned that the "presumption of waiver from a silent record is impermissible" because "[t]he Constitution requires that every effort be made to see to it that a defendant in a criminal case has not unknowingly relinquished the basic protections that the Framers thought indispensable to a fair trial." Id., at 433 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 241-242 (1973)). The Seventh Circuit emphasized that the public trial right, like other rights for which this Court has refused to infer waiver from silence, "concerns the right to a fair trial." Id., at 434. Public trials serve vital interests in "prevent[ing] perjury" and "unjust condemnation," and "keep the accused's 'triers keenly alive to a sense of their responsibility and to the importance of their functions.'" Id., at 432 (quoting Waller, 467 U.S. at 46). Public trials also

"preserve the integrity of the judicial system in the eyes of the Public." Id.; accord Gomez, 705 F.3d at 73-74 (noting that public trials "ensure a fair trial," as 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"). Because a public trial is indispensable to fairness, it constitutes a "fundamental trial right" that can be "relinquished only upon a showing that the defendant knowingly and voluntarily waived [the] right." Walton, 361 F.3d at 434.

3. Six state courts' rules conflict with those of their regional federal circuits.

At least six state courts of last resort have adopted a rule that conflicts with that of their regional federal circuit. The First Circuit, for example, holds that the failure to object constitutes a forfeiture of the defendant's public trial right, see Espinal-Almeida, 699 F.3d at 600, but Massachusetts holds the same conduct constitutes a waiver, see Morganti, 4 N.E.3d at 247. While the Second Circuit holds that the failure to object is mere forfeiture, see Gomez, 705 F.3d at 75, New York holds it to be a waiver, see Alvarez, 20 N.Y.3d at 75. Michigan and Ohio both hold the failure to object to be forfeiture, in conflict with the Sixth Circuit's conclusion that it constitutes affirmative waiver. Compare Vaughn, 821 N.W.2d at 288, and

Bethel, 854 N.E.2d at 170, with Johnson, 586 F.3d at 444. Similarly, the Seventh Circuit's position that failure to object constitutes forfeiture conflicts with Wisconsin's determination that such inaction is a waiver. Compare Walton, 361 F.3d at 434, with Pinno, 850 N.W.2d at 224. Finally, while the Ninth Circuit holds that the failure to object forfeits a defendant's claimed violation of his public trial right, see Rivera, 672 F.3d at 1232, California holds it constitutes waiver, see Bradford, 929 P.2d at 570.

C. THE DECISION BELOW IS WRONG.

The Second Circuit faulted petitioner for failing to show "'that jurists of reason would find it debatable whether the district court was correct in it's procedural ruling' that his claim was defaulted in state court." Cruz v. Hallenbeck, Document 42 (Order denying motion for a certificate of appealability), 18-1662 (2d Cir. 2018). But the district court's ruling that petitioner procedurally defaulted his claim for want of a contemporaneous objection failed to consider that New York's contemporaneous objection requirement in the context of the assertion of a public trial right was neither based upon an adequate state ground, nor was it independent of federal law. Accordingly, the Circuit erred in denying petitioner his application for a certificate of appealabilty.

1. The New York contemporaneous objection requirement in the context of a public trial claim was not based upon an adequate state ground.

This Court has held that "only a firmly established and regularly followed state practice may be interposed by a State to prevent subsequent review by [a federal court] of a federal constitutional claim." Ford v. Georgia, 498 U.S. 411 423-424 (1991) (Citations and internal quotation marks omitted); see also Johnson v. Mississippi, 486 U.S. 578, 587 (1988) (state procedural rule not adequate unless it is "strictly or regularly followed").

It is true that whether state courts regularly impose a preservation requirement on public trial claims determines the issue of the adequacy of the state procedural ruling. But, as a matter of simple logic, if a state practice discriminates against a federal right, merely repeating it many times does not then render it lawful.

Thus, to ask whether the state contemporaneous objection requirement was firmly established and regularly followed in the context of public trial claims, as did the Second Circuit in Downs v. Lape, 657 F.3d 97, 102 (2d Cir. 2011), is to ask the wrong question. Rather, the question is whether that practice may be reconciled with the general state practice dispensing with the necessity of preserving fundamental constitutional

errors. If it cannot, then the practice is not an adequate state ground barring this Court's review of petitioner's claim.

In the normal course, the New York appellate courts may eschew reviewing an error that a defendant asserts if defense counsel made no protest of that error at trial. C.P.L. §470.05(2). But where the error complained of on appeal is structural in nature, New York appellate courts have, as a matter of law, the power to review the issue at bar as a "mode-of-proceedings" error, which does not require traditional preservation. See People v. Agramonte, 87 N.Y.2d 765, 769-770 (1996) ("certain deviations from mandated procedural, structural and process-oriented standards affect the organization of the court or the mode of proceedings prescribed by law and present a question of law even without timely objection" [citations and internal quotations omitted]). Thus, the New York Court of Appeals has held that a criminal defendant "cannot waive or even consent" to such errors. People v. Carvajal, 6 N.Y.3d 305, 322 (2005) (internal quotation marks and citation omitted).

In People v. Casey, 95 N.Y.2d 354, 365 (2000), the New York Court of Appeals described the categories of error that do not require preservation as including "those where 'the court had no jurisdiction, or that the constitutional method of trial by jury was disregarded … or some other defect in the proceedings, which *could not be waived* or *cured* and is fundamental.'" quoting,

People v. Bradner, 107 N.Y. 1, 4-5 (1887) (italics and elision in original; emphasis supplied).

While Alvarez ruled that a public trial claim was not a mode of proceedings error, Alvarez, 20 N.Y.3d at 81, its conclusion is at odds with its own recognition that "[t]he right to a public trial has long been regarded as a fundamental privilege of the defendant in a criminal prosecution." Alvarez, 20 N.Y.3d at 80; see also People v. Frost, 100 N.Y.2d 129, 137 (2003) ("the Sixth Amendment right to a public trial" is "fundamental"). Further, the New York Court of Appeals is bound by this Court's determination that the right to a public trial is "structural." Weaver v. Massachusetts, 582 U.S. ___, ___, 137 S.Ct. 1899, 1908 (2017) (noting that a public trial is a structural right).

Moreover, the necessity of preservation here was obviated by the burden that this Court has placed upon trial courts to ensure the public's right of access to criminal trials. In the words of the Court, "[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials." Presley, 558 U.S. at 215. And, where a trial court has an affirmative duty, and the right is not waivable, the Second Circuit itself has determined that "a defendant cannot waive his right to attack a conviction rendered without the [right at issue] simply because he did not inform the trial

judge of the judge's failure to discharge his duties at the time the error was committed." Suggs v. LaVallee, 570 F.2d 1092, 1116-1117 (1978). Of course, there is no reason that this logic would not apply in the context of a public trial -- as the Washington State Supreme Court has determined. Wise, 288 P.3d at 1121 (ruling that "[s]ince [defendant] did not waive his right to a public trial by not objecting, and prejudice is presumed, a new trial is warranted").

It follows that because the Appellate Division had the power to review petitioner's fundamental constitutional claim under its mode-of-proceedings review power, a power which New York courts regularly exercise in cases where other fundamental errors have been raised, the default that the Second Circuit relied upon here is inconsistent with the State's mode-of-proceedings jurisprudence. Therefore, it cannot be said that the preservation requirement in the context of a public-trial claim is an adequate state ground to prevent review on habeas because it is not a firmly established and regularly followed state practice.

2. The state court's ruling barring petitioner's public trial claim was not independent of federal law.

When a state decision is "interwoven with the federal law," its invocation of a state procedural bar will not foreclose federal habeas review. Coleman v. Thompson, 501 U.S. 722, 735

(1991). This principle dictates that where a state waiver rule applied only to nonfundamental claims, the question of whether that rule applied to a federal constitutional error was not sufficiently independent of federal law so as to foreclose federal review of the merits of the claim. This is because the "State has made the application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error has been committed." Ake v. Oklahoma, 470 U.S. 68, 75 (1985); see also Foster v. Grant, ___ U.S. ___, 136 S. Ct. 1737, 1746-47 & n. 4 (2016) (applying Ake in the context of a state prisoner's habeas petition and holding that "it is apparent that the state habeas court's application of res judicata to Foster's Batson claims was not independent of the merits of his federal constitutional challenge" and "[t]hat court's invocation of res judicata [to deny state postconviction relief] therefore poses no impediment to our review of Foster's Batson claim").

As shown, New York state's preservation rule applies only to nonfundamental claims. Here, the Appellate Division both "considered and rejected defendant's remaining claims concerning closure of the courtroom," Cruz, 130 A.D.3d at 505, and also, by adopting the reasoning it articulated in Tate, imposed a preservation requirement when it stated "'Errors of constitutional dimension -- including the right to a public

trial -- must be preserved.'" Tate, 130 A.D.3d at 505, quoting People v. Alvarez, 20 N.Y.3d 75, 81 (2012). Notably, Alvarez held that "[t]he argument that a public trial is a mode of proceedings error likewise lacks merit." Alvarez, 20 N.Y.3d at 81. Accordingly, the Appellate Division in petitioner's case, made an antecedent determination that petitioner's constitutional claim lacked merit and was thus, in the eyes of the Appellate Division, outside of the scope of the state's "mode of proceedings" error exception to the State's preservation rule. Therefore, the Appellate Division's procedural ruling here was interwoven with its rejection of petitioner's federal claim on the merits and does not bar habeas review.

D. THIS APPLICATION PRESENTS QUESTIONS OF NATIONAL IMPORTANCE.

The substantive and procedural questions raised here go to the heart of a criminal defendant's right to be tried in public. No matter where the boundaries of the public's right to attend criminal trials are to be drawn, it is difficult to imagine that the Framers of the First Amendment would countenance holding a trial in secret without according the public its right to object and intervene. See Richmond Newspapers, 448 U.S. at 555, 581, n. 4 (noting that constitutional injury complained of was that notice and an opportunity to be heard was not provided to the

public before their exclusion). Likewise, whatever shortcomings in protecting a defendant from overreaching prosecution and biased adjudication that the Sixth Amendment might tolerate, to concede that it would include holding a secret trial based upon a constitutionally deficient order as to the public is to unfairly ascribe a fatal omission to the Framers of that Amendment. See Waller, 467 U.S. at 46 ("there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public"). And, because the right of a public trial is shared between the public and a criminal defendant, to defer to a state forfeiture rule, as the Second Circuit did here, is to both betray a misconception of the dual nature of the right and to gratuitously surrender federal habeas corpus jurisdiction over it.

Because a public trial is a shared right, it is not simply personal to the defendant and protective of him. Rather, it ensures the integrity of the administration of justice. In the words of this Court, public trials serve to "discourage[] perjury, the misconduct of participants, or decisions based on secret bias or partiality." Richmond Newspapers, 448 U.S. at 569. Thus, the questions raised here have profound implications for the integrity of the administration of justice in this country. To accept the legitimacy of a trial held in secret

without a properly noticed hearing is to allow that the norm of a public trial could well be replaced, in time, with the norm of secrecy.

Indeed, that possibility is already becoming manifest. As one scholar has noted, there is a "series of widespread trends in audience physical exclusion that are found in local courthouses, both urban and rural, across the country." Jocelyn Simonson, The Criminal Court Audience in a Post-Trial World, 127 Harv. L. Rev. 2173, 2191 (2014). See also, e.g., Recent Case, Second Circuit Affirms Conviction Despite Closure to the Public of a Voir Dire, 125 Harv. L. Rev. 1072, 1079 n.63 (2012) (an "unfortunate line of cases … undercut Waller's clear enunciation of a structural public trial right by refusing to reverse convictions that occur after improper courtroom closures") and Daniel Levitas, Comment, Scaling Waller: How Courts Have Eroded the Sixth Amendment Public Trial Right, 59 Emory L.J. 493 (2009) (describing the various justifications courts employ to affirm criminal convictions despite improper courtroom closures even as the Supreme Court has reiterated the structural importance of the right to a public trial).

Recent decisions reveal a culture of courts routinely blocking public access to criminal trials, of which this case is but one example. Time and again, experienced trial counsel fail to object to routine closures, unthinkingly deferring to the

trial judge without considering their clients' Sixth Amendment right to a public trial. For example, the First Circuit noted one "[district] court's longstanding practice' of excluding the public from jury selection" -- a practice that attorneys "accepted … as [the] lawful status quo" even though it violated well established precedent. United States v. Negron-Sostre, 790 F.3d 295, 299, 301-306 (1st Cir. 2015) (holding that courtroom closure warranted new trial despite lack of objections). See also People v. Porter, No. 298351, 2011 WL 2936790, at *1 (Mich. Ct. App. July 21, 2011) (defense counsel did not object when judge stated prior to voir dire, "I have to excuse everyone from the courtroom. Only prospective jurors can be in for this process; okay?").

Given the prevalence of improper courtroom closures, appellate courts routinely face claims that defendants' public trial rights were violated during voir dire. See, e.g., United States v. Gupta, 699 F.3d 682, 686 (2d Cir. 2012); United States v. Santos, 501 F. App'x 630, 631-632 (9th Cir. 2012); Evans v. Sec'y, Fla. Dep't of Corr., 699 F.3d 1249, 1265 (11th Cir. 2012); Owens v. United States, 483 F.3d 48, 61 (1st Cir. 2007); Commonwealth v. Cohen, 921 N.E.2d 906, 911 (Mass. 2010). As well, New York courts subject defendants to "wholesale closure of courtrooms during the testimony of undercover police officers." Ayala v. Speckard, 131 F.3d 62, 82 (2d Cir. 1997)

(Parker, J., dissenting) (internal quotation marks and citation omitted) -- an observation no less true today than it was when Judge Parker made it over twenty years ago. See e.g., People v. King, 151 A.D.3d 633 (1st Dept. 2017); People v. Lewis, 148 A.D.3d 1056 (2d Dept. 2017); People v. Moise, 144 A.D.3d 491 (1st Dept. 2016); and, People v. Menner, 53 Misc.3d 52 (Sup. Ct., App. Term, Second Dept., 2, 11 & 13 Judicial Dist. 2016).

In summary, the right of a public trial should be considered as one of "the indispensable conditions of an open as against a closed society." Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J.). Accordingly, this Court should not suffer its further retrenchment without examining the dynamic relationship between the First and Sixth Amendment public trial rights -- a fundamental relationship that it has not yet passed upon. See Presley, 55 U.S. at 213. Where petitioner's case captures that dynamic, it is eminently worthy of this Court's review. Consequently, this Court should grant petitioner's application for a writ of certiorari.

CONCLUSION

For all the foregoing reasons and principles of law, the Court should grant Mr. Cruz's petition for a writ of certiorari.

Respectfully submitted,

ALAN S. AXELROD
Counsel of Record for Petitioner

STEVEN R. BERKO
Of Counsel

December 20, 2018

EXHIBIT A

S.D.N.Y. – N.Y.C.
16-cv-9014
Koeltl, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of October, two thousand eighteen.

Present:

Jon O. Newman,
Susan L. Carney,
Circuit Judges,
Richard J. Sullivan,*
District Judge.

Julio Cruz,

Petitioner-Appellant,

v. 18-1662

David Hallenbeck, Superintendent, Hale Creek Correctional Facility,

Respondent-Appellee.

Appellant moves for a certificate of appealability. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because Appellant has not shown "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling" that his claim was defaulted in state court. *Gonzalez v. Thaler*, 565 U.S. 134, 140–41 (2012) (internal quotation marks omitted).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

* Judge Richard J. Sullivan, of the United States District Court for the Southern District of New York, sitting by designation.

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JULIO CRUZ,

Plaintiff,

- against -

DAVID HALLENBECK, Superintendent, Hale Creek Correctional Facility,

Defendant.

16-cv-9014 (JGK)

MEMORANDUM OPINION & ORDER

JOHN G. KOELTL, District Judge:

The petitioner, Julio Cruz, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petitioner argues that his Sixth Amendment right to a public trial was violated because the trial court failed to provide notice to the public before it held a hearing to address a motion for closure of the courtroom during the testimony of an undercover agent.

For the reasons stated below, the petition for a writ of habeas corpus is **denied**.

I.

The petitioner was arrested in January 2017 as a result of a long-term undercover buy operation in the Bronx. Berko Aff. ¶ 1. The petitioner was charged with various narcotics sale and related offenses arising out of two sales of cocaine he made to an undercover officer. Id.

The petitioner's case went to trial on June 2, 2009. Trial Tr. 1. After the opening statements of the parties, but prior

to the commencement of testimony, the prosecution moved the court for an order to close the courtroom during the testimony of the undercover agent to whom the petitioner had sold cocaine ("UC 5853"). Trial Tr. 52. Justice Wiley held a hearing pursuant to People v. Hinton, 286 N.E.2d 265 (N.Y. 1972), to evaluate the prosecution's motion. Id. At the hearing, which itself was conducted in a closed courtroom, UC 5853 asserted that testifying in the case in open court would jeopardize his safety and would prevent him from operating effectively as an undercover officer. Id. at 58-59. The defense cross-examined UC 5853 but did not offer any evidence at the hearing. Id. at 70.

At the end of the hearing, Justice Wiley concluded that, based on the credible testimony adduced at the hearing, the courtroom should be closed during the testimony of UC 5853. The Court also noted that the Court sat in a Part that frequently involved narcotics cases and defendants with pending or past narcotics charges and that defendants "not infrequently" came to court. Id. at 70-71. After Justice Wiley announced the decision, the defense objected to the closure as follows:

> I just want to object very briefly Judge. I believe the case is People v. Martinez, 82 New York 2d, 436. I specifically asked the undercover officer whether any associates of the defendant or targets of any investigations involved in this case had made any threats to him. He said no. I believe there was no link established by the DA between his fear of the safety and this particular case I just want to, I submit Judge, that that is the standard adopted by the Court of Appeals

in that case. So I object to the closure. Id. at 72-73. Justice Wiley noted the objection but did not address it in substance or change his ruling. Id. at 73.

At trial, the petitioner was convicted of one count of criminal sale of a controlled substance in the first degree; three counts of criminal possession of a controlled substance in the third degree; one count of criminal possession of a controlled substance in the fourth degree; and four counts of criminally using paraphernalia in the second degree. Id. at 1564-66. The petitioner was sentenced to 16 years' imprisonment and five years' post-release supervision. Sentencing Tr. 17. The petitioner is currently serving his sentence in state custody at Hale Creek Correctional Facility. Berko Aff. ¶ 4.

The petitioner appealed his conviction to the Appellate Division, First Department. State Court Record ("SR") 1. In his appeal, the petitioner contended, among other things, that he was deprived of his Sixth Amendment right to a public trial because the trial court failed to provide advance notice of the Hinton hearing to the non-present members of the public. SR 51-59.

The Appellate Division unanimously affirmed the petitioner's conviction. People v. Cruz, 13 N.Y.S.3d 420 (App. Div. 2015). With respect to his Sixth Amendment claim that the court failed to provide public notice of the Hinton hearing, the

Appellate Division held that the petitioner had failed to preserve that argument because he had not objected to the closure on that basis at the time of the hearing:

> For the reasons stated in People v. Tate, . . . [decided simultaneously herewith], we find that defendant failed to preserve his claim that the court was required to provide the public with notice of an impending hearing on the closure of the courtroom during an undercover officer's testimony, and we decline to review it in the interest of justice, and we also find that defendant lacks standing to assert such a claim.

Cruz, 13 N.Y.S.3d at 504-05.

Leave to appeal to the New York Court of Appeals was denied. People v. Cruz, 42 N.E.3d 218 (N.Y. 2015).

II.

In his federal habeas petition, the petitioner again asserts his claim that his Sixth Amendment right to a public trial was violated because the court failed to provide notice to the public prior to its holding of a Hinton hearing on the issue of closure. In response, the defendant argues that federal habeas review of this claim is barred because the state court denied the petitioner's claim on an independent and adequate state procedural ground.

It is well-settled that where "a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can

demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 750 (1991); see also Lee v. Kemna, 534 U.S. 362, 375 (2002); Cotto v. Herbert, 331 F.3d 217, 238 (2d Cir.2003); Faison v. McKinney, No. 07-cv-8561 (JGK), 2009 WL 4729931, at *10 (S.D.N.Y. Dec. 10, 2009). To be considered an independent and adequate state ground, the state law must be "'firmly established and regularly followed' in the specific circumstances presented in the case." Cotto v. Herbert, 331 F.3d 217, 240 (2d Cir.2003) (citing Lee, 534 U.S. at 386-87). While violations of such state rules normally will preclude federal habeas review, there are "exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." Lee, 534 U.S. at 376, 122 S.Ct. 877; see Williams v. Artus, 691 F. Supp. 2d 515, 524 (S.D.N.Y. 2010).

New York Criminal Procedure Law § 470.05(2) provides that "a question of law with respect to a ruling or instruction of a criminal court during a trial or proceeding is presented when a protest thereto was registered, by the party claiming error, at the time of such ruling or instruction or at any subsequent time when the court had an opportunity of effectively changing the

same." N.Y. Crim. Pro. L. § 470.05(2). The New York Court of Appeals has explained that this provision "require[s], at the very least, that any matter a party wishes the appellate court to decide to have been brought to the attention of the trial court at a time and in a way that gave the latter the opportunity to remedy the problem and thereby avert reversible error." People v. Luperon, 647 N.E.2d 1243, 1247 (N.Y. 1995); see also Garcia v. Lewis, 188 F.3d 71, 78 (2d Cir. 1999). The Court of Appeals for the Second Circuit has consistently held that application by the New York state courts of the contemporaneous objection rule codified in N.Y. Crim. Proc. L. § 470.05(2) represents an adequate and independent state ground that acts as a procedural bar to federal habeas review. See Garcia, 188 F.3d at 79 ("[W]e have observed and deferred to New York's consistent application of its contemporaneous objection rules"); Downs v. Lape, 657 F.3d 97, 104 (2d Cir. 2011) ("[W] have held repeatedly that the contemporaneous objection rule is a firmly established and regularly followed New York procedural rule."); see also Bossett v. Walker, 41 F.3d 825, 829 n.2 (2d Cir. 1994); Fernandez v. Leonardo, 931 F.2d 214, 216 (2d Cir. 1991); Byrd v. Walker, No. 98-cv-55 (JGK), 2000 WL 565193, at *2 (S.D.N.Y. May 9, 2000).

In this case, the Appellate Division explicitly relied on the contemporaneous objection rule in denying the petitioner's

claim that his Sixth Amendment right had been violated because of the lack of public notice of the Hinton hearing. The Appellate Division found that the petitioner's claim was unpreserved for "reasons stated in People v. Tate [14 N.Y.S.3d 332 (App. Div. 2015)]." SR 179. In Tate, the Appellate Division addressed an identical argument to the petitioner's claim on appeal that his Sixth Amendment right was violated by the lack of public notice for the closure hearing. The Court in Tate held:

> Defendant did not preserve his claim that, before closing the courtroom during the testimony of an undercover officer in order to protect his identity, the court was required, under the First Amendment, to provide the public with notice and an opportunity to be heard on the closures. "Errors of a constitutional dimension-including the right to a public trial-must be preserved." Although defendant asserted his own right to a public trial, that assertion did nothing to alert the court that he wanted it to invent, or import from other jurisdictions, new remedies for the benefit of nonparties, including the 'posting' or 'docketing' of information about the impending hearing on the closure issue. Defendant's entire argument in this regard is raised for the first time on appeal, and we decline to review it in the interest of justice.

Tate, 14 N.Y.S.3d at 332 (citations omitted).

The state court therefore relied on an adequate and independent state law ground -- the contemporaneous objection rule -- when it denied the petitioner's claim that his Sixth Amendment right to a public trial had been violated by the lack of public notice for the closure hearing. Federal habeas relief

is thus barred.[1] See Coleman, 501 U.S. at 729; Downs, 657 F.3d at 104, 108 (holding that federal habeas review of a Sixth Amendment public trial claim was barred where the state court dismissed the claim pursuant to the contemporaneous objection rule).

III.

None of the petitioner's arguments that he has not procedurally defaulted his claim is persuasive.

First, the petitioner argues that his attorney's objection to the Court's ruling at the Hinton hearing that the courtroom would be closed during the undercover officer's testimony was sufficient to preserve his claim that his Sixth Amendment right was violated because the court did not provide public notice of the Hinton hearing in advance of that hearing. While it is not wholly clear, this appears to be an argument that review of the petition is not barred by the independent and adequate state ground doctrine because the Appellate Division made an "exorbitant application of a generally sound rule" when it found that the petitioner's objection did not preserve his claim regarding lack of public notice. Lee v. Kemna, 534 U.S. 362, 376 (2002).

[1] The Appellate Division also denied the appeal on the grounds that the petitioner did not have standing to assert a claim for lack of notice on behalf of the public. The Court need not consider that argument in this opinion.

There was a sound basis in the record to support the Appellate Division's finding that the petitioner's claim was not preserved by his counsel's objection at the hearing. Counsel did not object to the lack of notice to the public, or assert his belief that such notice was required, either before or at the Hinton hearing. Instead, the petitioner objected to the closure only after the Court has issued its closure ruling and only on the basis that the District Attorney had not established a link between UC 5853's fear for his safety and the petitioner's particular case, and therefore the District Attorney had not met the standard for closure as articulated by the New York Court of Appeals. Trial Tr. 72-73. It was not unreasonable for the Appellate Division to find that such an objection -- which focused specifically on a requirement for closure and did not in any way reference or concern the issue of public notice of the closure hearing -- did not preserve for appellate review a claim that the petitioner's Sixth Amendment right was violated because the public was not notified of the Hinton hearing. See Whitley v. Ercole, 642 F.3d 278, 286 (2d Cir. 2011) ("[The contemporaneous objection] rule has been interpreted by New York courts to require at the very least, that any matter which a party wishes to preserve for appellate review be brought to the attention of the trial court at a time and in a way that gave it the opportunity to remedy the problem

and thereby avert reversible error." (citation and quotation marks omitted)).

The Appellate Division therefore did not make an "exorbitant application of a generally sound rule" that would justify review of the federal habeas petition when it found that the petitioner had not preserved his Sixth Amendment claim premised on a lack of public notice of the Hinton hearing. See Whitley, 642 F.3d at 288 (holding that the state court's finding that an objection was unpreserved was not an exorbitant application of the contemporaneous objection rule); Downs, 657 F.3d at 106 ("Given the ambiguity of counsel's comments and the limited state-court record, the Appellate Division had a legitimate basis to conclude that Downs's Sixth Amendment claim on appeal was not preserved.").

The Trial Court and the Appellate Division could reasonably have expected that the petitioner should have raised his claim for public notice of the Hinton hearing before that hearing occurred when public notice could have been given and when the Trial Court would have had the opportunity to consider the arguments in support of such an application. In this case, there is no indication that the petitioner made any argument at trial that public notice of the Hinton hearing was required or any objections at all when no such notice was given.

Next, the petitioner argues that he has shown cause for the default and prejudice arising from the alleged violation and therefore the Court cannot rely on the independent and adequate state law ground doctrine to deny the petition. See Coleman, 501 U.S. at 750 (an independent and adequate state law ground bars federal habeas review "unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law").

As an initial matter, this argument was raised for the first time on reply and therefore was forfeited. See, e.g., Bertuglia v. City of New York, 839 F. Supp. 2d 703, 737 (S.D.N.Y. 2012). In any event, the petitioner has failed to demonstrate either cause or prejudice.

The petitioner argues that he can show cause for the default because the failure to object was "entirely attributable to his lawyer's failure to interpose a contemporaneous objection to the improperly issued closure order." Pet'r's Reply Br. 27. In order for his lawyer's error to qualify as cause, the petitioner must show that his lawyer's performance was so egregious as to constitute ineffective assistance of counsel. See Coleman, 501 U.S. at 755; Edwards v. Carpenter, 529 U.S. 446, 451 (2000). Additionally, where a petitioner relies on his lawyer's ineffective assistance as the cause for his default, the exhaustion doctrine "generally requires that a claim of

ineffective assistance be presented to state courts as an independent claim before it may be used to establish cause for a procedural default." Murray v. Carrier, 477 U.S. 478, 489 (1986).

The petitioner has not presented a claim for ineffective assistance of counsel to the state court, nor has he attempted to justify in any way his failure to do so. See Docket No. 29; see also Edwards, 529 U.S. at 451, 453 (an ineffective assistance of counsel claim asserted as cause for a procedural default can itself be procedurally defaulted, and the state prisoner must satisfy cause for the procedural default of the ineffective assistance claim). He therefore cannot rely on ineffective assistance of counsel as the basis for a showing of cause for a procedural default because he has not exhausted his claim for ineffective assistance of counsel.

The petitioner has also not demonstrated that he was prejudiced by the alleged violation of the Sixth Amendment. In support of his claim of prejudice, the petitioner asserts that "the right to a public trial is structural and, therefore, is immune from harmless error analysis, where, as here, the closure was effected during the testimony of the government's main witness." Pet'r's Reply Br. 27. The petitioner has confused the substance of his claim which is that the public should have been given notice of the Hinton closure hearing with an argument

that the conclusion of that hearing was erroneous and the undercover officer should not have been permitted to testify in a closed courtroom at trial. In any event, the Supreme Court held in Weaver v. Massachusetts, 137 S.Ct. 1899 (2017), that "the failure to object to a public-trial violation [does not] always deprive[] the defendant of a reasonable probability of a different outcome." Id. at 1911. Accordingly, "when a defendant raises a public-trial violation via an ineffective-assistance-of-counsel claim, . . . the burden is on the defendant to show either a reasonable probability of a different outcome in his or her case or . . . to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair." Id. at 1911. The petitioner has not presented any evidence to support that he was prejudiced under this standard. Accordingly, the petitioner has not demonstrated either cause for the default or prejudice arising from the alleged violation.

Finally, the petitioner offers a variety of arguments regarding why the contemporaneous objection rule generally cannot be an independent and adequate state ground on which to dismiss his petition. For example, the petitioner argues that there is no specific preservation requirement for claims under the Sixth Amendment; that the right to a public trial may only be affirmatively waived and only by the defendant; that the

Appellate Division should have considered this violation a "mode of proceedings" error; and that the Appellate Division implicitly ruled on the merits of the constitutional question when it found that the claim fell outside the "mode of proceedings" exception.

But all of these arguments are foreclosed by the Second Circuit Court of Appeals' decision in Downs, which found that New York State's contemporaneous objection rule is an adequate and independent state law ground for disposing of a claim that a Sixth Amendment right to a public trial has been violated. 657 F.3d at 104, 108. This Court is, of course, bound by that decision and cannot -- as the petitioner suggested it do, Reply Br. 23-25 -- simply disregard it.

CONCLUSION

For the reasons stated above, the petitioner's habeas corpus petition is **DENIED**. Because the petitioner has failed to make a substantial showing of the denial of a constitutional right, the Court declines to issue a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2). The Clerk is directed to enter judgment dismissing the petition and closing this case.

SO ORDERED.

Dated: **New York, New York**
May 18, 2018

John G. Koeltl
United States District Judge

EXHIBIT C

26 N.Y.3d 1008
(The decision of the Court of Appeals of New York is referenced in the North Eastern Reporter and New York Supplement in a table entitled "Applications for Leave to Appeal - Criminal.")
Court of Appeals of New York

People
v.
Julio Cruz

October 27, 2015

1st Dept.: 130 A.D.3d 504, 13 N.Y.S.3d 420 (NY)

Opinion

Pigott, J.

Denied.

All Citations

26 N.Y.3d 1008, 42 N.E.3d 218, 20 N.Y.S.3d 548 (Table)

Synopsis

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EXHIBIT D

130 A.D.3d 504, 13 N.Y.S.3d 420, 2015 N.Y. Slip Op. 06038

**1 The People of the State of New York, Respondent
v
Julio Cruz, Appellant.

Supreme Court, Appellate Division, First Department, New York
15691, 602/07
July 9, 2015

CITE TITLE AS: People v Cruz

HEADNOTES

Crimes
Controlled Substances

Criminal Sale of Controlled Substance—Sufficiency of Evidence

Crimes
Right to Public Trial

Closure of Courtroom

Seymour W. James, Jr., The Legal Aid Society, New York (Steven R. Berko of counsel), for appellant.
Cyrus R. Vance, Jr., District Attorney, New York (Alice Wiseman of counsel), for respondent.

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered July 8, 2009, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the first degree, criminal possession of a controlled substance in the third degree (three counts), criminal possession of a controlled substance in the fourth degree, and criminally using drug paraphernalia in the second degree (four counts), and sentencing him to an aggregate term of 16 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence amply established that defendant was a participant in the drug sale. In addition to evidence plainly supporting the inference that defendant acted as a lookout during the sale, the police investigation established that defendant was part of an ongoing drug-trafficking operation, and that his role included, among other things, storing drugs in his apartment. In sum, "[d]efendant's entire course of conduct and interactions with his codefendants supported the conclusion that he was a participant in a drug operation, and that he assisted the others by acting as a lookout" (*People v Eduardo*, 44 AD3d 371, 372 [1st Dept 2007], *affd* 11 NY3d 484 [2008]).

For the reasons stated in *People v Tate* (130 AD3d 505 [1st Dept 2015] [decided simultaneously herewith]), we find that defendant failed to preserve his claim that the court was *505 required to provide the public with notice of an impending hearing on the closure of the courtroom during an undercover officer's testimony, and we decline to review it in the interest of justice, and we also find that defendant lacks standing to assert such a claim.

We have considered and rejected defendant's remaining claims concerning closure of the courtroom (*see generally Waller v Georgia*, 467 US 39 [1984]; *People v Ramos*, 90 NY2d 490, 498-499 [1997], *cert denied* 522 US 1002 [1997]). Concur—Mazzarelli, J.P., Sweeny, Saxe, Richter and Manzanet-Daniels, JJ.

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