No. ___ – _____

# In the Supreme Court of the United States

JOSEPH NJUNGUNA NJONGE,

*Petitioner*,

v.

MARGARET GILBERT, SUPERINTENDENT,

*Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

## PETITION FOR A WRIT OF CERTIORARI

MICHAEL FILIPOVIC
*Counsel of Record*
*Federal Public Defender*
VICKI W. W. LAI
*Assistant Federal Public Defender*
Federal Public Defender's Office
1601 Fifth Avenue, Suite 700
Seattle, Washington 98101
(206) 553-1100
Michael_Filipovic@fd.org

*Counsel for Petitioner*

## QUESTIONS PRESENTED

1. Whether the "triviality exception" to the Sixth Amendment public-trial right comports with *Waller v. Georgia*, 467 U.S. 39 (1984), which provides the standards courts must apply before excluding the public from any stage of a criminal proceeding.

2. If the triviality exception does apply, whether the trial court's intentional and unjustified three-hour closure of voir dire to the public, including Petitioner's family and friends, for no other reason beyond shortage of courtroom space, and during which a prospective juror voiced his racial and religious prejudices, can be so "trivial" that the Sixth Amendment right to a public trial did not attach.

## RELATED PROCEEDINGS

- *Njonge v. Gilbert*, No. 18-35396, United States Court of Appeals for the Ninth Circuit. Judgment entered July 24, 2019.
- *Njonge v. Gilbert*, No. C17-1035-RSM, United States District Court for the Western District of Washington. Judgment entered April 11, 2018.
- *In re Njonge*, No. 93546-7, Washington State Supreme Court. Judgment entered April 5, 2017.
- *In re Njonge*, No. 74682-1-1, Washington State Court of Appeals. Judgment entered August 22, 2016.
- *State v. Njonge*, No. 86072-6, Washington State Supreme Court. Judgment entered September 25, 2014.
- *State v. Njonge*, No. 63869-6-1, Washington State Court of Appeals, Division One. Judgment entered May 2, 2011.
- *State v. Njonge*, No. 08-1-03125-6 KNT, King County Superior Court. Judgment entered July 20, 2009.

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## INTRODUCTION

This case concerns the intersection of the Sixth Amendment's public-trial right with the triviality standard, which has never been sanctioned by this Court, but is used by the majority of the circuit courts and various state courts of last resort to deny a structural error claim not susceptible to a harmless error standard. This Court has recognized a presumption in favor of open trials. *See Waller v. Georgia*, 467 U.S. 39, 45 (1984). Yet, when a court denies a public-trial claim as "trivial," it dispenses with the *Waller* test entirely. This practice cannot be squared with *Waller,* which held that its four-factor test applies to "any closure," 467 U.S. at 47, or with *Presley*, which held that "*Waller* provided standards for courts to apply before excluding the public from any stage of a criminal trial." *Presley v. Georgia*, 558 U.S. 209, 213 (2010). *See also Press-Enter. Co. v. Super. Ct. of Cal., Riverside Cty.*, 464 U.S. 501, 509 (1984) ("Closed proceedings . . . must be rare and only for cause shown that outweighs the value of openness."). Applying the triviality exception, which places the burden on a defendant to show "whether the closure involved the values that the right to a public right serves[,]" *United States v. Ivester*, 316 F.3d 955, 960 (9th Cir. 2003), has resulted in a panoply of unpredictable outcomes for similarly situated individuals entirely dependent on the jurisdiction and the reviewing court. Even if the *Waller* test allows room for a triviality exception, there must be a point at which the defendant's public-trial rights cannot be too trivial to justify a closure. That point is this case.

## OPINIONS AND ORDERS BELOW

The opinion of the court of appeals is not officially reported but is available at 773 F. App'x 1005 (9th Cir. 2019). Pet. App. 1a. The court of appeals' order denying the petition for rehearing is not officially reported but is reproduced at Pet. App. 10a. The opinion of the district court denying habeas corpus relief is not officially reported but may be found at 2018 WL 1737779. Pet. App. 11a.

## JURISDICTION

The Ninth Circuit entered judgment on July 24, 2019. Pet. App. 1a. Petitioner timely filed a petition for panel rehearing and rehearing en banc, which was denied on September 3, 2019. Pet. App. 10a. On November 27, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including January 31, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment, U.S. Constitution, amendment VI, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

## STATEMENT OF THE CASE

### A. As trial begins for Mr. Njonge, a Kenyan national with no criminal history, the trial judge tells the public that because of the lack of space, there may be no room for them once the venire arrives.

The state of Washington charged Joseph Njonge, a 24-year-old Kenyan national with no criminal history, with the first-degree premeditated murder of 75-year-old Jane Britt. Trial began on June 2, 2009. Although the maximum capacity of her courtroom was 49, the trial judge asked for a venire pool of 65 rather than the usual 50. ER 97, 123.[1] The State moved to exclude witnesses from voir dire but informed the court that one witness, a member of the victim's family, wanted to stay to watch voir dire. The trial judge rejected the request, noting in part that "we are in very cramped quarters for jury selection" and that "about the only place for visitors to sit is going to be in a little anteroom out there. . . ." ER 122.

Turning to the public audience, which on that day included Mr. Njonge's sister Ann Njonge and friends from his Kenyan community, the trial judge warned there would be a "slim to none" chance there would be room for everyone once the jurors arrived the following day because the only seating for the public would be in the previously mentioned anteroom outside the swinging courtroom doors. ER 125–26. And, the judge warned the anteroom could only be used if the fire marshal allowed her to keep "those first swinging doors open[,]" which would "allow some

[1] "ER" refers to Petitioner's Excerpts of Record filed in the Ninth Circuit Court of Appeals. The facts are taken both from the trial transcripts and the undisputed sworn affidavits that entered the record through the state collateral review proceedings.

people to observe if they wish to do so during jury selection by sitting in that kind of entry hall, if we can do that." ER 125. Seating was further limited by the court's instruction, without elaboration, that the first two courtroom benches were to remain clear "at all times." ER 123–24.

### B. The public, including Mr. Njonge's family and friends, are excluded from the first morning session of voir dire because members of the venire filled the courtroom.

Jury selection began at 9:30 a.m. the next day. Having been told that seating would be limited to the hallway anteroom, Ann Njonge, along with Mr. Njonge's supporters from his Kenyan community, arrived at the courthouse early, only to find the courtroom doors closed. No one was allowed in the courtroom (or to observe from the anteroom) until after the lunch break some four hours later. While most of Mr. Njonge's friends left the courthouse, Ms. Njonge and family friend Evelyn Thuo stayed behind. They were eventually allowed into the courtroom at around 1:30 p.m. ER 99-100, 104. Neither party objected to the closure.

During that morning session, the trial judge introduced the parties to the venire and discussed the charge against Mr. Njonge and the State's burden of proof. She also explained the voir dire process and addressed hardship requests. Observing that she had "never had quite this many hardships for [such a] medium length case," the court questioned the venire. ER 167. During the questioning, Juror No. 7 veered off topic, telling the court: "It is personal for me. It goes deeper than just work. I lived in Indonesia for a couple of years and that society in dealing with persecution and the suppression of women and this whole situation, this whole case is going to be very disturbing for me." ER 148.

After the court excused the venire for lunch, the trial judge remained on the bench, stating, "we have 35 people we can excuse for hardship *and cause*." ER 171 (emphasis added). Regarding Juror No. 7, the prosecutor asked the court whether he should be excused for cause because "he talked about some problems about hearing a case like this. He is the one who referred about Muslim." ER 171–72. The court responded that he would not be excused for hardship but might get excused for cause. ER 172. Before recessing for lunch, the court identified six jurors she was concerned could not be fair, ER 175, and excused 21 jurors, some of whom had also indicated they could not be fair. ER 167–77.

After the court reconvened at around 1:30 p.m., the prosecutor told the court that some non-witness family members had "stuck around this morning, hoping there might be some seats later, and your bailiff informed them at lunch since some people were excused there were some." ER 177. The court confirmed the fire department had not allowed her to keep the courtroom "doors open for visitors to come in" but there was now room because some venire members had been excused. ER 178. The trial judge also mentioned that a television station crew had wanted to film voir dire but that she had denied them entry until after voir dire because they had not asked for her permission. ER 180.

Jury selection continued for the afternoon and concluded early the following morning. At the end of the six-day trial, the jury found Njonge guilty of the lesser-included offense of second-degree murder and he was sentenced to 200 months' imprisonment. ER 51, 54.

### C. Mr. Njonge appeals, and the Washington Court of Appeals reverses after concluding the court's closure violated his public-trial right, but the Washington Supreme Court affirms the judgment after finding the record inconclusive on whether the courtroom had been totally closed.

The Washington Court of Appeals reversed and remanded for a new trial on direct review after concluding Mr. Njonge was denied his right to a public trial when the trial court closed the courtroom during the morning session of voir dire. The State petitioned for review. The Washington Supreme Court agreed that under well-settled Washington law, "a public trial claim may be raised for the first time on appeal and does not require an objection at trial to preserve the error[,]" ER 65, but found no public-trial right violation because it concluded the record was unclear whether "spectators were totally excluded from the juror excusals." ER 68.

### D. Mr. Njonge files a personal restraint petition, providing undisputed evidence establishing a total closure, but is denied relief because he cannot establish prejudice on collateral review.

Mr. Njonge thereafter filed a personal restraint petition in the Washington Court of Appeals. He submitted extraneous evidence establishing that no member of the public was allowed into the courtroom or anteroom during the first morning session. Specifically, he provided uncontested sworn affidavits from Ann Njonge and family friend Evelyn Thuo. Both averred they went early to the courthouse with others from their Kenyan community the morning of June 3, 2009, to secure a seat but that no one was allowed in the courtroom (or to observe from the anteroom) until after the lunch break almost four hours later. ER 99, 104. Mr. Njonge also submitted his own affidavit, stating he had wanted his family and friends in the courtroom that first day to show prospective jurors he had family and community

support and that the only people allowed in the courtroom that morning besides the jurors were the court personnel, the attorneys, and a detective. ER 107–14. Finally, he submitted a letter from King County Superior Court stating that the maximum capacity for the courtroom was 49. ER 97. The petition was dismissed because he could not show prejudice from the closure.

The Washington Supreme Court commissioner denied discretionary review of the court of appeal's decision on April 5, 2017. ER 115. The commissioner acknowledged the habeas record contained evidence that had not been available on direct review, observing that "[t]his is an important distinction[.]" ER 116. But the commissioner questioned "whether lack of access to the courtroom during preliminary excusals for hardship implicates the right to a public trial" and reasoned that, even if it did, because petitioner was "asserting the violation as a freestanding claim on collateral review" he had to show prejudice. ER 117. Because he could not show prejudice, the Washington Supreme Court denied review. Mr. Njonge's motion to modify that ruling was denied by the court on June 28, 2017, and the court of appeals issued a certificate of finality on August 11, 2017.

### E. Mr. Njonge files a federal habeas petition, the district court holds that although petitioner established a constitutional injury with no state procedural bar it was not redressable because he could not show prejudice, and a divided Ninth Circuit affirms.

Mr. Njonge raised the same public-trial right claim in a federal habeas petition. The chief magistrate judge recommended the district court grant the petition. ER 32 (magistrate concluded "the trial court violated Mr. Njonge's right to a public trial when it completely closed the courtroom to the public, for a non-trivial

duration, without first considering alternatives to closure and the effect of closure on Mr. Njonge's public trial right."). The district court declined to follow the recommendation. The court agreed that no procedural bar precluded relief, that the Washington Supreme Court's decision on collateral review was contrary to, or involved an unreasonable application of, *Waller v. Georgia*, 467 U.S. 39 (1984), and *Presley v. Georgia*, 558 U.S. 209 (2010) (per curiam), and that, on the merits, the trial court's closure violated the Sixth Amendment. ER 16–21. But based purely on "policy considerations," the district court denied relief. ER 22. The court noted that if it were to "mechanically apply the same approach as the Supreme Court in *Presley*, the appropriate remedy would be to reverse Petitioner's conviction and grant a new trial." *Id.* Instead, the court devised an ad hoc exception to structural error analysis: holding "a new trial will be generally granted as a matter of right" if there was a contemporaneous objection, but that an entirely different analysis applies when there is no objection (regardless of the state's procedural rule regarding contemporary objections to closures). ER 24. The court then imposed a prejudice requirement it had earlier determined was unreasonably imposed by the state court, holding habeas relief was warranted only if Mr. Njonge established prejudice by way of his separate ineffective-assistance-of-counsel claim—a standard that the court conceded was impossible given "the difficulty of quantifying the effects of a public trial right violation." ER 29.

In an unpublished memorandum, a divided panel of the Ninth Circuit affirmed but on a different ground than argued by the parties or relied upon by the

district court. Pet. App. 1a. The majority, assuming it was "not bound by the constraints of AEDPA," applied a de novo analysis. Pet. App. 2a–3a. It ignored the district court's stated "policy" reasons for denying relief and instead sua sponte concluded the three-hour closure was "'too trivial to implicate the Sixth Amendment guarantee,'" characterizing the first morning session of voir dire as "routine" and "administrative." Pet. App. 3a (quoting *United States v. Ivester*, 316 F.3d 955, 958–60 (9th Cir. 2003)). Although the majority acknowledged Juror No. 7's "unprompted mention of personal concerns with the trial" during the "closed session," it concluded the prospective juror's declaration of his religious and/or racial bias did not preclude finding the closure trivial for Sixth Amendment purposes. *Id.*

Dissenting, Senior Circuit Judge Kleinfeld would have held that the "exclusion in this case was too long and substantial, and the voir dire too eventful, to be deemed 'trivial.'" Pet. App. 5a. He observed that "even though the court might have expected the entire morning to be of no significance to conviction or acquittal[,]" the trial court lost that gamble because "[l]ike many voir dires, this one also had a surprise." Pet. App. 8a–9a. Characterizing Juror No. 7's comment as "an expression that might be taken to invite jury prejudice against the Kenyan defendant," Pet. App. 8a, Judge Kleinfeld continued that while the "remark about 'persecution and the suppression of women and this whole situation' might (or might not) poison the jury[,]" nevertheless, "[t]he portion of voir dire during which it occurred cannot be characterized as so 'trivial' that the right to public trial did not attach." Pet. App. 9a.

The majority voted to deny panel rehearing over the dissent of Judge Kleinfeld and the Ninth Circuit denied en banc rehearing. Pet. App. 10a.

## REASONS FOR GRANTING THE WRIT

The decision below reaffirms the division in the court of appeals and state supreme courts about when a deliberate and total closure of a courtroom to the public, including family and friends, is too trivial to warrant the application of *Waller*'s four-part constitutional test. A majority of circuit courts—the Second, Third, Fourth, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits[2]—have held that total closures that are brief, unintentional, and non-substantive can be too trivial to trigger the *Waller* test. In stark contrast, the Eighth, Eleventh, and First Circuits have rejected the idea that temporary closures are not subject to the *Waller* test. The state courts in Washington, Alabama, and Colorado have also rejected the triviality doctrine in most if not all cases involving total closures.

Further, the Ninth Circuit majority's position—that the "triviality" exception can excuse the total and deliberate exclusion of the public, including petitioner's family and friends, from the first three hours of voir dire, during which a juror said "something that might [have] bias[ed] the whole panel[,]" Pet. App. 8a, reflects the confusion of the lower courts on the proper application of *Waller* and *Presley*. This case presents an unusually clear opportunity for resolving the issue because it

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[2] *See Peterson v. Williams*, 85 F.3d 39, 42–43 (2d Cir. 1995); *United States v. Patton*, 502 F. App'x 139, 141–42 (3d Cir. 2012); *Snyder v. Coiner*, 510 F.2d 224, 230 (4th Cir. 1975); *Braun v. Powell*, 277 F.3d 908, 918 (7th Cir. 2000); *United States v. Al-Smadi*, 15 F.3d 153, 154–59 (10th Cir. 1994); *United States v. Perry*, 479 F.3d 885, 890 (D.C. Cir. 2007).

involves a total (not partial), lengthy (over an hour) closure of voir dire to the public, including family and friends, during which something substantive occurred. This Court should grant certiorari to resolve this split on a constitutionally important question of legal and practical import.

### A. The courts of appeals and state supreme courts are divided over when the *Waller* four-part test must be applied.

#### 1. The Eighth and Eleventh Circuits, and the highest courts of Washington, Alabama, and Colorado, have rejected the triviality exception in most if not all contexts. The First Circuit, while not rejecting the doctrine outright, has repeatedly rejected arguments that temporary, inadvertent closures are too trivial to warrant constitutional scrutiny.

The Ninth Circuit panel majority ruled that a trial court's closure can be "trivial"—and thus constitutional—absent a *Waller* analysis even where, as here, the closure was both total (*i.e.*, the public, including Mr. Njonge's family and friends, had no access to the first morning of voir dire) *and* the exclusion was neither brief nor inadvertent. Two courts of appeals and three state high courts have rejected the use of the triviality exception under these circumstances.

The Eighth Circuit holds that total closures, no matter how temporary, are subject to *Waller*'s four-part constitutional test. The Eighth Circuit explained in *United States v. Thompson*, 713 F.3d 388 (8th Cir. 2013), that "[w]hether a closure is total or partial, according to this circuit's precedent, *depends not on how long* a trial is closed, but rather who is excluded during the period of time in question." *Id.* at 395 (emphasis added). And, in those "rare circumstances, when complete closure is contemplated," the *Waller* test must be applied. *Id.* at 394–95 (citing to *Waller*, 467 U.S. at 48). In *United States v. Thunder*, 438 F.3d 866 (8th Cir. 2006), the court

closed the courtroom during the testimony of children whom the defendant allegedly abused at the request of the government. The court reversed. Citing to *Globe Newspaper Co. v. Super. Ct. for Norfolk Cnty.*, 457 U.S. 596, 606 (1982), the court pointed out that the Supreme Court "has never actually upheld the closure of a courtroom during a criminal trial or any part of it, or approved a decision to allow witnesses in such a trial to testify outside the public eye." 438 F.3d at 867. The Eighth Circuit held that "[t]o withstand a defendant's objection to closing a trial or any part of one, an order directing closure must adhere to the principles outlined in *Press-Enterprise*, 464 U.S. at 510, which holds that 'the presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Id.* at 867 (citing *Waller*, 467 U.S. at 47).

Similarly, the Eleventh Circuit has stated that "[n]owhere does our precedent suggest that the total closure of a courtroom for a temporary period can be considered a partial closure, and analyzed as such." *Judd v. Haley*, 250 F.3d 1308, 1315–16 (11th Cir. 2001). Rather, the Eleventh Circuit "recognized a distinction between total closures of proceedings, as in *Waller*, and situations where the courtroom is only partially closed to spectators[,]" and that when access to the courtroom is retained by some spectators, such as the defendant's family members, the impact of the closure is deemed not to be as great or as deserving of constitutional scrutiny. *See Douglas v. Wainwright*, 739 F.2d 531, 532 (11th Cir. 1984). But the court nonetheless held that both partial and total closures burden

the defendant's constitutional rights, and that before either is undertaken, a court must "hold a hearing and articulate specific findings." *Id.*

Although not rejecting the doctrine outright, the First Circuit has also repeatedly rejected arguments that temporary total closures are too trivial to warrant constitutional scrutiny. In *United States v. Agosto-Vega*, 617 F.3d 541, 544-45 (1st Cir. 2010), the First Circuit, citing to *Waller* reversed, holding that the trial court's total closure of voir dire because there was no space for the public (including defendant's family members) in the courtroom, without "seeking alternative solutions to totally barring the public during voir dire," violated the Sixth Amendment. *Id.* at 547–48. The court emphasized that "[o]n these facts, we need not consider whether, as the government contends, there may be circumstances where a courtroom closure is so trivial that it does not require a new trial." *Id.* at 548. In *Owens v. United States*, 483 F.3d 48 (1st Cir. 2007), *abrogated on other grounds by Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), the court similarly stressed that "closure may be justified only by 'an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest,'" and that "a court must consider (and reject) alternatives to closure before barring public access." 483 F.3d at 61–2 (emphasis added) (*citing Press-Enterprise*, 464 U.S. at 511; *United States v. Antar*, 38 F.3d 1348, 1361 (3d Cir. 1994)). The court concluded that "[g]iven the strong interest courts have in providing public access to trials, the district court could have considered whether a larger courtroom was available for jury selection" and that "the court was obligated

to consider this alternative." *Owens*, 483 F.3d at 62 (citing *Press-Enterprise*, 464 U.S. at 511).

The Washington Supreme Court has also repeatedly rejected the adoption of a de minimis exception in most, if not all, cases. *See State v. Frawley*, 181 Wash. 2d 452, 466, 334 P.3d 1022, 1029 (Wash. 2014) ("We have considered a de minimis argument in the context of public trial rights in past cases," and "we expressly rejected a de minimis approach[.]"). In *State v. Easterling*, 157 Wash. 2d 167, 137 P.3d 825 (Wash. 2006), the trial court fully closed the courtroom to consider the codefendant's pretrial motions to sever and to dismiss. There was no complaint from the State or Easterling. The state supreme court rejected the State's argument that the closure was "de minimis," stating that "a majority of this court has *never* found a public trial right violation to be de minimis." 157 Wash. at 180, 137 P.3d at 831 (emphasis added). Recently, in *State v. Schierman*, 192 Wash. 2d 577, 438 P.3d 1063 (Wash. 2018), the Washington Supreme Court majority adopted "a *limited* de minimis exception to our rule of automatic reversal for *all* violations of the public trial right[,]" applying the exception to a ten-minute closure during the guilt phase of a death penalty trial lasting over three months, during which the trial court heard and ruled on six for-cause challenges in chambers. *Id.* at 615, 1082 (emphasis added). The court reasoned that although the public-trial right attached since juror challenges and rulings "can reflect racial, ethnic, and other forms of bias in jury selection[,]"the ten-minute meeting in chambers was a de minimis error because, in part, it involved no juror questioning or substantive discussions. *Id.* at 609–12,

1080–81. The majority made clear that "our current precedent, which today's decision does not disturb, forecloses the possibility of de minimis violations involving juror questioning or witness testimony." *Id.* at 613, 1081.

The Alabama Supreme Court has also ruled that "before a trial court can order a total closure of the courtroom, even on a temporary basis, the four-prong test set forth in *Waller* must be satisfied[.]" *Ex parte Easterwood*, 980 So. 2d 367, 376 (Ala. 2006). There, the court concluded there was a de facto total closure of the courtroom, which invoked the *Waller* test even though the trial court permitted the defendant's mother to remain during the witness's testimony, and that even for partial closures, the "court still must satisfy the three remaining requirements of the *Waller* test." *Id.*

The Colorado Supreme Court has similarly, to date, never recognized a triviality exception to the public-trial right. *See People v. Hassen*, 351 P.3d 418, 422 (Colo. 2015) ("We have never considered whether to adopt the Second Circuit's triviality framework, but we need not rule on its propriety today. Even if *Peterson*'s triviality analysis applied, the closure here was plainly not trivial."). Whether the triviality exception is generally appropriate is pending before the Colorado Supreme Court. *See People v. Lujan*, __ P.3d __, 2018 WL 3384670 (Colo. App. 2018), *cert. granted*, 2019 WL 189366, at *3 (Colo. Jan. 14, 2019) ("The triviality standard has not been adopted in Colorado" but "even if we were to adopt the triviality standard, the closure [during the re-reading of limiting instructions to jury during deliberations] was not trivial.").

### 2. The Ninth, Second, Third, Fourth, Sixth, Seventh, Tenth, and D.C. Circuits have held directly to the contrary.

In direct contrast, the Ninth, Second, Third, Fourth, Sixth, Seventh, Tenth, and D.C. Circuits have adopted the triviality exception, even in total closure cases, as the "proper benchmark" when evaluating whether a closure absent *Waller* findings is a Sixth Amendment violation—but with little consistency. *Smith v. Hollins*, 448 F.3d 533, 540 (2d Cir. 2006) ("[W]hen addressing whether an unjustified closure is a Sixth Amendment violation, a 'triviality standard' is the proper benchmark."). Rather, the courts are divided on how serious the closure must be to trigger Sixth Amendment scrutiny, including the length of the closure, the effect of exclusion of family and friends, and whether a closure that is deliberate and substantive can still be trivial.

The Ninth Circuit majority determined that the total three-hour closure of the morning session of voir dire was too "'trivial to implicate the Sixth Amendment guarantee'" because the substance of the voir dire involved only "'routine jury administrative matters[,]'" which did not "implicate the values served by the public trial right." Pet. App. 3a (citing *Ivester*, 316 F.3d at 960). The Ninth Circuit, like its sister circuits, has adopted the triviality standard first articulated in *Peterson v. Williams*, 85 F.3d 39 (2d Cir. 1996), which held that the relevant question in evaluating whether the public-trial right attaches or whether a court closure is too trivial depends on whether the "values" of the public-trial right are implicated. *Peterson*, 85 F.3d at 42. Under that standard, even unjustified closures may require no remedy.

In practice, the triviality framework has been inconsistently applied as courts disagree on which factors determine when a closure crosses the line from trivial to unconstitutional. Here, the courtroom was closed to the public, including Mr. Njonge's family and friends, for some three hours (until space opened up after the lunch break). Although the length of time, by itself, is not dispositive, courts have generally found a courtroom closure of less than an hour to be trivial or de minimis. *See Peterson*, 85 F.3d at 41–2, 44 (20 minute closure while defendant testified was "extremely short" and "too trivial" to constitute Sixth Amendment violation); *Al-Smadi*, 15 F.3d at 154–55 (rejecting public trial violation, in part, because 20 minute closure was "brief"); *Ivester*, 316 F.3d at 960 (closure trivial where questioning of jury took no more than 15–20 minutes).

But when the closure is for more than an hour, but no more than one day, courts have reached conflicting results. *Compare State v. Torres*, 844 A.2d 155, 162 (R.I. 2004) (exclusion of defendant's two sisters for "an entire morning" of voir dire cannot be considered "de minimis"); *Schnarr v. State*, No. CR16-165, 2017 WL 374727 (Ark. Jan. 26, 2017) (partial closure of two hours and thirty-seven minutes covering almost entire jury selection process not trivial); *Commonwealth v. Morganti*, 467 Mass. 96, 4 N.E.3d 241 (Mass. 2014) (seventy-nine minute exclusion of public during voir dire not "de minimis"); *Owens*, 483 F.3d at 63 ("[T]his was not a mere fifteen or twenty minute closure; rather, Owens' trial was allegedly closed to the public for an entire day while jury selection proceeded."); *United States v. Santos*, 501 F. App'x 630, 633 (9th Cir. 2012) ("[T]he defendants have not met their

burden of demonstrating that the closure was non-trivial" where voir dire was closed "over the afternoon of one day and the morning of the next" due to lack of space), *with Gibbons v. Savage*, 555 F.3d 112, 114–15, 121 (2d Cir. 2009) (exclusion of defendant's mother, the only spectator at trial, during first few hours of jury selection, "was unjustified" but trivial).

*United States v. Gupta*, 650 F.3d 863 (2d Cir. 2011) (*Gupta* I), illustrates the unpredictability that results in applying a doctrine for which the outer boundaries have never been defined. In *Gupta I*, the Second Circuit majority applied its precedent from *Peterson* and *Gibbons* to hold that the intentional closure of the entirety of jury selection, beginning at 9:45 a.m. in the morning and completed that same day, was trivial even though it was "undisputed that the district court's "exclusion of Gupta's brother and girlfriend did not meet the four-part *Waller* test," stating "*Presley* does not alter the 'triviality exception[.]'" 650 F.3d at 871. The majority concluded that vacatur of Gupta's conviction was not warranted because the "closure did not subvert the values underlying the public trial guarantee." *Id.* at 871–72. Judge B.D. Parker, Jr. dissented, stating that "[e]very day, in courts across this circuit, juries are chosen in unremarkable proceedings that last but a few hours. The majority's holding suggests that all such proceedings are inconsequential and can permissibly be closed to the public. Even more disturbing, the logic has no apparent end." *Id.* at 876.

Following a petition for certiorari to this Court and rehearing en banc in the Second Circuit, that same panel vacated its opinion and came to the opposite

conclusion, stating: "Whatever the outer boundaries of our 'trivality standard' may be (and we see no reason to define these boundaries in the present context), a trial court's intentional, unjustified closure of a courtroom during the entirety of voir dire cannot be deemed 'trivial.'" *United States v. Gupta* (*Gupta* II), 699 F.3d 682, 689 (2d Cir. 2012).

Courts have also treated the exclusion of family and friends inconsistently. In *United States v. Perry*, 479 F.3d 885, 890–91 (D.C. Cir. 2007), the court held the trial court's exclusion of the defendant's eight-year-old son during his trial, despite defendant's protestations, did not implicate the values served by the public-trial right and was thus "trivial." *See also United States v. Patton*, 502 F. App'x 139, 142 (3d Cir. 2012) (holding to the "extent that members of [defendants'] families were denied entry into the courtroom because it was filled to capacity, no constitutional violation occurred."); *Gibbons*, 555 F.3d at 121 (exclusion of defendant's mother during jury selection for one afternoon too trivial to violate public-trial right). But the Ninth Circuit reached the exact opposite conclusion in *United States v. Rivera*, 682 F.3d 1223 (9th Cir. 2012). In *Rivera*, the Ninth Circuit rejected the government's argument that excluding the defendant's seven-year-old son (and other family members) from his 35-minute sentencing was trivial, noting, in part, this Court's "special concern for assuring the attendance of family members of the accused" at trial proceedings. *Id.* at 1232 (citations omitted) (citing *In re Oliver*, 333 U.S. 257, 272 (1984)). *See also State v. Torres*, 844 A.2d 155 (R.I. 2004) (exclusion of two sisters for morning of voir dire not trivial); *Agosto-Vega*, 617 F.3d at 548

(although a brief, inadvertent closure may be excusable, excluding defendant's family for jury selection process without meeting the *Waller* test constitutes structural error); *Harrison v. State*, No. 02-10-00432-CR, 2012 WL 1034918, at *13 (Tex. App. Mar. 29, 2012) (per curiam) (referencing and rejecting triviality doctrine for closure of voir dire to defendant's family members).

Some courts require an intentional rather than inadvertent act by the trial court to exclude persons from the courtroom. *See United States v. Shryock*, 342 F.3d 948, 974 (9th Cir. 2003) (internal quotation marks omitted) (held limited audience seating in the courtroom did not amount to a "de facto closed courtroom" where district court allowed defendant's family members and general public to use the available seating, stating denial of a defendant's Sixth Amendment public-trial right "requires some affirmative act by the trial court"); *Al-Smadi*, 15 F.3d at 154–55 (inadvertent 10-minute closure of courtroom to defendant's wife and child unable to gain access to the second-floor courtroom after the courthouse closed, did not violate defendant's Sixth Amendment right to a public trial because it "requires some affirmative act by the trial court meant to exclude persons from the courtroom."); *Gupta II*, 699 F.3d at 689 ("a trial court's intentional, unjustified closure of a courtroom during the entirety of voir dire cannot be deemed 'trivial.'"); *Perez v. Cockrell*, 77 F. App'x 201, 204 (5th Cir. 2003). Others have reached the opposite conclusion. *See Walton v. Briley*, 361 F.3d 431, 433 (7th Cir. 2004) ("Whether the closure was intentional or inadvertent is constitutionally irrelevant."); *Gonzalez v. Quinones*, 211 F.3d 735, 737 (2d Cir. 2000) (court applying

*Peterson*, held closure lasting "full morning" although done without the knowledge or intention of the judge, could not "be considered so 'trivial' as to fall outside constitutional protection").

How much the substance of the proceeding matters in a triviality framework is also unclear. Here, the Ninth Circuit majority ruled that despite a juror's reference to the perceived nationality, race, or religion of the defendant, the closed portion of jury selection was "routine" and "administrative" which "'ha[d] no bearing on [the defendant's] ultimate guilt or innocence." Pet. App. 3a. In direct contrast, the Second Circuit has stated that proceedings closed to the public need not be contentious: "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." *Gupta II*, 699 F.3d at 689 (*quoting Press-Enter. Co.*, 464 U.S. at 508) (emphasis added). Yet, a different Second Circuit panel found a closure trivial because "nothing of significance happened" during the closure. *Gibbons*, 555 F.3d at 121. In *State v. Paumier*, 176 Wash. 2d 29, 288 P.3d 1126 (Wash. 2012), the Washington Supreme Court simply held that the presumption of openness extends to voir dire and that the questioning of four potential jurors in chambers in the presence of the attorneys and defendant, without considering alternatives to ensure the least restrictive means of closure, was structural error requiring a new trial.

And, as illustrated by Judge Kleinfeld's dissenting opinion, whether a proceeding is "trivial" may be interpreted differently by different judges even in the same case. Unlike the majority, Judge Kleinfeld viewed "[t]he exclusion in this case

[as] too long and substantial, and the voir dire too eventful, to be deemed 'trivial.'" Pet. App. 5a.

### 3. The decision below is wrong.

This Court has never endorsed the triviality exception, and for good reason: the triviality exception contradicts both *Waller* and *Presley*. Most recently, this Court adhered to its precedents in *Waller* and *Presley*, reaffirming that although courtroom closures may be justified in some circumstances, it is "'incumbent upon' the trial court 'to consider all reasonable alternatives to closure [under the *Waller* test].'" *Weaver*, 137 S. Ct. at 1909 (*quoting Presley*, 558 U.S. at 215–16). And although the triviality exception purports to require an analysis of Sixth Amendment values, it ignores the fact that *Press-Enterprise* and *Waller* provide a comprehensive analysis for determining whether closure is justified. The *Waller* framework itself incorporates consideration of Sixth Amendment values. An additional values analysis is not only superfluous, but injects an unwarranted level of subjectivity into an otherwise easily administered inquiry.

*Waller* laid out the framework for determining whether a closure of proceedings violates a defendant's Sixth Amendment public-trial right. The decision to adopt that framework, and the application of the public-trial right to voir dire proceedings, involved extensive analysis of the values animating the right to a public trial. *See Waller*, 467 U.S. at 46 ("The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his

triers keenly alive to a sense of their responsibility and to the importance of their functions.") (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979)); *Press-Enterprise*, 464 U.S. at 508 ("The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.").

The framework itself incorporates the value-laden consideration that "the right to an open trial may give way in certain cases to other rights or interests." *Waller*, 467 U.S. at 44. "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Id.* at 45 (quoting *Press-Enterprise*, 464 U.S. at 510) (internal quotation marks omitted). This Court made clear that "[s]uch circumstances will be rare, however, and the balance of interests must be struck with special care." *Id.* at 44. To determine whether that "rare" exception exists, this Court "provided standards for courts to apply before excluding the public from any stage of a criminal trial." *Waller*, 467 U.S. at 48; *see id* at 39. ("[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.").

In *Presley*, the trial judge excluded the public from voir dire because "[t]here [wa]sn't space for them to sit in the audience." 558 U.S. at 210 (first alteration in original) (quoting *Presley v. State*, 674 S.E. 909, 910 (Ga. 2009)). Because the trial judge failed to apply *Waller*'s four-part test, this Court held by summary disposition that even if "the trial court had an overriding interest in closing voir dire, it was still incumbent upon it to consider all reasonable alternatives to closure. It did not, and that is all this Court needs to decide." *Presley*, 558 U.S. at 216. Similarly here, the Washington trial court did not apply *Waller*'s four-factor test before denying the public, including Mr. Njonge's family and friends and the press, access to voir dire. And, as in *Presley*, "[n]othing in the record show[ed] that the trial court could not have accommodated the public at [Njonge's] trial." *Id.* at 215.

Finally, determining whether a defendant's constitutional public-trial right is implicated based on post-hoc judicial value-weighing contradicts *Waller*'s holding, reiterated in *Presley*, that the *Waller* categorical test must be applied to "any closure." 467 U.S. at 47. This Court has recognized in other contexts that looking to the purposes or values of a categorical constitutional right—rather than the right itself—"replaces the constitutionally prescribed method . . . with a wholly foreign one." *Crawford v. Washington*, 541 U.S. 36, 62 (2004). While closing voir dire to prevent overcrowding might have passed the *Waller* test, this Court has instructed that trial judges still need to explicitly engage in the analysis. Application of *Waller* and *Presley* to this case makes clear that Mr. Njonge's public-trial right was

violated and that, absent the majority's sua sponte application of the triviality exception, habeas relief in this case would have been required.

But even if the triviality exception does not directly contravene *Waller* and *Presley*, as stated by Judge Kleinfeld in dissent, "[t]o be permissible at all, [the] 'trivial' exception to the constitutional right to public trial must be carefully and narrowly confined." Pet. App. 6a. The use of the exception should not be allowed in this case, where the closure of voir dire was intentional, three hours in length, involving the exclusion of family members and friends, and substantive: a prospective juror voiced his substantive prejudices and biases against the defendant's perceived religion and background. The closure of voir dire under these circumstances "cannot be characterized as so 'trivial' that the right to public trial did not attach, even though the court might have expected the entire morning to be of no significance to conviction or acquittal." Pet. App. 9a.

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## CONCLUSION

For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari.

DATED this 22nd day of January 2020.

Respectfully submitted,

*Michael Filipovic*
*Counsel of Record*
Federal Public Defender

*Vicki W. W. Lai*
Assistant Federal Public Defender

*Counsel for Petitioner*