No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD ANDERSON,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

On October 4, 2013, and again on December 4, 2013, Kevin Felton, a friend of Mr. Anderson, tried to attend Mr. Anderson's trial. On both occasions, without instruction from the Court, United States Marshals Service employees removed Mr. Felton from the Courtroom without evidence that he was engaged in disruptive behavior. The partial courtroom closure raises the following questions:

I. Whether there is a "triviality exception" to the Sixth Amendment which recognizes that brief or inadvertent courtroom closures can be too trivial to constitute a violation to the right to a public trial?

II. Whether the "triviality exception" conflicts with *Waller v. Georgia* by shifting the burden on the defendant to demonstrate that he was prejudiced by the courtroom closure?

III. Whether a partial courtroom closure that excludes a family member or friend of the defendant can ever be deemed trivial.

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Richard Anderson 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 Court of Appeals' opinion is reported at 804 F.App'x 8 (2d Cir. 2020) (*see* App. at 22). The order denying Mr. Anderson's petition for a panel rehearing, or in the alternative a rehearing *en banc*, is unpublished. *United States v. Johnson*, Nos. 14-1027-cr(L), 14-1120-cr(Con.), 14-1719-cr(Con.) (2d Cir. June 9, 2020) (Docket Item 456, order denying Mr. Anderson's petition for rehearing) (App. at 29).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on March 6, 2020 (App. at 22). The Court of Appeals denied Mr. Anderson's petition for rehearing and rehearing *en banc* on June 9, 2020 (App. at 29). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides the following:

> 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 defence.

STATEMENT

Richard Anderson, along with his codefendants, Aston Johnson and Andrew Wright, were charged in an eight count superseding indictment with the following offenses: conspiracy to possess with intent to distribute 1,000 kilograms or more of a mixture or substance containing marijuana, in violation of 21 U.S.C. § 846; possession of firearms in furtherance of a drug trafficking crime, violation of 18 U.S.C. §§ 924(c)(1) and 2; three counts—one count for each victim—of causing the death of the victims while knowingly and unlawfully possessing and discharging firearms, in violation of 18 U.S.C. §§ 924(c), 924(j)(1), and 2; three counts—one count each for each victim—of intentionally killing the victims while conspiring to possess with intent to distribute and distribution of 1,000 kilograms or more of marijuana,

in violation of 21 U.S.C. § 848(e)(1)(A), and 18 U.S.C. § 2.[1] The charges arose from a March 9, 2010, incident in which three bodies were discovered in a Greece, New York, apartment.

Mr. Anderson's friend is removed from the courtroom

Messrs. Anderson, Wright, and Johnson asserted their Sixth Amendment right and proceeded to trial on the charges. On October 4, 2013, the fourth day of the trial, the Court brought informed counsel that a man, described as "wearing dreads," was confronted and removed from the courtroom because he was seen communicating with Mr. Anderson. Apparently, the man and Mr. Anderson exchanged waves. The Marshals later learned that the individual's name was Kevin Felton, and that he once was housed in the jail with Mr. Anderson.

The Court was unconcerned that Mr. Felton and Mr. Anderson exchanged waves, stating that it "happens all the time." The Court also

[1] Other defendants, who did not proceed to trial with Messrs. Anderson, Wright, and Johnson, were also named in Count 1 of the indictment.

ruled that Mr. Felton should not be precluded from the courtroom. In time, the Court's order would be disregarded.

Mr. Anderson's friend is again removed from the courtroom

On the morning of December 4, 2013, the day that the Court was charging the jury, Mr. Felton entered the courtroom to watch the proceedings. Approximately two-and-one-half minutes after he sat down, a Deputy Marshal, with the assistance of a CSO, escorted Mr. Felton from the courtroom and had him removed from the building. Mr. Felton's movements from the time he entered the courtroom until the time he was removed was captured on a courtroom security camera.[2]

During a break in the proceedings, defense counsel sought to place on the record the events leading to Mr. Felton's ejection from the courtroom. The Court indicated that it was unaware of the incident but stated that, "if the Marshals saw him trying to communicate with any

[2] A copy of the security footage was preserved on a DVD and marked as Court Exhibit 1.

of the defendants, they acted properly." Mr. Anderson, joined by Messrs. Johnson and Wright, moved for a mistrial. In order to clarify the record, the Court asked members of the Marshals Service to state what they observed. Deputy Marshal Jon Serdula told the Court what he witnessed. The Court responded, "[u]p until this point, he hadn't done anything wrong." Others also offered their observations. Without observing the courtroom security footage, the Court denied the mistrial motion finding that, "the Marshals made a decision that they thought the individual was communicating and took action."

At the conclusion of the ten-week trial, the jury found all three men guilty of the charges in the indictment.

Mr. Anderson moved for a new trial on the grounds that his First and Sixth Amendment rights to a public trial were violated each time Mr. Felton was removed from the courtroom. The Court addressed Mr. Anderson's motion at sentencing. In denying the motion, the Court stated that, during the trial, it did not have "the benefit of looking at the video at that point, [and believed] that the Marshal Service was

acting in good faith, albeit perhaps misguided faith." The Court did "not believe, based on the law, that [the removal] justifie[d] vacating the verdict and granting a new trial."

The Court sentenced Mr. Anderson to four consecutive life sentences, plus sixty-months imprisonment for possession of a firearm in furtherance of a drug trafficking crime. Mr. Anderson timely filed his notice of appeal.

Mr. Anderson appeals the courtroom closure

On appeal, Mr. Anderson raised the question, whether the two courtroom closures by the Marshals Service violated his Sixth Amendment right to a public trial by removing his only friend in attendance from the proceedings.[3] In a March 6, 2020, summary order, a Second Circuit panel (Pooler, Livingston, and Sullivan, JJ.), noting that it was court security officers that closed the courtroom and not the Court, determined that Mr. Anderson was not entitled to a new trial.

[3] Other issues, not pertinent to this petition, were also raised in Mr. Anderson's appeal to the Second Circuit.

804 F.App'x at 13. Relying on *Gibbons v. Savage*, 555 F.3d 112, 120 (2d Cir. 2009), the panel concluded that, "even when improper exclusion does occur, not 'every temporary instance of unjustified exclusion of the public—no matter how brief or trivial, and no matter how inconsequential the proceedings that occurred during an unjustified closure—would require that a conviction be overturned.'" The panel decided that the closure fell under the auspices of the "triviality exception" to the Sixth Amendment, and thus a new trial was not warranted. 84 F.App'x at 13 (citing *Smith v. Hollins*, 448 F.3d 533, 540 (2d Cir. 2006)). The panel also noted that, "[e]ven if court security officers should not have removed Felton from the courtroom, his individual removal did not threaten the values the Sixth Amendment was fashioned to protect." *Id.*

Pursuant to FED.R.APP.P. 35 & 40, Mr. Anderson petitioned for a panel rehearing or, alternatively, for rehearing *en banc*. The Court denied Mr. Anderson's petition (App. at 29).

REASONS FOR GRANTING THE PETITION

I. The Courts are split over whether there is a triviality exception to the right to a public trial.

The Sixth Amendment establishes a criminal defendant's right to a public trial. U.S. CONST. amend. VI. This right serves several purposes: it helps ensure a fair trial; it reminds the prosecutor and the Court of their responsibility to the accused and the importance of their functions; it encourages witnesses to come forward; and it discourages perjury. *Waller v. Georgia*, 467 U.S. 39, 46-47 (1984). Simply put, a public trial is a means "to guarantee that the accused would be fairly dealt with and not unjustly condemned." *Estes v. Texas*, 381 U.S. 532, 538-539 (1965). This right is a guarantee for the benefit of the accused. *See id.* at 583 (Warren, C.J., concurring) (recognizing that "a public trial is a necessary component of an accused's right to a fair trial"); *id.* at 584 (Harlan, J., concurring) ("the right of public trial is not one belonging to the public, but one belonging to the accused").

Nonetheless, this Court recognizes that, "[a]lthough the right of access to criminal trial is of constitutional stature, it is not absolute." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982). Under

rare and limited circumstances, the public can be excluded from a trial. *Id*. These rare and limited circumstances must support an overriding interest to preserve higher values. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 823-824 (1984) (*citing Globe Newspaper Co.*). In the case of a partial courtroom closure, in which only a select person or persons were kept from the courtroom, there must be a "substantial reason" to justify the exclusion. *See, e.g., Garcia v. Bertsch*, 470 F.3d 748, 752-753 (8th Cir. 2006). Even so, while under certain circumstances the right to a public trial may be limited, "without exception . . . an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged." *In re. Oliver*, 333 U.S. 257, 271-272 (1948).

The Second Circuit adopted the "triviality exception" to the Sixth Amendment's right to a public trial, holding that, "an unjustified closure may, on its facts, be so trivial as not to violate the charter." *Peterson v. Williams*, 85 F.3d 39, 40 (2d Cir. 1996). In determining whether a closure is trivial, the "analysis turns on whether the conduct at issue 'subverts the values the drafters of the Sixth Amendment

sought to protect.'" *Gibbons*, 555 F.3d at 121 (quoting *Smith*, 448 F.3d at 540). The triviality exception served as the basis for determining that the closure did not violate Mr. Anderson's right to a public trial or infringe on the values the Sixth Amendment sought to protect. *Johnson*, 804 F.App'x at 13.

Other federal courts of appeals have adopted the triviality exception recognized in *Peterson*. *See United States v. Greene*, 431 F.App'x 191, 196-197 (3d Cir. 2011); *United States v. Izac*, 239 F.App'x 1, 4 (4th Cir. 2007) (per curiam); *United States v. Arellano-Garcia*, 503 F.App'x 300, 305 (6th Cir. 2012); *Braun v. Powell*, 227 F.3d 908, 919 (7th Cir. 2000); *United States v. Ivester*, 316 F.3d 955, 959-960 (9th Cir. 2003); *United States v. Perry*, 479 F.3d 885, 890-891 (D.C. Cir. 2007). Some state courts have also adopted this exception. *See People v. Lujan*, 461 P.3d 494, 498-499 (Colo. 2020); *State v. Decker*, 907 N.W.2d 378, 385 (N.D. 2018); *State v. Schierman*, 538 P.3d 1063, 1082 (Wash. 2018) (adopting doctrine of de minimis error to the proceeding); *People v. Vaughn*, 821 N.W.2d 288, 304-305 (Mich. 2012); *Tinsley v. United States*, 868 A.2d 867, 875 (D.C. Ct. App. 2005)(per curiam); *see also*

Commonwealth v. Cohen, 921 N.E.2d 906, 919 (Mass. 2010) (agreeing with the principles cited in *Peterson*, *et al.*, but finding that the principle does not govern in the case at bar); *Farrington v. People*, 59 V.I. 690, 698 (V.I. 2013) (finding *Peterson*, and the application of the triviality exception, analogous to the case at bar); *State v. Torres*, 844 A.2d 155, 162 (R.I. 2004) (recognizing that "[a]n unjustified closure may, on its facts, be so trial as not violate the Sixth Amendment guarantee").

Not all courts have followed the Second Circuit by adopting a triviality exception to the Sixth Amendment's right to a public trial; there is a split of authority regarding the triviality exception. For example, the Eleventh Circuit held that a total courtroom closure, even for a temporary period of time, must be analyzed using *Waller*'s four pronged test. *Judd v. Haley*, 250 F.3d 1308, 1316 (11th Cir. 2001). In the event of a partial closure, a less rigorous level of constitutional scrutiny is required, but the Court must still "hold a hearing and articulate specific findings." *Id.* at 1315 (quoting *Douglas v. Wainwright*, 739 F.2d 531, 532 (11th Cir. 1984)(per curiam)). The First

Circuit, when given the opportunity, declined to consider the government's argument that a courtroom closure was trivial. *United States v. Agosto-Vega*, 617 F.3d 541, 548 (1st Cir. 2010). The defendant's family, in *Agosto-Vega*, was kept out of the courtroom throughout jury selection based on the view that there was insufficient room. *Id.* at 544-545. The Eighth Circuit, likewise, has not adopted this exception. *See Smith v. Smith*, No. 17-cv-673, 2018 WL 3696601, at *8-10 (D.Minn. Aug. 3, 2018) (concluding that the triviality exception is inconsistent with *Waller* and *Presley v. Georgia*, 558 U.S. 209 (2010)(per curiam)), *aff'd*, 958 F.3d 687 (8th Cir. 2020), *petition for cert. filed* (U.S. Nov. 10, 2020) (No. 20-633); *see also Marcyniuk v. Kelley*, No. 15-cv-226, 2019 WL 8752322, at *2 n.1 (E.D. Ark. May 7, 2019) (*citing Smith*, 2018 WL 3696601, at *8-10 & n.13). There are also state courts that have rejected the triviality argument. *See State v. Easterling*, 137 P.3d 825, 831-32 & n.12 (Wash. 2006) (*en banc*); *Harrison v. State*, No. 02-10-00432-cr, 2012 WL 1034918 (Tex.App. Mar. 29, 2012) (per curiam).

The triviality exception subverts the purpose of the Sixth Amendment's guarantee of a public trial by allowing Courts to brush

aside a courtroom closure without making the appropriate findings. It becomes more significant when the closure is the result of actions undertaken by someone other than the court, given that the duty to control the courtroom lies solely with the judge. *See Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966); *see also* AMERICAN BAR ASSOC., ABA STANDARDS FOR CRIMINAL JUSTICE, SPECIAL FUNCTIONS OF THE TRIAL JUDGE, Std. 6-3.5 (3d ed.) (judge's use of powers to maintain order) [hereinafter ABA STANDARDS]. According to standards set by the American Bar Association, it is the trial judge who must maintain control of the proceedings. ABA STANDARDS, Std. 6-3.5, Commentary. The Court's control is lost when a determination to close the courtroom is made by someone other than the trial judge.

Given the split amongst the Circuit Courts of Appeal, as well as the split in the state courts, the question whether the triviality exception violates the Sixth Amendment right to a public trial is ripe for Supreme Court review.

II. The triviality exception improperly shifts the burden on the defendant to prove prejudice in order to obtain relief.

When considering a defendant's right to a public trial, the defendant is not required to prove specific prejudice in order to obtain relief. *Waller*, 467 U.S. at 49; *see also Levine v. United States*, 362 U.S. 610, 627 n.1 (1960) (Brennan, J., dissenting) ("the settled rule of the federal courts [is] that a showing of prejudice is not necessary for reversal of a conviction not had in public proceedings"). Yet, this is not the case when a Court considers whether the closure was trivial. In order to rebut a finding that a closure was trivial, the burden shifts to the criminal defendant to show prejudice.

It has been suggested that the triviality standard "does not dismiss a defendant's claim on the grounds that the defendant was guilty anyway or that he did not suffer 'prejudice' or 'specific injury.'" *Peterson*, 85 F.3d at 42. The standard "looks . . . to whether the actions of the court and the effect that they had on the conduct of the trial deprived the defendant . . . of the protections conferred by the Sixth

Amendment." *Id*. This conflicts with the rule that specific prejudice need not be shown in order to obtain relief for a violation of the right to a public trial. *Waller*, 467 U.S. at 49 & n.9. This is because, as the Court noted, in most cases a defendant deprived of the right to a public trial would not have evidence to show a specific injury. *Id.* at 49 n.9 (quoting *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 608 (3d Cir. 1969)(*en banc*)).

The Court in *Waller* further noted that, while "the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real." *Id.* Shifting the burden on a defendant to show prejudice in order to overcome a finding that a closure was trivial defeats the Framers reasoning underlying right to a public trial. That is, "secret judicial proceedings would be a menace to liberty." *Gannett v. DePasquale*, 443 U.S. 368, 412 (1979) (Blackmun J., concurring in part and dissenting in part). Placing the burden on the defendant to demonstrate prejudice when the courtroom is close disrupts the purpose of a public trial.

Accordingly, the Court should consider whether the triviality exception improperly shifts the burden on a criminal defendant to prove prejudice.

III. The unwarranted removal of a defendant's friends and family can never be trivial.

Mr. Anderson, a Jamaican national, was tried in the Western District of New York. However, he was not from New York and his family, who lived in another part of the United States, did not travel to Rochester to support him during the trial. The one person who wanted to attend the trial to offer support and see whether Mr. Anderson was being treated fairly, besides his legal team, was Kevin Felton, a man he met while incarcerated in the Monroe County Jail. Yet this is the one person that the Marshals twice removed from the courtroom, though he never attempted to disrupt the proceedings.

It has long been recognized that, "without exception . . . an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged." *In re. Oliver*, 333 U.S. at 271-272. The significance of this is such that, "[t]he

exclusion of courtroom observers, especially a defendant's family members and friends, even from part of a criminal trial, is not a step to be taken lightly." *Guzman v. Scully*, 80 F.3d 772, 776 (2d Cir. 1996); *see also United States v. Rivera*, 682 F.3d 1223, 1232 (9th Cir. 2012) (citing *Guzman*). The presence of family and friends reminds the participants in the proceedings, "especially the judge, that the consequences of their actions extend to the broader community. Friends and family . . . are particularly effective in this regard, because they are the individuals most likely to be affected by the defendant's incarceration." *Rivera*, 682 F.3d at 1230.

The exclusion of Mr. Felton raises the question as to whether a closure that excludes a family member or friend of the defendant can ever be deemed trivial. There have been instances where courts upheld the exclusion of a defendant's family and friends. *See, e.g.*, *Perry*, 479 F.3d at 890-891 (exclusion of defendant's young son from the courtroom); *Izac*, 239 F.App'x at 4 (excluding defendant's wife); *State v. Ortiz*, 981 P.2d 1127, 1132 (Haw. 1999) (ordering exclusion of defendant's family). In contrast, the Alabama Supreme Court has

recognized that, "[a] partial closure usually contemplates that the defendant's family, friends, and members of the press will remain in the courtroom." *In re. Easterwood*, 980 So.2d 367, 376 (Ala. 2007); *see also Purvis v. State*, 708 S.E.2d 283, 285 (Ga. 2011) (holding that excluding defendant's brother from attending trial implicated Sixth Amendment right to a public trial).

The removal of Mr. Felton from the courtroom implicated Mr. Anderson's right to have his friend present in the courtroom. After the fact, the Court never found any reason justifying Mr. Felton's removal from the courtroom. By deeming the removal as trivial, it raises the question whether any removal of a family member or friend from the courtroom can be deemed trivial.

CONCLUSION

For the reasons set forth above, the Court should grant the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Dated: Rochester, New York
December 28, 2020

Respectfully submitted,

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APPENDIX

804 Fed.Appx. 8
This case was not selected for publication in West's Federal Reporter.
RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.
United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,
v.
Aston JOHNSON, aka Richard Burke, aka Daniel Arroyo, aka Robert Brooks, Richard Anderson, aka Jason Key, aka Christopher Key, Andrew Wright, aka Charles Rainey, Defendants-Appellants.*
14-1027-cr (Lead)
|
14-1120-cr (Con)
|
14-1716-cr (Con)
|
March 06, 2020

Synopsis
Background: Defendants, who were participants in cross-country marijuana-distribution operation, were convicted in the United States District Court for the Western District of New York, Charles J. Siragusa, Senior District Judge, under drug conspiracy, firearm possession, and murder statutes in connection with their murders of victims. They appealed.

Holdings: The Court of Appeals held that:

[1] investigators properly obtained cell-site location information (CSLI) associated with cell phone defendant registered under stolen identity, pursuant to facially valid search warrant supported by probable cause;

[2] even if search warrant had been defective, suppression was not warranted, pursuant to good faith exception to warrant requirement;

[3] there was sufficient evidence to support defendant's conviction;

[4] removal of defendant's friend from courtroom during trial proceedings did not violate defendant's Sixth Amendment right to public trial; and

[5] defendant's ineffective assistance of counsel claim should have been raised in motion to vacate, rather than on direct appeal.

Affirmed.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion; Post-Trial Hearing Motion.

West Headnotes (6)

[1] Telecommunications Carrier's cooperation; pen registers and tracing

Even if defendant had reasonable expectation of privacy in cell-site location information (CSLI) associated with cell phone he registered under stolen identity, investigators properly obtained that information pursuant to facially valid search warrant supported by probable cause; search warrant application included detailed factual recitation from which issuing judge could conclude that defendant was involved in drug conspiracy surrounding victims' murders, that he had traveled to area where murders took place, and that he traveled together with other suspects to hotel immediately after murders took place. U.S. Const. Amend. 4.

[2] **Criminal Law**Particular cases

Even if search warrant authorizing law enforcement agents to obtain cell-site location information (CSLI) associated with cell phone defendant registered under stolen identity had been defective, suppression was not warranted, pursuant to good faith exception to warrant requirement, where agents' reliance on warrant was objectively reasonable. U.S. Const. Amend. 4.

[3] **Homicide**Conspiring and planning
HomicideAiding, abetting, or other participation in offense

Aiding-and-abetting and *Pinkerton* liability may attach to offenses under the statute prohibiting intentional murder committed in furtherance of a continuing criminal enterprise or while engaging in major drug conspiracy. 18 U.S.C.A. § 2; Comprehensive Drug Abuse Prevention and Control Act of 1970 § 408, 21 U.S.C.A. § 848(e)(1)(A).

[4] **Conspiracy**Controlled Substances
HomicideMiscellaneous particular circumstances
HomicideConfessions and declarations
WeaponsPossession or Carrying

There was sufficient evidence to support defendant's conviction under drug conspiracy, firearm possession, and murder statutes, where, in addition to effectively unchallenged evidence that defendant participated in drug-distribution conspiracy with codefendants, government offered compelling evidence that defendant participated in planning and execution of murders, including witness testimony, cell-site location information (CSLI), ballistics evidence, video evidence, and defendant's own statements discussing firearm he obtained.

[5] **Criminal Law**Defendants and persons associated with defendants

Removal of defendant's friend from courtroom during trial proceedings did not violate defendant's Sixth Amendment right to public trial, where trial court did not close courtroom either to public or press, but, instead, court security officers removed single individual for suspicious behavior, including repeatedly attempting to communicate with defendant and potentially attempting to intimidate jury, and even if removal of defendant's friend was unjustified, his individual removal did not threaten values Sixth Amendment was fashioned to protect. U.S. Const. Amend. 6.

[6] **Criminal Law**Conduct of Trial in General
Criminal Law Preferability of raising effectiveness issue on post-conviction motion

Defendant's ineffective assistance of counsel claim should have been raised in motion to vacate, rather than on direct appeal, where record on appeal was incomplete, and District Court was forum best suited to developing facts necessary to determining adequacy of representation during entire trial. U.S. Const. Amend. 6;

28 U.S.C.A. § 2255.

***9** Appeal from a judgment of the United States District Court for the Western District of New York (Siragusa, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Attorneys and Law Firms

For Appellee: Monica J. Richards, Assistant United States Attorney, for James P. Kennedy, Jr., United States Attorney for the Western District of New York, Buffalo, NY

For Defendant-Appellant Johnson: Vivian Shevitz, South Salem, NY

For Defendant-Appellant Anderson: Jay S. Ovsiovitch, Assistant Federal Public Defender, Rochester, NY

For Defendant-Appellant Wright: Lawrence D. Gerzog, New York, NY

Present: Rosemary S. Pooler, Debra Ann Livingston, Richard J. Sullivan, Circuit Judges.

***10 SUMMARY ORDER**

Defendants-Appellants Aston Johnson, Richard Anderson, and Andrew Wright (together, the "Defendants") appeal from their judgments of conviction entered on April 1, March 27, and May 9, 2014, respectively, in the United States District Court for the Western District of New York (Siragusa, *J.*). Defendants, who were participants in a cross-country marijuana-distribution operation, were convicted under drug-conspiracy, firearm-possession, and murder statutes in connection with their murders of Robert Moncriffe, Mark Wisdom, and Christopher Green (together, the "Victims") in Greece, New York. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

* * *

I. Anderson's Cell-Site Location Information

[1]At trial, the government offered historical cell-site location information ("CSLI") associated with Anderson's cell phone as evidence of his traveling from his home in Arizona to the murder scene in New York (with a stop in Columbus, Ohio, to obtain firearms and a rental car). The government obtained Anderson's CSLI pursuant to a warrant issued on April 8, 2010 by a Monroe County judge. In the district court, Anderson moved to suppress the CSLI associated with his cell phone, but the district court denied the motion on the basis that Anderson had registered the phone with his service provider under the stolen identity—including the birth date and social security number—of Florida nursing-home resident named Jason Key. The district court concluded that Anderson therefore lacked a reasonable expectation of privacy in the CSLI associated with the phone. On appeal, Anderson argues that he had an objectively reasonable privacy interest in this CSLI despite having registered his phone in another's identity. We need not address the issue, however, because even assuming *arguendo* that Anderson had a reasonable expectation of privacy in the records at issue, investigators properly obtained them pursuant to a facially valid judicial warrant supported by probable cause, defeating Anderson's argument that the records should have been suppressed.

It is clear that law enforcement agents may properly obtain CSLI records, even assuming that an individual maintains a reasonable expectation of privacy in such records, when police act pursuant to a warrant issued on the basis of probable cause. *See* *Carpenter v. United States*, —— U.S. ——, 138 S. Ct. 2206, 2221, 201 L.Ed.2d 507 (2018). And in issuing such a search warrant, the court is tasked with "simply mak[ing] a practical, common-sense decision whether, given all the circumstances

set forth in the affidavit before [it] ... there is a fair probability that ... evidence of a crime" will be reflected in the records at issue. *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). On appeal, we accord "substantial deference to the finding of an issuing judicial officer that probable cause exists, limiting our inquiry to whether the officer had a substantial basis for his determination." *United States v. Boles*, 914 F.3d 95, 102 (2d Cir. 2019) (internal quotation marks and citation omitted). The issuing court here had such a basis. The New ***11** York State Police investigator's application included a detailed factual recitation from which the issuing judge could conclude that Anderson was involved in the drug conspiracy surrounding the Victims' murders, that Anderson had traveled to the Rochester area by the time of the murders, and that Anderson traveled together with the other suspects to a hotel immediately after the murders took place.

[2]Even if the warrant had been defective, moreover, Anderson would not be entitled to a suppression order in the circumstances here. The exclusionary rule applies only to deter "deliberate, reckless, or grossly negligent conduct." *Herring v. United States*, 555 U.S. 135, 144, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009). "When an officer genuinely believes that he has obtained a valid warrant ... and executes that warrant in good faith, there is no conscious violation of the Fourth Amendment, 'and thus nothing to deter.' " *United States v. Raymonda*, 780 F.3d 105, 118 (2d Cir. 2015) (quoting *United States v. Leon*, 468 U.S. 897, 920–21, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984)). As long as the officer's reliance on the warrant was objectively reasonable, this "good faith" exception to the warrant requirement insulates the evidence from exclusion. *See Boles*, 914 F.3d at 103. Since there is no evidence to suggest that reliance on the warrant here was anything other than reasonable, the district court did not err in declining to exclude the CSLI evidence.[1]

II. The District Court's Aiding-and-Abetting and *Pinkerton* Instructions

Wright and Johnson next argue that the district court erred in instructing the jury that it could convict the Defendants not only as principal offenders under 21 U.S.C. § 848(e)(1)(A), but also for aiding and abetting pursuant to 18 U.S.C. § 2 or as coconspirators as described in *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946). We review a district court's jury instructions *de novo* and reverse where, in view of the charge as a whole, there was prejudicial error. *United States v. Sheehan*, 838 F.3d 109, 121 (2d Cir. 2016). There was no such error here.

[3]In *United States v. Walker*, 142 F.3d 103, 113–14 (2d Cir. 1998), we held that both aiding-and-abetting and *Pinkerton* liability may attach to offenses under § 848(e). In that case, after concluding that the "district court was correct in instructing the jury that aiding and abetting liability was available," we upheld the conviction of a defendant who "aided in preparations for" a murder and "accompanied [another defendant] to [the murder victim's] house with the shared intent of carrying ***12** out the killing." *Id.* We also upheld a *Pinkerton* instruction in connection with a murder charged under § 848(e)(1)(A). *Id.* at 114. The district court did not err in instructing the jury that it could convict the Defendants under an aiding-and-abetting or *Pinkerton* theory of liability.

III. The Sufficiency of the Evidence to Convict Wright

As he did in his unsuccessful Rule 29 motion before the district court, Wright argues that the government's evidence was insufficient to support the jury's guilty verdict under any of the instructed theories of liability, and that we should therefore vacate his conviction. Because the evidence was sufficient to support Wright's conviction, we agree with the district court that Wright is not entitled to vacatur. We review a district court's decision on a motion for acquittal pursuant to Federal Rule of Criminal Procedure 29 *de novo*. *United States v. Valle*, 807 F.3d 508, 515 (2d Cir. 2015). In so doing, we view the evidence in the light most favorable to the Government with all reasonable

inferences resolved in the Government's favor. *United States v. Anderson*, 747 F.3d 51, 60 (2d Cir. 2014). We will uphold the jury's verdict "if any rational trier of fact could have found the essential elements of the crime had been proved beyond a reasonable doubt." *Valle*, 807 F.3d at 515. We therefore "assum[e] that the jury resolved all questions of witness credibility ... in favor of the prosecution," *United States v. Abu-Jihaad*, 630 F.3d 102, 134 (2d Cir. 2010), and "defer to the jury's determination of the weight of the evidence and the credibility of the witnesses, and to the jury's choice of the competing inferences that can be drawn from the evidence," *United States v. Best*, 219 F.3d 192, 200 (2d Cir. 2000) (internal quotation marks omitted). The verdict "may be based on circumstantial evidence," and "the Government is not required to preclude every reasonable hypothesis which is consistent with innocence." *United States v. Ogando*, 547 F.3d 102, 107 (2d Cir. 2008) (internal quotation marks omitted).

[4]Here, the evidence was plainly sufficient to find Wright guilty of the charged offenses. In addition to the effectively unchallenged evidence that Wright participated in a drug-distribution conspiracy with Johnson and Anderson, the government offered compelling evidence that Wright participated in the planning and execution of the murders. The government presented witness testimony and CSLI records showing that Wright booked a flight to Columbus, Ohio, rented a car, obtained two firearms, and drove to Rochester, New York, where he stayed in a Holiday Inn Express along with the other suspects. Ballistics evidence showed that one of the firearms Wright obtained in Columbus matched shell casings found at the murder scene. Video evidence also showed that on the day of the murders, Wright and Johnson left the Holiday Inn Express together and traveled to a Comfort Inn, where Johnson rented a room. Further video evidence showed that Wright and Anderson thereafter left the Holiday Inn Express together, traveling in the direction of the murder scene, and that Anderson, Wright, and Johnson all returned to the Comfort Inn approximately fifteen minutes after the 911 call alerting police to the murders. Wright and Anderson left about ten minutes later, and drove back to Columbus. The government also presented evidence that approximately one week after the murders, Wright discussed a firearm he obtained in Columbus with the man who supplied it, indicating ***13** that the transaction had served its purpose and that Wright had disposed of the firearm. On this and other evidence in the trial record, the jury had more than a sufficient basis to convict Wright.

IV. Anderson's Sixth Amendment Claim

Anderson argues that he is entitled to a new trial because court security officers twice removed his friend Kevin Felton from the courtroom during the trial proceedings, allegedly violating Anderson's Sixth Amendment right to a public trial. Under the circumstances here, we agree with the district court that Anderson is not entitled to a new trial.

The right to a public trial is "subject to the trial judge's power to keep order in the courtroom." *Cosentino v. Kelly*, 102 F.3d 71, 73 (2d Cir. 1996) (quoting *United States v. Fay*, 350 F.2d 967, 971 (2d Cir. 1965)). And even when improper exclusion does occur, not "every temporary instance of unjustified exclusion of the public—no matter how brief or trivial, and no matter how inconsequential the proceedings that occurred during an unjustified closure—would require that a conviction be overturned." *Gibbons v. Savage*, 555 F.3d 112, 120 (2d Cir. 2009). Under this "triviality" exception, an unjustified exclusion from the courtroom will not require a new trial if the closure does not "subvert[ ] the values the drafters of the Sixth Amendment sought to protect:" (1) ensuring a fair trial, (2) reminding the prosecutor and judge of their responsibility to the accused, (3) encouraging witnesses to come forward, and (4) discouraging perjury. *Smith v. Hollins*, 448 F.3d 533, 540 (2d Cir. 2006).

[5]Felton's removal did not violate Anderson's right to a public trial or infringe on the values listed above. At no point during the alleged exclusion events did the district court close or partially close the courtroom either to the public or to the press. *See Cosentino*, 102 F.3d at 73 (affirming an order that "allowed access to most members of the public (and press) ... and only barred those individuals who ... posed a threat to the orderly conduct of the second trial"). Instead, court

security officers removed a single individual for suspicious behavior, including repeatedly attempting to communicate with a defendant and potentially attempting to intimidate the jury. Even if court security officers should not have removed Felton from the courtroom, his individual removal did not threaten the values the Sixth Amendment was fashioned to protect. The district court was therefore correct to deny Anderson's motion for a new trial. *Cf.* *Peterson v. Williams*, 85 F.3d 39, 43–44 (2d Cir. 1996) (finding no basis for a new trial even where an administrative error resulted in the complete closure of the courtroom during the defendant's testimony).

V. Johnson's Ineffective Assistance of Counsel Claim

[6]On appeal, Johnson argues that he was afforded constitutionally ineffective assistance of counsel because his attorney failed to make certain procedural motions to mitigate the effect of Wright's trial strategy of blaming his codefendants, failed to join in Anderson's motion to suppress CSLI evidence, and failed to join in motions concerning the alleged Sixth Amendment violations described above. On the record before us, we decline to resolve Johnson's claim of ineffective assistance of counsel, leaving him with the opportunity to raise it again—along with any other collateral attacks on his conviction—in a motion pursuant to 28 U.S.C. § 2255. *See* ***14** *United States v. Doe*, 365 F.3d 150, 152 (2d Cir. 2004).

Our Circuit has a "baseline aversion to resolving ineffectiveness claims on direct review," *United States v. Morris*, 350 F.3d 32, 39 (2d Cir. 2003) (internal quotation marks omitted), a position consistent with the Supreme Court's observation that "in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance," *Massaro v. United States*, 538 U.S. 500, 504, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003). "Among the reasons for this preference is that the allegedly ineffective attorney should generally be given the opportunity to explain the conduct at issue." *United States v. Khedr*, 343 F.3d 96, 100 (2d Cir. 2003) (citation omitted). In light of the incomplete record before us, and because "the district court [is] the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial," we decline to address Johnson's ineffective-assistance claims at this time. *Massaro*, 538 U.S. at 505, 123 S.Ct. 1690.

We have considered Defendants' remaining arguments and find any error to be harmless or the claims to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

All Citations

804 Fed.Appx. 8

Footnotes

* The Clerk of Court is respectfully directed to amend the caption as set forth above.

1 Indeed, because investigators obtained Anderson's CSLI in 2010, prior to the Supreme Court's decisions in *Carpenter* and *United States v. Jones*, 565 U.S. 400, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012), this conclusion would hold even if investigators had *not* secured a warrant supported by probable cause before obtaining Anderson's CSLI records. *See* *United States v. Zodhiates*, 901 F.3d 137, 143–44 (2d Cir. 2018). In *Zodhiates*, we held that government agents who obtained a criminal defendant's CSLI records without a warrant before the Supreme Court decided *Carpenter* and *Jones* relied in good faith on then-applicable appellate precedent. *Id.* The government issued the subpoena at issue in *Zodhiates* pursuant to the Stored Communications Act ("SCA"), 18 U.S.C. § 2703. For court orders like the warrant at issue in this case, the SCA required only a showing of "specific and articulable

facts showing that there are reasonable grounds to believe that the ... information sought[ ] [is] relevant and material to an ongoing criminal investigation." *Id.* § 2703(d). The warrant that issued here clearly met this standard.

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 9th day of June, two thousand twenty.

United States of America,

Appellee,

v.

Aston Johnson, AKA Richard Burke, AKA Daniel Arroyo, AKA Robert Brooks, Richard Anderson, AKA Jason Key, AKA Christopher Key, Andrew Wright, AKA Charles Rainey,

Defendants - Appellants.

ORDER

Docket Nos: 14-1027 (Lead)
14-1120 (Con)
14-1716 (Con)

Appellant, Richard Anderson, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk