

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MILTON BALKANY,	:	
	:	
Petitioner,	:	
	:	12 Civ. 8884 (DLC)
-v.-	:	10 Cr. 441 (DLC)
	:	
UNITED STATES OF AMERICA,	:	
	:	
Respondent.	:	

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GOVERNMENT'S MEMORANDUM IN OPPOSITION TO
HABEAS PETITION OF MILTON BALKANY

Preet Bharara
United States Attorney for the
Southern District of New York
Attorney for the United States
of America.

MARC P. BERGER
Assistant United States Attorney
- Of Counsel -

TABLE OF CONTENTS

Preliminary Statement..	1
Factual Background	2
I. The Indictment..	2
II. Trial.	2
A. The Evidence Presented and the Jury's Verdict .	2
B. Jury Selection.	3
III. Sentencing Proceedings..	8
IV. Appeal and Habeas Petition..	10
Argument.	10
I. Balkany's Claim Is Procedurally Barred Because He Failed To Raise It On Direct Appeal..	10
A. Applicable Law.	10
II. Assuming The Truth Of Balkany's Allegations, The District Court's Exclusion Of Several Spectators From A Portion Of Jury Selection Provides No Basis To Vacate Balkany's Conviction.. .	13
A. Applicable Law.	13
1. The Sixth Amendment Public Trial Right.. .	14
2. The Triviality Exception..	17
B. Discussion.	21
III. Having Failed To Object To The Closure Balkany's Claim Can Be Rejected Under The Plain Error Standard..	31
IV. The Record Undermines Balkany's Claim That The Court Excluded Family Members.	35
Conclusion.	38

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The Government respectfully submits this motion in opposition to Milton Balkany's ("Balkany") "Petition" pursuant to Title 28, United States Code, Section 2255. In his Petition, Balkany argues that his conviction should be reversed because three of his children were excluded from the courtroom during a portion of jury selection, in violation of his Sixth Amendment right to a public trial. Specifically, the three children allege, pursuant to individual affidavits submitted more than two years after the purported closure, that upon attempting to enter the courtroom on November 1, 2010 -- the first morning of jury selection -- each was told by "the Court's assistant" that she/he could not enter the courtroom but instead had to wait outside, and thereafter the children were not permitted to enter the courtroom until after the luncheon recess. (Petition at 3-4).

For the reasons outlined below, Balkany's Petition should be denied.

FACTUAL BACKGROUND

I. The Indictment

Indictment 10 Cr. 441 (DLC), filed on May 20, 2010, charged Balkany in four counts. Count One charged him with extortion, in violation of Title 18, United States Code, Section 875(d). Count Two charged him with wire fraud, in violation of Title 18, United States Code, Section 1343. Count Three charged him with blackmail, in violation of Title 18, United States Code, Section 873. And Count Four charged him with making false statements, in violation of Title 18, United States Code, Section 1001.

II. Trial

A. The Evidence Presented and the Jury's Verdict

Trial against Balkany commenced on November 1, 2010, and concluded on November 10, 2010. The Government's evidence at trial demonstrated overwhelmingly that Balkany, a rabbi and the dean of a religious girls school, tried to extort a hedge fund and blackmail its chief executive officer for four million dollars. The Government's proof included dozens of recorded conversations in which Balkany demanded that the hedge fund pay him the money, coupled with threats that if it did not pay, then someone that Balkany knew – and could control – would accuse the chief executive officer of having committed the crime of insider

trading. At the same time, Balkany assured the hedge fund that if it did pay the money he demanded, he would guarantee that the insider trading allegations would never surface. The evidence showed that in furtherance of his scheme, Balkany called the United States Attorney's Office for the Southern District of New York ("USAO") and, in calls that were also recorded, lied repeatedly to a federal law enforcement official.

Balkany did not present a defense case.

On November 10, 2010, after less than four and a half hours of deliberations, the jury found Balkany guilty of all charges.

B. Jury Selection

Jury selection began in the morning on November 1, 2010 and ended in the middle of the afternoon on the same day, spanning the lunch break. (VD 1-176).¹ Immediately before the prospective jurors entered the courtroom, the Court requested that individuals who were already seated in the gallery move to one side. See Tr. 31 ("I would ask everyone seated in the courtroom in the gallery please to move to the far corner where Ms. Row (sic) has is (sic) directing you. Do that promptly, please.")

The jury selection process commenced at about 9:30 a.m. with the distribution of a written questionnaire to prospective

¹ "VD" refers to the transcript of the voir dire proceeding on November 1, 2010; "Tr." refers to the transcript of the trial proceedings.

jurors. (VD 2-3). Before turning to the questionnaire, your Honor introduced herself to the jury venire. (VD 2). Your Honor noted for those in attendance that while "some of you have to be standing right now, [] in a moment, 18 of you will be seated in this jury box, and there is plenty of room for everyone to have a seat." (VD 2). The Court then spoke briefly about the importance of jury duty, the nature and anticipated length of the case, and the process of jury selection. (VD 2-3). The Court then gave a very brief description of the allegations in the indictment and the charges. (VD 3). Next, the Court discussed how it would use the questionnaire with the prospective jurors, and then described certain important principles of law the jurors must agree to, such as, among others, the presumption of innocence. (VD 6-9).

After your Honor swore the jury panel in, the Courtroom Deputy began to call out names of prospective jurors one at a time. (VD 9). In total, 36 names were called. The first 18 of those whose names were called were seated in the jury box and the remaining 18 sat in the first two rows of the courtroom. (VD 9-11). Once this process was completed, the Court noted that "[a]ll of those who are standing, now you can be seated in any of the open seats. Now I'm going to ask those who are seated against the wall in the back, if you could move up and seat yourselves in the open seating, I would appreciate it." (VD 11).

Beginning with prospective juror 1, the Court read aloud the questions on the questionnaire relating to the prospective juror's fitness as an impartial juror, and reminded him that he could opt to answer any of them confidentially at side bar. The initial section of questions on the questionnaire were general as to the juror's fitness to be an impartial juror, and the subsequent group of questions related to certain personal information about the juror. (VD 11-22). Before beginning to read these questions aloud to prospective juror 1, your Honor advised that this was the only time the Court would read the questions individually, to ensure that everyone in the courtroom listened carefully. (VD 11).

This process – during which prospective jurors provided responses to the questions on the questionnaire, first the background questions and then the personal questions – took the rest of the morning, until approximately 12:45pm. (VD 22-110). Specifically, during the morning session and before the lunch break, the District Court questioned 25 prospective jurors; of the 25, 19 were qualified as prospective jurors after questioning, and 6 were dismissed for cause, all on consent of both parties. (VD 41, 55, 65, 83, 105). Neither party made a challenge for cause that was denied by the District Court or to which the other side objected. The entire morning session was

done in open court, except for approximately seven occasions where potential jurors requested to be heard at sidebar.

Before dismissing the jurors for the lunch break, the Court reminded them, among other things, not to discuss the case and not to research the case during the lunch break. (VD 110). The jury pool was then recessed and asked to return at 2:00 p.m. (VD 111).

To those remaining in the courtroom, the Court then gave the following instruction: "I'd like the others to be seated, please. I want to make sure that all our visitors in the courtroom, friends and family members or others who are interested, are aware that they are to have no contact whatsoever with the jury. They are not to say hello to any jury member or any potential jury member; no conversation whatsoever. Thank you very much. I deeply appreciate your cooperation. It's important to us, and I greatly appreciate it." (VD 111) (emphasis added).

When the proceedings resumed, presumably at or shortly after 2:00 p.m., the Court continued to question the remaining 17 jurors whose names were called earlier that morning. As it turned out, the Court questioned a total of 21 prospective jurors; of the 21, 17 were qualified as prospective jurors after questioning, and 4 were dismissed for cause, all on consent of both parties. (VD 121, 131, 144, 153). Again, the questioning

was done in open court, except for approximately four requests from jurors to speak at sidebar.

Once 36 prospective jurors were qualified, Judge Cote invited counsel up to the bench and asked if either side moved to strike any of the remaining prospective jurors for cause. Defense had one request, which was denied after some colloquy. (VD 169-171).

With all questioning of prospective jurors over, the parties immediately exercised their peremptory strikes in open court - but on paper outside the presence of those in the courtroom. (VD 173-174). The Courtroom Deputy then announced the names of the jurors who were excused after the peremptory strikes. (VD 174-175). The trial jury was then seated in the order in which they were to sit in the jury box. (VD 175-176).

Next, the remaining members of the venire panel were dismissed. (VD 176). Following a brief recess and empaneling of the 12 jurors and 1 alternate juror, the Court stated the following to those in the gallery:

I want to thank the family members and other visitors who have been with us today and who were so cooperative. Much appreciated. You can move forward now and sit wherever you would like comfortably in the courtroom. Of course I remind you, you can't have any contact with the jury, no statements, no nods, no type of communication. And thank you so much for helping us.

(VD 177) (emphasis added).

It is not clear from the record precisely when jury selection ended, but it was sufficiently early for the Court to give preliminary instructions to the jury (Tr. 35-42), for both parties to deliver opening statements (Tr. 42-76), and for direct testimony from the first Government witness (Tr. 77-80). From the beginning to the end of the jury selection process, no objection was asserted by either party to anything that occurred during that process.

III. Sentencing Proceedings

In advance of sentencing, Balkany raised various arguments with respect to the United States Sentencing Guidelines (the "Guidelines"), and contended that a downward variance was warranted under Title 18, United States Code, Section 3553, in light of a long history of community service and certain family circumstances. In support of a variance, Balkany submitted 87 letters from friends and family members attesting to various acts of charity and the like. The Government argued, among other things, that Balkany's motives in seeking to extort \$4 million from SAC were anything but pure, as Bais Yaakov not only gave him a salary and paid for various expenses, but was also the foundation of his reputation and standing in the community, his access to power, and his ego. Nevertheless, the Government agreed that a non-Guidelines sentence might well be appropriate

in light of, among other things, Balkany's history of community service.

On February 18, 2011, Balkany appeared before your Honor for sentencing. (2/18/11 Tr. 1-79). After hearing oral argument from the parties and a lengthy statement from Balkany himself, your Honor first ruled on the Guidelines disputes, concluding that Balkany's advisory Guidelines range was 87 to 108 months' imprisonment. (2/18/11 Tr. 66-67). The Court found, however, that a variance from that range was appropriate based on Balkany's "lifetime of good works and generosity to a number of people." (2/18/11 Tr. 76). The "challenge," the Court continued, was to balance that "extraordinary lifetime of good works and care for the least fortunate among us" with "this remorseless effort on [Balkany's] part to obtain money to which [he had] no entitlement whatsoever, to misrepresent and lie and scheme over a period of weeks, to put pressure on and ratchet up the pressure on others, to get the U.S. Attorney's Office and its investigators, to try to manipulate them so that they could further [his] scheme unwittingly." (2/18/11 Tr. 70). Criticizing a radio interview that Balkany had done days after his arrest in this case in which he claimed that his lifetime of public service had led to the charges, your Honor told Balkany: "You were subject to criminal charges because you chose to pick up the phone and try to extort \$4 million from a hedge fund,

because you picked up the phone and tried to involve the U.S. Attorney's Office in your schemes and to assist and promote the extortion scheme." (2/18/11 Tr. 70). The Court noted also that "the lack of contrition, remorse, acceptance of responsibility here in my mind is profound." (2/18/11 Tr. 70). Weighing these considerations, the Court ultimately imposed a sentence of 48 months' imprisonment, to be followed by three years of supervised release, and ordered Balkany to pay a mandatory \$325 special assessment. (2/18/11 Tr. 71-72). Balkany is currently serving his sentence.

IV. Appeal And Habeas Petition

Balkany filed a timely notice of appeal. On appeal, Balkany argued (1) that the Court erred in denying his request for a jury instruction on entrapment, (2) that the Court erred in allegedly allowing a key Government witness to offer his opinion that Balkany had committed the charged crimes; and (3) that his conviction for perjury should be set aside because the Government manufactured the crime.

On March 19, 2012, the Second Circuit issued a summary order affirming Balkany's conviction.

By motion dated December 6, 2012, Balkany filed the instant Petition seeking to vacate his conviction and sentence. By Order dated December 12, 2012, the Court directed that the Government respond to the Petition on or before February 15, 2013.

ARGUMENT

I. BALKANY'S CLAIM IS PROCEDURALLY BARRED BECAUSE HE FAILED TO RAISE IT ON DIRECT APPEAL.

A. Applicable Law

"The grounds provided in Section 2255 for collateral attack on a final judgment in a federal criminal case are narrowly limited." Napoli v. United States, 32 F.3d 31, 35 (2d Cir. 1994). Section 2255 addresses only those claims alleging a jurisdictional defect, a constitutional error, or an error constituting "a fundamental defect which inherently results in a complete miscarriage of justice." United States v. Addonizo, 442 U.S. 178, 185 (1979); see also Davis v. United States, 417 U.S. 333, 346 (1974); Hill v. United States, 368 U.S. 424, 428 (1962); Napoli, 32 F.3d at 35-36. A Section 2255 petition is not a substitute for direct appeal. United States v. Frady, 456 U.S. 152, 165 (1982).

On habeas review, a defendant may not generally raise a claim that could have been raised previously on direct appeal. See DeJesus v. United States, 161 F.3d 99, 102 (2d Cir. 1998). Such a claim is barred, unless the defendant can show "cause" for failing to raise the issue at the appropriate time as well as actual prejudice from the alleged error. Napoli, 32 F.3d at 36-37; Douglas v. United States, 13 F.3d 43, 46 (2d Cir. 1993); Marone v. United States, 10 F.3d 65, 67 (2d Cir. 1993); see also

Campino v. United States, 968 F.2d 187, 189-90 (2d Cir. 1992) (“procedural default of even a constitutional issue will bar review under § 2255, unless the defendant can meet the ‘cause and prejudice’ test”). As the Second Circuit has held, “if a petitioner fails to assert a claim on direct review, he is barred from raising the claim in a subsequent § 2255 proceeding unless he can establish both cause for the procedural default and actual prejudice resulting therefrom or that he is ‘actually innocent’ of the crime of which he was convicted.” DeJesus, 161 F.3d at 102; see also Riascos-Prado v. United States, 66 F.3d 30, 33 (2d Cir. 1995) (absent showing of cause and prejudice, petitioner bringing § 2255 motion cannot raise issues that could have been raised on appeal, but were not); Douglas, 13 F.3d at 46 (prisoner is barred from seeking relief under Section 2255 when he has not first raised claim on direct appeal unless he can establish that there is cause for his failure to raise issue and he is prejudiced as result); Velasquez v. United States, 24 F. Supp. 2d 320, 320 (S.D.N.Y. 1998) (petitioner who fails to raise claim on direct review is barred from obtaining relief under Section 2255 unless he can establish cause and show actual prejudice resulting from error).

The Supreme Court has made clear that “cause” is measured by a stringent standard of diligence. See, e.g., Coleman v. Thompson, 501 U.S. 722, 752 (1991) (“cause” is “something

external to the petitioner" that "cannot be fairly attributed to him"); Murray v. Carrier, 477 U.S. 478, 488 (1986). "Attorney ignorance or inadvertence is not 'cause.'" Coleman, 501 U.S. at 752. The "cause and prejudice" standard requires a petitioner to show not only that "some objective factor external to the defense" impeded his efforts to raise a claim, Coleman, 501 U.S. at 753 (1991), but also that the error he alleges "worked to his actual and substantial disadvantage, infecting his entire trial with error," United States v. Frady, 456 U.S. 152, 170 (1982).

Here, Balkany's claim is procedurally barred. There is nothing in the record indicated that his claim that three of his children were improperly excluded from a portion of the voir dire arises from recently discovered evidence. Indeed, for reasons discussed further below, see Section IV, it is highly probable that any exclusion of his children would have been known to Balkany as soon as the lunch break on the first day of trial. Nor does Balkany demonstrate that some "objective factor external to the defense" prevented him from making this claim at an earlier time. Despite this fact, Balkany did not raise this Sixth Amendment argument at any time during, or after trial, and again failed to challenge it on appeal. Under these facts, where Balkany has not even attempted to explain why his claim was not raised earlier, Balkany has not shown "cause" for failing to

raise the claim earlier and it is therefore procedurally barred. Accordingly, Balkany's Petition should be dismissed.

II. ASSUMING THE TRUTH OF BALKANY'S ALLEGATIONS, THE DISTRICT COURT'S EXCLUSION OF SEVERAL SPECTATORS FROM A PORTION OF JURY SELECTION PROVIDES NO BASIS TO VACATE BALKANY'S CONVICTION

A. Applicable Law

1. The Sixth Amendment Public Trial Right

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . public trial." U.S. Const. amend. VI; see In Re Oliver, 333 U.S. 257, 266-73 (1948). In addition, the right to a public trial extends to the press and the general public, although this First Amendment right is qualified. See Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty., 464 U.S. 501 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603-04 (1982). "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. . . ." Waller v. Georgia, 467 U.S. 39, 46 (1984) (quoting Gannett Co. v. DePasquale, 443 U.S. 368, 380 (1979)) see also Morales v. United States, 635 F.3d 39, 44 & n.11 (2d Cir. 2011) (values "generally understood to be . . . protected by the Sixth Amendment right to

a public trial" include "(1) ensur[ing] a fair trial, (2) remind[ing] the prosecutor and judge of their responsibility to the accused and the importance of their functions, (3) encourag[ing] witnesses to come forward, and (4) discourag[ing] perjury").

The Supreme Court has held that "[t]he Sixth Amendment right to a public trial extends to the voir dire of prospective jurors." Presley v. Georgia, 130 S. Ct. 721, 724 (2010) (per curiam). However, the right is not absolute, and "[w]hile the accused does have a right to insist that the voir dire of the jurors be public, there are exceptions to this general rule." Id. Indeed the right to a public trial "may give way in certain cases to other rights or interests." Waller v. Georgia, 467 U.S. at 45. In Waller, the Supreme Court identified four factors for courts to apply before excluding the public from any stage of a criminal trial. See id. at 48. First, "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced." Id. Second, "the closure must be no broader than necessary to protect that interest." Id. Third, "the trial court must consider reasonable alternatives to closing the proceeding." Id. And fourth, the court "must make findings adequate to support the closure." Id.; accord Presley, 130 S. Ct. at 724; Gibbons v. Savage, 555 F.3d 112, 116 (2d Cir. 2009); cf. Press-Enter. Co. v. Superior Court of Cal., 464 U.S. 501, 510

(1984) (adopting these factors in evaluating whether a courtroom closure during voir dire was consistent with the First Amendment).

In Presley, for example, the state court trial judge excluded the defendant's uncle from jury selection over the defendant's objection. When the defense attorney suggested that the court should make "some accommodation" for the family member, the court refused to do so. Id. at 722. The Supreme Court reversed and remanded the case for a new trial, stating that "trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials." Id. at 725.

While the Supreme Court in Presley did not address whether Presley was entitled to the remedy of a new trial, it remanded to the Georgia Supreme Court for further proceedings "not inconsistent" with its opinion. Id. In earlier cases, however, the Supreme Court had made clear that violation of the Sixth Amendment public trial right is a "structural error"—that is, an error that affects "the framework within which the trial proceeds, such that it is often difficult to assess the effect of the error." United States v. Marcus, — U.S. —, 130 S. Ct. 2159, 2164–65 (2010) (citing Waller) (brackets, citations, and internal quotation marks omitted). As a result, where a defendant preserves the issue by contemporaneously objecting to the courtroom closure, as Presley did, see 130 S. Ct. at 722,

violation of the public trial right is not subject to harmless error analysis, see, e.g., Waller, 467 U.S. at 49-50 & n.9; Gibbons, 555 F.3d at 119; cf. United States v. Gomez, - F.3d -, 2013 WL 149893 (2d Cir. 2013) (reviewing claim for plain error where the defendant did not object to, and invited, the exclusion); United States v. Scott, 564 F.3d 34, 37 (1st Cir. 2009) (holding that an unpreserved public trial claim is reviewed only for plain error).

2. The Triviality Exception

However, the Second Circuit has found, even following Presley, that "a closure may be 'too trivial' to constitute a Sixth Amendment violation." Morales v. United States, 635 F.3d 39, 43 n.7 (2d Cir. 2011), citing Peterson v. Williams, 85 F.3d 39, 42 (2d Cir. 1996), and Gibbons v. Savage, 555 F.3d 112, 121 (2d Cir. 2009). The Morales finding follows a long line of precedent holding limited closures to be "too trivial" on numerous occasions.² See, e.g., Gibbons, 555 F.3d at 120 ("It does not necessarily follow, however, that every deprivation in a category considered to be 'structural' constitutes a violation of the Constitution or requires reversal of the conviction, no

² While Morales involved an ineffective assistance of counsel claim, underlying the Court's rejection of the claim is the reasoning that the closure was so limited that "it is difficult to see how Morales's lawyers at the time of the courtroom closure and after the trial would perceive Morales's right to a public trial to have been violated." Id. at 44.

matter how brief the deprivation or how trivial the proceedings that occurred during the period of deprivation.") (citation omitted); Carson v. Fischer, 421 F.3d 83, 94 (2d Cir. 2005) (holding that exclusion of defendant's mother-in-law from courtroom during informant's testimony was "too trivial" and "not significant enough to rise to the level of a constitutional violation"); Bowden v. Keane, 237 F.3d 125, 129 (2d Cir. 2001) (affirming conviction where courtroom closed during a witness's testimony and noting that "[w]hether a closure is deemed broad or narrow depends on a number of factors, including its duration") (citation omitted); Brown v. Kuhlmann, 142 F.3d 529, 541 (2d Cir. 1998) ("If the remedy of a new trial without a showing of prejudice is intended to deter unjustified courtroom closures, then the necessity for that remedy should depend on the degree to which it 'could be charged that the judge deliberately enforced secrecy in order to be free of the safeguards of the public's scrutiny.") (citation omitted); Peterson, 85 F.3d at 40 (2d Cir. 1996) ("Moreover, even an unjustified closure may, on its facts, be so trivial as not to violate the charter."); but cf. United States v. Gupta, 699 F.3d 682, 689 (2d Cir. 2011) (refraining to apply the exception where public was intentionally excluded from entirety of voir dire without justification grounded in the record.)

Significantly, the inquiry does not turn on how important the closed portion of the trial was as a matter of abstract principle. Instead, it demands a careful evaluation of "the particular circumstances" involved and a close "examination of all the details" of what actually "occurred" during the closure to which spectators would have been privy had they not been excluded. Gibbons, 555 F.3d at 121; see, e.g., Morales, 635 F.3d at 44-45; Carson, 421 F.3d at 93-94; Gonzalez, 211 F.3d at 737; Peterson, 85 F.3d at 41-44; see also Yarborough v. Keane, 101 F.3d at 897 ("To determine whether an error [requires per se reversal], we must look not only at the right violated, but also at the particular nature, context, and significance of the violation."). In addition, "[t]riviality is not determined by any one factor, such as the duration of the closure or its effect on the outcome of the proceeding." Morales, 635 F.3d at 43 n.7. Instead, it depends on "a number of factors, including [the closure's] duration; whether the public can learn (through transcripts, for example) what transpired while the trial was closed; whether the evidence presented during the courtroom closure was essential, or whether it was merely cumulative or ancillary; and whether selected members of the public were barred from the courtroom, or whether all spectators were precluded from observing the proceedings." Bowden, 237 F.3d at 129-30 (citations and footnote omitted).

Notably, applying this multi-factored and fact-intensive approach, the Second Circuit has made clear that the triviality exception may apply even where spectators have been excluded from "one of the most important portions of the trial." Gibbons, 555 F.3d at 121 (referring to Peterson). Thus, for example, the Court has applied the exception to a courtroom closure during the testimony of the defendant himself, see Peterson, 85 F.3d at 41-44; see also Brown, 142 F.3d at 541 (stating that Peterson involved a closure "during the testimony of . . . one of the most significant trial witnesses"); during the testimony (which lasted for three days) of an informant who had set up the drug deal for which the defendant was on trial and had identified the defendant in a lineup, see Carson, 421 F.3d at 85-87; during the testimony of a police officer regarding his encounter with the defendant using an alias linking him to the charged crime, see Brown, 142 F.3d at 532-33; during the testimony of a police chemist in a drug case, see Gonzalez, 211 F.3d at 739; and during a substantial portion of voir dire, see Gibbons, 555 F.3d at 120-21; cf. Morales, 635 F.3d at 43-45 (holding that counsel's failure to object to the closure of the courtroom during a portion of voir dire was not unreasonable). By contrast, the Court has refrained from applying the exception where the closure occurred during the "crux" of the prosecution's case. Smith, 448 F.3d at 540-41 (courtroom closed for the testimony of two

undercover police officers who “provided the great bulk of the trial testimony” against the defendant, one of whom “was the principal prosecution witness” and “the only witness to identify [the defendant] as having been involved in the [crime]”); accord Gonzalez, 211 F.3d at 738 (courtroom closed for “the testimony of the primary prosecution witness – the only witness who made a positive identification of the defendant as a participant in the [crime]”).

B. Discussion

As a threshold matter, the factual record in this case is infirm that family members were, in fact, denied access to the courtroom. As discussed further below, see section IV, the Court’s comments make clear that the public, including certain members of the defendant’s family, were present in the courtroom at all stages of jury selection. (See, e.g., VD 111 (after jury pool was recessed for lunch, the Court stated: “I’d like the others to be seated, please. I want to make sure that all our visitors in the courtroom, friends and family members or others who are interested, are aware that they are to have no contact whatsoever with the jury. . . . Thank you so much. I deeply appreciate your cooperation. It’s important to us, and I greatly appreciate it.”); see also VD 177 (at the conclusion of the jury selection, the Court stated, “I want to thank the family members and other visitors who have been with us today and who were so

cooperative. Much appreciated.”)).³ Ultimately, however, this Court need not make a factual finding on the issue of whether three family members were in fact excluded for a portion of the voir dire, because whether or not that occurred, the facts here simply do not justify overturning Balkany’s conviction. That result follows from this Court’s decision in Gibbons, which, like this case, involved a family member being excluded during a portion of voir dire.

In Gibbons, the trial court affirmatively closed the courtroom to spectators during the first day of trial, which consisted of the start of jury selection, and instructed the sole spectator who was present – the defendant’s mother – to leave. See 555 F.3d at 114. The trial court explained that it was closing the courtroom because of the small size of the courtroom; the large number of venire members; and the desire not to have prospective jurors sitting in close proximity to spectators, especially to a relative of the defendant. See id. The defendant objected and proposed alternative measures, but the trial court rejected them. See id. After he was convicted and exhausted his state appeals and state habeas, the defendant filed a federal habeas petition claiming violation of his public trial right. The district court denied the petition. See id. at 115.

³ In addition, two of Balkany’s children acknowledge that “[o]ther family members” were inside the courtroom. (See, e.g., Hecht Aff. ¶ 6, M. Balkany Aff. ¶ 6).

On appeal, the Second Circuit held – as the Supreme Court would in Presley the next year – that the trial court had failed to satisfy the Waller requirements before closing the courtroom. See id. at 117-19. The Court also held, however, that the violation was “too trivial to justify vacating Gibbons's conviction.” Id. at 121.

The Court reasoned that, given the “particular circumstances” of the case and what actually occurred to which spectators would have been privy had they not been excluded, the courtroom closure did not “subvert” the four core values underlying the public trial guarantee enough to warrant a new trial. Id. Specifically, the Court found that the “third and fourth values” – encouraging witnesses to come forward and discouraging perjury – were “not implicated by voir dire because no witnesses testified.” Id. As for the “first and second values” – ensuring a fair trial and reminding the prosecutor and judge of their responsibility to the accused and the importance of their functions – “limiting presence at the voir dire proceedings to only the attorneys, judge, defendant, and prospective jurors for one afternoon did not subvert these values.” Id. As the Court explained:

Even if the trial judge had not excluded Gibbons's mother from the courtroom, she would not have been able to watch a significant portion of what occurred during that afternoon session because the private interviews of individual jurors as to their reasons for inability to serve were justifiably conducted . . . out of the

hearing and sight of the other jurors. Further, nothing of significance happened during the part of the session that took place in the courtroom. The judge read the indictment, asked questions of a few jurors, and provided administrative details on what the jurors should expect if chosen. No prospective jurors were excused except with the consent of both parties. No peremptory challenges were made, and no objections were asserted by either party to anything that occurred. The next morning, when voir dire resumed, Gibbons's mother was allowed to watch the proceedings.

Id. Accordingly, the Court held, "[a]lthough the closure was not justified" under Waller, it was "too trivial to warrant the remedy of nullifying an otherwise properly conducted . . . criminal trial." Id.; cf. Morales, 635 F.3d at 44-45 (holding that the failure of counsel to object to the exclusion of spectators from one morning of voir dire, during which peremptory challenges were made, was not unreasonable in part because "these challenges are seldom, if ever, registered within earshot of spectators, so the public was not precluded from witnessing anything to which it otherwise would have been privy").

For present purposes, and again assuming the truth of the allegations in the three affidavits submitted in support of Balkany's motion, exclusion of certain family members from the courtroom during voir dire likely constituted a partial closure and violated the four-factor Waller test. However, as in Gibbons, affirming the conviction notwithstanding that violation would not "subvert[] the values the drafters of the Sixth Amendment sought to protect." 555 F.3d at 121. In fact, under

the facts of this case, as compared to Gibbons, the argument for applying the triviality exception is indeed much stronger.

As an initial matter, here, as in Gibbons, the third and fourth public trial values identified by the Supreme Court – encouraging witnesses to come forward and discouraging perjury – “are not implicated by voir dire because no witnesses testified,” and thus “do not weigh either in favor or against a triviality finding.” Id. at 121.

Moreover, whereas in Gibbons the court in fact announced closure to a family member, the Gibbons court found that “limiting presence at the voir dire proceedings to only the attorneys, judge, defendant, and prospective jurors . . . did not subvert” the values of ensuring a fair trial and reminding the prosecutors and judge of their responsibility to the accused and the importance of their functions. Id. Here, however, and unlike in Gibbons, no such blanket instruction was imposed by the Court limiting who could attend the proceedings. To the contrary, the record is clear that, separate and apart from the jury panel, during the alleged period of courtroom closure there were “visitors . . . friends and family members” in the courtroom, along with “others who [we]re interested” in the proceedings. (VD 111). Indeed the record strongly suggests the public was present the entire day. For example, in addition to receiving instructions from the Court at the conclusion of the

morning session, (VD 111), these same constituents of the public -- "family members" and "other visitors" -- were thanked by the Court at the end of jury selection for their cooperation throughout the day. (VD 177).

And so unlike Gibbons, where the participants in the trial were aware of the courtroom closure and objected, see id. at 114, here there is no indication in the record that Balkany's lawyer knew about the closure in the morning session, and there was certainly no objection made. In other words, whereas the lawyers in Gibbons knew that they were free from the gaze of any public observers, the lawyers here had every reason to believe the public was present. That is, the public trial guarantee is an effective check on the abuse of power in large part because the participants believe "that every criminal trial is subject to contemporaneous review in the forum of public opinion." Oliver, 333 U.S. at 270. Here, all the key participants in the trial - the defendant, the Government and defense attorneys, the prospective jurors, and the Court - believed that the proceedings were subject to such review. It follows that the exclusion did nothing to subvert the value of "reminding the prosecutor[s]," let alone the other trial participants, "of their responsibility to the accused and the importance of their functions." Gibbons, 555 F.3d at 121; see, e.g., Hoyt v. Lewin, 444 F. Supp. 2d 258, 272 (S.D.N.Y. 2006) (concluding that the "second value"

underlying the public trial guarantee – “to remind the prosecutor and judge of their responsibility to the accused and of the importance of their functions” – was “not undermined” where “neither party had any reason to know” that the courtroom had been closed) cf. Peterson, 85 F.3d at 43 (“[S]ince the defendant did not know of the closure and he was the only one to have testified during it, the closure was most unlikely to have encouraged perjury.”). At bottom, “[t]here is no reason to believe that [Balkany]’s trial was any less fair, or that the court officers or [prospective jurors] took their roles any less seriously,” because of a courtroom closure about which they had no knowledge. Braun, 227 F.3d at 919; cf. Owens v. United States, 483 F.3d at 65 (speculating, in a case where the trial court disclosed its intention to close the courtroom, that the defendant “and the Government might have picked a more impartial jury or asked different questions with local citizenry watching”).

Other than this compelling factor -- one that makes the argument for applying the triviality exception here much stronger than it was in Gibbons -- the facts here are strikingly similar to those in Gibbons. Here, as there, the courtroom was closed for only a portion of one day, constituting the beginning portion of voir dire. Here, as there, very few spectators were affected by the courtroom closure. See also Braun v. Powell, 227 F.3d at

918-20 (holding that the exclusion of a single spectator from a six-week trial qualified as "trivial" and did not require retrial). Here, as there, some of what occurred during the relevant time properly took place out of the hearing and sight of the gallery anyway. Here, as there, jury selection continued into a second session during which spectators were allowed to return. Here, as there, the parties exercised peremptory challenges after spectators were allowed to return. And finally here, as there, "nothing of significance happened during the part of the session that took place in the courtroom." Gibbons, 555 F.3d at 121. That is, no prospective jurors were excused except on consent of both parties, no peremptory challenges were exercised, and "no objections were asserted by either party to anything that occurred." Id.⁴

In light of these factors – not to mention the presence of dozens of other impartial spectators to the proceedings in the

⁴ In addition, a complete transcript of the jury selection proceedings was prepared in this case and available to the public. (VD 1-178). As the Supreme Court itself has noted, "the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time." Press-Enterprise I, 464 U.S. at 512; see also, e.g., Brown v. Kuhlmann, 142 F.3d at 538 (holding that closure was "narrowly tailored" under the second Waller factor where, inter alia, "[t]he transcript of the proceeding, never sealed, was available to the public"); United States v. Waters, 622 F.3d 1075, 1090 (9th Cir. 2010) (observing that the defendant's "public-trial right in the omnibus pretrial hearing is doubtless important, but it may have been vindicated by the public availability of a transcript").

form of the prospective jurors themselves – it simply cannot be said that the values underlying the public trial right were “subvert[ed]” in this case. Gibbons, 555 F.3d at 121. Accordingly, any alleged closure was “too trivial to warrant the remedy of nullifying an otherwise properly conducted . . . criminal trial” and vacating Balkany’s conviction. Id.

The Second Circuit’s decision in United States v. Gupta, 699 F.3d 682 (2d Cir. 2011), upon which Balkany relies almost exclusively (Petition at 7-10), does not compel a different result. In Gupta, the district court completed jury selection over the course of one day. Then, following the defendant’s conviction at trial, and while his case was on appeal, Gupta filed a letter with the Second Circuit arguing that the district court had violated his right by closing the courtroom during voir dire. See 699 F.3d at 686. The Second Circuit remanded to the district court for supplemental fact finding. Id.

The record was supplemented as follows: Gupta’s counsel submitted an affidavit stating, in sum and substance, that subsequent to the Presley decision on January 19, 2010, he had been advised by Gupta that Gupta’s brother and Gupta’s brother’s companion had been instructed to leave the courtroom when prospective jurors were being brought in for questioning. Id. In addition, Gupta’s brother and Gupta’s brother’s companion also submitted affidavits in support of their claim of exclusion.

Rather than conduct a fact-finding hearing, the district court adopted as its factual findings an affidavit submitted by the courtroom deputy which stated, in relevant part:

At the Court's direction, in order to accommodate the large numbers of jurors in the venire panel, and to protect the panel from hearing anything about the case from any member of the public present, I requested that individuals who were not venire panel members leave the courtroom during jury selection. I conveyed to those individuals that once jury selection was complete, and there was again space in the public area of the courtroom, they were more than welcome to attend the proceedings.

Id. (Omitting cite to joint appendix). On this record, the Second Circuit vacated Gupta's conviction and held that "the district court's intentional, unjustified closure for the entirety of voir dire violated the defendant's Sixth Amendment right to a public trial." Id. at 690.

The Gupta case is inapposite, as its holding was based on certain significant factors different from those presented here. Again, assuming the children's allegations to be true, the following two critical differences from Gupta are inescapable for Balkany: first, in Gupta, unlike here, the were no members of the public present in the courtroom during voir dire; and second, in Gupta, unlike here, the exclusion of family members occurred for the entirety of jury selection.

But where, as here, family members and public were in the courtroom for the entirety of voir dire, only a few members of the public claim to have been excluded, only approximately half

of the jury panel was questioned during the alleged period of exclusion (19 of 36 prospective jurors were qualified; see VD 1-109), and nothing of significance happened during the period of the claimed exclusion, improper closure of the courtroom is "too trivial" to disturb an otherwise valid conviction.

III. HAVING FAILED TO OBJECT TO THE CLOSURE BALKANY'S SIXTH AMENDMENT CLAIM CAN BE REJECTED UNDER THE PLAIN ERROR STANDARD

Whereas the defendant in Gibbons objected to exclusion of his family from the courtroom, see 555 F.3d at 114, Balkany said nothing in connection with the exclusion of his three children in this case. To be sure, while there is no affirmative evidence in the record that Balkany was aware of the exclusion at the exact time it occurred, there are at least two compelling reasons to believe that Balkany himself would have known about any such exclusion by later in the day.

First, given the allegations from his daughter - Audel Hecht - that she "had intended to assist [her] father by sharing [her] thoughts regarding prospective jurors with him and defense attorneys during lunch break," (Hecht Aff. ¶ 7), it is reasonable to assume that if Ms. Hecht had been excluded, Balkany would have learned about such exclusion from her by at least during the lunch recess, the very period of time when she intended to confer with him about the prospective jurors. Second, and more generally, since the nearly identical claims are made by three of

Balkany's children, with whom he clearly has a close and intimate relationship, it is highly probable that at least one of them, if not all, would have discussed and/or complained of the exclusion with him over the lunch break.

"Due regard generally for the public nature of the judicial process does not require disregard of the solid demands of the fair administration of justice in favor of a party who, at the appropriate time and acting under advice of counsel, saw no disregard of a right, but raises an abstract claim only as an afterthought on appeal." Levine v. United States, 362 U.S. 610, 619-20 (1960).

[T]he timely raising of claims and objections . . . gives the district court the opportunity to consider and resolve them In the case of an actual or invited procedural error, the district court can often correct or avoid the mistake so that it cannot possibly affect the ultimate outcome. And of course the contemporaneous-objection rule prevents a litigant from "sandbagging" the court - remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor.

Puckett v. United States, 556 U.S. 129, 134 (2009) (quoting Wainright v. Sykes, 433 U.S. 72, 89 (1977)).

To establish plain error, the defendant must show (1) an error; (2) that is plain; and (3) that affects substantial rights; in which case, (4) the Court may exercise its discretion to notice the error, but only if it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." Johnson v. United States, 520 U.S. 461, 466-67

(1997); accord United States v. Marcus, 130 S. Ct. 2159, 2164 (2010). The Supreme Court and the Second Circuit have cautioned that "reversal for plain error should 'be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'" United States v. Villafuerte, 502 F.3d at 209 (quoting United States v. Frady, 456 U.S. 152, 163 n.14 (1982)).

The Second Circuit recently rejected a Sixth Amendment claim where there was no objection to the exclusion of the defendant's family during voir dire. United States v. Gomez, -- F.3d --, 2013 WL 149893 (2d Cir. 2013). To be sure, in Gomez, the defense attorney volunteered to exclude the family during jury selection in response to the district court's inquiry as to who the seated persons in the gallery were. In applying plain error analysis to these facts, the Circuit denied the defendant's constitutional claim. See Gomez, -- F.3d --, 2013 WL 149893, *5 ("[E]ven if the exclusion of the Gomez family members during the voir dire in this case was error, it cannot be viewed as one that affected the fairness, integrity, or public reputation of judicial proceedings. To the contrary, the fairness and public reputation of the proceeding would be called into serious question if a defendant were allowed to gain a new trial on the basis of the very procedure he had invited.")

Here, although Balkany did not invite and then consent to the exclusion, as in Gomez, it is reasonable to conclude, for the reasons set forth above, that had the exclusion occurred as alleged, he would have been made aware of such error by no later than the lunch break. That he did not raise this issue upon returning to the courtroom, permitting the Court an opportunity to attempt to correct any error that may have occurred, counsels in favor of finding waiver.⁵

If Balkany did forfeit his claim, and plain error review applies, Balkany can not possibly demonstrate that the claimed error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings," Johnson, 520 U.S. at 470. In fact, "it would be the reversal of a conviction such as this which would have that effect." Id. The evidence at trial in this case showed overwhelmingly that Balkany orchestrated an extortion scheme and in the course of such scheme, lied to the USAO. Almost all of Balkany's conduct was captured on tape for the jury to see and hear. As the Court noted, it was "hard to argue in this case about [the defendant's] intent and about his state of mind . . . because of the strength of the evidence, the fact that almost everything is on tape." (Tr. 914-15).

⁵ In order to correct any error, for example, the Court, after hearing from defense counsel, may have opted to re-question the 19 qualified jurors in the beginning of the afternoon session, or begin jury selection again.

Reversing his conviction due to an error that had no effect whatsoever on the factual determination of his guilt would "encourage[] litigants to abuse the judicial process and bestir[] the public to ridicule it." Johnson, 520 U.S. at 470 (quoting Chief Justice Roger J. Traynor, The Riddle of Harmless Error 50 (1970)).

IV. THE RECORD UNDERMINES BALKANY'S CLAIM THAT THE COURT EXCLUDED FAMILY MEMBERS

As outlined above, even assuming the factual allegations in the affidavits as true, Balkany's Sixth Amendment claim that he was denied a public trial can and should be denied as a matter of law, on any one of three independent legal bases: (1) procedural error in not raising the claim earlier, (2) the triviality exception; or (3) waiver under plain error review. Notwithstanding that the Court need not reach the factual issue as to what, if anything, the courtroom deputy said to Balkany's three children, it bears noting that the record appears to conflict with the factual allegations in the affidavits. As such, while the Court can accept Balkany's claims as true for purposes of resolving the Petition, it need not take the factual allegations as true where his claims are contradicted by the record. See Puglisi v. United States, 586 F.3d 209, 214 (2d Cir. 2009).

As an initial matter, there is nothing in the record of the voir dire proceedings to suggest that the Court affirmatively closed the proceedings to the public. Indeed -- and quite to the contrary -- the record not only shows that the public was present for all of the voir dire proceedings, but also demonstrates that the Court appreciated the public's participation in the proceedings. Consider the following:

- Before the prospective jurors entered the courtroom, the Court's comments make clear that there were people in the courtroom. (See Tr. 31 ("I would ask everyone seated in the courtroom in the gallery please to move to the far corner where Ms. Row (sic) has is (sic) directing you. Do that promptly, please."));
- At approximately 12:45 p.m., after the jury pool was dismissed for their lunch break, members of the public, including Balkany's family, were present in the courtroom. (See VD 111 ("(Jury pool recessed) THE COURT: I'd like the others to be seated, please. I want to make sure that all our visitors in the courtroom, friends and family members or others who are interested, are aware that they are to have no contact whatsoever with the jury. . . . Thank you so much. I deeply appreciate your cooperation. It's important to us, and I greatly appreciate it.")); and
- At the conclusion of jury selection, in the mid-afternoon, the Court acknowledged the presence of family members and visitors who had been present all day and thanked those individuals for their cooperation. (See VD 177 ("I want to thank the family members and other visitors who have been with us today and who were so cooperative. Much appreciated. . . . And thank you so much for helping us.")).

Moreover, there is nothing in the record to suggest that space in the courtroom was at capacity such that certain members of the public needed to be excluded. Again, and to the contrary,

the facts establish that, apart from the first few minutes of jury selection, there was open seating for everyone to have a seat:

- When jury selection commenced, the courtroom was crowded and individuals were permitted to temporarily stand until space became available. (See VD 2 ("Good morning ladies and gentlemen. My name is Judge Cote. We are here this morning to choose a jury in a criminal case. I apologize that some of you have to be standing right now, but in a moment, 18 of you will be seated in this jury box, and there is plenty of room for everyone to have a seat."));
- Shortly into the jury selection process, and immediately after the names of 36 potential jurors were called, everyone was able to be seated in the courtroom and open seating was available. (See VD 11 ("All of those who are standing, now you can be seated in any of the open seats. Now I'm going to ask those who are seated against the wall in the back, if you could move up and seat yourselves in the open seating, I would appreciate it.")); and
- After the jury was chosen members of the public were thanked and then invited to sit wherever they chose in the courtroom. (See VD 177 ("I want to thank the family members and other visitors who have been with us today and who were so cooperative. Much appreciated. You can move forward now and sit wherever you would like comfortably in the courtroom.")).

Against this backdrop of the Court acknowledging (and thanking) friends, family and other members of the public for their participation in the voir dire proceedings, and in the face of a clear record demonstrating that the Court took deliberate and mindful steps to assure seating in the courtroom for members of the public who chose to attend the proceedings, the affidavits allege that the Court's assistant, on her own, effectively closed

the courtroom to a select few family members. Again, while the Court need not resolve any factual dispute for purposes of denying Balkany's Petition, the record strongly undermines the factual assertions made.

CONCLUSION

For all the reasons stated, the Court should deny Balkany's
Petition in its entirety, without a hearing.

Dated: New York, New York
February 15, 2013

Respectfully submitted,

PREET BHARARA
United States Attorney
Southern District of New York

By: /s/
Marc P. Berger
Assistant U.S. Attorney
(212) 637-2207

AFFIRMATION OF SERVICE

MARC P. BERGER, pursuant to Title 28, United States Code, Section 1746, hereby declares under the penalty of perjury:

That I am an Assistant United States Attorney in the Office of the United States Attorney for the Southern District of New York.

That on February 15, 2013, I caused one copy of the within Government's Opposition to Habeas Petition of Milton Balkany to be served by ECF, to:

Jeremy Gutman, Esq.
233 Broadway, Suite 2707
New York, NY 10279
Tel: 212-644-5200

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: New York, New York
February 15, 2013

/s/_____
MARC P. BERGER