

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**
-----X

MILTON BALKANY,
Petitioner,

12 Cv. 8884(DLC)
10 Cr. 441 (DLC)

- against -

UNITED STATES OF AMERICA,
Respondent.

-----X

**REPLY MEMORANDUM OF LAW
IN SUPPORT OF
PETITION PURSUANT TO 28 U.S.C. § 2255**

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INTRODUCTION

This memorandum is respectfully submitted as a reply to the government’s memorandum in opposition to the petition of Milton Balkany (“Balkany”) for relief pursuant to 28 U.S.C. § 2255. Notably, although the government suggests that the record somehow “undermines” our assertion that members of Balkany’s family were excluded from the courtroom during jury selection [Govt. Mem., Section IV] – even though the portions of the record the government points to are entirely consistent with the facts alleged in support of our petition – the government does not seek an evidentiary hearing to resolve the facts, nor does it present evidence of any fact it deems pertinent. Instead, after seeking to avoid review based on a theory of “procedural default” that we will show to be unsustainable, the government asks the Court to assess the substantive Sixth Amendment issue on the assumption that the facts alleged in the affidavits submitted in

support of the petition are true.¹ As we will show, the government's argument that the error is too "trivial" to warrant relief disregards or misconstrues the teaching of the Court of Appeals, including its recent resolution of an analogous courtroom closure issue in *United States v. Gupta*, 699 F.3d 682 (2d Cir. 2012).

ARGUMENT

BECAUSE THE EXCLUSION OF MEMBERS OF BALKANY'S FAMILY FROM THE COURTROOM, WITHOUT PRIOR NOTICE OR FINDINGS THAT WOULD JUSTIFY THE EXCLUSION, VIOLATED HIS CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL, HIS CONVICTION AND SENTENCE SHOULD BE VACATED

A. The Failure to Raise the Present Issue on Direct Appeal Poses No Bar to its Consideration by this Court

Relying on *DeJesus v. United States*, 151 F.3d 99, 102 (2d Cir. 1998), and similar Second Circuit cases, the government argues that, because Balkany did not raise the constitutional issue arising from the exclusion of family members on his direct appeal, he is procedurally barred from raising it in the present petition pursuant to Section 2255 unless he can show "cause" for that failure and "prejudice" from the error. Govt. Mem.,

¹The government's willingness to proceed on the assumption that the allegations are true "for purposes of resolving the Petition" (Govt. Mem., p. 35) implicitly includes the assumption that the acts of the Courtroom Deputy described in the affidavits of Balkany's children should be attributed to the Court. Thus, the heading of the section of the government's memorandum addressing our substantive constitutional claim is "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." Govt. Mem, Section II.

pp. 11-14. The government fails to note, however, that the “procedural default” rule on which it relies is inapplicable to an error that, like the present one, was de hors the record. Consequently, the government’s reliance on that procedural theory is misplaced.

In *DeJesus*, the Court of Appeals applied the holding of *Bousley v. United States*, in which the Supreme Court recognized that “[h]abeas review is an extraordinary remedy and ‘will not be allowed to do service for an appeal,’” 523 U.S. 614, 621 (1998), quoting *Reed v. Farley*, 512 U.S. 339, 354 (1994) (internal quotation omitted). In *Bousley*, the Court held that the petitioner’s claim that his guilty plea was invalid because the district court misinformed him about the nature of the charged crime was “procedurally defaulted” because he failed to raise it on direct appeal, and that it therefore could not be reviewed under Section 2255 unless he made a sufficient showing of “cause” and “prejudice” to relieve the default.

Bousley, however, expressly acknowledged that there is an “exception to the procedural default rule for claims that could not be presented without further factual development.” 523 U.S. at 621. In *Waley v. Johnston*, 316 U.S. 101, 104 (1942) (per curiam), the Court had held that the “procedural default” rule did not apply to a claim that a plea of guilty was coerced by a government agent’s threats, because the pertinent facts were “de hors the record and their effect on the judgment was not open to consideration and review on appeal.” *Waley* held that, in such circumstances, the issue “was appropriately raised by the habeas corpus petition.” *Id.* The Court distinguished

Bousley's claim from Waley's by observing that, unlike a claim involving alleged coercion by a government agent, the allegation that Bousley's plea was not entered knowingly and intelligently because the district court gave him erroneous information was the type of claim that "can be fully and completely addressed on direct review based on the record created at the plea colloquy." *Bousley*, 523 U.S. at 622.

The present claim, like Waley's, is based on facts that are de hors the record. Indeed, the record on Balkany's appeal contained no indication that anyone had been excluded from the courtroom at any time; to establish that fact for purposes of the present petition, it was necessary to supplement the record with affidavits of the three family members who were prevented from entering the courtroom during jury selection. *See* Federal Rules of Appellate Procedure, Rule 10(a) (the Record on Appeal consists of papers and exhibits filed in the district court, the transcript of proceedings, and the docket entries prepared by the clerk of the court). Far from treating the failure to raise an issue that depends on evidence beyond the record as a "procedural default," the Court of Appeals, in the context of cases alleging ineffective assistance of counsel, has expressed a "baseline aversion" to resolving such issues on direct appeal. *United States v. Pena*, 233 F.3d 170, 173 (2d Cir.2000) (citation and internal quotation marks omitted). *See Billy-Eko v. United States*, 8 F.3d 111, 116 (2d Cir. 1993) (claim based on correspondence that was not part of the record was "clearly one that was properly reserved for a § 2255 petition, since there was evidence outside the record to support [the petitioner's]

arguments”), *abrogated on other grounds by Massaro v. United States*, 538 U.S. 500 (2003).²

Because the issue in the present case falls squarely within the exception that applies to claims based on matter dehors the record, Balkany was under no obligation to raise it on his direct appeal, and his failure to do so was not a “procedural default.”³ On the contrary, it is precisely the type of claim that is “properly reserved for a § 2255 petition.” *Billy-Eko*, 8 F.3d at 116. Accordingly, the government’s assertion that the present claim is procedurally barred should be readily rejected.

B. The Record Is Entirely Consistent With the Factual Allegations Made in Support of Balkany’s Petition

Somewhat confusingly – and seemingly trying to have it both ways by insinuating that the sworn statements of the petitioner’s family members are dubious even while declining to challenge them at an evidentiary hearing – the government asserts simultaneously that “the Court can accept Balkany’s claims as true for purposes of resolving the Petition,” and that it “need not take the factual allegations as true . . .”

²It is not entirely correct to say that *Massaro* “abrogated” *Billy-Eko*, because it actually *broadened* the rule announced in that case, holding that “an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, *whether or not* the petitioner could have raised the claim on direct appeal.” 538 U.S. at 504 (emphasis added).

³In *United States v. Gupta*, 699 F.3d 682, 686 (2d Cir. 2012), the Court of Appeals granted a motion to remand the matter for further fact-finding while the direct appeal was pending. Although such a remand is certainly within the power of the Court of Appeals, *see United States v. Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994), it has never been suggested that requesting such a procedure is required, or even preferred, nor has it ever been held that the availability of such a procedure affects the applicability of the *Waley* exception.

(Govt. Mem., p. 35). Even though it does not formally dispute or contradict the statements of Balkany's children, and rests its argument on the assumption that their statements are true, the government does not hesitate to suggest that "the factual record in this case is infirm that family members were, in fact, denied access to the courtroom."

(Govt. Mem., p. 21). In support of that assertion, the government claims that "the record appears to conflict with the factual allegations in the affidavits." The "conflict" imagined by the government, however, does not exist.

As the government sees it, the sworn statements in which three of Balkany's children describe how they were prevented from entering the courtroom are somehow at odds with portions of the record reflecting that members of the public, including other members of Balkany's family, were present during the entire *voir dire*. Govt. Mem., pp. 36-38. The affidavits, however, in no way suggest that *all* members of the public were excluded from the courtroom; the affiants described only their own exclusion. Indeed, Audel Hecht expressly stated that she had been told about the proceedings that took place in her absence by "[o]ther family members who had been in the courtroom." Exhibit 1 (accompanying petition), ¶ 6. Menachem Balkany similarly referred to "[o]ther family members who had been inside the courtroom in the morning." Exhibit 2, ¶ 6. Although Schmucl Balkany's affidavit did not explicitly mention that other family members attended the jury selection in the morning, it suggested nothing to the contrary, and

implicitly acknowledged that fact by stating that he “subsequently learned about what was going on in the courtroom that morning.” Exhibit 3, ¶ 3.

Thus, the portions of the record to which the government points do not in any way conflict with or undermine the sworn statements submitted in support of this petition. On the contrary, they are entirely consistent with the affidavits; if anything, a fair reading of the affidavits in conjunction with the record demonstrates that the affiants were careful to state no more than what they knew to be true, and to avoid overstating the extent of the exclusion. The government’s effort to impugn the integrity of the three affiants based on a purported conflict with the record is simply unfounded.⁴

C. Excluding Three Family Members from the Courtroom, Without Notice of the Court’s Intention or Findings That Justified the Exclusion, Violated Balkany’s Sixth Amendment Right to a Public Trial in a Manner That Was Not Trivial

As the government correctly observes, our opening memorandum relied largely on *United States v. Gupta*, 699 F.3d 682 (2d Cir. 2012), in which a panel of the Court of Appeals re-affirmed the exceptional importance of the Sixth Amendment guaranty of the

⁴The government is also mistaken in suggesting that “the affidavits allege that the Court’s assistant, *on her own*, effectively closed the courtroom to a select few family members.” Govt. Mem., p. 38 (emphasis added). Nothing in the affidavits suggests that the affiants presumed to know whether or not the Court’s assistant was acting “on her own,” nor did anything in our papers suggest such a presumption. On the contrary, in the absence of evidence suggesting otherwise, we would assume (as the government apparently does) that the Courtroom Deputy would act only as authorized by the Court. Additionally, the government’s use of the word “select” mischaracterizes the factual assertions made by the affiants; nothing in the affidavits suggests a belief that the particular family members who were excluded were “selected” for exclusion or that the Courtroom Deputy even knew who they were.

right to a public trial by vacating, following a rehearing *en banc*, its own earlier holding that a closure during jury selection, without prior notice or articulation of the findings delineated in *Waller v. Georgia*, 467 U.S. 39 (1984), could be excused pursuant to the “triviality exception” adopted in *Peterson v. Williams*, 85 F.3d 39 (2d Cir. 1996). The government, on the other hand, tries to wish away much of *Gupta*’s teaching about the obligation of courts to protect the right to a public trial and the limited scope of the “triviality exception.” Although much of the government’s memorandum is devoted to arguing that the Court should rely on that exception to deny Balkany’s petition (Govt. Mem., pp. 17-31), it takes no note of *Gupta*’s reminder that the Second Circuit has “repeatedly emphasized . . . the doctrine’s narrow application,” 699 F.3d at 688, and that the “triviality exception” may be relied on only in “rare circumstances.” *Id.* at 690. The government also ignores *Gupta*’s insistence that “the importance of the public trial right dictates that, before closing a courtroom to the public, a trial court must inform the parties of its intentions and make explicit *Waller* findings” and that “[f]ailure to comply with this procedure will, in nearly all cases, invite reversal.” *Id.*⁵

⁵The government also overlooks the many similarities between *Gupta* and *Gibbons v. Savage*, 555 F.3d 112 (2d Cir. 2009), the case on which it most heavily relies in its present memorandum. Its failure to take note of this is particularly striking in view of the fact that, in *Gupta*, the government made (and the Court of Appeals ultimately rejected) many of the same arguments that it advances at pages 22 to 29 of its memorandum. The *Gibbons*-based arguments the government makes to this Court largely reiterate those made in the following portions of the government’s original brief to the Court of Appeals in *Gupta*:

The Government concedes that here, as in *Gibbons* and *Presley*, the District Court’s exclusion of members of the public from the

courtroom during voir dire violated the four-factor *Waller* test. As in *Gibbons*, however, 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. 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. And, as in *Gibbons*, “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, as there, the courtroom was closed for only a portion of one day. . . Here, as there, some of what occurred during the relevant time properly took place out of the hearing and sight of the gallery anyway. And here, as there, “nothing of significance happened during the part of the session that took place in the courtroom.” 555 F.3d at 121. No prospective jurors were excused except on consent, no peremptory challenges were exercised in open court, and “no objections were asserted by either party to anything that occurred.” *Id.*

Govt. Original Brief, *United States v. Gupta*, 09-4378-cr, available at 2011WL 6258162, *25-27 (footnote omitted).

In its present memorandum, the government also echoes the following aspects of the argument that was rejected in *Gupta*:

In addition, there are at least two other factors in this case that make the argument for applying the triviality exception even stronger than it was in *Gibbons*. First, whereas in *Gibbons* the participants in the trial were aware of the courtroom closure and the defendant objected, see *id.* at 114, there is no indication in the record here that any of the lawyers even knew about the closure and there was certainly no objection. (See SA 183). In other words, the lawyers here had every reason to believe the public was present (above and beyond the 70 prospective jurors), and the exclusion therefore did nothing to subvert the value of “reminding the prosecutor[s] ... of their responsibility to the accused and the importance of their functions.” *Gibbons*, 555 F.3d at 121. Put simply, “[t]here is no reason to believe that [Gupta]’s trial was any

The government does not dispute that, in the present case, the Court neither informed the parties of an intention to close the courtroom nor made any findings to justify doing so. It argues that the “triviality exception,” which was held inapplicable in

less fair, or that the court officers or witnesses took their roles any less seriously, because of the exclusion of [the] spectator [s].” *Braun*, 227 F.3d at 919.

Second, a complete transcript of the jury selection proceedings was prepared in this case and available to the public. (SA 1-141). 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”). In light of these factors – not to mention the presence of 70 impartial spectators to the proceedings in the 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, “[a]lthough the closure was not justified,” it was “too trivial to warrant the remedy of nullifying an otherwise properly conducted... criminal trial” and vacating Gupta’s conviction. *Id.*

Id. at 28-29. Although this argument was initially adopted by the Court of Appeals as a basis for applying the “triviality exception,” see *United States v. Gupta*, 650 F.3d 863, 868 (2d Cir. 2011), the Court ultimately concluded, after rehearing en banc, that, notwithstanding the similarities between *Gibbons* and *Gupta*, reversal was required.

Gupta, can be relied on here based on two “differences” between this case and *Gupta* that it contends are “critical:”

first, in *Gupta*, unlike here, there 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*.

Govt. Mem., p. 30 (emphases in original). While these factors undoubtedly differentiate this case from *Gupta*, they fall far short of establishing that this case involves the type of “rare circumstances” in which a Sixth Amendment violation is too trivial to warrant relief.

The Court of Appeals has long recognized that the constitutional right to a public trial is implicated by a “partial closure” in which only some members of the public are excluded from the courtroom. *Guzman v. Scully*, 80 F.3d 772, 775 (2d Cir. 1996); *Woods v. Kuhlmann*, 977 F.2d 74, 76 (2d Cir.1992). The key distinction between a partial closure and a complete closure is that, for the former, the first of the four *Waller* requirements is “slightly relaxed” in that, rather than an “overriding interest” in favor of closure, the trial court need find only that the closure is justified by a “substantial reason.” *Id.* Because the Court made *no* findings in the present case, that distinction is of no moment here.

Moreover, particular concerns are raised when even a partial closure excludes individuals who are related to the defendant. The Court of Appeals summarized those concerns in *Smith v. Hollins*, 448 F.3d 533, 539 (2d Cir. 2006):

Recently, in *Rodriguez v. Miller*, this Court scrutinized the tension between the Sixth Amendment and the exclusion of family members. 439 F.3d 68 (2d Cir.2006). In granting the writ to a defendant whose family's attendance was conditioned upon their willingness to sit behind a screen during the testimony of an undercover, this Court expressed its strong devotion to the preservation of an individual's right to have family and friends present at his trial. *Id.* at 73 ("Intrinsic to the public trial right is an individual's right to have family members and friends present at his trial, a right this Court takes very seriously."); *see also Carson v. Fischer*, 421 F.3d 83, 91 (2d Cir.2005)("[T]his Court takes very seriously a defendant's right to have family members present at his trial."); *Guzman v. Scully*, 80 F.3d 772, 776 (2d Cir.1996) ("The 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."); *Vidal v. Williams*, 31 F.3d 67, 69 (2d Cir.1994) (noting "a special concern for assuring the attendance of family members of the accused"). The *Rodriguez* Court also reminded us, however, that our "devotion" is not unbridled, as it "may give way in certain cases to other rights or interests." *Waller*, 467 U.S. at 45, 104 S.Ct. 2210.

In *Smith*, the Court of Appeals granted a writ of habeas corpus based on the exclusion of the petitioner's siblings during the testimony of an undercover officer, notwithstanding that other family members were permitted to be present. The Court held that the distinction the state court had drawn between relatives who lived in Queens and relatives who lived in Brooklyn was not an adequate justification. 448 F.3d at 540. The unjustified exclusion of family members in the present case similarly represents a substantial violation of the right to a public trial, even though other family members and friends were allowed to attend the proceedings.

As to the second factor on which the government relies – that the exclusion of family members lasted for less than the “entirety of the jury selection” (Govt. Mem., p. 30) – the government offers no principled reason for viewing this distinction as one that makes a difference. We noted this distinguishing factor in our opening memorandum, but also observed that the three family members were kept out of the courtroom for approximately two thirds of the *voir dire*, during which more than half of the prospective jurors were questioned, and argued that such an exclusion cannot fairly be described as “brief” or “trivial,” particularly where it prevented Audel Hecht from sharing her thoughts about prospective jurors with her father. Balkany Opening Mem., pp. 9-10. The government’s memorandum does not even attempt to rebut our argument on that point.

Perhaps the most glaring flaw in the government’s argument is its failure to recognize that, in each of the cases it cites to support its argument that the Court should apply the “triviality exception,” the closure was either inadvertent or occurred after notice to the parties and after the trial court articulated a rationale (although not necessarily a satisfactory one) for its action. *See Morales v. United States*, 635 F.3d 39, 41 (2d Cir. 2011) (court gave notice that spectators would not be permitted because all space in courtroom would be needed for prospective jurors; no party objected); *Gibbons v. Savage*, 555 F.3d 112, 114 (2d Cir. 2009) (court announced that it was closing courtroom to spectators during *voir dire* because of the small size of the courtroom and a desire not to “taint” the jury pool); *Peterson*, 85 F.3d at 41 (court closed courtroom on prosecutor’s

motion based on finding that witness was an active undercover officer; court inadvertently failed to reopen courtroom during brief testimony of the defendant that followed undercover's testimony); *Carson v. Fischer*, 421 F.3d 83, 86 (2d Cir. 2005) (after prosecution moved to close courtroom during testimony of an undercover officer, the court held a hearing and made findings to justify closure, although it made an exception to accommodate members of the defendant's immediate family); *Peterson v. Williams*, 85 F.3d 39, 41 (2d Cir. 2005) (courtroom closed on prosecutor's motion based on finding that witness was an active undercover officer; court inadvertently failed to reopen courtroom during brief testimony of the defendant that followed undercover's testimony); *Bowden v. Keane*, 237 F.3d 125, 128 (2d Cir. 2001) (courtroom closed during testimony of undercover officer on prosecutor's motion after finding witness might be identified and threatened by suspects from whom he bought drugs, but who were still at large); *Gonzales v. Quinones*, 211 F.3d 735, 736 (2d Cir. 2000) (after motion by prosecutor to close the courtroom during the testimony of two undercover officers, all parties agreed to a procedure under which a hearing would be held only if a guard posted at the door informed the court that someone other than a family member or an attorney from the Legal Aid Society, which represented the defendant, sought entry; the sergeant in charge of the court's security detail, "perhaps because of a misunderstanding," decided at some point to lock the door rather than post a guard there, and three Legal Aid attorneys were unable to enter); *Brown v. Kuhlmann*, 142 F.3d 529, 533 (2d Cir. 1998)

(closure during testimony of undercover after hearing at which officer explained concerns about revelation of his identity and court made finding that this supported closure); *Braun v. Powell*, 227 F.3d 908, 909 (7th Cir. 2000) (trial court excluded excused juror who sought to watch the trial after informing the parties that it was the court’s policy to exclude former members of the venire panel; the decision does not indicate that any party objected).

Thus, none of the cases the government relies on to support its argument for applying the “triviality exception” involved the circumstance that the *Gupta* Court recognized as requiring reversal in virtually all cases: the Court’s failure to inform the parties of its intention to close the courtroom or to make any finding to justify the closure.

The government simply ignores *Gupta*’s pronouncement that:

[I]f a court intends to exclude the public from a criminal proceeding, it *must* first analyze the *Waller* factors and make specific findings with regard to those factors. If a trial court fails to adhere to this procedure, any intentional closure is unjustified and will, in all but the rarest of cases, require reversal.

699 F.3d at 687 (emphasis in original). Indeed, as it also did in *Gupta*, *see* n.5, *supra*, the government seeks to make a virtue of the fact that, in contrast to *Gibbons*, “the lawyers here had every reason to believe the public was present.” Govt. Mem., p. 26. To accept the government’s argument that this factor “makes the argument for applying the triviality exception here *much stronger* than it was in *Gibbons*” (Govt. Mem, p. 27) (emphasis in original), the Court would have to join it in ignoring the Court of Appeals’ clear

statements in *Gupta* (in which the lawyers were similarly unaware of the closure) that “before closing a courtroom to the public, a trial court must inform the parties of its intentions and make explicit *Waller* findings,” 699 F.3d at 690, that this procedure “must” occur before “*any* intentional closure,” *Id.* at 687 (emphasis added), and that “[f]ailure to comply with this procedure will, in nearly all cases, invite reversal.” *Id.* at 690. Applying *Gupta* and the cases and principles on which it is based, this Court should conclude that this case does not involve the “rare circumstances” in which a courtroom closure can be deemed too trivial to warrant a remedy.

D. The Sixth Amendment Claim Was Not Forfeited and is Not Subject to “Plain Error” Review

In a further effort to defeat Balkany’s petition, the government, even while acknowledging that “there is no affirmative evidence in the record that Balkany was aware of the exclusion at the exact time it occurred” (Govt. Mem., p. 31), urges the Court to find that he forfeited this issue by failing to object to the closure, and that the issue should therefore be reviewed under the “plain error” standard. Govt. Mem., Point IV. In *Gupta*, the Court of Appeals rejected a virtually identical argument:

As a final matter, the Government maintains . . . that we should deem Gupta’s Sixth Amendment challenge forfeited because Gupta did not object contemporaneously to the exclusion of the public during voir dire.

The Government bases its argument on the theory that Gupta learned of the district court’s exclusion of his brother and girlfriend prior to the close of *voir dire*, and, for this reason, Gupta had an obligation either to object to the

exclusion himself or to inform his counsel of this fact. Although the record is at best undeveloped on this point, the parties do agree that Gupta's trial counsel was unaware of the closure at the time it occurred. The Government would have us conclude that, because Gupta has not affirmatively demonstrated that he did not know of the closure, we should assume that he had such knowledge and therefore hold him accountable. We decline this invitation. Nothing apart from the Government's speculation supports the conclusion that Gupta was aware of the closure when it happened and thus had the ability to raise a contemporaneous objection. Even if we assume that Gupta had such knowledge, however (and there is no record evidence supporting this assumption), we are loath to impute to a defendant – at least in the circumstances here – an obligation to raise a legal objection as to which his own defense counsel is ignorant during the throes of trial. *Cf. United States v. Tramunti*, 500 F.2d 1334, 1341 n. 3 (2d Cir.1974) (“Defense counsel cannot fairly be penalized for failure to raise at trial an issue of which he was, without his own fault, ignorant.”). We therefore reject the Government's argument that Gupta has forfeited his Sixth Amendment claim

699 F.3d at 689-90 (footnote omitted).

Rather than suggesting any reason why this Court, unlike the Court of Appeals, should accept the government's “invitation” for it to rely on speculation to find that a Sixth Amendment claim was forfeited, the government simply ignores the Court of Appeals' resolution of its forfeiture argument in *Gupta*. Instead, it relies on the Court's recent application of the “plain error” standard to a Sixth Amendment claim in *United States v. Gomez*, 705 F.3d 68 (2d Cir. 2013). Govt. Mem., p. 33. The record in *Gomez*, however, unlike that in either *Gupta* or the present case, established not only that defense counsel was aware of the closure before it occurred, but that “Gomez's attorney fully

acquiesced in the exclusion of the family.” 705 F.3d at 75. Thus, *Gomez* is completely inapposite and provides no support for the government’s claim that the constitutional issue raised in the present petition was forfeited.

CONCLUSION

For the reasons discussed above and in our opening memorandum, the Court should vacate the conviction and sentence.

Respectfully submitted,

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