Appeals Court of Massachusetts,
Plymouth.
COMMONWEALTH
v.
Glen S. ALEBORD.

09–P–1290.
Argued Oct. 8, 2010.
Decided Sept. 21, 2011.

Background: Defendant was convicted in the Superior Court Department, Plymouth County, Linda E. Giles, J., of murder in the second degree, and his motion for new trial was denied. Defendant appealed.

Holdings: The Appeals Court, Rubin, J., held that:
(1) court officer's refusing members of public entry to jury selection proceedings pursuant to safety policy violated defendant's right to public trial;
(2) United States Supreme Court's decision in *Presley v. Georgia*, holding that closure of jury voir dire to the public violates the Sixth Amendment right to public trial, would apply retroactively; and
(3) defendant's failure to object to the exclusion of his family members from the courtroom was insufficient to demonstrate a knowing waiver of his right to public trial.

Order denying motion for new trial vacated, and case remanded.

West Headnotes

[1] Criminal Law 110 635.6(4)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k635 Public Trial
110k635.6 Considerations Affecting Propriety of Closure
110k635.6(4) k. Management of courtroom; security, order, and decorum. Most Cited Cases

Criminal Law 110 635.7(4)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k635 Public Trial
110k635.7 Nature of Proceeding Affecting Propriety of Closure
110k635.7(4) k. Jury selection. Most Cited Cases

Criminal Law 110 635.11(5)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k635 Public Trial
110k635.11 Proceedings on Request for Closure
110k635.11(5) k. Findings. Most Cited Cases

Court officer's refusing members of the public entry to jury selection proceedings, pursuant to safety policy, because there was insufficient seating for anyone other than jury venirepersons, violated defendant's Sixth Amendment right to public trial; although courtroom was not closed by express judicial order, judge failed to make case-specific determination regarding necessity of closure, breadth of closure or reasonable alternatives. U.S.C.A. Const.Amend. 6.

[2] Criminal Law 110 635.7(4)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k635 Public Trial

110k635.7 Nature of Proceeding Affecting Propriety of Closure
110k635.7(4) k. Jury selection. Most Cited Cases

Venirepersons are not members of the "public" in the relevant sense, so the presence of venirepersons in the courtroom during jury selection proceedings does not mean it has not been closed for Sixth Amendment public trial purposes. U.S.C.A. Const.Amend. 6.

[3] Criminal Law 110 635.6(1)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k635 Public Trial
110k635.6 Considerations Affecting Propriety of Closure
110k635.6(1) k. In general. Most Cited Cases

Before a courtroom may be closed to the public, a judge must make a case-specific determination that closure is necessary. U.S.C.A. Const.Amend. 6.

[4] Criminal Law 110 635.5(2)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k635 Public Trial
110k635.5 Limitations on Power to Close Proceedings
110k635.5(2) k. Alternatives to closure. Most Cited Cases

Criminal Law 110 635.5(3)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k635 Public Trial
110k635.5 Limitations on Power to Close Proceedings
110k635.5(3) k. Narrow tailoring requirement. Most Cited Cases

Criminal Law 110 635.6(3)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k635 Public Trial
110k635.6 Considerations Affecting Propriety of Closure
110k635.6(3) k. Overriding interest; necessity. Most Cited Cases

Criminal Law 110 635.11(5)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k635 Public Trial
110k635.11 Proceedings on Request for Closure
110k635.11(5) k. Findings. Most Cited Cases

In order for a courtroom closure to be held permissible, it must satisfy four requirements, (1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceedings, and (4) it must make findings adequate to support the closure. U.S.C.A. Const.Amend. 6.

[5] Criminal Law 110 635.5(3)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k635 Public Trial

110k635.5 Limitations on Power to Close Proceedings
110k635.5(3) k. Narrow tailoring requirement. Most Cited Cases

Criminal Law 110 ⚿635.7(4)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k635 Public Trial
110k635.7 Nature of Proceeding Affecting Propriety of Closure
110k635.7(4) k. Jury selection. Most Cited Cases

Where space does not permit members of the public to attend a portion of voir dire, it might amount to a sufficient interest to justify a closure of the courtroom; nonetheless, the closure may be no broader than necessary to protect the interest that requires the closure. U.S.C.A. Const.Amend. 6.

[6] Criminal Law 110 ⚿635.6(1)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k635 Public Trial
110k635.6 Considerations Affecting Propriety of Closure
110k635.6(1) k. In general. Most Cited Cases

Closure of courtroom to the public by policy runs counter to the requirement that a court make a case-specific determination before a closure of any part of a criminal proceeding constitutionally may occur. U.S.C.A. Const.Amend. 6.

[7] Courts 106 ⚿100(1)

106 Courts
106II Establishment, Organization, and Procedure
106II(H) Effect of Reversal or Overruling
106k100 In General
106k100(1) k. In general; retroactive or prospective operation. Most Cited Cases

United States Supreme Court's decision in *Presley v. Georgia*, explicitly stating that closure of jury voir dire to the public violates the Sixth Amendment right to public trial, did not announce a new rule of constitutional law, and thus would apply retroactively. U.S.C.A. Const.Amend. 6.

[8] Courts 106 ⚿100(1)

106 Courts
106II Establishment, Organization, and Procedure
106II(H) Effect of Reversal or Overruling
106k100 In General
106k100(1) k. In general; retroactive or prospective operation. Most Cited Cases

A “new rule” of constitutional law will not be applied retroactively; rules that do apply retroactively are those that were dictated by precedent existing at the time the defendant's conviction became final.

[9] Criminal Law 110 ⚿1166.7

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1166.5 Conduct of Trial in General
110k1166.7 k. Public or open trial; spectators; publicity. Most Cited Cases

Denial of a defendant's Sixth Amendment right to a public trial is a structural error that is not susceptible to harmless error analysis. U.S.C.A. Const.Amend. 6.

[10] Criminal Law 110 ⚿1035(3)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in

Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1035 Proceedings at Trial in General
110k1035(3) k. Course and conduct of trial in general. Most Cited Cases

Although denial of the right to public trial is a structural error, appellate court does look to whether defendant raised the issue in a timely manner, because the right to a public trial, like other structural rights, can be waived. U.S.C.A. Const.Amend. 6.

[11] Criminal Law 110 635.13(1)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k635 Public Trial
110k635.13 Waiver of Public Trial
110k635.13(1) k. In general. Most Cited Cases

While neither a written waiver nor oral colloquy is required, and the defendant's assent to waiver need not necessarily appear on the record, the burden is on the Commonwealth to establish that the defendant knowingly waived his right to public trial either personally or through counsel. U.S.C.A. Const.Amend. 6.

[12] Criminal Law 110 635.13(2)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k635 Public Trial
110k635.13 Waiver of Public Trial
110k635.13(2) k. Sufficiency. Most Cited Cases

Defendant's failure to object to the exclusion of his family members from the courtroom during jury selection proceedings was insufficient to demonstrate a knowing waiver of his right to public trial. U.S.C.A. Const.Amend. 6.

[13] Criminal Law 110 635.13(2)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k635 Public Trial
110k635.13 Waiver of Public Trial
110k635.13(2) k. Sufficiency. Most Cited Cases

Silence alone is not sufficient to demonstrate a knowing waiver of the right to public trial. U.S.C.A. Const.Amend. 6.

[14] Criminal Law 110 635.6(1)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k635 Public Trial
110k635.6 Considerations Affecting Propriety of Closure
110k635.6(1) k. In general. Most Cited Cases

A defendant's Sixth Amendment rights to public trial are not violated where a closure of the courtroom can be characterized as so trivial or de minimis as to fall entirely outside the range of “closure” in the constitutional sense. U.S.C.A. Const.Amend. 6.

****745** Chauncey B. Wood, Boston, for the defendant.

Mary E. Lee, Assistant District Attorney, for the Commonwealth.

Present: McHUGH, RUBIN, & HANLON, JJ.

RUBIN, J.

***432** The trial of the defendant, Glen S. Alebord, took place from February 3 to February 5, 2004. He was convicted by a jury of murder in the second degree; we consolidated his direct appeal and the appeal from the denial of his motion for a new trial, and his conviction was affirmed. See *Commonwealth v. Alebord*, 68 Mass.App.Ct. 1, 859 N.E.2d 440 (2006). The Supreme Judicial Court denied further appellate review on March 1, 2007. *Commonwealth v. Alebord*, 448 Mass. 1105, 862 N.E.2d 379 (2007). After the United ****746 *433** States Court of Appeals for the First Circuit decided *Owens v. United States*, 483 F.3d 48 (1st Cir.2007), the defendant brought the instant second motion for postconviction relief, arguing that he was deprived of his constitutional right to a public trial because the public was excluded from the jury selection portion of his trial.

Proceedings below. The motion judge, who was also the trial judge, held an evidentiary hearing and found that the defendant's trial was held in the second criminal session of the Brockton courthouse of the Plymouth County Division of the Superior Court Department, a courtroom that accommodated sixty people seated on the benches along the back and one side of the courtroom or about eighty people standing wall-to-wall. The judge found that the third and fourth criminal sessions courtrooms are bigger than the second session, that each can seat about eighty people, and that those courtrooms were unused on the morning of jury impanelment, February 3, 2004. Seventy-two jurors were summoned for jury service on that day, and the entire venire was brought up to the second session courtroom for jury impanelment, which lasted about eighty minutes.

The judge found that the defendant's friend, his sister, and his brother-in-law were prevented from entering the courtroom by a court officer stationed by the only public entrance to the courtroom. The judge found that the court did not order the exclusion but that pursuant to what she described as "the court officers' safety policy, ... members of the public other than venirepersons were not permitted to enter the courtroom if there was only standing room inside." The judge found that with seventy-two venire persons inside the second session courtroom there were no seats available for the defendant's friend and relatives, and found that there was nothing in the record showing that seats became available in that courtroom during the jury impanelment process. She found that the defendant's attorney had no knowledge of anyone being excluded from the courtroom "at any time."

The judge concluded that the courtroom was not closed for constitutional purposes because she did not exclude members of the public for an indiscriminate reason or time period, but rather that three members of the public unknown to the court officers ***434** were not permitted by them to enter the courtroom for safety reasons. Second, she concluded that because of the courtroom's finite capacity, reasonable restrictions on general access were permissible, and that the venire itself was composed of members of the public who were able to observe the impanelment.

The judge also concluded that even if a closure had taken place, the defendant had waived his objection by failing to object at trial to the closure. She also found that, in any event, the defendant had not made a showing that there was sufficient space in the courtroom to permit his friend and relatives to be seated safely inside the courtroom or that the larger courtroom would have afforded a solution to the problem by allowing those individuals to sit apart from the venire.

Discussion. During the pendency of this appeal, the Supreme Judicial Court decided *Commonwealth v. Cohen (No. 1)*, 456 Mass. 94, 921 N.E.2d 906 (2010) (*Cohen*). As the court explained there, the right to a public trial rests upon two different provisions of the Bill of Rights. *Id.* at 106, 921 N.E.2d 906. The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...." The public trial right has

been held by the United States Supreme Court to extend beyond the accused, and it may ****747** be invoked under the First Amendment to the United States Constitution as well. See *Press Enterprise Co. v. Superior Ct.*, 464 U.S. 501, 508, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984).

In 1984, the Supreme Court held that the voir dire of prospective jurors must be open to the public under the First Amendment. See *id.* at 510, 104 S.Ct. 819. That same year in *Waller v. Georgia*, 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), the Supreme Court held that the public trial right under the Sixth Amendment extended to proceedings beyond the portion of the trial at which actual proof is introduced and tested; that case addressed a pretrial suppression hearing, which the Court held was required to be open to the public. The Court stated, "[T]here can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and the public." *Ibid.*

[1] In the evidentiary hearing on this new trial motion, the defendant's trial counsel, who is an experienced trial attorney, testified ***435** that he was aware at the time of the trial of a "standard practice" of closing the courtroom to the public during jury impanelment in the second criminal session of the Brockton courthouse. As described above, the judge found that she had not been informed during the trial that specific individuals were turned away at the courtroom door. At trial, counsel did not object to the closing of the courtroom, nor was such an issue raised on appeal or in the defendant's first new trial motion.

In *Owens v. United States*, 483 F.3d at 66, the United States Court of Appeals for the First Circuit held that facts not unlike those here amounted to a violation of a defendant's right to a public trial under the Sixth Amendment. FN1 In *Presley v. Georgia*, 558 U.S. 209, 130 S.Ct. 721, 724, 175 L.Ed.2d 675 (2010), the United States Supreme Court explicitly stated that closure of jury voir dire to the public violates the Sixth Amendment.

> FN1. The facts are not precisely the same. In *Owens*, the First Circuit stated that "[d]espite the growing number of seats vacated by dismissed jurors, ... the marshals continued to bar Owens' family from the courtroom for the remainder of jury selection, which lasted an entire day." *Id.* at 54. As described above, the judge in this case found that "there is nothing in the record to suggest that seats ever became available" during the eighty-minute impanelment.

[2] There can be no doubt that, unless the court officer's action was within some independent exception, the courtroom in this case was "closed" in the constitutional sense. The fact that a court officer, not the judge, prevented the defendant's friend and relatives from entering the courtroom during jury selection does not alter this. As the Supreme Judicial Court made clear in *Cohen*, 456 Mass. at 108, 921 N.E.2d 906, "a courtroom may be closed in the constitutional sense without an express judicial order." In that recent case, the Supreme Judicial Court held that court officers' closure of a courtroom pursuant to an established policy without the awareness of a judge nonetheless amounted to an unconstitutional closure of the courtroom. *Id.* at 109, 921 N.E.2d 906. FN2

> FN2. Contrary to the conclusion of the judge, venirepersons are not members of the public in the relevant sense, so the presence of venirepersons in the courtroom does not mean it has not been closed for constitutional purposes. See *Presley*, 130 S.Ct. at 725 (reversing the defendant's conviction because the courtroom was closed to spectators during jury selection).

[3][4] Before a courtroom may be closed, "a judge must make a case-specific ****748** determination that closure is necessary." *Id.* at 107, 921 N.E.2d 906. In order for a courtroom closure to be held permissible, it ***436** must satisfy four require-

ments: "[1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceedings, and [4] it must make findings adequate to support the closure." *Ibid.*

[5][6] Where space does not permit members of the public to attend a portion of voir dire, it might amount to a sufficient interest to justify a closure of the courtroom. See *id.* at 112, 921 N.E.2d 906 (concluding that "lack of space to accommodate the general public due to the number of prospective jurors in the court room" is a "substantial" interest that might justify partial closure of a courtroom). Nonetheless, the "closure may be 'no broader than necessary to protect [the] interest' " that requires the closure. *Id.* at 113, 921 N.E.2d 906, quoting from *Waller,* 467 U.S. at 48, 104 S.Ct. 2210. In this case, as in *Cohen,* "the record indicates that the judge did not make a particularized determination about available space for members of the public at the beginning of the empanelment proceedings." *Ibid.* Nor did she make findings about the breadth of the closure or reasonable alternatives. Of course, the point is not that the law requires a judge who is unaware of closure to make findings about it. Rather, as the Supreme Judicial Court explained in *Cohen,* it is that "[c]losure by policy runs counter to the requirement that a court make a case-specific determination before a closure of any part of a criminal proceeding constitutionally may occur." *Id.* at 114, 921 N.E.2d 906. Consequently, on the record before us, as in *Cohen* and *Owens,* the closure of the courtroom here did not satisfy the conditions set out in *Waller.*

[7] The Commonwealth argues that we should affirm because the rule that the Sixth Amendment right to a public trial includes jury impanelment that was articulated in *Presley* and applied in *Cohen* should not be applied in this case where *Owens, Presley,* and *Cohen* were all decided after the judgment in this case became final.

[8] The Supreme Judicial Court has announced that it will follow the retroactivity rule articulated in *Teague v. Lane,* 489 U.S. 288, 310–311, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion), under which a "new rule" of constitutional law will not be applied retroactively. See ***437** *Commonwealth v. Bray,* 407 Mass. 296, 300–301, 553 N.E.2d 538 (1990). [FN3] Rules that do apply retroactively are those that were "*dictated* by precedent existing at the time the defendant's conviction became final" (emphasis in original). *Id.* at 301, 553 N.E.2d 538, quoting from *Teague v. Lane,* 489 U.S. at 301, 109 S.Ct. 1060. See *Commonwealth v. Clarke,* 460 Mass. 30, 34–35, 949 N.E.2d 892 (2011) (providing a detailed analysis of when under *Teague* a "new rule" has been created).

> FN3. That court has recently expressly reserved the question whether a broader retroactivity rule might apply as a matter of State law. See *Commonwealth v. Clarke,* 460 Mass. 30, 34 n. 7, 949 N.E.2d 892 (2011).

To be sure, here, the judge did not at trial have the benefit of *Presley* or *Owens.* In *Presley,* however, the Supreme Court held that the exclusion of the public from jury selection violated the Court's "clear [Sixth Amendment] precedents." 130 S.Ct. at 722. The Supreme Court issued *Presley* in a summary disposition without ****749** oral argument. It stated specifically that the rule was "so well settled that the Sixth Amendment right extends to jury voir dire that this Court may proceed by summary disposition." *Id.* at 723–724. See *Commonwealth v. Downey,* 78 Mass.App.Ct. 224, 228 n. 9, 936 N.E.2d 442 (2010). While Justice Thomas, joined by Justice Scalia, dissented from that view, *Presley, supra* at 725–727, in the face of the announcement by the Supreme Court majority that the question in *Presley* was "well settled" since 1984, we are compelled to conclude that *Presley* did not announce a "new rule." [FN4] Rather, the Supreme Court has told us that the rule that a defendant's public right to trial under the Sixth Amendment ex-

tends to jury voir dire was, at the time the defendant's conviction became final in 2007, not merely "dictated by" Supreme Court precedent but "well settled" by it. See *id.* at 723–724.

> FN4. In *Owens*, 483 F.3d at 66, the First Circuit, in a collateral challenge to a 1997 Federal conviction, applied retroactively the Sixth Amendment rule that jury selection could not be closed to the public. *Owens* was decided in 2007 even before *Presley*, and *Teague v. Lane* controlled the question of retroactivity. Had the First Circuit concluded that the rule prohibiting closure of the courtroom during jury selection was a "new rule" within the meaning of *Teague*, it could not properly have applied the rule in the case before it. Indeed, the *Owens* court held that another of the claims of the defendant was barred by the retroactivity rule of *Teague v. Lane*. *Id.* at 70.

[9] The Commonwealth also argues that the closure, to which, again, there was no objection at trial, created no substantial risk ***438** of a miscarriage of justice. "Denial of a defendant's Sixth Amendment right to a public trial is a structural error that is not susceptible to harmless error analysis. [*Cohen*, 456 Mass.] at 105 [921 N.E.2d 906], citing *Commonwealth v. Baran*, 74 Mass.App.Ct. 256, 296 [905 N.E.2d 1122] (2009). Because we place such value on the right to public trial and because it is virtually impossible to demonstrate concrete harm flowing from a violation of that right, a violation relieves the defendant of the need to show prejudice in order to obtain a new trial. See *Commonwealth v. Edward*, 75 Mass.App.Ct. 162, 173 [912 N.E.2d 515] (2009)." *Commonwealth v. Downey*, 78 Mass.App.Ct. at 228–229, 936 N.E.2d 442. We held therefore in *Edward*—a case involving a new trial motion brought fifteen years after trial and more than thirteen years after the defendant's conviction was affirmed on direct appeal—that "[a] conclusion that the defendant's right to a public trial was violated does not lead us to the substantial risk [of a miscarriage of justice] analysis" that would be involved in assessing other errors that, like this one, were not timely raised. 75 Mass.App.Ct. at 173, 912 N.E.2d 515. See also, e.g., *Owens*, 483 F.3d at 64–65 & n. 13, quoting from *Strickler v. Greene*, 527 U.S. 263, 282, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (holding that, in a collateral challenge to a conviction, a defendant need not show prejudice arising from counsel's failure to object to closure at trial on public trial right grounds in order to obtain relief under the applicable "cause and prejudice" test).

[10][11] Nonetheless, "[a]lthough denial of the right to public trial is a structural error, 'we do look to whether the defendant raised [the] issue in a timely manner because "the right to a public trial, like other structural rights, can be waived." ' [*Cohen*, 456 Mass.] at 105–106 [921 N.E.2d 906] (internal citations omitted)." *Downey*, 78 Mass.App.Ct. at 230, 936 N.E.2d 442. See *Commonwealth v. Grant*, 78 Mass.App.Ct. 450, 458–460, 940 N.E.2d 448 (2010). "While neither a written waiver nor oral colloquy is required, and the defendant's assent to waiver need not necessarily****750** appear on the record, the burden is on the Commonwealth to establish that the defendant knowingly waived his right to public trial either personally or through counsel." *Downey*, 78 Mass.App.Ct. at 230, 936 N.E.2d 442.

[12][13] The judge in this case determined that the defendant did not object to the closure of the courtroom, and concluded on that basis that his claim was waived. Silence alone, however, is not ***439** sufficient to demonstrate a knowing waiver. See *Edward*, 75 Mass.App.Ct. at 173 n. 13, 912 N.E.2d 515 (contrasting the "Massachusetts rule" that waiver of the public trial right requires "the defendant's knowing assent" with other jurisdictions that "view counsel's failure to object as sufficient"). A remand therefore is required so that the judge may consider in the first instance whether the public trial right was knowingly waived at trial in this

case. Although there was testimony at the evidentiary hearing bearing upon the question, the judge's factual findings are not sufficient to allow us to make a determination on our own whether there was such a waiver.

[14] Further, as the defendant notes, in *Cohen*, 456 Mass. at 109, 921 N.E.2d 906, the Supreme Judicial Court indicated that a defendant's Sixth Amendment rights are not violated where a closure can "be characterized as so trivial or de minimis as to fall entirely outside the range of 'closure' in the constitutional sense."

The judge acknowledged that "[t]he right to be tried in open court is not trammeled by a short, inadvertent, trivial courtroom closure," but did not rule whether the de minimis exception applied in this case. Particularly since the scope of this de minimis exception has not yet been addressed in any decision of a court of the Commonwealth, and in light of the fact that a remand is in any event required, we think it prudent to allow the motion judge to consider, after full briefing, both its scope and whether the facts of this case might fall within this exception. We emphasize that we express no opinion on either question; there has been some debate after *Presley* about the first. See, e.g., *Owens v. United States*, 483 F.3d at 63 (concluding that a closure was not trivial because it "was not a mere fifteen or twenty-minute closure; rather, Owens' trial was allegedly closed to the public for an entire day while jury selection proceeded"); *United States v. Agosto–Vega*, 617 F.3d 541, 548 (1st Cir.2010) (concluding, after *Presley*, that a closure was not trivial); *United States v. Gupta*, 650 F.3d 863, 872 (2d Cir.2011) ("[A]lthough the district court's exclusion of [the defendant's] brother and girlfriend during voir dire failed to meet the four-factor test set forth in *Waller* [and now *Presley*], the exclusion was too trivial to implicate [the defendant's] Sixth Amendment right to a public trial"); *id.* at 874–76 (Parker, J., dissenting) (unlike in prior ***440** triviality cases where "the closure lasted only for part of voir dire and/or was limited to certain spectators, and in many instances the closure was inadvertent ..., the intentional, unjustified, and undisclosed closure of an *entire* voir dire is necessarily a non-trivial structural error that violates the Sixth Amendment"). On remand the judge may also hold a further evidentiary proceeding should she determine it is necessary for her to decide any or all of the questions before her.[FN5]

FN5. The judge's findings on remand could also obviate the need to address the defendant's ineffective assistance of counsel claim. Consequently, we do not address it further here.

The order denying the motion for new trial is therefore vacated, and the case is ****751** remanded for further proceedings consistent with this opinion.

So ordered.

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