COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss. SUPREME JUDICIAL COURT
NO. SJC-10486

COMMONWEALTH
(Appellee)

v.

DAVID COHEN
(Appellant)

ON APPEAL FROM JUDGMENTS OF THE
NORFOLK SUPERIOR COURT

BRIEF OF THE COMMITTEE FOR PUBLIC COUNSEL SERVICES AS AMICUS CURIAE

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for the Committee for Public Counsel Services

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

The Committee for Public Counsel Services ("CPCS"), the Massachusetts public defender agency, is statutorily mandated to provide counsel to indigent defendants in criminal proceedings. This court invited amicus briefs on the question of "[w]hether court officers' posting of a sign on the courtroom door that read 'Jury selection in progress. Do Not Enter' for more than three days of jury selection denied the defendant his right to a public trial." The issue presented in this case is of importance to CPCS because the Court's decision will likely have a profound impact on whether CPCS' thousands of clients will receive fully public trials.

It is in the interest of CPCS' clients, and the fair administration of justice, that CPCS' views be presented in order to contribute to this Court's full consideration of all aspects of the important issue raised in this case.

ISSUE PRESENTED

As stated by this Court in its amicus invitation, the issue is “whether court officers' posting of a sign on the courtroom door that read ‘Jury selection in progress. Do Not Enter’ for more than three days of jury selection denied the defendant his right to a public trial.”

STATEMENT OF THE CASE

Amicus adopts the statement of the case set forth in the defendant's brief.

STATEMENT OF FACTS

Amicus adopts the statement of facts set forth in the defendant's brief.

ARGUMENT

I. The right to a public trial, including juror voir dire, assures the fairness of the proceedings and belongs personally to the accused. The Court should not conflate its analysis of violation of a defendant's rights with the related but substantially different analysis of violation of the public's weaker right to attend trial.

A. Primacy of the right of the accused to a public trial.

The right of the accused to a public trial is personal to the accused; it is distinct from and holds primacy over the rights of the public. The United States Supreme Court's 1946 opinion in *In re Oliver* succinctly stated this principle and the practical considerations underlying it:

> 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.[1]

Thirty-eight years later, the Supreme Court reaffirmed this principle in *Waller v. Georgia* by explaining

> [t]he central aim of a criminal proceeding must be to try the accused fairly, and "[our] cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant."[2]

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[1] *In re Oliver*, 333 U.S. 257, 271 (1948).
[2] *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (*quoting Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979)).

Thus, the right to a public trial is one that inheres in defendants individually.

Waller involved a criminal defendant's objection to the exclusion of the public from a suppression hearing.[3] But roughly contemporaneous with its 1984 decision in *Waller*, the Court decided *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise I*),[4] which clarified two points: (1) that the concept of "public trial" includes juror voir dire[5] and (2) that the public trial rights of the defendant are of primary importance. Specifically, *Press-Enterprise I* notes that the accused's right to a public trial is intertwined with the public's right to attend trial but holds "primacy."[6] To wit,

> the primacy of the accused's right is difficult to separate from the right of everyone in the community to attend the voir dire which promotes fairness.[7]

Indeed, the Court's earlier opinion in *Gannett Co. v. DePasquale* held that, while defendants had the right

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[3] *Waller*, 467 U.S. at 43.
[4] *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984).
[5] *Id.* at 508; *see also Commonwealth v. Gordon*, 422 Mass. 816, 823 (1996)
[6] *Press-Enterprise I*, 464 U.S. at 508.
[7] *Id.*

to a public trial, third parties did not even have standing to assert a public trial right.[8]

B. The Waller test.

The test promulgated by the Supreme Court in *Waller* has four factors:

> [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 judge] must consider reasonable alternatives to closing the proceeding, and [4] [the judge] must make findings adequate to support the closure.[9]

Further, as this Court explained in *Commonwealth v. Martin*, the findings must be "particular," not general, and they must be supported by the record.[10] Because the Waller test draws on *Press-Enterprise I*, it is clear that this test applies regardless of whether it is a defendant or the public asserting the right.

However, because the defendant's public trial right enjoys primacy, the balance of the above-mentioned interest shifts greatly when the accused objects to closure. As *Waller* explains,

One of the reasons often advanced for

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[8] *Gannett Co. v. DePasquale*, 443 U.S. 368, 387-381 (1979).
[9] Waller, 467 U.S. at 48.
[10] *Commonwealth v. Martin*, 417 Mass. 187, 196 (1994).

> closing a trial -- avoiding tainting of the jury by pretrial publicity, e. g., *Press-Enterprise*, 464 U.S., at 510 -- is largely absent when a defendant makes an informed decision to object to the closing of the proceeding.[11]

Applying *Globe Newspaper Co. v. Superior Court*,[12] *Press-Enterprise*, and *Waller*, the only other recognized justifications for closure of a courtroom are the privacy interests of minor sexual assault victims,[13] the privacy interests of jurors responding to intimate or volatile voir dire questions,[14] and the privacy interests of persons mentioned in testimony who are not before the court.[15] The first and third of justifications are not present here.

As to the privacy interests of jurors, it cannot be seriously contended that the voir dire in this case was so sensitive that it required even partial closure. *Press-Enterprise* (a case in which the defendant actually asked for closure) makes this clear.[16] In that case, the defendant was charged with

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[11] *Waller*, 467 U.S. at 47 n.6.
[12] *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982).
[13] *Id.*
[14] *Press-Enterprise I*, 464 U.S. at 511-512.
[15] *Waller*, 467 U.S. at 48-49.
[16] *Press-Enterprise I*, 464 U.S. at 504.

rape and murder of a teenage girl.[17] But even given the obvious potential for extremely sensitive questioning, the Supreme Court held that general closure was inappropriate and instead laid out a series of preliminary steps to ensure that closure was only implemented as to individual jurors with privacy concerns and only when absolutely necessary.[18]

CPCS notes with concern the misdirection related to *Press-Enterprise* contained the Plymouth District Attorney's amicus brief at pages 5-6 and note 1. The Plymouth D.A. notes that the criminal defendant in that case (Brown) remains on death row despite the exclusion of the public. It then cites the procedural history of Brown's unsuccessful criminal appeals, implying that the defendant sought and was denied relief based on a public trial claim. The implication is false. Brown supported the exclusion of the public[19] and never sought relief on that ground.

II. Because calculating the effect of the denial of a public trial is a practical impossibility, the Supreme Court has repeatedly held that such error is "structural". The Court should reject amicus Plymouth County District Attorney's ridiculous suggestion that the criminal defendant's remedy

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[17] *Press Enterprise I*, 464 U.S. at 512.
[18] *Id.*
[19] *Press-Enterprise I*, 464 U.S. at 504.

for the denial of a public trial is the provision of transcripts to the public.

Both this Court and the United States Supreme Court have consistently held that the improper closure of a courtroom is structural error requiring reversal without regard to prejudice. Long before *Waller*, this Court held in *Commonwealth v. Marshall,* that

> [e]ven if we might be of [the] opinion that [closure of the courtroom] was harmless error, we cannot reach that result under the Sixth Amendment. . . . A showing of prejudice is not necessary for reversal of a conviction which is not the result of public proceedings.[20]

(This court repeated *Marshall*'s holding in 1994 in *Commonwealth v. Martin*.[21]) *Waller* agreed with the view expressed in *Marshall*, which it characterized as "the consistent view of the lower federal courts."[22] The *Waller* Court endorsed the view that inquiry for prejudice is inappropriate and "a practical impossibility" in this context because "the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance."[23]

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[20] *Commonwealth v. Marshall*, 356 Mass. 432, 435 (1969) (emphasis added) (citations omitted).
[21] *Martin*, 417 Mass. at 195; *see also Commonwealth v. Baran*, 74 Mass. App. Ct. 256, 297 n.50 (2009).
[22] *Waller*, 467 U.S. at 49.
[23] *Waller*, 467 U.S. at 49 n.9 (*quoting State v. Sheppard*, 438 A. 2d 125, 128 (1980)).

The Supreme Court has never retreated from its view that public trial violations are structural error. In 1997 in *Johnson v. United States*, it explicitly referenced the violation of the right to a public trial as one of a few rare types of structural error.[24]

> A "structural" error, we explained in *Arizona v. Fulminante*, is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself," 499 U.S. [279,] 310 [(1991)]. We have found structural errors only in a very limited class of cases: . . . *Waller v. Georgia*, 467 U.S. 39, 81 L. Ed. 2d 31, 104 S. Ct. 2210 (1984) (the right to a public trial).[25]

And in 2006 the Court decided *Washington v. Recuenco*,[26] and *United States v. Gonzalez-Lopez*,[27] which both noted again that the denial of a public trial was structural error.

The Plymouth District Attorney counters that *Waller* itself did not require per se reversal and

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[24] *Johnson v. United States*, 520 U.S. 461, 468-469 (1997)
[25] *Id.* (citations omitted); *see also Neder v. United States*, 527 U.S. 1, 8 (1999) (same).
[26] *Washington v. Recuenco*, 548 U.S. 212, 218-219 & n.2 (2006)
[27] *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006).

therefore it should not be required here either.[28] The relevant portion of *Waller* reads

> we do not think [the closing of the suppression hearing] requires a new trial in this case. Rather, the remedy should be appropriate to the violation. If, after a new suppression hearing, essentially the same evidence is suppressed, a new trial presumably would be a windfall for the defendant, and not in the public interest.[29]

The new suppression hearing ordered in *Waller* is *sui generis*. There, a new suppression hearing involving discrete identifiable witnesses was possible.

Here, no new juror voir dire is possible. Such a rehearing would necessarily involve hundreds of potential jurors (query whether they would be a new pool or a reconstruction of the previous pool) and a now-deceased trial counsel. Such a morass validates the Supreme Court's observation that post-hoc inquiry into the effect of public trial violations is a practical impossibility.

Further, five years after *Waller*, the Court decided *Gomez v. United States*.[30] Relying on *Waller*, the Court held that using a Federal Magistrate Judge to conduct jury selection (instead of an Article III

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[28] Amicus Brief of Plymouth County District Attorney at 19.
[29] *Waller*, 467 U.S. at 50.
[30] *Gomez v. United States*, 490 U.S. 858 (1989).

judge) without congressional authorization constituted structural error.[31] The Court reasoned that later review of the juror voir dire transcript by an Article III judge insufficiently protected the defendant's right to have his case tried by a person with jurisdiction to do so.[32]

> [W]e harbor serious doubts that a district judge could review this function meaningfully. . . . To detect prejudices, the examiner . . . must scrutinize not only spoken words but also gestures and attitudes of all participants to ensure the jury's impartiality. *See, e. g., Wainwright v. Witt*, 469 U.S. 412, 428, n. 9 (1985) (*quoting Reynolds v. United States*, 98 U.S. 145, 156-157 (1879)). But only words can be preserved for review; no transcript can recapture the atmosphere of the voir dire, which may persist throughout the trial. *Cf. Waller v. Georgia*, 467 U.S. 39, 49, n.9 (1984) ("While the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real").[33]

Gomez, then, establishes two related and important points. First, it further gives the lie to amicus Plymouth District Attorney's laughable assertion that, "[a]n erroneous closure of the courtroom does not require reversal of the conviction if the closure is short [n.b., here, it was four days]

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[31] *Gomez*, 490 U.S. at 873-75.
[32] *Gomez*, 490 U.S. at 875 & n.29.
[33] *Gomez*, 490 U.S. at 874-75 (footnote omitted).

and the public can obtain the full information from the disclosure of the trial transcript."[34] As has already been established above, the concern here is primarily for the interests of the defendant not those of the public. Providing the voir dire transcript to the public years after the fact does not remotely remedy the lack of public observation of juror selection, e.g., the gestures and atmosphere attendant to that process. Thus, *Gomez*'s application of *Waller*'s rationale for structural error to juror voir dire makes practical sense.

Indeed, *Gomez* suggests the importance of the public trial values even when much (but not all) of the voir dire is conducted at sidebar. The public may not hear what the jurors say at sidebar, but they can observe the potential jurors including, for example, their race, as well as the visible reaction of the parties, the attorneys, and the court, to those potential jurors.

Posit an interracial murder requiring individual sidebar voir dire[35] and a courtroom with observers who feel that one side of the controversy has been

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[34] Amicus Br. Plymouth County Dist. Atty. at 19.
[35] *Commonwealth v. Young*, 401 Mass. 390 (1987).

unfairly dealt with due to the race of the defendant or the deceased. Simple observation by the public may impact the atmosphere of jury selection by inhibiting racially-motivated challenges by the parties and by heightening the trial judge's sensitivity to such challenges.

And here, it appears that some of the public who wanted to attend the proceedings were police officers. They may have known by sight certain jurors who they knew had criminal records or involvement (perhaps not otherwise disclosed to the Court or the parties). As a result, their mere presence as observers may have encouraged greater candor from potential jurors during all aspects of jury selection including individual voir dire at sidebar.

III. Amicus Plymouth District Attorney improperly focuses on and misleadingly presents federal habeas corpus jurisprudence.

Amicus Plymouth District Attorney places much stock in the First Circuit's decision in *Horton v. Allen* to support its contention that public trial violations involving jury selection do not constitute

structural error.[36] That case is almost entirely irrelevant to the case at the bar.

First, *Horton* involved a claim that counsel was ineffective in agreeing to closed voir dire.[37] Here, counsel objected. Thus, if there was error, reversal necessarily results as explained above. Ineffective assistance, by contrast, requires a showing of both deficient performance and impact upon the result of the proceeding.[38] The distinction is important because the First Circuit in *Horton* held that the defendant explicitly agreed to the closed voir dire as a matter of reasonable strategy.[39] As a result, that court chose to

> resolve the ineffective assistance claim on the performance prong of the analysis[;] we do not decide if prejudice would be presumed in the present circumstances.[40]

Second, the only aspect of jury selection at issue in *Horton* was the private individual voir dire.[41] Here, the entire process of jury selection (including, e.g.,

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[36] Amicus Br. Plymouth County Dist. Atty. at 8 (*citing Horton v. Allen*, 370 F.3d 75 (1st Cir. 2004)).
[37] *Horton*, 370 F.3d at 82.
[38] *Strickland v. Washington*, 466 U.S. 668, 694 (1984).
[39] *Horton,* 370 F.3d at 81-82.
[40] *Horton,* 370 F.3d at 81.
[41] *See Commonwealth v. Horton*, 434 Mass. 823, 831 (2001).

the general questioning of jurors) was closed, not just the individual questioning of jurors.[42]

Perhaps more troubling is amicus Plymouth District Attorney's discussion of the First Circuit's decision in *Owens v. United States*.[43] *Owens* holds, on very similar facts, that the exclusion of the public from jury selection constituted structural error despite the lack of objection.[44]

The Plymouth District Attorney rejoins that *Owens* "is not controlling in Massachusetts state proceedings."[45] That much is true. The First Circuit is a sister court to this one, not a superior court. But this Court explained in *Commonwealth v. Moore* that the decisions of the First Circuit are persuasive authority entitled to "respectful consideration."[46] (The Court further noted in *Commonwealth v. Masskow* that "it would be undesirable for us to affirm the conviction of a defendant if the inevitable consequence were that he would be released on a writ of habeas corpus."[47])

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[42] Def. Br. at 34.
[43] *Owens v. United States*, 483 F.3d 48 (1st Cir. 2007).
[44] *Owens*, 483 F.3d at 64-65.
[45] Amicus Br. Plymouth County Dist. Atty. at 11.
[46] *Commonwealth v. Moore*, 379 Mass. 106, 110 (1979).
[47] *Commonwealth v. Masskow*, 362 Mass. 662, 668 (1972).

But the Plymouth District Attorney's suggested approach to the First Circuit is neither respectful nor considered. It suggests that if this Court affirmed the defendant's conviction, that decision would be upheld upon habeas corpus review by the First Circuit.[48] Because of the strict requirements of 28 U.S.C. § 2254(d)(1),[49] it invites this court to affirm by relying on the questionable premise that the United States Supreme Court has not decided a case that absolutely dictates reversal in this case. This is a thinly veiled invitation to the Court eschew its own independent obligation to declare what the law is and instead make a result-oriented decision to affirm the conviction. That is obviously beneath this Court. Rather, this Court declared 164 years ago in *Commonwealth v. Porter* (dealing with jury nullification arguments) that,

> it is the proper province and duty of judges to consider and decide all questions of law which arise, and that the responsibility of a correct decision is placed finally on them.[50]

CPCS has every confidence that this Court will meet and decide the issue before it directly and not with

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[48] Amicus Br. Plymouth County Dist. Atty. at 11.
[49] *See Williams v. Taylor*, 529 U.S. 362, 412-13 (2000).
[50] *Commonwealth v. Porter*, 51 Mass. 263, 276 (1845).

the cynicism espoused by the Plymouth District Attorney.

Further, the Plymouth District Attorney has ventured into an area beyond its expertise by making predictions about federal habeas corpus jurisprudence. The Commonwealth's pretended analysis incorrectly analyzes the first prong and completely omits the second prong of 28 U.S.C. § 2254(d)(1).

The first prong is the "contrary to" prong described above. Justice O'Connor's controlling opinion in *Williams v. Taylor* is instructive. She explained that

> A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. Take, for example, our decision in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in Strickland that the prisoner need only demonstrate a "reasonable probability that .

> . . the result of the proceeding would have been different."[51]

And indeed, the *Williams* Court found the Virginia state court decision "contrary to" *Strickland* because it applied the *sui generis* ineffective assistance prejudice analysis in *Lockhart v. Fretwell* rather than the standard prejudice analysis found in *Strickland.*[52] Similarly, *Waller* contains a *sui generis* exception to the standard structural error analysis in public trial claims. But the combination of *Press-Enterprise*'s extension of the public trial guarantee to juror voir dire and the Court's consistent characterization of public trial violations as structural leaves little doubt that application of any prejudice standard other than structural error would be contrary to Supreme Court precedent.

The second prong is the "unreasonable application" prong. Justice O'Connor explained in *Williams* that a state-court decision

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[51] *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000) (citation omitted).
[52] *Williams*, 529 U.S. at 413-14 (*citing Lockhart v. Fretwell,* 506 U.S. 364 (1993)).

> involves an unreasonable application of this Court's precedent if the state court . . . unreasonably refuses to extend [the] principle [of Supreme Court precedent] to a new context where it should apply.[53]

Thus, even if the refusal to find structural error in the lack of a public trial during jury voir dire was not contrary to Supreme Court precedent, it would be unreasonable to refuse to extend that principle to this context.

Again, CPCS is confident that the Court's concern is reaching the correct result in its own decision, not the result of potential habeas proceedings. But the amicus Plymouth District Attorney's brief left a misimpression of the law that required correction.

Finally, the Plymouth District Attorney presents extended argument regarding the state of the record particularly as it relates to preservation of the error. That is not the proper role of amici. This Court invited submissions only on the substantive question. It did not ask for essentially an additional set of briefs for each party.

In any event, CPCS would be beyond surprised if the assertions by the Commonwealth and amicus Plymouth District Attorney were true. They assert that trial

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[53] *Williams*, 529 U.S. at 407.

counsel, the esteemed late Richard Egbert, was in fact aware of the closure of the courtroom and deliberately failed to object until the fourth day of jury selection in order to plant error. That makes no sense. Given the structural nature of the error, an attorney who was seeking to plant error would have realized that he need only have objected after the first day.

In addition, CPCS refers the Court to *Commonwealth v. Pavao.*[54] There, this Court found structural error and reversed because of the lack of a jury waiver colloquy despite the fact that it was *established* that trial counsel deliberately failed to bring the error to the judge's attention in order to plant error.[55] Here, the assertion of planted error is dubious rather than established. And further, considering the personal and structural nature of the right to a public trial, this Court should simply pass these somewhat unseemly assertions.

IV. An assertion of the right to individual voir dire does not waive the right to public trial.

[54] *Commonwealth v. Pavao*, 423 Mass. 798 (1996).
[55] *Pavao*, 423 Mass. at 803.

Both the Commonwealth and amicus Plymouth District Attorney claim that a criminal defendant who requests individual voir dire at sidebar in order to protect his constitutional right to an impartial jury necessarily waives his right to a public trial.[56]

First, as explained above, there remain significant public trial values to be respected even where voir dire is conducted at sidebar.[57]

But the assertion also seriously overreaches in attempting to demand a *sub rosa* waiver of important constitutional rights. This Court's decision in *Commonwealth v. Aquino* is instructive.[58] In that case, the defendant argued that he had been improperly found in violation of probation based on acts that post-dated the expiration of his probationary term.[59] The Commonwealth rejoined that the acts were properly the basis of a violation because the defendant's probation was constructively extended when he requested a continuance to obtain counsel.[60] This Court soundly rejected that argument.

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[56] Comm. Br. at 29-31; Amicus Br. Plymouth County Dist. Atty. at 13.
[57] *Supra* at 13.
[58] *Commonwealth v. Aquino*, 445 Mass. 446 (2005).
[59] *Aquino*, 445 Mass. at 449.
[60] *Aquino*, 445 Mass. at 450.

> Probation may be extended only after notice and compliance with other requirements. The defendant is entitled, inter alia, to an opportunity to be heard, the right to counsel and specific findings of fact. Finally, the Commonwealth asserts that the defendant's request for a continuance to obtain counsel was a waiver of his constitutional rights. The assertion of one right (the right to counsel) does not act as a waiver of other rights (e.g., the right to be heard, the right to specific findings).[61]

And the Court added in a footnote, "[a] waiver of constitutional rights and a consent to the extension of probation do not lurk in a mere request for a continuance."[62]

So it is in this case. Cohen's assertion of his right to individual voir dire in no way waived his right to a public trial. It in no way waived his right as a criminal defendant to notice and an opportunity to be heard prior to closure of the courtroom. In *Lankford v. Idaho*, the Supreme Court reiterated that

> [n]otice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure. . . . . In a variety of contexts, our cases have repeatedly emphasized the importance of giving the parties sufficient notice to enable them to identify the issues on which a decision may turn.[63]

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[61] *Aquino*, 445 Mass. at 450.
[62] *Id.* at 450 n.5.
[63] *Lankford v. Idaho*, 500 U.S. 110, 126 & n.22 (1991) (citations omitted).

Nor did Cohen's request for individual voir dire waive his right under *Waller* to specific contemporaneous findings justifying the closure.[64] As in *Aquino*, a waiver of the constitutional right to a public trial does not lurk in a request for individual voir dire.

(CPCS also notes with concern the Commonwealth's purported quotations of *Globe Newspaper Co. v. Superior Court*[65] in making this argument. The citations are inaccurate. But more importantly, the quoted language appears nowhere in that opinion or in any other state or federal opinion that CPCS can find.)

V. The trial judge erred in failing to consider alternatives or narrowly tailoring the closure effected by her court officers.

The Commonwealth argues that "there is no 'exclusion' or 'closure' where there is not enough room to seat spectators without risking jury contamination."[66] This argument puts the cart before horse. The closure was reflexively implemented without consideration of alternatives.

Under *Press-Enterprise*, a closure may be justified only by "an overriding interest based on

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[64] *Waller*, 467 U.S. at 48.
[65] *Globe Newspaper Co. v. Superior Court*, 383 Mass. 838 (1981), *reversed*, 457 U.S. 596 (1982).
[66] Comm. Br. at 24.

findings that closure is essential to preserve higher values and is *narrowly tailored* to serve that interest." In particular, *Press-Enterprise* and its progeny require that a court must consider (and reject) alternatives to closure before barring public access.[67]

The parties skirmish over the size of the courtroom and the number of seats.[68] The Court need not delve that far into the record. The First Circuit explained in *Owens* that, even assuming the courtroom needed to be cleared of spectators at the beginning of jury selection in order to make room for the entire panel of prospective jurors, "once prospective jurors began to leave the courtroom, the court's interest in closing the courtroom dissipated."[69] The trial judge did not do this. She merely deferred to the practice of her court officers. The trial judge's total failure to consider alternatives to closure in this case mandates the finding of a public trial violation.

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[67] *Press-Enterprise*, 464 U.S. at 511.
[68] Def. Br. at 24-27; Comm. Br. at 23.
[69] *Owens*, 483 F.3d at 62.

Conclusion

This Court should hold that closure of the courtroom during jury selection violates a defendant's right to a public trial.

Respectfully submitted,

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Certificate of Service

I hereby certify that on September 4, 2009, I served two copies of the foregoing "Brief" by mailing, first class postage paid to: Special ADA Stephanie Martin Glennon, P.O. Box 1461, Portsmouth, NH 03802.

David J. Nathanson

Certificate of Compliance

I hereby certify that the brief in this matter complies with the rules of court that pertain to the filing of briefs, including but not limited to: Mass. R. App. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. App. P. 16(e) (references to the record); Mass. R. App. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. App. P. 16(h) (length of briefs); Mass. R. App. P. 18 (appendix to the briefs); and Mass. R. App. P. 20 (form of briefs, appendices and other papers).

David J. Nathanson

ADDENDUM

Constitutional Provisions 28

Statutes 28

CONSTITUTIONAL PROVISIONS

Part One, Article Twelve, Massachusetts Declaration of Rights:

No subject shall . . . be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

Sixth Amendment, United States Constitution:

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

STATUTES

28 U.S.C. § 2254 (d)(1) provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

established Federal law, as determined by the Supreme Court of the United States