COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH COUNTY

SUPREME JUDICIAL COURT
NO. SJC-10486

COMMONWEALTH
Appellee

VS.

DAVID M. COHEN
Appellant

ON APPEAL FROM JUDGMENTS OF
THE PLYMOUTH SUPERIOR COURT

AMICUS BRIEF FOR THE PYMOUTH COUNTY DISTRICT ATTORNEY

TIMOTHY J. CRUZ
District Attorney
Plymouth District
MARY LEE
Assistant District Attorney
BBO # 561829
32 Belmont Street
Brockton, MA 02301
(508) 584-8120

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APPLICANT'S INTEREST IN COMMONWEALTH V. DAVID COHEN

The Plymouth County District Attorney, Timothy J. Cruz, seeks to submit a brief as amicus curiae, pursuant to Massachusetts Rule of Appellate Procedure 17, in support of the position of the District Attorney for the Norfolk District. On June 15, 2009, the Supreme Judicial Court invited briefs of amicus curiae in this matter analyzing "[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." Briefs of amicus curiae must be filed in this case by August 24, 2009.

While both the Norfolk District Attorney and the Plymouth District Attorney represent the Commonwealth, the Plymouth County District Attorney is a party to a pending criminal case on appeal that involves a very similar issue; Commonwealth v. Glen Alebord, Appeals Court Docket Number 2009-P-1290, a second degree murder case. The defendant Alebord even sought a stay of proceedings in his appeal because Alebord's "appeal raises a single issue: whether the Defendant was deprived of his constitutional right to a public trial

when the public was excluded from the jury selection portion of his trial.... This precise issue is currently pending before the Supreme Judicial Court in Commonwealth v. Cohen." The Alebord appeal has been stayed. The Cohen case will be heard at oral argument on September 9, 2009; whereas no briefs have even been filed in the Alebord appeal yet. Thus, the Cohen decision will likely be decided in advance of the Alebord appeal. Therefore, the decision of this Court in Cohen is expected to be highly relevant to the legal analysis in the Alebord appeal.

Given these circumstances, the Plymouth County District Attorney fully anticipates that the Cohen decision will affect the analysis used in the Alebord appeal. Therefore, the Plymouth County District Attorney has a strong interest in a fully considered, just and proper decision by the Supreme Judicial Court governing the analysis of courtroom closure during the jury impanelment process.

REASONS THAT A BRIEF OF AMICUS CURIAE IS DESIRABLE

In addition to this Court's solicitation for amicus, the Plymouth County District Attorney hopes to offer an additional viewpoint and helpful analysis to the Supreme Judicial Court on the issue of the right

to a public trial during jury impanelment. This office has participated in an evidentiary hearing in a motion for a new trial in Alebord and filed a memorandum in opposition to Alebord's post-conviction motion. As such, the Plymouth County District Attorney anticipates that this brief of amicus curiae will be helpful to this Court regarding this issue.

ISSUES PRESENTED

I. Whether closing a courtroom during jury impanelment with an individual voir dire requires reversal of a criminal conviction?

STATEMENT OF THE CASE AND FACTS

The Plymouth County District Attorney relies on the descriptions of the prior proceedings and facts set out in the brief for the Commonwealth submitted by the District Attorney for the Norfolk District. (Brief for the Commonwealth, 1-12).

ARGUMENT

I. THE CLOSURE OF A COURTROOM DURING JURY IMPANELMENT WITH AN INDIVIDUAL VOIR DIRE IS NOT STRUCTURAL ERROR AND SHOULD NOT RESULT IN A REVERSAL OF CONVICTION, WHERE THERE HAS BEEN NO TIMELY OBJECTION.

The legal analysis regarding the right to a public trial begins with the federal constitution in a

criminal defendant's right to a public trial found in the Sixth Amendment. U.S. CONST., Amend. VI.

> 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.

U.S. CONST., Amend. VI. The public also has a right to attend criminal trials under the First Amendment.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., Amend. I; Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 509-510 (1984) (construed to give public right to attend criminal trials); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980) (same). Also Commonwealth v. Gordon, 422 Mass. 816, 823-824 (1996); Globe Newspaper Co. v. Commonwealth, 407 Mass. 879, 884 (1990).

The Massachusetts Declaration of Rights contains no guarantee of a public trial in criminal

proceedings. Massachusetts Declaration of Rights, art. XII-XIV. The constitutional right to a public trial has been applied to state proceedings by incorporation through the Fourteenth Amendment. U.S. Const., Amend. XIV; Gannett Co. v. DePasquale, 443 U.S. 368, 379 (1979) overruled on other grounds by Richmond Newspapers, Inc. v. Virginia, supra.

The United States Supreme Court has never reversed a criminal conviction for the exclusion of the public during jury selection. Press-Enterprise Co. v. Superior Court of California, 464 U.S. at 509-510 (First Amendment right of public violated when excluded from six-week jury selection; transcript of jury selection released). After Press-Enterprise, the underlying criminal conviction of Albert Greenwood Brown, (Id. at 503), remained valid. Brown remains on death row in California for the 1978 rape and murder of a teenage schoolgirl, despite the fact that the media were excluded from the jury selection in his case.[1] Also Waller v. Georgia, 467 U.S. 39, 46, 50

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[1] People v. Brown, 40 Cal. 3d 512, 545, 726 P.2d 516, 535 (1985) (conviction affirmed, death sentence remanded); California v. Brown, 479 U.S. 538, 539 (1985) (considered only death sentence; affirmed sentence but remanded to state court); People v. Brown, 45 Cal. 3d 1247, 1264; 756 P.2d 204, 214 (1988)

(1984) (right of defendant to public attendance during pretrial suppression hearing; defendant received new suppression hearing in public and new trial would not be necessary unless there was some change to the original denial of suppression); Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 569 (defendant was acquitted after trial; press was not permitted to attend entire trial in violation of First Amendment); Gannett Co. v. DePasquale, 443 U.S. at 377 n.4, 393-394 (proper exclusion of media for part of pretrial suppression hearing with defendant's agreement to prevent prejudice; guilty pleas conducted in open court).

"The process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system.... [S]ince the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown." Press-Enterprise Co. v. Superior Court of California, 464

(conviction affirmed; death sentence remanded); 6 Cal. 4th 322, 340, 862 P.2d 710, 722 (1993) (death sentence affirmed), cert. denied, Brown v. California, 513 U.S. 845 (1994), habeas corpus denied 503 F.3d 1006 (2007), cert. denied, ___ U.S. ___, 129 S.Ct. 63 (2008). None of these cases addressed the exclusion of the public during Brown's jury impanelment.

U.S. at 505. Also Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 565. "Public jury selection thus was the common practice in America when the Constitution was adopted." Press-Enterprise Co. v. Superior Court of California, 464 U.S. at 508 (referencing jury selection in the criminal case surrounding the Boston Massacre in 1770). Also Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 567-574 (*unbroken history of public trials*).

In describing jury selection in Press-Enterprise, the United States Supreme Court pointed out, "No right ranks higher than the right of the accused to a fair trial." Id. at 508. "Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness." Id. at 509. "Of course the right of an accused to fundamental fairness in the jury selection process is a compelling interest." Id. at 510. Likewise, the privacy interests of potential jurors in disclosing *personal matters or embarrassing episodes must* be balanced against the need for openness. Id. at 512.

Instead of reversal of the criminal conviction, the remedy for a constitutional violation under the First Amendment in Press-Enterprise was the release of

the transcript of the jury impanelment (redacted to protect juror's names regarding private matters) to any members of the public who were excluded. Press-Enterprise Co. v. Superior Court of California, 464 U.S. at 513. Also Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 569; Gannett Co. v. DePasquale, 443 U.S. at 393-394.

There is no case from the United States Supreme Court or this Court that holds that exclusion of the public from jury selection amounts to a fundamental structural error or that such exclusion requires a new trial. Commonwealth v. Horton, 434 Mass. 823, 832 (2001) (where defendant approved individual voir dire of potential jurors in private anteroom and showed no unfairness in process, no substantial risk of miscarriage of justice), habeas corpus denied Horton v. Allen, 370 F.3d 75, 82-83 (1st Cir. 2004), cert. denied, 543 U.S. 1093 (2005). Contrast Waller v. Georgia, 467 U.S. at 46, 50. While the Waller court suggested that specific prejudice may not need to be shown from an improper exclusion of the public from pretrial evidentiary hearings, it did not hold that a reversal of a defendant's conviction was mandated. Waller v. Georgia, 467 U.S. at 50, n.9. Where a

defendant requests individual voir dire and makes no timely objection to a closed courtroom during jury impanelment, the appropriate standard of review is the substantial risk analysis. Commonwealth v. Horton, 434 Mass. at 832.

The defendant cannot pursue his claim under the First Amendment; his rights are confined to the Sixth Amendment analysis. Commonwealth v. Horton, 434 Mass. at 833. "However, the public's interest is distinct from that of the accused, and the defendant has not demonstrated that he has standing to press this right of the public. See Commonwealth v. Adamides, 37 Mass. App. Ct. 339, 341 (1994) ('No case has been called to our attention in support of the proposition that a criminal defendant has standing to raise the First Amendment rights of members of the press or the public excluded from his trial')." Commonwealth v. Horton, 434 Mass. at 833. Contrast Gannett Co. v. DePasquale, 443 U.S. at 387-388 (public has no constitutional right to public trial under Sixth Amendment). The jury selection process is regarded as part of the trial for the purposes of the Sixth Amendment analysis. Gonzalez v. United States, ___ U.S. ___, ___, 128 S.Ct. 1765, 1772 (2008) (considering issue of

clerk magistrate presiding over jury selection); Gomez v. United States, 490 U.S. 858, 872-876 (1989) (same); see also Press-Enterprise Co. v. Superior Court of California, 464 U.S. at 516 (Stevens, J., concurring, raising issue).

This Court, the federal district court in Massachusetts and the First Circuit have all considered issues involving a non-public impanelment or a closed courtroom during jury selection. Commonwealth v. Horton, 434 Mass. at 832 (private individual voir dire of potential jurors in separate room; no substantial risk of miscarriage of justice); Gordon, 422 Mass. at 823-824 (hardship colloquies with jurors need not be open to public, no violation of Sixth Amendment right; no reversible error); Commonwealth v. Owens, 414 Mass. 595, 605-606 (1993) (defendant's own exclusion from jury voir dire was subject to harmless error analysis); Owens v. United States, 483 F.3d 48, 65, n.14 (1st Cir. 2007), on remand 517 F.Supp.2d 570, (D.Mass. 2007) (judge closed courtroom during one-day jury impanelment in federal trial; conviction reversed);[2] Horton v. Allen, 370 F.3d

[2] Although the state and federal Owens' cases share similar local issues and the same supreme, they

at 82-83 (private individual voir dire of potential jurors in separate room; relief denied).

The First Circuit's decision in Owens v. United States is not controlling in Massachusetts state proceedings. The First Circuit noted that the standard of review that it applied in federal cases was more favorable for federal defendants than for state defendants because of comity and federalism concerns. Owens v. United States, 483 F.3d at 65, n.14. Therefore, the First Circuit held that a defendant from a Massachusetts state case must show that a Massachusetts appellate court arrived at a conclusion that is opposite to the conclusions reached by the United States Supreme Court or that a Massachusetts appellate court has decided a case differently on a set of materially indistinguishable facts. Horton v. Allen, 370 F.3d at 80. See Hunt v. Houston, 563 F.3d 695, 705 n.2 (8th Cir. 2009) ("a finding of structural error does not obviate a petitioner's obligation to show prejudice when attempting to overcome a state procedural default").

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involve different defendants and entirely different proceedings. Commonwealth v. Owens, 414 Mass. 595 (1993); Owens v. United States, 483 F.3d 48 (1st Cir. 2007).

Thus, Owens v. United States is not even binding on this Court when the defendant has failed to properly preserve his rights.

Regardless, even the court in Owens v. United States acknowledged that a short, inadvertent, trivial courtroom closure would not be structural error. Id. at 62-63 citing Bowden v. Keane, 237 F.3d 125, 129 (2d Cir. 2001) (closure of courtroom during one witness' testimony); Peterson v. Williams, 85 F.3d 39, 44 (2d Cir. 1996) cert. denied 519 U.S. 878 (1996) (twenty minute closure during testimony). Thus, even under the nonbinding authority from the First Circuit, a temporary, trivial and inadvertent closure of the courtroom during jury selection is not necessarily structural error. See Owens v. United States, 483 F.3d at 62-63; Horton v. Allen, 370 F.3d at 80. Therefore, the proper analysis in the instant case where there was no timely objection,[3] is whether the defendant has demonstrated a substantial risk of a miscarriage of justice. Commonwealth v. Rivera, 429

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[3] According to the Commonwealth's brief, the defendant Cohen failed to object until the fourth day of jury selection, though counsel was aware of the sign on the door for the three preceding days. (Commonwealth's Brief, p.14, n.21 citing Add.4, 6; 4:7-8).

Mass. 620, 623 (1999) (substantial risk analysis applicable even when the unpreserved issue is of constitutional dimension; Fourth Amendment); Commonwealth v. Bradshaw, 385 Mass. 244, 259 (1982) (same; invocation of right to counsel). Even if a defendant pursues a claim of ineffective assistance of counsel for failure to object to a courtroom closure, the defendant would still be required to demonstrate at least a substantial risk of a miscarriage of justice. Commonwealth v. Curtis, 417 Mass. 619, 624-625 and n.3 (1994).

More significantly, such closure may indeed result from the strategic waiver of rights for the purpose of ensuring the countervailing constitutional right to "an impartial jury." U.S. CONST., Amend. VI. Commonwealth v. Hudson, 446 Mass. 709, 715 (2006) (claim of ineffective assistance requires defendant to show that strategy was manifestly unreasonable). Such a strategy that ensures greater privacy for jurors cannot be deemed manifestly unreasonable. This Court has correctly held that the closure of the court during jury impanelment cannot prejudice criminal defendants who consent to individual voir dire and who are present throughout voir dire if "the less public

setting for the voir dire in all likelihood helped rather than harmed the defendant." Commonwealth v. Horton, 434 Mass. at 833 (defendant had claimed ineffective assistance). After all, the purpose of a public trial is "the assurance of fairness." Id. at 832.

Where a trial strategy necessitates a focus on the privacy of the voir dire, it is entirely reasonable for trial counsel to concern himself with creating an atmosphere that encourages candor from potential jurors, reading the jury questionnaires, listening to the voir dire questions and juror answers without interruption or interference from the public. Estes v. Texas, 381 U.S. 532, 535 (1965) (concerns of publicity interfering with judicial process); Commonwealth v. Jaynes, 55 Mass. App. Ct. 301, 312-313, rev. denied, 437 Mass. 1108 (2002) (trial judge properly closed part of jury selection to ensure a fair and impartial jury).

Such a strategy promoting juror privacy to make it likely to weed out inappropriate and biased jurors is essential to due process where a crime has resulted in significant pretrial publicity, as in the Cohen case, or in historically tense circumstances as in

interracial murders or rapes, in sexual assaults on children or in cases with insanity defenses. G.L. c. 234, § 28; Commonwealth v. Seguin, 421 Mass. 243, 249 (1995), cert. denied, 516 U.S. 1180 (1996) (insanity defense); Commonwealth v. Flebotte, 417 Mass. 348, 353 (1994) (sexual assaults on children); Commonwealth v. Young, 401 Mass. 390, 398 (1987) (interracial murders); Commonwealth v. Hobbs, 385 Mass. 863, 873 (1982) (interracial sexual offenses against children); Commonwealth v. Sanders, 383 Mass. 637, 640-641 (1981) (interracial rapes). Attentive and effective counsel will cautiously err on the side of juror privacy in such situations in order to discover otherwise confidential life experiences that could render a juror biased and require his or her exclusion.

Further, attentive and effective counsel would seek to do so without infecting the remaining members of a jury panel by keeping an individual juror's inappropriate and potentially prejudicial remarks out of earshot of the rest of the panel. See G.L. c. 234, § 28 (requiring questions about reasons for potential bias to be conducted apart from the other potential jurors). Decisions about the need for privacy during jury selection necessarily involves strategic

decision-making by counsel. Commonwealth v. Ramirez, 407 Mass. 553, 554-557 (1990) (overruling Sanders and Young on requirement of personal colloquy with defendant because individual voir dire is tactical decision to be decided by counsel). Thus, the attorneys for criminal defendants are fully able to waive the presence of the public for their clients for the purposes of an individual voir dire because of the competing constitutional interests of a public trial and an impartial jury. Ramirez, 407 Mass. at 554-557.

The First Circuit in Owens v. United States suggested that potential jurors will be more likely to provide honest and candid answers, if they know the proceeding is public. Owens v. United States, 483 F.3d at 65. Both the United States Supreme Court and the Massachusetts Supreme Judicial Court have rejected this unsubstantiated theory, holding that some secrecy must be provided to jurors to ensure that their answers on sensitive issues, like racial prejudice, prior sexual assaults or even medical issues, are forthright and honest without fear of public condemnation or humiliation. Press-Enterprise v. Superior Court of California, 464 U.S. at 510, 512; Commonwealth v. Horton, 434 Mass. at 832; Gordon, 422

Mass. at 823-824. See Estes v. Texas, 381 U.S. at 535; Chandler v. Florida, 449 U.S. 560, 581-583 (1981) (same, modifying Estes).

Even in the First Circuit's decision in Horton v. Allen, that court recognized the benefit of individual voir dire, outside of the hearing of the public. Horton v. Allen, 370 F.3d at 82. Without such candor from jurors, there would be no assurance of a fair trial for criminal defendants as guaranteed in the Sixth Amendment right to an impartial jury. U.S. CONST., Amend. VI. Thus, this Court should reject the contrary analysis in the nonbinding opinion found in Owens v. United States.

In the Cohen case, the defendant requested and benefited from individual voir dire. (Brief for Commonwealth, p.12-13 and n.19). Horton, 434 Mass. at 832. His family and some members of the public were present, thus the courtroom was not even closed. The entire venire was present, though no one was privy to the remarks made during individual voir dire, save the parties and the trial judge herself, as mandated by the governing statute. G.L. c. 234, § 28. While the defendant had a Sixth Amendment right to a public trial, Waller v. Georgia, 467 U.S. at 50, his trial

strategy necessitated a focus on the privacy of the voir dire, in preference to promoting full exposure to all members of the public. Since the public was in fact present at Cohen's jury selection, reversal of his conviction would be inappropriate.

In the Cohen case, the court officers apparently were responsible for the posted notice on the door closing the courtroom to additional spectators, without the trial judge's knowledge. The actions of court officers, without the knowledge of the trial judge or the parties in prohibiting entrance of the public during jury selection cannot create a substantial risk of a miscarriage of justice where such closure was based on room capacity and security and the closure was temporary. Room capacity necessarily will have an impact on the number of people present in the courtroom.

> It is far more important that trials be conducted in a quiet and orderly setting than it is to preserve that atmosphere on city streets. Compare, *e. g.*, Kovacs v. Cooper, 336 U.S. 77 (1949), with Illinois v. Allen, 397 U.S. 337 (1970), and Estes v. Texas, 381 U.S. 532 (1965). **Moreover, since courtrooms have limited capacity, there may be occasions when not every person who wishes to attend can be accommodated. In such situations, reasonable restrictions on general access are traditionally imposed, including preferential seating for media representatives.** Cf.

> Gannett, 443 U.S., at 397-398 (POWELL, J., concurring); Houchins v. KQED, Inc., 438 U.S. 1, 17 (1978) (STEWART, J., concurring in judgment); id., at 32 (STEVENS, J., dissenting).

Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 582 n.18 (emphasis added). Even the First Circuit in Owens v. United States acknowledged that a courtroom may need to be cleared to accommodate a large number of people in the jury pool. Owens v. United States, 483 F.3d at 62 and n.11. Thus, closure due to overcrowding cannot be a permissible basis for reversal of a criminal conviction.

An erroneous closure of the courtroom does not require a reversal of the conviction if the closure is short and the public can obtain the full information from the disclosure of the trial transcript, (Press-Enterprise Co. v. Superior Court of California, 464 U.S. at 513; Horton v. Allen, 370 F.3d at 83, n.6), than would have been possible during the entirely permissible individual voir dire. Horton, 434 Mass. at 832; Horton v. Allen, 370 F.3d at 80; G.L. c. 234, § 28. A temporary closure to ensure the defendant's constitutional rights does not itself violate the constitution, particularly when a transcript of the closed proceedings is then an available public record.

Gannett Co. v. DePasquale, 443 U.S. at 393. After all, the right of the accused to a fair trial cannot be outweighed by the public's right to be present. Press-Enterprise Co. v. Superior Court of California, 464 U.S. at 508. Thus, any error in a closure of the courtroom may be remedied by the release of the transcript, redacted to protect private juror information. Press-Enterprise Co. v. Superior Court of California, 464 U.S. at 513; Horton v. Allen, 370 F.3d at 83, n.6; Gannett Co. v. DePasquale, 443 U.S. at 377 n.4, 393-394.

CONCLUSION

For the reasons set forth above, the Plymouth County District Attorney respectfully submits this brief of amicus curiae, and asks this Court to hold that closure of a courtroom during jury impanelment that includes an individual voir dire is not structural error and is harmless beyond a reasonable doubt, where the transcript of the proceedings can be made public as a remedy, ensuring both the public's right to attend criminal trials and criminal defendants' rights to public attendance at trial, as well as to an impartial jury. Where a defendant has requested individual voir dire and has made no timely

objection, the closure of a courtroom during jury selection cannot create a substantial risk of a miscarriage of justice.

Respectfully submitted,

TIMOTHY J. CRUZ
DISTRICT ATTORNEY

BY: Mary Lee

MARY LEE
Assistant District Attorney
Plymouth District
32 Belmont Street
Brockton, MA 02301
PH: 508-584-8120
FAX: 508-586-3578
BBO # 561829

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