

09-4738-cr

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No.: 09-4738-cr
UNITED STATES OF AMERICA,
Appellee,
—v.—

RAGHUBIR K. GUPTA,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF AMICUS CURIAE THE CENTER ON THE ADMINISTRATION
OF CRIMINAL LAW IN SUPPORT OF APPELLANT RAGHUBIR GUPTA
AND FOR REVERSAL OF THE DISTRICT COURT'S ORDER

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STATEMENT OF INTEREST¹

The Center on the Administration of Criminal Law at New York University (the “Center”) submits this brief in support of appellant, Raghubir Gupta. The Center is dedicated to improving the administration of the criminal justice system through academic research, litigation, and participation in the formulation of public policy. The Center’s litigation practice aims to use the Center’s empirical research and experience to assist courts in important criminal justice cases, and has filed briefs on behalf of the government and defendants in courts nationwide, including the Supreme Court.

The Center’s interest in this case is to further its mission of promoting and defending the administration of the criminal justice system. This case considers the appropriate treatment of constitutional errors deemed “structural.” The Center seeks to promote clear rules in this area that define constitutional errors in a manner consistent with controlling Supreme Court precedent and fundamental first principles.

¹ Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Second Circuit Rule 29.1(b), counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The majority opinion relies on the triviality exception to reject defendant's claim that his Sixth Amendment right to a public trial has been violated. In so holding, the majority suggests that structural errors need not be remedied so long as a court finds the error "trivial" when assessed in the context of the proceedings in which it occurred. This conflicts with long-standing Supreme Court doctrine on structural errors and fundamental first principles that certain constitutional rights merit heightened protection – and that violation of those rights is so fundamental a breach that *per se* reversal must follow. Accordingly, the Circuit should hold that the triviality exception has no place in its development of the doctrine of structural error.

I. THE EXCEPTION MAKES STRUCTURAL ERRORS NON-REMEDIABLE WHENEVER A COURT DEEMS THEM "TRIVIAL"

This Court should not uphold the majority's decision in *United States v. Gupta*, 650 F.3d 863 (2d Cir. 2011), because its use of the triviality exception will erode the heightened protection traditionally afforded to structural errors. In this case, the defendant appealed to the Second Circuit the district court's order denying him a new trial, and a panel majority affirmed. In reaching its decision, the majority found that closure of the full length of *voir dire* proceedings was improper and unjustified under the Supreme Court's decision in *Waller v. Georgia*, 467 U.S. 39 (1984). However, the case was not decided on the basis of *Waller*. Instead, the majority applied the triviality exception and asked whether the closure was "trivial," because of its short duration and the government's suggestion that "nothing of importance" occurred during *voir dire*. Pursuant to this exception -- and over a vigorous dissent by Judge Parker -- the majority held that Gupta was not entitled to reversal of the trial verdict because the improper and unjustified *voir dire* closure was too "trivial" to implicate his Sixth Amendment right to a public trial.

A. Structural Error Embodies the Fundamental First Principle that Certain Constitutional Rights are Not Susceptible to Review for Harmlessness

The majority's holding ignores a bedrock principle of criminal constitutional jurisprudence: the notion that certain constitutional rights are so fundamental to a fair trial that their violation mandates automatic reversal of a trial verdict. This underlying principle motivates much of the doctrine on constitutional error and reflects courts' belief that certain rights must be protected at the expense of the interests of other actors in the criminal justice system.

To be sure, the Constitution does not guarantee a defendant a right to a perfect trial, only a fair one. *United States v. Yakobowicz*, 427 F.3d 144, 158 (2d Cir. 2005) (quotations and citations omitted). Thus, errors are to be expected, and when they occur, appellate courts must often weigh two competing factors: the value in correcting the error against the value in upholding the verdict and preventing costly retrials. *See, e.g.*, Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?* 70 N.Y.U. L. REV. 1167, 1186-87, 1201 (1995); Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 80-81 (1988) (discussing courts' desire to balance protection of constitutional rights against the protecting the "truth-determining" function of criminal trials); Charles Ogletree, *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 162 (1991) (same). This balancing effect can be seen in courts' treatment and review of most constitutional errors occurring in criminal trials. Courts have increasingly adopted an "accuracy-first" approach in reviewing constitutional errors at the appellate level – meaning that an error is only prejudicial and reversible if it affects the accuracy of the jury verdict. This has led to the pronouncement that most constitutional errors will never be serious enough to merit automatic reversal of the outcome at the trial court level, absent any

evidence that the error led to an inaccurate trial outcome. Edwards, *supra* at 1176-78; *see also* Stacy & Dayton, *supra* at 80-81; Ogletree, *supra* at 162. In these instances, courts may well acknowledge that a constitutional error occurred but uphold the verdict nonetheless on the grounds that the error is harmless to the defendant, because there was no reasonable probability the error affected the verdict or because there was other overwhelming evidence of guilt. Generally, therefore, errors are to be tolerated so long as they do not upset the accuracy of the trial.

However, this approach has not been adopted with respect to all constitutional errors. Courts have identified a discrete set of fundamental constitutional rights that, when violated, undermine both the reliability of the trial mechanism and the Constitution's fair trial guarantee. When these errors have been found, courts have ordered automatic reversal of the trial verdict. By granting automatic reversal for certain constitutional errors, courts have refused to balance these rights against competing interests. Thus, courts will not require a defendant to offer specific proof of harm or prejudice, and they will likewise not allow the government to advance arguments as to why the verdict should be upheld. Put differently, structural errors are treated very differently from most constitutional errors: courts do not perform a balancing test to determine whether the defendant's interest in vindicating his constitutional right outweighs the government's interest in upholding the verdict. Instead, they have recognized that these rights constitute "basic protectio[ns]," and they have opted to enforce and protect these rights through the use of the bright-line, categorical rule of automatic reversal, even if the trial verdict otherwise reflects the "right result." *See Chapman v. California*, 386 U.S. 18, 23 (1967) (citations omitted) (emphasis added); *Fulminante v Arizona*, 499 U.S. 279, 306, 310 (1991) (holding that "most" constitutional errors are harmless whereas structural errors are viewed as more serious, because

they “affect[] the framework within which the trial proceeds” and render the process “fundamentally” unfair) (quoting *Rose v. Clark*, 478 U.S. 570, 577-78 (1986)). *See also Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993) (describing structural errors as a “basic protection whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function”) (citations and internal quotations omitted).

B. The Structural Error Doctrine Protects Such Constitutional Rights

This dichotomous approach to protecting constitutional rights is played out in the legal doctrine. Although the Supreme Court has held that most constitutional errors are harmless and are not grounds for a new trial absent evidence that the error harmed or prejudiced the defendant, it has also in the same breath repeatedly exalted a limited number of constitutional rights as so fundamental to a fair trial that a violation of these rights results in automatic reversal of the verdict, without regard to whether a defendant can show specific harm. This is known as the doctrine of structural error.

In establishing the doctrine, the Supreme Court created two categories of constitutional errors – “trial” errors and structural errors – and it defined these categories in opposition to each other. While “trial” errors constitute the bulk of constitutional errors and are not subject to automatic reversal unless they specifically harm or prejudice a defendant, structural errors are considered “so basic to a fair trial that their infraction can *never* be treated as harmless.” *Chapman*, 386 U.S. at 23 (citations omitted) (emphasis added); *Fulminante*, 499 U.S. at 306. *See also Sullivan*, 508 U.S. at 282 (describing structural errors as having “consequences that are necessarily unquantifiable and indeterminate”). Given that structural errors implicate fundamental rights that undercut the reliability and fairness of criminal trials, the Court has held that only by automatically reversing the trial verdict can these rights be sufficiently vindicated. *See, e.g., Waller*, 467 U.S. at 49 n. 9.

Consistent with the belief that most errors are “trial” ones, the Supreme Court has only sparingly added to the category of structural errors. *See United States v. Marcus*, --- U.S. ---, 130 S. Ct. 2159, 2164 (2010) (“structural errors” are “a very limited class” of errors...). To date, the Court has only categorized six errors as structural: total deprivation of counsel; lack of an impartial trial judge; the right to self-representation at trial; unlawful exclusion of grand jurors of defendant’s race; violation of the public trial right; and erroneous reasonable-doubt instructions. *See Johnson v. United States*, 520 U.S. 461, 468-69 (1997) (citing cases in which the Court has found structural error) (citations omitted). However, this does not mean that the Court has retreated from protecting this small core set of structural errors. To the contrary, it has never wavered in citing the violation of the Sixth Amendment public trial right as a paradigmatic structural error. *See, e.g., Fulminante*, 499 U.S. at 310. In fact, the Supreme Court has developed an expansive notion of the public trial right to include pre-trial proceedings such as suppression hearings and *voir dire* proceedings.² *See Waller*, 467 U.S. at 46-47 (public trial right covers suppression hearings); *Presley v. Georgia*, 558 U.S. ---, 130 S. Ct. 721, 723-24 (2010) (public trial right covers *voir dire*). *See also United States v. Abuhamra*, 389 F.3d 309, 323-24 (2d Cir. 2004) (“The Supreme Court has construed [the public trial right] *expansively* to apply to a range of criminal proceedings”) (emphasis added).

Over time, the jurisprudence has reinforced the importance of the difference between these two categories of constitutional error. The Court’s cases instruct that the trial

² This is consistent with the Court’s robust protection of other enumerated rights guaranteed in the Sixth Amendment. *See Bullcoming v. New Mexico*, --- U.S. ---, 131 S. Ct. 2705, 2716 (2011) (refusing to find “open-ended exceptions” to the Sixth Amendment’s confrontation clause and rejecting argument that confrontation clause or right-to-counsel violations could be cured by substitute or ameliorative measures on the ground that once a “particular guarantee” of the Sixth Amendment is violated, no substitute procedure can cure the violation, and [n]o additional showing of prejudice is required to make the violation complete.”) (internal quotations omitted) (citing *Gonzalez-Lopez*).

error/structural error dichotomy is the touchstone for reviewing whether a defendant's constitutional rights have been violated, and that courts are not free to disregard these categories when called upon to review a defendant's claim that her constitutional rights were violated. For instance, in *United States v. Gonzalez-Lopez*, the Court engaged in a debate about the meaning of the categories, which were first introduced in *Fulminante*. Writing for the dissent, Justice Alito criticized the bright-line trial error/structural error dichotomy and suggested that these errors were fungible, *i.e.*, trial errors are not the only sort of errors amenable to harmless error review, and not all errors affecting the framework of a trial are necessarily structural. *Id.*, 548 U.S. 140, 149 n. 4 (2006). In response, Justice Scalia, writing for the majority, rejected this malleable approach to defining and categorizing trial and structural errors, noting that "it is hard to read [*Fulminante*] as doing anything other than dividing constitutional error into *two comprehensive* categories...." *Id.* (emphasis added). The *Gonzalez-Lopez* court's bright-line approach to categorizing errors is consistent with the Court's discussion of structural error in *Neder v. United States*, 527 U.S. 1 (1999). In *Neder*, the Court held that "[u]nder our cases, a constitutional error is *either structural or it is not.*" *Id.*, at 14. This black-and-white approach to defining constitutional errors meant that, for courts engaging in the "initial structural-error determination," it must take a "traditional[ly] *categorical*" approach, as opposed to a "case-by-case approach." *Id.* (emphasis added).

1. These Cases Provide the Framework for Analyzing Structural Errors

When read together, Supreme Court jurisprudence – and its development of the trial error/structural error dichotomy – provides the framework for analyzing structural errors. Notably, the cases giving rise to this framework do not contemplate the use of the triviality exception at any step of the analysis. *First*, courts must assess the complained-of conduct to determine whether it does or does not violate the Constitution. This is a necessary threshold

question that must be answered, because not all errors are Constitutional ones. With respect to the specific question whether an error violates the Sixth Amendment’s public trial right, this question can be answered by looking to *Waller*’s test, which assesses whether courtroom closures are consistent with the Sixth Amendment. Indeed, *Waller*’s importance should not be overlooked, as this Circuit has referred to it as both the “touchstone of case law on public trials” and the “*ne plus ultra* of the Sixth Amendment,” holding that it is “rightly regarded as a rule of general applicability in the courtroom closure context.” *Rodriguez v. Miller*, 537 F.3d 102, 108 (2d Cir. 2008).

Second, if courts find a constitutional error, they must, per the Supreme Court’s dichotomy, categorize it as either a trial or structural error. This inquiry is relatively straightforward if the right violated has already been deemed “structural” by the Supreme Court. Because an error is either structural or not, *see Gonzalez-Lopez*, 548 U.S. at 149 n. 4; *Neder*, 527 U.S. at 14, if the Supreme Court has already categorized it as such, this conclusion binds lower courts. Such is the case with the public trial right, which the Court has repeatedly held is structural.

Third, courts must determine the appropriate remedy, if any, for the error. This determination highlights the Court’s emphasis on the dichotomy of trial and structural errors, because the remedy to be granted depends *entirely* on how the error was categorized. For run-of-the-mill constitutional trial errors, the remedy turns on whether a defendant can show specific prejudice or harm suffered as a result of the error. However, structural errors are exempt from review for prejudice or any sort of “balancing” test – they result in automatic reversal. *See, e.g., Fulminante*, 499 U.S. at 294-95.

C. *Gupta*’s Application of the Triviality Exception Violates The Principles Underlying the Structural Error Doctrine

The majority undermined the structural error framework by holding that courtroom closures do not require any remedy so long as they are “minor” or “trivial.” Remarkably, they reached this conclusion despite finding that the closure at issue was “improper” and “unjustified” under the Supreme Court’s *Waller* test, which determines when a courtroom closure is “consistent with” the aims of the Sixth Amendment. For the reasons discussed below, the triviality exception conflicts both with important first principles underlying structural error, not to mention the doctrine itself, and should not be used as it was here to shape the limits of this Circuit’s Sixth Amendment jurisprudence.

1. This Circuit’s Jurisprudence Conflicts with Supreme Court Case Law and the Underlying Principles that the Structural Error Doctrine Protects

Gupta’s holding embodies this Circuit’s retreat from the Supreme Court’s jurisprudence on structural errors. By reinterpreting constitutional errors as existing on a spectrum – as opposed to a clear, categorical dichotomy - this has created a slippery slope with the potential to erode the doctrine of structural error and the rights and underlying principles that the doctrine protects.

a. *Yarborough v. Keane*: Opening the Door to the Triviality Exception

In *Yarborough v. Keane*, 101 F.3d 894 (2d Cir. 1996), this Circuit opened the door to the triviality exception by suggesting that the Supreme Court’s classification of errors as either trial or structural did not require that the error *always* be classified as one or the other:

We do not understand *Fulminante*’s list of examples of [structural errors] to mean that any violation of the same constitutional right is a ‘structural defect’ regardless whether the error is significant or trivial. Nor does the fact that the Supreme Court has applied harmless error analysis to one level of a violation of a particular right necessarily mean that even the most egregious violations of that right would also require demonstrated prejudice.

Id. at 897. Thus, according to *Yarborough*, there is no longer any category of constitutional rights that, when violated, results in automatic reversal. Instead, whether an error merits automatic reversal (as opposed to harmless error analysis) depends on the magnitude of the error as either “significant” or “trivial.”

Yarborough has reinterpreted the doctrine of structural error in a way that fundamentally conflicts with Supreme Court jurisprudence on two levels. First, the Court has strongly suggested that its taxonomy of constitutional errors is both categorical and comprehensive – it has never held that errors exist on a sliding scale, such that a structural error can later be treated as a trial one, *i.e.*, subject to harmless error analysis, if a court deems the error trivial. Indeed, the Court has described its structural error jurisprudence as employing a “traditional categorical approach” and has rejected a case-by-case analysis of constitutional errors. *See Neder*, 527 U.S. at 14.

Second, the Court has sharply criticized *Yarborough*’s premise that constitutional errors can sometimes be treated as either trial or structural ones depending on the magnitude of the error. As stated above, *see supra* at 6-7, in *Gonzalez-Lopez* (decided after *Yarborough*), Justice Alito’s dissent advanced the same argument made in *Yarborough* when he described the trial error/structural error dichotomy as “misleading,” because *Fulminante* never held that “trial errors are the *only* sorts of errors amenable to harmless-error review or that *all* errors affecting the framework within which the trial proceeds are structural.” *Id.*, 548 U.S. at 159 (Alito, J., dissenting) (citations and internal quotations omitted) (emphasis in original). Justice Scalia, writing for the majority, rejected Justice Alito’s interpretation of the Court’s prior doctrine, noting that “it is hard to read [*Fulminante*] as doing anything other than dividing constitutional error into two *comprehensive* categories....” *Id.*, 548 U.S. at 149 n. 4 (emphasis added).

Yarborough and its progeny have important implications for the future of structural error and the continued protection of fundamental first principles in this Circuit. By referring to “level[s]” of violations and their “significance” or “triviality,” *Yarborough*, 101 F.3d at 897, this resurrects Justice Alito’s argument – which was rejected by the *Gonzalez-Lopez* majority – and suggests that the Supreme Court’s clear trial error/structural error dichotomy is irrelevant to determining the availability of relief is available for constitutional errors. *Yarborough* thus counsels an approach where reversal of a constitutional error turns on whether the error – regardless of whether it is “trial” or “structural” – meets a certain level of significance. *See id.* Thus, in focusing on the size of the error, *Yarborough* dispenses with the dichotomy and essentially concludes that there are no longer *any* constitutional rights that mandate automatic reversal. Instead, whether a constitutional error is (or is not) reversible turns solely on the magnitude of the violation.

b. *Gibbons v. Savage*: “Trivial” Structural Errors Do Not Merit Relief

Yarborough’s reinterpretation of the trial error/structural error dichotomy gave birth to the triviality exception in *Gibbons v. Savage*, 555 F.3d 112 (2d Cir. 2009), on which the *Gupta* majority relied. In *Gibbons*, the Second Circuit considered whether the exclusion of defendant’s family members from the courtroom violated the Sixth Amendment. After finding that the closure violated *Waller*, and despite acknowledging that the error had been categorized as “structural” by the Supreme Court, the *Gibbons* majority – consistent with *Yarborough* - focused on the magnitude of the constitutional violation and reasoned that not *all* structural errors mandated automatic reversal if they were deemed “trivial.” *Id.*, 555 F.3d at 119-120. Thus, without clarifying how it distinguished “trivial” structural errors from “large” ones, the court concluded that “trivial” structural errors did not “warrant the remedy of nullifying an otherwise

proper[.]” criminal trial.” *Id.* at 121.

Gibbons represents a further retreat from the trial error/structural error dichotomy and conflicts with Supreme Court jurisprudence on structural errors. First, the holding demotes *Waller* in favor of the triviality exception as the dispositive test for finding a Sixth Amendment violation. Neither Supreme Court nor Second Circuit case law supports this substitution. In fact, the case law establishes *Waller* as the only standard – the “*ne plus ultra*” – for assessing violations of the Sixth Amendment public trial right. See *Fulminante*, 279 U.S. at 310; *Rodriguez*, 537 F.3d at 108. Second, *Gibbons* suggests that constitutional errors include a third category of errors – “trivial” structural errors – and that these do not merit automatic reversal. See *id.*, 555 F.3d at 120 (“It does not necessarily follow, however, that every deprivation in a category considered to be ‘structural’ ... requires reversal of the conviction”). Again, however, Supreme Court jurisprudence has consistently held that there are only *two* categories of error – trial and structural – and it has never indicated that the latter category exists within a spectrum, such that only “large” structural errors get relief. See *Gonzalez-Lopez*, 548 U.S. at 149 n. 4; *Neder*, 527 U.S. at 14.

c. *United States v. Gupta: A Total Retreat From the Trial Error/Structural Error Dichotomy*

By endorsing the triviality exception and holding that a courtroom closure can violate *Waller* yet somehow not violate the Sixth Amendment, see *Gupta*, 650 F.3d at 867 (noting that the courtroom closure violated *Waller*), the *Gupta* majority’s holding can be read as a retreat from the position that certain constitutional rights are so fundamental that they deserve to be protected and remedied at the expense of all other interests. Consistent with *Yarborough*’s de-emphasis on the trial/structural error dichotomy, the *Gupta* majority never acknowledges that Sixth Amendment public trial violations are “structural” errors that are subject to automatic

reversal. Likewise, it also downplays *Waller* by suggesting that its test asks only when a closure is “unjustified,” *see id.*, as opposed to asking when a closure does (or does not) violate the Sixth Amendment.

Thus, instead of acknowledging that certain errors must be reversed “for the sake of” protecting a basic right, *Neder*, 527 U.S. at 34 (Scalia, J. dissenting), *Gupta* opens the door to balancing a defendant’s right against the government’s interest in upholding the verdict. Now, when a defendant suffers from an unjustified courtroom closure in violation of *Waller*, it does not follow that this is a structural error in the form of a Sixth Amendment violation, and she can no longer avail herself of the automatic reversal rule. To obtain automatic reversal, she must also be prepared to offer additional proof that the unjustified closure was of sufficient magnitude.

At the same time, the government is arguably no longer hamstrung by the presence of a structural error. Even if a courtroom closure violates *Waller* – which governs when such closure complies with the Sixth Amendment – it no longer follows that this is a structural error subject to automatic reversal. Instead, the government can concede that a closure was “improper” pursuant to Supreme Court precedent – as it did here – yet invoke the triviality exception to argue that the verdict should nonetheless be upheld because the error was so minor that the remedy of automatic reversal is unjustified. In short, the *Gupta* holding strongly suggests that there are no longer any constitutional rights the violation of which requires automatic reversal. Instead, a constitutional error only merits automatic reversal if a defendant can show that the error is not “trivial” and is of sufficient magnitude to merit relief.

d. The Triviality Exception: A Slippery Slope for the Structural Error Doctrine

The triviality exception creates a slippery slope because it erodes the underlying principles protected by the doctrine of structural error. As previously noted, courts recognize the

importance of a small set of constitutional rights that are fundamental to ensuring a defendant's right to a fair trial. When these rights are violated, courts remedy the violation by applying a bright-line, categorical rule of automatic reversal. *See supra* at 2-8. They do this because the value inherent in "protecting a basic right" trumps the fact that the conviction may very well reflect the "right result." *See Neder*, 527 U.S. at 34 (Scalia, J. dissenting) (internal quotations omitted). This approach thus reflects a deliberate choice to protect these rights against all other competing interests. Accordingly, unlike their approach to trial errors, when courts find a violation of these rights they do not require a defendant to show prejudice, nor do they permit the government to argue why the error was harmless.

However, *Yarborough's* (mis)interpretation of the Supreme Court's jurisprudence implies that courts are free to disregard the sharp division that the Supreme Court has (for good reason) drawn to separate structural and trial errors and can instead focus on the size and impact of a violation in order to determine the availability of relief for a given constitutional error. Given *Yarborough's* tension with Supreme Court jurisprudence, the triviality exception should not be used to determine whether an error is (or is not) structural and subject to mandatory reversal. No matter where the triviality exception is applied – to determine if a constitutional violation occurred, to determine if a constitutional violation can be deemed "structural" as opposed to "trial" error, or to determine if the structural error requires automatic reversal – it has the same effect. It makes access to the automatic reversal rule turn on a court's determination of the "significance" or "triviality" of an error. This is precisely the approach the Supreme Court sought to prevent through the development of the structural error doctrine.

To be clear, by rejecting the triviality exception, this Circuit is not constrained to conclude that all courtroom closures – even fleeting, inadvertent ones – will always violate the

Sixth Amendment. Indeed, *Waller* does not require such a conclusion because it is concerned with intentional courtroom closures. This Circuit is free to further develop its Sixth Amendment doctrine by creating a test for assessing whether unintentional, inadvertent, or otherwise negligent closures may be subject to a different analysis, in the same way it has held that *partial* closures are subject to a modified *Waller* test. See *Woods v. Kuhlmann*, 977 F.2d 74, 76 (2d Cir. 1992) (altering *Waller* test for partial courtroom closures). However, for all the reasons stated herein, this Circuit should not allow the triviality exception to do this work because of the confusion it generates and the tension it creates with well-established structural error jurisprudence.

II. GUPTA HAS NEGATIVE IMPLICATIONS FOR THE TREATMENT OF OTHER STRUCTURAL ERRORS

Gupta's triviality exception will have potentially negative effects on this Circuit's treatment of other structural errors. Because the triviality exception functions similarly to harmless error, which itself has been subject to much criticism for the effect it has had in eroding the protection of other constitutional rights, there is a danger that defendants will no longer be ensured of a remedy for concededly structural errors.

A. The Triviality Exception Resembles Harmless Error

As discussed above, the triviality exception will in practice eliminate the rule of automatic reversal for structural errors. Thus, there will be little difference between structural errors and harmless trial errors, where defendants almost never get relief even for conceded constitutional violations. See *Edwards, supra* at 1170, 1176-78, 1182; *Stacy & Dayton, supra* at 80-81; *Ogletree, supra* at 174. And while it is true that this Circuit has stated that a triviality exception is "very different from a harmless error inquiry," *Peterson v. Williams*, 85 F.3d 39, 42 (2d. Cir. 1996), closer inspection shows the opposite to be true.

The triviality exception strongly resembles harmless error analysis in two distinct respects. First, like harmless error analysis, it provides a vehicle by which the government can defend the trial verdict by pointing to the nature of proceedings. Under harmless error analysis, the government can defend the verdict by showing that, despite the constitutional error, the jury still reached the “right” result. Under the triviality exception, the government’s focal point shifts from the “right” result to the substance of the proceedings – if “nothing of importance” happened at the proceedings, then the violation is too “trivial” to merit reversal. This emphasis on the “importance” of the proceedings encourages courts to weigh the structural error in the context of other issues – despite the fact that the structural error doctrine instructs exactly the opposite conclusion. Thus, while it is true that harmless error analysis looks at the effect on the verdict (and triviality does not), both analyses function similarly, in that courts are encouraged to ignore the Supreme Court’s emphasis on categorization of errors in favor of assessing the errors in the context of the trial proceedings in which they occurred.

Second, the two analyses are fundamentally similar because they introduce the concept of balancing. The hallmark of the Supreme Court’s structural error doctrine is that courts do not balance any other interests against protecting those constitutional rights deemed structural. *See Chapman*, 386 U.S. at 22-23; *Fulminante*, 499 U.S. at 306, 310. Upon categorizing an error as structural, the government is foreclosed from defending the trial verdict by arguing that the verdict reflects the “right” result. However, the triviality exception necessarily encourages balancing *precisely* because it allows the government the opportunity to argue for upholding the conviction where previously it had no opportunity to do so. Now, when faced with an appeal involving a constitutional error deemed “structural,” the government is no longer foreclosed from defending the verdict because it can invoke the triviality exception to argue that any errors

were “small,” as they occurred during a period when nothing of importance happened. In this way, then, courts are no longer simply assessing the alleged error to see whether it fits within the Supreme Court’s dichotomy – they are weighing the defendant’s interest in vindicating the violation of her constitutional rights against the government’s interest in upholding the verdict.

B. The Triviality Exception Will Scale Back Constitutional Rights as Harmless Error has Done

The triviality exception creates a situation where, if a court deems an infringement “minor,” the defendant will be denied all relief for an undisputed violation of her constitutional rights. A similar situation already exists in the realm of harmless error, where constitutional rights violations are only remedied if they sufficiently affect the accuracy of the proceedings in which they arise.

1. Harmless Error Analysis Has Curtailed Constitutional Rights

By applying the harmless error standard to undisputed constitutional violations, the Supreme Court has sanctioned frequent infringement on constitutional rights in particular cases. For example, in *Fulminante*, the Court held that admitting a coerced confession could be found harmless. *Id.*, 499 U.S. at 308. Although in *Fulminante* the error was not found harmless, *Id.* at 287, the decision opened the door to situations where verdicts resting in part on coerced confessions could be upheld based on post-hoc assessment of the evidence. For example, in one post-*Fulminante* decision denying habeas relief, the Fourth Circuit found an indisputably coerced confession harmless due to the overall strength of the prosecution’s evidence, emphasizing that there were two other voluntary confessions. *Cooper v. Taylor*, 103 F.3d 366, 370-71 (4th Cir. 1996). However, the dissent in *Cooper* argued that the error was not harmless, and noted how the two other confessions were barely mentioned during trial, in contrast to the constant and pervasive references to the third, inadmissible confession. *Id.*, 103 F.3d at 379 (Hamilton, J.

dissenting).

Decisions like *Cooper* demonstrate how harmless error has created a space for reasonable minds to disagree over “how much” a coerced confession influenced a particular verdict, whereas previously, a defendant’s due process right to be free of police coercion was absolute. Harmless error has also created a sliding scale regarding a defendant’s right to be convicted of every element of her crime by a jury. In *Sullivan*, the Court held that failure to instruct the jury to find the defendant guilty beyond a reasonable doubt deprived the defendant of his Sixth Amendment right to a jury trial, and therefore was not subject to the harmless error test. *Sullivan*, 508 U.S. at 275. However, the Court has extended harmless error review to other types of erroneous jury instructions, including the failure to instruct on all the elements of an offense.

In *Neder*, the Court found harmless the trial court’s failure to charge the jury on the element of materiality in a tax fraud prosecution. *Id.*, 527 U.S. at 19-20. Yet, as Justice Scalia notes in his *Neder* dissent, “we do not know, when the Court’s opinion is done, *how many* elements can be taken away from the jury with impunity, so long as appellate judges are persuaded that the defendant is surely guilty.” *Id.*, 527 U.S. at 33 (Scalia, J., dissenting) (emphasis in original). Indeed, Justice Scalia quoted Blackstone to warn against the prospect of harmless error eroding the jury trial right:

“[H]owever *convenient* [intrusions on the jury right] may appear at first...these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution and that, though *begun* in trifles, the precedent may gradually increase and spread to the utter disuse of juries in questions of the most momentous concern.”

Neder, 527 U.S. at 39-40 (Scalia, J., dissenting) (emphasis in original) (quoting 4 Blackstone, Commentaries * 350).

As forewarned by Justice Scalia, the extension of harmless error to jury instructions has

carved out many exceptions to the jury trial right. For example, the First Circuit found that although a judge's instruction permitting the jury to discuss their opinions on the case before deliberations commenced was unconstitutional, it was nonetheless harmless.³ Similarly, this Circuit found that in a continuing criminal enterprise case, failure to instruct the jury to agree unanimously on which narcotics violations constituted the "series of violations", and allowing the jury to consider acts not charged in the indictment but proven by the government at trial, were also harmless errors. *Monsanto v. United States*, 348 F.3d 345, 347 (2d Cir. 2003).

Thus, as shown above, the application of harmless error to the area of jury instructions turns the jury trial right into a balancing test, where each court can set its own standard for how erroneous jury instructions can be while still being "valid enough" to sustain a conviction.

2. The Triviality Exception Will Have the Same Effect on Structural Rights

Just as harmless error has limited basic constitutional rights, the triviality exception will scale back core and fundamental structural rights. *Gupta's* importation of this exception into the public trial right provides one example. And the expansion of the triviality exception into other areas of structural error will have the same result. As discussed below, this has already happened in the area of the Sixth Amendment right to counsel.

The right to counsel is among the core set of errors that the Supreme Court has identified

³ The judge's instructions were as follows: "You are not to discuss the case with each other or anyone else until you retire to the jury room at the end of the case to deliberate on your verdict. This rule is not as strict as it sounds... Personally, even this rule, the way I state it, I don't think is a terribly good rule. I understand the reason for it... But, again, don't over-interpret what I said. Of course you'll talk about interesting things that happened during the course of the trial, idiosyncracies [sic] of the judge and the lawyers, interesting things witnesses say, significant pieces of evidence. Just do not express an opinion about the case, again, until you begin deliberations and each have an opportunity to make your opinions known." *United States v. Jadowe*, 628 F.3d 1, 14-15 (1st Cir. 2010) *cert denied*, 131 S.Ct 1833 (2011).

as structural, and it has held that even denial of a defendant's counsel of choice is a structural error warranting automatic reversal, regardless of the quality of the representation. *Gonzalez-Lopez*, 548 U.S. at 150. Despite the robust protection the Court affords the right to counsel, this Circuit has applied the triviality exception to erode the right. In *United States v. Triumph Capital Group*, 487 F.3d 124, 135 (2d Cir. 2007), this Court considered whether defendant was entitled to a new trial due to a court-ordered communication ban between the defendant and his attorney during an overnight trial recess.

The *Triumph Capital* majority explicitly acknowledged that it is “well-settled” under Supreme Court precedent that the right to counsel is structural and is incapable of being subjected to harmless error review. *Id.*, 487 F.3d at 131. The majority also found that the communication ban violated the Sixth Amendment under relevant Supreme Court doctrine. *Id.*, 487 F.3d at 134. Remarkably, however, despite this acknowledgment it affirmed the district court's order denying the defendant a new trial. In reaching this result, the majority shunted aside Supreme Court precedent in favor of the triviality exception, which focused on the magnitude of the infringement. Thus, the majority held that “even some unjustified restrictions may be so trivial that they do not amount to a constitutional violation” *Id.*, 487 F.3d at 134-35 (holding that while the restriction was “unnecessary and unjustified,” it was “too trivial” based on its assessment of the “totality of the circumstances” to constitute a Sixth Amendment violation).

As the *Triumph Capital* case clearly illustrates, importation of the functional equivalent of harmless error analysis into the structural error context will render the distinction between structural and trial error meaningless, violate doctrinal principles established by the Supreme Court, and subvert the first principles embodied in the Court's structural error doctrine. Already,

this Court has replaced the presumption that a structural error is *per se* reversible with case-by-case analysis in almost all of the remaining structural rights areas. See *United States v. Shamsideen*, 511 F.3d 340, 345 (2d Cir. 2008) (reasonable doubt instruction); *Tankleff v. Senkowski*, 135 F.3d 235, 249 (2d Cir. 1998) (racial bias in jury selection); *United States v. Dyman*, 739 F.2d 762, 771(2d Cir. 1984) (right to self-representation).

In short, the purpose of structural error doctrine is to identify core rights that are not subject to case-specific analysis, balancing, or review for prejudicial effect on outcome. Faithfulness to Supreme Court doctrine and the principles that underlie that doctrine requires that a finding of structural error be followed by *per se* reversal, lest the category lose its meaning.

CONCLUSION

For the foregoing reasons, the Center respectfully requests that the Court reverse the *Gupta* court's decision and reject the use of the triviality exception as test for shaping Sixth Amendment doctrine.

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Respectfully Submitted,

s/Anthony S. Barkow

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type- volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 6,096 words in this brief.

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I hereby certify that on November 10, 2011, I caused to be served via UPS two true and correct copies to counsel for each of the parties and emailed them one copy of the same:

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ANTI-VIRUS CERTIFICATION

I, Anthony M. Barkow, certify that I have scanned for viruses the PDF version of the:

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