

SECOND CIRCUIT REVIEW

Expert Analysis

The Sixth Amendment And the Right to a Public Trial

In *Jordan v. Lamanna*, the U.S. Court of Appeals for the Second Circuit considered whether the district court properly granted a writ of habeas corpus and ordered a new trial for petitioner Gigi Jordan, who was convicted of manslaughter in New York State Supreme Court in 2014. 33 F.4th 144 (2d Cir. 2022).

In a unanimous decision authored by Circuit Judge Sack, with Circuit Judges Leval and Park concurring, the Second Circuit reversed the district court's grant of habeas corpus, finding that the trial judge's closing of the courtroom to the public for approximately 15 minutes, during Jordan's nine-week trial, did not violate



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Jordan's right to a public trial as guaranteed by the Sixth Amendment. The court held that the substantive impact of the closed proceeding was negligible, and that there was no historical precedent suggesting that the closed portion of the hearing should have been held in public. The panel concluded that Supreme Court precedent specifying the steps to be taken before closing a criminal trial to the public—in particular *Waller v. Georgia*, 467 U.S. 39, 44 (1984) and *Presley v. Georgia*, 558 U.S. 209, 212 (2010) (per curiam)—did not necessarily apply to ancillary proceedings such as

the 15-minute “closed proceeding” in *Jordan*. Thus, the Second Circuit held that the New York State Appellate Division's opinion upholding Jordan's conviction was not an unreasonable application of the law.

Jordan's Trial and the 'Closed Proceeding'

Petitioner Gigi Jordan was initially charged in 2010 with murder in the second degree in connection with the death of her son. In 2014, she proceeded to a nine-week jury trial in New York State Supreme Court before Justice Charles Solomon. Approximately one month into the trial, before the jury was brought into the courtroom, Justice Solomon asked all spectators to leave for a few minutes for “something that has to be done in private,” leaving only defendant and her counsel, the prosecution, and the judge. *Jordan*, 33 F.4th at 148.

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Over defense counsel's objections, Judge Solomon allowed the prosecutor to share information about a recently-posted website accusing the court of undermining the fairness of the trial by refusing to admit certain evidence helpful to Jordan. The prosecution also shared an email from Jordan, to media contacts, linking to this website and explaining her hopes that the suppressed evidence would come out through the website. After a total of 15 minutes, Judge Solomon reopened the courtroom to the public and, when the jury returned, repeated instructions to avoid media coverage of the trial. Judge Solomon initially denied defense counsel's motion to unseal the minutes and exhibits from the "closed proceeding," but by the end of that same day, reversed course and decided to unseal the minutes and exhibits.

The trial continued for five more weeks, ending with the jury convicting Jordan of manslaughter in the first degree in light of her affirmative defense of extreme emotional distress. Jordan moved to set aside her conviction, alleging that the "closed proceeding" violated her Sixth Amendment right to a public trial. The trial court

denied the motion, and Jordan appealed to the Appellate Division, which affirmed her conviction. After the New York Court of Appeals declined to hear the case and the U.S. Supreme Court denied a petition for a writ of certiorari, Jordan petitioned for a writ of habeas corpus in the U.S. District Court for the Southern District of New York, which Magistrate Judge Sarah

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Cave granted. (The Magistrate Judge sat as the district court by consent of the parties pursuant to 28 U.S.C. §636(c). *Jordan*, 33 F.4th at 147.)

The District Court Decision

The Magistrate Judge reviewed Jordan's petition under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which only allows a grant of the writ of habeas corpus if the Appellate Division's decision "was con-

trary to, or involved an unreasonable application of" clearly established federal law as determined by the U.S. Supreme Court. 28 U.S.C. §2254(d)(1)-(2). The court concluded, in a 42-page opinion, that the Sixth Amendment right to a public trial applied to the closed proceeding, the courtroom had been impermissibly closed to the public in light of Supreme Court precedent, the violation was not trivial, and the proper remedy was a new trial. *Jordan v. Lamanna*, 2020 WL 6647282 (S.D.N.Y. Nov. 12, 2020).

The Second Circuit's Decision in 'Jordan'

On appeal, the Second Circuit reviewed de novo the same question as the district court, and took issue with all four of the district court's conclusions. First, the court found that the Sixth Amendment did not apply to the closed proceeding. Noting that although the Sixth Amendment had been applied to a pretrial suppression hearing in *Waller* and to voir dire in *Presley*—beyond the actual proof presented at trial—neither Supreme Court case establishes that the Sixth Amendment extended to the closed proceeding "because

the closed proceeding does not share the historically open nature of jury selection, nor the functional importance of suppression hearings.” *Jordan*, 33 F.4th at 152.

The court found that any procedural violation here was indeed trivial, as the closed proceeding “did not appear to have any substantive impact on the case”; the sole consequence was the court’s repetition of a jury instruction. *Id.* at 152. While the district court viewed the closed proceeding’s aspects as trial-like, in that the trial judge presided from the bench, counsel spoke from their respective positions, and the defendant remained in the courtroom throughout, the Second Circuit dismissed these aspects as saying “nothing about the substantive impact of the proceeding or the historical precedent for conducting such proceedings in public.” *Id.* Finding there to be reasonable arguments supporting the Appellate Division’s ruling, the Second Circuit precluded habeas relief.

Conclusion

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Amendment public trial claims only a handful of times over the last three decades, and the decision in *Jordan* continues the court’s substance-over-form approach in Sixth Amendment public trial cases. The Second Circuit first asserted its focus on substance over form in Sixth Amendment public trial claims—often referred to as the “triviality doctrine”—more than 25 years ago in *Peterson v. Williams*, 85 F.3d 39 (2d Cir. 1996).

In *Peterson*, the court found that a brief and inadvertent courtroom closure followed by a helpful public summation did not infringe upon a defendant’s Sixth Amendment rights. In so doing, the court weighed “how seriously the values served by the Sixth Amendment were undermined.” *Peterson*, 85 F.3d at 43. The Second Circuit later held in *Gibbons v. Savage*, 555 F.3d 112, 121 (2d Cir. 2009) that although the trial court’s closure was not justified, it either was not a deprivation of a constitutional right or it was a deprivation “too trivial to justify vacating the state court’s judgment.” Similar considerations were explored in *United States v. Gupta*, 699 F.3d 682, 688 (2d Cir. 2012), ultimately lead-

ing to another finding that the defendant’s Sixth Amendment right to a public trial was not violated. In those decisions, the court has repeatedly and explicitly elevated considerations of the Sixth Amendment’s substantive values over structural, procedure-focused concerns. While the standard for granting a writ of habeas corpus presented a high bar to finding a Sixth Amendment violation, the court’s decision in *Jordan* continues the Second Circuit’s trend established in *Peterson*, *Gibbons* and *Gupta* of prioritizing substance over form in right to public trial challenges.