No. 19-7426

In the Supreme Court of the United States

JOSEPH NJUNGUNA NJONGE,

Petitioner,

v.

RON HAYNES, SUPERINTENDENT,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

MICHAEL FILIPOVIC
Counsel of Record
Federal Public Defender
VICKI W. W. LAI
Assistant Federal Public Defender
Federal Public Defender's Office
1601 Fifth Avenue, Suite 700
Seattle, Washington 98101
(206) 553-1100
Michael_Filipovic@fd.org

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF 1

1. The Brief in Opposition Erroneously Asserts that Petitioner's Failure to Raise a Contemporaneous Objection at Trial Provides a Basis for Denying Certiorari. 1

2. The Washington Supreme Court Commissioner's Decision—the Last Reasoned Decision on Collateral Review—Was Contrary to Federal Law Because It Applied a Rule that Contradicts the Governing Law Set Forth in Supreme Court Cases. 5

3. This Case Presents an Opportunity for the Court to Examine the Application of an Exception, Never Endorsed by this Court, Which Not Only Excuses Trial Courts from Following *Waller*'s Four-Part Test but Has Bred Confusion and Inconsistency in the Lower Courts. 9

CONCLUSION 11

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

Collins v. Youngblood, 497 U.S. 37 (1990) 9
County Court of Ulster County v. Allen, 442 U.S. 140 (1979) 4
Engle v. Issac, 456 U.S. 107 (1982) 4
Freytag v. Comm'r of Internal Revenue, 501 U.S. 868 (1991) 4
Gomez v. United States, 490 U.S. 858 (1989) 3
Levine v. United States, 362 U.S. 610 (1960) 2
Neder v. United States, 527 U.S. 1 (1999) 6, 7
Njonge v. Gilbert, 773 Fed. Appx. 1005 (9th Cir. 2019) 1
Peretz v. United States, 501 U.S. 923 (1991) 2, 3, 4
Presley v. Georgia, 558 U.S. 209 (2010) 6, 10
Sandin v. Conner, 515 U.S. 472 (1995) 9
Strickland v. Washington, 466 U.S. 668 (1984) 8
United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) 6, 7
United States v. Olano, 507 U.S. 725 (1993) 4
United States v. Young, 470 U.S. 1 (1985) 2
Waller v. Georgia, 467 U.S. 39 (1984) 2, 6, 7, 10
Weaver v. Massachusetts, 137 S. Ct. 1899 (2017) 7, 8, 9
Williams v. Taylor, 529 U.S. 362 (2000) 6

State Cases

Commonwealth v. Robinson, 480 Mass. 146, 102 N.E.3d 357 (2018) 8
People v. Jones, 2020 WL 2829705 (Colo. June 1, 2020) 11
People v. Lujan, 461 P.3d 494 (Colo. 2020) 11
State v. Njonge, 181 Wash. 2d 546, 334 P.3d 1068 (2014) 1
State v. Wise, 176 Wash. 2d 1, 288 P.3d 1113 (2012) 8

Federal Rule

Federal Rule of Criminal Procedure 52 4

REPLY BRIEF

Pursuant to Rule 15.6, Petitioner Joseph Njonge files this Reply Brief to the State's Brief in Opposition.

1. *The Brief in Opposition Erroneously Asserts that Petitioner's Failure to Raise a Contemporaneous Objection at Trial Provides a Basis for Denying Certiorari.*

The State spends much of its Brief in Opposition ("BIO") arguing that because Mr. Njonge did not object to the trial court's closure of voir dire, he waived his constitutional claim, and thus this case is not the proper vehicle for the Court to reach the important questions presented about the lower courts' use of the "triviality exception" to excuse unjustified courtroom closures.

The State acknowledged below that no state procedural bar prevented Mr. Njonge's public-trial claim because "the Washington Supreme Court reached the merits of his claim" under its state waiver rules. Brief of Respondent-Appellee at 27, *Njonge v. Gilbert*, 773 Fed. Appx. 1005 (Mem) (9th Cir. 2019) (No. 18-35396). Specifically, Washington Rule of Appellate Procedure 2.5(a) allows a public trial claim to be raised for the first time on appeal. *See State v. Njonge*, 181 Wash.2d 546, 555, 334 P.3d 1068, 1074 (2014) ("We continue to hew to our well-reasoned and long-standing precedent and hold that a defendant's failure to contemporaneously object to a public trial violation does not preclude appellate review under RAP 2.5(a).").

In *Waller*, this Court recognized that even an affirmative consent to a closure by a state litigant did not foreclose the possibility of a constitutional violation, but

raised only an issue of a state procedural defense dependent on state waiver rules, which this Court took care not to decide:

> Counsel for petitioner Cole concurred in the prosecution's motion to close the suppression hearing. Respondent argues that Cole is precluded from challenging the closure. The Georgia Supreme Court appears to have considered the objections of all the petitioners on their merits. . . . *The state courts may determine on remand whether Cole is procedurally barred from seeking relief as a matter of state law*.

Waller v. Georgia, 467 U.S. 39, 42 n.2 (1984) (emphasis added) (citations omitted). The only difference here is that the Washington Supreme Court has already explicitly declined to hold that Mr. Njonge waived his public-trial right based on a firmly established rule of state procedure.

In support of its argument that Mr. Njonge waived his public-trial claim by failing to lodge a contemporaneous objection, the State points to *Levine v. United States*, 362 U.S. 610 (1960), and *Peretz v. United States*, 501 U.S. 923 (1991). Neither are on point. In *Levine*, the Supreme Court addressed the extent to which a trial court may close the courtroom to protect grand jury secrecy. Because the proceedings were not a criminal prosecution, the Court decided on due process and common law grounds that they should have been open to the public. *See id.* at 616. The Court ultimately disposed of the case based on the federal contemporaneous-objection rule, determining that the defendant had forfeited the issue by not raising it below. *See id.* at 619–20. Under the federal contemporaneous-objection rule applicable to criminal prosecutions, a claim that is forfeited by not being raised below is not necessarily extinguished, but subject to plain-error review. *See United States v. Young*, 470 U.S. 1, 15 & n.12 (1985) ("The plain-error doctrine of Federal

Rule of Criminal Procedure 52(b) tempers the blow of a rigid application of the contemporaneous-objection requirement.").

In *Peretz*, the Court limited its earlier holding in *Gomez v. United States*, 490 U.S. 858 (1989), that conducting jury selection was beyond the authority of a magistrate judge, by holding that no constitutional right is implicated if a defendant expressly consents and that a magistrate judge would have statutory authority to conduct voir dire. *Peretz*, 501 U.S. at 940. The *Peretz* Court emphasized the significance of the parties' express consent, stating, "[P]etitioner's counsel, rather than objecting to the magistrate judge's role *affirmatively welcomed* it." *Id.* at 932 (emphasis added). Given counsel's consent, the majority held there was no constitutional error. *Id.* at 936. Thus, the majority had no need to reach the question of waiver. However, Justice Scalia, in dissent, implicitly endorsed a "plain-error" review standard for the majority's resolution of petitioner's "plainly forfeited" claim, reasoning that the only way the statutory and constitutional issues would ever make their way to the Court is when there was no objection below. *See id.* at 954–55 (Scalia, J., dissenting) ("By definition, these claims can be advanced only by a litigant who will, if ordinary rules are applied, be deemed to have forfeited them: A defendant who objects will not be assigned to the magistrate at all. Thus, if we invariably dismissed claims of this nature on the ground of forfeiture, district courts would never know whether the Act authorizes them. . . .").

The *Peretz* Court cited *Levine* in dictum for the proposition that the "failure to object to closing of [the] courtroom is [the] *waiver* of [the] right to public trial."

Peretz, 501 U.S. at 936 (emphasis added). That dicta appears in a parenthetical phrase in the middle of a lengthy string citation supporting the uncontroversial statement that "[t]he most basic rights of criminal defendants are . . . subject to waiver." *Id*. at 936. But *Levine* was a forfeiture rather than a waiver case. *Peretz* thus erroneously conflates the concepts of waiver and forfeiture and, as such, lends no support for the State's argument. This Court has distinguished the failure to assert a right—forfeiture—from the affirmative waiver of a right. *United States v. Olano*, 507 U.S. 725 (1993), explained that "[w]aiver is different from forfeiture" in that waiver is "'the intentional relinquishment or abandonment of a known right.'" *Id*. at 733 (citation omitted). Under Federal Rules of Criminal Procedure 52(b), "[m]ere forfeiture, as opposed to waiver, does not extinguish an 'error' under Rule 52(b)" but is instead subject to plain-error review. *Id*. at 733–36. As Justice Scalia has observed, courts "have so often used them interchangeably that it may be too late to introduce precision." *Freytag* v. *Comm'r of Internal Revenue*, 501 U.S. 868, 894 n.2 (1991). Neither the unique circumstances of *Peretz* nor *Levine* control here.

Moreover, waiver and forfeiture rules depend on the law of the jurisdiction. *See County Court of Ulster County v. Allen,* 442 U.S. 140 , 154 (1979) ("[I]f neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some state procedure rule, a federal court implies no disrespect for the State by entertaining the claim."); *Engle v. Issac*, 456 U.S. 107, 135 n.44 (1982) (citation omitted) ("Respondents bolster their plain-error contention by observing that Ohio will overlook a procedural default if the trial defect constituted plain

error. . . . If Ohio had exercised its discretion to consider respondent's claim, then their initial default would no longer block federal review.").

The district court correctly determined that Mr. Njonge's "independent public trial claim was not barred by any Washington State procedural rule, and in the interests of federalism and comity [the court] may entertain that claim on habeas review." ER 16.

2. The Washington Supreme Court Commissioner's Decision—the Last Reasoned Decision on Collateral Review—Was Contrary to Federal Law Because It Applied a Rule that Contradicts the Governing Law Set Forth in Supreme Court Cases.

The State also asserts the legitimacy of the triviality exception is not properly before this Court because the Washington Supreme Court correctly concluded on direct review that the trial record did not clearly show the courtroom was closed during jury selection. BIO at 22. The record demonstrates there was a closure and any finding to the contrary was an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2). *See* ER 122–125. But even if the § 2254(d)(2) habeas standard was not met on that basis, as the district court found, the Supreme Court Commissioner's subsequent ruling denying discretionary review of Mr. Njonge's personal restraint petition, the last reasoned decision on collateral review, was contrary to or an unreasonable application of Supreme Court law and thus, the § 2254(1) habeas standard was also met.

Specifically, the district court correctly concluded that the Washington Supreme Court commissioner "both failed to apply *Presley*, and in a situation with nearly identical material facts, reached the opposite outcome" and thus, "[t]he State

Supreme Court's error regarding well-settled federal law places its decision beyond the scope of any 'fairminded disagreement,' and it is therefore an unreasonable application of the law.'" ER 20 (citing *Presley v. Georgia*, 558 U.S. 209, 210–16 (2010)). The district court also found the Washington Supreme Court commissioner reached a decision contrary to clearly established federal law by requiring Mr. Njonge to show prejudice despite the structural nature of the public-trial violation. ER 20–21.

The State asserts the district court was wrong to conclude that the Washington Supreme Court's commissioner's prejudice requirement was contrary to or an unreasonable application of clearly established federal law because this Court has not specifically addressed a public-trial claim in this procedural posture. BIO at 22. The State is mistaken. Wrongful deprivation of the right to a public trial has been repeatedly characterized as structural error by this Court. *United States v. Gonzalez-Lopez,* 548 U.S. 140, 148–49 (2006) (citing *Waller*, 467 U.S. 39); *Neder v. United States*, 527 U.S. 1, 8 (1999) (citing *Waller*, 467 U.S. 39). Lower courts are not free to disregard the core of this Court's public-trial jurisprudence simply because the case involves a somewhat different procedural posture. Rather, this Court has made clear that a state court decision is "contrary to" Supreme Court precedent if "the state court *applies a rule* that contradicts the governing law set forth in [Supreme Court] cases." *Williams v. Taylor*, 529 U.S. 362, 405 (2000) (emphasis added).

This Court's rulings in *Waller* and *Presley*—that the public-trial right extends to voir dire and that a court's closure without applying *Waller*'s four-part test, constitutes structural error not subject to harmless error review—is no less true on collateral review than on direct appeal. *See Gonzalez-Lopez*, 548 U.S. at 149 n.4 (quoting *Waller*, 467 U.S. at 49 n.9) ("Violation of the public-trial guarantee is not subject to harmlessness review because 'the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance.'"). Rather, "[b]ecause demonstration of prejudice in this kind of case is a practical impossibility, prejudice must necessarily be implied." *Waller*, 467 U.S. 39, 50 n.9 (quoting *State v. Sheppard*, 182 Conn. 412, 418, 438 A.2d 125, 128 (1980)). And, whether an error is structural is categorical: "[u]nder [Supreme Court] cases, a constitutional error is either structural or it is not." *Neder*, 527 U.S. at 14.

Weaver v. Massachusetts, 137 S. Ct. 1899 (2017), the primary case upon which the State cites to support its argument, is inapposite. *Weaver*, as the State admits, "did not directly address the standard for prejudice for an underlying public trial claim[.]" *See* BIO at 22. Rather, *Weaver* is limited to post-conviction claims alleging ineffective assistance of counsel for failure to assert a right to a public trial. *Weaver*, 137 S. Ct. at 1907. In *Weaver*, this Court concluded that a different approach was appropriate where a defendant binds together public trial and ineffective assistance of counsel claims and where the structural error claim was

not preserved on direct review but raised for the first time on collateral review in an ineffective assistance of counsel claim.[1] *Id.* at 1910.

The structural error in *Weaver* was closure of the courtroom during jury selection, and this Court emphasized that it granted certiorari "specifically and only" to address the context where, after trial counsel failed to object to the closure of the courtroom during jury selection, the issue was neither preserved nor raised on direct appeal as a stand-alone claim, but rather was raised for the first time through a separate ineffective assistance of counsel claim on collateral review. *Id.* at 1907. While recognizing that structural errors may require automatic reversal where an error was preserved and raised on direct review, this Court held that when a structural error is raised *for the first time* in an ineffective assistance of counsel claim on collateral review, finality concerns required the defendant to show prejudice under *Strickland* v. *Washington*, 466 U.S. 668 (1984). *Weaver*, 137 S. Ct. at 1913. The majority explained that

> when a defendant raises a public-trial violation via an ineffective-assistance-of-counsel claim, Strickland prejudice is not shown automatically. Instead, the burden is on the defendant to show either a reasonable probability of a different outcome in his or her case or, as the Court has assumed for these purposes . . . to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair.

[1] Unlike Washington state, which allows public-trial right claims to be raised for the first time on direct review, Massachusetts requires a defendant to contemporaneously object to the closure at trial to properly preserve a public-trial violation. *Compare Commonwealth v. Robinson*, 480 Mass. 146, 152, 102 N.E.3d 357, 362 (2018) ("[W]here a defendant fails to contemporaneously object to an improper court room closure at trial, we have steadfastly held that the defendant's claim is procedurally waived.") *with State v. Wise*, 176 Wash. 2d 1, 15, 288 P.3d 1113, 1120 (2012) ("This court has long held that a defendant does not waive his right to a public trial by failing to object to a closure at trial.").

Id. at 1911. *Weaver* simply has no relevance to this case.

3. This Case Presents an Opportunity for the Court to Examine the Application of an Exception, Never Endorsed by this Court, Which Not Only Excuses Trial Courts from Following Waller*'s Four-Part Test but Has Bred Confusion and Inconsistency in the Lower Courts.*

This Court has previously reviewed reasoning emerging from the lower courts that introduces confusion into the law and lacks clear, constitutional grounding. For example, when due process methodology "strayed from the real concerns undergirding the liberty protected by the Due Process Clause," this Court abandoned a line of reasoning that had developed over nearly two decades. *Sandin v. Conner*, 515 U.S. 472 (1995). In *Sandin*, the Court "return[ed] to the due process principles we believe were correctly established and applied in [earlier cases]." *Id.* This Court explained that this decision "only abandons an approach that in practice is difficult to administer and which produces anomalous results." *Id.* at 483 n.5. Similarly, re-evaluation of doctrine related to the Ex Post Facto Clause led this Court to overrule two cases that "imported confusion into the interpretation of the Ex Post Facto Clause" and contradicted "the understanding of the term '*ex post facto* law' at the time the Constitution was adopted." *Collins v. Youngblood*, 497 U.S. 37, 45, 47 (1990).

That it is the lower courts which have "imported confusion" into interpreting the Sixth Amendment public-trial right creates an even greater urgency for this Court to intercede. The State suggests this Court has indirectly sanctioned a triviality analysis because it "has never held that a *de minimis* or trivial closure violates the [public-trial] right. BIO at 26. But *Waller*'s four-part test is incongruous

with a *de minimis* analysis. As the Court explained in *Presley*, the "general rule" is that "the accused does have a right to insist that the voir dire of the jurors be public" but there are exceptions. 558 U.S. at 213. And, as this Court made clear, whether such exceptional circumstances exist depends on whether the *Waller* standards are met:

> [T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Waller*, 467 U.S., at 45, 104 S.Ct. 2210. "Such circumstances will be rare, however, and the balance of interests must be struck with care." *Ibid*. *Waller* provided standards for courts to apply before excluding the public from any stage of a criminal trial[.]

Presley, 558 U.S. at 213. Having provided trial courts with the standards for evaluating whether "[t]he right to an open trial may give way in certain cases to other rights or interests," *Waller*, 467 U.S. at 45, there would be no reason for this Court to apply a triviality analysis. This is particularly true given that a *de minimis* ruling excuses, post hoc, a trial court's failure to apply *Waller*'s standards —a circumstance which this Court has never approved. *See id.* (though exceptions to an open courtroom are rare, a judge may deprive a defendant of this right by making proper factual findings supporting the decision to do so); *Presley*, *id*. at 215–16 (internal quotation marks omitted) (Court expressing concern that the state court's reasoning would allow the courtroom to be closed during jury selection "whenever the trial judge decides, for whatever reason, that he or she would prefer to fill the courtroom with potential jurors rather than spectators" and it was "incumbent upon" the court under *Waller* "to consider all reasonable alternatives to closure").

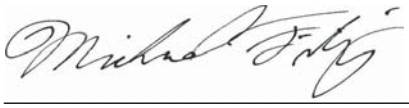
As laid out fully in the petition for certiorari, [2] the splits that have emerged among the lower courts on the constitutional meaning of a courtroom closure, divorced from the standards laid out by this Court in *Waller*, requires this Court's intervention. The Ninth Circuit's and other lower courts' rogue replacement of *Waller*'s flexible 36-year-old standards with their own ad hoc determinations regarding a closure's triviality violates established Supreme Court precedent, fails to cabin judicial discretion, and results in anomalous results within and among the various jurisdictions.

CONCLUSION

This Court should grant the Petition for a Writ of Certiorari.

DATED this 22nd day of June 2020.

Respectfully submitted,



Michael Filipovic
Counsel of Record
Federal Public Defender

Vicki W. W. Lai
Assistant Federal Public Defender

Counsel for Petitioner

[2] Since the certiorari petition was filed, the Colorado Supreme Court adopted for the first time a triviality assessment to determine that a closure lasting "only a matter of minutes" was trivial in a 4–3 decision. *People v. Lujan*, 461 P.3d 494, 499 (Colo. 2020). But more recently, the Colorado Supreme Court declined to find a partial closure trivial because, as here, it involved the exclusion of family members. *See People v. Jones*, No. 18SC445, 2020 WL 2829705, at *8 (Colo. June 1, 2020) (noting the importance of having family members present when a "defendant is charged with an unusually vicious offense [first-degree murder and child abuse] of the sort likely to arouse passion and a wide-spread desire of vengeance."). Here, Mr. Njonge, a Kenyan national, was also charged with the sort of crime "likely to arouse passion": the first-degree murder of a 75-year-old woman.