No. _____

In The Supreme Court of the United States

Kemen Lavatos Taylor, II, Petitioner

v.

Governor Mark Dayton and Tom Roy, Commissioner of Corrections, Respondents.

On Petition For Writ of Certiorari To The Eighth Circuit Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment's public trial guarantee contains a triviality exception, consistent with the Minnesota Supreme Court and Eight Circuit Court of Appeals opinions, such that there are certain courtroom closures to which the Sixth Amendment does not even apply.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

INDEX TO APPENDIX

OPINIONS BELOW

The opinion of the Court below is *Taylor v. Dayton*, 968 F.3d 857 (8th Cir. 2020) and appears at Appendix A. The Order of the United States District Court, *Taylor v. Dayton*, 16-3891 (DSD/LIB) (D.Minn. 4/16/19), appears at Appendix B. The Report and Recommendation of Magistrate Leo I. Brisbois appears at Appendix C. Mr. Taylor had an appeal to the Minnesota Supreme Court, *State v. Taylor*, 869 N.W.2d 1 (Minn. 2015). This opinion appears at Appendix D. Mr. Taylor's petition for panel rehearing was denied by an Order dated September 15, 2020. This Order appears at Appendix E.

JURISDICTIONAL STATEMENT

The order sought to be reviewed was entered on September 15, 2020. (Appendix E). Pursuant to an Order issued on March 19, 2020, the deadline for filing a petition for a writ of certiorari was extended to 150 days. Petitioner invokes this Court's jurisdiction on the basis of 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The questions presented implicate the following provisions of the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial …

U.S. CONST. amend. VI.

28 U.S.C. § 2254 is reproduced verbatim in the appendix to this section. (Appendix F).

STATEMENT OF THE CASE

Appellant Kemen Taylor, II, was convicted in Hennepin County of first-degree murder and attempted first-degree murder based on his alleged role in aiding and abetting a gang-related shooting that occurred the night of August 24, 2011, in Minneapolis, Minnesota. *State v. Taylor*, 869 N.W.2d 1 (Minn. 2015) (*Taylor I*). Following his conviction, the twenty-four-year-old Taylor was sentenced to life without the possibility of release and to two (2) concurrent 180-month sentences.

On the first day of appellant's trial, the trial court set specific rules for the spectators in the courtroom and closed the courtroom to certain members of the public:

> In past appearances, there have been some disruptions for persons in the gallery. So I have issued an order that deputies have posted outside the courtroom that set basic rules for behavior for those who are spectators, and those rules include the following:

> No one from the gallery is allowed to speak from the gallery while court is in session. Profanity in any form is prohibited. Moving around the courtroom while court is in session is prohibited.
>
> Hand signs or threatening gestures are prohibited. Food and beverages are prohibited. Gum chewing is prohibited. Failure to follow the orders and commands of the courtroom deputies or myself.
>
> Any kind of memorial or "Rest in Peace" type clothing, buttons, or signs are prohibited.
>
> Cell phones must not be audible or visible. In future court proceedings, *persons who are spectators will be required to show a photographic ID before being allowed entry into the courtroom*.
>
> Children are expected to remain quiet and follow these rules. If they cannot do so, they must be leave and be accompanied by an adult. Approaching any juror or witnesses for any kind of conversation is prohibited.

(T. 853-54) (emphasis added). The trial court issued a written order containing these rules and posted it on the courtroom door on the first day of trial. (T. 853). Neither party objected to the trial court's order.

As a result of this Order, several of Mr. Taylor's family members, including each of his three (3) sisters, were barred from his trial. *See Taylor v. State*, 910 N.W.2d 35, 37 (Minn. 2018) (*Taylor II*).

While Mr. Taylor's direct appeal was pending, Taylor asked his appointed counsel to stay his direct appeal in order to pursue postconviction claims. Minnesota has a unique procedure regarding postconviction and collateral issues. Minnesota requires appellants to seek a stay of their direct appeal in order to pursue postconviction issues and then combine both the direct appeal and postconviction appeal together if postconviction relief is denied. See Rule 28.02,

Subd. 4(4), Minnesota Rules of Criminal Procedure; *State v. Garasha*, 393 N.W.2d 20 (Minn. 1986). In contrast, the federal courts insist that direct appeal issues be decided first. Only after those decisions can collateral issues be raised in a § 2255 proceeding. See 28 U.S.C. § 2255. In *Massaro v. United States*, 538 U.S. 500 (2003), the United States Supreme Court held that even a collateral claim that could have been brought on direct appeal was not procedurally barred from a habeas claim under a 28 U.S.C. § 2255 claim filed after direct appeal.

When Taylor's appointed counsel on direct appeal refused to request a stay of Mr. Taylor's direct appeal to seek postconviction relief, Mr. Taylor asked his counsel to withdraw and decided to proceed *pro se*. On March 26, 2016, Mr. Taylor signed a Waiver of Counsel. (See Docket Id. 25 - Habeas Memo Exhibit 1). Mr. Taylor's appointed counsel then filed a motion to withdraw as counsel for Mr. Taylor with the Minnesota Supreme Court. (See Docket Id. 25 - Habeas Memo Exhibit 2-3). The Minnesota Supreme Court issued an Order permitting counsel to withdraw and placed Mr. Taylor's case on the non-oral calendar. (See Docket Id. 25 - Habeas Memo Exhibit 4).

Mr. Taylor then sought to stay his direct appeal. That motion was filed by the assistant state public defender as an accommodation to Mr. Taylor. (See Docket Id. 25 - Habeas Memo Exhibit 5). The Minnesota Supreme Court acknowledged receipt of the stay through Mr. Taylor's withdrawn counsel. (See Docket Id. 25 - Habeas Memo Exhibit 6). The prosecution opposed Mr. Taylor's *pro se* request for a

stay, while noting that the "state routinely makes no objection to such motions". (See Docket Id. 25 - Habeas Memo Exhibit 7).

On April 28, 2015, the Minnesota Supreme Court denied Mr. Taylor's request for a stay and ordered that Mr. Taylor's direct appeal was considered submitted with an opinion to be filed in "due course." (See Docket Id. 25 - See Habeas Memo Exhibit 8).

Mr. Taylor then asked the Minnesota Supreme Court to dismiss his direct appeal. (See Docket Id. 25 - Habeas Memo Exhibit 9). The clerk of appellate courts did not accept Mr. Taylor's *pro se* filing because it "was not signed and there was no date of service listed on [his] affidavit of service." (See Docket Id. 25 - Habeas Memo Exhibit 10). Mr. Taylor then attempted to remedy these irregularities.

In the Notice of Motion and Motion for Voluntary Dismissal of Direct Appeal filed on June 15, 2015, Mr. Taylor told the Minnesota Supreme Court that his motivation for dismissing his appeal was to pursue postconviction relief and expand the record on his claims. (See Docket Id. 25 - Habeas Memo Exhibit 11). This second motion was never ruled on. On August 26, 2015, the Minnesota Supreme Court affirmed Mr. Taylor's conviction. *See State v. Taylor*, 869 N.W.2d 1 (Minn. 2015) (*Taylor I*).

One of the issues raised in Mr. Taylor's direct appeal, and on which he had intended to expand the record through postconviction proceedings, was whether the trial court's closure of the courtroom violated his Sixth Amendment right to a public trial. The Minnesota Supreme Court decided the claim involved a "partial closure"

based on arguments made in the brief submitted by Mr. Taylor's appointed, and by the time of decision, withdrawn, counsel. *Taylor I* at 10. The Minnesota Supreme Court went on to identify *Waller v. Georgia*, 467 U.S. 39 (1984), as the controlling caselaw and appropriate test for determining if Mr. Taylor was entitled to relief, but then went on to determine that the closure at issue was too "trivial" to constitute a closure of the courtroom. *Taylor I* at 11-12.

In reaching the conclusion that there was no closure implicating Mr. Taylor's Sixth Amendment right to a public trial, the Minnesota Supreme Court noted "there is no evidence in the record that a significant portion of the public was unable to attend due to the identification requirement; that Taylor, his family, his friends, or any witnesses were excluded; or that any individuals actually excluded were known to Taylor." *Taylor I* at 11. The Minnesota Supreme Court then concluded as follows: "here there is simply no evidence that the requirement was enforced, or, if so, that even a single individual—identifiable or not—was actually excluded. Thus, we hold that the photographic identification requirement did not constitute a "true" closure." *Taylor I* at 11-12.

On November 14, 2016, Mr. Taylor filed a *pro se* petition for habeas corpus in the Minnesota Federal District Court. In his petition, Mr. Taylor raised several issues, including a claim that his Sixth Amendment right to a public trial was violated based on the trial court's closure of the courtroom. (See *Taylor v. Mark Dayton*, Docket Id. 1). Taylor, through counsel, later asked for a stay of his federal

habeas proceedings to seek postconviction relief in the Minnesota Courts. (See Motion to Stay, Docket Id. 11).

A petition for postconviction relief was filed in the Hennepin County District Court under the state's postconviction statute, Minn. Stat. § 590, *et seq.* Mr. Taylor's postconviction petition included sworn affidavits from nine (9) individuals who stated they were denied access to Mr. Taylor's trial because they did not have valid identification. *Taylor II* at 37.

The trial judge, The Honorable Daniel H. Mabley, denied Mr. Taylor's petition without a hearing, holding that Mr. Taylor's claims were barred based on *State v. Knaffla*, 243 N.W.2d 737 (Minn. 1976). (See Docket Id. 25 - Habeas Memo Exhibit 13). The trial court noted that the public trial issue was known and raised on direct appeal and concluded that neither the interests of justice or novel issue exceptions were applicable to Mr. Taylor's claims. (Id.).

Mr. Taylor appealed the summary denial of his petition for postconviction relief to the Minnesota Supreme Court and that Court affirmed the denial of relief. *Taylor v. State*, 910 N.W.2d 35 (Minn. 2018) (*Taylor II*). According to the Minnesota Supreme Court, Mr. Taylor's claim was procedurally barred as known, raised, and decided by that court on direct appeal, and he "forfeited" appellate review of his postconviction claim because he did not specifically argue that his claims fell under the interests of justice exception recognized in *Knaffla*. *Taylor II* at 38.

Following the conclusion of the state court proceedings, the stay on Mr. Taylor's habeas proceeding was lifted and he was ordered to file an amended petition. (See Order Directing Amended Petition be Filed, Docket Id. 21). Mr. Taylor subsequently filed an amended petition raising six issues: (1) that the state courts unreasonably applied clearly established federal law in determining that his public trial rights were not violated, (2) that if he was required to show prejudice to bring the first argument, he should be granted an hearing to present his claim because the state courts had denied him an opportunity to do so, (3) that he should be granted a hearing on "cause and prejudice" to show that Minnesota's postconviction process was ineffective to protect his due process rights and establish that he received the ineffective assistance of appellate counsel when appellate counsel failed to stay his direct appeal to supplement the record regarding the courtroom closure, (4) that his Sixth Amendment right to present a complete defense was violated when he was precluded from presenting alternative perpetrator evidence, (5) that he should be granted habeas relief based on cumulative error at his trial, and (6) that he received the ineffective assistance of appellate counsel. (See Amended Petition, Docket Id. 24).

On January 22, 2019, Magistrate Leo I. Brisbois issued a Report and Recommendation recommending that Mr. Taylor's petition be denied and that he be denied a certificate of appealability. Relevant to this petition, the Report and Recommendation concluded that: (1) no actual courtroom closure had occurred (Report and Recommendation P. 14, 16, Docket Id. 33), (2) that the Minnesota

Supreme Court decision in *Taylor I* was neither contrary to nor an unreasonable application of clearly established federal law (Report and Recommendation P. 11), (3) that Mr. Taylor was procedurally defaulted in his efforts to factually supplement his public trial argument with evidence of people being excluded and there was no cause and prejudice to excuse the procedural default (Report and Recommendation P. 14, 16), and (4) that no certificate of appealability should issue. (Report and Recommendation P. 28).

On April 16, 2019, the Judge David S. Doty issued an Order overruling Mr. Taylor's objections and adopting the Report and Recommendation, with the exception of granting a certificate of appealability on the public trial claim. (Order, Docket Id. 38).

Mr. Taylor them appealed to the Eighth Circuit Court of Appeals. In its opinion affirming the denial of Mr. Taylor's habeas petition, the Eighth Circuit Court of Appeals also concluded that the restrictions put in place did not constitute a sufficient closure to implicate the Sixth Amendment, concluding: "As a result, the Minnesota Supreme Court decided "whether a closure meriting Sixth Amendment concern has occurred at all," D. Ct. Dkt. 38 at 5, and did not need to evaluate whether the state trial court properly applied the standards for closing a courtroom set forth in *Waller* and *Presley*." *Taylor v. Dayton*, No. 19-2064 p. 3, (8th Cir. August 4, 2020).

REASONS FOR GRANTING THIS PETITION

I. This Court should grant review to determine whether Minnesota precedent which characterizes a closure as trivial and then declines to apply *Waller* and *Presley* is consistent with clearly established federal law related to courtroom closures.

The right to a public trial is guaranteed by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI. All portions of a trial are subject to the public trial guarantee, including the presentation of evidence to the jury. *See Waller*; *Presley*. Giving access to the public ensures that the accused is "fairly dealt with and not unjustly condemned" and keeps the "triers keenly alive to a sense of their responsibility and to the importance of their functions." *In re Oliver*, 333 U.S. 257, 270 n. 25 (1948) (quoting 1 Thomas M. Cooley, *Constitutional Limitations* 647 (8th ed. 1927)).

The right to a public trial protects more than just the rights of the defendant, it is also for the benefit of the public and the press. *See Press–Enterprise Co. v. Superior Court of Cal., Riverside Cnty.*, 464 U.S. 501, 507 (1984) ("This open process gave assurance to those not attending trials that others were able to observe the proceedings and enhanced public confidence.") (*Press-Enterprise I*); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 556 (1980) (stating the purpose of a public trial is to provide "assurance that the proceedings were conducted fairly to all concerned and discouraging perjury, the misconduct of participants, or decisions based on secret bias or partiality.").

The right to a public trial is not absolute and can be overcome. *Globe Newspaper Co. v. Superior Court for Norfolk Cnty*, 457 U.S. 596, 606 (1982). "Such

circumstances will be rare, however, and the balance of interests must be struck with special care." *Waller*, 467 U.S. at 45. "While the Supreme Court has held that the right of access to a criminal trial is "not absolute," *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 606, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982), the Court has never actually upheld the closure of a courtroom during a criminal trial or any part of it, or approved a decision to allow witnesses in such a trial to testify outside the public eye." *United States v. Thunder*, 438 F.3d 866, 867 (8th Cir.2006).

"The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Waller*, 467 U.S. at 45. Then, even if the government makes out an interest that would support closure, "the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Id.* at 48; *Thunder*, 438 F.3d at 867.

Before closing the courtroom to the public, a trial court must apply the four-part test set out in *Waller*. *Waller*, 467 U.S. at 48. Under this test, a courtroom closure may be justified under the following circumstances (1) "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced", (2) "the closure must be no broader than necessary to protect that

interest", (3) "the trial court must consider reasonable alternatives to closing the proceeding", and (4) "it must make findings adequate to support the closure." *Id.* at 39

In holding that Mr. Taylor was not entitled to relief because of the trial court's *sua sponte* requirement that all spectators show photographic identification, the Minnesota Supreme Court concluded that the closure at issue was so trivial as to not even rise to the level of implicating Mr. Taylor's Sixth Amendment rights. *Taylor I* at 11-13. In affirming this line of reasoning, the Eighth Circuit Court of Appeals held: "As a result, the Minnesota Supreme Court decided "whether a closure meriting Sixth Amendment concern has occurred at all," D. Ct. Dkt. 38 at 5, and did not need to evaluate whether the state trial court properly applied the standards for closing a courtroom set forth in *Waller* and *Presley*." *Taylor v. Dayton*, No. 19-2064 p. 3, (8th Cir. August 4, 2020).

Neither *Waller* nor *Presley* contain any language to suggest that just because the district court's attempt to restrict public entry to a trial might not be very effective, that the court, in imposing that restriction, is relieved of its obligation to conduct the required four-part test. *Waller*, 467 U.S. at 48. In *Presley*, the Supreme Court reiterated its point that "*Waller* provided standards for courts to apply before excluding the public from any stage of a criminal trial." 558 U.S. at 213. The Minnesota Supreme Court had a duty, one at which it failed, to apply the squarely established rule from *Presley* to the facts of Appellant's case.

In failing to recognize that any courtroom closure requires the *Waller* test to be applied, which never occurred in this matter, the lower courts have decided this case in a manner that conflicts with the precedent of this Court. Even assuming the closure created by the photo ID requirement in Mr. Taylor's case is "trivial", this Court has never held that a trivial or partial closure is warranted without justification. On the contrary, it has expressed that all portions of a jury or bench trial are subject to the public trial guarantee. *See Waller* and *Presley*.

Anything that closes a courtroom during a defendant's trial must meet the exacting four-part test set forth by the Court in *Waller*. *Waller*, 467 U.S. at 45 (quoting *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 510 (1984) (*Press-Enterprise I*) ("The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."); *United States v. Thunder*, 438 F.3d 866, 867-68 (8th Cir. 2006) ("To withstand a defendant's objection to closing a trial *or any part of one*, an order directing closure must adhere to the principles outlined in *Press-Enterprise*…." (emphasis added)).

The *Presley* case is instructive on how this should work. There, the question arose as to whether "it [was] so well settled that the Sixth Amendment right extends to juror *voir dire* that [the] Court [could] proceed by summary disposition." *Presley*, 558 U.S. at 213. The Court had little difficulty in answering this question:

"The point is well settled under *Press–Enterprise I* and *Waller*." *Id.* Prior to *Presley*, there was no United States Supreme Court case explicitly stating that *Waller* applied to voir dire, but relief was granted anyway, because the precedent and its application was clear. In the same way with the factual background present here, it is clear that *Waller*'s four-factor test must be satisfied prior to allowing any closure. *Waller*, 467 U.S. at 45; *Presley*, 558 U.S. at 213.

Mr. Taylor has met his burden of establishing that the Minnesota Supreme Court's resolution of his Sixth Amendment claim was contrary to clearly established federal law. Supreme Court precedent leaves no room for closures conducted outside the *Waller* inquiry. In carving out such an exception to the public trial guarantee, the Minnesota Supreme Court applied "a rule that contradicts the governing law set forth in [the Supreme Court's] cases." *Williams v. Taylor,* 529 U.S. 362, 405-06 (2000). While the standard set by the AEDPA is "difficult to meet," *Metrish v. Lancaster*, 569 U.S. 351, 358 (2013), the standard should not be made impossible where, as here, the constitutional violation at issue is patently obvious and should be addressed to ensure that the public trial requirement of the Sixth Amendment is fairly and consistently protected in all criminal proceedings.

II. This Court should grant review to examine whether Minnesota Supreme Court pattern of eroding a criminal defendant's right to a public trial is consistent with the Sixth Amendment mandate of a public trial.

The Minnesota Supreme Court's holding in Mr. Taylor's case stems from a line of Minnesota cases that have steadily eroded the public trial right in Minnesota. *State v. Lindsey*, 632 N.W.2d 652 (Minn. 2001) (closure was too trivial

to constitute a Sixth Amendment violation where two children were excluded from courtroom, but courtroom was never cleared of all spectators and the trial remained open to the public and press at all times); *State v. Brown*, 815 N.W.2d 609 (Minn. 2012) (closure was too trivial to constitute a Sixth Amendment violation where trial judge locked courtroom door during closing argument, but no persons already present were required to leave courtroom); *State v. Silvernail*, 831 N.W.2d 594 (Minn. 2013) (closure was too trivial to constitute a Sixth Amendment violation where trial judge locked the courtroom during the state's closing argument, but where the spectators already present were allowed to remain); *State v. Smith*, 876 N.W.2d 310 (Minn. 2016) (excluding spectators during a motion in limine hearing to determine if Smith could present evidence of previous burglaries of his house to support his self-defense claim did not constitute a Sixth Amendment violation because the motion in limine was administrative in nature and therefore did not implicate the right to a public trial).

Justices of the Minnesota Supreme Court have expressed concern over the "triviality" and "administrative" doctrines as application of a rule that does not faithfully apply *Waller* and its progeny.

Dissenting in *Brown*, Justice Helen Meyer stated:

> I respectfully dissent. I believe that the trial court's decision to close and lock the courtroom doors during jury instructions contravened the purposes of the public trial guarantee, requiring the district court to conduct an analysis pursuant to *Waller v. Georgia*, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). Because the trial court failed to articulate any reason to justify locking the doors for a portion of the trial under the *Waller* factors, I would remand the case to the

> postconviction court for an evidentiary hearing and findings in accordance with *State v. Fageroos*, 531 N.W.2d 199, 203 (Minn.1995).

Brown, 815 N.W.2d at 623-24 (Meyer, J., *dissenting*).

Dissenting in *Silvernail*, Justice Paul Anderson stated:

> The closure at issue in this case fails to satisfy the standard established by the Supreme Court in *Waller v. Georgia*, 467 U.S. 39, 48, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). That standard applies in Minnesota. See *State v. Mahkuk*, 736 N.W.2d 675, 684–85 (Minn. 2007) (adopting the Waller standard). Under Waller, before a judge may close the courtroom, (1) the party seeking closure must advance an overriding interest likely to be prejudiced; (2) the closure must be no broader than necessary to protect the overriding interest asserted; (3) the court must consider reasonable alternatives to closure; and (4) the court must make adequate findings to support the closure on the record. *Mahkuk*, 736 N.W.2d at 685 (citing *Waller*, 467 U.S. at 48, 104 S.Ct. 2210) (emphasis added). Here, not a single one of the Waller requirements is met. No party advanced an overriding interest for the closure; the court deemed the closure necessary sua sponte. The court held no hearing on the closure, considered no alternatives to closure, and made no findings to support the closure. Accordingly, the district court's closure violated the *Waller* standard right across the board. Therefore, I would conclude that the court violated Silvernail's right to a public trial when it closed the courtroom during the State's closing argument.

Silvernail, 831 N.W.2d at 608 (Anderson, J., *dissenting*). Justice Anderson then went on to state:

> Over the course of the past 2 years, I have become concerned about the increasing number of petitions for review that our court has received from defendants who claim that district courts across our State have closed courtrooms in violation of the defendants' constitutional rights. We have denied review in the vast majority of those cases. For lack of a better term, I have come to refer to this recent phenomenon as 'creeping courtroom closure.' The closure of courtrooms during trial is a practice that has unquestionably begun to creep its way into the routine of many of Minnesota's criminal courts. My concern that our decision in *Brown* would result in such unwarranted closures appears to have been justified. That is why I believe we should reconsider and overrule *Brown.* It is not enough to admonish courts, as the majority

> does, to only lock the courtroom doors 'carefully and sparingly' and to 'expressly state why the court is locking the courtroom doors.' The United States and Minnesota Constitutions demand more and we should meet that demand. Here, the only way that demand can be met is if we reverse Silvernail's conviction and remand for a new trial.

Silvernail, 831 N.W.2d at 609-10 (Anderson, J., *dissenting*).

Dissenting in this very case, Justice Alan Page stated:

> Although we permitted the courtroom closures in *Brown* and *Silvernail*, we cautioned trial courts that "the act of locking courtroom doors ... creates the appearance that Minnesota's courtrooms are closed or inaccessible to the public." *Brown*, 815 N.W.2d at 618; see also *Silvernail*, 831 N.W.2d at 601 n. 2. We further noted that "[t]rial courts should therefore commit such acts carefully and sparingly" and that "[t]o facilitate appellate review in future cases ... the better practice is for the trial court to expressly state on the record why the court is locking the courtroom doors." *Brown*, 815 N.W.2d at 618; *see also Silvernail*, 831 N.W.2d at 601 n. 2. Our cautionary statement has not been followed, as evidenced by the fact that we have denied nine petitions for review since *Brown* that have challenged a trial court's decision to close or lock the courtroom doors at various stages of the trial.
>
> I, like the court, am "extremely reluctant to overrule our precedent," and I understand that we require a "compelling reason" to do so. *State v. Lee*, 706 N.W.2d 491, 494 (Minn. 2005). It is clear to me now, however, that the practice of closing courtrooms to the public has creeped "its way into the routine of many of Minnesota's criminal courts." *Silvernail*, 831 N.W.2d at 609 (Anderson, Paul H., J., dissenting). The breadth and scope of the closures that are occurring compel me to conclude that it is time to stop the creep.

Taylor I at 23 (Page, A., *dissenting*).

In concurring in the result in *State v. Smith*, 876 N.W.2d 310, 337-343 (Minn. 2016), Justice David Stras stated:

> Nevertheless, I reach the same conclusion as the court: the closure in this case did not violate the Sixth Amendment. I do so not because I view the closure as trivial or administrative, as the court does, but because I am unconvinced that the closure here occurred during

> Smith's "trial." U.S. Const. amend. VI; Minn. Const. art. I, § 6. Therefore, I concur only in the judgment with respect to Part III of the court's opinion.

Smith, 876 N.W.2d at 337 (Stras, D., *concurring*). Despite concurring in the result, Justice Stras went on to express concern about the administrative closing doctrine the court had relied upon to reach its conclusion, stating:

> One of the lessons from *Waller* is that a closure is less likely to be constitutionally acceptable when a hearing involves live witness testimony, which is one of the reasons that I cannot join Part III of the Court's opinion. I understand the court to be holding—categorically, in fact—that a district court may close the courtroom during administrative proceedings and when making routine evidentiary rulings, whether in a bench conference or in another setting, without violating the Sixth Amendment.
>
> In my view, however, the court's rule focuses on the wrong question. The question is not whether the task is administrative or legal, as the court seems to suggest. Rather, the relevant question is whether a criminal proceeding resembles, and thereby possesses the characteristics of, a bench or jury trial. *See United States v. Thompson*, 713 F.3d 388, 393 (8th Cir. 2013) (concluding that the public-trial right applies to sentencing hearings, largely because they are "trial like" proceedings). When a criminal proceeding involves the presentation of witness testimony, the arguments of counsel on a disputed question, or invocation of the court's fact-finding function, it is more likely to be subject to the requirements of the Sixth Amendment, whether or not it involves what appears to be an administrative task or a routine evidentiary motion. *See, e.g., Rovinsky v. McKaskle*, 722 F.2d 197, 200–02 (5th Cir. 1984) (extending the Sixth Amendment's public-trial right to a hearing on motions in limine); *Commonwealth v. Jones*, 472 Mass. 707, 37 N.E.3d 589, 603–08 (2015) (extending the Sixth Amendment public-trial right to hearings on the application of Massachusetts' rape-shield law).
>
> In this case, because all of the trial-like aspects of the proceedings—specifically, the consideration of witness testimony and the arguments of counsel—occurred during a hearing in open court on April 17, 2014, I would conclude that Smith's right to a public trial was not violated. Aside from discussing the scope of the court's written order, nothing else occurred during the brief hearing on the morning of April 21, 2014

> that resembled a bench or jury trial. Accordingly, although the district court should not have closed the courtroom on the morning of April 21, see Minn. R.Crim. P. 26.03, subd. 6 (creating rules for "closed hearing[s]"), I cannot conclude under these facts that the closure violated Smith's rights under either the Sixth Amendment to the United States Constitution or Article I, Section 6 of the Minnesota Constitution.

Smith, 876 N.W.2d at 343 (Stras, D., *concurring*).

Waller and *Presley* require a different outcome than that reached by the Minnesota Supreme Court on Mr. Taylor's claim that his right to a public trial was violated. In *Presley* the failure to consider reasonable alternatives to closure was "all [the] Court need[ed] to decide" the Sixth Amendment public trial question. *Presley*, 558 U.S. at 216. The Minnesota Supreme Court's holding, and the Eighth Circuit decision affirming it, are clearly contrary to these precedents because they allowed a closure of the courtroom without any consideration of single one of the *Waller* factors.

Mr. Taylor urges this Court to grant review because of the exceptional importance of the questions raised and to maintain uniformity and adherence to United States Supreme Court Sixth Amendment public trial precedent. The Sixth Amendment right a public trial applies in all criminal proceedings, regardless of jurisdiction. However, as the dissenting and concurring opinions cited above show, the Minnesota Supreme Court continues to dilute that protection for defendants by creating exceptions that simply do not exist in this Court's case law addressing how any and all courtroom closures must be addressed. Review of those decisions by this Court would help settle this dispute on this important federal question.

CONCLUSION

For the reasons stated above, Mr. Taylor respectfully requests that this Court grant this petition for certiorari.

Respectfully submitted.

Dated: February 1, 2021

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