No.

IN THE

SUPREME COURT OF THE UNITED STATES

HAYZE L. SCHOONOVER, Petitioner,
-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari

To The Supreme Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether allowing the media to remain in the courtroom preserves a defendant's Sixth Amendment right to a public trial during a partial courtroom closure where the defendant's family members and the general public are barred from attending the proceedings.

(2) Whether the "overriding interest" test established by this Court in *Waller v. Georgia*, 467 U.S. 39 (1984) or the "substantial reason" test, that has been adopted by a majority of jurisdictions, should be used to determine if a defendant's Sixth Amendment right to a public trial has been violated by a partial courtroom closure.

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The petitioner, Hayze L. Schoonover, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The order of the Illinois Supreme Court denying Hayze Schoonover's petition for rehearing is attached as Appendix A. The decision of the Illinois Supreme Court affirming Hayze Schoonover's conviction is reported at 2021 IL 123832, and is attached as Appendix B. The published opinion of the Illinois Appellate Court reversing Hayze Schoonover's conviction is reported at 2019 IL App (4th) 160882, and is attached as Appendix C.

JURISDICTION

On December 16, 2021, the Illinois Supreme Court issued an opinion reversing the decision of the Illinois Appellate Court and affirming Hayze Schoonover's conviction. A petition for rehearing was timely filed and denied on January 24, 2022. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment to the U.S. Constitution

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

Sixth Amendment to the U.S. Constitution

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. U.S. Const. amend. VI.

Fourteenth Amendment to the U.S. Constitution

> No state shall make of enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV.

720 ILCS 5/115-11 (2014)

> In a prosecution for a criminal offense defined in Article 11 or in Section 11-1.20, 11-1.30, 11-1.40, 11-1.50, 11-1.60, 12-13, 12-14, 12-14.1, 12-15 or 12-16 of the Criminal Code of 1961 or the Criminal Code of 2012, where the alleged victim of the offense is a minor under 18 years of age, the court may exclude from the proceedings while the victim is testifying, all persons, who, in the opinion of the court, do not have a direct interest in the case, except the media.

STATEMENT OF THE CASE

Hayze Schoonover was charged with four counts of predatory criminal sexual assault of a child. (C. 1–4); 720 ILCS 5/11-1.40 (2014). The alleged victim was Mr. Schoonover's niece, M.L., who was under the age of 18 at the time of the alleged offense. (C. 1–4) The case proceeded to a jury trial.

The jury trial began with testimony from M.L. (Vol. XIX, R. 19) However, prior to her testimony, the trial court *sua sponte* cleared the courtroom of spectators pursuant to section 115-11 of the Illinois Code of Criminal Procedure of 1963 (725 ILCS 5/115-11 (2014)). Section 115-11 states that in the prosecution of certain criminal offense where the alleged victim of the offense is a minor, "the court may exclude from the proceedings while the victim is testifying, all persons, who, in the opinion of the court, do not have a direct interest in the case, except the media." 725 ILCS 5/115-11. The following exchange occurred between the court and the parties:

> "THE COURT: [T]he victim in this case is under eighteen years of age; is that correct?
>
> MR. LARSON [the prosecutor]: That's correct, Your Honor.
>
> THE COURT: When [M.L.] testifies, I want the courtroom cleared except for family members.
>
> MR. LARSON: Thank you, Your Honor.
>
> MR. ALLEGRETTI [defense counsel]: I'm sorry, Judge. Mr. Schoonover's family members are here. Is that—are you barring them?
>
> THE COURT: Out.
>
> * * *
>
> THE COURT: Well, pursuant to 725 ILCS 5/115-11, where the alleged victim of the offense is a minor under eighteen years of age, the court may exclude from the proceedings while the victim is testifying all persons who, in the opinion of the court, do not have a direct interest in the case except the media. So I'm going to order that the courtroom be cleared, with the exception of the media, when [M.L.] testifies. I will note [defense

counsel's] objection.

MR. LARSON: Your Honor, if I may.

THE COURT: Yes.

MR. LARSON: The victim's grandmother is here and would like to remain.

THE COURT: She would be someone who is allowed to remain.

* * *

THE COURT: All right. At this point pursuant to 725 ILCS 5/115-11, I'm going to clear the courtroom. Mr. Larson, you said the grandmother is going to be present.

MR. LARSON: Yes, Your Honor.

THE COURT: Who else?

MR. LARSON: You Honor, her father and stepfather we would also ask to be present

THE COURT: Who is in the back of the courtroom? Who is the gentleman sitting there? And then the rest of the people on this side. All right. As soon as we get done with her testimony, I will bring the rest of the people in the courtroom." (Vol. XIX, R. 3, 11, 18)

M.L. then testified as to the alleged offense. (Vol. XIX, R. 19–50) The State recalled M.L. to testify later in the trial. (Vol. XIX, R. 139–40) The courtroom was not cleared before her second testimony. (Vol. XIX, R. 139–40)

The jury found Mr. Schoonover guilty on three of the four counts. (Vol. XX, R. 67–68; C. 234–37) He was sentenced to 35 years in prison for Counts I and III and 15 years in prison for Count IV. (C. 261) All three counts were to be served consecutively. (C. 261)

Mr. Schoonover argued on direct appeal, *inter alia*, that the courtroom closure violated his statutory and constitutional right to a public trial. *People v. Schoonover*, 2021 IL 124832, ¶ 12, reh'g denied (Jan. 24, 2022). On April 12, 2019, the Illinois

Appellate Court majority reversed Mr. Schoonover's conviction and remanded for a new trial. *Schoonover*, 2021 IL 124832, ¶ 15. The majority found that the trial court violated Mr. Schoonover's statutory right to a public trial when it excluded Mr. Schoonover's family member without first making an express finding that they did not have a direct interest in the case. *Id.*, ¶ 14. While this issue was forfeited, the majority held that the error was reversible under the second prong of the Illinois plain error rule. *Id.* The dissent argued that, while the court should have inquired into the identity of those present, Mr. Schoonover failed to sustain his burden or clearly express his objection to the courtroom closure. *Id.*, ¶ 15.

The Illinois Supreme Court allowed the State leave to appeal to consider whether the trial court's partial closure and exclusion of spectators from the courtroom violated section 115-11 or Mr. Schoonover's constitutional right to a public trial pursuant to the Sixth Amendment. *Id.*, ¶¶ 3, 18. On December 16, 2021, the court, with one justice dissenting, reversed the judgment of the Illinois Appellate Court and remanded the cause for further proceedings. *Id.*, ¶ 3.

The Illinois Supreme Court ruled that record did not indicate that the persons excluded were "immediate family member or otherwise interested parties." *Id.* ¶ 36. The court acknowledged that defense counsel brought to the attention of the trial court that Mr. Schoonover's family members were present. *Id.* However, the Illinois Supreme Court stated that this was not sufficient basis to know that immediate family members with a direct interest in the case were excluded. *Id.* The court also did not accept that a proper objection to the closure was made by defense counsel. *Id.* ¶ 38. Additionally, the Illinois Supreme Court found that the trial court had made an inquiry as to the identity of the spectators; however, this was not an express finding made on the record. *Id.* ¶¶ 38–39. Nonetheless, the court held that section 115-11 does not require the trial

court to make an express determination as to a spectator's direct in the case before excluding them. *Id.* ¶¶ 39–40. Accordingly, the court found that there was no statutory violation of section 115-11. *Id.* ¶ 40.

With regards to Mr. Schoonover's constitutional claims, the Illinois Supreme Court stated that "[c]losure of a trial or courtroom is not entirely prohibited, nor does every closure violate the [S]ixth [A]mendment, as the right of access to criminal trials is not absolute."*Id.*, ¶ 44. The court further stated that:

> "The stringent limitations prescribed by the United States Supreme Court only apply in instances in which the press and public are barred from judicial proceedings. [citation] That is not the case before this court. Here, neither the press nor public was barred from the judicial proceedings, as the trial court invoked section 115-11, which expressly prohibits the exclusion of the media from the courtroom." *Id.* ¶ 45 (citation omitted).

Citing its own precedent, the court claimed that it is "well settled that the presence of the media preserves a defendant's right to a public trial as well as the fundamental protections afforded by that right" because the media is "in effect the presence of the public." *Id.* ¶ 46. By allowing the media to be present, the trial court preserved Mr. Schoonover's right to a public trial. *Id.*, ¶¶ 46–47. Accordingly, the court found that the courtroom closure did not violate the Sixth Amendment.

The dissenting justice in the Illinois Supreme Court would have found that the trial court abused its discretion and violated section 115-11 by failing to determine the interest of spectators before excluding them from the courtroom. *Schoonover*, 2021 IL 124832, ¶¶ 62–65 (Neville, J., dissenting). Further, the dissenting justice found that the courtroom closure violated Mr. Schoonover's Sixth Amendment right to a public trial and the public's First Amendment right to a public trial. *Id.*, ¶¶ 69–75. The dissenting justice specifically noted that the general public has a First Amendment right to a public trial that is independent from the press's First Amendment right to

a public trial. *Id.*, ¶ 74. Accordingly, "[t]he presence of the media is not an adequate substitute for the presence of the public." *Id.*

On January 24, 2022, the Illinois Supreme Court entered an order denying Mr. Schoonover's petition for rehearing. Mr. Schoonover now respectfully petitions this Court for a writ of certiorari.

REASON FOR GRANTING CERTIORARI

The Illinois Supreme Court erroneously held that a defendant's Sixth Amendment right to a public trial is not violated during a partial courtroom closure where the media is permitted to remain.

The Illinois Supreme Court has adopted the unprecedented position that a defendant's Sixth Amendment right to a public trial is not implicated during a partial courtroom closure where the media is permitted to remain. *People v. Schoonover*, 2021 IL 124832, ¶ 46. While this Court has not considered issues relating to a partial courtroom closure, nearly every other jurisdiction to consider this issue has found that a defendant's Sixth Amendment right to a public trial is implicated during a partial courtroom closure. See *infra* notes 1 and 2. The Illinois Supreme Court's decision stands as a clear outlier in this regard. This Court should grant certiorari to reverse this grievous error and the violation of Hayze Schoonover's Sixth Amendment right to a public trial.

Additionally, there is a split in jurisdictions with regards to the constitutional test that should be applied when determining the constitutionality of a partial courtroom closure. Some courts have applied the "overriding interest" test established by this Court in *Waller v. Georgia,* 467 U.S. 39 (1984), while others have applied the less stringent "substantial reason" test. See *infra* notes 1 and 2. In the instant case, reversal would be required under either test. Nonetheless, this Court should grant certiorari to provide guidance to the lower courts and clarify the applicable constitutional standard for partial courtroom closures.

In *Waller v. Georgia*, 467 U.S. 39, this Court established the "overriding interest" test to determine whether a defendant's Sixth Amendment right to a public trial has been violated. The four-part test requires that the party seeking to close a proceeding "advance an overriding interest that is likely to be prejudiced, 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." *Waller*, 467 U.S. at 48.

While *Waller* involved a full courtroom closure, it did not explicitly restrict its holding to only full courtroom closures. *Id.* Nor has this Court ever held that the Sixth Amendment was not implicated during a partial courtroom closures. However, this Court has not specifically articulated whether the *Waller* test applies to partial courtroom closures (i.e., situations in which one or more members of the public are allowed to observe trial proceedings that are otherwise closed to the public). Nonetheless, nearly every jurisdiction that has considered this issue has applied a constitutional test—generally the modified *Waller* test.[1] In a few jurisdictions, the trial court was required to satisfy the full unmodified *Waller* standard.[2] No jurisdiction has

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1 See *Bucci v. United States*, 662 F.3d 18, 23 (1st Cir. 2011); *United States v. Smith*, 426 F.3d 567, 571 (2d Cir. 2005); *United States v. Greene*, 431 Fed. Appx. 191, 197 (3d Cir. 2011); *United States v. Cervantes*, 706 F.3d 603, 613 (5th Cir. 2013); *United States v. Simmons*, 797 F.3d 409, 413 (6th Cir. 2015); *United States v. Thompson*, 713 F.3d 388, 395 (8th Cir. 2013); *United States v. Rivera*, 682 F.3d 1223, 1236 (9th Cir. 2012); *United States v. Addison*, 708 F.3d 1181, 1187 (10th Cir. 2013); *United States v. Flanders*, 752 F.3d 1317, 1337 (11th Cir. 2014); *Renkel v. State*, 807 P.2d 1087, 1093 (Alaska Ct. App. 1991); *Ex parte Easterwood*, 980 So. 2d 367, 377 (Ala. 2007); *Mitchell v. State*, 567 S.W.3d 838, 841 n.2 (Ark. 2019); *People v. Scott*, 216 Cal. Rptr. 3d 223, 230 (Cal. App. 5th 2017); *People v. Jones*, 464 P.3d 735, 741 (Colo. 2020); *Kovaleski v. State*, 103 So. 3d 859, 861 (Fla. 2012); *State v. Ortiz*, 981 P.2d 1127, 1137–39 (Haw. 1999); *State v. Frisbee*, 140 A.3d 1230, 1239 (Me. 2016); *Longus v. State*, 7 A.3d 64, 67 (Md. 2010); *Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 839 (Mass. 2021); *People v. Kline*, 494 N.W.2d 756, 759 (Mich. Ct. App. 1992); *Feazell v. State*, 906 P.2d 727, 729 (Nev. 1995); *State v. Cote*, 725 A.2d 652, 659 (N.H. 1999); *State v. Garcia*, 561 N.W.2d 599, 605 (N.D. 1997); *State v. Drummond*, 854 N.E.2d 1038, 1054 (Ohio 2006); *Com. v. Penn*, 562 A.2d 833, 838 (Pa. Super. 1989); *State v. Uhre*, 922 N.W.2d 789, 796 (S.D. 2019); *State v. James*, 1996 WL 22631, at *1 (Tenn. Jan. 3, 1996) (unpublished order).

2 See *Tinsley v. United States*, 868 A.2d 867, 874 (D.C. 2005) ("we are not persuaded that the distinction between a 'substantial reason' and an 'overriding interest' is a particularly meaningful one."); *State v. Mahkuk*, 736 N.W.2d 675, 685 (Minn. 2007)

held that the presence of the media automatically preserves a defendant's right to a public trial. Illinois is the first state to issue such a ruling in its highest court. In every other jurisdiction, the trial court would have been required to satisfy, at minimum, a modified *Waller* test. See *supra* notes 1 and 2.

Under the modified *Waller* test, the first prong requires the party seeking closure to advance a substantial reason that would be prejudiced by the courtroom being open. *United States v. Simmons*, 797 F.3d 409, 413 (6th Cir. 2015). However, the other three prongs of the *Waller* test remain the same. *Id.* Accordingly, the closure must also be no broader than necessary to protect the substantial interest, the trial court must consider reasonable alternatives to closing the proceeding, and the court must make findings adequate to support the closure. *Waller*, 467 U.S. at 48.

In the instant case, it is undisputed that a partial closure occurred. *Schoonover*, 2021 IL 124832, ¶ 54. While protecting the privacy of a minor victim is a substantial interest, the record shows that the trial court failed to comply with the other three prongs of the modified *Waller* test. The trial court made no findings to support the closure. (Vol. XIX R. 3–18) The court did not take any actions to ensure the scope of the closure was limited to be "no broader the necessary" to protect the substantial reason for the closure. (Vol. XIX R. 3–18) Further, with regards to Mr. Schoonover's family,

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("Although some federal circuit courts of appeals apply a lesser 'substantial reason' test to review the constitutionality of partial closures, . . . we have not applied different tests to complete versus partial closures."); *State v. Turrietta*, 308 P.3d 964, 970 (N.M. 2013) ("We adopt the 'overriding interest' standard as discussed by the Supreme Court in *Waller* for any type of courtroom closure."); *People v. Jones*, 750 N.E.2d 524, 529 (N.Y. 2001) ("We are aware that some courts have recognized that a less demanding standard can be applied to limited closure requests . . . . We disagree. We believe that there is no need to adopt such an articulation of the *Waller* standard since *Waller* already contemplates a balancing of competing interests in closure decisions.").

the court failed to consider reasonable alternatives to closing the proceedings. Instead, it employed a blanket exclusion on any spectators that were present on behalf of Mr. Schoonover. (Vol. XIX R. 3–18) The trial court did not weigh any factors before issuing its ruling. (Vol. XIX R. 3–18) After being asked if members of Mr. Schoonover's family could remain in the courtroom during M.L.'s testimony, the trial court merely stated: "Out." (Vol. XIX R. 11) Accordingly, the court failed to meet the requirements of the modified *Waller* test and violated Mr. Schoonover's Sixth Amendment right to a public trial.

The majority of the Illinois Supreme Court held that "the stringent limitations prescribed by the United States Supreme Court only apply in instances in which the press and public are barred from judicial proceedings." *Schoonover*, 2021 IL 124832, ¶ 45 (citing *People v. Falaster*, 173 Ill. 2d 220, 228 (1996)). Accordingly, the court found that by allowing the media to attend, the trial court preserved Mr. Schoonover's Sixth Amendment right to a public trial. *Id.*, ¶ 46. The court erroneously equated the media's right to be present during trial as coextensive with the public's right to be present.

The First Amendment separately recognizes rights retained by the public and the media. U.S. Const. amend. I. This Court has stated that the "First Amendment serves to ensure that the *individual citizen* can effectively participate in and contribute to our republican system of self-government." *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 604 (1982) (emphasis added). Further, this Court explained that "public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government." *Globe Newspaper Co.*, 457 U.S. at 606 (1982). While the presence of the media can provide some courtroom access to the general public, it cannot serve as a complete substitute to the public's right to attend criminal trials.

The dissenting justice explained how the presence of the media is not an adequate substitute for the presence of the public. *Schoonover*, 2021 IL 124832, ¶¶ 74–75 (Neville, J., dissenting). Courtroom audience members differ from the press because "audience members are not 'attracted to the courthouse by famous or newsworthy stories in the way that the institutional press is.'" *Id.*, ¶ 75 (quoting *People v. Radford*, 2020 IL 123975, ¶ 112 (Neville, J., dissenting)). This is especially true as media companies consolidate and the newsroom workforce shrinks.[3] For many cities, especially those in smaller rural counties, the local newspaper—if one still operates—does not have the resources to cover every trial. Even in the instant case, while the judge stated that media may remain during M.L.'s testimony, the record does not indicate that any media members were actually present. (Vol. XIX, R. 3–18)

The dissenting justice also noted that the public has "an important and distinct identity and role in the criminal justice system." *Schoonover*, 2021 IL 124832, ¶ 75 (Neville, J., dissenting). While the media may provide the general public some information on a particular case, that information is being filtered through the subjective lens of the individual writing the story and the media entity publishing the story. Especially for those who have a direct interest in the outcome case—such as a defendant's family members—a second-hand account of trial testimony is an insufficient substitute for hearing the testimony first-hand. Therefore, by denying Mr. Schoonover's family members and the general public access to the courtroom during M.L.'s testimony, the Illinois Supreme Court denied Mr. Schoonover's his Sixth Amendment right to a public trial.

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3 Mason Walker, *U.S. newsroom employment has fallen 26% since 2008*, Pew Research Center (July 13, 2021), https://www.pewresearch.org/fact-tank/2021/07/13/u-s-newsroom-employment-has-fallen-26-since-2008/.

While the statute at issue in the instant case was limited to the testimonies of minor victims, the Illinois Supreme Court's holding is so broad that it would apply in many other situations. Since this case was decided, the Criminal Law Committee of the Illinois Senate unanimously approved a bill that would allow judges to close the courtroom during the testimony of any sexual assault victim, regardless of age.[4] Based on the Illinois Supreme Court's decision in the instant case, the Sixth Amendment would not be implicated under the proposed bill so long as the media was allowed to be present. Further, the Illinois Supreme Court in *People v. Radford* held that a partial courtroom closure during jury *voir dire* did not constitute a clear or obvious error depriving the defendant of their Sixth Amendment right to public trial. *People v. Radford*, 2020 IL 123975, ¶ 42, reh'g denied (Sept. 28, 2020), cert. denied sub nom. *Radford v. Illinois*, 141 S. Ct. 1438 (2021). The Illinois Supreme Court's decisions in this case and *Radford* evidence an erosion of the right to a public trial in Illinois courts.

The Illinois Supreme Court also erroneously conducted a harmless error analysis on the violation of Mr. Schoonover's right to a public trial. The court stated that the partial closure did not deprive Mr. Schoonover "of the protections encompassed by the [S]ixth [A]mendment's right to a public trial, or otherwise subject[] him to the evils of [a] closed trials." *Schoonover*, 2021 IL 124832, ¶ 47. As this Court has recognized, public trial rights are "structural" and not subject to a harmless error analysis. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017). The Illinois Supreme Court erred by subjecting this constitutional violation to a harmless error analysis.

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4 Edith Brady-Lunny & Maggie Strahan, *McLean County state's attorney testifies on bill to change court rules around victims of sexual crimes*, WGLT: NPR from Illinois State University (February 9, 2022), https://www.wglt.org/local-news/2022-02-09/mclean-county-states-attorney-testifies-on-bill-to-change-court-rules-around-victims-of-sexual-crimes.

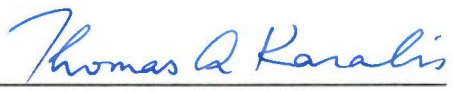
Nonetheless, Mr. Schoonover suffered potential harm when his family and the general public were denied access to the courtroom. The protections of the public trial guarantee were violated because the complainant, M.L., was not discouraged from perjury. The potential for perjury was compounded due to M.L.'s grandmother, father, and step-father being present for her testimony. (Vol. XIX R. 11–18) The presence of only M.L.'s family pressured M.L. to repeat statements she made to her family even if they were not completely truthful or accurate. The Illinois Supreme Court erroneously conducted a harmless error analysis; however, even if a harmless error analysis was required, Mr. Schoonover should be entitled to relief.

This decision by the Illinois Supreme Court demonstrates a further erosion of the right to a public trial in Illinois. Review by this Court is necessary to correct this violation of Mr. Schoonover's right to a public trial and to protect every Illinoisan's right to attend criminal proceedings. Therefore, the petitioner respectfully requests that this Honorable Court grant certiorari.

CONCLUSION

For the foregoing reasons, petitioner, Hayze L. Schoonover, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Supreme Court.

Respectfully submitted,



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