

In The  
**Supreme Court of the United States**

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CHRISTOPHER DAVID TARPEY,  
*Petitioner,*  
v.  
THE STATE OF WYOMING,  
*Respondent.*

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**On Petition For A Writ Of Certiorari  
To The Supreme Court  
Of The State Of Wyoming**

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**RESPONDENT'S BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

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BRIDGET HILL  
Wyoming Attorney General

JENNY L. CRAIG  
Deputy Attorney General

KRISTEN R. JONES  
Senior Assistant Attorney General  
*Counsel of Record*  
Kristen.Jones1@wyo.gov

DONOVAN BURTON  
Assistant Attorney General  
109 State Capitol  
Cheyenne, WY 82002  
Telephone: (307) 777-7977  
*Counsel for Respondent*

**QUESTION PRESENTED**

Whether a criminal defendant waives his Sixth Amendment right to a public trial when he fails to object to a courtroom closure after having notice of the closure and an opportunity to object.

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The opinion of the Wyoming Supreme Court is published as *Tarpey v. State*, 523 P.3d 916 (Wyo. 2023). The opinion is before this Court in the Appendix to the *Petition for Writ of Certiorari* at Appendix A, pages 1a through 43a. The order of the Wyoming Ninth Judicial District Court, Teton County, Wyoming (the trial court), denying Tarpey's motion for a new trial, is in the Appendix to the *Petition for Writ of Certiorari* at Appendix B, pages 44a through 93a. The *Judgment and Sentence* of the trial court is in the Appendix to the *Petition for Writ of Certiorari* at Appendix C, pages 94a through 101a. The trial court's *Order After May 25 & 28, 2021 Hearings* is in the Appendix to the *Petition for Writ of Certiorari* at Appendix D, pages 102a through 110a.

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## JURISDICTION

Tarpey seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari, through the authority of 28 U.S.C. § 1257(a).

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## CONSTITUTIONAL PROVISIONS INVOLVED

Tarpey seeks to invoke the following constitutional provisions:

**United States Constitution, Amendment VI, Rights of the Accused**

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

**United States Constitution, Amendment XIV, Due Process—Equal Protection—Section 1. Citizenship Rights Not to Be Abridged by States.**

No State shall make or 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.

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**STATEMENT OF THE CASE**

**I. Introduction**

Tarpey's trial was the first criminal jury trial in Teton County, Wyoming, during the Covid-19 pandemic. After consulting with the local public health department, the trial court imposed a modified trial operating plan involving a closed courtroom and remote public access. Tarpey inaccurately portrays this as a case about waiver of the Sixth Amendment right to a public trial. In reality, his case was about whether the trial court properly closed the courtroom while providing public access through a live audio broadcast. The Wyoming Supreme Court held that the trial court

did not violate Tarpey’s right to a public trial because it properly closed the courtroom after applying the test from *Waller v. Georgia*, 467 U.S. 39 (1984). That holding is not before this Court. Instead, Tarpey focuses on the Wyoming Supreme Court’s finding of waiver, which the court briefly discussed as an alternate basis for its decision under state law. The State of Wyoming requests that this Court deny certiorari because the issue Tarpey asks this Court to resolve is not a dispositive issue nor does it involve a conflict between courts on an important federal question.

## **II. Factual and Procedural History**

In July 2020, Tarpey sexually assaulted another person in Teton County, Wyoming. (Pet. App. 3a). The State of Wyoming charged Tarpey with one count of first-degree sexual assault. (*Id.*). The trial court scheduled Tarpey’s jury trial for June 2021. (*Id.*). Several months before trial, the trial court informed the parties that it would conduct the jury trial “in compliance with its Covid-19 jury trial plan.” (*Id.*). The court advised the parties to review the plan and it set a deadline for objections. (*Id.*). One month before trial, the court emphasized that its Covid-19 jury trial plan would not permit members of the public in the courtroom. (*Id.* at 4a). The court noted that members of the public could attend Tarpey’s trial “by a video link.” (*Id.*).

One week before trial, the trial court held two hearings where it discussed the Covid-19 jury trial

plan with the prosecution, Tarpey, and his attorney. (*Id.* at 4a-6a). The court discussed its ability to broadcast the trial and decided to provide public access to the trial through a live audio broadcast instead of a video broadcast. (*Id.* at 6a). In its *Order After May 25 & 28, 2021 Hearings*, the court noted that, through the live broadcast, “the criminal trial is open to the public.” (*Id.* at 8a, 107a). The court also observed that, “[w]ith respect to the Sixth Amendment, it is notable that the Defendant, whose right it is to have a public trial, did not oppose the audiostream options and joined in the State’s preference to use that option.” (*Id.* at 10a, 109a).

Nonetheless, the trial court analyzed its Covid-19 jury trial plan under the test announced by this Court in *Waller*. (*Id.* at 7a-10a, 107a-109a).<sup>1</sup> The court explained the steps it must follow before ordering a full courtroom closure: “(1) the party (or in this case, the court), seeking to close the proceeding 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) the court must make findings adequate to support the closure.” (*Id.* at 7a-8a, 107a) (citing *Waller*, 467 U.S. at 39).

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<sup>1</sup> Tarpey claims that “[t]here is nothing in the record indicating Mr. Tarpey even knew of the nature of his right to a public trial[.]” (Pet. 11). His claim is factually inaccurate and inconsistent with the trial court’s oral and written orders including its Sixth Amendment public trial analysis.

The trial court analyzed and applied the *Waller* test to the circumstances of Tarpey's case. First, the court found that protecting trial participants from Covid-19 was an overriding interest that would be prejudiced in the absence of modified public access. (*Id.* at 8a-9a, 108a). Second, a full closure of the courtroom was necessary because in-person public access would "preclude physical distancing and therefore increase the public health risk to the jurors and trial participants." (*Id.* at 9a, 108a). Third, the court considered reasonable alternatives including limited in-person access and a video stream. (*Id.* at 8a-10a, 108a-109a). However, it found that any in-person attendance would preclude physical distancing. (*Id.*). Further, it found that a video stream would be "unworkable" due to the size of the courtroom and number of trial participants. (*Id.*). Fourth, the court made the above findings on the record and memorialized those findings in a written order. (*Id.*).

Following the trial, the jury found Tarpey guilty. (*Id.* at 19a). The trial court sentenced him to ten to fifteen years of incarceration. (*Id.* at 20a, 94a-101a). Tarpey filed a motion for a new trial in the trial court, claiming that he received ineffective assistance of counsel for six reasons. (*Id.* at 20a). None of those reasons involved the courtroom closure. (*Id.*). The trial court denied Tarpey's motion. (*Id.* at 21a, 44a-92a).

### **III. Opinion of the Wyoming Supreme Court**

Tarpey timely appealed his conviction to the Wyoming Supreme Court. (*Id.* at 21a). He raised three issues, two of which are not relevant to his petition for a writ of certiorari. (*Id.* at 3a). The relevant issue was whether the trial court violated his Sixth Amendment right to a public trial. (*Id.*). The State of Wyoming responded that the trial court properly closed the courtroom and that Tarpey waived any Sixth Amendment challenge to the courtroom closure. (*Id.* at 22a).

On February 6, 2023, the Wyoming Supreme Court issued its opinion affirming Tarpey's conviction. (*Id.* at 1a-43a). The court first analyzed whether the trial court violated Tarpey's Sixth Amendment right to a public trial. (*Id.* at 22a-31a).<sup>2</sup> It noted that, although a criminal defendant has a constitutional right to a public trial, the right "is not absolute." (*Id.* at 23a). The court recognized that a trial court can close a courtroom and override the defendant's right if it first applies the test from *Waller*. (*Id.* at 24a).

The Wyoming Supreme Court analyzed the trial court's *Waller* analysis and compared Tarpey's case to two other Covid-19 related courtroom closures where appellate courts found that the trial court's modified access rules violated the defendant's right to a public trial. (*Id.* at 24a-28a) (citing *United States v. Allen*, 34

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<sup>2</sup> Tarpey quotes extensively from the Wyoming Supreme Court's public trial analysis. (Pet. 5-6). However, he omits the court's legal analysis under *Waller* and the court's primary holding.

F.4th 789 (9th Cir. 2022) and *State v. Brimmer*, 983 N.W.2d 247 (Iowa 2022)). The Wyoming Supreme Court found that, unlike *Allen* and *Brimmer*, the trial court in Tarpey’s case “was cognizant of its obligations under *Waller*,” “specifically articulated its reasoning for physically closing the courtroom to the public,” “attempted to narrowly tailor the closure,” “considered all available alternatives,” and “implemented the least restrictive, available option to provide virtual public access to the trial.” (*Id.* at 27a-28a).

The Wyoming Supreme Court also concluded that the trial court crafted its audio stream plan in an effort to comply with the purposes of the Sixth Amendment right to a public trial, as explained in *Waller*. (*Id.* at 28a). Specifically, it recognized that the trial court informed the jury of Tarpey’s right to a public trial and advised the jury that the public may be listening to the trial. (*Id.*). The Wyoming Supreme Court noted that the “public could listen in to ensure Mr. Tarpey was being ‘fairly dealt with,’ and the jurors’ knowledge that ‘spectators’ were monitoring the trial kept them aware of their responsibility and the importance of their function.” (*Id.*) (quoting *Waller*, 467 U.S. at 46). It held that “the district court complied with *Waller*, and it did not commit structural error when it balanced Mr. Tarpey’s right to a public trial against the overriding and compelling interest of preventing the spread of Covid-19 and implemented the least restrictive option for physically closing the courtroom to the public while allowing virtual public access to the trial.” (*Id.*).

“In addition” to holding that the trial court did not violate Tarpey’s Sixth Amendment right to a public trial, the Wyoming Supreme Court proceeded to analyze whether Tarpey waived his right to a public trial. (*Id.* at 28a-31a). It cited three instances where the trial court advised Tarpey of the Covid-19 closure and noted that Tarpey did not object at any point. (*Id.* at 29a). The Wyoming Supreme Court found that Tarpey “knew about the district court’s plan to partially close the courtroom and he never objected to that partial closure or to the use of the audio broadcast, even though he had multiple opportunities to do so.” (*Id.*). “Under the facts of this case,” it found that Tarpey waived his right to a public trial. (*Id.* at 30a).

The Wyoming Supreme Court concluded its Sixth Amendment public trial analysis by finding that “the district court did not violate Mr. Tarpey’s Sixth Amendment right to a public trial, and he waived his right to a public trial.” (*Id.* at 31a). The Wyoming Supreme Court did not address the question presented in Tarpey’s petition surrounding whether a defendant must personally waive his right on the record. (*See generally id.*). Tarpey’s *Petition for Writ of Certiorari* followed.

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## **REASONS FOR DENYING THE WRIT**

Tarpey seeks a writ of certiorari from this Court on one issue: Is the Sixth Amendment right to a public trial a fundamental right that is personal to the defendant such that waiver must be on the record by the

defendant himself? His issue is flawed for at least three reasons.

First, the issue is not dispositive in Tarpey's case because the Wyoming Supreme Court held that the trial court did not violate Tarpey's right to a public trial when it properly closed the courtroom after applying the *Waller* test. Waiver was merely an alternate basis for the court's holding and was not the primary focus of the court's opinion. Moreover, the court below did not decide the question of personal waiver which Tarpey presents to this Court.

Second, although various courts have applied two different tests when addressing waiver of the right to a public trial, the conflict does not involve an important federal question because this Court has stated that the test for waiver of the right to a public trial is a matter of state law for state courts to decide. Further, neither of the two tests conflicts with any precedent from this Court.

Third, Tarpey misstates the conflict that he asks this Court to resolve. Although different jurisdictions apply two different waiver tests under the Sixth Amendment, neither test requires that a defendant personally waive his right on the record. No resolution of the actual conflict by this Court would impact Tarpey's case because the Wyoming Supreme Court applied the more stringent test and concluded that Tarpey knowingly and intentionally relinquished his right to a public trial. Therefore, the State of

Wyoming respectfully requests that this Court deny certiorari.

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## **ARGUMENT**

### **Tarpey does not present a compelling reason for this Court to grant his petition for writ of certiorari.**

Rule 10 of the Rules of the Supreme Court of the United States provides that this Court will grant a petition for writ of certiorari “only for compelling reasons.” Sup. Ct. R. 10. A compelling reason may be found when “a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.” *Id.* Tarpey argues that there is a split among various courts surrounding whether “the public trial right can only be waived in open court on the record by defendant.” (Pet. 7). This Court should decline to address this question because Tarpey’s case is not an appropriate vehicle to reach this question, it is not an important federal question, and because no court has reached the conclusion that Tarpey asks this Court to reach.

#### **A. The Wyoming Supreme Court primarily held that the trial court properly closed the courtroom.**

Tarpey argues that a criminal defendant’s Sixth Amendment right to a public trial is a fundamental

right that can only be waived by the defendant himself. (*Id.* at 6-12). He correctly points out that the Wyoming Supreme Court found that he waived his right to a public trial. (*Id.*; *see Pet. App.* 29a-30a). However, the court below did not analyze whether the right was personal or could be waived through counsel. Moreover, waiver was not the primary issue or holding of the Wyoming Supreme Court—it affirmed Tarpey’s conviction because the trial court did not violate Tarpey’s Sixth Amendment right to a public trial when it closed the courtroom and provided public access through an audio stream. (*Pet. App.* 27a-28a). This Court should deny certiorari because Tarpey does not challenge the dispositive holding below regarding the Sixth Amendment right to a public trial.

This Court typically does not grant certiorari to address non-dispositive issues because it “reviews judgments, not statements in opinions.” *California v. Rooney*, 483 U.S. 307, 311 (1987) (quoting *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956)). It does not review aspects of a state court decision that are not essential to the holding because this Court’s “power is to correct wrong judgments, not to revise opinions.” *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945). This Court has stated that it is “not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after [this Court] corrected its views of federal laws, [this Court’s] review could amount to nothing more than an advisory opinion.” *Id.* For example, in *Rooney*, this Court found that it had “improperly granted” certiorari to review a warrantless

search of a trash bin because the state court had already found that the evidence obtained from the trash bin was not essential to the result of the case. *Rooney*, 483 U.S. at 314. “That the Court of Appeal even addressed the trash bin issue is mere fortuity.” *Id.* at 311.

The main focus of the proceedings below was whether the courtroom closure during the Covid-19 pandemic violated Tarpey’s Sixth Amendment right to a public trial. (Pet. App. 22a-31a). In *Waller*, this Court recognized that the Sixth Amendment “right to an open trial may give way in certain cases to other rights or interests[.]” *Waller*, 467 U.S. at 45. *Waller* established a four-part analysis that trial courts must follow before closing a courtroom during a criminal proceeding “over the objections of the accused.” *Id.* at 47. First, “the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced.” *Id.* at 48. Second, “the closure must be no broader than necessary to protect that interest.” *Id.* Third, “the trial court must consider reasonable alternatives to closing the proceeding.” *Id.* Fourth, the trial court “must make findings adequate to support the closure.” *Id.* Thus, although a criminal defendant has a Sixth Amendment right to a public trial, a trial court “may deprive a defendant of his right to an open courtroom by making proper factual findings in support of the decision to do so.” *Weaver v. Massachusetts*, 582 U.S. 286, 298 (2017).

Here, the Wyoming Supreme Court based its judgment on its conclusion that the trial court did not violate Tarpey’s Sixth Amendment right to a public trial. (Pet. App. 28a). The Wyoming Supreme Court analyzed

the trial court's application of *Waller* before discussing waiver. (*Id.*). The court held that the trial court "complied with *Waller*" because it balanced Tarpey's right to a public trial "against the overriding and compelling interest of preventing the spread of Covid-19 and implemented the least restrictive option for physically closing the courtroom to the public while allowing virtual public access to the trial." (*Id.*). Tarpey does not challenge this holding, which would have resulted in the court affirming Tarpey's conviction even if he had objected to the closure. *Waller*, 467 U.S. at 47. Because the Wyoming Supreme Court found no Sixth Amendment violation caused by the courtroom closure, there was no constitutional violation for Tarpey to waive.

Although the Wyoming Supreme Court proceeded to address waiver, the court's discussion of waiver was an alternate basis for its opinion and was not essential to the court's judgment. (*Id.* at 28a-29a). Its waiver analysis consisted of only two paragraphs and did not address the question of personal waiver raised in Tarpey's petition to this Court. (*Id.*). The fact that the Wyoming Supreme Court "even addressed" waiver "is mere fortuity." *Rooney*, 483 U.S. at 311. Thus, even if this Court reviewed the waiver issue in this case and found that the Wyoming Supreme Court applied an incorrect rule, "the same judgment would be rendered by" the court on remand. *Herb*, 324 U.S. at 126. Any review of this issue "could amount to nothing more than an advisory opinion." *Id.* This Court should deny Tarpey's Petition for Writ of Certiorari to address personal waiver of the Sixth Amendment right to a public

trial because this case is not an appropriate vehicle to address this non-dispositive question that the state court did not address below.

**B. Waiver of the right to a public trial is a matter of state law.**

Tarpey asks this Court to grant certiorari to review a conflict between jurisdictions surrounding how and when a defendant may waive his right to a public trial. (Pet. 6-12). However, although different courts apply two different tests when addressing waiver of the Sixth Amendment right to a public trial, a state court's waiver test is a matter of state law. This Court does not have a compelling reason to review this issue because it does not involve "an important federal question." Sup. Ct. R. 10.

This Court has discussed waiver in several cases and held that the Sixth Amendment right to a public trial is among the rights that a criminal defendant may waive. *See, e.g., Singer v. United States*, 380 U.S. 24, 35 (1965); *Gannett Co. v. DePasquale*, 443 U.S. 368, 382 (1979). Respondent is not aware of any case where this Court has imposed a specific test that federal or state courts must follow when analyzing waiver of the defendant's right to a public trial. However, under this Court's precedent, a defendant's failure to object to a courtroom closure is sufficient to show waiver of the defendant's right to a public trial. *Levine v. United*

*States*, 362 U.S. 610, 619 (1960); *Peretz v. United States*, 501 U.S. 923, 936 (1991).<sup>3</sup>

This Court’s opinion in *Waller* shows that the facts supporting waiver and a court’s analysis of waiver of the Sixth Amendment right to a public trial are a matter of state law for state courts to resolve. There, this Court reviewed a trial court’s decision to close the courtroom during a suppression hearing over the objection of some of the petitioners. *Waller*, 467 U.S. at 42. The respondent pointed out that one of the petitioners did not object to the closure below. *Id.* at 42 n.2. This Court analyzed the closure and held that “under the Sixth Amendment any closure of a suppression hearing over the objections of the accused” must satisfy the four-part test discussed above. *Id.* at 47. This Court remanded all of the cases, including that of the petitioner who did not object, for the state court to analyze the closure under the four-part test. *Id.* at 42 n.2. But this Court invited the state court on remand to determine if the petitioner who failed to object could seek

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<sup>3</sup> Although this Court found that the defendant’s failure to object was insufficient in *Press-Enterprise*, that case has no bearing here because it involved a First Amendment challenge to a secret proceeding over the objection of a member of the public. *Press-Enterprise Co. v. Superior Ct. of California, Riverside Cnty.*, 464 U.S. 501, 503-04 (1984). Unlike *Press-Enterprise*, Tarpey’s petition solely involves a Sixth Amendment challenge. (*See generally* Pet.). Moreover, Tarpey’s jury trial was not a secret proceeding because it was available to the public through a live audio broadcast. (Pet. App. 28a, 107a-109a). Further, no member of the public objected to these proceedings below. (*See generally* Pet. App.).

relief or if he was “procedurally barred from seeking relief as a matter of state law.” *Id.*

Under Wyoming law, “waiver is the intentional relinquishment or abandonment of a known right.” *Jackson v. State*, 445 P.3d 983, 987 (Wyo. 2019) (citation and internal quotation marks omitted). In Tarpey’s case, the Wyoming Supreme Court applied state law to conclude that Tarpey had waived his right to a public trial and was procedurally barred from raising a violation of that right on appeal. (Pet. App. 28a-30a). The court reached this conclusion because Tarpey “knew about the district court’s plan to partially close the court-room, and he never objected to that partial closure or to the use of the audio broadcast, even though he had multiple opportunities to do so.” (*Id.*).

Thus, as contemplated in *Waller*, the Wyoming Supreme Court applied state law to the facts of Tarpey’s case and concluded that he had knowingly and intentionally relinquished or abandoned his right to a public trial. *See Jackson*, 445 P.3d at 987. Regardless of the fact that some state and federal courts apply a different test for waiver, the Wyoming Supreme Court’s opinion shows that Tarpey was “procedurally barred from seeking relief as a matter of state law.” *Waller*, 467 U.S. at 42 n.2. The Wyoming Supreme Court had authority to find waiver and exercised that authority based on state waiver law, which does not conflict with any precedent from this Court surrounding waiver of the right to a public trial. *See, e.g., Peretz*, 501 U.S. at 936. Thus, this Court should deny certiorari because

this case presents a question of state waiver law rather than an important federal question. Sup. Ct. R. 10.

**C. No court has reached the conclusion that Tarpey asks this Court to reach.**

Tarpey's sole argument is that this Court should review this case to determine whether "the public trial right can only be waived in open court on the record by defendant." (Pet. 7). He claims that "there is a split in the lower courts" on this issue. (*Id.*). He is incorrect. Although different courts have applied two different tests to determine whether a defendant waived his right to a public trial, Respondent is not aware of any court that has applied the personal waiver test that Tarpey asks this Court to apply.

The United States Court of Appeals for the Eleventh Circuit discussed the conflict surrounding waiver of the Sixth Amendment right to a public trial last year in *Moon*, which this Court declined to review. *United States v. Moon*, 33 F.4th 1284, 1299 (11th Cir. 2022), cert. denied, 143 S. Ct. 376 (2022). In *Moon*, the court recognized that different jurisdictions fall into two categories when considering whether a defendant waived his Sixth Amendment right to a public trial. *Id.* But neither of these categories require the defendant to personally waive the right on the record. *Id.*

In the first category, some courts "have held that waiver occurred where the defendants and their counsel were present for the courtroom closures but did not object." *Id.* (citing *United States v. Hitt*, 473 F.3d 146,

155 (5th Cir. 2006) and *United States v. Cazares*, 788 F.3d 956, 971 (9th Cir. 2015)). Thus, in some jurisdictions, the defendant’s failure to object alone is sufficient to show waiver. This Court’s opinions in *Levine*, *Waller*, and *Peretz* support the application of this approach. *See Levine*, 362 U.S. at 620; *Waller*, 467 U.S. at 47; *Peretz*, 501 U.S. at 936.

In the second category, other courts “have held that more than a mere failure to object is needed.” *Moon*, 33 F.4th at 1299. Under this standard, a defendant’s waiver must be voluntary, knowing, and intentional. *Walton v. Briley*, 361 F.3d 431, 433 (7th Cir. 2004); *State v. Martinez*, 956 N.W.2d 772, 785 (N.D. 2021). However, a defendant’s or his attorney’s failure to object to the closure may satisfy this standard when the defendant or attorney has notice of the closure and an opportunity to object. *United States v. Christi*, 682 F.3d 138, 142 (1st Cir. 2012) cert. denied, 568 U.S. 988 (2012); *Addai v. Schmalenberger*, 776 F.3d 528, 533 (8th Cir. 2015).

In the proceedings below, the Wyoming Supreme Court cited to cases involving both approaches to waiver of the Sixth Amendment right to a public trial. (Pet. App. 28a-29a). Although the court did not explicitly say which approach it adopted, the court found that Tarpey knowingly waived his right after having notice of the closure and an opportunity to object. (*Id.* at 29a-30a). Thus, the court applied the more stringent approach and found that the facts supporting waiver went beyond “a mere failure to object.” *Moon*, 33 F.4th at 1299.

Tarpey now asks this Court to review the conflict surrounding waiver but impose an entirely new test requiring a defendant to personally waive the right on the record. (Pet. 7). Based on the appendices to Tarpey's petition, it appears that his petition is the first time that he has even alleged that this category of cases exists. (*See generally* Pet. App.). But none of the cases cited by Tarpey fall into this category. (Pet. 7). None of the cases cited by the Wyoming Supreme Court fall into this category. (Pet. App. 29a). The Wyoming Supreme Court did not even mention this category of cases in its opinion. (*Id.*). As far as Respondent is aware, this category of cases does not exist. Thus, even though a conflict exists, a resolution of that conflict would not lead this Court to the conclusion that Tarpey requests. This Court would need to disregard both waiver tests adopted by lower courts and impose an entirely new test under the Sixth Amendment to resolve this case in Tarpey's favor.

This Court should not address any conflict surrounding waiver of the Sixth Amendment right to a public trial in this particular case because waiver was not a dispositive holding of the Wyoming Supreme Court. Moreover, this Court does not need to resolve any conflict because waiver is a matter of state law. Finally, this Court should deny Tarpey's petition because he is not asking this Court to resolve a conflict between courts but instead is asking this Court to impose a new waiver test. Tarpey has failed to present a compelling reason for this Court to grant certiorari. Sup. Ct. R. 10.

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## **CONCLUSION**

For the foregoing reasons, the State of Wyoming respectfully requests that this Court deny Tarpey's Petition for Writ of Certiorari.

Respectfully submitted this 21st day of June 2023.

BRIDGET HILL  
Wyoming Attorney General

JENNY L. CRAIG  
Deputy Attorney General

KRISTEN R. JONES  
Senior Assistant Attorney General  
*Counsel of Record*  
Kristen.Jones1@wyo.gov

DONOVAN BURTON  
Assistant Attorney General  
109 State Capitol  
Cheyenne, WY 82002  
Telephone: (307) 777-7977  
*Counsel for Respondent*