No. 22-1090

IN THE

Supreme Court of the United States

CHRISTOPHER DAVID TARPEY,

Petitioner,

—v.—

THE STATE OF WYOMING,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF WYOMING

REPLY TO OPPOSITION

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A. RESPONDENT IS INCORRECT IN ITS ASSERTION THAT THE ISSUE PRESENTED TO THIS COURT IS NOT DISPOSITIVE.

Respondent claims that the Wyoming Supreme Court's waiver analysis was an "alternate basis" for the court's holding and was not the "primary focus" of the court's opinion. (Resp. Brief, p. 9). The Wyoming Supreme Court did not, however, issue a distinct holding on whether the Sixth Amendment was violated and then, separately, provide that the waiver analysis was mere dicta. In fact, the waiver analysis is found under Section I of the "Discussion" portion of the opinion entitled "*Did the district court violate Mr. Tarpey's Sixth Amendment right to a public trial*?" (Wyo. Supreme Court Opinion, p. 13). There is no separate subsection or subpart for the waiver analysis. Rather, the waiver analysis is part and parcel of the Wyoming Supreme Court's ruling on whether the Sixth Amendment right to a public trial was violated.

Even so, Respondent's argument about the importance of waiver to the Wyoming Supreme Court's analysis is a red herring. Petitioner's argument on appeal has always been that his Sixth Amendment right to a public trial was violated by the *trial court*, which did indeed find Mr. Tarpey's lack of objection "notable." Specifically, the trial court wrote, "With 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 and joined in the State's preference to use that option."[1] (Order on Trial Closure, p. 6, ¶ 24).

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[1] The trial court's finding that the Defendant "joined in the State's preference" is inaccurate. Defense counsel did not join the State, but rather simply did not object. Defense counsel

In its brief to the Wyoming Supreme Court, Respondent acknowledged the centrality of waiver in whether the Sixth Amendment was violated, arguing that Mr. Tarpey had waived his right to a public trial. Now, in its Opposition to the Petition for Writ of Certiorari, the State asserts the issue is not dispositive. In summarizing the arguments of the parties below, the Wyoming Supreme Court wrote "The State asserts Mr. Tarpey waived his right to challenge the use of the audio broadcast." (Wyo. Supreme Court Opinion, p. 13). In fact, the State admits that waiver is the central issue in its framing of the "Question Presented" to this Court, which they claim is "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." (Resp. Brief, p. i).

There is a reason the State focuses on the question of waiver: whether Mr. Tarpey waived his right to a public trial has been central to his appeal and central to whether his Sixth Amendment right to a public trial was violated. As Petitioner wrote in his opening brief to the Wyoming Supreme Court, this Court in *Press-Enterprise Co. v. Superior Ct. of California, Riverside Cnty., ("Press-Enterprise I")*, 464 U.S. 501, 503-504 (1984) and again in *Presley v. Georgia*, 558 U.S. 209 (2019) confirmed that it is the trial court, not the parties, who must protect the defendant's right to a public trial. (Petitioner's/Appellant's Brief

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expressed concern that the court make sure the sequestered State's witnesses were not able to view or hear the trial, and then when asked, "And other than your comment, Dick, do you have any preference?", defense counsel said, "No." (May 25, 2021 Tr. p. 31 – 32).

to Wyoming Supreme Court, p. 17). Perhaps the Wyoming Supreme Court and Respondent's focus on waiver is an acknowledgment of potential problems under *Waller v. Georgia*, 467 U.S. 39 (1984), including the fact that during Petitioner's trial, the audio link was not working, yet the proceedings continued without any additional waiver or *Waller* analysis regarding the fact that now no one from the public could even hear the trial, much less see it.

As Mr. Tarpey set out in his Petition, there is a way for this Court to ensure that trial courts are in fact protecting the Sixth Amendment right to counsel: require trial courts to conduct an in-person colloquy with defendant prior to closing the courtroom for trial. In *Waller*, it was clear the defendant objected to the closure of the suppression hearing. In this case, there is no record of the trial court enquiring directly of Mr. Tarpey his position on closure. Rather, we have Mr. Tarpey appearing via telephone and/or Microsoft Teams at various pretrial proceedings (May 7, 2021 Tr., p. 3; May 25, 2021 Tr., p. 8-9), while his attorney, in a different location as his client, stood silent while the court closed the courtroom to his client's family and friends, while keeping it open for victim's advocates. That is not enough to ensure the Sixth Amendment right to a public trial is protected.

B. RESPONDENT IS INCORRECT IN ITS ASSERTION THAT WAIVER OF THE RIGHT TO A PUBLIC TRIAL UNDER THE SIXTH AMENDMENT IS A QUESTION OF STATE LAW.

Respondent claims that "a state court's waiver test is a matter of state law," therefore there is not a compelling reason for this Court to review the issue presented "because it does not involve 'an important

federal question.'" (Resp. Br. p. 14). In making this assertion, Respondent confuses the question of the *procedure* by which states set forth that waiver is to be considered by the state courts with the *substantive* question of what is required under the U.S. Constitution for waiver of a fundamental, personal constitutional right to a public trial. As this Court is well aware, this Court sets the floor for fundamental Constitutional rights, not the states.

Respondent claims, "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 the state courts to resolve." (Resp. Br. p. 14.) But *Waller* contains no such holding. Instead, *Waller* contains one sentence regarding a procedural matter on remand: provides nothing more than there may be a state law procedural bar to raising certain claims, explaining,

> Counsel for petitioners Waller, Thompson, Eula Burke, and W. B. Burke lodged an objection to closing the hearing. Counsel for petitioner Cole concurred in the prosecution's motion to close the suppression hearing. App. 14a, 15a. 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. 251 Ga. 124, 126-127, 303 S. E. 2d 437, 441 (1983). Cole's claims in this Court are identical to those of the others. Since the cases must be remanded, we remand Cole's case as well. The state courts may determine on remand whether Cole is procedurally barred from seeking relief as a matter of state law.

Waller, 467 U.S. at 42.

This one sentence is far from this Court holding that whether a fundamental right is waived is a matter of state law. Respondent's strained reading of *Waller* is a misguided attempt to expand states' inherent ability to establish procedural guidelines for review of their cases to include a power that the States do *not* have the ability to do, and that is to establish what is Constitutionally required under the Sixth Amendment for defendants who appear in the state courtrooms across the country.

Respondent goes on to cite the Wyoming Supreme Court's opinion in *Jackson v. State*, 445 P.3d 983, 987 (Wyo.2019) intimating that *Jackson*, not federal precedent, controls the question presented. But *Jackson* was not addressing even the issue of waiver as it applied to a state constitutional claim, much less a federal constitutional claim. *Jackson*, 445 P.3d 983, 987 (Wyo.2019). Instead, *Jackson* holds that a defendant waives an objection to a jury instruction when he himself was the one that proposed the offending jury instruction in the first place, under the state's invited error doctrine. *Id.* And, even so, the *Jackson* court cited this Court's precedent in so holding. *Id.*

> We apply the invited error doctrine instead of plain error when a party has affirmatively waived a right or objection. *Id.* As explained by the Supreme Court in *United States v. Olano*:
>
> > Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right." Whether

> a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake.
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> *United States v. Olano*, 507 U.S. 725, 733, 113 S. Ct. 1770, 1777, 123 L. Ed. 2d 508 (1993) (citations omitted). A party waives a right when he "knowingly and intelligently relinquishe[s]" it, rather than "merely fail[s] to preserve" it. Toth, ¶ 45, 353 P.3d at 710 (quoting *United States v. Cornelius*, 696 F.3d 1307, 1319 (10th Cir. 2012)).

Jackson, 445 P.3d at 987.

Of course, there can be different rules on how each state court proceeds to consider a host of Constitutional issues raised in a criminal case under their own rules of criminal procedure, but whether or not the Constitutional right itself was violated is determined by the law as set forth by this Court. And so it must be with the Sixth Amendment right to a public jury trial. This Court set forth the *Waller* factors, and Petitioner is asking this Court to set Constitutional guidelines that require courts to engage directly with the defendant when considering whether to close the courtroom, not rely on the assertions of counsel.

In making its argument as to why this is a State law question, Respondent correctly identifies that it is possible for a criminal defendant to waive his Sixth Amendment right to a public trial (though in so doing they cite cases for which that is not the Court's principal

holding),[2] and they correctly identify that this Court has not yet determined what must be considered for such a waiver to comply with the Sixth Amendment. (Resp. Br. p. 14). This is exactly the question presented to this Court for resolution by grant of certiorari.

C. RESPONDENT'S ARGUMENT THAT NO LOWER COURT HAS MADE THE REQUESTED RULING HAS NO IMPACT ON WHETHER THIS COURT SHOULD GRANT THE PETITION.

Respondent does not cite any law that supports the proposition that this Court can only take cases where

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[2] For example, Respondent claims that *Singer v. United States*, 380 U.S. 24, 35 (1965) and *Gannett Co. v. DePasquale*, 443 U.S. 368, 382 (1979) stand for the proposition that "the Sixth Amendment right to a public trial is among the rights that a criminal defendant may waive." (Resp. Br. p. 14). *Singer*, however, is not the relevant case on point for this proposition. While *Singer* does note that "a defendant can, under some circumstances, waive his constitutional right to a public trial," the comment was made in reference to the proposition that having the right to waive a constitutional right does not mean the opposite: that the defendant has the sole right to insist on the waiver of such a right. In *Singer*, this Court addressed the conditions that may be imposed upon a defendant's waiver of the right to a *jury* at trial, and did not address what conditions may be imposed upon a defendant who wishes to waive the public nature of his trial. *Singer*, 380 U.S. at 34-35. And, while *Singer* discusses the various rules for waiver of juries that the states have adopted which address whether the prosecution can object to the waiver of a jury, *Singer* definitely did not hold that the question of whether a defendant's waiver of a jury is sufficient under the Sixth Amendment is a state law question. Similarly, Respondent's citation to *Gannett* is even more misplaced. While *Gannett* is clear that the Sixth Amendment right to a public trial is personal to the accused, the case itself was addressing whether members of the press could override the defendant's right to waive the public nature of his trial when the defendant was affirmatively waiving that right.

a lower court has made a previous ruling that Defendant seeks. Prior to *Brown v. Board of Education*, 347 U.S. 483 (1954), lower courts required only that separate public schools be equal, not integrated, and yet this Court in *Brown* declared for the first time that segregation of the public schools violated the Fourteenth Amendment. In this case, Petitioner ask this Court to do something squarely within its powers and something only this Court can do: declare a national standard for waiver of a Sixth Amendment public trial right that is consistent with the fundamental nature of the right and declare the proper role of waiver or lack thereof in the *Waller* analysis.

This Court has never squarely addressed the issue presented by this case: what precisely is required to waive the fundamental right to a public trial? Is mere silence enough, as in forfeiture of the right, or must the defendant "intentionally relinquish the right," "participate personally in the waiver," what "certain procedures are required for waiver," and must "defendant's choice must be particularly informed or voluntary?" See *Olano*, supra. Contrary to the State's assertions, *Levine v. United States*, 362 U.S. 610 (1960) nor *Peretz v. United States*, 501 U.S. 923 (1991) did not answer the question posed in this case. *Levine*, a case that dealt with contempt proceedings from refusal to testify in a Grand Jury proceeding, plainly stated "Procedural safeguards for criminal contempts do not derive from the Sixth Amendment," and "Inasmuch as the petitioner's claim thus derives from the Due Process Clause and not from one of the explicitly defined procedural safeguards of the Constitution, decision must turn on the particular circumstances of the case, and not upon a question-

begging because abstract and absolute right to a 'public trial.'" *Levine*, 616-617.

Because, as *Olano* states, what is required to waive a right depends on "the right at stake," and because the Sixth Amendment right to a public jury trial is a fundamental right and this Court has never directly answered what is required to waive it, this Court should grant the Petition for Writ of Certiorari in this case and answer that question.

CONCLUSION

WHEREFORE Petitioner respectfully requests this Court to GRANT the Petition for Writ of Certiorari in this case.

Dated: July 5, 2023

Respectfully submitted,

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