No. _____

In The
Supreme Court of the United States

RONALD TAI YOUNG MOON, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

What is the standard for finding a waiver (as opposed to mere forfeiture) of the Sixth Amendment right to a "public trial?" This prominently includes whether such a waiver must be by the defendant personally, or whether actions and inactions only by counsel can waive the right for the defendant.

RELATED CASES

United States v. Moon, 2:19-cr-00324-ACA-HNJ, U.S. District Court for the Northern District of Alabama, Judgment entered Oct. 2, 2020.

United States v. Moon, No. 20-13822, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered May 10, 2022. Moon's Petition for Rehearing *En Banc denied* July 5, 2022.

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Petitioner, Ronald Tai Young Moon, Jr., respectfully prays that a writ of certiorari issue to review the decision and judgment of the U.S. Court of Appeals for the Eleventh Circuit, *U.S. v. Moon*, No 20-13822 (11th Cir. May 10, 2022) *rehearing denied* (11th Cir. July 5, 2022).

OPINIONS BELOW

The opinion of the U.S. Court of Appeals, is reproduced in Appendix A [1a-37a]. *United States v. Moon*,

33 F.4th 1284 (11th Cir. 2022). The order of the U.S. District Court for the Northern District of Alabama, which the Eleventh Circuit affirmed, is reproduced in Appendix B [38a-91a]. The Order of the U.S. Court of Appeals denying Moon's Petition for Rehearing is reproduced in Appendix C. [92a-93a].

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The decision below, affirming the denial of Petitioners' direct appeal, was issued on May 22, 2021. Moon's Petition for Rehearing En Banc was denied July 5, 2022.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const, Amend. VI provides, "[I]n 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."

STATEMENT OF THE CASE

This case involves the Sixth Amendment right to a "public trial," and what it takes for a defendant to be found to have waived that constitutional right such that he simply cannot make an argument about an unwarranted courtroom closure on appeal.

Petitioner, Moon, was charged in federal court with and convicted of creating, attempting to create, and possessing lascivious images on videotapes. "At a conference the day before trial, the government stated that it intended to ask the court to clear the courtroom of non-essential personnel before it played video clips containing nudity." *United States v. Moon*, 33 F.4th 1284, 1293 (11th Cir. 2022) [14a]. The District Court replied, "How about we do this so that I can cut off at the pass their [defense's] objection. Why don't you approach and say, Hey, this is one of those tapes, and we'll do it that way." [*Id.*, 14a]. The District Court thus did not even consider the possibility whether there could be a solution short of clearing the courtroom, such as positioning all video monitors so that this evidence would not be seen by trial spectators. *Compare Presley v. Georgia*, 558 U.S. 209, 214, 130 S. Ct. 721, 724-25 (2010) (court has duty to consider alternatives to closure, even when not suggested by the parties).

The record indicates that, between that pretrial conference and the trial itself, there were discussions between the prosecutors and defense counsel, culminating in some sort of an "agreement." The record does not disclose any consensus on the terms of any such

"agreement." The Court of Appeals declared that the agreement was "(1) . . . to close the courtroom during the display of sensitive evidence and the questioning that would surround that evidence and (2) they would inform the court when closure was appropriate." *Moon*, 33 F.4th at 1293 [14a]. The record support for this declaration by the Court of Appeals, it seems, was a post-trial filing by Moon's counsel stating that "he understood the closure agreement to be limited to portions of the trial involving 'clips of alleged child pornography, attempts to produce child pornography, or sensitive non-child pornography involving adults and the immediate questioning about those clips.'" *Moon*, 33 F.4th at 1296 [21a]. The Court of Appeals thus substituted its phrase "the questioning that would surround that evidence" for "the immediate questioning about those clips." But, as will be seen, that alone was not – not even remotely – the full extent of the problem that developed.

The record does not disclose any reason to believe that defendant Moon, himself, took part in the discussions or in any such "agreement."

The record does not disclose any inquiry at trial by the District Court into what precisely the agreement was, or whether it was justified in whole or in part under cases such as *Waller v. Georgia*, 467 U.S. 39 (1984). The District Court did not take any active role to ensure that any particular closure was justified under *Waller* before closing the courtroom for the playing of any video clip, or that there were no alternatives short of closure, at any time. Nor did the District Court take

any active role in ensuring that the courtroom was reopened promptly after each item of evidence putatively requiring closure was off the video monitors. As the District Court later put it in justification of this latter point, the court "had no way of knowing whether the upcoming testimony would come under the purview of the parties' agreement." [69a]. The District Court thus entirely took a backseat on the issue of courtroom closure. In reality, District Courts certainly do have the power to insist that their courtrooms be open at any moment where there is not a sufficient justification for closing them under *Waller*.

And – importantly for purposes of the question presented to this Court – the District Court made no effort whatsoever to determine whether defendant Moon himself knew that issues involving courtroom closure implicated his Sixth Amendment right to a public trial (as opposed to being just a run-of-the-mill trial-management decision). And the District Court made no effort whatsoever to determine whether Moon himself was knowingly and intelligently waiving his Sixth Amendment right – or, if so, to what degree.

Against this background, with too little attention being paid to the issue of Moon's right to a public trial, things went badly off the rails. The right to a public trial was treated as an afterthought, when it was thought of at all, with no involvement by Moon personally. Even as recounted by the Court of Appeals, there were multiple occasions when – after a video clip had been played during a particular prosecution witness's testimony – the courtroom *remained* closed for the

entire remainder of that witness's testimony on direct and cross. *E.g.*, *Moon*, 33 F.4th at 1293-94 [15a-16a] (recounting this happening with two witnesses on first day of trial); *id.* at 1294 [17a] (recounting this happening with first witness on second day of trial). There were – even as recounted by the Court of Appeals – at least nine witnesses whose testimony took place *entirely* in the closed courtroom – including one whose testimony involved establishing that blank Maxell videotapes traveled in interstate commerce. *Id.* at 1294-95 [18a-19a].

When Moon raised the Sixth Amendment public-trial right on appeal, the United States Court of Appeals for the Eleventh Circuit held that the issue was not reviewable at all – not even for plain error – on the grounds that Moon had "waived" the issue. All of the evidence that the Court of Appeals cited, as "waiver," was action and inaction by Moon's counsel, in failing to object and sometimes more overtly acquiescing or being involved in continuation of courtroom closure beyond anything that was legally necessary. *Moon*, 33 F.4th at 1300 [29a-30a]. There was and is not an iota of evidence that Moon was ever informed that the closure of the courtroom implicated his fundamental constitutional right under the Sixth Amendment, or that he himself did anything to expressly or even impliedly waive that right knowingly and intentionally.

REASONS FOR GRANTING THE PETITION

1. This case presents an important and often-recurring question, of the type that this Court has repeatedly answered as to other constitutional rights in the criminal process, on which there is a split in the lower courts.

This case presents a question that arises in a great number of cases, that has never received a clear answer from this Court, and that has led to a split in the lower courts. It involves the question of what it takes to *waive* a defendant's Sixth Amendment right to a "public trial." The question is about *waiver* – such that the defendant can never be heard to complain at all, not even under "plain error" or any other type of review – as contrasted with mere forfeiture, ordinarily established through a failure to object, which nonetheless allows the possibility of review. *United States v. Olano*, 507 U.S. 725, 733-34 (1993) (distinction between forfeiture and waiver).

The general rule is that waiver of a constitutional right in criminal proceedings must be "knowing" and "intelligent." *Iowa v. Tovar*, 541 U.S. 77, 81 (2004) ("Waiver of the right to counsel, as of constitutional rights in the criminal process generally, must be a 'knowing, intelligent ac[t] done with sufficient awareness of the relevant circumstances.' "), *quoting Brady v. United States*, 397 U.S. 742, 748 (1970). Courts should "indulge every reasonable presumption against waiver," *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937), and should "not presume acquiescence in the

loss of fundamental rights," *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307 (1937).

This case calls upon the Court to consider the extent to which any finding of *waiver* of the foundational constitutional right to a public trial must focus on the defendant himself, as contrasted with finding a waiver solely based on the actions and even inactions of counsel. It is settled that the answer to this question depends on the particular constitutional right at issue. "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." *United States v. Olano*, 507 U.S. 725, 733 (1993).

This Court can, and should, decide what it takes for the Sixth Amendment right to public trial to be waived. This Court has done that for various other rights, and there is a whole body of law to which this Court can and should add the next piece, regarding the "public trial" right in particular.

"As a general matter, where there is a full trial there are various points in the pretrial and trial process when rights either can be asserted or waived; and there is support in our cases for concluding that some of these rights cannot be waived absent the defendant's own consent." *Gonzalez v. United States*, 553 U.S. 242, 247 (2008). "For certain fundamental rights, the defendant must personally make an informed waiver. *See*, *e.g.*, *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938)

(right to counsel); *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966) (right to plead not guilty). For other rights, however, waiver may be effected by action of counsel." *New York v. Hill*, 528 U.S. 110, 114 (2000). "[S]ome basic trial choices are so important that an attorney must seek the client's consent in order to waive the right. *See*, *e.g.*, *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (identifying the choices "'to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal'" as examples . . .)" *Gonzalez*, 553 U.S. at 250-51. Other rights, the Court has held, can be waived through the actions of counsel alone.

On which side of that line does the right to a public trial fall? The existence and the importance of the unsettled question calls for an answer. Petitioner will show in the next section that there is a good argument that the answer should be that this is one of those rights that can be waived only by the defendant himself. But regardless of how the case ultimately is decided on the merits, the question needs an answer.

There is a split in the lower courts on the issue, as seen most starkly by contrasting the decision below with the decision of the Supreme Court of North Dakota in *State v. Martinez*, 2021 ND 42, 956 N.W.2d 772 (N.D. 2021) (involving multiple cases raising the issue of waiver of right to public trial, consolidated for appellate review). (Though that was a case in state court, the Court was considering the federal Sixth Amendment "public trial" right; and the "question of a waiver of a federally guaranteed constitutional right is, of

course, a federal question controlled by federal law." *Brookhart v. Janis*, 384 U. S. 1, 4 (1966).)

The Supreme Court of North Dakota held that the right to public trial can be waived knowingly and intentionally only by the defendant himself.

> We now conclude that the right to a public trial can be waived according to the same standards of knowing, intelligent, and voluntary waiver that we have applied to other Sixth Amendment rights that implicate structural error such as the right to counsel and the right to a jury trial.

Martinez, 2021 ND 42, ¶ 13, 956 N.W.2d at 782. (As noted above, those are among the rights as to which this Court has insisted on a knowing and intentional waiver by the defendant himself.) "The record must reflect the defendant was informed prior to closure that the constitutional right to a public trial was implicated, and there must be an express waiver of that right under circumstances indicating the waiver was voluntary." *Id.*, 2021 ND 42, ¶ 18, 956 N.W.2d at 785. "The court did not inform Moore that he had a right to a public trial. The court did not inquire of Moore to elicit an express waiver of a known right. . . . We conclude this record does not establish a voluntary and intentional relinquishment of Moore's right to a public trial." *Id.*, 2021 ND 42, ¶ 35, 956 N.W.2d at 789-90.

> The record does not reflect a knowing, intelligent, and voluntary waiver. There is no indication that [Martinez] was informed prior to the courtroom closure that he had a

> constitutional right to a public trial. Martinez, through counsel, did confirm he did not object to closing the courtroom and did not oppose the State's request. But nothing indicates knowledge that a constitutional right was implicated and that he was being asked to waive it.

Id., 2021 ND 42, ¶ 47, 956 N.W.2d at 792.

There appears as well to be a split among the federal Courts of Appeal. The Seventh Circuit, according to a fair reading of *Walton v. Briley*, 361 F.3d 431, 433-34 (7th Cir. 2004), seems to hold that any waiver must be done by the defendant personally and that actions or inactions of counsel are not enough to waive the public-trial right. That is, the Seventh Circuit put the public-trial right in the same category as "the right to a trial, the right to a trial by jury, [and] the right to an attorney" in terms of what is required for waiver. *Id.* at 434. *Walton* has been recognized as splitting from other Circuits in this regard, and it has been recognized that the split comes in the absence of a clear answer from this Court. *McKinnon v. Ryan*, Civil Action No. 14-12005-PBS, 2017 U.S. Dist. LEXIS 125202, at *17 & n.4 (D. Mass. Apr. 11, 2017) (noting that "other circuit courts have split on whether "waiving the right to a public trial requires the defendant's personal assent," citing *Walton*, and noting the absence of "clearly established Supreme Court law on whether the right to a public trial is waivable by counsel").

With this split in the lower courts – and especially with the recognition that this is an issue that recurs

with frequency, *see Martinez*, 2021 ND 42, ¶ 2, 956 N.W.2d at 779 (noting "the increasing frequency with which closure orders have been entered in the trial courts and then argued to us on appeal") – an answer from this Court is needed.

The context in which this case presents the issue, as further detailed in the Statement above, makes it a particularly apt case for addressing the extent to which "the defendant must participate personally in the waiver"; *Olano*, 507 U.S. at 733. The context is that, in advance of this criminal trial, there were discussions between the prosecutors and the defense counsel, the precise nature of which the record does not disclose, about the closure of the courtroom during some parts of the trial. The lower courts opined that those conversations resulted in an "agreement," but the terms of the agreement are not disclosed in the record; nor is there evidence that defendant Moon personally took part in any such agreement. The District Court neither inquired into what specific "agreement" allegedly had been reached, nor – so far as the record reflects – made any independent judgment or findings about the propriety of, or extent of, courtroom closures, or about whether there were alternatives short of closure that would adequately serve the purpose.

And what happened *repeatedly* was that, once a video had been played to a closed courtroom, no one – not the prosecutor, not the District Court, and not defense counsel – made sure to reopen the courtroom promptly each time. So, the courtroom remained closed for lengthy additional stretches amounting

cumulatively to hours, without any justification whatsoever other than perhaps that the District Court and the lawyers did not burden themselves to keep having the audience brought in and out. The District Court explained its inaction in reopening the courtroom by saying (in a post-trial ruling) that it "had no way of knowing whether the upcoming testimony would come under the purview of the parties' agreement." [69a]. The District Court, satisfied in not knowing the terms of any "agreement" between the parties, thus failed to actively involve itself in ensuring that the courtroom was open as much as possible.

The Court of Appeals rejected Moon's Sixth Amendment argument on appeal on the basis of "waiver." And in so doing, the Court of Appeals found "waiver" in the actions and inactions of counsel alone. There is no hint that the defendant himself made a knowing and intelligent waiver of the right to have the courtroom open at any time – certainly not during the times when a tape had been played and there was no continuing justification for the closure other than mere convenience.

Frankly, it appears that the prosecutors and the District Court itself were not being sufficiently "knowing and intelligent" about this ongoing issue, in the sense of realizing that this was an issue that involved considerations far greater than their convenience. And there is, therefore, no basis for saying that the defendant himself made a "knowing and intelligent" waiver of the constitutional right at stake, when it appears that the prosecution and the trial court either were not

realizing that there was an issue in failing to reopen the courtroom promptly in an effort to uniquely tailor the closures to be no greater than necessary, or were subordinating the issue to a sense of convenience. To say that the defendant was making a knowing and intelligent decision, when the prosecutor and the trial court seemingly were not, is untenable.[1]

An answer to the question as presented in this case will give guidance to courts handling cases involving other factual contexts as well. In every case in which there is an arguably good reason for a partial closure of the trial during the presentation of particular evidence, an answer to the question in this case will guide all lower courts about how to handle the matter to see whether the defendant – and not merely his or her counsel – concurs in a prosecutor's proposal for partial closure.

2. The right to a public trial – the right not to have the courtroom closed without actual necessity – is one of those rights that can be waived only by the defendant, and not merely by his counsel.

There is good reason to conclude that the Sixth Amendment right to a public trial is a right waivable

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[1] Included within the question presented, and available as a possible avenue to decision in this case, would be whether the actions of defense counsel even amounted to a wholesale "waiver" of objection to all of the courtroom closures, as contrasted with a mere "forfeiture" that would, nonetheless, leave the issue subject to some level of appellate review.

only by the defendant himself. Putative waiver by counsel is not enough.

Part of the reason for this conclusion is the importance, both historical and contemporary, of the right. The right to a public trial is among the "highly exceptional category of structural errors." *Greer v. United States*, 141 S. Ct. 2090, 2100 (2021) (internal quotation marks omitted). Its historical and contemporary importance – both for the sake of the defendant in the individual trial, and also for the press and for the community at large – is enormous.

> The open trial thus plays as important a role in the administration of justice today as it did for centuries before our separation from England. The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

Press-Enterprise Co. v. Superior Court of Cal., 464 U.S. 501, 508 (1984) (emphasis in original).

> [T]he historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open. This is no quirk of history; rather, it has

> long been recognized as an indispensable attribute of an Anglo-American trial. Both Hale in the 17th century and Blackstone in the 18th saw the importance of openness to the proper functioning of a trial; it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality.

Richmond Newspapers v. Virginia, 448 U.S. 555, 569 (1980). Both the history and the contemporaneous importance are further discussed at length in the *Brief of Amicus Curiae National Association of Criminal Defense Lawyers in Support of Petitioner* in *Weaver v. Massachusetts*, No. 16-240.

It may be true that appeals to the right's importance may take us only so far. Decisions of this Court, regarding how the line is drawn between rights that can be waived by counsel alone and rights that cannot, may be read as relying on a more functional distinction. This is seen, for instance, in *Gonzalez*, 553 U.S. at 248-51, and its discussion of *Hill*, 528 U.S. at 114-15.

These portions of *Gonzalez* and *Hill* seem to draw a functional line between the things that in some sense "should" be left up to the lawyers and the things that "shouldn't." The things that are left up to the lawyers, under a fair reading of *Gonzalez*, are the things that meet these criteria: (1) they are things that should be up to the lawyer because the lawyer is much more likely to make an appropriate decision and it may be

hard to explain to the client (what might be called the "relative competence" question);[2] and (2) they are things as to which explaining to the client, and getting the client's position on the record, would take up too much time and cause too much burden during trial or trial-preparation (what might be called the "time consumption" question).[3] Nonetheless, it remains true after *Gonzalez* that there is no rule that everything that happens during trial is up to the lawyer rather than the client. For instance, the decision whether to

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[2] As stated in *Gonzalez*:

> Numerous choices affecting conduct of the trial, including the objections to make, the witnesses to call, and the arguments to advance, depend not only upon what is permissible under the rules of evidence and procedure but also upon tactical considerations of the moment and the larger strategic plan for the trial. These matters can be difficult to explain to a layperson; and to require in all instances that they be approved by the client could risk compromising the efficiencies and fairness that the trial process is designed to promote. In exercising professional judgment, moreover, the attorney draws upon the expertise and experience that members of the bar should bring to the trial process. In most instances the attorney will have a better understanding of the procedural choices than the client; or at least the law should so assume.

Gonzalez, 553 U.S. at 249-50 (2008).

[3] "Giving the attorney control of trial management matters is a practical necessity. 'The adversary process could not function effectively if every tactical decision required client approval.' *Taylor v. Illinois*, 484 U.S. 400, 418 (1988)." *Gonzalez*, 553 U.S. at 249. "Requiring the defendant to consent to a magistrate judge only by way of an on-the-record personal statement is not dictated by precedent and would burden the trial process, with little added protection for the defendant." *Id.* at 253.

testify – a trial decision, to be sure, and one that cannot be made wisely and finally until the moment arrives – is up to the client personally. *Gonzalez*, 553 U.S. at 250-51.

If this is the dividing line, then whether to waive the right to a public is a decision that should remain with the client, whose constitutional right is at stake.

As to the "relative competence" factor, among the myriad decisions that are made before and during a trial, deciding whether to waive the right to a public trial is one of the decisions on which the client's competence is likely just as good as the lawyers. And if the lawyer has reasons for suggesting to his client that the right should be waived, those reasons will not be hard to explain. (They will be much easier to explain, for instance, than whether for instance to object to certain testimony under the Confrontation Clause – or whether to let the testimony in without objection and then try to walk through some door that the testimony opened.)

Moreover, whether to object to a proposed trial closing is actually a thing – much more than most – on which the defendant may well have absolutely legitimate interests that are not shared by his counsel. On this point, we cannot do better than to quote from amicus brief of the NACDL as cited above:

> It bears remembering that defendants and their families often have an interest in keeping the courtroom open even when defense counsel does not. Just as public scrutiny keeps

> judges and prosecutors on their toes, it does the same for defense lawyers. Most criminal defendants have counsel appointed for them. Their lawyers are strangers they are meeting for the first time. Defendants and their families are well aware that the source of their lawyer's paycheck is the same government that employs the prosecutor and the judge. They know that defense counsel works each day with the prosecutor and the judge in the same courtroom. Defendants and their families sometimes harbor suspicions that appointed counsel's true allegiance is to the court or to the government rather than to the defendant.
>
> A public trial allows the defendant's family and friends to see that defense counsel is in their corner, working for the defendant rather than for the government. If defense counsel were allowed to forfeit the right to a public trial without the defendant's affirmative waiver, the defendant's community could hardly be faulted for viewing the forfeiture as evidence of collusion between defense counsel and the prosecutor, for the purpose of keeping defense counsel's conduct out of sight. If trials could be closed without the defendant's affirmative consent, trials would thus lack "the appearance of fairness so essential to public confidence in the system." *Press-Enterprise*, 464 U.S. at 508.

Brief of Amicus Curiae National Association of Criminal Defense Lawyers in Support of Petitioner in *Weaver v. Massachusetts*, No. 16-240, pp. 14-15.

As to the "time consumption" factor, the most critical fact is this: *any order closing a courtroom during a criminal trial is already supposed to be a thing that requires some time, focus, and deliberation on the court's part, including thought about the public interest in openness*. An order closing a courtroom is not just one more of the hundreds of split-second decisions that occur on all sides, and at the bench, during a criminal trial. It is, as discussed above, a thing that impacts the public's interest as well as the defendant's own immediate interest as expressed through his counsel. "The early history of open trials in part reflects the widespread acknowledgment, long before there were behavioral scientists, that public trials had significant community therapeutic value." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 570 (1980) (plurality). And closing a courtroom to the public is, under this Court's decisions, a thing that requires thought and care. A mere lack of objection, following a prosecutorial request to close the courtroom, is not supposed to make it a simple or immediate decision. "The public has a right to be present whether or not any party has asserted the right." *Presley v. Georgia*, 558 U.S. 209, 214, 130 S. Ct. 721, 724-25 (2010). And a court has the duty to consider alternatives short of actual closure, even if no party has suggested such an alternative. *Id.* A trial court is simply not supposed to close the courtroom during a criminal case, without finding an overriding justification, considering alternatives, and making factual findings to justify the closure. *Id.*

So, the "time consumption" factor must be considered in light of all this. Closure of a courtroom is supposed to be an issue that makes the trial court take some reasonable amount of time, out of the rush of split-second tactical decisions by counsel and quick rulings from the bench, to make an appropriate decision. If a trial court then also wants to see if the defendant personally will waive any objection to the closure of the courtroom, that process will add relatively little time and effort to what should already be a carefully considered and at least moderately time-consuming and important decision by the trial court. (Or, of course, the trial court could avoid spending any such time at all, by simply making its ruling and not trying to secure from the defendant a personal waiver of the right to object, leaving the defendant with at least a potential issue on appeal.)

The "relative competence" and "time consumption" factors, at least, do not weigh so heavily in favor of making this into a lawyer decision, to allow counsel to waive the right for the client. After all, one could quite readily say that those factors are present even as to the decision whether to testify in one's own defense: lawyers probably have a better sense of how it will go than most clients do, and it takes a good bit of time to properly counsel a client about it. Yet the right to waive or not waive remains with the client. Here, as to the public-trial right, the lawyer is not markedly better positioned than the client to make a decision, and the time involved in discussion with the client will likely

be less as to this issue than in the question whether to testify.

There is, therefore, a substantial argument that waiver of the Sixth Amendment right to a "public trial" requires a waiver – knowing and intentional – by the defendant himself or herself. Recognizing this principle would protect the foundational constitutional right to a public trial, without unduly burdening the trial process and without embroiling the defendant in decisions that are (perhaps) too hard for most clients to understand.

Moreover – to make the stakes and the consequences clear – it is useful to reiterate that a lack of waiver by the defendant himself, in a given case, does not mean that the courtroom cannot be closed. The trial court remains free to make the decision it believes to be correct under the law (after paying more attention to the matter than the District Court did here). The consequence of a lack of waiver is merely that the defendant may raise the issue on appeal, and the appellate court can then make an appellate decision under whatever is the appropriate standard of review. In this sort of case, a finding of purported "waiver" by counsel alone functions primarily at the trial court level as a reason to pay too little attention to the "public trial" right, and at the appellate level as a rationale for avoiding appellate review of such errors. Involving the defendant in the process will, if anything, help

focus the trial courts on the importance of the issue at stake.

CONCLUSION

There is plainly a split in the Circuits, and an even wider divergence of law and practice in the District Courts; and the answer to the question presented will have a material impact and provide much needed guidance to the lower courts handling this increasingly present issue. For the reasons stated herein, this Court should grant review of the decision below.

Respectfully submitted,

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