No. _____

In The
Supreme Court of the United States

THOMAS MICHAEL DIXON,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

QUESTION ONE: Should *Crawford* be a one-way street? Contrary to *Hemphill v. New York*, __ U.S. __, 142 S. Ct. 681, 692-93, 211 L.Ed.2d 534 (2022), the trial court permitted the prosecution to admit testimony of a non-testifying party's hearsay confession, implicating Petitioner, while denying the Petitioner an opportunity to present that same party's repeated recantations.

QUESTION TWO: The Texas Court of Criminal Appeals has consistently applied a sufficiency of the evidence test for constitutional error in contravention of *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967). This case presents an opportunity to rectify the Texas Court's **persistent** refusal to follow this Court's clear and unambiguous Constitutional commands.

QUESTION THREE: There is a compelling need to resolve the conflict between federal and state courts as to what constitutes a closed courtroom. Here, the Texas Court of Criminal Appeals held that the trial court's total closure of the courtroom during a hearing regarding critical *Crawford* and *Brady* issues was "trivial," without assessing any of the factors set out in *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L.Ed.2d 31 (2010).

PARTIES TO THE PROCEEDING

Parties to the preceding are:

At both trials The State of Texas was the Plaintiff and Thomas Dixon was the Defendant.

On direct appeal Thomas Dixon was the Appellant and The State of Texas was the Appellee.

On the first Petition for Discretionary Review The State of Texas was the Petitioner and Thomas Dixon was the Respondent.

At the appeal on remand Thomas Dixon was the Appellant and The State of Texas was the Appellee.

On the second Petition for Discretionary Review Thomas Dixon was the Petitioner and The State of Texas was the Respondent.

STATEMENT OF RELATED CASES

State of Texas v. Thomas Dixon, Cause No. 2012-435, 942, 140th District Court of Lubbock County, Texas. Judgment entered on November 18, 2015.

Thomas Dixon v. State, No. 07-16-00058-CR, Seventh Court of Appeals of Texas. Conviction reversed on December 13, 2018.

State of Texas v. Thomas Dixon, PD-0048-19, Texas Court of Criminal Appeals. Judgment reversing the court of appeals entered on January 15, 2020.

Thomas Dixon v. State, No. 07-16-00058-CR, Seventh Court of Appeals of Texas. Judgment affirming conviction on remand entered on January 13, 2022.

STATEMENT OF RELATED CASES—Continued

Thomas Dixon v. State, No. PD-0242-22, Texas Court of Criminal Appeals. Petition for Discretionary Review refused on August 24, 2022.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully requests that this Court issue a Writ of Certiorari on the questions presented.

OPINIONS BELOW

Dixon v. State, 595 S.W.3d 216 (Tex. Crim. App. 2020).

Dixon v. State, No. 07-16-00058-CR (Tex. App.—Amarillo Jan. 13, 2022, modified r'hrg denied) (Amarillo, Apr. 25, 2022, pet. ref'd).

JURISDICTION

The second Petition for Discretionary Review was refused by the Texas Court of Criminal Appeals on August 24, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to a public trial, [and] to be confronted with the witnesses against him." U.S. CONST. amend. VI.

The Fourteenth Amendment to the United States Constitution provides in pertinent part, "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." U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

Petitioner received two trials. During the first trial, in 2014, the jury deadlocked, and a mistrial was granted. *State of Texas v. Thomas Dixon* (Cause No. 2012-435, 942).

After a second trial in 2015, Petitioner was convicted and filed a Motion for New Trial which was denied.

On appeal, the Texas Seventh Court of Appeals reversed the conviction on the grounds that Petitioner was denied a public trial when the courtroom was improperly closed to the public and because the State used cell phone location data obtained without a warrant. Having reversed on these issues, the Seventh Court of Appeals did not rule on any issues that were raised. *Dixon v. State*, No. 07-16-00058-CR (Tex. App.—Amarillo Dec. 13, 2018) Appendix at 88. The State filed a Petition for Discretionary Review with the Court of Criminal Appeals which was granted. The Court of Criminal Appeals reversed the Seventh Court of Appeals and remanded the case for decisions on the remaining issues not addressed by the Court of Appeals

on the previous appeal. *Dixon v. State*, 595 S.W.3d 216 (Tex. Crim. App. 2020) Appendix at 65.

On remand, the Court of Appeals decided all remaining issues, including the questions here presented and sustained the conviction. *Dixon v. State*, No. 07-16-00058-CR (Tex. App.—Amarillo Jan. 13, 2022) Appendix at 1. Petitioner requested a rehearing of the Seventh Court of Appeals' decision, which was denied.[1] Petitioner then again petitioned the Court of Criminal Appeals for discretionary review which was denied. *In re Dixon*, No. PD-0242-22 (Tex. Crim. App. Aug. 24, 2022) Appendix at 141.

Factual Background

The prosecution's theory was that Petitioner, Dr. Michael Dixon, planned and paid David Shepard to kill Dr. Joseph Sonnier. At the first trial the prosecution called Shepard as a witness. However, he testified at that first trial that "[Dixon] did not pay [him] to kill Dr. Sonnier." 3SCR Volume 1, 2481. At the second trial, the State listed Shepard as a prosecution witness, however they did not call him to testify. Instead, the prosecution introduced Shepard's out-of-court admissions through a police detective,[2] and

[1] However, the Court of Appeals corrected some factual matters in its opinion. *See Dixon v. State*, No. 07-16-00058-CR (Tex. App. Jan. 13, 2022) and *Dixon v. State*, No. 07-16-00058-CR (Tex. App. Apr. 25, 2022).

[2] Lubbock, Texas Police detective Zachariah Johnson.

Shepard's roommate,[3] that he had killed Dr. Sonnier, and that Petitioner had paid, planned, and participated in the murder. The Judge admitted this hearsay over objection, however, the court recognized that if the State did not call Shepard as a witness, subject to cross-examination, there would be "a big problem."

> **Defense Counsel: "Judge they're doing everything in their power to introduce hearsay. Violation of confrontation." (3SCR Volume 1, page 457).**
>
> **The Court: "Well, all of these with regard to the hearsay issue are** *predicated in the fact that if the state doesn't call Mr. Shepard there's a big problem*." **Emphasis supplied (3SCR Volume 1, 1365).**

Despite the fact that the State did not call Shepard to testify at the second trial, the court allowed the unconfronted hearsay testimony of Shepard's confession implicating Petitioner into evidence, and thereafter denied Petitioner's repeated attempts to offer testimony of Shepard's numerous recantations, including a videotaped recantation of Petitioner's involvement to the prosecutor just two weeks before trial, 7R143-45, and his prior testimony at Petitioner's first trial that Petitioner did not pay for, help, plan, nor participate in the killing of Dr. Sonnier, 15R45; 17R19.

Thereafter, when defense counsel attempted to cross-examine Detective Johnson as to whether Shepard had recanted his statements to curry favor with

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[3] Paul Reynolds.

Detective Johnson, the trial court sustained the prosecution's hearsay objection. 7R146-7. During this exchange, at the end of that trial day, the Court cleared the courtroom of any and all spectators for the discussion of the *Crawford* and *Brady* issues confronting the Court. Counsel properly objected to the closure as a denial of Petitioner's right to a public trial based on *Presley v. Georgia*, 558 U.S. 209, 130 S. Ct. 721, 175 L.Ed.2d 675 (2010). At the closed hearing, the defense attempted to enter Shepard's multiple recantations to impeach the statements admitted against Petitioner in violation of his Sixth Amendment right to confrontation.

The Court of Appeals, in its first opinion, noted that the State agreed that *Carpenter v. United States*, 138 S. Ct. 2206, 201 L.Ed.2d 507 (2018) was retroactive when it reversed Dixon's conviction for illegally obtained cell site location data. "We believe the holding of the Court's *Carpenter* opinion is controlling and applies retroactively, a conclusion the parties do not dispute. . . ." *Dixon v. State*, No. 07-16-00058-CR (Tex. App.—Amarillo Dec. 13, 2018) Appendix at 111.

On the State's Petition for Discretionary Review, the Court of Criminal Appeals in defiance of this Court's opinion in *Chapman*, reviewed this Constitutional structural error under a sufficiency of the evidence analysis, finding that while the evidence affected the verdict, its effect was slight, and affirmed the conviction, remanding the case to the Court of Appeals to consider the remaining points of error.

ARGUMENT

QUESTION ONE: Should *Crawford* be a one-way street? Contrary to *Hemphill v. New York*, __ U.S. __, 142 S. Ct. 681, 692-93, 211 L.Ed.2d 534 (2022), the trial court permitted the prosecution to admit testimony of a non-testifying party's hearsay confession, implicating Petitioner, while denying the Petitioner an opportunity to present that same party's repeated recantations.

The case against Petitioner was built entirely on out-of-court, unconfronted hearsay statements made by the actual killer, David Shepard, to Lubbock, Texas police Detective Zachary Johnson[4] and Shepard's roommate, Paul Reynolds, who was a crime stoppers tipster.[5] The prosecution's theory was that Petitioner, Dr. Michael Dixon, planned and paid David Shepard to kill Dr. Joseph Sonnier.

At the Petitioner's first trial, which resulted in a hung jury, the State called Shepard to testify against Petitioner. Shepard had given a prior statement to the

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[4] Shepard testified under cross-examination at Petitioner's first trial that resulted in a hung jury, that this was a fabrication to curry favor with the authorities in order to avoid the death penalty. By depriving Petitioner of the opportunity to cross-examine Shepard at Petitioner's second trial, and offering only his hearsay statement, the prosecution deprived the second jury of critical information regarding Petitioner's guilt.

[5] Shepard testified at Petitioner's first trial that it was his roommate, Paul Reynolds, not Petitioner, who discussed plans to murder Dr. Sonnier. 9R127, 3SCR Volume 1, 2561. By depriving Petitioner of the opportunity to cross-examine Shepard at the second trial, this factor, bearing on Reynolds' credibility, was never heard by the second jury.

authorities, implicating Petitioner in the murder of Dr. Sonnier.[6] However, Shepard surprised the prosecution, testifying that "Dr. Dixon and [he] never once had a conversation about physically hurting or killing anyone," *see* 3SCR Volume 1, 2278, that Petitioner "did not pay [him] to kill Dr. Sonnier," and that Petitioner did not want Dr. Sonnier "to be harmed in any way." 10R8, 3SCR Volume 1, 2481. Under cross-examination by the defense at Petitioner's first trial, Shepard testified that his statement implicating Petitioner was a fabrication, designed to curry favor with the prosecution.[7] In fact, he testified at the first trial that he understood that his testimony exculpating Petitioner might be construed as a violation of his plea agreement, exposing him to again face the death penalty. *See* 10R8-9, 3SCR Volume 1, 2481.[8]

However, because the State understandably did not call Shepard to testify at Petitioner's second trial, the State was able to convince the trial court that Petitioner had "opened the door" to the inculpatory, out-of-court hearsay statements,[9] while at the same time

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[6] In that out-of-court statement to Detective Johnson, Shepard stated that Petitioner had planned and paid for Dr. Sonnier's murder.

[7] Shepard further testified at the Petitioner's first trial that his lawyers advised him that "it was better" for him to testify against Petitioner and take "life without parole for the benefit of [his] children," telling him to "sell it." 3SCR Volume 1, 2202.

[8] Had Petitioner been permitted to put on that prior exculpatory testimony it would have come with considerable gravitas.

[9] The trial court at Petitioner's second trial ruled that by questioning Detective Johnson as to unrelated issues regarding the other prosecution witness, Paul Reynolds' credibility, Petitioner had invited or opened the door to violations of Petitioner's

sustaining the prosecutor's hearsay objections to Shepard's prior testimony regarding his motive for telling a false story implicating Petitioner in order to avoid the death penalty, and any of his numerous subsequent recantations to law enforcement, including a video of him recanting his inculpatory statements to the prosecutor "just two weeks" before Petitioner's second trial.[10]

Thus, by failing to call Shepard at Petitioner's second trial the State managed to avoid Shepard's expected exculpatory testimony, admit his inculpatory hearsay statements, while at the same time deprive Petitioner of his Constitutional right to confront or even adequately impeach Shepard's out-of-court hearsay statements with his numerous recantations.

Crawford's guarantees cannot be such a one-way street. If anything, the Sixth Amendment right to Confrontation should provide greater benefit to the accused than the prosecution. After all, the text of the Sixth Amendment literally guarantees the right of confrontation only to the "accused," and as Justice Scalia noted in *Giles v. California*:

> [T]he confrontation guarantee limits the evidence a State may introduce without limiting

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Confrontation rights. *See Contra Hemphill v. New York*, No. 20-637, at *2 (Jan. 20, 2022) and fuller discussion hereafter.

[10] For example, when defense counsel attempted to inquire regarding a video recording of an interview with prosecutor Matt Powell "as recently as two weeks ago," in which Shepard recanted his statements implicating Petitioner, *see* 5R17, counsel for the State's hearsay objection was immediately sustained by the trial court. 7R142.

> the evidence a defendant may introduce. . . . Just as it is true that the State cannot decline to provide testimony harmful to its case or complain of the lack of a speedy trial. The asymmetrical nature of the Constitution's criminal-trial guarantees is not an anomaly, but the intentional conferring of privileges designed to prevent criminal conviction of the innocent. The State is at no risk of that.

Giles v. California, 554 U.S. 353, 376, n.7, 128 S. Ct. 2678, 171 L.Ed.2d 488 (2008).

Again, the State's case against Petitioner at his second trial was based almost entirely on the hearsay statements made after Shepard entered a plea agreement promising him that he would not face the death penalty. However, when Shepard testified at Petitioner's first trial, he completely exonerated Petitioner, and he repeatedly recanted his hearsay admissions to Detective Johnson and Paul Reynolds.[11]

Here, the State argued,[12] and the Court of Appeals held,[13] that Petitioner had "opened the door" to these out-of-court hearsay statements offered in contravention of *Crawford v. Washington*, by its cross of

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[11] In fact, in those initial conversations Shepard told Detective Johnson "that Mike Dixon [Petitioner] had nothing to do with" Sonnier's murder and that he had "repeatedly said that Mike Dixon did not pay him for a murder." 7R139.

[12] The prosecutor successfully argued in the trial court that Petitioner had "opened the door" allowing the admission of "otherwise inadmissible evidence" in order to cure "a false impression." 16R109.

[13] *See Dixon v. State*, Appendix 23-24.

Detective Johnson relating to the credibility of the other State's witness, Paul Reynolds; allowing the prosecution to correct what the Court described as a misleading impression. *See Dixon v. State*, Appendix 23-24.[14]

When confronted with this very argument in *Hemphill v. New York*, No. 20-637, at *1 (Jan. 20, 2022),[15] this Court made clear that when it comes to the Constitutional right of confrontation, there are no such exceptions to the Constitutional requirement of confrontation.

> The Sixth Amendment speaks with . . . clarity: 'In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.' It *admits no exception* for cases in which the trial judge believes unconfronted testimonial hearsay might be reasonably necessary to correct a misleading impression. Courts may not overlook its

[14] The defense had asked Detective Johnson if Shepard had implicated Reynolds, and then had him confirm that he was not able to rule that out. The court of appeals claimed that this opened the door because the state needed to correct the misleading questioning of Johnson. Rather, as noted in *Crawford*, that would best be accomplished in the "crucible" of cross-examination.

[15] There the trial court had "reasoned that Hemphill's arguments and evidence had 'open[ed] the door' to the introduction of these testimonial out of court statements, not subjected to cross-examination, because they were 'reasonably necessary' to 'correct' the 'misleading impression' Hemphill had created." *See Hemphill v. New York*, at *1.

> command, no matter how noble the motive. (emphasis supplied).

Hemphill v. New York, at *12.

This Court went on to reject the notion that the trial judge may admit "unconfronted testimonial hearsay . . . simply because the judge deemed [the defendant's] presentation to have created a misleading impression."

> The trial court here violated this principle by admitting unconfronted, testimonial hearsay against Hemphill simply because the judge deemed his presentation to have created a misleading impression that the testimonial hearsay was reasonably necessary to correct. For Confrontation Clause purposes, it was not for the judge to determine whether Hemphill's theory that Morris was the shooter was unreliable, incredible, or otherwise misleading in light of the State's proffered, unconfronted plea evidence. Nor, under the Clause, was it the judge's role to decide that this evidence was reasonably necessary to correct that misleading impression. Such inquiries are antithetical to the Confrontation Clause.

Hemphill v. New York, __ U.S. __, 142 S. Ct. 681, 692-93, 211 L.Ed.2d 534 (2022).

The Texas Seventh Court of Appeals also held that Shepard's statements did not violate petitioner's confrontation rights because they were "non-testimonial" in nature. *See Dixon v. State*, No. 07-16-00058, *17 (Tex. App.—Amarillo Jan. 13, 2022, pet. ref'd).

However, Shepard's statements to Detective Johnson, implicating and laying blame off on another to curry favor with the authorities are accusatory and constitute the very essence of that "core class of 'testimonial' statements" described in *Crawford*, 541 U.S., at 51. And the fact that Shepard simultaneously may have made similar accusatory statements to his roommate and crime-stoppers tipster, Paul Reynolds, does not render the Confrontation Clause inapplicable simply because Reynolds was not law enforcement. In fact, one of the historical examples relied upon in *Crawford* as the origin of "testimonial" statements was Lord Cobham's "letter" admitted at the trial of Sir Walter Raleigh. *See Crawford*, 541 U.S., at 43-44.

More importantly, Paul Reynolds is not just some innocent family member or bystander as described by the Texas Seventh Court of Appeals. Remember that at the first trial, where Petitioner had the opportunity to confront and cross-examine Shepard, it was Paul Reynolds who Shepard testified had tried to "encourage [him] to commit this crime," 10R88, 3SCR Volume 1, 2561. This called into question Reynolds' motives and credibility, something Petitioner was unable to do at the second trial, where Shepard was not available for cross-examination.

Moreover, the Texas Court of Appeals' suggestion that Shepard's statements to Reynolds, laying some of the blame off on Petitioner "were admissible as statements against interest," citing Rule 803(24) of the Texas Rules of Evidence, ignores *Crawford's* basic thesis, that the Constitutional right to confrontation

trumps any evidentiary rule. This Court in *Crawford* specifically rejected the notion that "self-inculpatory" statements constitute exceptions to the right of confrontation. *See Crawford*, 541 U.S., at 61.

Again, as this Court held in *Crawford*, "[w]here testimonial statements are involved we do not think the framers meant to leave the Sixth Amendment's protection to the rules of evidence, much less to amorphous notions of 'reliability.' " *See Crawford v. Washington*, 541 U.S., at 40.

Importantly, here the State made no showing that Shepard was unavailable, it was obvious that the prosecution wanted to be spared having him exculpate Petitioner again at the second trial, and Petitioner had no duty or obligation to call him. As this Court made clear in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324, 129 S. Ct. 2527, 2540, 174 L.Ed.2d 314, 330 (2009):

> [T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses, *not on the defendant* to bring those adverse witnesses into court. *Melendez-Diaz v. Massachusetts*, 557 U.S., at 324 (emphasis supplied).

Here, the State was permitted to use uncross-examined testimonial hearsay statements made by the actual killer, David Shepard through Detective Johnson, and Shepard's roommate, Paul Reynolds, while denying Petitioner the opportunity to offer continuing and repeated recantations. *See Giles v. California*, 554 U.S. 353, 376, n.7 (2008) (if there is to be a disparity

with respect to the Constitutional right of confrontation it should work in the defendant's favor).

The decision below construes the Confrontation Clause to provide greater rights to the prosecution than to the defense, when precisely the opposite should be the case.

The Texas Seventh Court of Appeals denied Petitioner's motion for rehearing after this Court decided *Hemphill*. Yet the Texas Court of Appeals concluded, in contravention of *Hemphill*, that Petitioner had "opened the door" allowing the State's admission of hearsay statements in violation of the Confrontation Clause.

Such a ruling turns *Crawford* on its head, allowing the prosecution to violate an accused's Sixth Amendment right to confrontation, while depriving the accused of that same advantage. Such a result has the "asymmetry" of Constitutional rights backwards, placing the State's access to unconfronted statements above the citizens'. The Court should grant certiorari and address this troublesome issue.

QUESTION TWO: The Texas Court of Criminal Appeals has consistently applied a sufficiency of the evidence test for Constitutional error in contravention of *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967). This case presents an opportunity to rectify the Texas Court's persistent refusal to follow this Court's clear and unambiguous Constitutional commands.

The test for Constitutional error requires the beneficiary of the error to prove beyond a reasonable doubt that it had no effect on the verdict. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824 (1967) (expressly holding that the formulation of a test for harmless error with respect to federal Constitutional rights cannot be left to the states, at p. 21, and that the burden is on the beneficiary of the error to prove same, at p. 24).[16]

The Texas Court of Criminal Appeals has spoken about the *Chapman* test on numerous occasions over the years[17] and has reached the conclusion that this Court has changed the test as well; asserting that in *Harrington v. California*, 395 U.S. 250, 89 S. Ct. 1726, 23 L.Ed.2d 284 (1969) this Court applied a sufficiency of the evidence test to determine harm by stating the evidence supporting the conviction was overwhelming. *Mallory v. State*, 752 S.W.2d 566, 568 (Tex. Crim. App.

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[16] *See generally* 1 Wigmore, Evidence § 21 (3d ed. 1940).

[17] "The *Chapman* test for harmless error, however, has experienced numerous semantic modifications." *Mallory v. State*, 752 S.W.2d 566, 569 (Tex. Crim. App. 1988).

1988). Thus, rather than focusing on whether the error contributed to the verdict or whether the beneficiary of the error disproved its effect on the verdict beyond a reasonable doubt as required by this Court's decision in *Chapman*, Texas' highest Criminal Court has decided in this case that the erroneously admitted evidence had little effect on the verdict, without requiring the State to bear any burden to disprove an effect on the verdict beyond a reasonable doubt.

In this case, the Constitutional error was admission of cell site location data obtained in violation of the Fourth Amendment. The Texas Seventh Court of Appeals had originally reversed Dixon's conviction applying the *Chapman* test. *Dixon v. State*, No. 07-16-00058-CR (Tex. App.—Amarillo Dec. 13, 2018) Appendix at 127. Reversing the Texas Seventh Court of Appeals, the Court of Criminal Appeals applied a sufficiency of the evidence test and reversed the Court of Appeals, finding that the effect on the verdict was slight; i.e., it was not a "significant pillar of the State's case." *Dixon v. State*, 595 S.W.3d 216 (Tex. Crim. App. 2020) Appendix at 71. On discretionary review the Texas Court of Criminal Appeals agreed that it was error and then conducted what amounted to a sufficiency of evidence analysis, mistakenly finding that Petitioner's testimony placed him in the same town as the CSLI, when in fact it put him in a town one hour away.

In *Harrington*, this Court noted that, unlike the instant case, the defendant there had admitted he was at the scene, and therefore the erroneously admitted non-testifying co-defendants' hearsay was merely

"cumulative." This Court further found that "apart from" the erroneously admitted hearsay statements, the evidence against the defendant was overwhelming. *Harrington*. 395 U.S., at 254. Here, the State's case against Petitioner was based almost entirely upon the two out-of-court, hearsay statements related by Johnson and Reynolds.

Similarly, the Texas Rules of Appellate Procedure do not assign the burden of disproving the effect of Constitutional error on the verdict to the beneficiary of the error. *See also Davis v. State*, 203 S.W.3d 845 (Tex. Crim. App. 2006). It requires the Court to determine the effect of the error on the "conviction or punishment."[18] This inquiry does not appear to be focused on the effect of the error on the jury's determination but on appellate review of evidence in support of the conviction.

The Texas Court of Criminal Appeals and Texas Rules of Appellate Procedure have diminished Constitutional error to the equivalent of non-Constitutional error. In *Saylor v. State*, 660 S.W.2d 822 (Tex. Crim. App. 1983), the Court of Criminal Appeals found the circumstantial evidence "overwhelming" and therefore its erroneous admission harmless beyond a reasonable doubt. *Saylor* placed no requirement on the State to

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[18] "**(a)** *Constitutional Error*. If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the Court of Appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment." Tex. R. App. P. 44.2(a).

show the evidence had no effect on the verdict. In *Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000), the Court of Criminal Appeals required Constitutional error to have a material effect on the verdict and assigned no burden on the beneficiary of the evidence to show no effect. *Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000) (citing *Satterwhite v. Texas*, 108 S. Ct. 1792, 1797 (1988)).

In this case, the Texas Court of Criminal Appeals analyzed Constitutional error and found that, although it had an effect on the verdict, it "was not a pillar of the State's case," and thus acceptable. *Dixon v. State*, 595 S.W.3d 216 (Tex. Crim. App. 2020) Appendix at 71.

Because the Court of Criminal Appeals declined to apply the proper test for Constitutional error contained in *Chapman* both here and in so many other cases,[19] this Court should grant Certiorari and instruct the Texas Court of Criminal Appeals to apply the *Chapman* test to Constitutional error.

[19] *See* cases cited above.

QUESTION THREE: There is a compelling need to resolve the conflict between federal and state courts as to what constitutes a closed courtroom. Here the Texas Court of Criminal Appeals held that the trial court's total closure of the courtroom during a hearing regarding critical *Crawford* and *Brady* issues was "trivial," without assessing any of the factors set out in *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L.Ed.2d 31 (2010).

In *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210 (1984), this Court decided that the test established in *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984) should be used to determine if a defendant's structural Sixth Amendment right to a public trial was violated. The test requires (1) the party seeking to close the hearing to advance an overriding interest that is likely to be prejudicial; (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 trial court must make findings adequate to support the closure. In reversing the Georgia Supreme Court, this Court stated that closing courtrooms to the public can be permissible only in the rare instances when the balance of interests weighs in favor of courtroom closure; such as protecting the defendant's right to a fair trial or the government's interest in protecting sensitive information by closing the trial. Closure must be decided with "special care" by the trial court.

The *Waller* case dealt with a complete closure of the courtroom to the public during a suppression hearing. This Court held that the government's claims during a hearing that unindicted persons would be discussed, lacked specificity as to whose privacy was at stake and how their privacy interest would be infringed. Further, this Court determined that the entire suppression hearing did not need to be closed because the sensitive information only related to a fraction of the total evidence presented. Additionally, this Court found the trial court erred in failing to consider any alternatives to closure. Accordingly, this Court determined that closing the entire suppression proceedings was, therefore, overbroad and unjustified.[20]

Twenty-six years later, this Court again addressed the right to a public trial in *Presley v. Georgia*, 558 U.S. 209, 130 S. Ct. 721, 175 L.Ed.2d 675 (2010). There, a single person was prevented from attending a portion of the trial proceedings; the jury voir dire. While the Georgia Supreme Court permitted the closing citing the trial court's overriding interest in keeping a voir dire proceeding free from public influence, they also placed the burden on the defendant to raise or suggest alternatives to the closure. This Court, applying the *Waller* test, reversed, holding that: "Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials." *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210 (1984). The Court reasoned there may be instances when the courtroom

[20] The Court ordered a new suppression hearing, suggesting that a new trial may be warranted after remand.

should be closed for voir dire proceedings, but such cases require the trial court to articulate the particular interest and the threat to that interest with enough specificity to allow a reviewing court to determine whether the closure order was proper. Deficiencies in the trial record, this Court held, could not be resolved *post-hoc*. Making it clear that an overriding interest will not be inferred when the record at the time of the closure does not show that the trial court considered all reasonable alternatives to closure.

Here, rather than follow the clear test set out in *Waller*, the Texas Court of Criminal Appeals expressly rejected its application, applying instead a "triviality doctrine."

The United States Constitution's Sixth Amendment states:

> In *all* criminal prosecutions, *the accused shall enjoy the right to a* speedy and *public trial*. . . . U.S. CONST. amend. VI. (emphasis added).

In this case, the complete clearing of the courtroom during a heated and critical hearing on *Crawford* and *Brady* issues, can hardly be characterized as "trivial." Moreover, this Honorable Court has never recognized gradients of the right to a public trial. This Court has applied the same test when the closure was of all people for the entire proceeding, as in *Waller*, or of only one person for a portion of the proceeding, as in *Presley.* The test is not relaxed for such structural error based on how many people were excluded or for how much of a proceeding the courtroom is closed. The same criteria applies in both circumstances. The ultimate results

may differ, but the analysis of structural error set out in *Waller* should remain the same.

In *Fulminante*, this Court acknowledged that Constitutional errors are of two classes: trial error and structural error. *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246 (1991). Violations of the right to a public trial are structural errors. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S. Ct. 2557 (2006) (listing structural errors). There, Justice Scalia explained that the denial of the right to a public trial is a structural defect that defies "analysis by harmless error standards because they affect the framework within which the trial proceeds and are not simply an error in the trial process itself." *Id*. Further, this Court explained this is the case because structural errors, by their very nature, result in "consequences that are necessarily unquantifiable and indeterminate." *Id*.

In this case Texas' highest criminal court expressly declined to apply this Court's *Waller* standard, instead applying its own triviality test.

The Texas Court of Criminal Appeals also expressly rejected *Waller* in favor of such a triviality test in *Williams v. State*, No. 04-18-00883-CR, 2020 WL 2543308 (Tex. App.—San Antonio, May 20, 2020), noting that "**[W]e conclude that to the extent there was a closure here, it was trivial and it is therefore unnecessary to scrutinize the trial court's actions under** *Waller*." *Williams v. State*, PD-0504-20, at p. 22 (Tex. Crim. App. 2022).

In *Williams*, the brother of the defendant was removed from the trial courtroom during the testimony of a State witness because the State asserted that its witness felt intimidated. The trial court did not hold a hearing, articulate any findings, or consider reasonable alternatives to closure. The Texas Fourth Court of Appeals reversed the conviction stating the trial court failed to meet the *Waller* standard. *Williams v. State*, No. 04-18-00883-CR, 2020 WL 2543308 (Tex. App.—San Antonio, May 20, 2020). The Texas Court of Criminal Appeals granted discretionary review and reversed the Fourth Court's decision, holding that the trial court was not required to follow *Waller*. It reasoned that although the brother was excluded, he was able to view the witness testimony remotely, making the closure "trivial." *Williams v. State*, PD-0504-20 (Tex. Crim. App. 2022).

The Texas Court of Criminal Appeals is not alone in failing to apply the *Waller* test. Federal circuit courts have adopted a "partial" closure scenario, suggesting that courts apply a modified-*Waller* test. The modified-*Waller* test was introduced in 1989 by the Tenth Circuit Court of Appeals for use when some spectators were allowed to remain in the Courtroom. *Nieto v. Sullivan*, 879 F.2d 743 (10th Cir. 1989). The modified test allows closure when the proponent demonstrates a "substantial reason" for closure, rather than an overriding interest. Before this Court's opinion in *Presley*, other circuits also adopted this modified-test where some spectators remained in the courtroom.

United States v. Osborne, 68 F.3d 94 (5th Cir. 1995); *Judd v. Haley*, 250 F.3d 1308, 1316 (11th Cir. 2001).

The Fifth Circuit endorsed a judge's decision to limit the number of family members each defendant could have present during voir dire, holding that the *Waller* procedures are not required when reviewing partial closings. The court reasoned that partial closings do not raise the same Constitutional concerns as a total closure.

> "When a criminal proceeding is only partially closed, the court must 'look to the *particular circumstances of the case to see if the defendant will still receive the safeguards of the public trial* guarantee.' *Osborne*, 68 F.3d at 98. This is because 'the partial closing of court proceedings does not raise the same constitutional concerns as a total closure because an audience remains to ensure the fairness of the proceedings.' *Id*. Partial closure of a courtroom during a criminal proceeding is a constitutional question reviewed de novo, and the Court will affirm so long as the lower court had a 'substantial reason' for partially closing a proceeding. *Id*. at 98-99."

United States v. Cervantes, 706 F.3d 603, 611-12 (5th Cir. 2013).

The Eighth Circuit failed to apply the *Waller* standard in a case where family members of the defendant (the only spectators present) were removed from the courtroom during the testimony of a jailhouse informant based solely on the State's contention that

the witness was in fear of retaliation. In this case, the court reviewed the judge's decision to close the courtroom using an abuse of discretion standard. Additionally, the Eighth Circuit decided that although the *Waller* factors require the trial court make sufficient findings to allow a reviewing court to determine whether the closure was proper, "in this circuit, specific findings by the district court are not necessary if we can glean sufficient support for a partial temporary closure from the record." *Id*. Finding no abuse of discretion, it determined there was no violation of the defendant's Sixth Amendment right to a public trial. *United States v. Thompson*, 713 F.3d 388, 395 (8th Cir. 2013).

The Sixth Circuit used this modified *Waller* test finding that the trial court violated the defendant's right to a public trial by barring three co-defendants from being in the courtroom during testimony of a government witness finding there was not sufficient evidence to justify this measure. *United States v. Simmons*, 797 F.3d 409, 413 (6th Cir. 2015).

The Third Circuit claimed to use the *Waller* standard in a case where members of the public were excluded from the courtroom throughout witness testimony. The Third Circuit found that it could not determine from the record who was excluded or for how long, and that the courtroom was not entirely closed throughout all of the witnesses' testimony. The court found there that the trial judge's reasons for closing the courtroom, "disruptions and witness tampering and intimidation," constituted overriding interests satisfying

the first prong of *Waller*, and that the defendant's Sixth Amendment right to a public trial had not been violated. *Tucker v. Superintendent Graterford SCI*, 677 F. App'x 768 (3d Cir. 2017).

Courts have applied a "triviality" test, instead of the *Waller* standard to a situation where the judge was unaware of the closure and the closure was inadvertent. *United States v. Greene*, 431 F. App'x 191, 197 (3d Cir. 2011). Other circuits have determined there is no real distinction between an overriding interest and a substantial reason. The D.C. Circuit Court, for example, agreed with the Second Circuit that "the sensible course is for the trial judge to recognize that open trials are strongly favored, to require persuasive evidence of serious risk to an *important* interest in ordering any closure, and to realize that the more extensive is the closure requested, the greater must be the gravity of the required interest and the likelihood of risk to that interest." *Tinsley v. United States*, 868 A.2d 867, 874 (D.C. 2005); *Woods v. Kuhlmann*, 977 F.2d 74, 76 (2d Cir. 1992) (to the same effect). Using this rationale, the D.C. Court of Appeals equated an "overriding interest" with a "substantial reason," thus diminishing the right to a public trial even more. In *Tinsley*, the trial court closed the courtroom to the defendant's family to protect the safety of a witness and encourage her truthful testimony. The D.C. Court of Appeals said the closure was justified without applying the *Waller* test or requiring the court to consider all reasonable alternatives to closure.

While some federal circuit courts were adopting and applying a modified *Waller* test, the highest courts in some states were rejecting that modification. The Illinois Supreme Court applied the proper *Waller* test in finding an Illinois statute violated the Confrontation Clause by allowing exclusion of spectators who did not have a direct interest in the case when a minor testified. *People v. Holveck*, 141 Ill.2d 84 (1990). The Supreme Courts in New York and Minnesota agree that one cannot use a modified *Waller* test and have applied this Court's *Waller* opinion appropriately. *See People v. Jones*, 750 N.E.2d 524 (N.Y. 2001); *State v. Muhkuk*, 736 N.W.2d 675, 685 (Minn. 2007).

Other circuit courts have created different approaches to courtroom closures. For example, The Tenth Circuit considered a case where the courthouse doors were routinely locked at 4:30 p.m. each day. The defendant's wife and daughter arrived after this time and were prevented from gaining access to the courtroom. The trial ended at 4:50 p.m. The court found that because the trial court had not taken affirmative action to exclude anyone from the courtroom this situation did not impact the defendant's Sixth Amendment right to a public trial. *United States v. Al-Smadi*, 15 F.3d 153 (10th Cir. 1994).

In a case where the trial judge had closed the courtroom for the testimony of an undercover officer, but failed to reopen the courtroom when the defendant testified, the Second Circuit found the inadvertent closure was "trivial" because defense counsel reiterated much of what the defendant had testified to during her

summation and there was no evidence that any observer wishing to enter during that time was excluded. It held, in the context of that specific case, the closure was (1) extremely short, (2) followed by a helpful summation, and (3) entirely inadvertent. *Peterson v. Williams*, 85 F.3d 39, 40 (2d Cir. 1996).

Other circuit courts adopting a triviality test include the Seventh, Ninth, D.C., and Fourth Circuit Courts. *Braun v. Powell*, 227 F.3d 908 (7th Cir. 2000); *United States v. Ivester*, 316 F.3d 955 (9th Cir. 2003); *United States v. Perry*, 479 F.3d 885 (D.C. Cir. 2007); *United States v. Izac*, 239 F. App'x 1 (4th Cir. 2007).

The Third Circuit applied a "triviality test," instead of the *Waller* standard, to a situation in which the judge was unaware of the closure, considering the closure to be inadvertent. *United States v. Greene*, 431 F. App'x 191, 197 (3d Cir. 2011).

However, after this Court's decision in *Presley*, it was "apparent, in view of the Supreme Court's analysis, that the question of whether the closure was total or partial was immaterial." *Longus v. State of Maryland*, 416 Md. 433 (Md. 2010). Additionally, Arizona and New Mexico declined to recognize a modification of the *Waller* test. *State of Arizona v. Tucker et al.*, 2 CA-CR 2011-0340 (Ariz. Dec. 24, 2012); *State of New Mexico v. Turrietta*, 2013-NMSC-036 (N.M. June 28, 2013). Still other state courts do not apply the *Waller* test at all.

Recently, the New Mexico Supreme Court adopted the "triviality" test in a case where members of the

public, including the members of the defendant's family, were erroneously barred from the courtroom for ten to fifteen minutes because a "Do Not Disturb" sign had been affixed to the courtroom door. *State v. Telles*, 446 P.3d 1194 (N.M. 2019). The closure was deemed "trivial" because the trial court did not order the closure and was not aware of the closure, and no one knew who had posted the sign. As the closure was inadvertent, it was determined that the *Waller* test was not required.

The Colorado State Supreme Court, in recent cases, has addressed both the modified *Waller* test and the triviality test, holding that while partial closures may meet Constitutional muster, the findings required by *Presley* cannot be remedied *post-hoc*, finding that even a partial closure constituted a structural error and "that the exclusion of even a single person, depending on the circumstances, can violate the defendant's public trial right." *People v. Jones*, 464 P.3d 735 (Colo. 2020).

The Colorado Supreme Court also adopted a triviality exception where, although the closure might have been unjustified, it was "so trivial as not to violate a defendant's right to a public trial." *People v. Lujan*, 461 P.3d 494, 499 (Colo. 2020). It held that "[a] court should consider the totality of the circumstances and consider such factors as the duration of the closure, whether the proceedings were later memorialized in open court or placed on the record, whether the closure was intentional, and whether the closure was total or partial." *Id*. It warned this analysis is meant for

application when the closure is *brief and inadvertent*, *id*. distinguishing such closures from intentional closures during significant testimony. The court explained the later are not considered trivial because of their potential to affect the fairness of the proceedings.

Despite this Court's holdings in *Waller* and *Presley* and their application to both complete and partial closures, the federal circuit courts and some state supreme courts have incorrectly rejected the *Waller* test in favor of various triviality tests for closures of the courtroom that are far from trivial. It is important to the preservation of this fundamental Constitutional right that structural error be consistently analyzed in the same manner, pursuant to the same standards. That was the underlying purpose of this Court's *Waller* and *Presley* decisions.

Application to this Petitioner

On three separate occasions, Dr. Dixon's re-trial was either partially or totally closed to the public in violation of his Sixth Amendment right to a public trial. The first instance took place during voir dire when a sketch artist was prevented from entering the courtroom. The defense objected, at which time the court allowed the sketch artist to sit in the jury box and attend the remainder of voir dire. In the next instance, a *Crawford* confrontation issue and a *Brady* issue were the center of a heated discussion during cross examination of a law enforcement officer. At that point, the trial court first excused the jury and then cleared

the entire courtroom, closing it to all of the public[21] for the duration of a critical hearing relating to the important issues discussed in Question One herein. Although the defendant objected to this closure,[22] the trial court failed to make findings regarding any overriding interest that would be prejudiced by allowing the public to be present or to enter any such findings on the record. Instead, the court entered *post-hoc* findings of fact and conclusions of law,[23] giving only conclusory statements as justification for closing the courtroom, none of which presented any overriding interest as required by *Waller*. Appendix at 139. In the final instance, the court did not make room for all interested members of the public present to attend the closing arguments. Again, the defendant objected. This time the court decided to close the courtroom without considering reasonable alternatives available to accommodate the public. The court simply stated it held the hearing in the largest courtroom at the courthouse; however, there was another room available that could have accommodated all interested members of the public. Again, the trial court failed to apply the *Waller* standard.

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[21] The trial court ordered that: "if everybody would please excuse yourself from the courtroom." 7R143 and Appendix 128.

[22] Defense counsel promptly responded to the trial court closing the courtroom: "We object, your Honor, that's a violation of Presley versus Georgia." 7R143-34.

[23] The Texas Seventh Court of Appeals, first remanded the case to the trial court for *post-hoc* findings, and then reversed the conviction. *Dixon v. State*, No. 07-16-00058-CR (Tex. App.—Amarillo Dec. 13, 2018).

Despite this Court's decisions in *Waller* and *Presley*, both federal circuit courts and state courts continue to adopt a variety of disparate approaches to determining whether a defendant's Sixth Amendment right to a public trial has been violated and what standards to apply in deciding whether such structural error has occurred.

This Honorable Court should grant certiorari to rectify this confusing situation and insure that the structural right to a public trial is preserved.

CONCLUSION

Petitioner respectfully prays that Certiorari be granted and the Court order full briefing and argument on the merits of this case.

Respectfully submitted,

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