

NO. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

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DAVANTE TURNER,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

(1) Whether it is structural error and a violation of Petitioner's constitutional protections to a fair and public trial under the Sixth Amendment of the United States Constitution mandating reversal for the Government's agent to unilaterally close a courtroom to members of the public, without the prior knowledge and order of the trial court, when the Government's agent removed members of Petitioner's family and prevented them from returning to the courtroom during certain trial testimony?

## **LIST OF PARTIES**

All parties appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Davante Turner, Petitioner

United States of America, Respondent

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IN THE

SUPREME COURT OF THE UNITED STATES

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PEITION FOR WRIT OF CERTIORARI

Petitioner, Davante Turner, respectfully prays that a Writ of Certiorari issue to review the judgment below.

OPINION BELOW

The judgment and sentence entered by the District Court, which found Petitioner guilty of racketeering conspiracy and robbery, appears at Appendix A. The unpublished opinion of the United States Court of Appeals for the Sixth Circuit appears at Appendix B and can be found at *United States v. Lewis, et al.* (6th Cir. January 25, 2022).

The United States Court of Appeals for the Sixth Circuit issued an unreported order denying Petitioner's Petition for Rehearing En Banc on April 21, 2022 and appears at Appendix C to this petition.

JURISDICTION

On January 25, 2022, the United States Court of Appeals for the Sixth Circuit entered its ruling affirming the conviction of Petitioner. *United States v. Lewis*, No. 19-6253, 2022 U.S. App. LEXIS 2384 (6th Cir. Jan. 25, 2022). Pursuant to Federal Rules of Appellate Procedure 35(b), Petitioner filed a Petition for Rehearing En Banc with the United States Court of Appeals for the Sixth Circuit on March 22, 2022. On April 21, 2022 the Court of Appeals for the Sixth Circuit denied Petitioner's Petition for Rehearing En Banc, which was mandated on April 29, 2022. The jurisdiction of this Court is invoked under 28 USCS § 1254(a).

## STATUTES, RULES, ORDINANCES, AND REGULATIONS INVOLVED

### (1) USCS Const. Amend. 6:

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

USCS Const. Amend. 6

## INTRODUCTION

It is well settled an accused is entitled to a speedy, and public trial according to our constitution. USCS Const. Amend. 6. Mr. Turner was not afforded this protection. During the course of Mr. Turner's fifteen (15) day trial which consisted of several cooperating witnesses testifying for the Government, an agent from the Government's counsel table removed Mr. Turner's girlfriend and another friend from the courtroom and prevented them from coming back for the rest of the day. In *Waller v. Georgia*, 467 U.S. 39 (1984), this Court established the test trial courts should apply to determine whether a courtroom closure is appropriate. However, the crux of the issue in Mr. Turner's case is whether under the circumstances of this case a partial closure constitutes structural error, which this Court to date respectfully has not addressed.

In various cases cited herein, this Court's decision in *Waller* and its progeny, including lower courts have held that are exceptions, including the "disruptive" courtroom for which the lower court can eject a person from the courtroom. In this case, however, the district court judge did not order the person ejected from the courtroom, rather it was the Government's agent, who was seated at the Government's counsel table. When this was brought to the trial court's attention, the court acknowledged the unilateral removal of a person during the proceedings, stating it was unacceptable and that cannot be allowed. Even still, the actions of the Government's agent (a United States Marshal), seated in a position of influence and intimidation, removed two people from the courtroom against the fundamental right

of Mr. Turner to have a public trial pursuant to the Sixth Amendment.

This case also presents an excellent vehicle for resolving the unsettled question whether partial closure of a courtroom to members of the public without the trial court addressing the *Waller* factors, even for several hours, constitutes structural error and a violation of the Sixth Amendment right to a public trial.

#### STATEMENT OF THE CASE

The United States Constitution and this Honorable Court has frequently held that “in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...” USCS Const. Amend. 6. The basis of this principal is derived from the United States Constitution, and the public trial right is considered a fundamental aspect of criminal trial proceedings, meaning that violations of the right typically are recognized as structural errors, for which prejudice to the defendant is presumed. *Williams v. Burt*, 949 F.3d 966, 969 (6th Cir. 2020). In *Waller v. Georgia*, 467 U.S. 39, 46 (1984), this Court developed a four-factor test for determining when a courtroom closure is proper:

(1) the party seeking to close a public hearing must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure.

*Waller v. Georgia*, 467 U.S. 39, 46 (1984).

The Sixth Circuit, which affirmed the trial court in this case, has further ruled that both partial and total closures burden a defendant’s constitutional rights. *United*

*States v. Simmons*, 797 F.3d 409, 413 (6th Cir. 2015). In Mr. Turner's case, a public trial was denied because an agent of the Government, and not before the Court's intervention, unilaterally removed Mr. Turner's girlfriend from the courtroom. Upon the district court discovery what transpired, it stated that was not acceptable and that it could not be allowed. By the time the district court was made aware, the Government's act was done, and a member of the public, who was also part of Mr. Turner's family support, was excluded from the courtroom and told not to return to the courtroom that day. This closing of the courtroom to members of the public stands to thwart the very protections afforded by the Sixth Amendment right to a public trial as clearly established in *Waller*.

#### REASONS FOR GRANTING THE WRIT

This Honorable Court should grant the writ to decide the important question this case presents. The question presented is an important question of federal law that has not been, but should be, settled by this Court regarding whether the partial closing of courtrooms constitutes structural error and a violation of the Sixth Amendment right to a public trial.

- I. Whether it is structural error and a violation of Petitioner's constitutional protections to a fair and public trial under the Sixth Amendment of the United States Constitution mandating reversal for the Government's agent to unilaterally close a courtroom to members of the public, without the prior knowledge and order of the trial court, when the Government's agent removed members of Petitioner's family and prevented them from returning to the courtroom during certain trial testimony?

The Sixth Amendment to the United States Constitution states (in part): "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public

trial...." USCS Const. Amend. 6. The most definitive statement this Court has issued on the scope of one's right to a public trial came in the 1984 seminal case of *Waller v. Georgia*, 467 U.S. 39 (1984). In *Waller*, the Court considered the case of a group of defendants who had been convicted in Georgia state court of racketeering and gambling offenses. *Id.* The state argued that the suppression hearing should be closed to spectators, as some of the recordings could violate the privacy rights of uncharged persons whose voices could be heard on the tapes. *Id.* The trial court granted the state's motion, and closed the hearing (which lasted seven days) to the public. *Id.* The defendants were eventually convicted, and after the Georgia Supreme Court affirmed those convictions, the United States Supreme Court granted certiorari to consider whether the closure of the suppression hearing violated the defendants' Sixth Amendment right to a public trial.

Justice Powell, writing for the Court, found that the closure of the suppression hearing indeed violated the defendants' Sixth Amendment rights. *Id.* *See also, Judd v. Haley*, 250 F.3d 1308, 1314, (11th Cir. 2001). Furthermore, this Court's holding in *Waller* also concluded that a violation of one's right to a public trial is structural error. *Id.* at 49; *See also, Johnson v. United States*, 520 U.S. 461, 469 (1997) (citing *Waller* as one of the "limited class" of cases where structural error has been found). Structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). As such, structural errors are not subject to harmless error analysis. *Id.* at 309. Therefore, once a petitioner demonstrates a violation of his Sixth

Amendment right to a public trial, he need not show that the violation prejudiced him in any way. The mere demonstration that his right to a public trial was violated entitles a petitioner to relief. *See generally, Judd v. Haley*, 250 F.3d 1308, 1314-15 (11th Cir. 2001).

In this case, Mr. Turner's trial with his co-defendants spanned over two weeks. Several days into the trial, on June 7, 2019, the district court judge addressed an issue that occurred during the Government's proof and a cooperating witnesses' testimony during the morning session, unbeknownst to the judge. (Trial Trans., 6-7-19, R.E. 662, Page ID#3502-04). It was determined that during ongoing testimony, a case agent seated at the Government's table had 'taken it upon himself to remove an individual from the gallery of the courtroom, confiscate her notebook in which she had been taking notes, and demand that she leave the courthouse. (Trial Trans., 6-7-19, R.E. 662, Page ID#3503). The Government later stated that the individual was told to leave the courtroom due to potential witness intimidation. (Trial Trans., 6-7-19, R.E. 662, Page ID#3505). Concerned with what had occurred, the district court stated:

...if there's a safety issue in this courtroom, one person definitely needs to know about it. And for your team to take it upon themselves to make decisions, well meaning or not, about the security of this courtroom and have people excluded from this courtroom without bringing it up to the Court is just unacceptable...just the unilateral step of taking the document and excluding the person from the courtroom, we just can't have that anymore.

(Trial Trans., 6-7-19, R.E. 662, Page ID#3506).

Turner's counsel objected to this removal of the observer on the basis of Turner's Sixth

Amendment right to public trial, and at the close of trial for the day, renewed his objection and made clear that he was making a Motion for Mistrial based on the violation of Turner's constitutional right to public trial. (Trial Trans., 6-7-19, R.E. 662, Page ID#3507-08; 3597). It was later determined that the individual who had been removed from the courtroom and told to leave was Jerrica Tyson, Turner's girlfriend. (Trial Trans., 6-7-19, R.E. 662, Page ID#3512; Trial Trans., 6-10-19, R.E. 663, Page ID#3609).

The Sixth Circuit in its opinion under review further held that the actions of the Government were not proper and unacceptable. Specifically, the Sixth Circuit found the Government's actions in Mr. Turner's case were "troubling." *See United States v. Lewis*, No. 19-6253, 2022 U.S. App. LEXIS 2384 (6th Cir. Jan. 25, 2022). Yet, the Sixth Circuit finally concluded it could not say this incident implicated Mr. Turner's Sixth Amendment rights because the incident did not undermine the values of the public trial guarantee. *Id.* at pg. 18. Petitioner advances the holding in *Waller* is indeed implicated in this case as the agents'<sup>1</sup> actions to unilaterally eject persons from the courtroom, regardless of the period, invokes a violation of Mr. Turner's public trial protections mandating reversal.

The removal and exclusion of these individuals from the courtroom was in violation of the Sixth Amendment protections afforded to Mr. Turner. According to this Court's holding in *Waller*; that is enough. The district court and the Sixth Circuit both opined on the unacceptableness and troubling actions of the Marshal and the

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<sup>1</sup> The Government's case agent was also accompanied by a United States Marshal at the time the individuals seated in the courtroom were removed.

Government's agent, lest we need not forget how individuals in authority positions, who are seated in places of authority can also influence and intimidate members of the jury and public. As this Court stated in *Waller*, structural errors are not subject to harmless error analysis. *Id.* at 309. Therefore, once a petitioner demonstrates a violation of his Sixth Amendment right to a public trial, he need not show that the violation prejudiced him in any way. The mere demonstration that his right to a public trial was violated entitles a petitioner to relief. (emphasis added). The lower courts have already stated they could not allow this, that the actions of the Government and its agents were unacceptable, and that the ejection was troubling. The courts have openly acknowledged that the actions taken were improper and substantial that warrant correction, and *Waller* only requires a demonstration that Mr. Turner's right to a public trial was violated to be entitled to relief. Even when the district court was made aware of the inappropriate actions of the Government, it permitted Petitioner's counsel to find and call them back, but the damage had already been suffered and the jury was able to witness the Government's agents exercise their authority to eject someone – not the judge. The Government's agents showing of influence and intimidation, Petitioner would advance, has a heavier effect on the jury than a member of the public gallery who potentially whispers louder than others.

Petitioner further submits in order to consider fully what had occurred, and in light of the Government's request that Ms. Tyson not be allowed to return to the courtroom for the remainder of the trial, the district court judge determined that a jury-out hearing would need to take place. (Trial Trans., 6-10-19, R.E. 663, Page

ID#3612). To be clear, both partial and total closures burden the defendant's constitutional rights, and *before* either is undertaken, a court must "hold a hearing and articulate specific findings." *Judd v. Haley*, 250 F.3d 1308, 1315 (11th Cir. 2001).

Various circuits have seemingly established different standards for evaluating the effect of and relief from total and partial closing of courtrooms. However, *Waller* did not distinguish between complete and partial closures of trials. Nearly all federal courts of appeals, conversely, have distinguished between the total closure of proceedings and situations in which a courtroom is only partially closed to certain spectators. Whether a closure is total or partial depends not on how long a trial is closed, but rather who is excluded during the period of time in question. *United States v. Simmons*, 797 F.3d 409, 411 (6th Cir. 2015). In other words, a total closure involves excluding all persons from the courtroom for some period while a partial closure involves excluding one or more, but not all, individuals for some period. *Id.*

The Sixth Circuit has adopted the "substantial reason" test for partial closures, as have some of its sister circuits, including the Second, Eighth, Ninth, Tenth, and Eleventh Circuits have done the same). *Id.* at 414. Thus, under the modified *Waller* test applied by those courts, (1) a party seeking a partial closure of the courtroom during proceedings must show a "substantial reason" for doing so that is likely to be prejudiced if no closure occurs; (2) the closure must be no broader than necessary or must be "narrowly tailored"; (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. *Id.* The facts in this case are different, however, because the

Court did not go through the analysis, rather the Government's agent accompanied by a United States Marshal unilaterally made the decision to eject members of the public (Mr. Turner's girlfriend and her friend) from the courtroom.

The unique facts of Mr. Turner's case are different from the different partial closure reviewed and ordered by a trial court. Here, after the close of proof on June 10, 2019, the district court heard testimony from a U.S. Marshal who testified that Ms. Tyson and her seatmate had been having conversations between themselves on June 7, 2019 at such a volume that jurors were being distracted. (Trial Trans., 6-10-19, R.E. 663, Page ID#3841-42). Initially, the Marshal walked over to the women and asked that they stop talking. (Trial Trans., 6-10-19, R.E. 663, Page ID#3841-42). Then, when their talking continued, the Marshal asked both women to step out into the hallway, where he told them that they must stop talking and disturbing the jury. (Trial Trans., 6-10-19, R.E. 663, Page ID#3842).

Upon all individuals returning to the courtroom, testimony by the case agent with the Government's team revealed that he walked over behind Ms. Tyson to make sure she was not gesturing to the witness who was providing testimony for the Government. (Trial Trans., 6-11-19, R.E. 664, Page ID#3886). Importantly, according to the case agent, Ms. Tyson was not engaged in any disruptive behavior at the time he was observing her, nor had he seen her gesturing or trying to intimidate a witness prior to that time. (Trial Trans., 6-11-19, R.E. 664, Page ID#3900. It was while he stood behind her, however, that the case agent noticed Ms. Tyson's notes and, finding them interesting, tapped Ms. Tyson on the shoulder and

requested that she follow him out of the courtroom to the hallway. (Trial Trans., 6-11-19, R.E. 664, Page ID#3887). After briefly questioning Ms. Tyson in the hallway, the case agent seized her notebook, took a photograph of her driver's license and told her to leave. (Trial Trans., 6-11-19, R.E. 664, Page ID#3901). The case agent did not bring this situation to the attention of the district court judge at any time before or after Ms. Tyson's removal from court. (Trial Trans., 6-11-19, R.E. 664, Page ID#3895). Eventually, the district court became aware of what had transpired. The district court, in ruling against Turner's Motion for Mistrial, found that no partial closure had occurred because the court had not taken any affirmative act to remove or exclude Ms. Tyson. (Trial Trans., 6-11-19, R.E. 664, Page ID#3920-21).

The trial court's justification, different from what several circuits have previously opined on concerning partial closures, is that the court itself did not take an affirmative act to remove or eject members of the public the courtroom. Instead, agents of the Government and a United States Marshal unilaterally ejected members of the public. Despite finding the actions by the agents and Marshal unacceptable and troubling, the court essentially reasoned since it had not been involved in removing the members of the public, the issues implicated in *Waller* and the Sixth Amendment were not implicated. They unilaterally effectuated a partial closing without the authority of the district court. Ultimately, however, the district court is the gatekeeper. While the district court admonished the Government and its agents for their conduct, this was insufficient as the exclusion of these individuals violated Mr. Turner's constitutional right to a public trial amounting to structural error and

entitling petitioner to relief. See *Waller v. Georgia*, 467 U.S. 39 (1984); and *Judd v. Haley*, 250 F.3d 1308, 1315 (11th Cir. 2001).

Here, the rationale offered by the district court that it had not taken the actions of excluding the individuals from the courtroom and that they were offered to return is also placed into serious question in light of the Second Circuit's narrowing of the "triviality exception" *See Constant v. Pa. Dep't of Corr.*, 912 F. Supp. 2d 279 (W.D. Penn. 2012) (citing *United States v. Gupta (Gupta II)*, 699 F. 3d. 688-89). In *Gupta*, vacating the defendant's conviction, the Second Circuit held as follows:

"In *Waller v. Georgia* ...the Supreme Court held that, consistent with the Sixth Amendment, a trial court may exclude the public from the courtroom only upon satisfaction of a four factor test...Because the lower court here did not analyze the *Waller* factors prior to closing the courtroom, the closure was unjustified. In prior decisions, of this Court, we have suggested that an unjustified closure, under certain and limited circumstances, may not require reversal of the defendant's convictions, *See, e.g., Gibbons v. Savage*, 555 F.3d 112, 113 (2d Cir. 2009) Whatever the outer boundaries of this doctrine may be, however, they do not encompass the present case...As should be clear from the above, the importance of the public trial right dictates that before closing a courtroom to the public, a trial court must inform the parties of its intentions and make explicit *Waller* findings. Failure to comply with this procedure, will, in nearly all cases, invite reversal. Here the district court's intentional, unjustified exclusion of the public for the entirety of voir dire was neither brief nor trivial, and thus violated Gupta's Sixth Amendment right to a public trial..."

Moreover, even under the modified *Waller* test adopted by the Sixth Circuit in *United States v. Simmons*, 797 F.3d 409, 413 (6th Cir. 2015), the district court's actions were still erroneous. There was no proof of intimidation or threats from the excluded persons and no determination of how long the exclusion would need to last or even whether admonishing the individuals was necessary or would suffice. In

essence, prior to the district court's review of the matter, given the Government agent and Marshal's unilateral, preemptive exclusion, no prior consideration was made reflecting the *Waller* or *Simmons* factor analysis.

Given the split among the circuits regarding partial closure and the absence of a clear standard for lower courts as to the remedy when actions are taken without their knowledge and before courts can conduct the appropriate analysis, there is a strong need for this Honorable Court to establish a clear standard by granting certiorari. Indeed, *Waller* was clear in reminding courts that one of the essential purposes of the Sixth Amendment was to "act as a safeguard against any attempt to employ our courts as instruments of persecution, reflecting the belief "that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings." *Waller v. Georgia*, 467 U.S. 39 n.4 (quoting *Estes v. Texas*, 381 U.S. 532, 588 (1965)). The "troubling" circumstances of the instant case rise to such a level where this Honorable Court can establish boundaries which reinforce the purposes underlying the Sixth Amendment and its interpretation under *Waller*. Moreover, *Waller* expressly stated one of the purposes of the right to a public trial was to "ensur[e] that judge and prosecutor carry out their duties responsibly." *Id.* at 46. Unfortunately, in this case because of the prosecution (Government) team's actions, the judge's duties were circumvented; however the judge has the ultimate responsibility for ensuring the principles of the Sixth Amendment and *Waller* were honored. In this case the trial court failed to do so by not granting a mistrial under these circumstances.

To date, the circuit courts since *Waller* have endeavored to establish modified *Waller* tests to address partial closures and public trial challenges under the Sixth Amendment, with no clear guidance or boundaries from this Court. In light of the *Waller* principles and the undefined standard for partial closures, Petitioner submits the proper application of *Waller* and Sixth Amendment was not undertaken in this case. Accordingly, Petitioner's Sixth Amendment right to a public trial was violated and this Court's review is warranted to establish a uniform standard concerning partial closures and structural error.

## CONCLUSION

Mr. Turner respectfully requests that this Petition for Writ of Certiorari be granted.

DATED: This 17th day of August 2022.

Respectfully Submitted,

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