22-6160

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

WAYLAND LYNN DILTS — PETITIONER
(Your Name)

vs.

MICHIGAN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Sixth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Wayland Lynn Dilts
(Your Name)

Kinross Correctional Facility
(Address)

4533 W. Industrial Park Dr. Kincheloe, Michigan 49788
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

This case involves an unprecedented public-trial violation claim like no other brought before this Court. The record here reflects, that during a jury trial in state court, in a blanket order and for no stated reason at all, the courtroom was completely closed to the public during the testimony of five prosecution witnesses, that no evidence of any kind was ever presented, supporting the need for the closure, and the only reason for the closure was because the prosecutor asked.

The question presented here is: 1) whether the Court of Appeals for the Sixth Circuit improperly applied both Weaver v. Massachusetts, 137 S.Ct. 1899 (2017) and AEDPA, and 2) whether the Michigan trial court violated the Sixth Amendment public-trial right when it closed the courtroom to the public during the testimony of five prosecution witnesses without adequate justification.

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** 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:

RELATED CASES

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

STATUTES AND RULES

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[✓] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[✓] reported at 2022 U.S. App. Lexis 16996; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[✓] reported at 2021 U.S. Dist. Lexis 201776; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[✓] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was June 17, 2022.

[ ] No petition for rehearing was timely filed in my case.

[✓] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 25, 2022, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *** and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

In August 2013, petitioner filed a pro se petition under 28 U.S.C. §2254 in the district court. He raised four grounds for relief: (1) the trial court erred by admitting certain evidence pursuant to MCR 768.27a; (2) trial counsel provided ineffective assistance; (3) the trial court's examination of witnesses deprived him of a fair trial; and (4) the trial court committed structural error when it told the jury that it must convict. In March 2016, the district court stayed the proceedings to allow petitioner to return to state court to exhaust certain claims. Petitioner then filed a motion for relief from judgment, See APPENDIX G, which the trial court denied, See APPENDIX H. Michigan's court of appeals and supreme court denied leave to appeal, See APPENDIX I.

Petitioner returned to the district court and filed an amended §2254 petition, raising eight additional grounds for relief: (5) appellate counsel was ineffective for failing to raise the issues that petitioner had raised in his motion for relief from judgment; (6) the trial court's closure of the courtroom during the testimony of five prosecution witnesses violated his right to a public-trial; (7) the trial court's instruction to the jury on reasonable doubt was constitutionally defective; trial counsel was constitutionally ineffective to the extent that prejudice should be presumed for failing to object to the closure of the courtroom, the reasonable doubt instruction, and the court's failure to properly administer the jury oath; (9) the trial court and the prosecutor violated his due process rights by referring to the compl-ainants as victims; (10) the trial court erred in scoring prior record and offense variables at sentencing; (11) the trial court improperly administer the oath to the jury; and (12) the trial court erred in failing to instruct the jurors that they must reach a unanimous agreement as to what acts had been

proven. Respondent filed its second answer in opposition. To which, petitioner filed a motion with the district court to preclude reliance on certain documents and statements because they are not part of the trial record in this case, See APPENDIX E. In an order dated October 20, 2021, the district court denied petitioners motion to preclude certain documents and statements, and concluded that petitioners claims were either not cognizable on habeas review, procedurally defaulted, or lacking merit, the district court denied the petition and declined to issue a certificate of appealibility (COA), See APPENDIX B (Dilts v Brown, 2021 U.S. Dist. Lexis 201776).

Petitioner timely filed a notice of appeal, and a motion for a COA with the United States Court of Appeals for the Sixth Circuit, as to only two of his claims: that the trial court violated his Sixth Amendment right to a public-trial and that trial counsel was constitutionally ineffective for failing to object to the courtroom closure, See APPENDIX F (motion for COA). In an order dated June 17, 2022, the Sixth Circuit denied petitioners application for a COA, See APPENDIX A (Dilts v Brown, 2022 U.S. App. Lexis 16996). Petitioner then timely filed with the Sixth Circuit a petition for rehearing en banc, See APPENDIX D, which the Sixth Circuit denied on August 25, 2022, See APPENDIX C (Dilts v Brown, 2022 U.S. App. Lexis 24024).

REASONS FOR GRANTING THE PETITION

The Sixth Amendment guarantees that criminal defendants "shall enjoy the right to a . . . public-trial". U.S. Const, Amdt. 6. To the framers, secret trials "obviously symbolized a menace to liberty", and the public-trial right provided a necessary "safeguard against any attempt to employ our courts as instruments of persecution". The public-trial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their functions more responsibly in an open court than in secret proceedings". Estes v Texas, 381 U.S. 532, 588, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965)(Harlan, J., concurring). Indeed, that is why public-trial violations are among the narrow class of "structural defects" that "defy analysis by 'harmless-error' standards". Arizona v Fulminante, 499 U.S. 279, 309 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).

Despite the importance of the public-trial right, this Court recognized in Waller v Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), that "the right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information". Id., at 45, 104 S.Ct. 2210, 81 L.Ed.2d 31. But Waller cautioned that "[s]uch circumstances will be rare, ...and the balance of interests must be struck with special care".

In Waller, this Court announced four requirements that must be met [before] a trial court can close a courtroom: (1) the party seeking to close the proceedings must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) the trial court must make findings adequate to support the closure. Press-Enterprise Co. v Superior Court of California, 464 U.S. 501.

In this case, the record reflects that just prior to jury selection, without prior notice or warning, the prosecutor suggested it may be "necessary" to "close the courtroom," "during the victim's testimony." He gave no further explanation for suggesting such drastic measures. The trial court stated, "I think that's wise." After jury selection, this time, the prosecutor said he "talked to" his first witness, LD, and that "She has asked that the courtroom be closed during her testimony." He did not say [why] she asked, and he cited no authority for his request to close the courtroom during her testimony. The trial court stated, "Okay." When the State called its first witness, LD, to the stand, the trial court asked the prosecutor, "Counsel, in regard to this testimony, will the courtroom be closed?" The prosecutor said "Please." To that, the trial court, in a blanket Order, announced, "All right. I would ask all unnecessary parties to leave the courtroom. The courtroom will be closed."

Once the gallery was completely cleared, and outside of public view, LD testified. No evidence supporting a closure order was presented. Neither the prosecutor nor the trial court cited authority for the closure. And, the trial court did not comply with any Statute or Court Rules before closing the courtroom. Trial counsel failed to object.

The courtroom closure, however, did not end there. On the second day of trial, that morning, the courtroom's doors were never openned to the public to begin with. While the proceedings were closed to the public, the trial court admonished a defense witness (HD), and the state called its witness, AC'1 to the stand, where she was placed under oath and gave her testimony. Outside of public view. At the conclusion of her testimony, the prosecutor called AC'2 to the stand. Lest there be any doubt that the courtroom was closed to the public, when the prosecutor called AC'2 to the stand, the trial court asked him if the courtroom "will remain closed?" Again, trial counsel failed to object to the closure. At the conclusion of her testimony, AC'2 was excused and the prosecutor

called JR to the stand, and she too testified behind closed doors. At the conclusion of her testimony, JR was excused and the prosecutor called RC to the stand. At that time, the trial court announced that it was "openning the courtroom."

At no time was the trial court presented with evidence of some kind, supporting the need for a closure of the courtroom. Six years later, in a motion for a new trial, petitioner here raised and argued, among other things, a public-trial violation claim. The transcript in this case clearly shows that no evidence of any kind was ever presented supporting the need for a closure, that the only reason for the closure was because the prosecutor asked, and that the trial court did not comply with any Statute or Court Rules before closing the courtroom to the public. Yet, when the trial court denied the claim, the trial court stated

> "public access was limited on certain occasions due to the sensitive nature of the proceedings - sexual offenses involving minors under the age of thirteen," and "This Court fully complied with MCR 8.116(D), which governs when and how a court may limit public access to a proceeding."

See App'x - G, petitioner's motion for new trial, public-trial violation claim (Ground 2) at page 3 to 11; related claim of ineffective-assistance-of-trial-counsel (Ground 5) at page 18 to 23, for his failure to object to the courtroom closure; App'x - J, trial transcript pages relevant to the courtroom closure, and App'x - H, trial court's March 31, 2016 denial of the courtroom closure issue at page 4.

Contrary to what the trial court claims in its post-hoc adjudication of the courtroom closure issue, the trial court did not comply with any requirements before closing the courtroom to the public. Whatsmore, there is no record evidence that the trial court [ever] considered the rights of the accused to a public-trial.

28 U.S.C. §2254(d)(2) Arguement and Evidence

When the trial court denied Petitioner's public-trial violation claim, the court made two statement's: 1) that "public access was limited on certain occassions due to the sensitive nature of the proceedings," and 2) that the court "fully complied with MCR 8.116(D)." In his Motion to Preclude Certain Statements and Documents, Motion for COA, and Motion for Rehearing en banc, Petitioner here was relentless in his argument that the trial court's two Statement's were falsely made and have no support in the trial transcript. See App'x - E (motion to preclude), App'x - F (motion for COA), and App'x - D (motion for rehearing en banc). And even though he didn't have to, Petitioner repeatedly provided those court's with extra copies of the relevant trial transcript pages, which clearly and convincingly proved his claim that the trial court's adjudication of the public-trial violation claim was based on an unreasonable determination of the facts. The Sixth Circuit erred when it disregarded the Petitioner's §2254(d)(2) argument and evidence in his motions.

Improper Application of Weaver and AEDPA

In Weaver v Massachusetts, 137 S.Ct. 1899 (2017), Weaver was standing trial for first degree murder and unlawful possession of a handgun, and the pool of potential jurors was so large that it exceeded the capacity of the courtroom. Id. at 1905-06. "As all of the seats in the courtroom were occupied by the venire panel, an officer of the court excluded from the courtroom any member of the public who was not a potential juror." Id. at 1906. Accordingly, when Weaver's mother and her minister sought entry to the courtroom "to observe the two days of jury selection, they were turned away." Id. When she subsequently informed trial counsel that she had been excluded from the courtroom, "he did

not discuss the matter" with Weaver, nor did he object, because he "believed that a courtroom closure for [jury selection] was constitutional. Id. Weaver thereafter was convicted of both charges.

Five years later, Weaver filed a motion for new trial, raising, among other things, a claim that his trial counsel "had provided ineffective assistance by failing to object to the courtroom closure." Id. Following an evidentiary hearing, the Massachusetts trial court denied Weaver's motion, finding that, although trial counsel had performed deficiently, Weaver had failed to prove that he was thereby prejudiced. Id. On appeal, the Supreme Judicial Court of Massachusetts affirmed the trial court's denial of Weaver's new trial motion, holding that, although the closure of the courtroom during voir dire had been structural error, an ineffective assistance claim based upon an unpreserved structural error nonetheless required a showing of prejudice, which Weaver had failed to prove and, indeed, did not challenge on appeal. Comm. v Weaver, 474 Mass. 787, 54 N.E.3d 495, 520-21. Weaver then petitioned this Court for certiorari to consider whether an ineffective assistance claim, based upon a procedurally defaulted structural error, requires a showing of prejudice, and the Court granted that petition. Weaver v Massachusetts, 137 S.Ct. 809 (2017). The Court rendered a narrow decision, holding that, in the specific context "of trial counsel's failure to object to the closure of the courtroom during jury selection," Weaver, 137 S.Ct. at 1907, "Strictland [v Washington, 466 U.S. 668 (1984)] prejudice is not shown automatically." Id. at 1911. "Instead," the Court instructed, "the burden is on the petitioner to show either a reasonable probability of a different outcome in his or her case or, as the Court assumed for these purposes, to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair." Id.

The Weaver Court observed that Weaver had "offered no evidence or legal argument establishing prejudice in the sense of a reasonable probability of a

different outcome but for counsel's failure to object." Id. at 1912-1913. As for whether the closure of the courtroom during voir dire had rendered Weaver's trial "fundamentally unfair," the Court noted that "the courtroom [had] remained open during the evidentiary phase of the trial," that the decision to close the courtroom had been "made by court officers rather than the judge," that "there were many members of the venire who did not become jurors" but had observed the proceedings, and that the record had indicated no "basis for concern, other than the closure itself." Id. at 1913. Moreover, observed the Court, Weaver had failed to show "that the potential harms flowing from a courtroom closure," such as juror misconduct during voir dire or "misbehavior by the prosecuter, judge, or any other party," had "[come] to pass." Id. Therefore, the Court concluded, the violation had not "pervade[d] the whole trial or [led] to basic unfairness," and Weaver had failed to show that trial counsel's deficient performance had resulted in a fundamentally unfair trial. Id. The Court thus affirmed the judgment of the Supreme Judicial Court, denying Weaver's ineffective assistance claim. Id. at 1913-1914.

In contrast with Weaver, where trial counsel had acquiesced in the courtroom closure because of ignorance of the law, in the instant case, trial counsel failed to object to the courtroom closure entirely. Whatsmore, in Weaver, this Court said, "the courtroom remained open during the evidentiary phase of the trial," there were presumably, "many members of the venire who did not become jurors" but had observed the proceedings, and the record indicates no "basis for concern, other than the closure itself." Id. at 1913.

In the instant case, the courtroom was closed to the public during the evidentiary phase of the trial, and there was basis for concern as both appellate counsel and Petitioner raised and argued claims of judicial bias.

In this case, Petitioner filed with the federal court's three (3) motion's, each of which he argued profusely that the courtroom closure in this case was

not justified, was completely unwarranted, and was unfair. Petitioner presented the federal court's with a mountain of evidence, including the actual trial transcript, proving that the trial courts adjudication of the public-trial violation claim was based on an unreasonable determination of the facts.

What is truely remarkable is how easy and casually the trial court closed the courtroom during the evidentiary phase of this trial. The prosecutor asked and the trial court granted his wish without hesitation. As though this is how jury trials are conducted.

There is no record evidence in this case that the trial court ever considered the rights of the accused to a public-trial or the publics right of access to the proceedings. For that reason alone, it is literally impossible for the trial court to have "complied" with any requirements.

CONCLUSION

In Weaver v Massachusetts, 137 S.Ct. 1899 (2017), this Court rejected the argument that, because a courtroom closure is a structural error, prejudice for purposes of an ineffective-assistance claim is shown automatically. Instead, the petitioner was required to show a probability of a different outcome but for counsel's failure to object or show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair. Weaver, 137 S.Ct. at 1911. Thus, this Court's holding in Weaver provided another option for petitioner's, such as in this case, raising public-trial violation claims via ineffective-assistance-of-trial counsel, on collateral review. To "show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair."

In the instant case, the Sixth Circuit Court of Appeals was provided with a mountain of evidence showing that the courtroom closure in this case was a public-trial violation so serious that it rendered the trial fundamentally unfair. In light of this Court's holding in Weaver, under 28 U.S.C. §2254(d)(1), the Sixth Circuit applied Weaver unreasonably. Additionally, under AEDPA, findings of fact made in the State court, are presumed to be correct unless shown to be incorrect by clear and convincing evidence. 28 U.S.C. §2254(e). They are binding on the federal habeas court unless it is shown that they constitute an unreasonable determination of the facts on the basis of the evidence presented. 28 U.S.C. §2254(d)(2).

The Sixth Circuit improperly applied both Weaver and AEDPA, and erred when it ignored Petitioner's §2254(d)(2) argument and evidence and affirmatively embraced the trial court's post-hoc determination.

For all of the reason's above, the decision by the United States Court of Appeals was wrong and warrants overturning by the United States Supreme Court.

Respectfully submitted

Wayland Dilts Dated: November 16, 2022

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