No. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

KRISTOFER D. GARRETT,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition of Certiorari to The Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

No execution date is presently scheduled

OFFICE OF THE OHIO PUBLIC DEFENDER

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Capital Case

QUESTION PRESENTED

Does a state court finding of structural error, based on a violation of a capital defendant's Sixth Amendment right to a public trial, satisfy the plain-error test's requirement that "substantial rights" were affected?

PARTIES TO THE PROCEEDING

Petitioner, Kristofer D. Garrett, an Ohio death row inmate, was the appellant in the Supreme Court of Ohio. Respondent, the State of Ohio, was the appellee in the Supreme Court of Ohio.

STATEMENT OF RELATED PROCEEDINGS

All proceedings directly related to this petition include:

- *State v. Kristofer D. Garrett*, Slip Opinion No. 2022-Ohio-4218, Supreme Court of Ohio. Judgment entered November 30, 2022.
- *State v. Kristofer D. Garrett*, No. 18 CR 168, Franklin County Common Pleas Court. Judgment entered September 16, 2019.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Kristofer D. Garrett respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio affirming Garrett's convictions and death sentence on direct review, filed November 30, 2022, is published as *State v. Garrett*, 2022-Ohio-4218, and is reproduced as Appendix A at A–1. The sentencing opinion by the Franklin County Court of Common Pleas in *State v. Garrett*, Case No. 18CR168, filed September 16, 2019, is reproduced as Appendix B at A–105. The Ohio Supreme Court's Entry denying the motion for reconsideration, filed December 23, 2022, is reproduced as Appendix C at A–134.

JURISDICTION

In this petition, Kristofer Garrett seeks review of the decision in which the Supreme Court of Ohio affirmed his convictions and death sentence on November 30, 2022. Garrett sought reconsideration, which was denied by the Supreme Court of Ohio on December 23, 2022. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

Garrett sought an extension of time to file this petition, which was granted on March 16, 2023. Garrett's petition is timely filed by May 22, 2023.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law […] abridging the freedom of speech, or of the press; […].".

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, […].".

Ohio Rule of Criminal Procedure 52(B) provides:

> (A) Harmless error. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.
> (B) Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

INTRODUCTION

This case hinges on the impact of an undisputed error that occurred during a capital trial–the unwarranted closing of the entirety of the proceedings against Kristofer Garrett to anyone under the age of 18. Had Garrett's counsel objected to this structural error, his convictions and sentence would not stand. Yet because defense counsel remained silent, the state court imposed an additional burden before it would grant relief, requiring Garrett to establish that the outcome of the proceedings would have been different if the error had not occurred. Garrett's plight encapsulates an unjustifiable inconsistency in the application of constitutional protections, where courts recognize the pervasive yet often intangible harm of a structural error implicating the Sixth Amendment's public trial right, yet require a defendant to prove discrete and concrete prejudice in his case in order to merit relief.

STATEMENT OF THE CASE

A. Factual Background

Twenty-four-year-old Kristofer Garrett was charged with aggravated murder in the deaths of his ex-girlfriend and their four-year-old daughter, C.D.. (App. A, p. A–11) The State sought the death penalty, with the charges and capital specifications related to the death of C.D. based, in part, on "causing the death of a child under the age of 13." (*Id.*)

During a pretrial proceeding on May 25, 2018, the trial court announced that "children are not permitted to be attendance throughout this hearing." (*Id.* at A–12) The trial court stated that "given the nature of the allegations and the offense that

Mr. Garrett is indicted with, I am not going to permit children in the courtroom," and that this order would "remain in effect throughout the entirety of the trial and throughout the entirety of the proceedings." (*Id.* at A–12-13) Neither the State nor the defense had requested such an order, and the record does not reflect that any incident or disturbance had occurred to prompt any restrictions on the public's access to the courtroom. The court filed its order regarding "courtroom decorum" later that day, confirming that "No children are permitted to be in attendance." (*Id.* at A–12)

When the State asked the court to clarify how it was defining "children" for purposes of the order, the court stated that it was "anyone under the age of 18, a minor child." (*Id.* at A–13) When the trial court asked defense counsel if they had any comment on the order, counsel replied, "No, thank you, Your Honor." (*Id.*)

There was at least one young person in the courtroom at the time of the announcement, and the trial court immediately stated that "we'll need someone to -- to take the young man out into the hallway at this time." (*Id.*)

Garrett's capital trial continued with this complete ban on minors in place. Nobody, including Garrett, disputed that he caused the victims' deaths. (*See, e.g.*, Tr. 1156 ("We agree that there is no contest here as to who perpetrated these crimes.")) Garrett confessed his involvement to law enforcement and expressed remorse. (App. A, p. A–97) His defense focused on the issue of his mental state at the time of the offenses, and his ability to understand the wrongfulness of his actions related to the death of his daughter. (*Id.* at A–6-10)

Garrett was convicted on all counts and specifications. (*Id.* at A–11) The defense mitigation case focused on his serious mental illness, low intellectual functioning, lack of a prior criminal record, traumatic childhood, and positive relationships with family and friends. (*Id.* at A–82) The jury recommended a death sentence as to the counts related to C.D., but recommended life in prison without parole for the count related to the adult victim. (*Id.* at A–11) The trial court accepted the jury's verdicts and sentenced Garrett to death on September 16, 2019. (*See* App. B)

B. Proceedings Below

On direct appeal, Garrett raised the Sixth Amendment issue related to the closing of his entire trial.[1] Because defense counsel had failed "to make a contemporaneous objection to the trial court's decorum order excluding all minors under the age of 18 from the courtroom," he had "forfeited all but plain error. (*Id.* at A–14-15)

The court then proceeded to apply the four-pronged test for determining whether a courtroom closure is necessary, as set out in *Waller v. Georgia*, 467 U.S. 39, 48 (1984). Because the closure was partial, and not total, the court applied a modified version of the test, lowering the threshold for justifying the closure to a "substantial reason" rather than an "overriding interest." *State v. Drummond*, 854 N.E.2d 1038, 1054 (Ohio 2006) (App. A, p. A–15) The court found that there was a

[1] Under Ohio law, when a sentence of death has been imposed for an offense committed on or after January 1, 1995, an appeal may be filed with the state supreme court as a matter of right. R.C. § 2953.02.

substantial reason for closing the courtroom to minors: "protecting minors from the nature of the offense or the type of evidence that was going to be elicited." (*Id.* at A–16)

The trial court's order failed the remaining three prongs of *Waller* test, however. The closure was broader than necessary, there was no consideration of reasonable alternatives, and the trial court failed to make adequate findings on the record to support its ruling. (*Id.* at A–16-17) And while the court explicitly declined to adopt the triviality standard, as the State had urged, the court held that the closure would not meet that standard either, as this was a categorical exclusion of minors and not a limited or inadvertent act. (*Id.* at A–18)

The court concluded that "the trial court failed to satisfy at least three prongs of the test as stated in *Waller*, and **therefore erred in closing the courtroom to all minors.**" (*Id.* at A–18-19)(emphasis added) And yet, in the very next sentence, the court held, "But even so, Garrett does not prevail because he has not established plain error." (*Id.* at A–19)

When an error has not been raised in the trial court, Ohio's plain error rule applies. *See* Ohio Crim.R. 52(B). There are three limitations on the reviewing court's ability to grant relief: 1) there must be a finding of error; 2) the error must be obvious; and 3) the error must have affected "substantial rights." (App. A, p. A–19) Ohio has interpreted this requirement to "mean that the trial court's error must have affected the outcome of the trial." (*Id.*)

Because "Garrett [did] not argue that the ultimate outcome of the proceedings (i.e., the findings of guilt and the death sentence) would have been different if the trial court had not closed the courtroom to minors or had engaged in the proper analysis before doing so," he failed to establish plain error (*Id.*) His convictions and death sentence were upheld despite the structural error that had occurred at his trial.

REASONS FOR GRANTING THE WRIT

The right to a public trial, as enshrined in the Sixth Amendment, is of vital importance to the accused. "Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution." *In re Oliver*, 333 U.S. 257, 270 (1948). The public trial right extends beyond just the presentation of evidence against the accused, and includes voir dire, suppression hearings, and other pretrial proceedings. *Presley v. Georgia*, 558 U.S. 209, 213 (2010); *Waller*, 467 U.S. at 47. Although the right to a public trial may give way to other interests, "such circumstances will be rare, however, and the balance of interests must be struck with special care." *Waller*, 467 U.S. at 45, 46 (finding that "there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public.").

Errors impacting a defendant's constitutionally protected rights, like the public trial protections under the Sixth Amendment, are considered "structural errors." *Arizona v. Fulminante*, 449 U.S. 279, 309-310 (1991). These errors—

violations of "basic, constitutional guarantees"—are not subject to harmless error analysis, because they "affect the framework within which the trial proceeds." *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1907-1908 (2017). Errors can be deemed structural if they infringe upon a right "not designed to protect the defendant from erroneous conviction but instead protects some other interest," if the "effects of the error are simply too hard to measure," or if the "error always results in fundamental unfairness." *Id.* at 1908. While there is no definitive test for determining whether an error is structural, there is no dispute that the violation of a right to a public trial is a structural error. When such an error has been objected to, the defendant is entitled to "automatic reversal" without any inquiry into prejudice or a determination of whether the error actually effected the outcome. *Neder v. United States,* 527 U.S. 1, 7-9 (1999).

What has been left open to debate is the effect of a structural error when it is raised on direct review, but had not been preserved at trial. When an error has not been preserved at trial, it is subject to plain-error analysis. *United States v. Olano*, 507 U.S. 725, 732 (1993). This Court has consistently recognized the possibility that at least some structural errors may automatically satisfy the "affecting substantial rights" component of the plain error doctrine. *See United States v. Marcus*, 560 U.S. 258, 263 (2010); *Puckett v. United States*, 556 U.S. 129, 140-141 (2009); *United States v. Cotton*, 535 U.S. 625, 632-633 (2002); *Olano*, 507 U.S. at 735. Numerous lower courts have remarked upon the unresolved nature of this issue. *See, e.g., United States v. Williams,* 974 F.3d 320, 341 (3d Cir. 2020); *United States v. Anderson*, 881

F.3d 568, 573 (7th Cir. 2018); *United States v. Smith*, 433 Fed.Appx. 847, 851 (10th Cir. 2011); *State v. West*, 200 N.E.3d 1048, 1064 (Ohio 2022) (Donnelly, J., dissenting).

Without guidance from the Court as to which, if any, structural errors automatically satisfy the substantial rights element of the plain error test, federal and state courts have reached wildly inconsistent results.

This Court now has a unique opportunity to resolve the issue. Garrett's case is on direct review, without the added layers and complexity of habeas deference and its exacting standards for granting relief. The error at issue—the violation of a right to a public trial—is a well-established category of structural error. And the particulars of the closure in Garrett's case–a death penalty case where minors were excluded from every stage of the trial, the defendant's relationship with family and friends was relevant to the question of moral culpability, and the jury reached disparate verdicts on counts related to the adult and child victims–are well-suited to clarifying the relationship between structural errors and substantial rights.

A. Some circuit courts have found structural errors to be coextensive with "affected substantial rights," while others have adopted their own methods of reviewing structural errors that occurred without contemporaneous objections.

When faced with this open question, circuit courts have reached conflicting answers. The First, Fourth, Sixth, and Ninth Circuits have endorsed the view that proving structural error can automatically satisfy the substantial rights prong of the plain error test, while the Tenth Circuit has declined to apply the apply the plain error test to structural errors, and instead implemented automatic reversal. The

Third Circuit has refused to accept the argument that structural error satisfies the substantial rights prong, and instead imposed its own case-specific balancing test, weighing the costs of allowing the error to stand against the costs of providing a remedy.

The First Circuit has held that "the closure of the courtroom during the entirety of voir dire was a plain and obvious error that, as a structural error, affected the defendants' substantial rights and seriously impaired the fairness, integrity, or public reputation of the proceedings." *U.S. v. Negrón-Sostre*, 790 F.3d 295, 306 (1st Cir. 2015). The court noted that, "Indeed, given the importance of the public trial right, it would be hard to see how the public reputation and integrity of the proceedings would not be compromised in this case." *Id.* Despite defense counsel's failure to object to this closure, the court reversed and remanded the case for a new trial. *Id.*

The Fourth Circuit has reached analogous results in cases of structural error beyond the public trial right. *See United States v. Ramirez-Castillo*, 748 F.3d 205, 215-216 (4th Cir. 2014) (deprivation of right to jury verdict beyond a reasonable doubt); *United States v. David*, 83 F.3d 638, 647 (4th Cir. 1996) (failure to instruct on an element of the crime). The Ninth Circuit has done the same, holding that the "affects substantial rights" portion of "plain error review is necessarily met when the error at issue is structural." *United States v. Becerra*, 939 F.3d 995, 1005-1006 (9th Cir. 2019)(reversing a conviction when the trial court failed to orally instruct the jury on the relevant substantive law).

In *Becerra*, the court recognized several factors that justified categorizing an error as structural, including lack of confidence in the fairness of the proceedings due to the uncertainty of knowing how the jury might have found if properly instructed, and the detrimental effect on the public reputation of judicial proceedings caused by the flagrant nature of the trial court's error. *Id.* at 1006. These same characteristics of structural error weighed against validating the overall fairness of the proceedings, and in favor of noticing plain error. *Id.*

According to the Sixth Circuit, *Olano* already stands for the proposition that structural errors per se satisfy the "affected substantial rights" prong, as defendants are not required to demonstrate prejudice once those errors are established. *United States v. Barnett*, 398 F.3d 516, 526 (6th Cir. 2005). The court extended the presumption of prejudice—and therefore satisfaction of the substantial rights standard—to "cases where the inherent nature of the error made it exceptionally difficult for the defendant to demonstrate that the outcome of the lower court proceeding would have been different had the error not occurred." *Id.*

The Tenth Circuit has bypassed the question of the intersection of structural and plain error analysis entirely by holding that structural errors are "not amenable to analysis" under the plain error test, and "**must be** corrected." *United States v. Wiles*, 102 F.3d 1043, 1060-1061 (10th Cir.1996)(emphasis in original), abrogated on other grounds.

In a case factually-similar to *Negrón-Sostre*, the Third Circuit evaluated the closure of a courtroom during the entirety of voir dire under the plain error standard.

United States v. Williams, 974 F.3d 320, 342 (3d Cir. 2020). But *Williams* reached the opposite result, concluding that the error did not did not "seriously affect the fairness, integrity, or public reputation of judicial proceedings," and therefore did not merit relief. *Id.* at 347-348. The court stated that "even when confronting a structural error, a federal court of appeals should evaluate the error in the context of the unique circumstances of the proceeding as a whole to determine whether the error warrants remedial action." *Id.* at 342.

B. State courts of last resort are also divided on the issue.

In the absence of clear guidance on this issue, state courts have implemented a patchwork of methods for addressing the issue of unobjected-to structural errors.

Ohio has outright "rejected the notion that there is any category of forfeited error that is not subject to the plain error rule's requirement of prejudicial effect on the outcome." *State v. Rogers*, 38 N.E.3d 860, 866-867 (Ohio 2015); *but see State v. West*, 200 N.E.3d 1048, 1067 (Ohio 2022)(Brunner, J., dissenting)(noting that "regardless of whether raised as or considered plain error, when the error is structural, no amount of analysis of whether the error affected the trial's outcome will diminish the fact that substantial rights were affected"). In a case involving a courtroom closure, published just a week before Garrett's direct appeal was decided, the court acknowledged "the limitations of using the outcome-determination analysis to determine whether a structural error affected substantial rights." *State v. Bond*, Slip Op. 2022-Ohio-4150, ¶ 30. The court concluded "that a structural error may affect substantial rights even if the defendant cannot show that the outcome of the trial

would have been different had the error not occurred." *Id.* at ¶ 32; *but see* App. A–19 (denying relief because "Garrett does not argue that the ultimate outcome of the proceedings (i.e., the findings of guilt and the death sentence) would have been different" if the public trial violation had not occurred).

When states require that public trial errors must be meticulously preserved, or condone exceptions to the right beyond the narrow circumstances contemplated in *Waller*, the right to a public trial can be eroded. Georgia has repeatedly invoked state law to deny review of unpreserved claims of error in partial closures of the courtroom, therefore evading constitutional scrutiny. *See Scott v. State*, 832 S.E.2d 426, 429-430 (Ga. 2019)(Peterson, J., concurring)(noting that the court of appeals' repeated sanctioning of closures makes it more likely that defendants will fail to preserve the issue). The Minnesota Supreme Court has seen (and rejected the majority of) "increasing number of petitions for review" from defendants alleging public trial violations, evidence of a pattern of "creeping courtroom closure" across the state. *State v. Silvernail*, 831 N.W.2d 594, 608-609 (Minn. 2013) (Anderson, J., dissenting).

In at least one county in Wisconsin it was "common practice" to close courtrooms during voir dire, and yet defendants were deemed to have "forfeited" the right if they did not contemporaneously object. *State v. Pinno*, 850 N.W.2d 207, 236-237, 243-244 (Wisc. 2014)(Abrahamson, C.J., and Crooks, J., dissenting). By allowing defendants to forfeit their rights, circuit courts are able "to close courtrooms to the public without any compelling reason," without any "remedy for violations of the public's right to open court proceedings." *Id.* at 236 (Abrahamson, C.J., dissenting).

In Massachusetts, failure to object to a courtroom closure waives all but review for a "substantial risk of a miscarriage of justice," even if counsel was unaware of the closure at the time it occurred. *Commonwealth v. Robinson*, 102 N.E.3d 357, 360-365 (Mass. 2018). Maryland has gone even further, holding that failure to preserve a public trial error can waive even plain error review. *See, e.g., Robinson v. State*, 976 A.2d 1072, 1083-1084 (Md. 2009).

Several states have considered the essential role of fundamental constitutional rights, such as a public trial, when considering how to address violations of those rights in the absence of a contemporaneous objection. Washington, for example, has adopted a strict five-part test for assessing whether courtroom closures are error. *State v. Bone-Club*, 906 P.2d 325, 327-328 (Wash. 1995). The test "mirrors" the *Waller* closure requirements. *State v. Brightman*, 122 P.3d 150, 155 n.5 (Wash. 2005). A defendant's failure to object does not "free the court from having to consider the defendant's public trial rights." *Bone-Club,* at 257, 261. "Prejudice is presumed where a violation of the public trial right occurs." *Id.* at 261-262.

Michigan has recently completely "jettisoned the prejudice analysis for forfeited structural errors," and held that "a forfeited structural error creates a formal presumption that the [substantial rights] prong of the plain-error standard has been satisfied." *People v. Davis*, 983 N.W.2d 325, 337-338 (Mich. 2022). The court found that imposing a rebuttable presumption creates a more appropriate framework for analyzing these claims: "Just as defendants face difficulty in proving prejudice from structural errors, they also face difficulty in identifying specific facts on the record

showing that the forfeited structural error seriously affected the fairness, integrity, or public reputation of the trial." *Id.* at 338.

C. The fundamental importance of the right to a public trial and the issues at stake in a capital case make this case an appropriate vehicle for addressing this issue.

"The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions. . . ." *In re Oliver*, 333 U.S. at 270 n.25, (1948). Even assuming that each actor in the judicial process intends to perform their duties faithfully, "the public-trial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings." *Estes v. Texas*, 381 U.S. 532, 588 (1965) (Harlan, J., concurring).

This Court has recognized that an accused person has a right to have relatives and friends present in the courtroom. *See In re Oliver*, 333 U.S. at 271-272. The presence of friends and relatives cannot be more vital than in a capital trial, when a defendant's life is at stake. The physical presence of the spectators during a capital trial no doubt confers a psychological influence on jurors, particularly as they are asked to assess a defendant's moral culpability. Excluding a defendant from a courtroom may deprive of his "due process right to exert a psychological influence upon the jury," as the jury may "speculat[e] adversely to the defendant about his absence from the courtroom." *Larson v. Tansy*, 911 F.2d 392, 396 (10th Cir. 1990).

Here, the exclusion of all minors could have the same effect—particularly in a case of a child victim and arguments that Garrett's positive relationships with others are entitled to mitigating weight.

Structural errors can cause "consequences that are necessarily unquantifiable and indeterminate." *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993). And the circumstances of Garrett's case make it likely that the exclusion of all minors from every aspect of the trial resulted in such insidious consequences. Garrett was a young man, accused of murdering his four-year-old daughter after a lifetime of law-abiding behavior. While his actions were not contested, his mental state was at issue in both phases of the trial. And during the mitigation phase, his relationship with family and friends was explicitly raised as a reason to spare his life. This Court should answer the question of whether the confirmed structural error (infecting the entirety of the proceedings) established that his substantial rights were affected.

CONCLUSION

This Court should grant the petition and summarily reverse the decision of the court below. In the alternative, this Court should grant the petition and order full merits review of this constitutional claim.

Respectfully submitted,

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