No. 22-7632

In the Supreme Court of the United States

KRISTOFER D. GARRETT,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION

G. GARY TYACK
Franklin County, Ohio, Prosecuting Attorney
SETH L. GILBERT*
Chief Counsel, Appeals Unit
**Counsel of Record*
373 South High Street, 13th Floor
Columbus, Ohio 43215
614-525-3555
sgilbert@franklincountyohio.gov

Counsel for Respondent

CAPITAL CASE

QUESTIONS PRESENTED

Defendant Kristofer Garrett killed his four-year-old daughter and her mother. Prior to Garrett's capital murder trial, the trial court *sua sponte* issued an order excluding children from the courtroom. Pursuant to the order, the trial court at a pre-trial motions hearing ordered the removal of an unidentified child who was in the courtroom at that time. But the trial court stated that it would be willing to reconsider its order in the future if asked to do so. The trial court specifically gave the defense an opportunity to object or make any comment regarding the order, and one of Garrett's attorneys affirmatively stated that the defense had nothing to add. Neither the parties nor any member of the public brought up the issue again for the remainder of the proceedings. Reviewing for plain error under Ohio R. Crim. P. 52(B), the Ohio Supreme Court found that the partial courtroom closure was error under the Sixth Amendment, but that the error did not affect "substantial rights," as required by Ohio law. This case presents two questions:

First, does this Court have jurisdiction to review the Ohio Supreme Court's application of Ohio R. Crim. P. 52(B)?

Second, even if jurisdiction is present, does the Ohio Supreme Court's decision that the partial courtroom closure did not affect substantial rights warrant review?

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INTRODUCTION

Unhappy about his obligation to pay child support, defendant Kristofer Garrett killed his four-year old daughter and her mother. Prior to Garrett's capital trial, the trial court *sua sponte* announced that children would not be permitted in the courtroom. At a pre-trial motions hearing, the trial court ordered a boy removed from the courtroom. But also at this hearing, the court expressed a willingness to reconsider its order if asked to do so. Despite receiving a specific opportunity to object or otherwise comment on the trial court's order, defense counsel affirmatively responded that the defense had nothing to add.

The Ohio Supreme Court on direct appeal held that the partial courtroom closure violated the Sixth Amendment. But the court affirmed Garrett's convictions and death sentence because the defense failed to preserve the issue for appeal and failed to establish plain error under Ohio R. Crim. P. 52(B). Applying the "substantial rights" requirement in the rule, the court held that Garrett failed to show that the outcome of the proceedings would have been different had the trial court not closed the courtroom or engaged in the proper analysis before doing so.

Garrett complains that the court applied an outcome-determination standard for determining substantial rights. According to Garrett, an unlawful courtroom closure is a structural error that *automatically* satisfies the "substantial rights" requirement of plain-error review.

But the standard for establishing plain error under Ohio R. Crim. P. 52(B)—including the "substantial rights" requirement—is purely a matter of Ohio law and thus within the exclusive purview of the Ohio Supreme Court. That is to say, there

is no federal question at issue here, and the Ohio Supreme Court's decision rests on an independent and adequate state-law ground. This Court thus lacks jurisdiction to review the question presented by Garrett's petition.

This case is unworthy of review for other reasons. *First*, because the Ohio Supreme Court's holding is limited to Ohio R. Crim. P. 52(B), granting certiorari in this case will not settle any uncertainty regarding how federal courts apply Fed. R. Crim. P. 52(b) or how other states apply their own laws regarding review of unpreserved structural errors. *Second*, wholly aside from whether Garrett satisfied the "substantial rights" requirement under Ohio R. Crim. P. 52(B), there are multiple alternative grounds for affirmance under state and federal law. *Third*, even on the "substantial rights" requirement, review at this point would be premature because the Ohio Supreme Court has not been uniform in requiring a defendant to show outcome determination in cases involving unpreserved structural error. This Court therefore should allow the issue to further develop in the Ohio courts before intervening. *Lastly*, the limited nature of the courtroom closure—resulting in the removal of only a single child from a pre-trial, non-evidentiary hearing—makes this case a poor vehicle to address whether all courtroom closures—let alone all structural errors—automatically satisfy the "substantial rights" requirement under Ohio R. Crim. P. 52(B).

If this Court were inclined to address the interplay between plain-error review and structural error, it should do so in a case posing no jurisdictional barriers, where

this Court's decision would have nationwide impact, and where the issue is dispositive to the outcome of the judgment. This is not such a case.

JURISDICTION

As explained in more detail below (see *infra*, pp. 7-12), this Court lacks jurisdiction because the Ohio Supreme Court's decision that Garrett failed to satisfy the "substantial rights" requirement under Ohio R. Crim. P. 52(B) rests on an independent and adequate state-law ground.

STATEMENT

I. Trial-court proceedings.

Garrett was charged with three counts of aggravated murder with death-penalty specifications in the deaths of Nicole Duckson and her and Garrett's four-year old daughter C.D. R. 1-2. Garrett was also charged with tampering with evidence. *Id.*

Prior to trial, the trial court filed an "Entry and Order Governing Courtroom Decorum," stating that "[n]o children are permitted to be in attendance." R. 159. At a pre-trial motions hearing, the trial court explained 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." 5-25-18, Tr., 3. The trial court noted that an unidentified child was in the courtroom and ordered his removal. *Id.*, 3.

The prosecutor asked how the trial court would define "children" for purposes of the order. *Id.*, 4. The trial court answered, "anyone under the age of 18," but stated that "if it's an issue, I'll reconsider." *Id.* The prosecutor then expressed concerns

about allowing objections before enforcing the order, particularly if a 17-year old entered the courtroom. *Id*. The trial court reiterated that if "something comes up," "we'll address it." *Id*., 5. The trial court asked Garrett's attorneys whether they had "anything regarding the decorum order," and one of Garrett's attorneys responded, "No, thank you, Your Honor." *Id*. Throughout the proceedings, neither the parties nor any member of the public expressed any desire to have a child in the courtroom.

At trial, the State presented evidence that Nicole and C.D. were repeatedly stabbed and killed outside their home. Trial Tr., 1194. Police soon identified Garrett as a suspect and arrested him later that night. Garrett admitted to police that he was present at the house and that he cut his hand at the scene. State's Exh. W1 (3:52:00 – 4:00:10). The next day, Garrett asked to speak to police again, and this time he fully confessed to both murders. State's Exh. W2 (12:45 – 13:00). Garrett stated that he was angry because he had received an email threatening incarceration for non-payment of child support; according to Garrett, his obligation to pay child support was "destroying [his] future." *Id*. (16:45 – 16:55). So Garrett went to Nicole's house and waited in his car (a Cadillac) for her to come outside. *Id*. (13:55 – 14:50). When Nicole emerged from the house, Garrett stabbed and killed her. *Id*. (17:10 – 17:20). C.D. was outside as well, and when she started to run, Garrett chased her down and stabbed and killed her as well. *Id*. (19:05 – 19:55).

The jury found Garrett guilty on all counts and specifications. Trial Tr., 2019-2021. The case then proceeded to a penalty-phase hearing, after which the jury recommended that Garrett be sentenced to life without parole on Count One

(aggravated murder of Nicole) and to death on Counts Two and Three (aggravated murder of C.D.). *Id.*, 2341. The trial court accepted the jury's recommendation and sentenced Garrett to life without parole on Count One and to death on Count Three (Counts Two and Three merged for sentencing purposes). R. 403-410. The trial court also imposed a concurrent 36-month prison term on Count Four (tampering with evidence). *Id.*

II. Appellate proceedings.

On direct appeal to the Ohio Supreme Court, Garrett raised 16 propositions of law. The third proposition of law argued that the trial court's decorum order violated Garrett's right to a public trial and that the error was structural, requiring automatic reversal. After discussing the relevant facts and the legal framework, the court held that the defense's "failure to make a contemporaneous objection to the trial court's decorum order excluding all minors under the age of 18 from the courtroom forfeited all but plain error." Pet. App. 15.

The court next recited the four-prong test from *Waller v. Georgia*, 467 U.S. 39 (1984). *Id.* Regarding the first prong, the court held that the trial court's exclusion of children from the courtroom was only a "partial closure," and so only a "substantial reason"—as opposed to an "overriding interest"—was needed to justify the closure. *Id.* The court found that protecting minors from the type of evidence that would be elicited constituted a substantial reason. *Id.*, 15-16. The court, however, found that the trial court failed to satisfy the remaining three *Waller* prongs. *Id.*, 16-18. The court also rejected the State's argument that the partial closure was "trivial." *Id.*, 18.

Having found that closing the courtroom to minors was error, the court next addressed whether Garrett established plain error under Ohio R. Crim. P. 52(B). *Id.*, 18-19. That rule requires that "the error must have affected 'substantial rights,'" which the court had previously interpreted "to mean that the trial court's error must have affected the outcome of the trial." *Id.*, 19, quoting *State v. Barnes*, 759 N.E.2d 1240, 1247 (Ohio 2002). The court held that Garrett failed to satisfy the "substantial rights" requirement: "Garret 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 trial court had not closed the courtroom to minors or had engaged in the proper analysis before doing so. * * * Thus, he has failed to establish plain error." Pet. App. 19 (internal citation omitted).

The court rejected Garrett's remaining propositions of law and affirmed his convictions and death sentence (the court remanded to the trial court to correct clerical errors in the sentencing entry). *Id.*, 99. The three dissenters disagreed with the majority that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. *Id.*, 99-104. The court denied reconsideration. *Id.*, 134.

REASONS FOR DENYING THE PETITION

Ohio R. Crim. P. 52(B) states: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The Ohio Supreme Court found that the trial court's closure of the courtroom to children violated the Sixth Amendment. But the defense failed to preserve the error, and so the court reviewed for plain error under Ohio R. Crim. P. 52(B). The court

found that the error did not affect substantial rights because Garrett failed to show that the outcome of the proceedings would have been different.

Garrett argues that an improper courtroom closure is a structural error that automatically satisfies the "substantial rights" requirement under the rule. But Ohio R. Crim. P. 52(B) is Ohio law, and this Court lacks jurisdiction to review the Ohio Supreme Court's interpretation of state law. For this and other reasons, certiorari should be denied.

I. This Court lacks jurisdiction because the Ohio Supreme Court's decision rests on an independent and adequate state-law ground.

Garrett does not seek review of any federal law. Indeed, the Ohio Supreme Court *agreed* with Garrett that the trial court's courtroom closure violated the Sixth Amendment right to a public trial. The court, however, found that Garrett's courtroom-closure claim failed to establish plain error. Accordingly, Garrett's question presented asks whether a structural Sixth-Amendment error "satisf[ies] the plain-error test's requirement that 'substantial rights' were affected." Pet. i. The "plain-error test" applied by the Ohio Supreme Court comes from Ohio R. Crim. P. 52(B), which of course is *state* law. Garrett himself put it best: "When an error has not been raised in the trial court, *Ohio*'s plain error rule applies." *Id.*, 6 (emphasis added).

This Court lacks jurisdiction because the Ohio Supreme Court's decision "rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). An independent and adequate state law deprives this Court of jurisdiction "whether the

state law ground is substantive or procedural." *Id.* "Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Id*, citing *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945).

Normally, the issue of an independent and adequate state-law ground arises in determining whether this Court has jurisdiction to review some separately-raised federal question. But here, not only does the Ohio Supreme Court's decision rest on a state-law ground—namely, that Garrett failed to satisfy the "substantial rights" requirement under Ohio R. Crim. P. 52(B)—but it is this exact state-law determination that Garrett asks this Court to review. He seeks review of no other question—federal or otherwise. That Garrett seeks review of a state-law determination and nothing else is all the more reason that this Court lacks jurisdiction. After all, this Court is "powerless to revise a state court's interpretation of its own law." *Cruz v. Arizona*, 143 S.Ct. 650, 662 (2023) (Barrett, J., dissenting), citing *Murdock v. Memphis*, 20 Wall. 590, 636 (1875).

This case does not present the sometimes "difficult" question of whether state law "is truly an independent basis for decision or merely a passing reference." *Coleman*, 501 U.S. at 732. Whereas in some cases the state-court judgment "rests upon two grounds, one of which is federal and the other non-federal in character," *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935), the Ohio Supreme Court's reliance on Ohio R. Crim. P. 52(B) was the *sole* basis for the court's rejection of Garrett's

courtroom-closure claim. Far from a "passing reference," the court devoted an entire section of its opinion to applying Ohio R. Crim. P. 52(B) to the courtroom-closure claim. The court's plain-error analysis is separate from its Sixth-Amendment analysis, and the court "actually [] relied on [Ohio R. Crim. P. 52(B)] as an independent basis for its disposition of the case." *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985).

Moreover, nothing in the Ohio Supreme Court's opinion suggests that the court "felt compelled" by federal law to construe Ohio R. Crim. P. 52(B) "in the manner it did." *Delaware v. Prouse*, 440 U.S. 648, 653 (1979), quoting *Zacchini v. Scripps-Howard Broad. Co.,* 433 U.S. 562, 568 (1977). True, Fed. R. Crim. P. 52(b) is worded similarly to Ohio R. Crim. P. 52(B), and both rules contain a "substantial rights" requirement. But the federal rule is inapplicable to state-court proceedings. Fed. R. Crim. P. 1(a)(1) ("These rules govern the procedure in all criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States."). While state courts occasionally rely on federal decisions in applying state plain-error standards, they do so "only because the [state] and federal plain error standards are similar, not because [the state court] was applying federal law." *Kaczmarek v. Rednour*, 627 F.3d 586, 592 (7th Cir. 2010). In any event, the Ohio Supreme Court's plain-error analysis does not cite Fed. R. Crim. P. 52(b) or any federal cases. The Ohio Supreme Court's finding that Garrett failed to establish plain error rests entirely and independently on Ohio law.

In addition to being independent of federal law, the Ohio Supreme Court's reliance on Ohio R. Crim. P. 52(B) adequately supports the court's judgment. A contemporaneous-objection rule like Ohio R. Crim. P. 52(B) serves important state interests and is an adequate state-law ground to prevent this Court from reaching the merits of a federal constitutional issue. *Osborne v. Ohio*, 495 U.S. 103, 123 (1990).

More to the point, the Ohio Supreme Court's application of an outcome-determination standard to satisfy the "substantial rights" requirement under Ohio R. Crim. P. 52(B) is not among the "rarest of situations" where a state-law decision is so "'unforeseeable and unsupported'" that it constitutes an inadequate ground to preclude this Court's jurisdiction. *Cruz*, 143 S.Ct. at 658, quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964). The outcome-determination standard is "'firmly established and regularly followed,'" *Cruz*, 143 S.Ct. at 658, quoting *Lee v. Kemna*, 534 U.S. 362, 376 (2002), and has long been a requirement under Ohio law, *Barnes*, 759 N.E.2d at 1247; *State v. Long*, 372 N.E.2d 804, 808 (Ohio 1979). As Garrett acknowledges in his petition (at 12), the Ohio Supreme Court has previously "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, 867 (Ohio 2015). While the Ohio Supreme Court a week before deciding Garrett's case declined to apply an outcome-determination standard to another courtroom-closure error (see *infra*, pp. 23-26, discussing *State v. Bond*, ___ N.E.3d ___, 2022-Ohio-4150, 2022 WL 17170221 (Ohio 2022)), it was hardly "unforeseeable and unsupported" that the court would apply an outcome-determination standard to

Garrett's courtroom-closure claim, see also *State v. McAlpin*, 204 N.E.3d 459, 481-487 (Ohio 2022) (applying outcome-determination standard to structural right-to-self-representation claim); *State v. West*, 200 N.E.3d 1048, 1054-1056 (Ohio 2022) (plurality) (applying outcome-determination standard to structural judicial-bias claim).

Federal habeas cases are instructive on the jurisdictional issue. Just as on direct review, a state court's reliance on an independent and adequate state-law ground limits federal courts' authority to grant habeas relief to state prisoners. *Coleman*, 501 U.S. at 729-730. Federal courts frequently find that a failure to establish plain error is an independent and adequate state-law procedural default that precludes habeas relief. See e.g., *Hand v. Houk*, 871 F.3d 390, 417 (6th Cir. 2017); *Kaczmarek*, 627 F.3d at 591-592; *Campbell v. Burris*, 515 F.3d 172, 176-182 (3rd Cir. 2008); *Lynch v. Ficco*, 438 F.3d 35, 44-45 (1st Cir. 2006); *Daniels v. Lee*, 316 F.3d 477, 487-488 (4th Cir. 2003). Of course, one key difference between federal habeas and this Court's direct review is that in habeas cases a procedural default may be excused by showing cause and prejudice. *Coleman*, 501 U.S. at 746-747. But there is no "cause and prejudice" exception that would allow this Court to review state-law questions on direct review.

It is no coincidence, then, that this Court's plain-error cases all involve Fed. R. Crim. P. 52(b) rather than any state plain-error rule. See e.g., *Greer v. United States*, 141 S.Ct. 2090 (2021); *Rosales-Mireles v. United States*, 138 S.Ct. 1897 (2018); *United States v. Davila*, 569 U.S. 597 (2013); *United States v. Marcus*, 560 U.S. 258 (2010);

Puckett v. United States, 556 U.S. 129 (2009); *United States v. Dominguez-Benitez*, 542 U.S. 74 (2004); *United States v. Cotton*, 535 U.S. 625 (2002); *Johnson v. United States*, 520 U.S. 461 (1997); *United States v. Olano*, 507 U.S. 725 (1993).

In short, Ohio R. Crim. P. 52(B) is state law—not federal law. Nothing in the Ohio Supreme Court's decision indicates that it rests "primarily on federal law" or even that it is "interwoven with federal law"—rather, the "adequacy and independence" of the state-law ground is clear from the "face of the opinion." *Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983). The court's opinion "clearly and expressly" states that it rejected Garrett's third proposition of law based solely on Garrett's failure to satisfy plain-error review under Ohio R. Crim. P. 52(B), which is a "bona fide separate, adequate, and independent" state-law ground. *Id.* at 1041. This Court accordingly lacks jurisdiction.

II. Even if this Court had jurisdiction, this case would be unworthy of review for multiple reasons.

Beyond this Court's lack of jurisdiction to review the Ohio Supreme Court's application of state law, several other reasons militate against granting certiorari.

A. The Ohio Supreme Court's decision does not implicate Fed. R. Crim. P. 52(b) or other states' laws.

Related to the lack of jurisdiction, this case does not implicate any split of authority beyond Ohio. As Garrett notes in his petition (at 8), this Court, when applying Fed. R. Crim. P. 52(b), has left open the "possibility" that structural error "might 'affec[t] substantial rights' regardless of their actual impact on an appellant's trial." *Marcus*, 560 U.S. at 263, quoting *Puckett*, 556 U.S. at 140-141. Garrett goes

on to discuss federal appellate decisions that, according to him, have reached "conflicting answers" on this "open question." Pet. 9-12.

But only two of these decisions—*United States v. Negrón-Sostre*, 790 F.3d 295 (1st Cir. 2015); and *United States v. Williams*, 974 F.3d 320 (3rd Cir. 2020)—involved a courtroom closure. In *Negrón-Sostre*, the First Circuit held that closing the courtroom to all members of the public for the entirety of voir dire was a structural error that affected substantial rights, but in doing so the court focused on the "specific ways" that a courtroom closure may prejudice a defendant during voir dire. *Negrón-Sostre*, 790 F.3d at 305-306. *Williams*, too, involved a total courtroom closure during voir dire. The Third Circuit, however, did not address the "substantial rights" requirement under Fed. R. Crim. P. 52(b), finding instead that the error did not "'seriously affect the fairness, integrity or public reputation of judicial proceedings.'" *Williams*, 974 F.3d at 341, quoting *Olano*, 507 U.S. at 736. Neither *Negrón-Sostre* nor *Williams* stands for the proposition that *all* courtroom closures—even partial closures—automatically satisfy the "substantial rights" requirement under Fed. R. Crim. P. 52(b).

Even if there is some conflict among the federal courts regarding whether all courtroom closures—or, more generally, all structural errors—automatically satisfy the "substantial rights" requirement under Fed. R. Crim. P. 52(b), the Ohio Supreme Court's decision is limited to Ohio R. Crim. P. 52(B) and thus has no impact on the federal rule. If and when this Court wishes to squarely address the effect of structural

errors on the "substantial rights" requirement in the federal plain-error standard, it can do so only in a case involving Fed. R. Crim. P. 52(b). This case does not qualify.

Garrett also cites several state-court decisions that have implemented what he describes as a "patchwork of methods" for addressing unpreserved structural errors. Pet. 12-15. But Garrett's argument in this regard only highlights why this Court's review is unwarranted. This "patchwork" is the result of courts applying state laws that vary from state to state. The Ohio Supreme Court applied Ohio law, and so any review of the court's decision would have no effect on other states' standard of review for unpreserved courtroom-closure or other structural errors.

B. Whether the courtroom closure affected substantial rights is not dispositive to the Ohio Supreme Court's judgment.

To demonstrate plain error under Ohio R. Crim. P. 52(B), "the party asserting error must show that an error occurred, that the error was plain, and that the error affected his substantial rights." *Bond*, 2022 WL 1710221, ¶ 17, citing *State v. Wilks*, 114 N.E.3d 1092, 1108 (Ohio 2018); see also *Barnes*, 759 N.E.2d at 1247. Even if these criteria are satisfied, Ohio R. Crim. P. 52(B) states that an appellate court "may" notice plain forfeited errors—"a court is not obligated to correct them." *Barnes*, 759 N.E.2d at 1247; see also *West*, 200 N.E.3d at 1053 ("An appellate court has discretion to notice plain error and therefore 'is not required to correct it."), quoting *Rogers*, 38 N.E.3d at 866. Under this discretionary aspect of plain-error review, the rule "admonish[es] courts to notice plain error 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.'"

Barnes, 759 N.E.2d at 1247, quoting *Long*, 372 N.E.2d 804, paragraph three of the syllabus.

Apart from whether the courtroom closure affected substantial rights, there are multiple grounds for affirmance. So however this Court would answer the question presented would have no effect on the Ohio Supreme Court's judgment.

Waiver. Before even reaching plain-error review, there is the issue of waiver. Garrett states that the defense "remained silent" when the trial court announced that children would be excluded from the courtroom. Pet. 3. Not true. The trial court gave defense counsel an opportunity to object and make any record it wanted regarding the decorum order, and defense counsel *affirmatively stated* that the defense had nothing to add. Given these circumstances, the defense consented to the courtroom closure. *Wilks*, 114 N.E.3d at 1111; *State v. Drummond*, 854 N.E.2d 1038, 1055-1056 (Ohio 2006); *State v. Bethel*, 854 N.E.2d 150, 170-171 (Ohio 2006).

In the context of a courtroom closure, when "the subject matter [is] unmistakably on the table, and the defense's silence is reasonably understood only as signifying agreement that there was nothing objectionable,' the issue is waived on appeal." *United States v. Laureano-Perez*, 797 F.3d 45, 78 (1st Cir. 2015), quoting *United States v. Christi*, 682 F.3d 138, 142 (1st Cir. 2012). The argument for waiver is even stronger when the issue is "unmistakably on the table" and defense counsel affirmatively declines to raise any objection.

The State raised the waiver argument below. While the Ohio Supreme Court rejected Garrett's argument that the courtroom-closure *could not* be waived by

"silence," the court did not directly address the State's waiver argument, choosing instead to apply plain-error review under Ohio R. Crim. P. 52(B). Pet. App. 14-15. But the defense's waiver of the courtroom-closure claim precludes *any* review.

No clear or obvious error. Even Garrett's courtroom-closure claim was forfeited—rather than waived—Garrett failed to meet his burden of establishing plain error under Ohio R. Crim. P. 52(B). To start, Garrett is wrong in saying that there is "undisputed error." Pet. 3. In fact, Ohio *does* dispute the existence of any error under *Waller*. Importantly, the trial court's courtroom closure was limited both in scope and duration. As to scope, the trial court's decorum order excluded only children. All other members of the public were permitted to be in the courtroom throughout the entire proceedings. As to duration, the only time the trial court actually closed the courtroom to anyone was during the pre-trial motions hearing, when the trial court ordered the removal of an unidentified child. For the remainder of the proceedings, the trial court stated that it would consider allowing children in the courtroom if requested to do so. Thus, beyond the exclusion of the one child at the motions hearing, the trial court's decorum order is best seen as a *proposed* courtroom closure. But neither the parties nor any member of the public brought up the issue again throughout the entire trial. The trial court therefore did not actually order the courtroom closed to anyone at any point after the motions hearing.

"'[T]here are certain instances in which [an] exclusion cannot be characterized properly as implicating the constitutional guarantee.'" *United States v. Perry*, 479 F.3d 885, 890 (D.C. Cir. 2007), quoting *Braun v. Powell*, 227 F.3d 908, 918 (7th Cir.

2000). "That is, even a problematic courtroom closing can be 'too trivial to amount to a violation of the [Sixth] Amendment.'" *Perry*, 479 F.3d at 890, quoting *Peterson v. Williams*, 85 F.3d 39, 42 (2nd Cir. 1996). "A courtroom closing is 'trivial' if it does not implicate 'the values served by the Sixth Amendment' as set forth in *Waller*." *Perry*, 85 F.3d at 890, quoting *Peterson*, 85 F.3d at 42. The triviality standard is based not on lack of "prejudice," but rather on whether the actions of the court deprived the defendant "of the protections conferred by the Sixth Amendment." *Perry*, 479 F.3d at 890, quoting *Peterson*, 85 F.3d at 42.

To be sure, the Ohio Supreme Court rejected the State's triviality argument on the ground that "the trial court ordered the *categorical* exclusion of all minors under the age of 18." Pet. App. 18 (emphasis sic). But the trial court did not exclude all minors; it excluded only one minor. The trial court kept an open mind as to whether other children would be excluded. The Ohio Supreme Court also noted that the triviality standard usually relies on an "inadvertent act." *Id.* But cases apply the triviality standard to intentional closures as well. See e.g., *Perry*, 479 F.3d at 887-888 (exclusion of the defendant's son); *Braun*, 227 F.3d at 917-920 (exclusion of a former member of the jury venire panel).

No less so than in *Perry*, excluding one child from a motions hearing would neither "'ensure that judge and prosecutor carry out their duties responsibly' nor 'discourage[] perjury." *Perry*, 479 F.3d at 890-891, quoting *Waller*, 476 U.S. at 46. "Nor would the child's attendance 'encourage [a] witness[] to come forward.'" *Perry*, 479 F.3d at 891, quoting *Waller*, 476 U.S. at 46. The exclusion of the one child "does

not implicate the policy concerns that inform the Sixth Amendment's right to an open trial." *Braun*, 277 F.3d at 920.

Even if the trial court's courtroom closure was not trivial, there was no Sixth Amendment error. At the outset, *Waller* itself states that the four-prong test announced in that opinion applies only if the trial court closes the courtroom "over the objections of the accused." *Waller*, 467 U.S. at 47; see also *Presley v. Georgia*, 558 U.S. 209, 213 (2010) (per curiam) ("the accused does have a right *to insist* that the *voir dire* of the jurors be public.") (emphasis added). When the accused does not object—and especially when defense counsel affirmatively states that it has no objection—the accused's Sixth Amendment right to a public trial is in applicable. (The Ohio Supreme Court did not address the courtroom closure under the First Amendment. See *Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty.*, 464 U.S. 501 (1984).)

Even applying the four-prong test in *Waller*, the trial court's partial courtroom closure passes muster. The prongs are: (1) "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced," (2) "the closure must not be 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*, 467 U.S. at 48.

Addressing the first *Waller* prong, the Ohio Supreme Court found that only a "substantial reason" was necessary because the trial court ordered only a partial courtroom closure, and that—given the nature of the case—the exclusion of minors

constituted a substantial reason. Pet. App. 15-16. Garrett wisely does not challenge this finding.

The Ohio Supreme Court found that the trial court failed to satisfy the remaining three *Waller* prongs. But at least one court has held that, with a partial closure, "a court need merely find a 'substantial' reason for [a] partial closure, and need not satisfy the elements of the more rigorous *Waller* test." *Judd v. Haley*, 250 F.3d 1308, 1315 (11th Cir. 2001), citing *United States v. Brazel*, 102 F.3d 1120, 1155 (11th Cir. 1997). Even assuming the remaining three *Waller* prongs apply, the State disagrees with the Ohio Supreme Court's analysis on these prongs.

Under the second *Waller* prong, the Ohio Supreme Court found that the courtroom closure was broader than necessary, relying mostly on the belief that the trial court's order precluded all children from the entirety of the proceedings. Pet. App. 16-17. But, again, there was no definitive courtroom closure beyond the exclusion of one child at the pre-trial motions hearing. By expressing a willingness to revisit its decorum order if requested to do so, trial court recognized that whether to exclude additional children would depend on a variety of factors, including the age of the child, the nature of the proceedings, etc.

As for the third *Waller* prong, the decorum order was a narrower alternative to a total closure because it applied only to children, and because the trial court agreed to revisited the order if requested to do so. "The trial judge has no further obligation to 'consider alternatives to the alternative,' in the absence of any request from the defendant." *Brown v. Kuhlman*, 142 F.3d 529, 538 (2nd Cir. 1998), quoting

Ayala v. Speckard, 131 F.3d 62, 71 (2nd Cir. 1997). And Garrett "made no such request." *Brown*, 142 F.3d at 538. The Ohio Supreme Court noted that trial courts must consider reasonable alternatives "even when they are not offered by the parties." Pet. App. 17, quoting *Presley*, 558 U.S. at 214. But this statement from *Presley* addressed the requirement to consider reasonable alternatives to a *total* closure—this Court was not addressing the issue of "alternatives to the alternatives."

On the fourth *Waller* prong, the trial court explained that the decorum order was based on the "nature of the charges" and it expressed a willingness to reconsider its order if requested to do so. "[T]he strength of the judge's findings must be evaluated by reference to the very limited scope of the closure that they support; by that standard, the trial court's findings were adequate." *Brown*, 142 F.3d at 538.

For the foregoing reasons, the trial court committed no Sixth Amendment error under *Waller*. But even if there were error, the Ohio Supreme Court made no finding that the error was "plain" as required by Ohio R. Crim. P. 52(B). A "plain" error is one that is "clear" or "obvious." *Barnes*, 759 N.E.2d at 1247, quoting *Olano*, 507 U.S. at 734. Whether an error qualifies as "obvious" is a question of state law. *Nitschke v. Belleque*, 680 F.3d 1105, 1112 (9th Cir. 2012). At the very least, it is "subject to reasonable dispute" that the trial court's decorum order violated the Sixth Amendment. *Puckett*, 556 U.S. at 135, citing *Olano*, 507 U.S. at 734. And "[c]lose calls do not cut it for plain-error review." *United States v. McNabb*, 958 F.3d 338, 341 (5th Cir. 2020).

No manifest miscarriage of justice. Even if the trial court's decorum order was a clear and obvious error under the Sixth Amendment, and even if the courtroom closure automatically satisfies the "substantial rights" requirement under Ohio R. Crim. P. 52(B), the fact would still remain that the Ohio Supreme Court was not obligated to correct the error.

Given the limited nature of the courtroom closure, and given that defense counsel affirmatively declined to object, this case is lightyears away from the "exceptional circumstances" where noticing plain error is necessary to "prevent a manifest miscarriage of justice." *Barnes*, 759 N.E.2d at 1247, quoting *Long*, 372 N.E.2d 804, paragraph three of the syllabus. The partial courtroom closure did not "'seriously affect[] the fairness, integrity or public reputation of judicial proceedings.'" *Barnes*, 759 N.E.3d at 1274, quoting *Olano*, 507 U.S. at 736.

This case is a prime example of this Court's observation that "an unlawful closure might takes place and yet the trial still will be fundamentally fair from the defendant's standpoint." *Weaver v. Massachusetts*, 582 U.S. 286, 299 (2017). The absence of any manifest injustice or fundamental unfairness operates on at least two levels. First, on the existing record, the partial courtroom closure did nothing to undermine the fairness of the trial, and indeed the absence of children in the courtroom likely made the trial *more* fair, given the nature of the charges against Garrett. Second, had the defense objected, the trial court could have "cure[d] the violation either by opening the courtroom or by explaining the reasons for closure." *Id*. at 302. The Ohio Supreme Court recognized as much, suggesting that the partial

courtroom closure was not *ipso facto* unlawful and that the trial court could have closed the courtroom to children had it "engaged in the proper analysis." Pet. App. 19. In other words, any "error" was not the courtroom closure itself, but rather that the trial court failed to follow the proper *procedure* in closing the courtroom. Such a procedural error does not justify reversal under Ohio R. Crim. P. 52(B).

Moreover, no less so than when a court vacates a conviction by finding that counsel was ineffective for failing to object, reversing a judgment on direct review based on an unpreserved courtroom-closure error "'can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial,' thus undermining the finality of jury verdicts." *Weaver*, 582 U.S. at 303, quoting *Harrington v. Richter*, 562 U.S. 86, 105 (2011); see also *Williams*, 974 F.3d at 344 ("reversal for an error raised for the first time on direct review carries its own 'systemic costs.'"). Indeed, defense counsel had legitimate strategic reasons for not wanting children in the courtroom during a trial involving the murder of a four-year-old child, which is all the more reason that there was no plain error under Ohio R. Crim. P. 52(B). "What appears to have been a tactical decision in this case during the trial cannot now be converted into judicial error." *State v. Claytor*, 574 N.E.3d 472, 478 (Ohio 1991).

In short, wholly apart from whether the partial courtroom closure affected substantial rights, the Ohio Supreme Court had ample reasons to exercise its discretion under Ohio R. Crim. P. 52(B) and decline to recognized plain error. "On this record there is no basis for concluding that the error 'seriously affect[ed] the

fairness, integrity or public reputation of judicial proceedings.' Indeed, it would be reversal of a conviction such as this which would have that effect." *Johnson*, 520 U.S. at 470.

C. The Ohio Supreme Court has taken varying approaches to the "substantial rights" requirement as applied to structural errors.

In Garrett's case, the Ohio Supreme Court applied an outcome-determination standard to the "substantial rights" requirement under Ohio R. Crim. P. 52(B). But just a week before deciding Garrett's case the Court in *Bond* took a different approach. In *Bond*, an altercation occurred outside the courtroom part-way through the trial, and so the trial court closed the courtroom to everyone but "immediate family members;" the closure remained in effect for the remainder of the trial, and neither party objected. *Bond*, 2022 WL 17170221, ¶¶ 2-3. The intermediate court of appeals found that the defense's failure to object did not waive the courtroom-closure issue and that courtroom closure was structural error requiring reversal. *Id.* at ¶ 5.

The Ohio Supreme Court agreed with the court of appeals that the courtroom closure was error under *Waller*. *Id.* at ¶¶ 11-15. But unlike the court of appeals, the Ohio Supreme Court applied plain-error review under Ohio R. Crim. P. 52(B). *Id.* at ¶ 17. Relying heavily on this Court's decision in *Weaver*, 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. Emphasizing that it was not "minimizing a defendant's obligation to object to an error during trial," the court did not hold that "prejudice will be presumed in such

cases but simply conclude[d] that there is room in plain-error review to recognize the unique nature and fundamental import of established structural errors." *Id.* at ¶ 34.

Although declining to apply an outcome-determination standard to the "substantial rights" requirement, the court found no plain error. The court stated that, "even if we were to assume here that the error affected substantial rights," the could would still have to consider "whether correcting the error is required to prevent a manifest miscarriage of justice or whether the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* at ¶ 35, citing *Olano*, 507 U.S. at 736; and *Long*, 372 N.E.2d 804, paragraph three of the syllabus. On this point, the court noted that the courtroom was closed only to the two individuals involved in the altercation, and that Bond failed to identify any specific person who was denied access to the courtroom. *Bond*, 2022 WL 17170221, ¶ 37. Bond did not assert that any harm resulted from the closure—i.e., that any of the trial participants failed to fulfill their duties during the trial or that any misconduct occurred that went unnoticed because of the closure. *Id.* The court accordingly found that the courtroom closure in Bond's case "did not rise to the level of a plain error that must be corrected." *Id.* at ¶ 37.

The court's decision in *Bond* is doubly significant. First, that the "substantial rights" requirement in Ohio R. Crim. P. 52(B) was not dispositive in *Bond* only cements the argument in the previous section that satisfying that requirement would not be dispositive in Garrett's case. Given the court's refusal to find a "manifest miscarriage of justice" in *Bond*, it is impossible to see how the court would reach a

different conclusion in the present case. If anything, the absence of any manifest miscarriage of justice is *more* apparent here than they were in *Bond*.

Second, *Bond* demonstrates that the Ohio Supreme Court is not firmly settled on an outcome-determination standard for satisfying the "substantial rights" requirement under Ohio R. Crim. P. 52(B). The court in *Bond* specifically recognized that requiring outcome determination may not be appropriate for structural errors. Although Garrett's case was decided one week after *Bond*, at least one Ohio court has cited *Bond* as the controlling precedent in applying plain-error review to structural errors. See e.g., *State v. Young*, 5th Dist. No. 21CA0028, 2022-Ohio-4726, 2022 WL 17977026, ¶ 40 (Ohio Ct. App. Dec. 28, 2022) (citing *Bond* and recognizing that in reviewing structural error under Ohio R. Crim. P. 52(B) "the appropriate test is not whether the violation affected the outcome of the trial"). As of the filing of this Brief in Opposition, no Ohio appellate court has cited Garrett's case in connection with plain-error review.

Given that the Ohio Supreme Court has not been uniform in whether in structural-error cases a defendant must show outcome determination to satisfy the "substantial rights" requirement under Ohio R. Crim. P. 52(B), any review on this issue by this Court would be premature. Before intervening, this Court should allow the Ohio courts to further develop and refine how to apply Ohio R. Crim. P. 52(B). When a lower court has taken varying approaches on an issue, "the ordinary course of action is to allow the court [] the first opportunity to resolve the disagreement."

Carlton v. United States, 576 U.S. 1044, 1044 (2015) (statement of Sotomayor, J., respecting the denial of certiorari). This Court should do so here.

D. The limited nature of the courtroom closure makes this case a poor vehicle to review the question presented.

Garrett highlights some of the values animating the public-trial right. Pet. 15. But insofar as Garrett relies on these values to argue that all courtroom closures automatically satisfy the "substantial rights" requirement under Ohio R. Crim. P. 52(B), this case is a poor vehicle to address Garrett's arguments, as the specific facts of this case do not implicate any of the values identified by Garrett.

Again, the trial court's courtroom closure was limited in both scope and duration, resulting in the removal of a single child from a pre-trial motions hearing. All other members of the public were free to attend the proceedings. Thus, the courtroom was open for the public to see that Garrett was "fairly dealt with and not unjustly condemned," and the presence of interested spectators "ke[pt] his triers keenly alive to a sense of their responsibility and to the importance of their functions." *In re Oliver*, 333 U.S. 257, 270 (1948), n. 25. There were no "secret proceedings," *Estes v. Texas*, 381 U.S. 532, 588 (1965) (Harlan, J., concurring), and Garrett was free to have friends and relatives in the courtroom, *In re Oliver*, 333 U.S. at 271-272. The jurors did not reach their verdicts in the absence of "[t]he physical presence of [] spectators." Pet. 15. Garrett argues that the absence of children in the courtroom could have had the same effect as if Garrett himself had been absent. *Id*., 15-16. But even assuming a child and a defendant could exert the same "psychological influence" on the jury, no juror would ever speculate "speculat[e] adversely" as to why no

children were in the courtroom the way they would if Garrett himself had been absent. *Larson v. Tansy*, 911 F.2d 392, 396 (10th Cir. 1990).

All of this is to state the obvious: There are multiple variables in any courtroom-closure case—the variables include *who* was excluded, *why* they were excluded, *when* were they excluded, and for *how long* were they excluded. There is at least some debate whether such an unpreserved partial (rather than total) courtroom closure constitutes structural error at all. *Rector v. Wolfe*, Case No. 5:07CV1229, 2009 WL 1788569, *12-13 (N.D.Oh. June 23, 2009) ("A partial closure, without objection, can hardly be said to * * * infect the entire trial process. In other words, the partial closure was not structural error."). Even if an improper partial closure qualifies as structural error, the present case illustrates perfectly why it makes little sense that *all* courtroom closures—total and partial—would automatically satisfy the "substantial rights" requirement under Ohio R. Crim. P. 52(B).

CONCLUSION

The State respectfully requests that certiorari be denied.

Respectfully submitted,

G. GARY TYACK
Franklin County Prosecuting Attorney

/s/ Seth L. Gilbert
SETH L. GILBERT*
Chief Counsel, Appeals Unit
**Counsel of Record*
Franklin County, Ohio, Prosecutor's Office
373 South High Street, 13th Floor
Columbus, Ohio 43215

614-525-3555
sgilbert@franklincountyohio.gov

Counsel for Respondent

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