

No. 22-7632 (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

---

**REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

---

No execution date is presently scheduled.

OFFICE OF THE OHIO PUBLIC DEFENDER

Melissa Jackson (néé Callais)  
Supervising Attorney, Death Penalty Department  
Member of the Bar of this Court  
*Counsel of Record*

250 East Broad Street, Suite 1400  
Columbus, Ohio 43215  
(614) 466-5395  
(614) 644-0708 (Fax)  
Melissa.Jackson@opd.ohio.gov

**Counsel for Petitioner Kristofer D. Garrett**

## TABLE OF CONTENTS

<b>TABLE OF CONTENTS .....</b>	i
<b>TABLE OF AUTHORITIES.....</b>	ii
<b>REPLY IN SUPPORT .....</b>	1
I.    This Court has jurisdiction over the federal constitutional issue that is the core of this case.....	1
II.   Ohio's application of plain error review to structural errors is neither an adequate nor independent basis for its decision.....	2
<b>CONCLUSION .....</b>	5

## TABLE OF AUTHORITIES

### CASES

<i>Ake v. Oklahoma</i> , 470 U.S. 68 (1985) .....	3
<i>Coleman v. Thompson</i> , 501 U.S. 722 (1991).....	2
<i>Cruz v. Arizona</i> , ____U.S.____, 143 S.Ct. 650 (2023).....	2
<i>Enterprise Irrigation District v. Farmers Mutual Canal Co.</i> , 243 U.S. 157 (1917).....	1, 2
<i>Florida v. Powell</i> , 559 U.S. 50 (2010) .....	4
<i>Foster v. Chatman</i> , 578 U.S. 488 (2016).....	3
<i>Lee v. Kemna</i> , 534 U.S. 362 (2002) .....	2, 3
<i>Michigan v. Long</i> , 463 U.S. 1032 (1983).....	1, 4
<i>Minnesota v. Natl. Tea Co.</i> , 309 U.S. 551 (1940) .....	1
<i>State v. Bond</i> , Slip Opinion No. 2022-Ohio-4150 (Nov. 23, 2022) .....	3
<i>State v. Garrett</i> , Slip Opinion No. 2022-Ohio-4218 (Nov. 30, 2022).....	1
<i>Waller v. Georgia</i> , 467 U.S. 39 (1984).....	1, 4

### CONSTITUTIONAL PROVISIONS

U.S. Const., amend. VI.....	1, 2
-----------------------------	------

### RULES

Ohio R. Crim. P. 52 .....	1
---------------------------	---

## REPLY IN SUPPORT

### **I. This Court has jurisdiction over the federal constitutional issue that is the core of this case.**

While respecting the fundamental autonomy of state judiciaries to interpret their own constitutions and laws, this Court must also ensure “that state courts will not be the final arbiters of important issues under the federal constitution.” *Minnesota v. Natl. Tea Co.*, 309 U.S. 551, 557 (1940). When “a state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds,” this Court will decline to review that decision. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). But “where the non-federal ground is so interwoven with the [federal ground] as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, [federal] jurisdiction is plain.” *Id.*, n. 4 (citing *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1917).

The central issue in this case—the Sixth Amendment right to a public trial—is most certainly a federal matter. While the State claims that the Ohio Supreme Court’s holding rests on its interpretation of Ohio R. Crim. P. 52(B), BIO, p. 2, applying that rule in this case necessarily involves a determination of whether a federal constitutional right is “substantial.” The state court opinion includes 21 paragraphs of analysis on the issue of the courtroom closure, applying the test laid out in *Waller v. Georgia*, 467 U.S. 39 (1984), and citing other federal and state cases interpreting the scope of the Sixth Amendment. right. *See State v. Garrett*, Slip Opinion No. 2022-Ohio-4218, ¶¶ 40-61 (Nov. 30, 2022). It includes a mere four

paragraphs summarily concluding that despite finding that a Sixth Amendment violation had occurred, Garrett could not meet the plain error test because he 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 structural error had not occurred. *Id.* at ¶¶ 62-65. This application of the plain error test is so interwoven with its analysis of the federal structural error that it lacks the “sufficient breadth to sustain the judgment” on its own. *See Enterprise Irrigation District*, 243 U.S. at 164.

Allowing Ohio to apply an outcome-determinative test to preclude relief despite the recognition that structural error has occurred gives the state the final word over the scope of federal constitutional protections. The State urges this Court to abdicate its role in interpreting the federal constitution and instead allow Ohio to determine the magnitude and significance of the right to a public trial. Instead, this Court should accept jurisdiction and address a state’s improper attempt to curb the protections of the Sixth Amendment.

## **II. Ohio’s application of plain error review to structural errors is neither an adequate nor independent basis for its decision.**

“This Court will not take up a question of federal law presented in a case ‘if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment.’” *Lee v. Kemna*, 534 U.S. 362, 376 (2002) (citing *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)). When assessing the adequacy requirement, “[o]rdinarily, a violation of a state procedural rule that is ‘firmly established and regularly followed’ . . . will be adequate to foreclose review of a federal claim.” *Cruz v. Arizona*, \_\_\_ U.S. \_\_\_, 143 S.Ct. 650, 658 (2023) (citing *Lee*,

534 U.S. at 376). But even a “generally sound rule” may be applied in a way that “renders the state ground inadequate to stop consideration of a federal question.” *Id.*

Ohio’s plain error rule is far from adequate. As the State itself has already noted, “[t]he Ohio Supreme Court has taken varying approaches to the ‘substantial rights’ requirement as applied to structural errors.” BIO, p. 23. Just one week before this case was decided, the same court found 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.**” *State v. Bond*, Slip Opinion No. 2022-Ohio-4150, ¶ 32 (Nov. 23, 2022)(emphasis added). The structural error alleged in that case was also a courtroom closure, subject to plain error review, and yet the court rejected the outcome-determinative test it would impose in Garrett’s case just one week later. This arbitrary application of the plain error doctrine is far from the “firmly established and regularly followed” rule that forecloses federal jurisdiction.

Although the inadequacy of the state-law ground is enough to secure this Court’s jurisdiction, the decision below also fails the “independent” basis test. When application of a state law bar “depends on a federal constitutional ruling, the state-law prong of the court’s holding is not independent of federal law, and our jurisdiction is not precluded.” *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985). When the merits of a federal claim are integral to the state court’s determination of whether to impose a procedural bar, the state court’s invocation of that bar does not foreclose federal review. *See, e.g., Foster v. Chatman*, 578 U.S. 488, 498-99 (2016)(holding that “the

state habeas court’s application of res judicata to Foster’s *Batson* claim was not independent of the merits of his federal constitutional challenge,” as the state court had engaged in a lengthy ‘*Batson* analysis’ to determine whether it would apply the res judicata bar); *Florida v. Powell*, 559 U.S. 50, 57-58 (2010)(federal jurisdiction was invoked because “Although invoking Florida’s Constitution and precedent in addition to this Court’s decisions, the Florida Supreme Court treated state and federal law as interchangeable and interwoven.”). As discussed in Section I, above, the federal law issues of the courtroom closure and resulting structural error are critical components of the state court’s plain error test.

The State attempts to conjure additional state-law grounds to thwart this Court’s jurisdiction, arguing that Garrett could not meet the “clear or obvious error” component of Ohio’s plain error rule. *See* BIO, p. 16-19. But this argument contravenes **the explicit finding of the Ohio Supreme Court that a constitutional error had occurred**. And in fact, the State cites the same federal law under *Waller*) to make its (albeit already rejected) arguments that the error was not clear or obvious. *Id.* Not only does the State fail to point to any “plain statement that the decision below rested on an adequate and independent state ground, *see Long*, 463 U.S. at 1044, its own arguments reveal the extent to which federal constitutional issues control the outcome.

## CONCLUSION

For the foregoing reasons and the reasons put forth in his petition, this Court should grant Garrett's petition for writ of certiorari.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

*/s/ Melissa Jackson*  
Melissa Jackson (néé Callais) - 0077833  
Supervising Attorney, Death Penalty –Department  
*Counsel of Record*

250 East Broad Street, Suite 1400  
Columbus, Ohio 43215  
(614) 466-5395  
(614) 644-0708 (Fax)  
Melissa.Jackson@opd.ohio.gov

**Counsel for Petitioner Kristofer D. Garrett**

September 11, 2023