

No. 23-_____

IN THE
Supreme Court of the United States

CHRISTOPHER DAVID TARPEY,
Petitioner,

—v.—

THE STATE OF WYOMING,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF WYOMING

PETITION FOR WRIT OF CERTIORARI

ANGELA L. CAMPBELL
Counsel of Record
DICKEY, CAMPBELL & SAHAG
LAW FIRM, PLC
301 East Walnut Street, Suite 1
Des Moines, Iowa 50309
Phone: (515) 288-5008
Fax: (515) 288-5010
angela@iowajustice.com

THOMAS A. FLEENER
DEVON W. PETERSEN
FLEENER PETERSEN, LLC
506 South 8th Street
Laramie, Wyoming 82070
Phone: (307) 460-4333
tom@fleenerlaw.com
devon@fleenerlaw.com
Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

Is the Sixth Amendment right to a public trial a fundamental right that is personal to the defendant such that waiver must be on the record by the defendant himself?

RELATED PROCEEDINGS

- *State of Wyoming v. Christopher David Tarpey*, Criminal No. 2717, District Court of the Ninth Judicial District, Teton County, Wyoming. Judgment and Sentence entered September 13, 2021 and Order Denying Defendant's Motion Pursuant to W.R.A.P. 21 for New Trial Based on Ineffective Assistance of Counsel issued June 3, 2022.
- *Christopher David Tarpey v. The State of Wyoming*, S-21-0234, S-22-0167, Wyoming Supreme Court. Opinion Affirming Conviction entered February 6, 2023.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW	i
RELATED PROCEEDINGS	i
TABLE OF AUTHORITIES.....	iv
OPINIONS BELOW.....	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED ...	1
U.S. Const., amend. VI	1
U.S. Const., amend. XIV (Sec 1)	2
STATEMENT OF THE CASE.....	2
I. Factual Background and Procedural History.....	2
Factual Background.....	2
Procedural History.....	4
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	12

APPENDIX TABLE OF CONTENTS

	PAGE
Opinion of the Wyoming Supreme Court, dated February 6, 2023	1a
Order Denying Motion for New Trial, dated June 3, 2022	44a
Judgment and Sentence, dated September 13, 2021	94a
Trial Court’s Order Regarding Public Access, dated June 2, 2021	102a

TABLE OF AUTHORITIES

	PAGE(S)
Cases	
<i>Adams v. U. S. ex rel. McCann</i> , 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268 (1942)	8
<i>Boykin v. Alabama</i> , 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)	7
<i>Faretta v. California</i> , 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)	8
<i>Fay v. Noia</i> , 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963)	8
<i>Johnston v. Zerbst</i> , 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)	7
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)	8
<i>In re Oliver</i> , 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1948)	6, 9
<i>Presley v. Georgia</i> , 558 U.S. 209, 130 S.Ct. 721, 175 L. Ed. 2d 675 (2010)	7, 10, 11
<i>State v. Martinez</i> , 2021 ND 42, 956 N.W.2d 772 (2021)	7

<i>United States v. Moon</i> , 33 F.4th 1284 (11th Cir. 2022)	7
<i>Waller v. Georgia</i> , 467 U.S. 39, 104 S.Ct. 2210, 81 L. Ed. 2d 31 (1984)	7, 10
<i>Walton v. Briley</i> , 361 F.3d 431 (7th Cir. 2004)	7
Statutes	
28 U.S.C. § 1257(a)	1
Constitutional Provisions	
U.S. Const., amend. VI	1, 4, 5, 8
U.S. Const., amend. XIV	2, 8
Rules	
Rule 14.1(g)(i)	5
Wyoming R. Crim. P. 48	3
Other Authorities	
Kenneth D. Katkin, “Incorporation” of the Criminal Procedure Amendments: The View from the States, 84 Neb.L.Rev. (2005)	8
LaFave, § 24.1(a) Nature of the right, 6 Crim. Proc. § 24.1(a) (4th ed.)	7, 8

OPINIONS BELOW

Criminal No. 2717; State of Wyoming v. Christopher David Tarpey; District Court of the Ninth Judicial District, Teton County, Wyoming; Judgment and Sentence (September 13, 2021), (Pet. App. 94a), and Order Denying Defendant's Motion Pursuant to W.R.A.P. 21 for New Trial Based on Ineffective Assistance of Counsel (June 3, 2022), (Pet. App. 44a). (Decisions not reported).

The Wyoming Supreme Court's opinion, affirming conviction. (February 6, 2023), (Pet. App. 1a). 2023 WY 14, 523 P.3d 916 (Wyo. 2023).

JURISDICTION

The Supreme Court of Wyoming entered its decision on February 6, 2023. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., amend. VI:

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

U.S. Const., amend. XIV (Sec 1):

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE**I. Factual Background and Procedural History****Factual Background**

During the pandemic, Christopher Tarpey's trial for sexual assault occurred in a selectively closed courtroom. The District Court prohibited any of Mr. Tarpey's family, friends, supporters, media, or simply interested members of the public from attending any part of the jury trial. The District Court cited COVID-19 concerns as the justification for prohibiting in-person attendance of the trial. The court did, however, allow prosecution-friendly attendees: it allowed the victim's advocate to be seated in the well of the courtroom near BS, the alleged victim, during her testimony. During closing arguments, the court allowed the victim's advocate to be seated next to BS who was also allowed a special exception to be present and visible to the jury during closing arguments. Prior to BS's testimony, it was announced to the jury that the victim's advocate was an advocate for the witness and that [the victim's advocate] would be sitting "near her for the duration of her testimony." Prior to closing argument, the prosecutor specifically told the court that she wanted BS to be visible to the jury, with her

advocate sitting next to her. BS and her advocate were the only two people in the courtroom other than the parties, attorneys, jurors, and court staff.

All of the above occurred without objection from defense counsel.

Mr. Tarpey's trial began on June 1, 2021. At the time, Wyoming State Courts were still struggling with the COVID-19 pandemic and how to conduct trials safely. Although other courts in Wyoming had conducted in-person jury trials with members of the public present, the Ninth Judicial District Court in Teton County had not. The trial court in this case believed it could not safely conduct a trial with members of the public present. The trial court repeatedly asked defense counsel whether the defense objected to a closed courtroom, and defense counsel never objected. The trial court relied heavily on the lack of objection from defense counsel in deciding to proceed to trial. Likewise, the appellate court repeatedly referred to the lack of objection from defense counsel in affirming the conviction. The trial court never had a colloquy with Mr. Tarpey about the decisions his counsel was making on his behalf regarding the closure of the courtroom.

At the time his trial began, Mr. Tarpey was out on bond, had no bond violations, was not near the 180-day speedy trial deadline under Wyoming Rules of Criminal Procedure and no continuances had been sought or granted. His speedy trial deadline pursuant to Wyoming Rule of Criminal Procedure 48 would have been August 30, 2021, nearly three months after trial began. Despite no apparent need to conduct the trial in a selectively closed courtroom, the trial court in this case proceeded to trial just ninety (90) days from Mr. Tarpey's arraignment without considering the

possibility of a continuance. Trial counsel also never sought a continuance.

After a five-day trial, a jury found Mr. Tarpey guilty of first-degree sexual assault. The District Court sentenced Mr. Tarpey to serve ten to fifteen years in prison. Mr. Tarpey then obtained new counsel, who appealed the conviction to the Wyoming Supreme Court, part of which included filing a Motion for New Trial, arguing that Mr. Tarpey had received ineffective assistance of counsel as required by Wyoming Rules of Appellate Procedure. In his brief to the Wyoming Supreme court, Mr. Tarpey argued that his Sixth Amendment right to a public trial had been violated. The Wyoming Supreme Court affirmed the conviction, rejecting Mr. Tarpey's claim that his Sixth Amendment public trial had been violated, relying heavily on the lack of objection from Mr. Tarpey's trial counsel to any of the above procedures.

Procedural History

A jury trial was held from June 1–5, 2021, in Jackson, Wyoming. At the end of the trial, the jury found Mr. Tarpey guilty of one count of sexual assault. On September 13, 2021, the District Court sentenced Mr. Tarpey to serve ten to fifteen years in prison. Mr. Tarpey timely filed his notice of appeal to the Wyoming Supreme Court on September 14, 2021.

On December 1, 2021, Mr. Tarpey filed a "Motion Pursuant to W.R.A.P. 21 New Trial Based on Ineffective Assistance of Counsel." The original appeal of the Judgment and Sentence was stayed. A hearing was held on the Motion for New Trial on March 17, 2022. On June 3, 2022, the District Court Denied the Motion.

On June 15, 2022, Mr. Tarpey filed a “Notice of Appeal,” appealing the District Court’s “Order Denying Defendant’s Motion Pursuant to W.R.A.P. 21 for New Trial Based on Ineffective Assistance of Counsel.” On July 5, 2022, the Wyoming Supreme Court consolidated the appeal of the Judgment and Sentence and the appeal of the Order Denying Motion for New Trial. On February 6, 2023, the Wyoming Supreme Court affirmed the conviction.

Pursuant to this Court’s Rule 14.1(g)(i): In Mr. Tarpey’s direct appeal to the Wyoming Supreme Court, he raised the federal question of whether his Sixth Amendment right to a public trial was violated. The Wyoming Supreme Court found that Mr. Tarpey’s Constitutional right to a public trial was not violated. In its opinion, the Wyoming Supreme Court addressed this specific issue: “*Did the district court violate Mr. Tarpey’s Sixth Amendment right to a public trial?*” (Pet. App. 22a). The Wyoming Supreme Court wrote:

Mr. Tarpey claims the district court violated his right to a public trial under the Sixth Amendment to the United States Constitution. “We review the constitutional issue *de novo*.” *Dugan v. State*, 2019 WY 112, ¶ 52, 451 P.3d 731, 746 (Wyo. 2019) (citing *Kramer v. State*, 2012 WY 69, ¶ 18, 277 P.3d 88, 93 (Wyo. 2012)). “Constitutional errors are presumed prejudicial, unless this Court is convinced the error was harmless beyond a reasonable doubt.” *Anderson v. State*, 2014 WY 74, ¶ 17, 327 P.3d 89, 94–95 (Wyo. 2014) (citing *West v. State*, 2013 WY 128, ¶ 12, 311 P.3d 157, 160 (Wyo. 2013)). Mr. Tarpey asserts “[t]he court’s selective closure [of the courtroom] to all but BS and her advocate violated [his] right to a public trial[.]” which

“constitutes structural error and requires automatic reversal and remand for a new trial.” The State asserts Mr. Tarpey waived his right to challenge the use of the audio broadcast. (*Id.*)

...

In this case, Mr. Tarpey knew about the district court’s plan to partially close the courtroom, and he never objected to that partial closure or to the use of the audio broadcast, even though he had multiple opportunities to do so. The district court’s scheduling order put Mr. Tarpey on notice the trial would be subject to Covid-19 protocols, and it set a deadline for Mr. Tarpey to object to those protocols. Mr. Tarpey did not file any objection to those protocols. During a pretrial hearing, the district court informed the parties it would be using the audio broadcast to provide public access, and although defense counsel expressed concerns that this might make it difficult to sequester the witnesses, he did not object to using the audio broadcast. At the end of voir dire, the district court again reminded the parties it intended to provide public access through the audio broadcast, and Mr. Tarpey did not object. Under the facts of this case, we find Mr. Tarpey waived his right to a public trial. (*Id.* at 29a).

REASONS FOR GRANTING THE WRIT

This Court has made clear through its public trial jurisprudence that the right to a public trial is amongst the most sacred rights in this country. See *In re Oliver*, 333 U.S. 257, 68 S. Ct. 499, 506–07, 92 L. Ed.

682 (1948); *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L. Ed. 2d 31 (1984); *Presley v. Georgia*, 558 U.S. 209, 214–15, 130 S.Ct. 721, 724–25, 175 L. Ed. 2d 675 (2010).

This Court has not yet held, however, that the right to a public trial is of such a fundamental nature that, like the right to counsel (see *Johnston v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)), the public trial right can only be waived in open court on the record by defendant. In the absence of clear guidance from this Court, there is a split in the lower courts.¹

While this Court has not specifically addressed the question presented by this Petition, this Court has held that similar rights are fundamental and personal, requiring waiver on the record by the defendant himself. In this category of personal rights is: 1) the decision whether to plead guilty, *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); 2) the decision whether to request a trial by jury,

¹ “See, e.g., *Walton v. Briley*, 361 F.3d 431 (7th Cir.2004) (explaining “the right to a trial, the right to a trial by jury, the right to an attorney, and the right to confront witnesses” are like the right to a public trial such that “a right to a public trial may be relinquished only upon a showing that the defendant knowingly and voluntarily waived such a right”); *United States v. Moon*, 33 F.4th 1284 (11th Cir.2022) (noting the Fifth and Ninth Circuits have held that waiver occurred where the defendants and their counsel were present for the courtroom closures but did not object, however First, Seventh, and Eighth Circuits have held that more than a mere failure to object is needed); *State v. Martinez*, 2021 ND 42, 956 N.W.2d 772 (2021) (noting division among the federal circuits and states on waiver of the right to a public trial, and reversing conviction because the trial closure was an obvious error without a waiver from the defendant).” LaFave, § 24.1(a) Nature of the right, fn. 18.50, 6 Crim. Proc. § 24.1(a) (4th ed.)

Adams v. U. S. ex rel. McCann, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268 (1942); 3) the decision to appeal, *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963); 4) the decision whether to forego the assistance of counsel, *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); and 5) the decision to obtain the assistance of counsel and to refrain from self-incrimination, *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Like these personal fundamental rights, the right to a public trial goes to the very heart of the adjudicatory process. In his widely cited treatise “*Criminal Procedure*,” Professor Wayne LaFave writes: “[The] fundamental [right to a public trial] was one of the first sixth amendment rights held by the Supreme Court to be an essential element of due process and therefore applicable in state proceedings under the Fourteenth Amendment.” LaFave, § 24.1(a) Nature of the right, 6 *Crim. Proc.* § 24.1(a) (4th ed.), citing *In Re Oliver* and Katkin, “Incorporation” of the Criminal Procedure Amendments: The View from the States, 84 *Neb.L.Rev.* 397, 443–45 (2005).

Although this Court has not specifically held that the public trial right is fundamental and personal and thus waiver must be on the record by the defendant himself, this Court has indicated that the public trial right goes to the very heart of the adjudicatory process in *Oliver*, *Waller*, and *Presley*. In *In Re Oliver*, this Court wrote:

In giving content to the constitutional and statutory commands that an accused be given a public trial, the state and federal courts have differed over what groups of spectators, if any, could properly be excluded from a criminal trial. But...no court in this country

has ever before held, so far as we can find, that an accused can be tried, convicted, and sent to jail, when everybody else is denied entrance to the court, except the judge and his attaches. And without exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged. In *Gaines v. Washington*, this Court assumed that a criminal trial conducted in secret would violate the procedural requirements of the Fourteenth Amendment's due process clause, although its actual holding there was that no violation had in fact occurred, since the trial court's order barring the general public had not been enforced. Certain proceedings in a judge's chambers, including convictions for contempt of court, have occasionally been countenanced by state courts, but there has never been any intimation that all of the public, including the accused's relatives, friends, and counsel, were barred from the trial chamber.

In view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison.

In re Oliver, 333 U.S. 257, 271–73, 68 S. Ct. 499, 506–07, 92 L. Ed. 682 (1948)

In *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984), this Court stated:

[T]here 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. The central aim of a criminal proceeding must be to try the accused fairly, and our cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant.

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 addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury.

Id. at 46, 2215.

In *Presley v. Georgia*, 558 U.S. 209, 214–15, 130 S. Ct. 721, 724–25, 175 L. Ed. 2d 675 (2010), a case in which this Court reversed a state court conviction where the trial court excluded a single member of the public (defendant's uncle) solely for *voir dire*, this Court made it clear that it is incumbent on the trial court, not counsel, to protect the right to a public trial, stating:

The conclusion that trial courts are required to consider alternatives to closure even when they are not offered by the parties is clear not

only from this Court's precedents but also from the premise that "the process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system. The public has a right to be present whether or not any party has asserted the right. In *Press-Enterprise I*, for instance, neither the defendant nor the prosecution requested an open courtroom during juror *voir dire* proceedings; in fact, both specifically argued in favor of keeping the transcript of the proceedings confidential. *Id.*, at 503–504, 104 S.Ct. 819. The Court, nonetheless, found it was error to close the courtroom. *Id.*, at 513, 104 S.Ct. 819.

Presley, at 214–15, 724–25.

This Court should find that the public trial right is so fundamental that it is deemed to be a personal right which must be waived personally by the defendant.

The reason for granting this Petition and answering the question in the affirmative is made clear by the facts of this case. In its opinion, the Wyoming Supreme Court repeatedly stated that "Mr. Tarpey" waived his right to a public trial. The truth is, however, that Mr. Tarpey never waived anything – it was his counsel who waived Mr. Tarpey's right to a public trial. There is nothing in the record indicating Mr. Tarpey even knew of the nature of his right to a public trial, or what the implications would be if he waived that right. Because that colloquy between the trial court and Mr. Tarpey never happened, Mr. Tarpey was tried and convicted of first-degree sexual assault in a courtroom void of any person who supported Mr. Tarpey. Worse yet, the State's victim's advocate sat in the well near the alleged victim during her testimony, and the alleged

victim and her advocate were the only two people present in the courtroom during the closing arguments.

Such a trial should never take place unless the trial court individually advises the defendant of his right to a public trial and the implications of waiving that right, and the defendant knowingly and voluntarily waives the right on the record. The right to a public trial, going to the heart of the adjudicatory process, is fundamental and personal to the defendant. Waiver of that right cannot be trusted to counsel, who may or may not understand the importance of the right and may not have discussed the right with the defendant.

CONCLUSION

Because there is a split in the lower courts with significant discord, because the right to a public trial is fundamental and personal, and because this Court should intervene to prevent future injustice, Petitioner respectfully requests that this Court grant this Petition for a Writ of Certiorari.

Dated May 4, 2023

Respectfully submitted,

ANGELA L. CAMPBELL

Counsel of Record

DICKEY, CAMPBELL & SAHAG

LAW FIRM, PLC

301 East Walnut Street, Ste. 1

Des Moines, Iowa 50309

Phone: (515) 288-5008

Fax: (515) 288-5010

angela@iowajustice.com

THOMAS A. FLEENER

DEVON W. PETERSEN

FLEENER PETERSEN, LLC

506 S. 8th Street

Laramie, Wyoming 82070

(307) 460-4333

tom@fleenerlaw.com

devon@fleenerlaw.com

Counsel for Petitioner