

No. 09-5270

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In The  
Supreme Court of the United States

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ERIC PRESLEY,  
*Petitioner,*

v.

THE STATE OF GEORGIA,  
*Respondent.*

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On Petition for Writ of Certiorari to  
The Supreme Court of Georgia

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**BRIEF *AMICUS CURIAE* OF THE GEORGIA  
ASSOCIATION OF CRIMINAL DEFENSE  
LAWYERS IN SUPPORT OF PETITIONER**

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**INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

The Georgia Association of Criminal Defense Lawyers' purpose is "to promote constant improvement in the administration of criminal justice." [www.gacdl.org](http://www.gacdl.org).

Following *Presley v. State*, 285 Ga. 270, 674 S.E.2d 909 (2009), the right to a public voir dire has been threatened in Georgia courts. The loss of this fundamental constitutional right affects all members of the criminal justice system in the State of Georgia.

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<sup>1</sup> All counsel of record have received timely notice of the intent to file this brief as required by Supreme Court Rule 37.2, and this brief is submitted with the consent of all parties.

No counsel for any party to the case has authored any part of this brief, nor made any monetary contribution intended to fund its preparation or submission. No such monetary contributions have been made other than by the members of the Georgia Association of Criminal Defense Lawyers.

## SUMMARY OF THE ARGUMENT

It is undisputed that the press and the public have a constitutional right of access to attend criminal trials. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982); *Press Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (“*Press Enterprise I*”); *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). *Globe Newspaper* established a “strict scrutiny test” to be employed when access rights are limited: the right of access can be outweighed only by a “compelling government interest” and denial must be “narrowly tailored to serve that interest.” *Id.* at 606-07. The right of public access is implied in the First Amendment’s “core purpose” of assuring free and open public discussion. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575, 100 S. Ct. 2814, 2826, 65 L.Ed.2d 973, 988 (1980). This right extends to voir dire:

[S]ince the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown..., The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered. *Press-Enterprise*, 464 U.S. at 505, 510.

“[T]his Court has regularly relied on traditional and subsisting practice in determining constitutionally permissible authority of courts.” *Sun Oil Co. v. Wortman*, 486 U.S. 717, 728 n.2, 108 S.Ct. 2117, 2125, 100 L.Ed.2d 743 (1988) (Scalia, J.). In *Press Enterprise Co. v. Superior Court*, 478 U.S. 1, 6 (1986) (“*Press Enterprise II*”), the Court relied upon the tests of a tradition of access to the preliminary proceeding and whether access plays “a significant positive role in the functioning of the particular process in question.” 478 U.S. at 8 (1986). “If the particular proceeding in question passes these test of experience and logic, a qualified First Amendment right of public access attaches.” *Id.* at 9.

The right of public access to the courts is not a right that can be taken lightly. *State ex. rel. Storer Broadcasting Co. v. Gorenstein*, 131 Wis. 2d 342, 388 N.W.2d 633, 12 Media L R 1870 (Wis. App. 1986). “Although the public trial right may not be absolute, protection of this basic constitutional right clearly calls for a trial court to resist a closure motion except under the most unusual circumstances.” *State v. Bone-Club*, 128 Wn.2d 254, 258-259, 906 P.3d 325, 327-328 (1995) (en banc). The guaranty of public access to proceedings and the right to a public trial served “complimentary and interdependent functions in assuring the fairness of our judicial system. In particular, the public trial right operates as an essential cog in the constitutional design of fair trial safeguards.” *Id.*

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. 257, 270 n.25, 68 S. Ct. 499, 92 L.Ed. 682 (1948).

Given the importance of the issue of closure to the public, to the defendant and to the criminal justice system as a whole, the Supreme Court ought to grant certiorari to finalize issues regarding proper procedure for closure, standards of review for closure, and burdens of arguing alternatives to closure to ensure that this right is upheld in Georgia courts.

## ARGUMENT

### I. THE PROCEDURES DEVELOPED FOR CLOSURE VARY WIDELY AMONG STATES AND RESULT IN DIFFERENT APPORTIONMENT OF THIS FUNDAMENTAL RIGHT DEPENDING ON WHERE THE TRIAL IS HELD.

The Court has always stressed the importance of the “interest of the judiciary and the public in correcting grossly prejudicial errors that undermine confidence in our legal system.” *Greenlaw v. United States*, 128 S.Ct. 2559, 2574, 171 L.Ed.2d 399 (2008) (Alito J., dissent); *United States v. Olano*, 507 U.S. 725, 736-737, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Decisions in state and federal courts have chipped away at the right to public voir dire, contrary to this Court’s explicit holdings regarding the rights to a public trial and jury selection. In New York, cursory approval of trial court’s exclusion of family members during voir dire for crowding reasons has been given repeatedly: *People v. Gibbons*, 18 A.D.3d 773, 795 N.Y.S.2d 700 (App.Div.2d Dep’t 2005); *People v. Mojica*, 279 A.D.2d 591, 719 N.Y.S.2d 608 (App. Div. 2d. Dep’t 2001); *People v. Valentin*, 250 A.D.2d 497, 671 N.Y.S.2d 977 (App. Div. 1<sup>st</sup>. Dep’t 1998). None of these New York decisions examine whether the court considered less restrictive alternatives to such a closure. In Florida, closure of a courtroom was justified because the trial court “simply excluded the idly curious” pursuant to a state statute that mandated closure of a courtroom to “all persons except parties to the cause and their immediate families” whenever a witness under the age of 16 testified concerning any sex offense. *Clements v. State*, 742 So.2d 338 (Fl. Ct.

App. 5th Dist. 1999).

Recent decisions hold that the Sixth Amendment right to a public trial does not apply to every moment of the trial. *United States v. Ivester*, 316 F.3d 955, 960 (II)(C) (9th Cir. 2003) (holding that “the values in *Waller* were not implicated by routine jury administrative matters that have no bearing on defendant’s ultimate guilt or innocence.”); *United States v. Edwards*, 303 F.3d 606, 616 (5th Cir. 2002) (determining whether *Waller* applies to a court’s decision to empanel an anonymous jury); *Peterson v. Williams*, 85 F.3d 39, 42-43 (2d Cir. 1996) (unjustified closure for twenty minutes is too trivial to violate the Sixth Amendment); *United States v. Al-Smadi*, 15 F.3d 153, 154-55 (10th Cir. 1994) (the brief and inadvertent closure of the courtroom did not implicate the Sixth Amendment).

Several states offer substantive protection for the right to a public trial. In *Storer Broadcasting*, the trial court concluded that partial closure of voir dire was necessary to protect defendant’s right to a fair trial, but it did so without holding a formal hearing, taking any evidence, or making any findings of fact. 131 Wis. 2d at 344 n.2, 388 N.W.2d at 635.

The trial court based its closure order on the “fact” that [defendant] could not otherwise get a fair trial. While this may be a valid reason for ordering closure, it was insufficient here. The trial court merely speculated that [defendant] could not receive a fair trial if voir dire were not partially sequestered....The trial court’s closure order was too severe a remedy here... [t]o close the courtroom to the general public to accomplish insulation of

some of the prospective jurors was innappropriate and unnecessary. [I]t is *apparent that an easy alternative to closure was available to this trial court*: instead of moving prospective jurors in and out of chambers, the court could have simply moved the rest of the panel out of the courtroom and examined individual jurors in open court. In that manner, contamination could have been avoided without suppressing the public's right ... to know what the court was doing. 131 Wis. 2d at 350-51, 388 N.W.2d at 637. (Emphasis added).

Holding that the trial court gave no substantial, compelling reason to warrant closure of voir dire, the Appellate Court found that the trial judge had abused his discretion in ordering closure. *Id.* These "apparent" and "easy alternative[s] to closure" find counter-parts in *Presley*. The concerns in *Presley* were similarly "merely speculative" and could have been avoided by taking steps to cut down on the size of voir dire panel, and with curative instructions to the jury. Finally, the Court in *Storer Broadcasting* admonished the "trial court's attitude toward the closure issue," finding that "the trial court was mistaken in treating this matter lightly." 131 Wis. 2d at 351-52, 388 N.W.2d at 637-38. Here, too, the trial court in *Presley*, and trial judges throughout the country who also take lightly the right of public access to voir dire, ought to be admonished on a national scale.

In *State v. Bone-Club*, the defendant claimed that the temporary, full closure of his pretrial suppression hearing violated his right to a "speedy public trial." 128 Wn. at 258-59, 906 P.2d at 327-28. That court has

developed a strict, well-defined standard for closing a hearing in opposition to the public's right to open proceedings. To assure careful, case-by-case analysis of a closure motion, the trial court must perform a weighing test consisting of five criteria: (1) the proponent of closure or sealing must make some showing of a compelling interest, and where that need is based on a right other than the accused's right to a fair trial, the proponent must show a serious and imminent threat to that right; (2) anyone present when the closure motion is made must be given an opportunity to object to the closure; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; and (5) the order must be no broader in its application or duration than necessary to serve its purpose. *Id.* (“*Bone-Club* factors”).

In *State v. Wahle*, the trial court granted a defendant's motion to have the trial closed to the general public. 298 N.W.2d 795 (S.D. 1980), overr'd on other grds by *State v. Abourezk*, 359 N.W.2d 137 (S.D. 1984). Following a hearing, the trial court determined that First Amendment rights could not be taken lightly and reopened the trial to the public. 298 N.W.2d at 798. The closing of a trial should be “an action of last resort taken by the trial court.” *Id.* at 799. Alternatives, such as change of venue and sequestration of the jury are other alternatives to protect the defendant's right to a fair trial. *Id.*

In *Providence Journal Co. v. Superior Court*, the Supreme Court of Rhode Island held that a limited closure of individual voir dire may have been an

unconstitutional infringement on the press and public's right of access because the trial court's reasoning was unsupported by facts in the record that demonstrated that an open proceeding would in fact imperil or prejudice prospective jurors' privacy rights or defendant's right to a fair trial. 593 A.2d 446 (R.I. 1991). The trial court had reasoned that the limited closure of individual voir dire examination of prospective jurors to the press and public was necessary because of "the sensitive nature of the questions that would be asked of the jurors," in order to avoid subjecting "any juror or prospective juror... to embarrassment or concern that his or her responses to such sensitive questions chilled their answer." *Id.* at 446-447. In assimilating the teachings of prior cases into a viable and instructive standard for future trial courts, the court found that a four-part inquiry should be made before any closure limiting the press and public's right of access is justified; any closure "(1) must be narrowly tailored to serve the interests sought to be protected, (2) must be the only reasonable alternative, (3) must permit access to those parts of the record not deemed sensitive, and (4) must be accompanied by the trial justice's specific findings explaining the necessity of the order." *Providence*, 593 A.2d at 449, quoting *State v. Cianci*, 496 A.2d 139, 144 (R.I. 1985). By failing to comply with this four-part inquiry, the Rhode Island Supreme Court reasoned that the trial court's closure of the individual voir dire examination of prospective jurors may have been an unconstitutional infringement on the press and the public's right of access to criminal proceedings. *Providence*, 593 A.2d at 449.

The trial court concluded that concern for the privacy rights of prospective jurors and the defendant's right to a fair trial merited limited closure. This conclusion, however, was unsupported by any facts in the record that demonstrated that an open proceeding would in fact imperil or prejudice those important interests. Consequently there was no compelling governmental interest that justified the limit imposed by the trial court on the press and public's right of access. In this respect the trial court's concerns were speculative and were an insufficient basis on which to conclude that limited closure was necessary. *Id.* (citing *Press-Enterprise I*, 464 U.S. at 510-511, 104 S. Ct. At 824-25, 78 L.Ed.2d at 639); *In re Dallas Morning News Co.*, 916 F.2d 205, 206 (5th Cir. 1990).

Under this reasoning, *Presley* must fail. Here, as in *Providence*, the court's conclusion that the "intermingling" of the defendant's family with prospective juror's may affect the fairness of the trial was "unsupported by any facts in the record that demonstrated" how the presence of defendant's family members in the courtroom during voir dire would actually impact the outcome of the trial. Consequently, here as in *Providence*, there was "no compelling governmental interest that justified" the dismissal of defendant's family from the courtroom during voir dire. The trial court's concerns were merely "speculative" and provided "an insufficient basis on which to conclude that a [c]losure was necessary."

The Fifth Circuit in *In re Dallas Morning News Co.* urged trial courts to employ less restrictive alternatives for protecting privacy of prospective jurors:

the better practice is for the district court, rather than closing a portion of the voir dire proceeding in anticipation of privacy concerns, to inform the prospective jurors carefully, in advance, that any of them may request to be questioned privately, in the presence only of court personnel, the parties, the attorneys. We recognize that the very act of requesting in camera questioning could compromise the candor of a venire member's response to sensitive questions. Hence, the district court may close the proceedings for the limited purpose of explaining to the venire members, together or individually, the general nature of the questions to be asked and giving each the opportunity, during the closed proceedings, to request to be questioned in camera, but only as to those matters that are sufficiently sensitive to *justify the extraordinary measure of a closed proceeding.*" 916 F.2d at 206-07 (Emphasis added).

Similarly, here, the trial court could have avoided the "extraordinary measure" of dismissing everyone from the courtroom by explaining, carefully, the consequences of any behavior that may effect the proceedings, whether in or out of the courtroom, between prospective jurors and the defendant's family members. Then, if there had been any evidence of improper fraternization, there may have been

sufficient facts on the record to justify the trial court's concerns about "intermingling."

However, "even assuming the findings necessary to demonstrate the compelling governmental interests to support the [c]losure were made, the trial court was required to consider any alternatives that might have been more narrowly tailored to protect" the interests of an open trial. *Press-Enterprise I.*, 464 U.S. at 511, 104 S. Ct. at 825, 78 L.Ed.2d at 639. For instance, in *Providence*, the record indicated that the trial court, both counsel, and the petitioners unsuccessfully attempted to reach a compromise that would have allowed a Providence News reporter to access the voir dire examination of prospective jurors. 593 A.2d at 450.

Because we have already ruled that the trial court failed to make findings sufficient to justify limited closure, we need not decide whether the trial court's consideration of these alternatives was constitutionally sufficient. However, we commend the trial court's sensitivity to this issue in considering these alternatives and urge trial courts in the future to consider these and other alternatives to closure that will be less intrusive on the press and public's right of access yet still capable of protecting the legitimate interests of prospective jurors and the defendant. *Id.*

Here, the trial court also failed to make findings sufficient to justify closure during voir dire and gave no apparent consideration to less restrictive alternatives.

The Supreme Court of Virginia, in *Richmond Newspapers, Inc. v. Commonwealth*, 222 Va. 574, 281

S.E.2d 915 (1981), established certain guidelines for determining whether to grant a closure motion in a criminal trial:

For intervention to take place, the public must have notice of the closure motion. For this reason, motions to close a hearing should be made in writing and filed with the court before the day of the hearing involved, and the public must be given reasonable notice that a closure hearing will be conducted. At the hearing on closure, the burden will be on the moving party to show that an open hearing would jeopardize the defendant's right to a fair trial. The intervenors, however, shall have the burden of showing that reasonable alternatives to closure are available. Upon entering a closure order, the trial judge shall articulate on the record his findings that the evidence supports the moving party's contention that an open hearing would jeopardize the defendant's fair trial rights, that alternatives will not protect these rights, and that closure will be effective in protecting them. There is the danger that the information sought to be kept from the public will be disclosed in the hearings on closure, thereby negating the purpose of closure. To protect against this, the trial court may hear or observe this information in camera in order to establish to what extent its release would be prejudicial to the defendant. *Richmond Newspapers, Inc.*, 222 Va. at 590, 281 S.E.2d at 924 (citations omitted).

The court in *In Re Times-World Corp.*, 7 Va. App. 317, 328, S.E.2d 474, 479 (1988), as here, apparently closed the proceedings without either party requesting such action. There, the trial judge had observed “I told them [the press] that we didn’t have room for them and some of the things we talked back here that if they printed in the paper and the jury got hold of it, could very well – I’d have a mistrial.” *Times-World*, 7 Va. App. at 321, 373 S.E.2d at 476. At the hearing regarding closure, the judge stated that “closed proceedings were necessary so the veniremen would give uninhibited answers to [counsel’s] questions.” 7 Va. App. at 322, 373 S.E.2d at 476.

In *Times-World*, the trial court “clearly was not concerned or possibly aware that ‘absent an overriding interest articulated in findings,’ such hearings should be open to the public. *Id.* at 327. “In fact, the court appeared to be under the mistaken belief that press access to the trial was dependent upon the defendant’s request to have reporters present.” *Id.* Furthermore, in *Times-World*, and here, “the court failed to give adequate notice of the closure [o]r provide an opportunity for the [public] to present alternatives to closure.” *Id.* A closure hearing should have taken place before the closure order took effect. *Id.* It is at that point that the trial court should have taken the opportunity to articulate its reasons for closure if it found doing so was necessary. *Id.* Of the reasons the *Times-World* trial court gave for closing voir dire to the press, most were based on inconvenience to the court. *Id.* “We hold that none of the stated reasons rise to the level of an ‘overriding interest’ that outweighs the first amendment right of public access. In addition, even if closure was appropriate for part of the proceedings, the closure order was not ‘narrowly tailored in this case to

suit the need.” *Times-World*, 7 Va. App. at 327, 373 S.E.2d at 479. Concerns over space were also rejected:

The trial court’s concern over the lack of space in chambers did not necessarily mandate closing the entire hearing just because it could not accommodate every member of the local press. Moreover, the court never gave the press an opportunity to present alternatives to complete closure before the [h]earing. In addition, during that hearing... eight representatives of the media were accommodated in judge’s chambers, along with the judge, five attorneys, and the court reporter, although the court described the chambers as “a little crowded.” 7 Va. App. at 327-28.

The trial court in *Presley* shared markedly similar concerns over space, which are susceptible to the same reasoning used to reject them in *Times-World*. The *Presley* trial court’s concern over the lack of space in the courtroom did not necessarily mandate closure of the entire voir dire process, since, as urged by Petitioner, the court could have taken less-restrictive alternatives, such as splitting the venire panel into two groups. The *Presley* trial judge feared that “intermingling” may occur between the defendant’s family and the potential jurors. Here, again, the reasoning in *Times-World* is appropriate.

However, the potential danger in this situation can be mitigated by instructing the jury, as is routine, to avoid receiving any outside information during any recess. In fact, the trial judge in the present case gave such an instruction at the close of evidence on

the first day of trial... [and] this warning was essentially repeated to the jury at lunch breaks and at the close of trial on the second day. Unless the record shows to the contrary it is to be presumed that the jury followed an explicit cautionary instruction. The trial court, therefore, had taken adequate precautions to alleviate its concern that the jury might be influenced by the [public] during recesses. 7 Va. App. at 328-29.

The *Times-World* court also took issue with the trial judge's reasoning in closure of the entire voir dire process based on a belief that the veniremen might not be entirely candid in their responses, calling these concerns "unwarranted." *Id. Press-Enterprise I* offered an alternative to closure by giving instructions for jurors to request "an opportunity to present the problem [of potential embarrassment] to the judge *in camera* but with counsel present and on the record." 464 U.S. at 512. This Court may recommend that courts facing concerns over "intermingling" may either: split the venire panel to provide a buffer zone between the panel and the public, or give strict orders prohibiting outside discussion of the case amongst and between potential jurors and the public with instructions to point out any sort of evidence of tampering or intermingling to the extent the trial judge sought to avoid it.

The *Times-World* holding and its attendant reasoning is instructive:

Clearly, the trial court, in this case, did not follow the basic tenet "that absent an 'overriding interest articulated in findings,' *Richmond Newspapers, Inc.*, 448 U.S. at 581,

such hearings should be open to the public.” A trial court, in deciding that closure might be warranted, or upon motion of either party, should give adequate notice of the closure hearing and provide an opportunity for [the public] to present alternatives to closure.... In addition, if the court decides that closure is necessary, it must articulate the basis for its finding of an *overriding interest* that requires closure, that closure is *essential* to preserving higher values than the presumption of openness, and the closure order must be *narrowly tailored* to serve that interest. We hold in the present case that the trial court erred in conducting closed proceedings without sufficient “overriding interest” articulated in the record, without first conducting a hearing on the matter, and without narrowly tailoring its closure order. Accordingly, the order of the trial court closing the proceedings to the [public] is reversed... 7 Va. App. at 330, 373 S.E.2d at 480-81. (Emphasis in original).

The same conclusion is applicable here, in *Presley*.

**II. THERE IS A DEFINITE NEED FOR A FINAL ADJUDICATION REGARDING WHETHER THE DENIAL OF A PUBLIC TRIAL IS SUBJECT TO HARMLESS ERROR REVIEW.**

A violation of one's right to a public trial is a structural error. *Waller*, 467 U.S. at 49; *Johnson v. United States*, 520 U.S. 461, 469, 137 L.Ed.2d 718, 117 S. Ct. 1544 (1997) (citing *Waller* as one of the "limited class" of cases where structural error had been found); *Carson v. Fischer*, 421 F.3d 83, 94 (2d Cir. 2005). Structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310, 113 L.Ed.2d 302, 111 S. Ct. 1246 (1991). Structural errors are not subject to harmless error analysis. *Id.* at 309. Structural error has consequences that are necessarily unquantifiable and indeterminate. *Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S. Ct. 2078, 124 L.Ed.2d 182 (1993); *United States v. Gonzales-Huerta*, 403 F.3d 727, 734 (10th Cir. 2005) ([I]f, as a categorical matter, a court is capable of finding that the error caused prejudice upon reviewing the record, then that class of errors is not structural."); *United States v. Gonzales-Lopez*, 548 U.S. 140, 149 n.4, 126 S. Ct. 2557, 165 L.Ed.2d 409 (2006) ("violation of the public-trial guarantee is not subject to harmless review because the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance"). Therefore, once a petitioner demonstrates a violation of his Sixth Amendment right to a public trial, he need not show that the violation prejudiced him in any way. *Judd v. Haley*, 250 F.3d 1308, 1314-15 (II) (11th Cir. 2001); *Owens v. United States*, 483 F.3d 48, 64 (II)(C) (1st Cir. 2007) (closure of

a trial for an entire day of jury selection was a structural error that defied harmless error review). The mere demonstration that his right to a public trial was violated entitles the petitioner to relief. *Id.* If public trial error was not deemed structural and thus subject to harmless error analysis, it would almost always be held to be harmless and the public trial right would become a right in name only, since its denial would be without consequence. *Owens*, 483 F.3d at 63-64.

There is a split among states regarding whether a structural error can be subject to harmless error analysis. See *Commonwealth v. Baran*, 74 Mass. App. Ct. 256, 296-97, 905 N.E.2d 1122 (2009); Cf. *Slaughter v. State*, 1997 OK CR 78, 950 P.2d 839, 875 (VI)(A) (Okla. Crim. App. 1997), reh'g denied, (Feb. 3, 1998) and cert. denied, 525 U.S. 886 (U.S. 1998) and post-conviction relief denied, 1998 OK CR 63, 1998 WL 813108 (Okla. Crim. App. 1998) (“There is no blanket rule dealing with whether trial errors can be harmless... a structural error of constitutional dimensions affects the framework within which the trial proceeds, while trial error is an error in the trial process itself. As such, a trial error - constitutional or otherwise - is subject to harmless-error analysis.”).

In *In re Pers. Restraint of Bonds*, the majority overturned the Appellate court's denial of defendant's request for equitable tolling where his counsel, once appointed, could not discover the issue of whether his right to a public trial was violated until after the statute of limitations had run. 165 Wn.2d 135, 196 P.3d 672 (2008)

The[se] closures were also constitutional errors which violated [defendant's] right to a public trial and the public's right to access his trial. This error was manifest. Prejudice is presumed where a violation of the public trial right occurs. A violation of public trial right has been recognized as a "structural defect" under federal law. *Id.* at 135.

However, "when access to the courtroom is retained by some spectators (such as representatives of the press or the defendant's family members), we have found that the impact of the closure is not as great, and not as deserving of such a rigorous level of constitutional scrutiny." *Judd*, 250 F.3d at 1315 (distinguishing between partial and total closures). "Both partial and total closures burden the defendant's constitutional rights. *Id.* However, in the event of a partial closure, a court need merely find a substantial reason, and need not satisfy the elements of the more rigorous *Waller* test. *Id.*

Here, the *Presley* trial court instituted a total closure by ordering everyone out of the courtroom during voir dire. See *Judd*, 250 F.2d at 1315 ("Nowhere does our precedent suggest that the total closure of a courtroom for a temporary period can be considered a partial closure and analyzed as such."); *English v. Artuz*, 164 F.3d 105, 108 (2d Cir. 1997); *Bell v. Jarvis*, 236 F.3d 149, 165-66 (4th Cir. 2000). A total closure of the courtroom, even for a temporary period, eliminates for a time the valuable role the presence of spectators can have on the performance of witnesses (by discouraging perjury), and court officials (by ensuring that trial participants perform their duties conscientiously), and can create a public perception

that the defendant is not being treated justly. *Id.* at 1315-1316. Therefore, *Presley* ought to be examined under the most rigorous constitutional scrutiny.

Without guidance from this Court, states may continue to diverge in their protection of the right to a public trial on appeal.

**III. *PRESLEY* SHIFTS THE BURDEN OF SUGGESTING LEAST RESTRICTIVE ALTERNATIVES TO CLOSURE TO THE OPPOSING PARTY. GUIDANCE FROM THIS COURT IS NECESSARY TO DETERMINE WHO MUST CARRY THIS BURDEN.**

“Although *Waller* declared that trial courts are to consider alternatives to closure, the United States Supreme Court did not provide clear guidance regarding whether a court must, sua sponte, advance its own alternatives to it.” *Presley*, 674 S.E.2d at 911. In the absence of clear guidance, the majority concluded that “where the factual record permits closure and the closure is not facially overbroad, the party opposed to closing the proceeding must alert the court to any alternative procedures that allegedly would equally preserve the interest.” *Id.* The majority reasoned that “any other rule would place an impractical – if not impossible burden on the trial courts.” *Id.* at 912 (Internal citations omitted).

The failure to consider alternatives sua sponte is a clear violation of this Court’s decision in *Waller v. Georgia*. *Id.* (Sears, C.J., dissenting). The majority failed to consider the burden that would be placed on

the opposing party if its rule were adopted, especially where, as here, the “counsel had no advance notice that the trial court intended to close voir dire” and “it is the trial court rather than a party who initiate[d] [closure].” *Id.* Since “[t]he guarantee [of a public trial] has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution... [and as] an effective restraint on possible abuse of judicial power,” the burden should be on the trial court to expressly consider alternatives and to articulate reasons for rejecting those alternatives. *Id.* at n.12.

## CONCLUSION

*Presley v. State*, and similar cases throughout the country, have abrogated the Sixth Amendment guarantee to a public voir dire. There is a need for guidance regarding procedures for closure, standards of review for closure, and where the burden lies for suggesting alternatives to closure. Therefore, this Court ought to grant certiorari to review the holding of the Georgia Supreme Court and to provide structure necessary to uphold this fundamental constitutional right.

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