No. 13-496

In the Supreme Court of the United States

NORM ROBINSON, WARDEN,
Petitioner,

v.

JOHN DRUMMOND,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

ALAN C. ROSSMAN
Federal Public Defender
Capital Habeas Unit
1660 West Second Street
#750
Cleveland, OH 44113
(216) 522-4856

DAVID L. DOUGHTEN
Counsel of Record
4403 St. Clair Avenue
Cleveland, OH 44103
(216) 361-1112
ddoughten@yahoo.com

Counsel for Respondent

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Sixth Circuit Court of Appeals's well-reasoned decision determining that the standards guiding courtroom closures set forth in *Waller v. Georgia*, 467 U.S. 39 (1984), constitute firmly established federal precedent that a trial court may not close a public court room with the exception of one media representative without first conducting a hearing, considering alternatives, or making sufficient findings justifying the need for the closure.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Respondent provides that he is an individual.

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

CASES

CONSTITUTION AND STATUTES

RULES

INTRODUCTION

"Review of a writ of certiorari is not a matter of right, but judicial discretion." RULES OF THE SUPREME COURT OF THE UNITED STATES, Rule 10 (February 16, 2010) Respondent respectfully requests that the Court deny the petition for a writ of certiorari for two basic and fundamental reasons. First, the decision below does not conflict with this Court's precedent in courtroom closure cases as set forth in *Waller v. Georgia*, 467 U.S. 39 (1984). *Waller* clearly anticipated and addressed the issue of possible partial closures under the auspices of courtroom restrictions being "no broader than necessary."

Second, this Court has subsequently emphasized that *Waller* applies in all courtroom closure scenarios. *Presley v. Georgia*, 558 U.S. 209 (2010). Although *Presley* was decided after the direct appeal procedures were completed, this Court view of *Waller* a firmly established federal law is relevant. Therefore, it is very unlikely the issues argued here will arise in the future in courtroom closure cases.

The courtroom closure arose in Respondent John Drummond's case during his capital murder trial. Here, a jury convicted Drummond of a homicide based mainly upon the testimony of witnesses who were provided deals in exchange for their cooperation with the prosecution. No witnesses actually saw the shooting. The prosecution alleged that Drummond fired gunshots randomly into a residence in retaliation for the death of a fellow gang member. A child was tragically shot inside the residence.

Because there were gang allegations, the trial judge, over objection, cleared the courtroom prior to the testimony of key witnesses whom the judge believed to have had gang affiliation. She allowed a single media representative in the courtroom. The record is clear that the judge did not conduct an evidentiary hearing. It is not clear whether anyone from the media was actually present during the testimony of the three key prosecution witnesses.

Although the petitioner is correct in stating that the Supreme Court of Ohio rejected Drummond's objection to the closure, it failed the note that the decision drew a heated dissent in a 4-3 decision. The majority found that the partial closure was not inconsistent with this Court's decision in *Waller* because the trial judge had a legitimate fear of a threat of a gang retaliation. Pet. App. 211a. Significantly, the majority also found that the trial court failed to even consider any alternatives to the closure. The majority deemed this acceptable as the courtroom was restricted to the public for only three witnesses. Pet. App. 212a.

The dissent noted that the majority application of the Waller four-pronged test was fatally flawed. Pet. App. 263a. The dissent noted that "there is little evidence that courtroom security and witness safety justified closing the courtroom . . ." " The record also does not support closing the courtroom because of the 'fear of retaliation expressed by various witnesses,' because no such witnesses were identified." Pet. App. 263a. The three dissenting judges found no basis for closing the courtroom during the testimony and/or cross-examination of the "key" prosecution witnesses. *Id.*

Drawing from decisions of federal circuits, not from this Court, the dissent discussed a category of courtroom restriction cases referred to as "partial closings." Other circuits found that partial closings were permissible, so long as the record established a "substantial reason' for the partial closing. The dissent noted that a substantial reason did not exist in this case. Pet. App. 266a.

This Court has never utilized the term "partial closings" in its decisions regarding the restriction of the public to the courtroom. It is the creation of the term of "partial closure" by the circuit courts prior to *Presley* that has caused the confusion in courtroom closure cases. By implementing the term, circuit and state courts have been able to circumvent *Waller* and its mandates and set relaxed or case-by-case standards in the review of courtroom closure issues. Such is the case here. The fact that the Sixth Circuit decision in *Drummond* may or may not conflict with other circuits is of no concern here as it does *not* conflict with *Waller*. As the Petitioner aptly observes in the Petition, "this Court 'explained . . . [a few] Terms ago . . . circuit precedent does not constitute 'clearly established Federal Law . . . .'" *Parker v. Matthews*, 132 S.Ct. 2148, 2155 (2012) (per curium) (quoting 28 U.S.C. § 2254(d)(1)); *see also e.g., Renico v. Lett*, 559 U.S. 766, 779 (2010). Pet. at 4.

At the time of Drummond's 2004 trial, this Court had discussed closure of the courtroom under the Sixth Amendment in *Waller v. Georgia*, 467 U.S. 39 (1984). This Court held that before ordering a closure, a trial court *must* render "findings specific enough that a reviewing court can determine whether the closure

order was properly entered." *Id.* at 45 (quoting *Press-Enterprise Co v. Superior Court of California*, 464 U.S. 501, 510, (1984). In making this mandatory assessment, this Court held the same guidelines used in their First Amendment courtroom closure cases were to be applied.

Specifically, "the tests set out in *Press-Enterprise* and its predecessors" under which: (1) "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced" if the courtroom remains open; (2) "the closure must be no 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." *Id.* at 47, 48 (citation omitted).

The second test commands that the closure be "no broader than necessary." The very language of the test envisions partial closures on occasions. It is clear that *Waller* anticipated, or more accurately commanded, that full courtroom closures be tolerated in very few instances. Thus, a court facing a closure issue, after following the *Waller* guidelines, may indeed come to a proper conclusion that the law requires only a partial closure, if that is the least restrictive means necessary.

The third standard requires that the trial court must consider alternatives to closing the proceeding. As noted above, the Supreme Court of Ohio made specific findings that alternatives were not considered by the trial court. This finding has not been challenged by the Respondent in the federal proceedings. Pet. App. 212a.

The fourth standard of *Waller* requires that in order to make any valid impingement on a defendant's right to a public trial, the trial court must make adequate findings to support the closure. Drummond's trial court judge failed to conduct a hearing or make adequate findings supporting her decision to close the courtroom.

The Sixth Circuit found that *Waller* was firmly established federal law. The circuit held that the state supreme court misapplied *Waller* on four standards. Pet. App. 17a. The circuit did find that the first test of *Waller*, finding that circuit cases had modified the first standard to a substantial reason rather than an overriding interest. The final three standards were applied as required by *Waller* without modification. Pet. App. 17a-22a.

This Court has never countenanced a modified or a less restrictive standard of the *Waller*/*Press Enterprise* mandates. Here, the failure of the trial court to consider alternatives to the closure alone establishes structural error. This Court specifically held in *Presley* that *Waller*/*Press Enterprise* had settled this specific point. This Court should deny the writ on this issue alone.

OPINIONS BELOW

This opinion of the Federal Sixth District Court of Appeals, *Drummond v. Houk*, 728 F.3d 520 (6th Cir. 2013) is reproduced at Pet. App. 1a. The opinion of the District Court for the Northern District of Ohio, *Drummond v. Houk*, 761 F. Supp. 2d 638 (N.D. Ohio 2010), is reproduced at Pet. App. 30a. The Supreme Court of Ohio opinion on direct appeal is reproduced at

Pet. App. 196a. *State v. Drummond*, 854 N.E.2d 1038 (Ohio 2006).

STATEMENT OF THE CASE

On April 3, 2003, a Mahoning County, Ohio, Grand Jury indicted John Drummond Jr. for aggravated murder, among other counts. The trial court appointed counsel to represent Drummond. On February 2, 2004, the trial began with the State's case-in-chief. On February 4, 2004, after the court's luncheon recess, the trial judge closed the courtroom during the trial testimony of key State witnesses James "Cricket" Rozenblad (closed at cross-examination), Nathaniel Morris, and Yaraldean Thomas. The judge announced in open court:

> Ladies and gentlemen that are here to watch the trial, the Court is going to clear the courtroom for the remainder of the afternoon. You are invited back tomorrow at 9 o'clock in the morning. Okay? Deputies, clear the courtroom. And leave the building, not only leave the courtroom but leave the building.

State v. Drummond, 854 N.E.2d at 1052.

The judge had made her decision without discussion or input from defense counsel. Only *after* the courtroom was cleared and prior to ordering the state to call its next witness did the judge inform counsel of her reasons for closing the courtroom; broadly based conclusory reasons that revealed that the judge did not consider or weigh any available alternatives:

> It's come to the attention of the Court that some of the jurors - - or witnesses feel threatened by

> some of the spectators in the court. The Court's making a decision that until we get through the next couple of witnesses, I'm going to clear the courtroom. That includes the victim's family, the defendant's family and all other spectators. The Court had two incidents yesterday involving one of the spectators where he showed total disrespect to the Court in chambers and gave the deputies a very hard time. I didn't hold him in contempt of court, but just after that then another individual - - there was a physical altercation between that individual who also came to watch the trial. His name's Damian Williams. . . . [w]ho ultimately got charged with assault on a peace officer. So over objection of the defendant I'm clearing the courtroom just for today only.

Id. at 1052-53.

At no point did the trial court ever:

1. Indicate how or by whom the referenced matters had "come to the attention of the court";

2. Indicate which specific jurors or witnesses felt threatened, or by which specific spectators;

3. Indicate any specific facts as to what constituted the basis for the threatening feelings by the unnamed persons;

4. Indicate what were the facts or circumstance of either of those "two incidents" to which the trial court made reference;

5. Indicate who specifically was that "one spectator" involved in those "two incidents" or how that spectator showed "disrespect" to the Court;

6. Indicate how that "one spectator," who showed such "disrespect" came to be in the judge's chambers, or how that spectator "gave the deputies a very hard time";

7. Indicate how it was that "one spectator," who showed such "disrespect" demonstrated behavior that warranted closure of the courtroom to Drummond's family and all other public viewers, but did not warrant being held in contempt of court;

8. Indicate who Damian Williams was, or what were the facts or circumstances in which the alleged "physical altercation" occurred with deputies, or how that incident was in any way related to Drummond's trial;

9. Indicate how any of the above was in any way related to Drummond, or Drummond's family members;

10. Indicate how the exclusion of any and all of Drummond's family from the courtroom would allay the fear, if any, the unnamed witnesses were alleged to have had.

Defense counsel objected to the trial court's closure action, noting that Drummond was "entitled to a public trial", that nothing the trial court had referenced had been attributable to Drummond, and that "we therefore, don't think that he should be punished in

terms of not having the support people– his family . . . .".

At no point prior to closure did the trial court conduct even a minimal evidentiary hearing specific to any alleged basis for the court's closing. At no point did the judge explain how an alleged earlier incident where Drummond allegedly approached a prospective juror's husband in the county jail was relevant to the decision to close the courtroom mid trial weeks later.

The testimony of Rozenblad, Morris, and Thomas was a critical part of the State's case. The State's theory of the case was that this was a retaliatory gang shooting. As the Supreme Court of Ohio noted, Rozenblad "overheard Drummond, Gilliam, and Andre Bryant talking about a 'guy moving in in [their] neighborhood [who] could have had something to do with the death of [gang member] Brett Schroeder.'" *State v. Drummond*, 854 N.E.2d 1038, 1049 (Ohio 2006). Rozenblad's testimony also placed Drummond at the party, connected Drummond to a gang, indicated Drummond had been an associate of Schroeder's, and identified Drummond possessing a gun at the party.

Mr. Morris told the jury he had overheard an incriminating conversation between Drummond and inmate Chauncey Walker in county jail in which Drummond allegedly acknowledged he had shot into the victim's house.

Mr. Thomas said that Drummond was at the party at his house, that Drummond had a gun and was a member of a gang, and that he allegedly heard Drummond say to co-defendant Wayne Gilliam, "it's on." He placed Drummond in Gilliam's car, and

concluded that he had heard gunshots five or ten minutes later.

All public spectators, including Drummond's family members, were excluded from the courtroom and thus prevented from hearing the testimony of these key witnesses.

On February 11, 2004, the jury returned guilty verdicts on all counts and specifications. After the mitigation hearing, the jury returned a recommendation that the death penalty be imposed. On February 20, 2004, the court sentenced Drummond to death.

REASONS FOR DENYING THE WRIT

I. The Circuit Court Properly Granted Habeas Relief Because the State Court Ruling Determining that the Closure of the Courtroom During the Petitioner's Trial was Proper Constituted an Unreasonable Application of Clearly Established Federal Law and/or an Unreasonable Determination of Facts in Light of the Evidence Presented. § 2254(d)(1)(2).

A. The Trial Court Violated *Waller* When It Failed To Conduct a Hearing and Place Any Public Safety Concerns on the Record Or Consider Alternatives to Closing the Courtroom.

The right to a public trial is guaranteed by the Sixth Amendment and a violation of such a fundamental right constitutes structural error. *Waller v. Georgia*, 467 U.S. 39, 44-47 (1984); *Johnson v. United States*,

520 U.S. 461, 468-69 (1997). The public trial guarantee was created for the benefit of defendants, *Waller*, 467 U.S. at 46, as it "discourages perjury and ensures that judges, lawyers and witnesses carry out their respective functions responsibly." *Id.* This law has been clearly established for many years. *In re Oliver*, 333 U.S. 257, 270 n.25 (1948). The violation of this right is considered structural because the "defect affect[s] the framework within which the trial proceeds," *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991), it "def[ies] analysis by 'harmless-error' standards." *Id.* at 309.

At the time of Drummond's 2004 trial, this Court had discussed closure of the courtroom under the Sixth Amendment in *Waller v. Georgia*, 467 U.S. 39 (1984). The Supreme Court of Ohio, the federal district court and the circuit court all believed the trial court's closing of the courtroom (with the sole exception of one member of the media) to all public spectators, including Drummond's family members, during the examinations of three key state witnesses, burdened Drummond's Sixth Amendment right to a public trial. and thus implicated the Supreme Court's reasoning and holdings in *Waller v. Georgia*, 467 U.S. at 44-47 and *Johnson v. United States*, 520 U.S. 461, 468-69 (1997). *State v. Drummond*, 111 Ohio St.3d 14, 21 (2006).

At the time of Drummond's 2004 trial, this Court had discussed closure of the courtroom under the Sixth Amendment in *Waller v. Georgia*, 467 U.S. 39 (1984). In *Waller*, a Georgia state trial court had closed a suppression hearing to all but witnesses, court personnel, the parties and their attorneys. *Id.* at 42. The trial court ordered the closure to prevent

unnecessary "publication" of information contained in wiretaps, which would render evidence tainted and inadmissible under Georgia wiretap law. *Id.*

This Court began its review of the Georgia Supreme Court's ruling by noting that "the right to an open trial" is not absolute, and "may give way in certain cases to other rights or interests […]." *Id.* at 45. The Court ruled and cautioned, however, that there is a "presumption of openness" and, therefore, the "balance of interests must be struck with special care." *Id.* For purposes of federal law, this fundamental concern and balancing requirement may be considered "clearly established."

This Court held that before ordering a closure, a trial court *must* render "findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.* at 45 (quoting *Press-Enterprise Co v. Superior Court of California*, 464 U.S. 501, 510, (1984). In making this mandatory assessment, *Waller* held the same guidelines used in their First Amendment courtroom closure cases were to be applied in courtroom closure cases. Specifically, the tests set fourth in *Press-Enterprise* and its predecessors are:

(1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced" if the courtroom remains open;

(2) the closure must be no 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.

Id. at 47, 48 (citation omitted).

The Supreme Court of Ohio acknowledged *Waller* as controlling law and applied these principles to the facts of the case. However, that court modified the principles bases upon its perception of federal circuit cases, not decisions of this Court.

Because some federal circuits improperly created that "partial closure" animal to allow relaxation of the *Waller* four-prong test, the Respondent now argues that there was no clearly established United States Supreme Court precedent for courtroom closing cases. In other words, creation of the "partial closure" term made *Waller* a nullity for all but full and complete courtroom closure cases. Clearly that was not the intent of this Court as evidenced by the *Presley v. Georgia*, 558 U.S. 209 (2010).

None of the circuit courts that adjudicated partial closure claims prior to the *Presley* chose to abandon *Waller* altogether, as the Respondent asserts was the proper course for the Ohio Supreme Court to undertake. As the district court observed, the Second, Eighth, Ninth, Tenth and Eleventh Circuits applied a modified *Waller* test, while the Seventh Circuit adhered to a strict *Waller* application. Equally important is the fact that the disagreement was whether or not to modify the first of four *Waller* test prongs, there was no split among the circuit courts

regarding the remaining three prongs of the *Waller* test.

Thus, the only "divergence" among the circuit courts was how to apply the first of four prongs of the *Waller* test, not whether it applied in the first instance. All circuit courts (as well as the Ohio Supreme Court) and any other court adjudicating a public trial claim recognized *Waller* as clearly established federal law.

However, it is not necessary to engage in this type of analysis. There is a direct violation of *Waller* which was found by the Supreme Court of Ohio. The third standard requires that the trial court must consider alternatives to closing the proceeding. As noted previously, the Supreme Court of Ohio made specific findings that alternatives were not considered. Pet. App. 212a. However, once it found the violation, the court failed to adhere to the mandatory nature of the standard. This ruling was a direct and unequivocal violation of clearly established federal law as set forth by this Court.

The state court finding has not been challenged by the Respondent in the federal proceedings. The deference due to this finding required a founding of structural error by the circuit court.

B. Clearly Established Federal Law Includes Both this Court's Explicit Holdings And The Logical Extension of those Holdings.

The Petitioner's attempt to preclude *Waller* as firmly established federal precedent because of a slight variation in facts rather than the constitutional principles that apply is also contrary to this Court's firmly established precedent. Identical fact patterns to

a case is not a prerequisite for determining that a Supreme Court case is "clearly established federal law" for AEDPA and a §2254(d)(1) analysis. In *Williams v. Taylor*, 529 U.S. 362, 408 (2000), this Court held that "a state-court decision . . . involves an unreasonable application of [Supreme Court] precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* at 409. This Court affirmed that precept in *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (quoting *Carey v. Musladin*, 549 U.S. 70, 81 (2006)(Kennedy, J., concurring)), where it held that, "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" A habeas petitioner need not point a habeas court to a factually identical precedent because oftentimes Supreme Court holdings are "general" in the sense that they erect a framework specifically intended for application to variant factual situations.

The Petitioner has provided no reason why the *Waller* test (as a statement of clearly established federal law), and particularly its second prong– that a courtroom closure be "no broader than necessary"– would be applicable to "total" courtroom closures but not "partial" ones.

Nor does the Petitioner even suggest that a "partial" closure implicates a categorically different constitutional right than a "total" closure. While this Court found in *Musladin*, 549 U.S. 70 (2006), one factual scenario warranted relief where another did not, the Court's findings turned on whether a

constitutional right was infringed. The *Musladin* Court considered the right to a fair trial and distinguished the factual scenarios of a defendant forced by the state to wear prison garb while uniformed state troopers sat immediately behind him from private courtroom spectators wearing buttons of the victim's picture. The *Musladin* Court found that the former implicated "clearly established legal principles" governing "state sponsored courtroom practices," but that the latter scenario involved only private button-wearing spectators, whose actions clearly had no relation to any official state action.

This Court noted there that clearly established federal law "has never addressed a claim that such private actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial." *Musladin*, 549 U.S. at 75. Thus, the *Musladin* Court determined that because one scenario encompasses a constitutional right while the other does not, the distinct factual patterns dictated different results.

Here in Drummond, however, neither the Petitioner nor any of the lower courts questioned the applicability of *Waller* as the Supreme Court case by which the trial court's conduct must be scrutinized. The "total/partial" closure is a distinction without a difference. Both implicate a criminal defendant's public trial rights.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

David L. Doughten
Counsel of Record
4403 St. Clair Avenue
Cleveland, OH 44103
(216) 361-1112
ddoughten@yahoo.com

Alan C. Rossman
Federal Public Defender
Capital Habeas Unit
1660 West Second Street, #750
Cleveland, OH 44113
(216) 522-4856

Counsel for Respondent