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

REPLY BRIEF FOR THE PETITIONER

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The Sixth Circuit in this capital case held that the Ohio Supreme Court had unreasonably applied clearly established law under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") when it concluded that the trial court's partial closure of the courtroom did not violate Respondent John Drummond's public-trial rights. Pet. App. 10a-25a. The Petition showed that the Court should review the Sixth Circuit's decision for three general reasons.

First, the Sixth Circuit's decision, itself subject to a dissent, conflicts with decisions from other circuits. Most directly, it conflicts with circuits that have held that the specific four-part test for *complete* courtroom closures established by *Waller v. Georgia*, 467 U.S. 39 (1984), does not permit AEDPA relief in *partial*-closure cases. *See Garcia v. Bertsch*, 470 F.3d 748, 754 (8th Cir. 2006) (rejecting habeas claim under AEDPA because "[t]he Supreme Court has not spoken on the partial closure issue"); *see also Angiano v. Scribner*, 366 F. App'x 726, 727 (9th Cir. 2010) (rejecting habeas claim under AEDPA because the "Circuits are split" over how *Waller*'s four-part test applies to partial closures). The Sixth Circuit's decision also rests uncomfortably with circuit cases that have substantially relaxed the strict *Waller* test for partial closures even *outside* AEDPA's constrained review. *See, e.g.*, *United States v. Christie*, 717 F.3d 1156, 1168-69 (10th Cir. 2013); *United States v. Cervantes*, 706 F.3d 603, 611-13 (5th Cir. 2013); *United States v. Farmer*, 32 F.3d 369, 371-72 (8th Cir. 1994); *Woods v. Kuhlmann*, 977 F.2d 74, 76-78 (2d Cir. 1992); *United States v. Sherlock*, 962 F.2d 1349, 1356-59 (9th Cir. 1989).

Second, the Sixth Circuit's decision conflicts with this Court's AEDPA precedents. The Sixth Circuit,

for example, found it clearly established that "some form" of *Waller*'s four-part test applies to partial closures. Pet. App. 13a-14a. But, when doing so, the court relied on *circuit* cases, not decisions of this Court. *See id.* That was a mistake, because circuit cases may not "be used to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced." *Marshall v. Rodgers*, 133 S. Ct. 1446, 1450 (2013) (per curiam). Similarly, the Sixth Circuit held that the Ohio Supreme Court unreasonably applied *Waller*'s four-part test even though the state court relied on a host of then-existing circuit cases supporting its reasoning. *See* Pet. App. 17a-25a, 210a-13a. But this Court has made clear that a state court cannot act unreasonably if its decision merely takes sides in an ongoing debate over how this Court's precedents from one setting apply to a different one. *See Carey v. Musladin*, 549 U.S. 70, 76-77 (2006).

Third, the Sixth Circuit's decision concerns a recurring, important issue. Many cases involve partial-courtroom closures precisely because state courts recognize that full closure should rarely occur. And, in many of these cases, courts partially close the courtroom based on a "witness's concern for his own safety." *United States v. Thompson*, 713 F.3d 388, 396 (8th Cir. 2013). So this AEDPA case includes not just the usual federalism interests that have repeatedly justified the Court's review, *see, e.g.*, *Burt v. Titlow*, 134 S. Ct. 10, 15 (2013); *Metrish v. Lancaster*, 133 S. Ct. 1781, 1786 (2013), but also important interests in courtroom order and safety.

In response, Drummond's Brief in Opposition fails to show that the Court should deny certiorari.

He largely ignores the Petition's first and third reasons for review, and, as for the second, his attempt to reconcile the decision below with this Court's cases disregards AEDPA's governing legal standards. If anything, therefore, the Brief in Opposition only confirms the necessity for the Court's review here.

I. DRUMMOND DOES NOT DISPUTE THE SUBSTANTIAL CIRCUIT CONFLICT OVER *WALLER*'S APPLICATION TO PARTIAL COURTROOM CLOSURES

The Brief in Opposition does not dispute that the Sixth Circuit's decision in this case conflicts with decisions from other circuits that relax *Waller*'s four-part test for partial closures. *See, e.g.*, Opp. 13 (conceding that "some federal circuits improperly created that 'partial closure' animal to allow relaxation of the *Waller* four-prong test"). Instead, Drummond argues that "[t]he fact that the Sixth Circuit decision may or may not conflict with other circuits is of no concern here as it does *not* conflict with *Waller*." Opp. 3. As this Court well knows, however, a circuit conflict is a principal, if not the principal, reason for review. If, moreover, the Sixth Circuit correctly held that *Waller* compels courts to apply its four-part test to partial closures *under* AEDPA, that would provide an even more compelling basis for the Court's review. It would mean that the other circuit courts—which have relaxed *Waller*'s standards even *outside* AEDPA's domain, *see* Pet. 18-24—have been misinterpreting the Court's precedent for quite some time. Thus, even assuming (wrongly) that the Sixth Circuit's decision correctly interpreted *Waller*, the circuit conflict would still fully justify review here.

Drummond, moreover, makes a circular argument in contending that the circuit conflict is irrelevant because the Sixth Circuit's decision does not conflict with *Waller*. The entire debate here concerns *Waller*'s proper scope—and, more specifically, whether *Waller* leaves room for the relaxed partial-closure standards. Drummond (and the Sixth Circuit) take a broad reading of *Waller*, ridiculing the other circuits' "'partial closure' animal." Opp. 13. The Warden (and other circuits) take a narrower view, one that allows state courts to apply relaxed standards to partial closures without being second guessed by federal courts under AEDPA's constrained review. For example, both *Garcia* and *Angiano* hold, contrary to the Sixth Circuit's decision, that *Waller* does not create "clearly established" law within the meaning of AEDPA for partial courtroom closures. *See Garcia*, 470 F.3d at 754; *Angiano*, 366 F. App'x at 727. Drummond does not even cite these conflicting cases, let alone attempt to distinguish them. The circuits' conflicting cases on this specific issue—how *Waller* applies to partial courtroom closures under AEDPA—warrant the Court's review.

While Drummond ignores AEDPA cases, he does attempt to distinguish non-AEDPA cases that have relaxed *Waller*'s standards. Opp. 13-14. He claims that these cases merely relax *Waller*'s first factor—requiring only a substantial (rather than an overriding) interest—and that "there [is] no split among the circuit courts regarding the remaining three prongs of the *Waller* test." *Id.* He thus concedes a split exists on the first *Waller* factor. And the cases cited by the Petition (and relied on by the Ohio Supreme Court) illustrate that Drummond is mistaken with

respect to the other *Waller* factors. Courts have relaxed those as well in this context. Pet. 18-24.

Take, for example, *Waller*'s third factor. It asks whether the trial court adequately considered "reasonable alternatives" to closing the courtroom. *See Waller*, 467 U.S. at 48. Several courts have found that this factor can be met in the partial-closure context even if the trial court did not consider an alternative to the partial closure because that closure was *itself* a considered alternative to a full closure. *See Brown v. Kuhlmann*, 142 F.3d 529, 538 (2d Cir. 1998) (holding that a trial court generally need not "'consider alternatives to the alternative'" (citation omitted)); *United States v. Osborne*, 68 F.3d 94, 99 (5th Cir. 1995) (noting that "[t]he court refused the government's request for total closure"); *Commonwealth v. Martin*, 653 N.E.2d 603, 606 (Mass. App. Ct. 1995) (holding that "by opting to exclude all family members but not 'the press' as an alternative to full closure, the judge appears to have given adequate consideration to" alternatives).

In this respect, Drummond is mistaken in suggesting that the Ohio Supreme Court's treatment of this third factor somehow amounts to a "direct and unequivocal violation of clearly established federal law as set forth by this Court." Opp. 14. To the contrary, the Ohio Supreme Court found this factor met based on the line of authority discussed above. The court indicated that the partial closure (allowing the media to remain) was a reasonably considered alternative to a complete closure, citing Second Circuit precedent. *See* Pet. App. 212a (citing *Brown*, 142 F.3d at 538). Thus, the Ohio Supreme Court's analysis with respect to this third *Waller* factor—far from

providing a reason to deny review—only confirms that the Sixth Circuit departed from its sister circuits in granting relief under AEDPA here.

II. DRUMMOND'S ATTEMPT TO RECONCILE THE DECISION BELOW WITH THE COURT'S CASES DISREGARDS THE CONSTRAINED STANDARD OF REVIEW

Drummond's Brief in Opposition also cannot reconcile the Sixth Circuit's decision with this Court's AEDPA precedents. Drummond repeatedly claims that the Sixth Circuit's decision "does not conflict with this Court's precedent in courtroom closure cases as set forth in *Waller*." Opp. 1; *see id.* at 4-5, 10-14. But this gets Drummond nowhere. AEDPA governs this case. The question presented here is not whether the Sixth Circuit correctly extended *Waller*'s four-part test to the state trial court's partial closure as a *de novo* matter. Rather, it is whether the Ohio Supreme Court unreasonably applied this Court's clearly established precedents in following the other circuits that had adopted relaxed standards in this context. *See* 28 U.S.C. 2254(d)(1).

When Drummond turns to AEDPA's demanding standards, he notes that "[i]dentical fact patterns to a case is not a prerequisite for determining that a Supreme Court case is 'clearly established federal law.'" Opp. 14-15 (citing *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007); *Williams v. Taylor*, 529 U.S. 362, 408 (2000)). But this principle does not help him. It simply means that a *general* legal standard (say, the test for ineffective assistance of counsel) can establish the "clearly established" law necessary to grant relief under AEDPA even in a case with facts dissimilar to the case establishing the standard (for

ineffective-assistance cases, *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). *See, e.g.*, *Lafler v. Cooper*, 132 S. Ct. 1376, 1390-91 (2012). The principle does not mean that a *specific* legal standard can be deemed "clearly established" for new situations where this Court has yet to apply them. *See Wright v. Van Patten*, 552 U.S. 120, 124-26 (2008) (per curiam) (refusing to extend presumption of prejudice in certain ineffective-assistance cases established by *United States v. Cronic*, 466 U.S. 648 (1984), to new situation); *Musladin*, 549 U.S. at 76-77 (refusing to extend rules for state courtroom practices to spectator courtroom practices).

This case does not implicate that principle for the reasons identified by the dissent below. Pet. App. 26a-29a. Perhaps a state court that held that a partial closure does not implicate the Sixth Amendment at all could unreasonably apply *Waller*'s *general* holding that the Sixth Amendment requires some balancing of interests. *See* 467 U.S. at 45. But this case concerns the question whether *Waller*'s *specific* four-part balancing test should apply to partial closures. That test cannot be considered "clearly established" for partial closures—especially considering the many cases that have said that it does not govern those types of closures. *See Musladin*, 549 U.S. at 76 (that "lower courts . . . diverged widely" on an issue "[r]eflect[ed] the lack of guidance from this Court").

Arguing the contrary, Drummond asserts that the Petition "has provided no reason why the *Waller* test . . . would be applicable to 'total' courtroom closures but not 'partial' ones." Opp. 15. In doing so, he ignores that the Petition—along with the cases relaxing *Waller*'s standards for partial closures—offered a

variety of reasons why this dichotomy "makes good sense in light of the purposes the public-trial right serves." Pet. 25. Because "the potential invasion of Sixth Amendment interests is so much less likely" with partial closures, "the test a district court must satisfy is correspondingly less onerous." *Christie*, 717 F.3d at 1168; *see Osborne*, 68 F.3d at 98.

Drummond lastly attempts to distinguish *Musladin*. Opp. 15-16. The distinction in *Musladin* between state and spectator practices, Drummond argues, "implicate[d] . . . categorically different constitutional right[s]," whereas both complete closures and partial closures implicate the same public-trial right. Opp. 15. This is mistaken. The general due-process right to a fair trial governed both types of courtroom practices in *Musladin*. *See* 549 U.S. at 72. But the Court denied habeas relief because the specific standards that this Court had applied for state courtroom practices were not clearly established for spectator practices. *Id.* at 76-77. *Musladin* thus controls here because AEDPA likewise does not require state courts to extend *Waller*'s specific four-part test for complete courtroom closures to partial courtroom closures—even if both are governed by the same general public-trial right.

In sum, the Sixth Circuit's decision in this case conflicts with the AEDPA principles that this Court's cases have established.

III. DRUMMOND FAILS IN HIS EFFORTS TO SHOW THAT THE QUESTION PRESENTED HAS DIMINISHING IMPORTANCE

Lastly, Drummond's Brief in Opposition fails to undermine the importance of the question presented.

He does not dispute that public-trial issues arise frequently. Nor does he dispute that they often involve important safety concerns requiring a delicate balance between openness and security. *See United States v. Addison*, 708 F.3d 1181, 1187 (10th Cir. 2013). Instead, Drummond argues that this Court has already set the proper balance by holding "that *Waller* applies equally to full and partial courtroom closures." Pet. App. 12a (citing *Presley v. Georgia*, 558 U.S. 209 (2010) (per curiam)). According to Drummond, *Presley* makes it "very unlikely the issues argued here will arise in the future in courtroom closure cases." Opp. 1.

Drummond is mistaken. As the Petition already noted, *Presley* does *not* resolve the principal question at issue here. *See* Pet. 32. During the jury-selection process in *Presley*, the trial court had excluded *all* of the public (which at the time included only the defendant's uncle) on the ground that the court needed to make room for the potential juries. *See* 558 U.S. at 210-11. This Court held that such a closure invoked *Waller*'s requirements, including the requirement that a trial court consider reasonable alternatives to the complete closure. *Id.* at 213-16. As these facts illustrate, however, *Presley* did not involve a *partial* closure that barred certain individuals from the courtroom but allowed others (such as the media) to remain. Instead, it involved a *complete* closure in which the trial court excluded the entire public from the courtroom proceedings.

This reading of *Presley* is not an idiosyncratic one. Many courts have recognized that it involved a *total* closure when continuing to apply their relaxed standards for *partial* closures. In *Angiano*, for ex-

ample, the Ninth Circuit held that no clearly established law existed on the partial-closure question given that "[t]he Circuits are split" on it. 366 F. App'x at 727. When doing so, the Court stated that *Presley* "[did] not impact [its] analysis" because the trial court in that case had closed "the courtroom to the public at large." *Id.*; *see also, e.g.*, *Addison*, 708 F.3d at 1188 n.6 (noting that voir dire in *Presley* "was closed to all members of the public, the closure just happened to affect only one individual"); *Cervantes*, 706 F.3d at 612 n.4 (referring to *Presley* as "an inapposite case concerning the complete closure of proceedings from the public"); *United States v. Espinal-Alemida*, 699 F.3d 588, 600 n.11 (1st Cir. 2012) (noting that *Presley* was "factually inapposite as [it] involve[d] [a] total courtroom closure[] in which the public was excluded from jury voir dire"); *Verdugo v. Miller*, No. CV 09-7634-DMG (AGR), 2013 WL 5467330, at *19 n.17 (C.D. Cal. Sept. 27, 2013) (noting that "*Presley*, the Supreme Court's most recent discussion of the right to a public trial, involved a total courtroom closure"); *Young v. Dickhaut*, No. 10-10820-DPW, 2012 WL 3638824, at *9 n.2 (D. Mass. Aug. 22, 2012) (noting that "*Presley* addressed a total, and not partial, closure of a courtroom").

In sum, *Presley* cannot possibly impact the specific AEDPA issue in this case because it came out after the Ohio Supreme Court's decision—as the Sixth Circuit conceded. Pet. App. 12a. More than that, however, it also does not answer this partial-closure question outside AEDPA's constraints. Courts have applied their relaxed standards to partial closures under *de novo* review after *Presley*, and they will continue to apply those standards in the foreseeable future. Contrary to Drummond's claims, therefore,

Presley does nothing to show the diminishing importance of the question presented. The question continues to arise frequently, implicates important state interests, and warrants this Court's attention.

CONCLUSION

The Court should grant the petition for certiorari.

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