No. 15-550

In the Supreme Court of the United States

JAMES ROBERT STACKHOUSE,
Petitioner,

v.

STATE OF COLORADO,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

BRIEF FOR THE STATE OF COLORADO IN OPPOSITION

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QUESTION PRESENTED

There are often strategic reasons for a criminal defendant to prefer a closed courtroom during jury *voir dire*—particularly when he is charged with sexual abuse of a minor. For example, it is easier for defense counsel to question the venire regarding sensitive subjects outside the presence of the defendant's and the victim's family members, and jurors may be more forthcoming regarding personal histories of abuse, rape, or child molestation when they are not being questioned in public. Accordingly, as a matter of state law, Colorado has long considered the failure to object to a courtroom closure to be an intentional waiver of the right to a public trial.

The question presented is as follows:

When a trial court announces during jury selection that anyone not in the jury pool must leave the courtroom, does a criminal defendant waive his Sixth Amendment right to a public trial by not objecting to the closure, where state law clearly required an objection to preserve the argument for appeal?

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INTRODUCTION

The Sixth Amendment guarantees criminal defendants "the right to a … public trial." U.S. Const. amend. VI; *see also Waller v. Georgia*, 467 U.S. 39, 46 (1984). This right is not limited to trial itself; it includes related proceedings, like jury *voir dire*, which is at issue here. *See Presley v. Georgia*, 558 U.S. 209, 213 (2010).

But the right is not absolute. It "may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Waller*, 467 U.S. at 45. A defendant may also waive the right to a public trial, *Peretz v. United States*, 501 U.S. 923, 936 (1991) (citing *Levine v. United States*, 362 U.S. 610, 619 (1960)), and there may be sound strategic reasons for him to do so. A closed courtroom enables counsel to probe sensitive or disturbing subjects outside the presence of the defendant's, or a sympathetic victim's, family members. As this case amply demonstrates, during jury selection prospective jurors may be more forthcoming about their personal histories of abuse, rape, and child molestation when they are not being questioned in public.[1]

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[1] Tr. March 1, 2010, 43 (prospective juror could not be fair to the petitioner because her niece had been molested), 44 (prospective juror could not be fair because he was abused as a child), 49–50 (prospective juror's sister had been sexually assaulted and she could not put that information aside), 57 (prospective juror had been personally assaulted and the proceedings made her nauseous), 58 (prospective juror's brother's experiences caused her to almost cry when she read the charges, and prevented her from being fair), 62–64 (prospective juror's experiences when she was

Like many constitutional rights, waiver of the public-trial right can be effected through defense counsel's actions and need not involve a personal waiver by the defendant. *See Taylor v. Illinois*, 484 U.S. 400, 417–18 (1988) (while some rights are not waivable without consent of the client, lawyers have—and must have—full authority to manage the conduct of trial). The decision to waive a public trial is like the choice of how and whether to confront witnesses, or other strategic choices counsel must make concerning other significant trial rights. *See, e.g.*, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313 n.3 (2009).

Since 1971, the law in Colorado has been that a defendant waives the public-trial right when he is aware that the courtroom has been closed to the public but fails to object. *Anderson v. People*, 490 P.2d 47, 48 (Colo. 1971), *cert. denied*, 405 U.S. 1042 (1972). This state-law rule discourages gamesmanship that could come in the form of silently acquiescing to a closure, then—if convicted—seeking to assert the public-trial right as an appellate parachute.

Here, Petitioner and his counsel knew that the court had ordered non-jurors to clear the gallery and did not object to that order. Under Colorado law, the failure to object to a known courtroom closure despite the longstanding rule requiring such objections to

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five years old would affect her ability to sit on a trial where the victim was currently six years old), 66–69 (prospective juror's wife was victimized as a child), 74 (prospective juror was sexually assaulted as a child and could not be fair), 76 (prospective juror was victimized as a child and could not be fair).

preserve the issue is considered an intentional waiver of the public-trial right, and the Colorado Supreme Court so held. Although Petitioner asserts that his and his counsel's choice not to object was "inadvertent," that assertion lacks support in the record and in the decisions of the courts below.

The application of Colorado's state-law rule does not entitle Petitioner to appellate relief, nor does it warrant this Court's review. Petitioner relies on a lone justice's dissent to argue that the decision below rested on federal grounds, but that assertion is simply not consistent with the majority opinion. This case was decided on state-law procedural grounds.

Petitioner argues that the Courts of Appeal and state courts of last resort are irrevocably divided regarding waiving the right to a public trial. This alleged split results largely from both state procedural rules regarding waiver and procedural default, and from the different procedural stages of review of the cases he cites. Accordingly, the alleged split does not require the intervention of this Court. Further, as Petitioner notes, this Court has recently and repeatedly declined to review claims similar to his. Pet. 29 n.9. The Court should decline to review Petitioner's claim as well.

STATEMENT OF THE CASE

Trial. Defendant James Robert Stackhouse was charged with three sexual crimes in violation of Colorado law: sexual assault on a child, sexual assault on a child by one in a position of trust, and sexual assault on a child as a part of a pattern of abuse. Pet. App. 30a–31a. The charges were based on Petitioner's

abuse of his girlfriend's daughter over a three-year period. *Id.* The victim was four years old when the abuse began. *Id.*

On the first day of trial, in public proceedings, the court addressed preliminary matters regarding the admission of child hearsay and Petitioner's prior acts. Then the court turned to jury selection. Because the courtroom could not accommodate the fifty prospective jurors without risking prejudice from comingling with spectators, the court ordered the gallery cleared:

> [W]hat I will ask is family members, others, you are going to have to step out of the courtroom while we seat the jury.
>
> Although the courtroom—the trial itself, proceedings that we are undertaking will be public, I don't have enough space in the benches to seat 50 jurors. So those in the back benches, you will have to vacate the courtroom until the jury is selected.
>
> Once selected, obviously we will have space. At that point in time there will not be a danger of having family members, others, comingle with jurors, and we will be in a position where there will not be a problem. I simply do not have enough space to put 50 jurors and accommodate observers. That will be the order of the Court.

Tr. Mar. 1, 2010 14–15.

The court invited objections to its closure order, asking counsel for both parties whether they had "anything further." *Id*. But despite this invitation, defense counsel did not object to the closure before or during jury selection. *Id.* at 15. Nor did defense counsel

ever object—or even mention the issue—at any point during trial.

Reflecting the sensitivity of the subject matter of trial, the *voir dire*, in addition to group questioning, included individual questioning of many of the prospective jurors in chambers concerning their personal experiences with sexual abuse. *Id.* at 43, 44, 49–50, 57, 58, 63–64, 69, 74, 76. *Voir dire* concluded the same day. *Id.* at 176–77.

Following a three-day trial, the full duration of which was open to the public, the jury convicted Petitioner of sexual assault on a child and sexual assault on a child by one in a position of trust but acquitted him of the pattern of abuse charge. Pet. App. 31a. Petitioner was sentenced to ten years to life in the Colorado Department of Corrections. *Id.*

Proceedings in the Colorado Court of Appeals. On direct appeal, Petitioner raised various challenges to his conviction and sentence, including—for the first time—an argument that his right to a public trial was violated when the trial court cleared the gallery to make room for prospective jurors. *Id.* at 31a. He contended that this closure constituted structural error entitling him to automatic reversal of his conviction. *Id*.

The court rejected this new argument. Citing the Colorado Supreme Court's decision in *Anderson*, the court of appeals reasoned that the defendant "waived his public trial claim by failing to object in the trial court to the closure of the courtroom during jury selection." *Id.* at 32a.

One judge specially concurred, suggesting that the Colorado Supreme Court should reconsider its public trial jurisprudence. Pet. App. 47a (Gabriel, J., concurring).

Proceedings in the Colorado Supreme Court. The Colorado Supreme Court granted certiorari and affirmed in a six-to-one decision, holding that *Anderson* "remains good law in Colorado," Pet. App. 2a, and that Colorado defendants "affirmatively waive their right to public trial by not objecting to known closures." *Id.* at 14a–15a. It further noted that attorneys in Colorado are presumed to know the rules of procedure, and "it has long been the rule in Colorado that defense counsel must object to a known closure to preserve appellate review on public trial grounds." *Id.* at 13a (citing *Anderson*, 490 P.2d at 48).

The court emphasized the "sound strategic reasons" for a defendant to waive his public trial right, particularly in a case involving sexual assault on a young child. *Id.* at 11a–12a. These include preventing the jury from being tainted by pretrial publicity, encouraging potentially biased jurors to be more frank and forthcoming during *voir dire*, and preventing a sympathetic victim's family from tainting the venire. *Id.*

The court concluded that, in this context, interpreting a failure to object as something other than an affirmative waiver would simultaneously provide a defendant with the strategic benefits of closed *voir dire* proceedings while preserving grounds for reversal in case of a conviction. *Id.* at 12a–14a. Specifically, "[a]llowing a defense attorney who stands silent during a known closure to then seek invalidation of an adverse

verdict on that basis would encourage gamesmanship, and any new trial would be a windfall for the defendant, a result that the *Waller* court expressly tried to prevent." *Id.* at 13a (citation and quotations omitted).

One justice dissented. In her view, Petitioner's failure to object was a forfeiture, rather than a waiver, and Petitioner's conviction should have been reversed on plain error review because the trial court had not expressly invoked the factors that apply when a defendant actually objects to a courtroom closure. Pet. App. 15a (Márquez, J., dissenting).

REASONS FOR DENYING THE PETITION

I. The decision below was based on the Colorado Supreme Court's application of two independent and adequate state law doctrines that preclude this Court's review.

This Court will not take up review of a federal question, even one involving constitutional rights, where a state court decision rests on an independent and adequate state law ground. *See Lee v. Kemna*, 534 U.S. 362, 375 (2002) (citing *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)). Thus, absent "exceptional" circumstances, "violation of firmly established and regularly followed state rules … will be adequate to foreclose review of a federal claim." *Lee*, 534 U.S. at 375 (citations and internal quotation omitted). "This rule applies with equal force whether the state-law ground is substantive or procedural." *Id.* Here, the Colorado Supreme Court relied on two state law doctrines when it rejected Petitioner's public trial

claim. Both require denial of the Petition, and both are consistent with federal constitutional law.

A. The Colorado Supreme Court relied on a 40-year-old state procedural rule in concluding that Petitioner waived his public-trial claim by failing to object despite being advised of the closure.

This Court has long deferred to state procedural rules governing when a failure to object amounts to a waiver. In *Osborne v. Ohio*, 495 U.S. 103, 107, 122–25 (1990), the Court concluded that Ohio's requirement that a defendant contemporaneously object to the absence of a scienter element in a jury instruction qualified as an adequate independent state-law ground that prevented the Court from reaching his due process argument. *Id.* at 123. The Court explained that Ohio's contemporaneous objection rule "serves the State's important interest in ensuring that counsel do their part in preventing trial courts from providing juries with erroneous instructions." *Id.* Similarly, this Court has held that the Sixth Amendment right to confrontation may be waived by a defendant's "failure to object to the offending evidence" and that "States may adopt procedural rules governing the exercise of such objections." *Melendez-Diaz*, 557 U.S. at 313 n.3, 327.

The same holds true in the public trial context. In *Waller*, the Court addressed Sixth Amendment claims by multiple parties, including defendant Waller and his co-defendant, Cole. *See* 467 U.S. at 42 n.2. Because defendant Cole (unlike Waller) had *not* objected to the courtroom closure, the Court remanded for the Georgia courts to "determine on remand whether Cole is

procedurally barred from seeking relief as a matter of state law." *Id.* Thus, this Court has not only expressly approved of state rules which require contemporaneous objections to prevent the waiver of constitutional rights, *see Osborne*, 495 U.S. at 107–08, 123, but has also implicitly approved of such rules in the public trial context. *Waller*, 467 U.S. at 42 n.2.

Colorado's requirement that defendants contemporaneously object to a courtroom closure in order to preserve public-trial arguments has been firmly in place since 1971. *Anderson*, 490 P.2d at 48; *see also* Pet. App. 6a–7a; *People v. Dunlap*, 124 P.3d 780, 819 (Colo. App. 2004). Because Colorado "presume[s] that attorneys know the applicable rules of procedure"—including this contemporaneous objection requirement—courts "can infer from the failure to comply … that the attorney *made a decision* not to exercise the right at issue." Pet. App. 12a–13a (emphasis added and quotation omitted). Thus, as a matter of state procedure, Colorado deems a public-trial claim waived in the absence of an objection to a known closure. *Id.* This requirement supports important state interests and allows the trial court an opportunity to address any possible violation at the time it occurs. There is no need for this Court to review this longstanding state-law rule.

B. Under state law, Petitioner's failure to object to the courtroom closure, where the record demonstrates that the closure was known to all parties, is not presumed to be "inadvertent."

The Petition, including the question presented and the purported split of authority, is premised on the

assumption that defense counsel below "inadvertent[ly] fail[ed] to object to [the] courtroom closure." Pet. I; *see also id.* at 1, 8, 10, 12, 14, 15, 16, 17, 21, 29. Although the Petition does not explain how defense counsel's failure to object could have been "inadvertent" (*i.e.*, accidental or unintentional), any assertion of inadvertence is not supported by the record or by the decisions below.[2] More importantly, under firmly established Colorado law, state courts do not simply presume that a failure to object to a courtroom closure was "inadvertent," particularly under factual circumstances such as those presented here.

Both Petitioner and his counsel were present when the trial court expressed its intention to restrict those in the courtroom to the members of the jury pool. Tr. March 1, 2010, 14–15. When the court then asked whether counsel had "[a]nything further" immediately following its announcement, Petitioner's counsel stood silent on the public trial issue, even though, for more than forty years, Colorado law has required contemporaneous objection to courtroom closures in order to preserve the issue. Tr. March 1, 2010, 14–15; *see also Anderson*, 490 P.2d at 48. Nor did Petitioner's counsel object to the statement on courtroom closure at any other time during the trial. The Colorado Court of Appeals (including the concurrence) and the Colorado Supreme Court (including the dissent) did not refer to

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[2] Although some cases refer to a *courtroom closure* as "inadvertent"—such as where a judge neglects to reopen the courtroom following an undercover agent's testimony, *Peterson v. Williams*, 85 F.3d 39, 41–42 (2d Cir. 1996)—that does not apply to the announced closure here and was not the analysis used by either of the courts below.

Petitioner's failure as inadvertent. The courts' analyses were instead limited to situations, like here, where the defense chooses not to object to a known closure. *See* Pet. App. 14a–15a; Pet. App. 32a–33a.

Thus, the Petition's repeated reference to and reliance on a supposedly "inadvertent" failure to object are contrary to the record. Instead, Petitioner's failure to object was knowing, intentional, and likely strategic. As the Colorado Supreme Court noted, "there are sound strategic reasons to waive the right to a public trial, as is particularly apparent in the context of [Petitioner's] jury selection for his trial on charges of sexual assault on a minor." *Id.* at 11a–12a. Accordingly, in Colorado there is a state-law presumption that a defendant who is made aware of a courtroom closure and does not object to it is not acting "inadvertent[ly]," Pet. I, but has instead made an "affirmative waiver of the public trial right." Pet. App. 14a. Petitioner has not overcome that presumption; this Court's review is therefore precluded by that additional state law ground.

C. The Colorado Supreme Court's application of state law to bar relief in this case is consistent with federal waiver principles.

Nothing in this Court's precedents suggests that the decision below or the state-law doctrines on which it relied are in conflict with the United States Constitution.

In *United States v. Olano*, this Court explained that "[w]aiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" 507 U.S. 725, 733

(1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). The Colorado Supreme Court's decision is not contrary to this language, as there is a distinct difference between a mere "failure to make timely assertion of a right" and the intentional decision to not assert the right, as occurred here, likely for strategic reasons.

Furthermore, waiver rules—including whether a right is waivable; whether a defendant's personal participation is required for that waiver; whether certain procedures are required for the waiver; and whether there must be a finding that the waiver was knowing, voluntary, and intelligent—all depend on the particular right at stake. *Id.* "To hold that every instance of waiver requires the personal consent of the client himself or herself would be impractical." *Gonzalez v. United States*, 553 U.S. 242, 250 (2008).

Thus, only a select group of rights require a specific finding of a knowing, voluntary, and intelligent waiver by the defendant. *See Johnson*, 304 U.S. at 464–65, 468–69 (right to counsel); *Iowa v. Tovar*, 541 U.S. 77, 88–89 (2004) (right to elect self-representation); *Brookhart v. Janis*, 384 U.S. 1, 7–8 (1966) (right to plead not guilty). These rights represent a choice that the defendant must personally make. Neither the court nor counsel may make the election or force a choice upon the defendant, no matter how compelling the rationale may be.

Although the right to a public trial is sometimes described as a fundamental and structural right, it is not absolute and may be taken from a defendant *even over his strenuous objection* if other interests warrant doing so. *See Presley*, 558 U.S. at 215; *Waller*, 467 U.S.

at 45. The right to a public trial is thus not among the narrow class of rights that require a personal, informed waiver.[3] Otherwise, it could not be taken from the defendant after a *Waller* analysis—which does not include the defendant's choice as a factor. *See Waller*, 467 U.S. at 45.

Accordingly, the right to a public trial can be waived by counsel's actions. *Peretz*, 501 U.S. at 936 (noting, in dicta, that failure to object to a courtroom closing waives the right to public trial and citing *Levine* 362 U.S. at 619; *see also Freytag v. Commissioner*, 501 U.S. 868, 895-96 (1991) (Scalia, J., concurring) ("First Amendment free-speech rights, for example, or the Sixth Amendment right to a trial that is 'public,' provide benefits to the entire society more important than many structural guarantees; but *if the litigant does not assert them in a timely fashion, he is foreclosed*.") (emphasis added).

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[3] The Petitioner cites an outlier case from the Seventh Circuit for the proposition that the Colorado Supreme Court's opinion is inconsistent with this Court's precedent. Pet. 13 (citing *Walton v. Briley*, 361 F.3d 431, 434 (7th Cir. 2004)). That decision, which held that relinquishing the right to a public trial requires the defendant to knowingly, voluntarily, and intelligently waive the right, represents a stark departure from the approach taken by other circuits and state courts and conflicts with *Waller*'s principle that the right to a public trial may be taken away from a defendant even if he or she objects. *See United States v. Hitt*, 473 F.3d 146, 155 (5th Cir. 2006) (counsel's waiver of the right to a public trial is effective on the defendant), *cert. denied*, 549 U.S. 1360 (2007); *People v. Vaughn*, 821 N.W.2d 288, 299 (Mich. 2012) (right to a public trial does not require a personal, knowing, and intelligent waiver). The Seventh Circuit's outlying (and incorrect) habeas case does not warrant this Court's intervention here.

Like many courts, the Colorado Supreme Court cited *Peretz* and *Levine* in holding that Petitioner waived his public-trial right. But the court below did not misunderstand those cases, as Petitioner claims, Pet. 17–20, nor did it simply defer to those cases as controlling. Rather, it recognized that this Court has never required a particular waiver for the right to a public trial, while noting that *Waller* itself acknowledged the possibility of state-law procedural bars to asserting public-trial rights on appeal. Pet. App. 10a (citing *Waller*, 467 U.S. at 42 n.2). Ultimately, the Colorado Supreme Court's citation to *Peretz* and *Levine* was a small part of its analysis, which was based primarily on the continuing validity of *state* law. *Id*. at 9a–12a. Nothing in *Olano*, *Peretz*, *Levine*, or any other decision of this Court suggests that the state procedural doctrines that the Colorado Supreme Court applied are inappropriate under the United States Constitution.

II. There is not a genuine split of authority that requires resolution by this Court.

The Petition presents a picture of rampant and random closure of courtrooms by trial courts and inconsistent approaches taken by appellate courts in reviewing these claims. It asserts that "[t]his Court's review is needed to provide guidance to courts nationwide and to resolve a mature and entrenched split" regarding waiver of the public-trial right. Pet. 8. The practice in many other states is, however, consistent with Colorado's. *See* Pet. App. 14a n.6. And differences in how courts treat the issue generally arise from different underlying facts, different state rules

regarding procedural default, and different procedural postures.

There is thus not a direct and genuine split requiring this Court to intervene. Different facts—including the nature of the closure and whether counsel acquiesced or objected to it—naturally affect how courts address public trial claims. And as explained above in Part I, this Court has repeatedly approved of state rules governing procedural default, including those that apply to waiver. Although Colorado's procedural rule regarding waiver of the public trial right is consistent with many jurisdictions, others may appropriately adopt and apply different rules through case law, statute, or court rule regarding timely assertion of this right. There is no need for this Court to reconcile cases decided on state-law grounds.

Procedural posture also matters a great deal: a direct appeal may necessitate a different analysis than does post-conviction review, particularly when the latter involves a claim that counsel was ineffective in failing to object to a closure.[4] An examination of the procedural postures of the cases Petitioner cites shows that there is no need for this Court to intervene to clarify the proper standard.

A. Cases on direct appeal.

Decisions on direct appeal are the most relevant to this case, as Petitioner's case also arises from a direct

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[4] In noting that this Court has repeatedly declined to review public-trial claims in cases he cites, Petitioner agrees that many of those cases are distinguishable because of their procedural postures. *See* Pet. 29 n.9.

appeal. In that posture, most appellate courts considering a defendant's failure to object to a known courtroom closure agree with Colorado: non-objection, in this context, is a waiver, rendering the case non-reviewable.[5]

Courts that hold that a defendant's failure to object constitutes waiver when the case is presented on direct appeal include the First[6] and Fifth Circuits and the high courts of Alabama, California, Colorado, the District of Columbia,[7] Maryland, New York, South

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[5] As Petitioner notes, some courts use the term "forfeiture" in the context of a claim that is not afforded appellate review. *See, e.g.*, *Peyronel v. State*, 465 S.W.3d 650, 650–52 (Tex. Crim. App. 2015), *cert. denied*, No. 15-6267, 2015 Lexis 7542 (Nov. 30, 2015). Those non-reviewable "forfeiture" cases may be appropriately considered waivers, because the claims in those cases were not reviewable for plain error.

[6] Petitioner claims an earlier First Circuit decision, *United States v. Espinal-Almeida*, 699 F.3d 588 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 1837 (2013), held that the failure to object to a closure forfeits, but does not waive, a Sixth Amendment claim. Pet. 11. But the cited portion of that case (discussing the judge's *ex parte voir dire* with certain jurors) was addressing both the right to be present under Fed. R. Crim. P. 43(a) and the Sixth Amendment right to a public trial, focusing on the former. 699 F.3d at 600. And in that case, the First Circuit dismissed the defendant's more relevant claim—that the district court wrongly excluded a spectator from the courtroom—because the claim lacked record support and was therefore "waived." *Id.* at 601. Thus, *Espinal-Almeida* is in fact consistent with the decision below.

[7] Petitioner claims an earlier District of Columbia decision, *Barrows v. United States*, 15 A.3d 673 (D.C. 2011), held that a failure to object is a forfeiture rather than a waiver. Pet. 11. But the later *Littlejohn v. United States*, 73 A.3d 1034, 1038 (D.C.

Carolina, and Utah, as well as the Texas Court of Criminal Appeals.[8]

The Petition claims that other jurisdictions on direct appeal have held that the failure to object to closure only forfeits, rather than waives, a Sixth Amendment public trial right. Pet. at 11–14. Those cited cases are distinguishable.

For example, the Ninth Circuit decision in *United States v. Rivera*, 682 F.3d 1223 (9th Cir. 2012) concluded that defense counsel had, in fact, sufficiently objected to a partial courtroom closure. *See id.* at 1233 ("Having already expressed Rivera's desire for his family to be present and explained the reasons for that request, defense counsel did not have to ask the court to reconsider its subsequent decision to close the proceedings … ."); *id.* ("[D]efense counsel had already

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2013), case controls in the District of Columbia, and the *Barrows* court emphasized the specific facts in that case, which are very different from those here: in *Barrows*, the defendant proceeded *pro se* at trial and the circumstances did not "suggest that the lack of objection might have been strategic, rather than inadvertent[.]" 15 A.3d at 677 (quotation, alterations omitted).

[8] *United States v. Acosta-Colon*, 741 F.3d 179, 187 (1st Cir. 2013); *Hitt*, 473 F.3d at 155; *Wright v. State*, 340 So.2d 74, 80 (Ala. 1976); *People v. Bradford*, 929 P.2d 544, 570 (Cal. 1997), *cert. denied*, 522 U.S. 953 (1997); *Stackhouse v. Colorado*, Pet. App. 14a–15a; *Robinson v. State*, 976 A.2d 1072, 1080 (Md. 2009); *People v. Alvarez*, 979 N.E.2d 1173, 1176 (N.Y. 2012); *State v. Beachum*, 342 S.E.2d 597, 598 (S.C. 1986), *overruled in part on other grounds by State v. Gentry*, 610 S.E.2d 494, 501 (S.C. 2005); *Peyronel*, 465 S.W.3d at 653–54; *State v. Butterfield*, 784 P.2d 153, 156–57 (Utah 1989); *see also Littlejohn*, 73 A.3d at 1038 (discussing prior direct appeal, from which this Court denied certiorari, 558 U.S. 959 (2009)).

done precisely what *Levine* requires."). And in *United States v. Gomez*, 705 F.3d 68 (2d Cir. 2011), *cert. denied*, 134 S. Ct. 61 (2013), although the Second Circuit reviewed a public-trial claim for plain error, it emphasized that the term "error" in that context "means 'some sort of [d]eviation from a legal rule[ ] *that has not been intentionally relinquished or abandoned*, *i.e.*, affirmatively waived, by the appellant.'" *Id.* at 75 (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)) (alterations and emphasis added by the Second Circuit). The court ultimately affirmed the conviction because defense counsel had "fully acquiesced" in exclusion of defendant's family from the courtroom. *Id.*

The state decisions likewise do not create a direct or genuine split of authority. While state courts apply varying analyses to closures of the courtroom, they generally reach the same result that the Colorado Supreme Court reached in this case—a defendant who stands silent at the closure is not entitled to relief on appeal. *See Vaughn*, 821 N.W.2d at 299 (applying plain error analysis, but concluding that the defendant was not entitled to relief); *State v. Addai*, 778 N.W.2d 555, 570 (N.D. 2010) (applying plain error because the defendant did not object to the closure, and holding that any error did not require reversal); *State v. Bauer*, 851 N.W.2d 711, 716 (S.D. 2014) (applying plain error review and concluding that defendant had failed to prove that the closure was plain error). Two cases that Petitioner invokes, *State v. Bethel*, 854 N.E.2d 150 (Ohio 2006) and *State v. Tapson*, 41 P.3d 305 (Mont. 2001), interpreted and applied their respective *state* constitutions. Indeed, only the Washington Supreme Court has invoked the United States Constitution to find reversible error in the public-trial context, and

that decision was still largely based on the state constitution and the trial court's failure to apply state-law precedent. *State v. Wise*, 288 P.3d 1113, 1120 (Wash. 2012). The Washington Supreme Court determined that the use of individual *voir dire* for jurors who were uncomfortable discussing certain topics in open court violated the defendant's public trial right. *Id.* Such an expansive application of the Sixth Amendment is an outlier from other jurisdictions, is based in part on state law, and is irrelevant to this case, where the very same practice was followed but was never challenged and is not mentioned in the Petition.[9]

Thus, while on direct review, courts may apply state procedural rules and consider the lack of objection to a courtroom closure to be a forfeiture, not a waiver, the result in the vast majority of cases is the same: a defendant who stood silent when given an opportunity to object is not entitled to relief. Accordingly, there is neither the great schism that Petitioner suggests nor a need for review by this Court.

B. Cases on post-conviction review

For two reasons, the decisions Petitioner cites that address the public-trial right on post-conviction review do not bear on the supposed "split" in authority that he asks this Court to resolve.

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[9] As noted above, many jurors were individually questioned in chambers concerning their personal experiences with sexual abuse. Tr. March 1, 2010, 43, 44, 49–50, 57, 58, 63–64, 69, 74, 76. Petitioner has never questioned the propriety of that process and does not do so here.

First, those courts generally hold that regardless of trial waivers, a defendant is entitled to review, under the framework of *Strickland v. Washington*, 466 U.S. 668 (1984), for ineffective assistance of counsel claims based on counsel's failure to object to a courtroom closure. *See Johnson v. Sherry*, 586 F.3d 439, 442 (6th Cir. 2009) (habeas case discussing state court's application of *Strickland*), *cert. denied*, 562 U.S. 946 (2010); *Morales v. United States*, 635 F.3d 39, 43–45 (2d Cir. 2011) (reviewing a defendant's public trial claim under *Strickland*), *cert. denied*, 132 S. Ct. 562 (2011); *Addai v. Schmalenberger*, 776 F.3d 528, 531–35 (8th Cir. 2015) (habeas case discussing state court's review of public trial claim under *Strickland*); *Charboneau v. United States*, 702 F.3d 1132, 1136–39 (8th Cir. 2013) (reviewing the defendant's claim that appellate counsel was ineffective for failing to raise a public trial claim in the direct appeal); *Littlejohn*, 73 A.3d at 1038–39 (reviewing for ineffective assistance of counsel); *Commonwealth v. Morganti*, 4 N.E.3d 241, 247–248 (Mass. 2014) (reviewing for ineffective assistance of counsel), *cert. denied*, 135 S. Ct. 356 (2014); *State v. Pinno*, 850 N.W.2d 207, 213 (Wis. 2014) (reviewing for ineffective assistance of counsel); *see also Vaughn*, 821 N.W.2d at 305–07 (reviewing a *Strickland* claim for ineffective assistance of counsel on direct appeal). Petitioner has not raised an ineffective assistance claim here.

Second, unlike review on direct appeal, post-conviction review generally allows for evidence-gathering and permits exploration into whether counsel's choices to waive the defendants' rights were

within the range of professional competence.[10] In the post-conviction context, where counsel's choices and the nature of the exclusion can be examined, there is no real split of authority. So, in this direct appeal case, with no factually-developed record regarding the reasons counsel chose not to object, this Court's intervention is not required, particularly because the decision below was based on independent and adequate state-law doctrine.[11]

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[10] Here, as a result of defendant's failure to object, the record is devoid of evidence as to the reasons defense counsel declined to object and the nature and length of the courtroom closure that followed the court's announcement.

[11] The Petition, in addition to asserting a Sixth Amendment public trial claim, also relies on a purported First Amendment violation—a claim that was not relied upon by the court of appeals or the supreme court below. *See* Pet. 1, 22. This argument is irrelevant and should not invite this Court's review. Criminal defendants lack standing to challenge courtroom closures based on a purported denial of the public's First Amendment rights, *see, e.g.*, *United States v. Bansal*, 663 F.3d 634, 661 (3d Cir. 2011), and no member of the press or public has ever been a party to this case or sought any relief under the First Amendment based on the clearing of the gallery during *voir dire*.

Just as the First Amendment claim does not govern this case, the amicus brief of the Reporter's Committee for Freedom of the Press in Support of the Petition is based on a question not presented in this case. The brief addresses whether overcrowding, as a general matter, is a legitimate reason to close a courtroom under *Waller*. However, overcrowding is irrelevant to whether Petitioner waived his right to a public trial.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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