State of Michigan
In the Supreme Court

The People of the State of Michigan

Plaintiff-Appellee,

-v-

Anthony Joseph Veach

Defendant-Appellant.

MSC Nos. 160469, 160470, 160471

COA Nos. 342394, 342395, 342396

Macomb County Circuit Court Nos.
17-447 FC, 17-1859-FC, 17-1865-FC

Defendant-Appellant Anthony Joseph Veach's Supplemental Brief

–Oral Argument Requested–

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A. Did the Macomb Circuit Court rely on the pretrial courtroom closures or Mr. Veach's failure to object to those closures to justify closing the courtroom for the defendant's trial?

Mr. Veach answers: the trial court cited both points when it justified its decision to close the trial

The Court of Appeals answered: No.

The trial court: cited both points when it justified its decision to close the trial

B. Was the Macomb Circuit Court's reliance on Mr. Veach's failure to object to the closure of the courtroom preliminary was erroneous?

Mr. Veach answers: Yes

The Court of Appeals did not answer

The trial court did not answer

Second Question

A. Did the closure of the courtroom during Mr. Veach's trial constitute a partial or total courtroom closure?

Mr. Veach answers: There is no legal distinction between a partial and total trial closure

The Court of Appeals answered: Partial

The trial court did not answer

B. Does the distinction between a 'partial' courtroom closure and a 'total' courtroom closure affect Mr. Veach's claim of error?

Mr. Veach answers: No

The Court of Appeals answered: Yes

The trial court did not answer

Third Question

What remedy, if any, is available to Mr. Veach if constitutional or statutory error occurred

Mr. Veach answers: a new trial

The Court of Appeals did not answer

The trial court did not answer

Supplemental Statement of Facts

At Anthony Veach's trial the judge closed the courtroom during the complainant's testimony over his objection. This Honorable Court has asked the parties to file supplemental briefs on three questions regarding that closure.

I. The closure of the courtroom during the complainant's preliminary examination testimony

On August 31, 2016, a complaint and warrant were filed in the 41-A Judicial District Court, charging Anthony Veach with one count of criminal sexual conduct in the first degree for allegedly sexually penetrating his daughter, SV, when she was less than sixteen years old. 1a. Before calling her first witness at the preliminary examination, the prosecutor requested the courtroom be closed during S.V.'s testimony:

> Pursuant to MCL 600.2163a, I am asking that the Court close the courtroom while the complaining witness is testifying. She is a minor. We are going to be taking testimony as to a sensitive nature, given what the offense is. And I believe that it's appropriate under the statute that the courtroom be closed during her testimony. [22a]

Mr. Veach's attorney responded: "To make it easy, I have no objections." The court ruled: "Okay." 22a.

At the conclusion of the examination, the district court bound Mr. Veach over on one count of CSC I and an added count of second degree criminal sexual conduct. 4a; 15a; 58a.

After the examination, the prosecutor filed complaints in the 37A and 38th District Courts, which charged Mr. Veach with assaulting S.V. in a different jurisdiction. 2a, 3a. At the beginning of the preliminary examination in the 37A District Court, the district court announced:

> We had a brief discussion relative to the scheduling [of] this matter. As a condition precedent I'm going to order the courtroom closed at this time. Are you satisfied with the condition of the courtroom? [91a]

The prosecutor answered that the request was being made pursuant to MCL 600.2163(a), and that "defense counsel is stipulating to that."

91a. After Mr. Veach's attorney acknowledged this was correct, the prosecutor said that the victim advocate would be permitted to remain in the courtroom while S.V. testified, which counsel also confirmed. 92a. The court ordered:

> I'm satisfied that's reasonable and appropriate. That stipulation is received and is ordered as such. [92a]

At the conclusion of the examination, Mr. Veach was bound over on two counts of CSC I and one count of CSC II. 6a; 16a; 141a.

Before S.V. testified at the preliminary examination in the 38th District Court the following day, the prosecutor stated:

> [I]t's my understanding after speaking to the Defense Counsel, for purposes of the preliminary exam and pursuant to MCL 600.2l63a I am requesting that the courtroom be closed at this time and any video or cameras be turned off so that the TVs do not show in the lobby. And in addition to that, your Honor, it's my understanding that there's also Stipulation pursuant to that same Statute that the support person, that being, Karen Phillips, our Victim Advocate from our office be permitted to be in the courtroom. [147a]

Mr. Veach's counsel responded: "So stipulated." 148a.

The district court then announced:

> Then we'll stipulate. I'm going to ask that the courtroom be cleared. At this point in time, we're going to begin our exam so everyone who has not been stated, I'm going to ask you to leave the courtroom now. [148a]

At the conclusion of the examination, Mr. Veach was bound over to circuit court to stand trial on four counts of CSC I. 9a; 17a; 192a-193a.

II. The trial court's order granting the prosecutor's motion to close the trial during the complainant's testimony

Before the trial, the prosecutor filed a "Motion to Close the Courtroom While the Victim Testifies Pursuant to MRE 611(a)." In the motion, the prosecutor identified the charges against Mr. Veach, and asserted:

> The victim, S.V. (DOB: [June 2000]), is the biological daughter of Defendant. SV was 14, 15 and 16 years old at the time of these incident(s). The victim has disclosed that the Defendant sexually assaulted her on multiple occasions. On more than one occasion, the victim has disclosed that the Defendant told her not to tell anyone about the sexual assaults.
>
> Pursuant to MRE 611(a), a trial court is given broad authority to employ special procedures to protect any victim or witness while testifying. …
>
> The victim in this matter has been through a horrific ordeal. She has been sexually assaulted on many occasions by her biological father. It is the People's contention that having anyone in the courtroom who is not necessary to the proceeding will further traumatize this now seventeen (17) year old victim who has already suffered great emotional trauma.
>
> The People are requesting that the courtroom be closed during the victims testimony pursuant to the Courts discretionary power under MRE 611(a). [202a-203a]

The prosecutor concurrently moved to allow a support person for S.V. and to join the three cases. 195a-200a.

At the motion hearing, the prosecutor said that she was relying on her motion to close the courtroom, but also added: "I did provide the Court with the appropriate evidence rule as well as the corresponding analogy as to why I believe that is appropriate." 218a.

Mr. Veach's counsel stipulated to providing a support person to S.V. while she testified, asked the court to delay ruling on the prosecutor's joinder motion, and objected to her motion to close the courtroom:

> Judge, [the] complaining witness in this case is 17 and a half years old. She is almost an adult in law. And for an adult, Judge, we do not close the courtroom.
>
> I wouldn't normally, Judge, very strongly advocate the courtroom not be closed because my client's family would actually like to hear the proceedings. They are his well

> wishers and so on. However, they are all going to testify except for maybe one or two of them, who will have nothing to do with the case.
>
> So as far as the main witnesses who wanted to hear a consent [sic], they are all going to testify and [indiscernible] the Court granting the motion to sequester they would not be allowed to sit in on any case.
>
> There may be one or two additional persons who may want to sit in over here who are not related to the complaining witness in any way or to even the Defendant in any way. They are just friendly.
>
> I would ask that we not close the courtroom so that these people can just attend and basically hear the proceeding. [218a-219a]

The trial court then granted the prosecution's motion to close the trial during S.V.'s testimony. In doing so, the court explained:

> The Court reviewed the motion in this matter. I also reviewed the preliminary exam transcript from … I think it was February 3, 2017. Just about six or seven months ago. There was no objection at that time to closing the courtroom raised by counsel. I see no reason not to close the courtroom in this case in particular, since the other witnesses are family members or the other family members may be called as witnesses and be sequestered anyway.
>
> Based on that, I will go ahead and grant the motion to close the courtroom for the purpose of the complaining witness testimony. [219a-220a]

The court then entered an order providing S.V. a support person and closing the courtroom to the public while she was testifying. 253a.

III. The closure of the trial to the public during the complainant's testimony

The prosecution's first witness was Mr. Veach's ex-wife, who testified about Mr. Veach's lifestyle and S.V.'s delayed disclosure. 583a-685a. When she was finished, the trial court informed the jury: "we're going to

take about [a] ten minute[] break so that we can clear the courtroom for our next witness." 687a. When the prosecutor completed her direct examination of S.V., the trial was adjourned for the day. 792a.

When the case was recalled the next day, the prosecutor asked for the courtroom to be closed, and the court announced: "The courtroom has been closed and we are ready for the jurors." 797a. When S.V. finished testifying, Mr. Veach's attorney announced:

> She is free to leave. She is discharged from the subpoena. We can even open the courtroom with the caveat whoever is testifying should stay out. [882a]

S.V. was the only witness who claimed to have personal knowledge that Mr. Veach committed any of the charged offenses. No other evidence implicated Mr. Veach or corroborated S.V.'s allegations, except for Mr. Veach's ex-wife's testimony relaying what S.V. told her about the alleged abuse, which the trial court allowed the prosecutor to admit as an excited utterance. 620a-621a. S.V.'s cousin, grandmother, and aunt, among other defense witnesses, testified that some of the instances of abuse S.V. alleged could not have occurred in the manners she described, and that the circumstances surrounding other assaults were objectively false. Despite this, the jury found Mr. Veach guilty of all charges. 1211a; 1217a-1219a.

Following the trial, the court sentenced Mr. Veach to sex offender registration, lifetime electronic monitoring, 20 to 60 years in prison for each of his CSC I convictions, and 10 to 15 years in prison for his CSC II convictions. 1220a-1222a; 1257a-1260a.

IV. Mr. Veach's Appeal

Mr. Veach appealed by right, and challenged, among other errors, the closure of his trial to the public during S.V.'s testimony. The prosecution acknowledged Mr. Veach's constitutional right to a public trial, and the applicability of the standard announced in *Waller v Georgia*, 467 US 39 (1984) to the issue. 1270a. It asserted, however, that "the courtroom was narrowly tailored to the reasons for the request—to protect the victim's welfare—because it was limited to only her testimony." 1271a.

The prosecution also asserted that "[t]he victim's emotional welfare and preserving the sanctity of her testimony were overriding interests that justified closing the courtroom during her testimony." 1271a-1272a. It claimed that these interests would be threatened by open proceedings because: "the assaults happened when the victim was 14 and 15 years old," "the allegations involved a sensitive matter," and "the allegations had caused a significant rift in the victim's family." 1271a. Finally, it asserted that the closure was necessary to "prevent other family members and Defendant's friends from attempting to intimidate the victim or influence her testimony." 1271a.

In support of these claims, the prosecution cited the district judge's inquiry of S.V. toward the end of the second preliminary examination: "[S.V.], you need a break or something? … Okay. If you need to take a break, you let me know," and S.V.'s response: "No, I just felt sick for a second, but I'm okay." 129a; 1271a. It also cited the fact that "during the exams and trial, the victim's voice was low and at times inaudible." 1271a. The prosecution did not explain or cite to the record or anything else to support its argument that concern Mr. Veach's family or friends might "attempt[] to intimidate the victim or influence her testimony" justified the closure.

The Court of Appeals' per curiam opinion acknowledged Mr. Veach's constitutional right to a public trial, recited the proper standard for determining when a trial court may close the courtroom during a trial, and the accurately described the requirement that the proponent of a courtroom closure must "advance an overriding interest" in support. 1290a. However, the panel then ignored the requirements of the Sixth and Fourteenth Amendments and Const 1963, art 1, § 20, and analyzed the issue based on its interpretation of MRE 611(a) and MCR 8.116(D).

The Court of Appeals held that the trial court had "narrowly tailored the closure to accommodate the ***specific interest*** to be protected by limiting the closure to the victim's testimony only." 1291a (emphasis added). The "specific interest" justifying the closure was preventing "embarrassment or harassment" to S.V., which the panel deemed "valid," and supported by "the sensitive nature of the victim's testimony, her fear of retaliation from defendant, and the family discord caused by her allegations." 1291a.

The Court of Appeals also held that the defense stipulation to a support person for S.V. while she testified was not "a less restrictive means to adequately and effectively protect the victim from harassment and embarrassment," "given the victim's expressed fear of defendant retaliating against her, as he had done in the past, and given the family discord stemming from the victim's allegations." 1291a. There is nothing in the record indicating S.V. had a "fear of defendant retaliating against her," either expressed or implied. There was no indication that she had been threatened or harassed by anyone in connection with her allegations against her father.

Even though the courtroom was closed to all members of the public, and not just Mr. Veach's friends and family, who the Court of Appeals was concerned might harrass and threaten S.V., it held that the "[t]he trial court narrowly tailored the closure to accommodate the specific interest to be protected by limiting the closure to the victim's testimony only." 1291a.

Ultimately, the Court of Appeals affirmed Mr. Veach's convictions, but remanded for correction of his guidelines and resentencing. 1305a. Mr. Veach sought leave to appeal with this Court, and the Court directed the prosecution to respond to his application. 1306a. After receiving its response, the Court ordered the application be held in abeyance pending a decision in *People v Davis*, Docket No. 161396. 1307a.

After the Court issued its opinion in *People v Davis*, _Mich_ (2022) (Docket No. 161396), concluding that the defendant was entitled to a new trial based on the trial court's violation of his forfeited right to a public trial, it directed the Clerk to schedule oral argument and ordered the parties to address:

> (1) whether the Macomb Circuit Court relied on its pretrial courtroom closures or the defendant's failure to object to those closures to justify closing the courtroom for the defendant's trial and, if so, whether that reliance was erroneous;
>
> (2) whether the closure of the courtroom during the defendant's trial was a partial or total courtroom closure and whether this issue affects the defendant's claim of error; and

(3) what remedy, if any, is available to the defendant, if constitutional or statutory error occurred.

1308a. Mr. Veach addresses these questions below.

Arguments

I. The trial court's closure of the courtroom to the public during the trial violated Mr. Veach's constitutional right to a public trial, and was not authorized by any statute, court rule, or evidentiary rule

Under the state and federal constitutions, in order "to justify a courtroom closure, there must be 'an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.' " *People v Davis*, _Mich_ (2022); slip op at 13, quoting *People v Vaughn*, 491 Mich 642, 653 (2012), quoting *Waller v Georgia*, 467 US 39, 48 (1984).

The only justifications, considerations, and/or findings made by the trial court when it ruled on the prosecutor's motion to close the trial to the public was that the courtroom had been closed during the preliminary examinations, Mr. Veach's counsel had not objected to those closures, and the "other witnesses are family members or the other family members may be called as witnesses and be sequestered anyway." 219a-220a. After citing those three points, the court was explicit that its decision to close the trial was the result of its consideration of those points, rather than the justifications first offered in the prosecution's Court of Appeals brief and the Court of Appeals' per curiam opinion: "***Based on that***, I will go ahead and grant the motion to close the courtroom." 220a (emphasis added).

The record speaks for itself. None of the justifications for the closure identified by the trial court were compelling, substantial, or real. The defense's stipulation to the closure of the preliminary examinations was not a cognizable state interest to be protected, did not waive the issue for trial, and did not override Mr. Veach's interest in a public trial. That many of Mr. Veach's friends and relatives would be sequestered during S.V.'s testimony did not compel the closure for those who would not be or for the general public. It at least partially addressed the concerns identified in the prosecution's motion for the closure. Neither were the prequisites of MCL 600.2163a met. The statute by its own definitions

did not apply to the complainant in this case given her age and lack of developmental disability. MCL 600.2163a(1)(g).

A. The trial court ordered the courtroom closed during S.V.'s trial testimony because the preliminary examination had been closed when she testified

In resolving the prosecution's motion to close the courtroom during S.V.'s trial and Mr. Veach's objection to that motion, the trial court stated:

> The Court reviewed the motion in this matter. I also reviewed the preliminary exam transcript from … I think it was February 3, 2017. Just about six or seven months ago. There was no objection at that time to closing the courtroom raised by counsel. I see no reason not to close the courtroom in this case in particular, since the other witnesses are family members or the other family members may be called as witnesses and be sequestered anyway. Based on that, I will go ahead and grant the motion to close the courtroom for the purpose of the complaining witness testimony. [219a-220a]

"There is no ambiguity in this language: the trial court had ordered the courtroom closed to all observers," *Davis*, *supra* at 11, a decision it "based on" the points it cited. "[T]he court did make statements during the proceedings that we presume formed the basis for its decision." *People v Jackson*, 467 Mich 272, 277 (2002). This presumption must apply to the trial court's findings here.

In *People v Vincent*, 455 Mich 110 (1997), the Court endeavored to determine if the trial court's oral statements regarding the defendant's motion for a directed verdict constituted an 'order', which depended in part on whether the judge had properly considered the evidence submitted to that point. *Id.* at 122, citing *People v Mehall*, 454 Mich 1, 6 (1997). "[A]lthough the judge mentioned that he was considering all the factors, there was no indication which factors he had actually considered or rejected." *Id.* at 122. "There is no way to assess which pieces of evidence reflecting premeditation and deliberation or lack thereof the court considered or rejected because there was no mention of them reflected in the express remarks of the court." *Id.* at 122. The Court did

not presume that the trial court considered factors it did not mention when it announced its ruling. It presumed the court had not, holding that because "[t]he trial court did not assess any of th[e] proofs in the record or indicate why it might have believed that they were insufficient," the Court concluded that the "[t]he foundation laid to support [the judge's] conclusory impression was inadequate." *Id.* at 123.

In the present case the Court of Appeals held that the trial court had not closed the courtroom under MCL 600.2163a–the authority the prosecutor cited for her motion close preliminary examination, 91a–and had not found that Mr. Veach "had forfeited or waived the right to a public trial by previously stipulating to the courtroom closures at the preliminary examinations." 1291a. Instead, the Court of Appeals ignored the teachings of *Jackson*, *Vincent*, and *Davis*, and concluded "[t]he court merely observed that the circumstances that justified the closures for the victim's testimony at the preliminary examinations had not changed in the six or seven months since then." 1291a.

If the trial court relied on factors other than those it identified when it ordered the trial closed to the public, such as those described in the prosecution's brief and the Court of Appeals' opinion, then as a matter of law, "it is not possible to conclude that closure was warranted." *Superior Court of California, Riverside County* (*Press-Enterprise I)*, 464 US 501, 511 (1984). Post hoc assertions by appellate courts "cannot satisfy the deficiencies in the trial court's record." *Waller*, 467 US at 49 n 8.

If, as the Court of Appeals concluded, the trial court did not rely on Mr. Veach's failure to object to the closure of the preliminary examinations when justifying its decision to close the trial, the sole justification for its closure order was the fact that several of Mr. Veach's friends and family members would be sequestered while S.V. was testifying. Trial courts possess broad discretion to sequester witnesses. *People v Martin*, 386 Mich 407, 424 (1971); MRE 615. The exercise of such discretion does not justify excluding all other members of the population who are not subject to the sequestration order.

B. The trial court erred in ordering Mr. Veach's trial closed to the public

The trial court violated Mr. Veach's right under the Michigan and United States Constitutions when it closed his trial to the public during S.V.'s testimony. "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." *Press-Enterprise I*, 464 US at 509–510. Mr. Veach's prior agreement to a closed preliminary examination was not an overriding interest that justified closing the trial over his objection. It is not an interest at all. It was a historical fact that had no bearing on his entitlement to the safeguards public trials afford to criminal defendants.

Nor did Mr. Veach's stipulation to a pretrial closure waive his right to a public trial. Waiver is the "intentional relinquishment or abandonment of a known right." *People v Carines*, 460 Mich 750, 762-63 n 7 (1999), quoting *United States v Olano*, 507 US 725, 733 (1993). Mr. Veach could not waive his constitutional right to a public trial by agreeing to a closed examination. "[A] preliminary examination is not a part of trial," so "the public has no common-law or constitutional rights of access to that proceeding." *In re Midland Pub Co, Inc*, 420 Mich 148, 162 (1984). Extending the scope of his stipulation to the trial itself would require the Court to impermissibly presume waiver from silence while also ignoring the express limitation the defense agreement to the closure as being "for purposes of the preliminary exam." 147a.

Although no reason was necessary, Mr. Veach likely had cogent reasons to agree to a closed preliminary examination, and then demand an open trial. "The object of the examination is not to determine guilt or innocence." *People v Medley*, 339 Mich 486, 492 (1954). Preliminary examinations are "designed, to some extent, to accomplish the purpose of ... protecting a party against being subjected to the indignity of a public trial for an offense before probable cause has been established against him by evidence under oath." *People v Annis*, 13 Mich 511, 515 (1865). "The whole purpose of such hearings is to screen out unreliable or illegally obtained evidence and insure that this evidence does not become known to the jury." *Gannett v DePasquale*, 443 US 368, 378 (1979). "Publicity concerning the proceedings at a pretrial hearing, however, could influence public opinion against a defendant and inform

potential jurors of inculpatory information wholly inadmissible at the actual trial." *Id.* After being bound over, Mr. Veach likely sought to avail himself in the protections afforded by a public trial, which exists "for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned." *In re Oliver*, 333 US 257, 271 n 25 (1948), quoting 1 Cooley, *Constitutional Limitations* (8th ed 1927) at 647.

C. MCL 600.2163a, MCR 8.116(D), and MRE 611(a) did not authorize the trial court to close Mr. Veach's trial in contravention of his constitutional right to a public trial

At the preliminary examinations, the prosecutor asserted that the closure of the courtroom while S.V. testified was supported by MCL 600.2163a, and defense counsel either said he agreed or would not object. 22a, 91a, 147a-148a. In its pretrial motion, the prosecution asserted MCR 8.116(D) and MRE 611(a) authorized the court to close Mr. Veach's trial to the public.

Had the trial court based its decision to close the courtroom on the applicability of MCL 600.2163a, it would have erred because S.V. was not a witness who qualified for special protections or procedures under the statute. MCL 600.2163a(17)(a) allows district courts to exclude "all persons not necessary to the proceedings" during a witness' testimony at the preliminary examination where that witness is under sixteen, possesses a developmental disability, or is a vulnerable adult within the meaning of the statute, and the court also determines the closure "is necessary to protect the welfare of the witness." MCL 600.2163a(1)(g), (16). MCL 600.2163a(19)(a) permits the trial court to exclude all people deemed "not necessary to the proceedings" during the witness' testimony at trial where the same requirements are met. MCL 600.2163a(1)(g), (18).

The trial court would have erred had it closed the courtroom based on this provision, as S.V. was not under sixteen, did not possess a developmental disability, and was not a vulnerable adult. S.V. was sixteen at the time of the preliminary examinations, and seventeen at the time of the trial. 25a, 292a. S.V. did not have a 'developmental disability' within the meaning of the statute. For a witness to be deemed to have a developmental disability, she must have a chronic condition that results in substantial limitations with self-care, receptive or

expressive language, learning, mobility, self-direction, capacity for independent living, or economic self-sufficiency. MCL 600.2163a(1)(c); MCL 330.1100a(26). To qualify for accommodations under the statute, the disability must limit three of those functions. There is no indication that S.V. struggled with even one. S.V. did not qualify as a vulnerable adult within the meaning of the statute either because she was under 18 and had not been placed in an adult foster care, family home, or small group. MCL 600.2163a(1)(f); MCL 750.145m(u); MCL 400.11(b); MCL 400.703(1)(b).

MCR 8.116(D) was also inapplicable to the closure in this case. By its own terms, the subrule is to apply "[e]xcept as otherwise provided by statute." A statute–specifically, MCL 600.1420–provides: "The sittings of every court within this state shall be public…" MCL 600.1420 allows only three narrow exceptions to this requirement, none of which applied here: (1) sequestration of witnesses when they are not testifying; (2) exclusion of minors from the courtroom in actions involving scandal or immorality; and (3) cases involving national security. Beyond this, MCR 8.116(D) appears to have been drafted to ensure compliance with the requirements of *Waller*, which "might not be entirely satisfied by compliance with subrule[] … (D)." *People v Cole*, 491 Mich 325, 332 (2012). "Therefore, regardless of the explicit wording of the subrules, a court may be required by the" by the constitution to make additional findings supporting the closure or to keep the courtroom open when *Waller* has not been satisfied. *Id.*

The prosecution and Court of Appeals asserted that MRE 611(a)(3) vested the trial court with the authority to close the trial while S.V. testified. 201a-203a, 218a, 1291a. MRE 611(a)(3) requires courts to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as … to protect witnesses from harassment or undue embarrassment." From undersigned counsels' research, the Rule has only ever been construed literally, so as to provide trial courts the discretion to control "the mode and order of admitting proofs and interrogating witnesses." *Moody v Pulte Homes, Inc*, 423 Mich 150, 162 (1985). See 2 Longhofer, Michigan Court Rule Practice (4th ed) § 611.3 (listing fourteen different situations in which the rule has been utilized, none of which involve excluding any person from the courtroom or otherwise limiting who may watch the trial).

"It is so basic as to require no citation that the constitution is the fundamental law to which all other laws must conform…" *Mays v Governor of Michigan*, 506 Mich 157, 189 (2020). "In light of the preeminence of the constitution, statutes which conflict with it must fall..." *Id.* Thus, even if MCL 600.2163a, MCR 8.116(D), and MRE 611(a) had purported to authorize or mandate the closure of Mr. Veach's trial to the public, statutes and court rules cannot "contravene[] the dictates of our state or federal constitution." *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 710 (2000). See *Globe Newspaper Co v Superior Court for Norfolk County*, 457 US 596, 611 n 27 (1982) ("mandatory rule, requiring no particularized determinations in individual cases, is unconstitutional"); *People v Yeager*, 113 Mich 228, 229 (1897) ("Whether this statute is effective must depend upon whether the trial provided for may be deemed a public trial; for, if such a trial as is provided for by the statute is not a public trial, the act is plainly in conflict with … the constitution"); and *People v Hackett*, 421 Mich 338, 347-348 (1984) (explaining that trial court's authority to exercise control over the mode of interrogating witnesses and presenting evidence could not infringe on defendant's rights under the Sixth Amendment). MCL 600.2163a, MCR 8.116(D), and MRE 611(a) could not authorize or excuse the trial court's non-compliance with the requirements of the Sixth and Fourteenth Amendments and with Article 1, § 20. To the extent these provisions cannot be interpreted consistently with the requirements of the constitutional right to a public trial, the Court should strike them down as unconstitutional. See *People v Lockridge*, 498 Mich 358, 391 (2015).

* * *

Whether or not the trial court closed the courtroom to the public during S.V.'s testimony because Mr. Veach agreed to the closure of his preliminary examinations or for some other unstated reason has no bearing on the fact that its error in ordering the courtroom closed was structural. The court did not identify an overriding interest in the closure and no such interest existed. "The post hoc assertion by the [Court of Appeals] that the trial court balanced petitioners' right to a public hearing against the privacy rights of others cannot satisfy the deficiencies in the trial court's record." *Waller*, 467 US at 49 n 8. That the closure was necessary to "adequately and effectively protect the victim from harassment and embarrassment," 1291a, "finds little or no

support in the record, and is itself too broad to meet the *Press–Enterprise* standard." *Id.*

II. Any distinction between a 'totally closed trial' and a 'partially closed trial' is inconsequential under the Michigan and United States Constitutions

As the Court explained a century ago:

> The defendant by the Constitution [i]s guaranteed a public trial, not one behind locked doors; he was guaranteed a trial to which the public was admitted, not part of the public and part of the time, but the public generally and all of the time.

People v Micalizzi, 223 Mich 580, 582 (1923). Earlier this year, Justice Zahra noted that "this Court has not distinguished between total and partial courtroom closures." *People v Davis*, _Mich_ (2022) (Docket No. 161396) (ZAHRA, J., concurring in the result). The United States Supreme Court has never drawn such a distinction either.

The precedent of this Court and the United States Supreme Court on the constitutional right to a public trial renders the distinction between a 'partial' and 'total' closure without consequence. Regardless of whether a proceeding is characterized as "partially" or "totally" closed, "[t]he 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." *Press-Enterprise I*, 464 US at 509–510 (emphasis added). See also *Vaughn*, 491 Mich at 665.

Despite the unambiguous command from both superior courts as to the procedure a court must follow before closing a courtroom, and the impact of its failure to follow that procedure, the Michigan Court of Appeals has carved out an exception to the public trial right that is wide enough to leave it completely hollow. In *People v Kline*, 197 Mich App 165, 170 (1992), the Court of Appeals announced: "A partial closure occurs where the public is only partially excluded, such as when family members or the press are allowed to remain, or when the closure order is narrowly tailored to specific needs." *Id.* at 170 n 2, citing *Davis v*

Reynolds, 890 F2d 1105, 1109 (CA 10, 1989) and *Douglas v Wainwright*, 714 F2d 1532, 1539 (CA 11, 1983), rev'd "for further consideration in light of *Waller*," *Douglas v Wainwright*, 468 US 1212 (1984).

Kline then held that *Waller* did not govern the required procedure for "partial closures," as *Waller* only set forth the requirements "for the total closure of a trial," because it "addressed [the] total closure of a suppression hearing." *Id.* at 169-170. The *Kline* Court deemed the closure at issue in the case 'partial' because the complainant's family had been permitted to remain in the courtroom while the courtroom was closed to other members of the public during her testimony, and because it "presume[d] that defendant's family and friends would also have been permitted to remain" had they been present at the time of the closure order. *Id.* at 171.

Although *Waller*, 467 US at 49 n 8 held that "post hoc assertion[s] … that the trial court balanced petitioners' right to a public hearing against the privacy rights of others cannot satisfy the deficiencies in the trial court's record," *Kline*, 197 Mich App 173 held that where "the court fail[s] to make adequate findings on the record, the deficiency can be remedied by the trial court upon remand." This was appropriate because the *Kline* panel did "not think that the failure to make findings at the time of the partial closure requires reversal," and also did "not think that failure to state the findings on the record in and of itself, requires a new trial." *Kline*, 197 Mich App at 172. But as the Court of Appeals more recently acknowledged, "lower courts must follow decisions of higher courts even if they believe the higher court's decision was wrongly decided or has become obsolete." *People v Dixon-Bey*, _Mich App_ (2022) (Docket No 354866); slip op 4, citing *Paige v Sterling Heights*, 476 Mich 495, 524 (2006). See also *People v Warner*, _Mich App_ (Docket No 351791 (2021) (BORELLO, J., concurring in result); slip op at 1 ("I do not believe we need to conjure an opinion from a blank slate, nor do I see a legal or policy basis to casually dismantle a half century of legal precedent set forth by a superior court.").

Unfortunately, as the Court of Appeals opinion in the present case shows, *Kline*'s holding that a court is only partially closed when the closure order "is narrowly tailored to specific needs" renders practically all real-world trial closures partial. According to *Kline*, such partial closures occur where the court restricts access to specific members of the

public, temporarily closes the courtroom to all members of the public, or does some combination of the two. This designation eliminates the requirement that an overriding interest exists and that the trial court engage in the mandatory analysis and tailoring before or contemporaneously with its order closing the trial to the public.

If *Kline* correctly described the requirements of the Sixth Amendment, the Supreme Court would not have held in *Presley v Georgia*, 558 US 209, 216 (2010), that courts must possess "an overriding interest in closing *voir dire,*" and would not have reversed based on the trial court's failure "to consider all reasonable alternatives to closure." See *id.* at 726-727 (THOMAS, J., dissenting) ("the Court may well be right that a trial court violates the Sixth Amendment if it closes the courtroom without sua sponte considering reasonable alternatives to closure. But I would not decide the issue summarily, and certainly would not declare, as the Court does, that *Waller* and *Press–Enterprise I* 'settle the point' without 'leaving any room for doubt.' "). If the *Press-Enterprise* and *Waller* standard did not apply where the public is excluded during a single witness' testimony, the *Globe Newspaper* Court would not have mandated that the closure of the courtroom while a minor sex offense victim testifies be "necessitated by a compelling governmental interest, and [be] narrowly tailored to serve that interest." *Globe Newspaper*, 457 US at 606–607,

If *Kline* correctly described the requirements of Article 1, Section 20 of Michigan's 1963 Constitution, in *Davis*, *supra* at 13-14, this Court would not have found plain error or granted the defendant a new trial where the trial court excluded all members of the public except the decedent's mother from the latter portion of the trial to advance an overriding interest, but "failed to consider reasonable alternatives to closing the proceeding," and "also failed to make adequate factual findings to support the closure." If *Kline* accurately described the protection afforded by the Michigan Constitution, *People v Murray*, 89 Mich 276 (1891) and *People v Micalizzi*, 223 Mich 580 (1923) would not have vacated the defendants' convictions where no justification appeared on the record supporting the court's decision to closure the trial to some, but not all members of the public. In both cases, the Court would have remanded to allow the trial courts to come up with some

justification in order to avoid having to preside over the defendants' retrials.

The Court of Appeals lacked the authority to abridge the fundamental right to a public trial, just as the trial court lacked the authority to close Mr. Veach's trial to the public without following the procedure mandated in *Waller* and *Vaughn*. The Court should reverse both decisions and refuse to deviate from the Sixth Amendment analysis mandated by United States Supreme Court or to construe Article 1, Section 20 as affording lesser protections than the federal public trial right guarantees.

A. Courts are not relieved of their obligation to follow the constitutionally mandated procedure where specific individuals are excluded from an order closing the trial to the general public

The first type of "partial closure" identified by the Court of Appeals in *Kline* "occurs where the public is only partially excluded, such as when family members or the press are allowed to remain." *Kline*, 197 Mich App at 170 n 2. *Douglas*, 714 F2d at 1539, one of the two cases *Kline* cited in support of its recognition of partial trial closures, was reversed and remanded by the United States Supreme Court "for further consideration in light of *Waller v Georgia*, 467 US 39 (1984)." *Douglas v Wainwright*, 468 US 1212 (1984). This Court should likewise make clear that *Kline*'s holding was erroneous and its recognition of such a distinction was improper.

A trial is not 'partially closed' and the right to a public trial is not infringed when all seats in the gallery are spoken for, and members of the public who wish to attend the trial are turned away. This is so because the constitutional right "does not impose on the authorities a duty to provide so large a place for public trials as would accommodate every member of the community at the same time." *People v Greeson*, 230 Mich 124, 147 (1925) (quotations and internal alterations omitted). "If without partiality or favoritism, a reasonable proportion of the public is allowed to attend, the requirement has been fairly observed." *Id.* Likewise, "the sequestration of potential witnesses at any time during the trial, including jury empanelment, is not a partial closure of the court room, because a defendant's right to a public trial does not include

a right to have potential witnesses in the court room at any time during a trial." *Commonwealth v Collins*, 470 Mass 255, 272 (2014). The exclusion of a limited number of specific individuals also may not implicate the public trial right. See *State v Lindsey*, 632 NW2d 652, 660 (Minn, 2001) (erroneous exclusion of two minors from the courtroom did not implicate defendant's public trial right). But see *United States* v *Simmons*, 797 F3d 409 (CA 6, 2015) (right to public trial violated where court excluded defendant's three co-defendants during witness' testimony based on prosecutor's unsubstantiated and uncompelling assertions, without articulating its findings).

However, "[a] public trial means one which is not limited or restricted to any particular class of the community, but is open to the free observation of all." *Greeson*, 230 Mich at 147. As a result, in *Murray*, *supra*, *Yeager*, *supra*, and *Micalizzi*, *supra*, where the trial court permitted some, but not all, members of the public to attend the trial, the Court did not deem the closures partial. The Court reversed and remanded for new trials because the defendants were "guaranteed a trial to which the public was admitted, not part of the public and part of the time, but the public generally and all of the time." *Micalizzi*, 223 Mich at 582.

The invalidity of *Kline*'s central holding is illustrated by the reluctance of courts to rely on it when rendering a decision. In the twenty years since it issued, *People v Russell*, 297 Mich App 707 (2012) is the only published Michigan opinion that has relied on *Kline*'s distinction between partial and total closures to resolve an issue. In *Russell*, the trial court ordered that only one member of the complainant's family and one member of the defendant's family could be present in the courtroom during jury selection due to spacing limitations. *Id.* at 719. The defendant was ultimately convicted and asserted on appeal that his attorney rendered ineffective assistance of counsel by failing to object. The Court of Appeals cited *Kline* and held that an objection by counsel would have been futile, as the action resulted in a 'partial closure', and "[t]he limited capacity of the courtroom was a substantial reason for the closure." *Id.* at 720. The *Russell* Court erred in denying relief on this basis, as this Court had already determined that an order closing the courtroom to all members of the public except the defendant's friends and relatives–a less

restrictive closure than the closure in *Russell*–violated the defendant's right to a public trial. *Yeager*, 113 Mich at 230. *Russell*'s reliance on *Kline* was also unnecessary. See *Weaver v Massachusetts*, 137 S Ct 1899, 1913 (2017) (defendant failed to show prejudice under *Strickland* where his attorney failed to object to the improper closure of the courtroom during voir dire).

Current events firmly establish the wisdom of this Court and the United States Supreme Court in refusing to permit 'partial closures' that are not compelled by an overriding interest. When Alexei Navalny was tried for fraud inside a Russian prison colony earlier this year, the trial was closed to the general public, but his wife, Yulia Navalnaya, was permitted to attend.[1] Even though the defendant's wife observed the proceedings, the arbitrary restriction undermined confidence in the fairness of the proceeding and result. "Amnesty International described the hearing as a 'sham trial, attended by prison guards rather than the media,' " and "German Chancellor Olaf Scholz said the new case was 'incompatible' with the rule of law." *Id*.

Even if the Court were to hold that trial courts can properly restrict access to the courtroom to specific members of the public without first articulating an overriding interest, reversal would still be required in this case because all members of the public were excluded from the courtroom. "[W]ithout exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged." *In re Oliver*, 333 US at 271–272. No court has permitted a conviction to stand "when everybody else is denied entrance to the court, except the judge and his attaches." *Id.* at 271. There was at least one member of the public present who could observe the proofs purportedly establishing Mr. Navalny's guilt. No one was permitted entry into the courtroom while the only evidence of Mr. Veach's alleged guilt was being presented.

The only individual who was excepted from the closure order was S.V.'s support person, who the prosecutor explained was "a victim advocate that works with the Prosecutors Office," 23a, and whose

[1] *Putin critic Navalny put on trial again in Russia*, BBC News (February 16, 2022), *available at* https://bbc.in/3ROowDo.

function was to "provide[] emotional support to the victim during the trial process." 200a. "For the purposes contemplated by the provision of the constitution, the presence of the officers of the court—men whom, it is safe to say, were under the influence of the court—made the trial no more public than if they too had been excluded." *In re Oliver*, 333 US at 272 n 28, quoting *People v Hartman*, 103 Cal 242, 244 (1894). The victim advocate could not effectively "help[] ensure that judges and prosecutors fulfill their duties ethically, encourage[] witnesses to come forward, [or] discourage[] perjury," while "provid[ing] emotional support to the victim during the trial process." *Davis*, *supra* at slip op 9, citing *Vaughn*, 491 Mich at 667; 200a.

B. Courts are not relieved of their obligation to follow the constitutionally mandated procedure where only specific portions of the trial are closed to the public

The Court of Appeals held that Mr. Veach was not entitled to relief because: "[t]he trial court narrowly tailored the closure to accommodate the specific interest to be protected by limiting the closure to the victim's testimony only." 1291a. Thus, to the extent the Court of Appeals' opinion addressed Mr. Veach's argument that his constitutional right to a public trial had been infringed, it was based on the second type of 'partial closure' identified in *Kline*, 197 Mich App at 170 n 2, which occurs "when the closure order is narrowly tailored to specific needs." This conception of a 'partial' closure has even less logical or legal support than closures that involve access restrictions, discussed above. A trial court may feel the need to close the courtroom for a very specific reason, but if that need is not a compelling interest, it does not justify an infringement on the defendant's or public's right to open proceedings.

The adoption of a partial closure rule involving 'specific needs' or 'temporary closures' would render the established law on 'total closures' a dead letter because it would render all courtroom closures that comply with the requirements set forth in *Waller* 'partial'. Proper (total) closure orders must serve "an overriding interest that is likely to be prejudiced," and "the closure must be no broader than necessary to protect that interest." *Waller*, 467 US at 48. By definition, an overriding interest is a specific need, and orders that are no broader than necessary are narrowly tailored.

This conception of a 'partial closure' also conflicts with the precedent of this Court and the United States Supreme Court. In *Waller*, 467 US at 41, after the jury was empaneled, the trial court excused the jury and ordered the courtroom closed while it conducted a hearing on the defendants' suppression motion. The closure was not deemed 'partial' because the court allowed spectators to reenter after it denied the motion. *Waller* held that the aims and interests of the public trial right "are no less pressing in a hearing to suppress wrongfully seized evidence. *Id.* at 47. As such, it held that the standard announced in *Press-Enterprises I*, 464 US at 510, which requires identification of an overriding interest, narrow tailoring, and adequate on the record findings sufficient to facilitate appellate review. *Id.* at *Id.* at 45. Because the trial court had identified an overriding interest or narrowly tailored the closure, reversal was required. *Id.* at 48. Likewise, in *Presley*, 558 US at 210, the trial court told the only person in the gallery–the defendant's uncle–that he had to leave the courtroom during jury selection, but was "welcome to come in after we ... complete selecting the jury this afternoon." The trial court explained that it was closing the courtroom because "[t]here just isn't space for them to sit in the audience," since "[e]ach of those rows will be occupied by jurors." *Id.* at 210. This closure order was narrowly tailored (the courtroom was closed only during jury selection and reopened after the jury was chosen) to meet a specific need (to provide adequate seating for the venire). But the Supreme Court was explicit that *Waller* applied to the closure, and that an overriding interest and an on-record consideration of alternatives to the closure was required to comply the Sixth Amendment. *Id.* at 216. The court's failure to comply with *Waller* required the defendant receive a new trial. *Id.*

Similarly, in *Vaughn*, 491 Mich at 647, without having made any findings to support the closure, the trial court told those in the gallery: "you're going to have to clear the courtroom until after the selection of the new jury." The violation of defendant's right to a public trial was unpreserved, so the Court analyzed the public trial violation for plain error, and explained:

> The first two prongs of the analysis are straightforward. In this case, the circuit court ordered the courtroom closed before voir dire. The Supreme Court of the United States

> has stated that the " 'party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced....' " Because the circuit court failed to advance that type of interest before closing the courtroom, we conclude that an error occurred. We also conclude that the error was plain, that is, "clear or obvious."

Id. at 665, quoting *Presley*, 558 US at 214 and *Carines*, 460 Mich at 763.

A rule permitting courts to restrict access to the courtroom to specific individuals where the restriction is not compelled by an overriding interest would conflict with the precedent of this Court and the United States Supreme Court. As Justice Zahra's concurrence in *Davis* noted, other jurisdictions adopted such a rule. *Davis*, *supra* at 14 n 30 (ZAHRA, J., concurring in the result). At least since *Waller* was decided, no jurisdiction other than the Michigan Court of Appeals has held that the evidentiary portion of a trial can be temporarily closed to all members of the public without an overriding interest necessitating the closure. Michigan would immediately afford less protection to the public trial right than any other jurisdiction in the country if the Court adopted such a rule.

It is presumably for this reason that Justice Zahra did not suggest the Court consider temporary closures to all members of the courtroom 'partial', and omitted reference to this aspect of *Kline*'s holding from his concurrence:

> "[A] total closure involves excluding all persons from the courtroom for some period while a partial closure involves excluding one or more, but not all, individuals for some period." *United States v Simmons*, 797 F3d 409, 413 (CA 6, 2015). See also *People v Kline*, 197 Mich App 165, 170 n 2 (1992) ("A partial closure occurs where the public is only partially excluded, such as when family members or the press are allowed to remain ...."). "Whether a closure is total or partial depends not on how long a trial is closed, but rather who is excluded during the period of time in question." *Simmons*, 797 F3d at 413 (quotation marks, citation, and ellipsis omitted). [*Id.* at 14-15 n 30]

As Justice Zahra noted, the Sixth Circuit's public trial jurisprudence permits access restrictions under a less demanding standard than *Waller* requires, but has been explicit *Waller* must be satisfied before a courtroom can be temporarily closed to all members of the public. Indeed, *Simmons*, 797 F3d at 413 was clear that the closure at issue in the present case would be deemed 'total', and cited precedent from the Eighth and Eleventh Circuits that is in accord:

> "Whether a closure is total or partial ... depends not on how long a trial is closed, but rather who is excluded during the period of time in question." *United States v Thompson*, 713 F3d 388, 395 (CA 8, 2013). In other words, a total closure involves excluding all persons from the courtroom for some period while a partial closure involves excluding one or more, but not all, individuals for some period. *Judd v Haley*, 250 F3d 1308, 1316 (CA 11, 2001).

In *Haley*, 250 F3d 1315 the Eleventh Circuit was even more direct: "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." Rather, "a total closure of a criminal trial during the presentation of evidence even for a temporary period, such as during the testimony of a particular witness, must be analyzed as a 'total closure,' and subjected to the four-pronged test established in *Waller*." *Id*. at 1316.

The other Federal Circuit Courts that have recognized a distinction between partial and total closures have also cautioned that temporary closures to all members of the public constitute total closures and continue to require an overriding interest. See *United States v DeLuca*, 137 F3d 24 (CA 1, 1998) ("a 'substantial reason,' rather than an 'overriding interest,' … may warrant a closure which ensures at least some public access"); *Woods v Kuhlmann*, 977 F2d 74 (CA 2, 1992) ("*Waller* dealt with the total closure of a suppression hearing in which all persons other than witnesses, court personnel, the parties and their lawyers were excluded for the duration of the hearing. The case herein, however, deals with a partial closure of a trial in which only members of the defendant's family were excluded"); *United States v Osborne*, 68 F3d 94, 99 (CA 5, 1995) ("The court refused the government's request for total closure of the proceedings," where "[w]ith one exception, the court

allowed all existing spectators to remain in the courtroom, only prohibiting access to those who may have attempted to enter during Jane Doe's testimony."); *United States v Thunder*, 438 F3d 866, 868 (CA 8, 2006) ("court's decision to grant the government's motion to close the courtroom during the alleged victims' testimony … resulted in what we have called a 'total closure' of the courtroom, that is, an exclusion of members of the public and the press"); *United States v Sherlock*, 962 F2d 1349, 1358 (CA 9, 1989) ("The government initially requested that Bennally's testimony be closed completely. Instead, the court issued a partial closure order, which affected defendants' families only for the duration of her testimony"); *Nieto v Sullivan*, 879 F2d 743 (CA 10, 1989) ("We do not feel the record shows a total closure of the courtroom, with only the defendant, the jury and, of course, the judge and court staff present," because "the record affirmatively indicated that only Nieto's relatives were excluded from the courtroom during Rodriguez' testimony.").[2]

The state high courts that have recognized 'partial closures' have also refused to deem the temporary exclusion of all members of the public 'partial' or permissible based on an interest that does not override the public trial right. The closest that any state court has come to adopting the Michigan Court of Appeals' expansive conception of partial closures has been to authorize closures to the public where at least one member of the media is permitted to attend and report on the proceedings. See *State v Drummond*, 854 NE2d 1038 (Ohio, 2006) and *State v Barkmeyer*, 949 A2d 984 (RI, 2008). See also *Mitchell v State*, 567 SW3d 838, 841 n 2 (Ark, 2019) (deeming it "unnecessary to decide in the present case whether the closure of the court room was complete or partial, or whether a less stringent standard should be applied to partial closures,"

[2] The D.C. Circuit does not recognize partial closures, but has held "trivial" closures do not implicate the Sixth Amendment. *United States v Perry*, 479 F3d 885, 890 (CA DC, 2007). It cited the exclusion of members of the venire not chosen to serve on the jury and the defendant's mother-in-law as examples of trivial closures, as well as temporary closures that occurred briefly on accident or while the court questioned the jurors about their safety concerns. *Id.*

where media was permitted to attend closed proceeding, as defendant would be entitled to a new trial under both standards).

However, most jurisdictions deem closure orders that permit a select few individuals to remain in the courtroom to observe the trial as total, and apply *Waller*. For example, in *Ex parte Easterwood*, 980 So2d 367, 376 (Ala, 2007), the courtroom was closed to all members of the public except for the defendant's mother during the complainant's testimony. As a result of her exclusion from the order, the intermediate appellate court deemed the closure partial. The Alabama Supreme Court reversed, deeming the order "a de facto total closure" because "it is doubtful that the constitutional considerations of the public-trial guarantee—promoting a fair trial, discouraging perjury, and ensuring that the prosecutor, judge, and jury act responsibly—could be adequately protected" by a mother's presence alone. *Id.* In *State v Garcia*, 561 NW2d 599, 606 (ND, 1997), the North Dakota Supreme Court deemed an order closing the courtroom to all members of the public except for the defendant's and victim's families and select members of the media during one witness' testimony partial, and affirmed based on the showing of a substantial interest. The *Garcia* Court contrasted the closure with the closure at issue in *State v Klem*, 438 NW2d 798 (ND, 1989), where the trial court excluded "the general public, except for one media representative," which "more closely resembled a complete or total closure of the courtroom than what the trial court did here." *Id.* at 605. The *Klem* Court noted that a lone member of the media had not "fulfill[ed] such objectives of a public trial as assuring testimonial trustworthiness," or "provide[d] moral support and comfort," as the witness' and defendant's family and friends would have. *Klem*, 438 NW2d at 803 n 5.

* * *

The evidence in Alexei Navalny's trial was presented in secret, but the Russian Federation permitted the announcement of the guilty verdict to be televised.[3] The live broadcast did not allow the public to see that he was "fairly dealt with and not unjustly condemned." *In re Oliver*,

[3] AFP News Agency, *Russian opposition leader Navalny found guilty on new embezzlement charges* (March 22, 2022), available at https://bit.ly/3z1qHe8.

333 US at 271 n 25, quoting 1 Cooley, Constitutional Limitations (8th Ed. 1927) at 647. The public could only see that Mr. Navalny had been condemned. It was left to speculate about the fairness of the proceedings.

And, where the evidence supporting a defendant's conviction is presented in secret, the public,[4] the press,[5] and the broader western world[6] rightly presume the proceedings were unfair. Evidence presented in a closed courtroom is inherently different and fundamentally worse than evidence presented in open court:

> This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than a private and secret examination given that a witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal. … Oftentimes witnesses will deliver in private that, which they will be shamed to testify publicly.

People v Fackelman, 489 Mich 515, 558 (2011), quoting 3 Blackstone, *Commentaries on the Laws of England* (Jones, ed., 1976), p. 373 and

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[4] See Dakin Andone, *Russian court schedules start of Brittney Griner's trial for Friday, her lawyer says*, CNN (June 28, 2022), available at https://cnn.it/3Qp5EJg, and July 22, 2022 correspondence from AAPI Women Lead, et al. to Joseph R. Biden and Kamala D. Harris, available at https://bit.ly/3TT0MPm.

[5] See Michael Schwirtz, *Russian court closes Politkovskaya trial to the public*, New York Times (Oct 19, 2008), available at https://nyti.ms/3etgS23 (" 'This is a politically motivated decision by the government,' said Dmitry A. Muratov, the editor in chief of Novaya Gazeta, where Politkovskaya worked as an investigative reporter. 'It is an attempt to cover up the facts in this case.' ").

[6] *Putin critic Navalny put on trial again in Russia*, BBC News (February 16, 2022), https://bbc.in/3ROowDo; Reuters, *Russian court finds jailed Kremlin critic Navalny guilty of fraud* (March 22, 2022), https://reut.rs/3zr1mvP (accessed 7/21/2022).

Hale, *The History of the Common Law of England* (6th ed., 1820), p. 345 (alterations omitted).

In *Weaver v Massachusetts*, 137 S Ct 1899, 1913 (2017), the Supreme Court held that, like other ineffective assistance of counsel claims, defendants must demonstrate prejudice under where their attorney's error forfeits their right to a public trial "because a public-trial violation does not always lead to a fundamentally unfair trial." But the Supreme Court explained that if "defense counsel errs in failing to object when the government's main witness testifies in secret, then the defendant might be able to show prejudice with little more detail." *Id.* at 1913.

Mr. Veach was convicted of the most heinous crimes imaginable based exclusively on evidence presented behind closed doors, while "the government's main witness testifie[d] in secret." *Id.* The open courtroom during the parties' arguments and the testimony of the officer in charge, Mr. Veach's ex-wife, and the defense witnesses did not afford Mr. Veach the protections afforded by a public trial. His fundamental right to a public trial was not reduced to merely a substantial right because the courtroom was open when the guilty verdict was read.

This Court should not weaken the right to a public trial guaranteed by our state constitution or authorize portions of criminal trials to be closed to some members of the public unless the closure is necessitated by interests that are greater than the interests served by the fundamental right to a public trial. The Court should not interpret the Sixth and Fourteenth Amendments to afford lesser protections than the United States Supreme Court has consistently held it guarantees.

III. Mr. Veach is entitled to a new trial based on the violation of his right to a public trial throughout the complaining witness' testimony

"[W]hen a defendant objects to a courtroom closure, the trial court can either order the courtroom opened or explain the reasons for keeping it closed." *Weaver*, 137 S Ct at 1912. "In order to justify a courtroom closure, there must be 'an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to

closing the proceeding, and it must make findings adequate to support the closure.' " *Davis*, supra at 10, quoting *Vaughn*, 491 Mich at 653, quoting *Waller*, 467 US at 48.

A "violation of the public-trial guarantee is not subject to harmlessness review because 'the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance.' " *United States v Gonzalez-Lopez*, 548 US 140, 149 n 4 (2006), quoting *Waller*, 467 US at 49 n 9. Thus, "[w]hen preserved, the erroneous denial of a defendant's public-trial right is considered a structural error." *Davis*, *supra* at 10, citing *Weaver*, 137 S Ct at 1908. "Because the harm rendered by these errors is extensive but intrinsic and difficult to quantify, preserved structural errors result in automatic relief to the defendant to 'ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial.' "*Id.*, quoting *Weaver,* 137 SCt at 1907.

Over Mr. Veach's objection, the trial court closed the courtroom to all members of the public during the complainant's testimony. The prosecutor did not assert an overriding interest that was likely to be prejudiced by keeping the courtroom open during the complainant's testimony. No overriding interest can be fairly inferred from the record. The trial court did not narrowly tailor the closure order. It did not identify any interest that would be prejudiced by open proceedings.

The prosecution did not assert and the trial court did identify an overriding or substantial interest that would be advanced by the closure. The closure was broader than necessary to protect the interests asserted by the Court of Appeals and prosecution, namely that the presence of Mr. Veach's friends and family would embarrass, traumatize, harass, intimidate, or attempt to influence S.V. while she was on the witness stand. There is nothing in the record to support the conclusion that S.V. would have been traumatized had she been required to testify publicly, or that the closed courtroom diminished the truama or alleviated any of the other concerns the prosecution has suggested. Had these concerns been genuine, Mr. Veach's family and friends could have been excluded from the courtroom without also excluding the general public from the proceeding. The court did not make factual findings that were adequate to support the closure. It ordered the closure simply because: "I see no reason not to close the courtroom in this case." 220a.

Those findings demonstrate that the closure order was arbitrary, unjustified, and unconstitutional. A closure based on any one of these errors, standing alone, would constitute structural error and would necessitate that Mr. Veach be granted a new trial.

In *Kline*, 197 Mich App at 170, the Court of Appeals held that classifying a closure as 'partial' altered the *Waller* analysis in two respects. First, trial courts need only a substantial, rather than an overriding interest, to order a partial closure. Second, where the trial court orders the closure without identifying the interest advanced by the closure and/or without considering less restrictive alternatives to the closure it ultimately orders, and where "the closure order appears to be narrowly drawn, … that failure to state the findings on the record … can be remedied by the trial court upon remand." *Id* at 172-173.

Kline's holdings on the value of the interest that must be advanced to justify a courtroom closure and the proper remedy where the trial court fails to make contemporaneous findings to support the closure directly conflict with precedent the *Kline* Court was bound by and should be rejected by this Court. That said, even if the Court were to adopt *Kline* in full, Mr. Veach would still be entitled to a new trial.

A. The absence of a compelling and concrete interest justifying the closure necessitates reversal

"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." *Press–Enterprise I*, 464 US at 510. Such interests might include "the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Waller*, 467 US at 45.

Before closing a trial to the public, "the particular interest, and threat to that interest, must 'be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.' " *Presley*, 558 US at 215, quoting *Press–Enterprise I*, 464 US at 510. This Court has further explained:

> When a motion for closure is made, the judge should, at a minimum, take testimony at a hearing open to all interested parties, explore the constitutional and statutory

> validity of any proffered justifications for excluding the public and press from any portion of the trial, and determine whether any alternative and less restrictive mechanisms exist. This was not done here and, hence, the closing of the trial was improper.

Detroit Free Press, Inc v Macomb Circuit Judge, 405 Mich 544, 549 (1979).

1. The trial court's failure to identify an overriding interest likely to be prejudiced absent the trial's closure constituted structural error

The prosecution asserted that the total closure was necessary to avoid "further traumatiz[ing] this now seventeen (17) year old victim who has already suffered great emotional truama." 199a. In support of this position it asserted "the Defendant sexually assaulted [S.V.] on multiple occasions," and "[o]n more than one occasion, the victim has disclosed that the Defendant told her not to tell anyone about the sexual assaults." 202a.

In this case, "the State's proffer was not specific as to" how "having anyone in the courtroom who is not necessary to the proceeding w[ould] further traumatize" S.V. *Waller*, 467 US at 48; 203a. "The generic risk" of further trauma, "unsubstantiated by any specific threat or incident, is inherent whenever" the alleged victim of sexual violence testifies publicly. *Presley*, 558 US at 215. "If broad concerns of this sort were sufficient to override a defendant's constitutional right to a public trial, a court could exclude the public from" the courtroom during the testimony of minor sex crime complainants "almost as a matter of course." *Id.* at 215. They cannot.

Globe Newspaper Co v Superior Court for Norfolk County, 457 US 596 (1982) held that trials could not be closed based on such generic concerns, which, it noted, likely exist to some degree in all cases involving child sex offense. It therefore invalidated a rule requiring the closure of trials during minor sex crime complainants' testimony, while also rejecting *Kline*'s view that such closures are 'partial' or permissible based on the showing of only a substantial interest.

The *Globe* Court considered the constitutionality of a Massachusetts "rule barring press and public access to criminal sex-offense trials during the testimony of minor victims," which the state deemed necessary for "the protection of minor victims of sex crimes from further trauma and embarrassment; and the encouragement of such victims to come forward and testify in a truthful and credible manner." *Id.* at 607. Even though only one part of the trial would be closed under this rule, the Court required the proponent of the closure to demonstrate a compelling interest, not merely a 'substantial' one: "Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Id.* at 606-607.

That S.V. was not only a minor and alleged victim of sexual assault, but was also the daughter of the defendant, does not change this analysis. In *In re Oliver*, 333 US at 269 n 23, the Supreme Court characterized the French "abuse of the *lettre de cachet* … as a convenient method of preventing the public airing of intra-family scandals," as a "menace to liberty."

Where a trial court believes that the potential trauma to the complaining witness justifies closing the courtroom during her testimony, "the particular interest, and threat to that interest, must 'be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.' " *Presley*, 558 US at 215, quoting *Press–Enterprise I*, 464 US at 510. "Because the circuit court failed to advance [an overriding] interest before closing the courtroom, we conclude that an error occurred." *Vaughn*, 491 Mich at 665. Because Mr. Veach objected, the error is preserved. *Weaver*, 137 S Ct at 1912. "When preserved, the erroneous denial of a defendant's public-trial right is considered a structural error." *Davis*, *supra* at 10.

2. Reversal is required where a criminal trial is closed to further a state interest that is less compelling than the defendant's interest in a public trial

Unlike the Michgian Court of Appeals, many jurisdictions that recognize a distinction between partial and total closures, continue to

heed the supremacy of the United States Supreme Court's interpretation of the Sixth and Fourteenth Amendments, and require that partial closures be supported by an overriding interest. See *State v Tucker*, 231 Ariz 125 (2012); *Mitchell v State*, 2019 Ark 67 (2019); *People v Prince*, 40 Cal 4th 1179 (2007); *Guardarrama v State*, 911 A2d 802 (Del, 2006); *People v Taylor*, 244 Ill App3d 460 (1993); *State v Hightower*, 376 NW2d 648 (Iowa, 1985); *Longus v State*, 416 Md 433 (2010); *State v Turrietta*, 308 P3d 964 (NM, 2013); *People v Jones*, 96 NY2d 213 (2001); *State v Long*, 199 NC App 616 (2009); *Commonwealth v Penn*, 386 Pa Super 133 (1989); *State v Barkmeyer*, 949 A2d 984 (2008); *State v Ndina*, 315 Wis2d 653 (2009); *McIntosh v United States*, 933 A2d 370 (DC, 2007).

Despite announcing the existence of partial trial closures under Michigan law, as well as a new standard for determining the propriety of such closures, the *Kline* Court did not explain how lower courts and future panels should decide if an asserted interest is substantial enough to justify a partial closure. However, the standard *Kline* announced appears to have been adopted from the standard applicable to the regulation of commercial speech, which requires: "The State must assert a substantial interest to be achieved by restrictions on commercial speech, … the regulatory technique must be in proportion to that interest," and "[t]he limitation on expression must be designed carefully to achieve the State's goal." *Central Hudson Gas & Electric Corp v Public Service Commission of New York*, 447 US 557, 564 (1980). In the context of commercial speech, states have been deemed to possess a "substantial interest in alleviating … societal ills," which includes "reducing the social costs associated with 'gambling' or 'casino gambling,' " *Greater New Orleans Broad Association, Inc v United States*, 527 US 173, 185-186 (1999), conserving energy and reducing enegry costs, *Central Hudson*, 447 US at 569, and "preventing access to tobacco products by minor." *Lorilland Tobacco Co v Reilly*, 533 US 525, 569 (2001).

But even in the context of commercial speech, a substantial interest cannot be demonstrated where there the state "provides only ineffective or remote support for the government's purpose," *Central Hudson*, 447 US at 564, or offers only "questionable assumption[s]." *Thompson v Western States Medical Center*, 535 US 357, 374 (2002). The Court of

Appeals' analysis in the present case indicates that such assumptions do establish a substantial interest under *Kline*. The panel affirmed based on its assumption that S.V. would have been "exposed … to potential harassment or embarrassment from having to testify about intimate matters before defendant's family and friends," and that testifying only before her father, the attorneys, the judge, jury, and court staff would "effectively protect the victim from harassment and embarrassment." 1291a. The prosecution did not cite evidence or provide an offer of proof to support its claim that testifying publicly would traumatize S.V. The only thing it offered was "***the People's contention*** that having anyone in the courtroom who is not necessary to the proceeding will further traumatize" S.V. 203a (emphasis added). The People's contention was not enough to justify the closure and is not enough to avoid reversal.

Commercial speech is afforded only "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." *Ohralik v Ohio State Bar Association*, 436 US 447, 456 (1978). "[T]he right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated.' " *Richmond Newspapers, Inc v Virginia*, 448 US 555, 580 (1980), quoting *Branzburg v Hayes*, 408 US 665, 681 (1972). Criminal defendants have a fundamental right to a public trial, which is mandated by due process. *Herring v New York*, 422 US 853, 857 (1975). A more compelling state interest is required to justify infringements on the fundamental right to a public trial than is required to sustain a government regulation on commercial speech.

Interests deemed sufficiently compelling to override the public trial right include "the defendant's right to a fair trial," and "constitutional right to be tried by an impartial jury," *Davis*, *supra* at 13, "the government's interest in inhibiting disclosure of sensitive information," *Waller*, 467 US at 45, and other specific "safety concerns." *Presley*, 558 US at 215. In all cases, however, the threat to the specified interest posed by open proceedings must be "concrete" and based on the specific facts of the case. *Id.* at 216. Thus, "[t]he generic risk of jurors overhearing prejudicial remarks, unsubstantiated by any specific threat

or incident, is inherent whenever members of the public are present during the selection of jurors." *Id*. Likewise, in *Waller*, where the prosecutor moved for closure because some evidence that would be presented would "involve" people who had not been indicted or who were under indictment, but were not on trial, "the State's proffer was not specific as to whose privacy interests might be infringed, how they would be infringed, what portions of the tapes might infringe them, and what portion of the evidence consisted of the tapes." *Waller*, 467 US at 48. "As a result, the trial court's findings were broad and general, and did not purport to justify closure of the entire hearing." *Id.*

The government's interest in preventing unnecessary trauma to child sexual assault victims (and to all crime victims, and all citizens for that matter), is certainly valid, and is no less substantial than reducing gambling. But "something more than the type of generalized finding [of trauma] is needed when the exception is not firmly rooted in our jurisprudence." *Coy v Iowa*, 487 US 1012, 1021 (1988) (citations omitted). Mr. Veach's interest in a public trial overrode the state's goal of reducing trauma to sexual assault victims. His and the public's interest in the transparency and security of open proceedings overrode the state's interest in eliminating potential sources of discomfort for its complaining witness.

3. The closure of Mr. Veach's trial was not compelled by a substantiated and cognizable state interest

Even if the Court were to adopt *Kline*'s substantial interest holding in full, reversal would still be required in this case. The *Kline*, 197 Mich App at 171 cited *Globe Newspaper* to support its position "[t]h government may have a substantial or compelling interest in protecting young witnesses who are called to testify in cases involving allegations of sexual abuse."

> The age of an alleged victim, the nature of an alleged offense, and the potential for harm to the victim are appropriate factors to consider in weighing an accused's right to a public trial against the government's interest in protecting a victim from undue harm. The court must consider these factors and any others with reference to the

> specific facts of each case, and must outline those facts that make closure necessary.

Id., citing *Davis v Reynolds*, 890 F2d 1105, 1110 (CA 10, 1989).

The record does not demonstrate a substantial state interest in the closure. The prosecution asserted that S.V. would be traumatized by testifying in public because "Defendant sexually assaulted her on multiple occasions" and "told her not to tell anyone about the sexual assaults." 202a. But as a practical matter, because S.V. would be required to testify even if the courtroom was closed, "the measure of the State's interest lies not in the extent to which minor victims are injured by testifying, but rather in the incremental injury suffered by testifying in the presence of the press and the general public." *Globe Newspaper*, 457 US at 607 n 19. Even if the public were excluded, absent a waiver, Mr. Veach could not be prohibited from attending his own trial, so S.V. would have to testify about the alleged assaults that she claimed Mr. Veach "told her not to tell anyone about," in his presence regardless. *Illinois v Allen*, 397 US 337, 338 (1970); *Coy*, 487 US at 1022. This further undermined the state's interest in the closure. 202a. See *Coy*, 487 US at 1020:

> The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses, since that is the very phenomenon it relies upon to establish the potential "trauma" that allegedly justified the extraordinary procedure in the present case. That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.

In its appellate brief, the prosecution asserted "[t]he victim's emotional welfare and preserving the sanctity of her testimony … justified closing the courtroom during her testimony," as "the allegations had caused a significant rift in the victim's family," and the closure would "prevent other family members and Defendant's friends from attempting to intimidate the victim or influence her testimony." 1277a-1278a. These allegations could not have supported the closure because

they were not presented to the trial court. There is also no implication from anything in the appellate record that Mr. Veach's family or friends would attempt to intimidate S.V. or influence her testimony. Even if such evidence existed, in arguing against the closure, the defense explained that Mr. Veach's friends and family who knew about the allegations would be sequestered, and therefore "would not be allowed to sit in [the gallery during S.V.'s testimony] in any case." 219a. By ordering the courtroom completely closed, the court prevented the general public and Mr. Veach's "well wishers," who had "nothing to do with the case," and were "not related to the complaining witness in any way or to even the defendant" from watching S.V.'s testify. 218a-219a.

Further, "[t]he generic risk" that someone in the gallery might attempt to harass, intimidate, or influence a witness, "unsubstantiated by any specific threat or incident, is inherent whenever members of the public are present during" witness testimony. *Presley*, 558 US at 215. "If broad concerns of this sort were sufficient to override a defendant's constitutional right to a public trial, a court could exclude the public from [all witness testimony] almost as a matter of course." *Id.*

The interest asserted by the prosecution cannot be deemed substantial because it was not substantiated by S.V.'s testimony or anything else in the record. The exclusion of the public from the courtroom during S.V.'s testimony did not eliminate or reduce the stressors or sources of trauma the prosecution and Court of Appeals asserted justified the trial's closure. The actual closure had little, if any impact on the state's asserted interest in the closure. The closure was not necessary and no interest identified on appeal compelled the total or partial closure of Mr. Veach's trial.

B. The closure of Mr. Veach's trial was broader than was necessary to advance each of the hypothetical state interests asserted by the prosecution, trial court, and Court of Appeals

"[T]to justify a courtroom closure, there must be 'an overriding interest that is likely to be prejudiced [and] the closure must be no broader than necessary to protect that interest…' " *Davis*, *supra* at 13, quoting *Vaughn*, 491 Mich at 653. "[T]he trial court must consider reasonable alternatives to closing the proceeding." *Waller*, 467 US at 48.

"The conclusion that trial courts are required to consider alternatives to closure even when they are not offered by the parties is clear." *Presley*, 558 US at 214. "Absent consideration of alternatives to closure, the trial court could not constitutionally close the" trial. *Press-Enterprise I*, 464 US at 511.

Before granting the prosecutor's motion, the trial court was obligated the court "to take every reasonable measure to accommodate public attendance." *Presley*, 558 US at 215. It did not do so. It granted the prosecution's motion in full and thus, closed the courtroom to all members of the public while S.V. was testifying. The only interest it identified–Mr. Veach's failure to object to the closure of the preliminary examination–would not have been prejudiced by requiring S.V. to testify in an open courtroom. To the extent this fact could qualify as an interest or was capable of protection, the closure was broader than necessary to protect that interest because it would have received exactly the same protection had the public been permitted to attend the entire trial.

"[T]here were several alternatives to closure available to the trial court" that would have advanced the theoretical interests asserted in the prosecution's appellate brief and the Court of Appeals' opinion. *Davis*, *supra* at 14. The trial court appointed a support person to "provide[] emotional support to the victim during the trial process," because of the "great deal of emotional trauma" S.V. asserted that she had endured. 199a-200a. According to the Court of Appeals, "allowing defendant's friends and family members to remain in the courtroom during the victim's testimony, even with a support person present, would have still exposed the victim to potential harassment or embarrassment from having to testify about intimate matters before defendant's family and friends." 1291a. If the presence of Mr. Veach's family and friends in the gallery "exposed the victim to potential harassment or embarrassment," 1291a, "[t]he trial court could have banned only [Mr. Veach's family and friends] from the courtroom." *Davis*, *supra* at 14. If the closure had been necessary to "prevent other [non-sequestered] family members and Defendant's friends from attempting to intimidate the victim or influence her testimony," the individuals who might intimidate S.V. or seek to influence her testimony should have been identified by the prosecutor and excluded by the court. If there was any implication that someone in the gallery was attempting

to intimidate or influence S.V., the court could have banned that person from the courtroom and held them in contempt.

"The court did not consider alternatives to immediate closure of the entire hearing: directing the government to provide more detail about its need for closure," *Waller*, 467 US at 48, and excluding only those individuals from the courtroom who might traumatize, threaten, embarrass, harass, and/or intimidate S.V. "[E]ven assuming, arguendo, that the trial court had an overriding interest in closing voir dire, it was still incumbent upon it to consider all reasonable alternatives to closure. It did not, and that is all this Court needs to decide." *Presley*, 558 US at 216.

C. The absence of a contemporaneous record supporting the closure and facilitating appellate review necessitates the reversal of Mr. Veach's convictions

"[W]hen a defendant objects to a courtroom closure, the trial court can either order the courtroom opened or explain the reasons for keeping it closed." *Weaver*, 137 S Ct at 1912. In *Presley*, 558 US at 216, the Supreme Court eliminated any question as to the appropriate remedy when the defendant objects to the closure, but the trial court does not open the courtroom or adequately explain the basis for the closure:

> even assuming, arguendo, that the trial court had an overriding interest in closing voir dire, it was still incumbent upon it to consider all reasonable alternatives to closure. It did not, and that is all this Court needs to decide.
>
> The Supreme Court of Georgia's judgment is reversed, and the case is remanded…

In contrast, *Kline* held that where "the court fail[s] to make findings on the record in support of its order as required by the United States Supreme Court … the failure to make findings at the time of the partial closure [does not] require[] reversal." *Id*. at 172. Instead, this error requires only remand "to the trial court with directions to supplement the record with the facts and reasoning upon which the partial closure of the courtroom was based." *Id*. at 172. Remand is not an alternative to reversal, as a trial court judge's "post hoc assertion … cannot satisfy the deficiencies in the trial court's record." *Waller*, 467 US at 49 n 8. "[T]he

factors and circumstances that might justify a temporary closure" should be considered and stated contemporaneously, "and not in the context of a later proceeding, with its added time delays." *Weaver*, 137 S Ct at 1912.

The remand procedure *Kline* authorized, which allows judges to provide a completely different basis for their closure order than they gave when they ordered the closure, would do at least as much damage to public confidence in the judiciary and the outcome of the proceedings as the original public trial violation. "There are established standards for reviewing the trial court's findings of fact and conclusions of law." *Davis*, *supra* at 12 n 10, citing *People v LeBlanc*, 465 Mich 575, 579 (2002). "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right." *LeBlanc*, 465 Mich at 579. An order granting the judge an opportunity to avoid reversal and deny the defendant relief by providing a fictional analysis after its initial findings have been deemed insufficient would turn the judge into a witness, who would functionally serve as a witness for the prosecution. While public trials are meant to serve the appearance of justice and impose an "effective restraint on possible abuse of judicial power," *In re Oliver*, 333 US at 270 n 25, *Kline*'s remand procedure is unjust and would create the appearance of an unrestrained judiciary.

A remand order would be even less sensible in this case. The trial court has already stated the reason that it ordered Mr. Veach's trial closed: Mr. Veach had not objected to the closure of the preliminary examination during S.V.'s testimony, nothing had changed since the preliminary examination, and many friends and family members of Mr. Veach would be sequestered anyway. 219a-220a. These reasons were legally inadequate and factually incorrect. Permitting the judge to amend its ruling five years later would place him in an untenable position, and value finality over fundamental fairness and fiction over fact.

D. No statute, court rule, or evidentiary rule can alter Mr. Veach's entitlement to a new trial

In ratifying the Sixth Amendment to the United States Constitution and Article 1, Section 20 of Michigan's 1963 Constitution, "the people

have erected their safeguards, not only against tyranny and brutality, but against the oppression of temporary majorities, and the rapacious demands of government itself." *Lockwood v Nims*, 357 Mich 517, 557 (1959). "In it they have said to the government itself…: Thus far you may go, but you shall not cross the line we draw." *Id* at 558. In both *Kline* and the present case, the Court of Appeals crossed this line by limiting the applicability of the fundamental right to a public trial and by diminishing the protection that right affords criminal defendants.

This Court's obligation in these circumstances is clear:

> With equal alacrity we halt in his tracks, once his foot crosses the line, the inquisitor, the policeman, the tax collector, the legislator, or the executive. Our question is not how far he has passed over the forbidden line, how serious his encroachment, or how aggravated the arrogance. Our duty arises with the trespass itself.

Id. at 558. The Court must reverse the Court of Appeals' holdings in this case and in *Kline* and reaffirm the preeminence of the state abd federal constitutions by making clear that no statute, Court Rule, or evidentiary rule authorizes the closure of a criminal trial unless: "(1) the party seeking closure must advance an overriding interest that is likely to be prejudiced by an open courtroom, (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) the trial court must make findings adequate to support the closure." *Vaughn*, 491 Mich at 676 n 1 (2012) (CAVANAGH, J., concurring), citing *Waller*, 467 US at 48 and *Presley*, 558 US at 212–213.

* * *

"[I]n the case of a structural error where there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled to 'automatic reversal' regardless of the error's actual 'effect on the outcome.' " *Weaver*, 137 S Ct at 1910, citing *Neder v United States*, 527 US 1, 7 (1999). "The errors in th[is] case[] necessitated automatic reversal after they were preserved and then raised on direct appeal." *Id.* at 1911–1912.

Conclusion and Relief Requested

For the reasons stated above, Anthony Joseph Veach respectfully requests that this Honorable Court vacate his convictions and grant him a new trial.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that this document contains 15,321 countable words. The document is set in Century Schoolbook, and the text is in 12-point type with 17-point line spacing and 12 points of spacing between paragraphs.

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