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STATE OF MICHIGAN
IN THE SUPREME COURT

People of the State of Michigan

Plaintiff-Appellee,

v.

Donald Wayne Davis

Defendant-Appellant.

MSC No. 161396

COA No. 343432

Genesee County Circuit Court
Case No. 16-40020-FC

Filed under AO 2019-6

Defendant-Appellant Donald Wayne Davis' Supplemental Brief

(Oral Argument Requested)

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TABLE OF CONTENTS

Index of Authorities 5

Statement of the Questions Presented 8

Statement of Facts 11

I. Donald Davis' Trial 11

A. The Evidence Presented in Open Court 12

B. The Order Excluding All Members of the Public Except the Decedent's Mother from Attending the Remainder of the Trial 13

C. The Evidence, Argument, and Verdicts Submitted During Proceedings Closed to All Members of the Public Except the Decedent's Mother 14

II. Mr. Davis' Appeal 18

Arguments 22

I. Mr. Davis was denied his right to a public trial as guaranteed by the state and federal constitutions when the trial court barred everyone from the courtroom for the majority of the trial other than the decedent's mother. He is entitled to relief under plain error review. 22

Standard of Review and Issue Preservation 22

Discussion 22

A. The trial court violated Mr. Davis' right to a public trial when it ordered the majority of his trial closed to all members of the public except the decedent's mother. The closure was not necessary and the court failed to consider reasonable alternatives that were available and apparent. 23

1. The trial court's interest avoiding any delay in Mr. Davis' trial did not override Mr. Davis' interest in a public trial. 23

2. The closure was broader than necessary to advance any compelling interest. 25

RECEIVED by MSC 4/14/2021 2:55:10 PM

3. The trial court failed to consider reasonable alternatives to closing the courtroom. 26

B. The trial court's order: "I'm going to bar everyone from this courthouse except for the" decedent's mother, and its clarification that the order applied: "[f]or the remainder of the trial, all the way into next week," closed the trial to the public, regardless of whether the courtroom's doors were locked. 27

1. The court's order closed the trial to members of the public who were present when it was given. 28

2. The court's order closed the trial to members of the public who were not present when it was given. 29

3. A defendant is not required to demonstrate the number of individuals excluded by a closure order to establish a public trial violation. The State cannot rebut a public trial violation by showing that the closure order was not violated. 29

C. Mr. Davis did not waive his right to a public trial when his trial counsel failed to object to the closure order. Counsel could not retroactively waive his former client's right to a public trial by testifying his silence was strategic at the *Ginther* hearing. 31

D. The trial court's error was plain and Mr. Davis is entitled to a new trial. 33

1. The error occurred and was obvious. 34

2. The closure of the courtroom to all members of the public other than the mother of the deceased affected Mr. Davis' substantial rights. 34

3. The closure of the majority of Mr. Davis' trial to all members of the public except for the mother of the man he was charged with murdering seriously undermined the fairness, integrity and public reputation of his convictions. 35

RECEIVED by MSC 4/14/2021 2:55:10 PM

4. Even if Mr. Davis could not show tangible harm, trials that are closed to the public without adequate justification presumptively undermine the fairness, integrity, and public reputation of the proceeding.....38

II. Mr. Davis was denied his right to the effective assistance of counsel where his attorney failed to object to the trial court's order closing his trial to all members of the public except for the decedent's mother 43

Standard of Review and Issue Preservation.....43

Discussion.....43

A. Counsel performed unreasonably when he failed to object to the closure of Mr. Davis' trial to all members of the public except for the decedent's mother without providing any explanation or instruction to the jury. 45

B. Mr. Davis was prejudiced by his attorney's failure to object to the closure of his trial to all members of the public except the mother of the deceased.....50

Conclusion and Relief Requested 53

RECEIVED by MSC 4/14/2021 2:55:10 PM

INDEX OF AUTHORITIES

Cases

City of Coldwater v Consumers Energy Company,
500 Mich 158 (2017) 41

Cuyler v Sullivan,
446 US 335 (1980) 44

Detroit Free Press, Inc v Macomb Circuit Judge,
405 Mich 544 (1979) 34

Estes v Texas,
381 US 532 (1963) 49

Florida v Nixon,
543 US 175 (2004) 45

Gordon v United States,
518 F3d 1291 (CA 8, 2008) 48

In re Oliver,
333 US 257 ..... passim

Janus v American Federation,
138 S Ct 2448 (2018) 41

Kirby v Michigan High School Athletic Association,
459 Mich 23 (1998) 30

Michel v Louisiana,
350 US 91 (1955) 48

Nixon v Warner Communications, Inc,
435 US 589 (1978) 27

People v Cain,
498 Mich 108 (2015) 35, 40, 42

People v Carines,
460 Mich 750 ..... passim

People v Davis,
331 Mich App 699 (2020) 40

People v Duncan,
462 Mich 47 (2000) 34

People v Greeson,
230 Mich 124 (1925) 27

People v Hunter,
493 Mich 1015 (2013) 40

People v Kowalski,
489 Mich 488 (2011) 32

People v Marion,
29 Mich 31 (1874) 38

People v McKinley,
496 Mich 410 (2014) 41
People v Micalizzi,
223 Mich 580 (1923) 22, 36
People v Orlewicz,
293 Mich App 96 (2011) 28
People v Pickens,
446 Mich 298 (1994) 44, 51
People v Randolph,
502 Mich 1 (2018) 48
People v Trakhtenberg,
493 Mich 38 (2012) 43, 51
People v Vaughn,
291 Mich App 183 (2010) 39
People v Vaughn,
491 Mich 642 (2012) ..... passim
People v Yeager,
113 Mich 228 (1897) 36
Presley v Georgia,
558 US 209 (2010) 24, 26, 34
Press-Enteprise Co v Superior Court of California, Riverside Co,
464 US 501 (1984) 23, 24, 25, 39
Puckett v United States,
556 US 129 (2009) 35
Richmond Newspaper v Virginia,
448 US 555 (1980) 28, 39
Robinson v City of Detroit,
462 Mich 439 (2000) 41
Roe v Flores-Ortega,
528 US 470 (2000) 46, 48
State v Keeler,
52 Mont 205 (1916) 36
Strickland v Washington,
466 US 668 (1984) ..... passim
Sweebe v Sweebe,
474 Mich 151 (2006) 31
Taylor v Illinois,
484 US 400 (1988) 45
United States v Negron-Sostre,
790 F3d 295 (CA 1, 2015) 40

RECEIVED by MSC 4/14/2021 2:55:10 PM

United States v Olano,
507 US 725 (1993) 22, 31, 33
United States v Wood,
299 US 123 (1936) 43
Waller v Georgia,
467 US 39 (1984) 23, 24, 34, 40
Weaver v Massachusetts,
137 S Ct 1899 (2017) ..... passim

Statutes and Constitutional Provisions

Const 1963, art 6, § 13 30
Const 1963, art 1, § 20 ..... 22, 44
Const 1963, art 1, § 24 28
MCL 600.1711 30
MCL 775.14 28
MCL 780.1 29
MCL 780.781 28
US Const, Am VI ..... passim

Rules

MCR 3.606 24
MRE 611 30

Other Authorities

My Reputation or Your Liberty (Or Your Life): The Ethical Obligations of Criminal Defense Counsel in Postconviction Proceedings,
23 J Legal Prof 85 (1999) 33
Restatement (Second) of Agency § 106 32
Restatement (Third) of the Law Governing Lawyers § 31 32
When the Interests of Self, Clients, and Colleagues Collide: The Ethics of Ineffective Assistance of Counsel Claims,
33 Am J Trial Advoc 347 (2009) 33

RECEIVED by MSC 4/14/2021 2:55:10 PM

RECEIVED by MSC 4/14/2021 2:55:10 PM

STATEMENT OF THE QUESTIONS PRESENTED

First Question:

Was Mr. Davis denied his constitutional right to a public trial where in order to avoid delaying the trial while the trial court initiated contempt proceedings against someone who had spoken with a juror in the hallway outside of the courtroom, the court instead ordered that only the decedent's mother was permitted to watch the remaining three-and-a-half days of the trial, had everyone else present in the gallery ejected, and ordered them not to return?

Mr. Davis answers:	Yes, for the reasons explained in Argument Section I(A).
The Court of Appeals Answered:	"No."
The trial court answered:	"No."

Second Question:

Was Mr. Davis' trial closed to the public even though the courtroom's doors were not locked, no sign was posted that said the trial was closed, and court personnel did not prevent members of the public from entering the courtroom?

Mr. Davis answers:	"Yes," for the reasons explained in Argument Section I(B).
The Court of Appeals Answered:	"No."
The trial court answered:	"No."

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Third Question:

Did the Court of Appeals err when it held that Mr. Davis' trial counsel's silence in response to the trial court's closure order had waived Mr. Davis' right to a public trial by virtue of counsel's post-conviction testimony asserting his belief Mr. Davis benefitted from the closure of his trial?

Mr. Davis answers:	"Yes," for the reasons explained in Argument Section I(C).
The Court of Appeals Answered:	"No."
The trial court answered:	"No."

Fourth Question:

Was Mr. Davis deprived of his constitutional right to the effective assistance of counsel where his attorney deferred to the trial court's decision to close the majority of his trial to all members of the public except for the decedent's mother without providing any explanation to the jury?

Mr. Davis answers:	"Yes," for the reasons explained in Argument Section II.
The Court of Appeals Answered:	"No."
The trial court answered:	"No."

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Fifth Question:

Is Mr. Davis entitled to a new trial where the circumstances clearly did not warrant any closure of the courtroom to the general public, but the majority of his five-day trial, including its most critical events, was closed to all members of the public except the decedent's mother?

Mr. Davis answers:	"Yes," for the reasons explained in Argument Section I(D).
The Court of Appeals Answered:	"No."
The trial court answered:	"No."

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STATEMENT OF FACTS

In August 2016, Donald Davis and Spencer Holiday were bound over for the murder of Devonte Hanson, who died as the apparent result of two gunshot wounds. His body was found in the driver's seat of his car, which was parked outside of Mr. Holiday's apartment. 5a-8a.

After being bound over, Mr. Holiday agreed to amend his original statement to police about Mr. Hanson's death, and testify that Mr. Davis shot Mr. Hanson during an attempted armed robbery, and then threatened to also shoot Mr. Holiday unless he too shot Mr. Hanson. In exchange for this testimony, Mr. Holiday was permitted to plead guilty to voluntary manslaughter persuant to a sentence agreement that originally provided for a 64.5-month minimum sentence. 11a, 206a. The sentence agreement was modified to provide for a 53.5 month minimum sentence after Mr. Hanson testified at Mr. Davis' preliminary examination, which allowed the prosecution to amend the charges against Mr. Davis to include felony murder and assault with intent to rob. 19a, 56a-57a, 89a; 206a-209a, 351a, 354a-357a.

I. Donald Davis' Trial

On the first day of Mr. Davis' trial, the jury was selected and sworn, and Judge Neithercut provided the jury its preliminary instructions. 63a-83a.

Before the jury was brought in to begin proceedings on the second day of trial, the prosecutor brought to Judge Neithercut's attention that a number of Mr. Hanson's family and friends were present. The prosecutor said that his only witness from the group was Mr. Hanson's mother, Monique Givens, who he intended to call first. He asked that she be excluded from the court's sequestration order. 85a-86a. Mr. Davis' trial counsel, Major White, did not object, but indicated he may object later on "if she creates a scene or causes a disturbance." 85a.

In his opening statement, the prosecutor accurately previewed his case to the jury:

> There are only three people who truly know what happened in that vehicle: Devante, who is dead; Spencer, who told us

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> what happened; and defendant Davis, who is currently on trial for murder and other charges.
>
> Spencer's testimony is the link to defendant Davis and defendant Davis was the architect of Devante's death. [90a]

A. The Evidence Presented in Open Court

Ms. Givens testified her son was 22 when he died, and had two young children. 96a-97a. After being asked to describe how she learned her son had been killed, Ms. Givens asked to describe having to identify her son's body at a funeral home. 100a-102a. When the prosecutor asked her to identify a photograph of her deceased son, the court reporter noted that she began to cry. 102a. The prosecutor consoled her: "I know its hard," and apologized: "I'm sorry you have to." 102a. He did not, however, seek to admit the photograph he had her look at. 103a. When Ms. Givens was excused, Judge Neithercut offered his own condolensences: "we are really sorry for your loss." 103a.

After Ms. Givens testified, a River Village Apartment security guard testified that she located Mr. Hanson's body in the driver's seat of his car, which was parked in the parking lot where she worked and Mr. Holiday lived. 108a-111a. She called the police and helped them locate relevant videos taken from security cameras, which were admitted as exhibits. 123a; Px 46, 47, 49.

The footage showed Mr. Hanson's car pull into the parking lot and park. Two men got into his car. The video then showed Mr. Hanson get out of the driver's seat, get something out of his trunk, and then return to the driver's seat. After about a minute, the two men who had gotten into Mr. Hanson's car, opened their doors, got out, and walked away.

The resolution security footage is low, but the security guard testified that she could recognize Spencer Holiday as one of the two men in the footage. She did not recognize the other man. 129a-130a.

A paramedic was called as the prosecutor's third witness. He described being dispatched to Mr. Hanson's vehicle, and discovering him unresponsive and without a pulse. 142a-143a, 147a. He lifted Mr. Hanson's shirt, and seeing two gunshot wounds. 148a-149a. After

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making this discovery, the paramedic contacted Hurley Hospital to report Mr. Hanson's death. 150a-151a. He had no other involvement in the case or investigation. 154a.

After the paramedic was excused, the trial recessed for lunch. 156a. After some discussion about whether the courtroom's doors would be locked during lunch, the prosecutor noted:

> There were family members in the hallway, but there was no contact with the jury … as they passed by. I don't want there to be any issues. … They were already outside. That was the problem. [157a-158a]

B. The Order Excluding All Members of the Public Except the Decedent's Mother from Attending the Remainder of the Trial

Two hours later, the case was recalled and Judge Neithercut asked who in the gallery worked for Hurley Hospital. A woman who identified herself as Daundria Frye said she did. 158a. Judge Neithercut asked Ms. Frye why she was watching the trial, and she said it was because Mr. Hanson was her child's father. 159a.

Judge Neithercut then informed the attorneys: "the jury has complained that [Ms. Frye] has tried to talk to them." 158a. Ms. Frye insisted that she: "didn't try to talk, I just saw a lady and I asked, … 'do you work at Hurley's?' " She acknowledged, "I know I'm not supposed to talk to them." 150a.

Judge Neithercut then explained:

> I've got two choices. One is to find you in contempt of court and lock you up. ... The other is to order everyone in the gallery to leave the courthouse and not come back.
>
> What we're going to do is this; in order to lock you up I'd have to get you a lawyer first and that wastes time because we have things to do here. So instead, I'm going to bar everyone from this courthouse except for the mother of Devante.

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> The rest of you leave. Don't you come back.
>
> MS. FRYE: Okay.
>
> THE COURT: Shame on you trying to subvert the justice system. [159a-160a]

Following this, one deputy said that another deputy would escort "them" out, which Judge Neithercut said was a good idea. 160a.

An unidentified speaker asked: "Judge, you did mean for the remainder of the trial correct?" 160a. Judge Neithercut said he did:

> For the remainder of the trial, all the way into next week. … The only person allowed to watch this trial is the mother of the young man who died. What foolishness. [160a]

The prosecutor asked if the jury should be polled to determine if it had been prejudiced by Ms. Frye's inquiry. Judge Neithercut said that he did not: "It was a short comment," and nothing about the case was implicated. 161a. Mr. White added that "it's still enough to sit there to cause some concerns, but I guess you worked it out. I understand why the concern (inaudible)." When the prosecutor asked Mr. White if he wanted the jury polled, he responded: "(inaudible) with the Judge's decision." 161a. Judge Neithercut responded: "I don't think it's necessary … I don't want to make the jury nervous." 161a-162a.

C. The Evidence, Argument, and Verdicts Submitted During Proceedings Closed to All Members of the Public Except the Decedent's Mother

On the third day of the trial, after a State Trooper testified about observing Mr. Hanson's body in the parking lot, 187a, the jury was excused for lunch. 196a. Mr. White then took exception to Ms. Givens' show of emotion in the gallery:

> I understand it's very emotional for Mr. Hanson's mother also as well, but I don't think it's appropriate once the jury is walking by for she and the victim advocate to be hugging on each other and patting each other on the back at that point in time. I—it's still going on, the trial's still going on

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> at this point in time, I don't want to influence the jury. I understand it's very emotional for her, but I have to place an objection to that sort of behavior when the jury is walking by. [197a]

Judge Neithercut instructed Ms. Givens that she "needed to be very neutral," and moved on. 197a-198a. Mr. White later recalled that this incident occurred as the jury was leaving the courtroom for a break. For most of the trial, his back was to Ms. Givens and he could not see how she was reacting. 446a.

Spencer Holiday testified on the fourth day of trial, and provided the only evidence that connected Mr. Davis to Mr. Hanson's death. Mr. Holiday claimed he did not know Mr. Davis, who was at his apartment visiting Mr. Holiday's brother the day Mr. Hanson died. 202a. Mr. Holiday overheard Mr. Davis say: "he needed to find a lick," meaning someone to rob. 202a, 215a-218a.

A couple hours later, Mr. Holiday decided to go to a liquor store to buy some cigarettes and marijuana. 225a-226a. He told his brother where he was going, and Mr. Davis followed him out of his apartment. 226a. On the elevator ride down to the first floor, Mr. Davis told Mr. Holiday "he was looking for a lick," to which Mr. Holiday responded, "I don't know where no licks at. I don't hit licks." 229a-231a.

As they were walking out of the apartment complex, Mr. Holiday told Mr. Davis he was going to go buy some marijuana, but Mr. Davis told him, "my man's 'finna pull up with some weed so you might as well wait." 233a. About a minute later, Mr. Hanson pulled into the parking lot in his car, parked, got out, and said told Mr. Holiday "he had some weed for sale." 232a-234a. Mr. Holiday got in the front passenger side of the car and Mr. Davis got into the backseat on the driver's side. 236a.

Inside the car, Mr. Hanson showed Mr. Holiday some marijuana of questionable quality, which Mr. Holiday said he was not interested in buying. So, Mr. Hanson got out of the car and went to his trunk to get a different strain. 236a-238a. While Mr. Hanson was outside of his car, Mr. Davis said to Mr. Holiday: "I'm about to get this nigga." Mr. Holiday replied: "there's cameras out here," and asked: "are you trippin?" 240a-

241a. When Mr. Hanson got back into the car he showed Mr. Holiday a bag containing a different strain of marijuana, which Mr. Holiday found acceptable. He handed Mr. Hanson $20, and Mr. Hanson gave him $15 back. 242a-243a.

After Mr. Holiday paid for the marijuana, Mr. Davis pulled his gun out and said to Mr. Hanson: "what's up with that shit." 244a. Mr. Davis' gun was pointed at the driver's seat headrest. Mr. Hanson turned around and grabbed the gun, 246a, or was "wrestling for the gun and it went off." 257a. After his gun discharged, Mr. Davis pointed it at Mr. Holiday, and said: "shoot him or I'm gonna shoot you." Mr. Holiday pulled out his gun, closed his eyes, and shot Mr. Hanson. 249a-250a.

Mr. Davis then ordered Mr. Holiday to get out of the car. They walked to Mr. Davis' sister's apartment. 253a-254a, 257a-259a. Once they got there, Mr. Davis "pulled his gun out on me and told me to give … my gun to him." Mr. Holiday complied, and Mr. Davis wrapped the gun in a white t-shirt. 260a-261a. Mr. Holiday called his brother, who picked them up and took them to the club. 263a-265a.

Mr. Holiday hypothesized that the major inconsistencies between his trial testimony, his preliminary examination testimony, and his prior statements to detectives were the result of him not being on psychological medication previously. 223a. For example, Mr. Holiday initially told a detective that "he heard a gunshot and then fired in the direction of the victim. … to protect … himself." 329a. The second time he spoke with a detective he said: "that while he was in the front seat he just fired into the back seat at the weed man," after Mr. Davis and Mr. Hanson had begun fighting. 332a-333a. At no point during either interview did Mr. Holiday claim that Mr. Davis had pointed the gun at him or forced him to shoot Mr. Hanson, nor had Mr. Holiday claimed that Mr. Davis had threatened him in any way. 333a. Mr. Holiday had also told the detective he had no knowledge of a robbery being planned before "any of this happened." 329a. When Mr. Holiday testified at the preliminary examination a few months before the trial, he said he had not shown Mr. Davis his gun, and Mr. Davis could not have known he had one. 25a. At the trial, he recalled that he showed Mr. Davis his loaded .38 revolver at his apartment before they left to buy marijuana. 219a-221a.

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The only evidence other than Mr. Holiday's testimony that purportedly implicated Mr. Davis in Mr. Hanson's death was an email he sent to a detective asking:

> THIS DONALD DAVIS YOU GUYS TOLD MAJOR WHITE I HAD INFO ABOUT ANOTHER CASE THAT CAN HELP ME WITH MY CASE WHAT KIND DEAL I CAN GET COME SEE ME. [61a, 344a-346a]

Both parties rested on the fourth day of trial. The next day, the parties gave their closing arguments. 377a-432a. Based entirely on Mr. Holiday's allegations at trial, the prosecutor successfully argued:

> Defendant Davis set into motion every single event that occurred in this case and he is culpable and responsible for each of the charges that we have charged him with and the evidence supports a verdict of guilty for each charge. [377a]
> …
>
> [H]e's the mastermind, he did this, he knew what he was doing, he thought about this all. ... [H]e says, give me the gun, don't tell your brother, wrapped it up. Spencer just for some reason doesn't do anything. [390a] …
>
> These emails: I introduced these emails for consciousness of guilt, that's it. A person's not going to be willing to just straight up plead, ask for a plea deal on a murder case such as this unless they know that they've done something wrong. He knows he did something wrong, he wanted a deal. You know, I'd agree with you, I don't like to give murderers plea deals. I hate it, but sometimes we have to do things we just don't like. If we want to catch the most culpable murderer, sometimes we have to make that deal that we have to swallow. [405a]

The jury found Mr. Davis guilty of all charges. 433a-436a. He was sentenced to mandatory life without parole for felony murder and lesser terms for his other convictions. 438a-439a.

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II. Mr. Davis' Appeal

Mr. Davis filed a brief on appeal, asserting, *inter alia*, that his right to a public trial and to the effective assistance of counsel were both violated where the trial court closed the majority of his trial to the public, except for the decedent's mother, and his attorney failed to object. 440a-443a. The Court of Appeals remanded to the trial court "to expand the factual record regirding its decision to close the trial to all members of the public except for the victims mother, and to allow defendant to file a motion for a new trial based on his claim that trial counsel was ineffective for failing to object to the court's decision." 444a.

Several members of Mr. Davis' family attended the evidentiary hearing, including his mother, brother, sister, uncle, and adoptive father. 457s. Mr. White testified that Mr. Davis indicated to him that he wanted his mother to know about his trial date so she could attend. Mr. White's office contacted his mother to relay the information to her, but the only time he ever saw her was at her son's sentencing. 450a. None of Mr. Davis' friends or family contacted Mr. White to inform him that they planned to attend his client's trial. 451a.

Shamika Jones, Mr. Davis' big sister, testified that the day before Mr. Davis' trial, she received a call from someone at a law office, who told her about her brother's trial, and said that her brother wanted her to attend. She wanted to come because "[h]e's my bother," and told the person she spoke with that she would. 457a-459a. When Ms. James arrived, the courtroom's doors were closed and locked. 458a-459a. She waited about twenty minutes in the hall with Mr. Hanson's family, who she had known since her childhood. She felt threatened by how they were looking at her. 459a-460a. She reported this to the deputy at the front door, but he told her: " 'if you feel threatened and you don't feel secure, … you should leave,' so I left." 461a. Based on this experience, she did not try to come back the next day. 459a, 462a.

Mr. White testified that when Judge Neithercut ordered that only Ms. Givens could attend the remainder of the trial, "[t]here was no one on defense side of the courtroom," and there were between three and ten people seated "[o]n the victim's side of the courtroom." 446a-447a. He considered the left side of the gallery the 'defendant's side' and the right

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side the 'victim's side, based on his prior experience as to where people usually sit in the courtroom. The jury was not informed that one side of the gallery was for people supporting the 'defense', and the other was for people who were there for the 'victim'. 447a, 465a.

Mr. White testified he did not object to Judge Neithercut's order closing the remainder of the trial to everyone except for Ms. Givens because he believed the order benefitted Mr. Davis. He testified that he had had no contact with Mr. Davis' family beforehand, and did not believe anyone in the courtroom was "present for him," at the time of the order. 453a. "I didn't have an issue with the jury not seeing anyone but the victim's mother, who they would expect … to be here at the trial on the dates [s]he testified already, and if that was the only person that they saw, then there would be no prejudice to my client because they wouldn't look at him and say he has no one here supporting him." 453a.

After the court issued the closure order, the only people in the gallery for the remainder of the trial were Ms. Givens and the "suport person from the prosecutor's office." 448a. Mr. White did not see any member of the public other than Ms. Givens even attempt to come into the courtroom after Judge Neithercut issued the order. 451a-452a To Mr. White's knowledge, there was not a sign on the door notifying the public of Judge Neithercut's order, nor were there deputies standing outside the door enforcing it. 452a.

Bryan Wooten testified that he began dating Mr. Davis' mother when Mr. Davis was about fourteen. Mr. Davis lived with Mr. Wooten until his arrest in this case, and Mr. Wooten thought of him as a son. 464a. He wanted to attend the trial because of his relationship with Mr. Davis, to show him support, and because he did not believe that Mr. Davis is a violent person, and wanted to see the State's evidence. 465a-466a

Mr. Wooten was able to walk into the courtroom at around noon one day, while the trial was still underway. 464a-466a. When he entered, he saw a female officer sitting, a lady with an oxygen mask, and Mr. Davis. 464a-465a. He took a seat in the gallery, but Mr. Davis looked back at him and gestured for him to leave by pointing toward the door. Based on this, Mr. Wooten left and did not return. 465a.

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At the conclusion of the hearing, Judge Neithercut denied Mr. Davis' motion for a new trial and made a record of his own recollection regarding what occurred:

> The Court emptied the courtroom because there was a conversation that occurred between one of the victim's family and the jury, and I didn't want that to happen by either side so I ordered the courtroom emptied. But I did not lock the courtroom, I did not close it to the public, I just kicked out three to ten people.
>
> And I admit I poorly worded it because I said don't come back and I probably should've said don't come back today. That's my error. [469a]

The Court of Appeals Majority affirmed Mr. Davis' convictions in a published opinion, with Judge Swartzle writing in dissent that Mr. Davis was entitled to a new trial based on the trial court's unpreserved violation of Mr. Davis' right to a public trial. Judge Swartzle would have found Mr. Davis' trial was closed to the public based on the trial court's unambiguous order, regardless of the court's actual intent or subsequent interpretation of the order. Mr. White's failure to object to the order forfeited the court's error. His silent satisfiaction with the closure order did not render the error waived. 483a-487a.

Finally, Judge Swartzle wrote that Mr. Davis was entitled to a new trial based on the trial court's plain error. "Given all that happened behind closed doors–most of the witness testimony, argument, instructions, and the rendering of the verdict–I find little doubt that the closure seriously affected the fairness, integrity, and public reputation of this trial." 486a. Judge Swartzle compared what occurred in the present case with the plain error addressed in *People v Vaughn*, 491 Mich 642 (2012), where jury selection was closed to the public, but the remainder of the trial was open. Unlike in *Vaughn*, where the members of the venire oversaw the selection process, and whose presence could protect many of the interests protected by the public at large, the exclusive presence of the decedent's mother in the gallery during most of Mr. Davis' trial was not a substitute. Additionally, unlike in *Vaughn*, where the trial was reopened before any witness testified, the majority

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of the testimony at Mr. Davis' trial was provided in the exclusive presence of the decedent's mother. Judge Swartzle pointedly asked: "If not here, where?" 485a-486a.

Conversely, the majority affirmed Mr. Davis' convictions based on the following conclusions:

(1) Mr. Davis' right to a public trial was not violated or even implicated, 478a;

(2) Judge Niethecut's order merely 'cleared' the courtroom of those present in the gallery at the time it was issued, but Mr. Davis' trial remained open to the general public, 478a;

(3) Mr. White retroactively waived Mr. Davis' right to a public trial by testifying he was pleased with the closure order at the *Ginther* hearing, 479a;

(4) Mr. Davis' right to the effective assistance of counsel was not violated because "there was much logic to counsel's silence," 481a, and

(5) if the trial was closed to the public and the issue was not waived, the error was plain, but reversal was not warranted because the prosecution presented sufficient proof to convict Mr. Davis of each of the charges and because the closure order "made less glaring the fact that no one was there who supported defendant." 480a-481a.

This Court subsequently granted oral argument on Mr. Davis' application, and directed the parties to address those five holdings. 488a. For the reasons explained below, those holdings were wrong.

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ARGUMENTS

I. Mr. Davis was denied his right to a public trial as guaranteed by the state and federal constitutions when the trial court barred everyone from the courtroom for the majority of the trial other than the decedent's mother. He is entitled to relief under plain error review.

Standard of Review and Issue Preservation

"Whether the circuit court violated defendant's right to a public trial presents a question of constitutional law." *People v Vaughn*, 491 Mich 642, 649–50 (2012) Constitutional questions are reviewed de novo. *Id.* at 650.

This issue is forfeited because Mr. Davis' trial counsel did not contemporaneously object to the trial court's closure order. See *People v Carines*, 460 Mich 750, 762 n 7 (1999), quoting *United States v Olano*, 507 US 725, 733 (1993) ("forfeiture is the failure to make the timely assertion of a right").

Discussion

"Constitutions were written to be obeyed. Their provisions are mandatory." *People v Micalizzi*, 223 Mich 580, 582 (1923). Donald Davis had a constitutional right to a public trial, US Const, Ams VI, XIV; Const 1963, art 1, § 20, and "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." *Id.* This fundamental right was violated where, without adequate justification and without considering less restrictive alternatives, the trial court ordered that all the spectators in the courtroom were required to leave and that all members of the public would be prohibited from attending the remainder of the trial, excepting only the decedent's mother from both provisions.

That the courtroom's doors remained unlocked did not lessen the real-world impact of the order closing the courtroom. The post-conviction evidentiary hearing testimony revealed that the defendant himself, obeying the judge's order, waved his own stepfather out of the courtroom when he entered. That deputies did not need to turn people away at the

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courtroom doors was irrelevant to Mr. Davis' public trial right. So too was the trial court's belated assertion at the same post-conviction hearing that, despite its contemporaneous statement to the contrary, it had intended the closure order to expire on the second day of the trial. Similarly, Mr. Davis' trial counsel did not and could not retroactively waive his former client's public trial right by attempting to characterize his failure to object as sound strategy at the hearing.

A. The trial court violated Mr. Davis' right to a public trial when it ordered the majority of his trial closed to all members of the public except the decedent's mother. The closure was not necessary and the court failed to consider reasonable alternatives that were available and apparent.

"Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness." *Press-Enteprise Co v Superior Court of California, Riverside Co*, 464 US 501, 509 (1984) ("*Press-Enterprise I*"). To justify closing the courtroom to the public, "the party seeking to close the hearing must advance 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." *Waller v Georgia*, 467 US 39, 48 (1984).

1. The trial court's interest avoiding any delay in Mr. Davis' trial did not override Mr. Davis' interest in a public trial.

Before closing a trial to the public, the interest served by the closure must be articulated on the record and must override the presumption of openness. *Press-Enterprise I*, 464 US at 510. The adequacy of the state's interest is evaluated on a case-by-case basis, but "the state's interest in denying access must be a weighty one." *Id.*

"There are no doubt circumstances where a judge could conclude that threats of improper communications with jurors or safety concerns are

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concrete enough to warrant closing" a courtroom, "[b]ut in those cases, 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 v Georgia*, 558 US 209, 215 (2010), quoting *Free Enterprise I*, 464 US at 510.

The only interest articulated by Judge Neithercut for closing the courtroom was to prevent a delay in the trial. He indicated that this was an either-or proposition: he could either bar the public from the courtroom during the trial or the trial would remain in recess while he appointed counsel to Daundria Frye, the mother of the decedent's child who had briefly spoken to a juror, had her tried her for contempt of court, and sentenced her to jail. 159a.

Foremost, avoiding a delay of trial did not override Mr. Davis' significant interest in a public trial. Among other benefits, the Constitutional guarantees of public trials and open courtrooms "serve as a safeguard against any attempt to employ our courts as instruments of persecution," by ensuring "that the public may see that [the defendant] is fairly dealt with and not unjustly condemned." *In re Oliver*, 333 US 257, 259, 270 n 25 (1948). The public's presence in the gallery keeps reminds the jury of its awesome responsibility, while also ensuring the judge and prosecutor responsibly carry out their duties. *Waller*, 467 US at 46. Transparency also "encourages witnesses to come forward and discourages perjury." *Id.*

Moreover, there were other alternatives to delaying the trial at all and closing the courtroom. The court could have ordered only Ms. Frye to leave and not come back, regardless of whether it cited her for contempt of court. The court could have cited Ms. Frye for contempt and had the charge pursued after Mr. Davis' trial. MCR 3.606.

Even assuming, *arguendo*, that Mr. Davis' trial could not resume until after counsel had been appointed for Ms. Frye, it is difficult to imagine that locating suitable counsel for Ms. Frye would cause a substantial delay. It was a Thursday afternoon in the circuit court building for Michigan's fifth most populated county, located in Flint, a

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metropolis, which is itself located within a one hour drive of two other major metropolitan areas, i.e. Saginaw and Detroit.[1]

There was also no apparent reason why avoiding any delay whatsoever was more important than Mr. Davis' right to a public trial, under the circumstances presented. The trial recessed later that day just after 3:00 p.m., and the jury was not recalled until 10:30 a.m. the next day.

2. The closure was broader than necessary to advance any compelling interest.

On remand, Judge Neithercut provided an additional basis for the closure order: "The Court emptied the courtroom because there was a conversation that occurred between one of the victim's family and the jury, and I didn't want that to happen by either side, so I ordered the courtroom emptied." 469a. He acknowledged, however, that the closure order was overly broad: "I said don't come back and I probably should've said don't come back today." 469a.

"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." *Free Enterprise I*, 464 US at 510. It appears that the courtroom already had a procedure in place to prevent communication between the public and the jurors, which would have been narrower and likely more effective than closing the inside of the courtroom, where no interactions had occurred and any attempt to communicate with the jury would be seen by court staff and could be stopped.

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[1] In 2019, Genesee County had an estimated population of 405,813, and Flint's population was estimated to be 95,538. See United States Bureau of the Census, *QuickFacts: Genesee County, Michigan* <https://www.census.gov/quickfacts/geneseecountymichigan> and United States Bureau of the Census, *QuickFacts: Flint city, Michigan* <https://www.census.gov/quickfacts/flintcitymichigan> (last accessed April 13, 2021).

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After the jury was excused for lunch, but before Ms. Frye's question was brought to the court's attention, the prosecutor noted that the jurors had passed by the "family members in the hallway." Even though he believed "there was no contact," he still considered it a "problem," which had occurred because the decedent's family members "were already outside." 157a-158a. The easiest, most obvious, and least restrictive means of preventing future contact between the jurors and the family would have been to excuse the jurors from the courtroom before permitting people in the gallery to exit. Similarly, there is no reason why a deputy could not have walked out with the jurors to ensure no one attempted to communicate with them.

3. The trial court failed to consider reasonable alternatives to closing the courtroom.

"Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials." *Presley*, 558 US at 215. "Nothing in the record shows that the trial court could not have accommodated the public at [Mr. Davis'] trial." *Id.*

Rather than closing Mr. Davis' trial to the public, the trial court could have prevented future communication between those attending the trial and jurors in any number of ways, which would have likely been at least as successful as closing the trial to the public. It could have done so by instructing those in attendance not to speak to the jurors, which had not previously occurred. It could have simply ordered Ms. Frye to leave and warned the others in attendance that they would also be ejected if they spoke to the jurors. It could have had a deputy walk with the jurors down the hall.

The only alternative the trial court mentioned was adjourning trial while Ms. Frye was appointed counsel so it could hold her in contempt of court. Its rejection of this option because "we have things to do here," 160a, indicates that this option was not realistically considered. Nor did the court consider the obvious alternatives mentioned above. There were no other indications in the record that Mr. Davis' trial was under any particular time constraint, so the need to avoid any delay whatsoever was not a good reason for rejecting all alternatives that would cause any

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delay or for failing to take a moment to determine what alternatives to closing the trial were actually available.

B. The trial court's order: "I'm going to bar everyone from this courthouse except for the" decedent's mother, and its clarification that the order applied "[f]or the remainder of the trial, all the way into next week," closed the trial to the public, regardless of whether the courtroom's doors were locked.

The Court of Appeals' conclusion that Mr. Davis' trial was not closed to the public was puzzling and clearly wrong. Nearly a century ago, this Court explained:

> 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. … If without partiality or favoritism, a reasonable proportion of the public is allowed to attend, the requirement has been fairly observed. The important thing is to have the trial open to the general public.

People v Greeson, 230 Mich 124, 147 (1925) (quotation omitted).

"The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed." *Nixon v Warner Communications, Inc*, 435 US 589, 610 (1978). It is not satisfied by less. In the present case, "[i]t is readily apparent from the record that the circuit court closed the courtroom…." because it "ordered spectators to clear the courtroom." *Vaughn*, 491 Mich at 665 n 83 (quotations omitted).

Judge Neithercut's order: "bar[ring] everyone from this courthouse except the mother of Devante [Hansen]," demanding that all others "leave," and "[d]on't come back," and his immediate clarification that his order would be in effect: "[f]or the remainder of the trial, all the way into next week, … [t]he only person allowed to watch this trial is the mother

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of the young man who died," closed the courtroom to all members of the public except Ms. Givens.

1. The court's order closed the trial to members of the public who were present when it was given.

Mr. White and Judge Neithercut both said that the closure order had the immediate effect of excluding two-to-nine people from the gallery, who had returned to court following a two-hour recess. 447a, 469a. Judge Neithercut directed his deputy to escort those people out of the courtroom. 160a.

The Court of Appeals' majority held that this order merely "cleared" the courtroom, but did not "close" it. 478a. There is no practical or constitutional distinction between the two words. See, e.g., *Vaughn*, 491 Mich at 665 n 83; *People v Orlewicz*, 293 Mich App 96, 112 (2011) (but for defendant's 'waiver', his right to public trial would have been violated where, "[a]t he very beginning of the trial, the trial court cleared the courtroom for voir dire."); *Smith v Titus*, S Ct No. 20-633 (SOTOMAYOR, J., dissenting from denial of certiorari) (defendant's public trial right was violated where "the judge cleared all members of the public from the courtroom before issuing a key evidentiary ruling."); and *Richmond Newspaper v Virginia*, 448 US 555, 560, 581 (1980) (despite defendant's request, and prosecutor's statement that he had no "objection to clearing the courtroom," the First Amendment right to a public trial was violated this action).

As Judge Neithercut ordered, none of the two-to-nine people who were ordered to leave the courtroom and not come back attempted to return to court to watch the latter half of the second day of the trial, or any part of the third, fourth, or fifth day of the trial. 448a. For the remainder of the trial, the only member of the public present in the courtroom was Ms. Givens. 447a-448a. Obviously, Ms. Givens was not a random member of the public. She was the mother of the deceased, a witness for the prosecution, MCL 775.14, a statutorily defined "victim" of the charged offense, MCL 780.781(1)(j)(ii)(c), with all of the rights granted to crime victims by the Michigan Constitution, Const 1963, art

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1, § 24, and the Crime Victims Rights Act, MCL 780.1, *et seq*., including an apparent financial interest in Mr. Davis' conviction of murder.[2]

2. The court's order closed the trial to members of the public who were not present when it was given.

After the trial court ordered the remainder of Mr. Davis' trial closed to the public, Bryan Wooten, a father figure to Mr. Davis, walked into the courtroom during a recess and sat down. The doors were not locked, and no bailiff or deputy ordered him to leave, but Mr. Davis did, by "gestur[ing] … for me to leave," and "point[ing] toward the door." 464a-465a.. Based on this, Mr. Wooten said he "thought I had to leave … so I left, … [a]nd I didn't come back." 465a. Mr. Wooten wanted to attend the trial to support for Mr. Davis, who had been living with him and who he had helped raise, and because he wanted to see the State's evidence, since he did not believe the charges. 465a-466a.

The Court of Appeals considered it significant that "[o]nly defendant acted in a way to convince Wooten to leave the courtroom." 476a. However, "it is apparent from the record that [his] action is attributable to the court," *Vaughn*, 491 Mich at 665 n 83, as Mr. Davis directed Mr. White to inform his mother of the upcoming trial dates before the trial. 450a. Mr. Davis was just obeying the judge's directive.

3. A defendant is not required to demonstrate the number of individuals excluded by a closure order to establish a public trial violation. The State cannot rebut a public trial violation by showing that the closure order was not violated.

As Judge Swartzle's dissent correctly stated, although "the trial court subsequently interpreted its earlier order more narrowly, the contemporaneous record is clear—the trial court ordered the courtroom closed for the rest of the trial, and we should not second-guess whether the trial court really meant what it said at the time." 483-484a.

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[2] See the Victim's Impact Statement in Mr. Davis' Presentence Investigation Report, which is being filed separately.

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It appears that no prior appellate court has placed the burden on the defendant to demonstrate that the judge's closure order did what it purported. Mr. Davis has shown that three-to-ten people did not attend the trial because of the order. In countless other decisions concluding that the public trial right was violated, the names, numbers, and relationships of those excluded from the trial is not addressed. See, e.g., *Vaughn*, 491 Mich at 647 ("the record is unclear regarding how many people were subject to the court's order").

There are numerous strong reasons such a showing is not required to establish a violation of the defendant's right to a public trial. An obvious one is that the defendant and his attorney are both inside of the courtroom during the closed trial and have no way to determine who attempted to get in, but were excluded. It is not practical for a defendant to have an investigator or family member sit outside the courtroom and take names and notes, and doing so in this case would have thwarted the reason that the trial was closed by ensuring contact between the public and the jurors exiting and entering the courtroom.

Further, under the majority's analysis, the only way a defendant could ever establish a public trial violation where a trial judge has ordered the courtroom closed to the public would be for a member of the public to attempt to violate the judge's order, potentially subjecting themselves to contempt proceedings. See Const 1963, art 6, § 13; MCL 600.1711(1); MRE 611(a)-(b); *Kirby v Michigan High School Athletic Association*, 459 Mich 23, 40 (1998) ("A party must obey an order entered by a court with proper jurisdiction, even if the order is clearly incorrect, or the party must face the risk of being held in contempt."). Such a rule would encourage or require defendants to violate court orders to establish the order had actually taken effect, thereby undermining judges' ability to control their courtrooms.

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C. Mr. Davis did not waive his right to a public trial when his trial counsel failed to object to the closure order. Counsel could not retroactively waive his former client's right to a public trial by testifying his silence was strategic at the *Ginther* hearing.

Attorney White did not waive Mr. Davis' right to a public trial by silently observing as the trial court ordered Mr. Davis' trial closed to all members of the public except for the decedent's mother. "[A] waiver must simply be explicit, voluntary, and made in good faith." *Sweebe v Sweebe*, 474 Mich 151, 157 (2006). The term "explicit" means "not completely silent on the issue." *Id.* At one point while the prosecutor and the court were discussing the closure and its implications, Mr. White asked to approach the bench, and was ignored. 160a. The only error that could be arguably waived during the entire exchange was the court's failure to ensure the jury was not prejudiced by giving a curative instruction. When the prosecutor asked for the defense position on that subject, Mr. White indicated it was "the Judge's decision." 161a.

"Waiver is different from forfeiture." *Carines*, 460 Mich at 763 n 7 (1999), quoting *Olano*, 507 US at 733. "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.' " *Id.* While there are exceptions, "the failure to assert a constitutional right ordinarily constitutes a forfeiture of that right." *Vaughn*, 491 Mich at 654. In *Vaughn*, this Court considered and rejected the State's argument that a defendant waives his right to a public trial based on his attorney's failure to object. *Id.* at 663-64. Thereafter, in *Weaver v Massachusetts*, 137 S Ct 1899, 1910 (2017), the United States Supreme Court considered another case where trial counsel had not objected to the closure, and characterized it as an unpreserved structural error, not as an error that had been waived.

Mr. White also did not waive Mr. Davis' right to a public trial by testifying that he did not object to Judge Neithercut's order because he thought it benefitted Mr. Davis. Mr. White testified he did not object because he had had no contact with Mr. Davis' family and assumed the jury would understand that everyone sitting on one side of the courtroom was on the "victim's side of the courtroom." 447a, 450a-451a.

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Despite recognizing that waiver does not occur through silence, the Court of Appeals majority held that Mr. White waived Mr. Davis' public trial right through his silence, "in light of trial counsel's testimony at the evidentiary hearing following remand," that he "strategically and intentionally," failed to object. 479a. Just as Judge Neithercut did not retroactively open Mr. Davis' trial to the public at the postconviction hearing by saying he misspoke, Attorney White could not and did not retroactively waive Mr. Davis' right to a public trial by testifying later that his silence was strategic.

"When defense counsel clearly expresses satisfaction with a trial court's decision, counsel's action will be deemed to constitute a waiver." *People v Kowalski*, 489 Mich 488, 503 (2011). But even if the expressed satisfaction were not required to be contemporaneous with the court's error, Mr. White did not express satisfaction with the court's decision until after Mr. Davis had been sentenced to life in prison, at which point he was no longer acting as Mr. Davis' counsel and lacked the authority to retroactively waive his former client's constitutional rights. See Restatement (Third) of the Law Governing Lawyers § 31(2)(e) (2000) ("a layer's actual authority to represent a client ends … because the lawyer has completed the contemplated services") and Restatement (Second) of Agency § 106, comment *a* (1958) ("his authority terminates when he has completed the transaction; he does not, because of such previous authority, have authority to deal further with the subject matter").

To the extent the Court of Appeals concluded Attorney White waived Mr. Davis' right to a public trial on the second day of trial through his silent internal contemporaneous satisfaction with court's closure order, coupled with his testimony ten months later that brought his silent internal satisfaction to light, this was contrary to all prior authority and the purpose underlying the preservation requirement. As *Carines*, 460 Mich at 764–65 explained, "requiring a contemporaneous objection [to avoid forfeiture] provides the trial court an opportunity to correct the error, which could thereby obviate the necessity of further legal proceedings and would be by far the best time to address a defendant's constitutional and nonconstitutional rights." If prosecutors were able to prevent review under even *Carines* by procuring *post hoc* testimony from trial attorneys that what was forfeiture on the record was actually a

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strategic and silent waiver, this would necessitate many further legal proceedings while also preventing more errors, including structural errors, from being be addressed.

On a practical level, requiring that trial attorneys admit their own error after the fact to avoid waiver, or assert intentional waiver so they can deny that they erred would be unfair to both the attorney and the former client. Even without this retroactive waiver rule, "[t]he dramatic consequences in collateral proceedings of a lawyer having decided to do nothing or take a particular route of non-action, as opposed to having never considered an issue, mean that the strategic thinking of the trial counsel is critical." Siegel, *My Reputation or Your Liberty (Or Your Life): The Ethical Obligations of Criminal Defense Counsel in Postconviction Proceedings*, 23 J Legal Prof 85 (1999). Trial attorneys who have been accused of ineffective assistance of counsel naturally have a conflict of interest with their former clients, as they fear disciplinary sanctions to their law license from the State Bar and fear legal malpractice claims. Being 'accused' of providing ineffective assistance of counsel "is not pleasant, and the impulse to defend one's self is all too human." Henak, *When the Interests of Self, Clients, and Colleagues Collide: The Ethics of Ineffective Assistance of Counsel Claims*, 33 Am J Trial Advoc 347, 369 (2009). "The prior lawyer may blame the client for this hassle," "[e]conomic pressures may also affect cooperation," and "[i]n the real world of criminal law, many lawyers see their interests aligning with those of the prosecution once a former client brings, or threatens, an ineffective assistance of counsel claim." *Id.* at 369-371.

D. The trial court's error was plain and Mr. Davis is entitled to a new trial.

"To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, and 3) and the plain error affected substantial rights." *Carines*, 460 Mich at 763, quoting *Olano*, 507 US at 732. "Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction

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of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id.* at 763-64 (internal quotations and alterations omitted).

1. The error occurred and was obvious.

"The first two prongs of the analysis are straightforward. In this case, the circuit court ordered the courtroom closed," without stating an overriding interest or considering less restrictive alternatives to complete closure. *Vaughn*, 491 Mich at 665. "Our case law clearly establishes that" this is required. *Carines*, 460 Mich at 770. See, e.g., *Waller*, 467 US at 48 ("party seeking to close the hearing must advance 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."); *Detroit Free Press, Inc v Macomb Circuit Judge*, 405 Mich 544, 549 (1979) ("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."); *Presley*, 558 US at 214 ("The conclusion that trial courts are required to consider alternatives to closure even when they are not offered by the parties is clear").

2. The closure of the courtroom to all members of the public other than the mother of the deceased affected Mr. Davis' substantial rights.

The requirement that a defendant show the plain error "affected substantial rights … generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Carines*, 460 Mich at 763. However, a violation of the defendant's right to a public trial is structural, and as this Court previously held: "structural errors 'are intrinsically harmful, without regard to their effect on the outcome.'" *Vaughn*, 491 Mich at 666, quoting *People v Duncan*, 462 Mich 47, 52 (2000).

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The most important events during Mr. Davis' trial occurred in a courtroom closed to all members of the public except the mother of the deceased. Mr. Davis' substantial rights were affected by the impact that the trial court's error had on his trial, even if prejudice were not presumed because the error was structural.

3. The closure of the majority of Mr. Davis' trial to all members of the public except for the mother of the man he was charged with murdering seriously undermined the fairness, integrity and public reputation of his convictions.

"[T]he fourth *Carines* prong is meant to be applied on a case-specific and fact-intensive basis." *People v Cain*, 498 Mich 108, 121 (2015), citing *Puckett v United States*, 556 US 129, 142 (2009). "The operative inquiry is whether the trial court's error … in the particular case 'seriously affected the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* quoting *Carines*, 460 Mich at 774.

The tangible impact of a trial's closure to the public is difficult to articulate, but is significant:

> Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. …
>
> In view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison.

In re Oliver, 333 US at 273 d.

The Court of Appeals majority affirmed Mr. Davis' convictions based on its view that the closure had no serious impact on the fairness, integrity, or public reputation of his trial because "[t]he initial closure effectively cleared out spectators who supported the prosecution,

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reduced the perception that the gallery was pro-victim and against defendant, and it made less glaring the fact that no one was there who supported defendant." This pro-victim/pro-defendant analysis is inherently flawed and has been rejected by this Court for well over a century. See *People v Yeager*, 113 Mich 228, 230 (1897) ("Who is to decide who are the friends of the accused? The law makes no such test, but allows all citizens freely to attend upon any trial") and *Micalizzi*, 223 Mich at 584, quoting *State v Keeler*, 52 Mont 205 (1916):

> Just how a defendant could show that he was prejudiced by an order excluding the public or that the presence of a particular person or of the public could have been of advantage to him is not disclosed, and such reasoning has been condemned by the courts everywhere. With equal propriety the court might deny a defendant charged with a felony the right to a trial by a jury, and then insist that the defendant, found guilty by the court, must show prejudice by demonstrating that a jury would have reached a different result.

The public trial guarantee affords several protections to the accused, which includes: "(1) ensuring a fair trial, (2) reminding the prosecution and court of their responsibility to the accused and the importance of their functions, (3) encouraging witnesses to come forward, and (4) discouraging perjury." *Vaugh*, 491 Mich at 667. The *Vaughn* Court held that the fairness and integrity of the proceedings were not seriously undermined by the closure of the courtroom during jury selection because "the *venire* [wa]s drawn from the public itself," and "remain[ed] public witnesses during much of the *voir dire* proceedings," offering the defendant similar protections as those traditionally provided by the public in an open courtroom. *Id.* at 305 (citations omitted).

Ms. Givens exclusive presence in the gallery during Mr. Davis' trial did not advance any of the goals or offer any of the protections that a public trial would have. It did the opposite. Ms. Givens reminded the court and prosecution of the need to convict and punish her son's murderer, but did nothing to remind them of their obligations to ensure the man accused of his murder receive a fair trial. Ms. Givens' presence did not ensure the jury would hold the State to its burden by reminding

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it of the loss and devastation a guilty verdict would cause Mr. Davis and his family. Her exclusive presence served only to remind the jury of the loss and devastation Mr. Davis was accused of having caused.

While in *Vaughn*, 491 Mich at 668-69, both parties were satisfied with the jury that was ultimately selected, which diminished the potential unfairness of selecting the jury in a closed courtroom, Mr. Davis was in no way satisfied with the fairness or integrity of the final three-and-a-half days of his trial. Mr. Holiday's trial testimony changed substantially from his preliminary examination testimony, which had itself changed substantially from his initial statements to detectives. While Mr. Holiday testified these differences were attributable to a change in his medication, 223a, Mr. Davis attributed them to the significant charge reduction and sentence agreement he received for changing his account of what happened. 421a-423a. Further, while the trial court and prosecutor both had to have known that the prosecutor's argument that "[a] person's not going to … ask for a plea deal on a murder case such as this unless they know they've done something wrong," was utterly false, 405a, the court permitted the prosecutor to make it and to introduce evidence that Mr. Davis had pursued such a plea deal in a closed courtroom. 61a, 379a-382a.

Finally, the jury was concerned enough about Ms. Frye's question that it reported it to Judge Neithercut. When the trial resumed, the only person who remained in the gallery was Ms. Givens. The jury would have understood the connection between the report and the closure. Because Ms. Givens was the only person in the gallery who the jury knew was connected to Mr. Hanson, and was also the only person permitted to attend the remainder of the trial, the jury likely assumed Ms. Frye's connection was to Mr. Davis rather than Mr. Hanson. It would have also fairly, but incorrectly, assumed that the court's drastic response to the potentially innocuous question was deemed necessary after reasonable consideration. The court's failure to provide any explanation to the jury about Ms. Frye's identity or its decision to close the courtroom ensured the proceedings would be unfair. It allowed the jurors to imagine Ms. Frye's question was an attempt to tamper with or intimidate them and to assume she was acting on Mr. Davis' behalf. Why else would the trial be closed and why else would Ms. Givens be

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permitted to stay? Based on the court's mishandling of the issue, Ms. Frye's question was easily construed as evidence of Mr. Davis' violent propensity and consciousness of guilt. See *People v Marion*, 29 Mich 31, 38-39 (1874) (evidence that defendant sought to bribe jury was relevant to his guilty knowledge).

If the duration, the unusual effect of the trial's closure, and the circumstances that led up to the closure did not undermine the fairness, integrity, and public confidence in Mr. Davis' trial, it is difficult to imagine any defendant ever being entitled to reversal under *Carines*. As Judge Swartzle questioned in dissent: "If not here, where?" 486a.

4. Even if Mr. Davis could not show tangible harm, trials that are closed to the public without adequate justification presumptively undermine the fairness, integrity, and public reputation of the proceeding.

In *Vaughn*, 491 Mich at 664, the Court held that forfeited public trial violations were to be analyzed under "the general *Carines* rule regarding forfeited constitutional error." Thus, where a trial court plainly errs in closing the defendant's trial, but the error is unpreserved, appellate courts "must exercise discretion and only grant defendant a new trial if the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 666 (cleaned up). It arrived at this holding principally "[b]ecause neither party ha[d] persuasively shown that this Court should deviate from the general *Carines* rule regarding forfeited constitutional error." *Id.* It also expressed concern about requiring automatic reversal for temporary or trivial closures would provide defendants an appellate parachute. *Id.* at 664, 667.

In *Weaver v Massachusetts*, 137 S Ct 1899, 1912 (2017), the United States Supreme Court also held public trial violations were subject to plain error review. Its reasons were different than that of the *Vaughn* Court, and are inapplicable to this case and to most unpreserved public trial violations that are raised in Michigan's appellate courts.

Its first reason for not requiring automatic reversal is inapplicable to all direct appeals: where an error is "raised on direct review, the

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systemic costs of remedying the error are diminished to some extent … because, if a new trial is ordered on direct review, there may be a reasonable chance that not too much time will have elapsed for witness memories still to be accurate and physical evidence not to be lost." *Id.* at 1912. Conversely, where the error is raised for the first time collaterally, like in a habeas petition or a motion for relief from judgment, "[t]he finality interest is more at risk … and direct review often has given at least one opportunity for an appellate review of trial proceedings." *Id.* at 1912.

The *Weaver* Court also expressed concern that automatic reversal would be required where the defendant invited the public trial violation, explaining "in some cases an unlawful closure might take place and yet the trial still will be fundamentally fair from the defendant's standpoint." As examples of this, the Court cited *Richmond Newspapers*, 448 US at 572-73 and *Free-Enterprise I*, 464 US at 501, which were both cases where the defendant expressly requested the closure of his trial to the public. The Court also expressed concern that automatic reversal should not be required for public trial violations that occurred "simply because the trial court omits to make the proper findings before closing the courtroom, even if those findings might have been fully supported by the evidence." *Weaver*, 137 S Ct at 1909.

When *Vaughn*, 491 Mich at 646 reversed the Court of Appeals' decision in *People v Vaughn*, 291 Mich App 183, 196-97 (2010), and held that failure to object to a public trial violation forfeits the issue, but does not waive it, the Court intended the distinction between waiver and forfeiture to have some real-world consequence, and rejected Justice Cavanaugh's criticism that "a defendant will never be able to satisfy the requirements to overcome forfeiture under the plain-error analysis." *Vaughn*, 491 Mich at 668 n 102, quoting *id.* at 683 (CAVANAUGH, J., concurring). Justice Cavanaugh's prediction that the fourth requirement of *Carines* would preclude relief for all unpreserved public trial violations has been proven correct. This result was inevitable because "the existence of a structural error—whose effect on the trial is unquantifiable and indeterminate—is incompatible with the requirement that a defendant identify specific facts on the record showing that the error seriously affected the fairness, integrity, or public

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reputation of the proceedings." *People v Cain*, 498 Mich 108, 149 (2015) (VIVIANO, J., dissenting). See also *Waller*, 467 US at 49 n 9 ("the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance").

"[G]iven the importance of the public trial right, it would be hard to see how the public reputation and integrity of the proceedings would not be compromised," by non-incidental closures. *United States v Negron-Sostre*, 790 F3d 295, 306 (CA 1, 2015). Yet the waiver/forfeiture distinction that this Court drew in *Vaughn* has not affected the outcome of a single case. The Court of Appeals majority's analysis in this case indicates that it never will.

Since *Vaughn* issued in 2012, no unpreserved public trial violation has resulted in reversal. Twenty appellate decisions have either specifically found or otherwise assumed that the trial court plainly erred in closing the defendant's trial to the public. Despite "this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public," *In re Oliver*, 333 US at 273, all twenty of those decisions, including the majority decision in the present case, have held the defendant was not entitled to relief because he had not shown the violation undermined the fairness, integrity or public reputation of the proceedings.[3] See *People v Davis*, 331 Mich App 699, 715 (2020); *People v Williams*, COA No 345096 (March 19, 2020); *People v Stanley*, COA No 340464 (June 25, 2019); *People v Shaul*, COA No 326905 (November 22, 2016); *People v Scott*, COA No 320321 (September 22, 2015); *People v Stalling*, COA No 311850 (June 24, 2014); *People v Smith*, COA No 300581 (October 17, 2013); *People v Robinson*, COA No 304936 (September 12, 2013); *People v Foster*, COA No 301361 (August 8, 2013); *People v Witherspoon*, COA No 302711 (April 4, 2013); *People v Fomby*, COA No 305602 (April 2, 2013); *People v Patterson*, COA No 304724 (March 26, 2013); *People v Gibbs*, COA No 306124 (February 14, 2013); *People v Blackwell*, COA No 305243 (January 29, 2013); *People v Hicks*, COA No 297058 (December 18,

[3] The unpublished opinions cited herein are decisions are being concurrently filed under a separate cover.

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2012); *People v Willis*, COA No 298643 (November 1, 2012); *People v Daniels*, COA No 300354 (October 11, 2012); *People v Williams*, COA No 301336 (October 9, 2012); *People v Bennett*, COA No 303025 (September 25, 2012); *People v Hunter*, COA No 297542 (August 30, 2012), rev'ed in part on other grounds, 493 Mich 1015 (2013).

Appellate courts' unshakeable conclusion that public trial violations do not seriously impact the fairness, integrity, or public reputation of the closed trial demonstrates that *Vaughn* was incorrectly decided. It was based on the Court's mistaken conclusion that *Carines* provided a workable framework for reviewing such errors. This Court has a duty to re-examine *Vaughn*'s reasoning, and "is not constrained to follow precedent when governing decisions are unworkable or badly reasoned." *Robinson v City of Detroit*, 462 Mich 439, 464 (2000). There is no reason to continue to adhere to it.

Vaughn "was decided only [nine] years ago, and any reliance on its holding has thus been relatively brief." *City of Coldwater v Consumers Energy Company*, 500 Mich 158, 173 (2017). "[B]y definition there can be no reliance on the [*Vaughn*] rule that" that traditional plain error analysis applies to forfeited structural error because trial judges who commit such errors presumably do so without any intention of violating the defendant's right to a public trial. *People v McKinley*, 496 Mich 410, 423 (2014).

An "important factor in determining whether a precedent should be overruled is the quality of its reasoning." *Janus v American Federation*, 138 S Ct 2448, 2479 (2018). Dissatisfaction with the alternatives suggested by the litigants, the primary reason given in *Vaughn* for adhering to the traditional *Carines* analysis to review unpreserved public trial violations is not a satisfactory reason for any holding that has an impact extend beyond those litigants. It is not a reason for the Court to ignore better alternatives when they are suggested or to ignore the reality that its holding has worked to deprive defendants of any meaningful recourse where they were previously deprived of their fundamental right to a public trial.

States are free to set their own preservation rules, even for federal constitutional issues. See *Carines,* 460 Mich at 761-768. Mr. Davis

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brought this claim under both the federal and state constitutions. See 440a.

The concerns cited in *Weaver* for requiring automatic reversal for every unpreserved public trial violation are valid. But this Court does not have to choose between ignoring those concerns and ignoring the impact that plainly erroneous closure orders have on defendants, even if the negative impact of the closure is as intangible as the benefits secured by the right to a public trial. It can strike the proper balance by adopting the approach to reviewing plain structural errors suggested by the dissenting Justices in *People v Cain*, 498 Mich 108, 149 (2015) (VIVIANO, J., dissenting):

> a structural error provides a rebuttable presumption that the fairness of the proceedings was seriously affected, while still allowing the prosecution to identify aspects of the trial record that show that the fairness, integrity, or public reputation of the proceedings were, in fact, not seriously affected despite the structural error.
>
> This framework recognizes the undeniable effect a structural error has on the inquiry under the fourth *Carines* prong while still retaining the fact-specific, discretionary characteristics of that final prong.

Where the closure order is brief or partial, where the error is based on a lack of articulation, rather than inadequate justification, and where the defendant invites the error, the prosecution will presumably be able to rebut this rule's presumption that the fourth *Carines* prong has been satisfied. Conversely, where a defendant like Mr. Davis has truly been denied the intangible benefits secured by the public trial right, he will not be denied relief simply because he might not be able to articulate the tangible impact on the proceedings outside of the closure itself.

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II. Mr. Davis was denied his right to the effective assistance of counsel where his attorney failed to object to the trial court's order closing his trial to all members of the public except for the decedent's mother

Standard of Review and Issue Preservation

"The question whether defense counsel performed ineffectively is a mixed question of law and fact; this Court reviews for clear error the trial court's findings of fact and reviews de novo questions of constitutional law." *People v Trakhtenberg*, 493 Mich 38, 47 (2012).

To demonstrate ineffective assistance, a defendant must show that his attorney's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense. *Strickland v Washington*, 466 US 668, 687 (1984). In considering these two components, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696. "In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Id.*

Discussion

The Sixth Amendment's guarantees of public and the assistance of counsel are "of first importance." *United States v Wood*, 299 US 123, 143 (1936). Like its requirement of public trials, "the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Strickland*, 466 US at 684. "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause." *Id.* at 684-85. It therefore entitles defendants to the assistance of counsel "who plays the role necessary to ensure that the trial is fair." *Id.* at 685. Michigan's constitution guarantees criminal defendants the

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same. Const 1963, art 1, § 20; *People v Pickens*, 446 Mich 298, 310-11 (1994).

A defendants' own counsel can deprive him of his constitutional right to counsel "simply by failing to render 'adequate legal assistance.' " *Strickland*, 466 US at 686, quoting *Cuyler v Sullivan*, 446 US 335, 344 (1980); *Pickens*, 446 Mich at 311. That is what happened in this case. Mr. Davis was denied his right to the effective assistance of counsel where his attorney failed to object to the trial court's decision to close his trial to all members of the public except the decedent's mother without providing any explanation to the jury for the closure.

Prior to his trial, Mr. Davis asked his counsel, Mr. White, to contact his mother so that she could attend the trial. 450a. Mr. White did not speak with her until after the trial was over, at which point he told her that her son would be sentenced to life in prison. In response, "she broke down in tears and indicated she would not be able to watch … that happen to her son, and asked [counsel] if [he] could give her a call once it was over." 451a. Mr. White testified that he believed that his secretary had spoken with Mr. Davis' mother prior to trial, that his secretary told him that she would have difficulty getting time off at work, or that she could not get any days off of work. 450a-451a.

The afternoon after Monique Givens testified and identified herself as Mr. Hanson's mother, the jury reported to Judge Neithercut that someone who had been attending the trial had asked one of them if they worked at Hurley Hospital. Daundria Frye identified herself to the court as the mother of Mr. Hanson's child and the individual who asked the question.

Counsel did not weigh in as Judge Neithercut decided between closing the courtroom to the public and delaying the trial to hold Ms. Frye in contempt of court. 159a. Counsel did not object when Judge Neithercut chose to close the courtroom instead of delaying the trial. Counsel did not object when Judge Neithercut excluded Ms. Givens from the closure order. Counsel then deferred to Judge Neithercut's decision not to question the jury or provide it any instruction about the closure. As a result, Ms. Givens and the support person from the Prosecutor's Office were the only people present in the gallery during the remaining

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three-and-a-half days of the trial, and Mr. Davis was convicted of all charges.

At a postconviction hearing, Mr. White testified that he did not object because he "absolutely" thought it was better to only have the decedent's mother attend the trial than to have a large group of people attend the trial. 453a. He explained:

> There were numerous people sitting over here on the victim's side during the course of trial, and my belief was that I didn't have an issue with the jury not seeing anyone but the victim's mother who they would expect—I would expect for them to be here at the trial on the dates he testified already, and if that was the only person that they saw, then there would be no prejudice to my client because they wouldn't look at him and say he has no one here supporting him. 453a.

A. Counsel performed unreasonably when he failed to object to the closure of Mr. Davis' trial to all members of the public except for the decedent's mother without providing any explanation or instruction to the jury.

"When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 US at 687-88. This standard is based on the "prevailing professional norms," but the Constitutional requires counsel to "advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Id.* at 688. Counsel "undoubtedly has a duty to consult with the client regarding important decisions, including questions of overarching defense strategy." *Florida v Nixon*, 543 US 175, 187 (2004). While this obligation "does not require counsel to obtain the defendant's consent to 'every tactical decision,' … certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate." *Id.*, quoting *Taylor v Illinois*, 484 US 400, 417-18 (1988).

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Counsel's total deference to the trial court's handling of the reported contact between Ms. Frye and a juror was objectively unreasonable. His handling of this issue fell below the level of representation to which Mr. Davis was entitled in several respects.

Counsel knew Mr. Davis wanted his mother to attend the trial, but had not spoken to her or any of his client's other family members when Judge Neithercut decided to close the remainder of the trial to the public. 450a-451a. Prevailing professional and societal norms required counsel to consult with Mr. Davis and obtain his opinion on the trial court's proposal to close the remainder of the trial to the public. This did not happen. Counsel did not request a moment to consult with Mr. Davis. He asked to approach the bench, and then allowed the prosecutor to raise his concerns about the court's decision, without offering any input of his own or obtaining any input from Mr. Davis. 160a-161a. Objectively reasonable counsel would have recognized that Mr. Davis' opinion on the closure was more important than his own, and would have consulted him before agreeing, or not objecting to it. This is more than a matter of common sense and courtesy. *Strickland*, 466 US at 688 recognized the ABA Standards of Criminal Justice as representative of the "[p]revailing norms of practice." See also *Roe v Flores-Ortega*, 528 US 470, 479 (2000). ABA Standards for Criminal Justice, Defense Function (4d ed. 2017) Standard 4-1.3(d) ("Defense Function") obligates defense counsel to "keep the client informed and advised of significant developments and potential options." The potential denial of the defendant's fundamental constitutional right to a public trial is a significant development. Consultation was necessary.

Counsel also performed unreasonably when he deferred to Judge Neithercut's decision not to ask the jurors what, exactly, Ms. Frye had said, and what conclusions they had drawn as a result. This decision was based on Judge Neithercut's view that doing so was not necessary and could make the jurors nervous. The court's interest in not "mak[ing] the jury nervous," by questioning it and/or instructing it on the reason for the closure was not aligned with Mr. Davis' more compelling interest in receiving a fair trial from an unbiased jury. If, as the prosecutor questioned, the jury had been prejudiced, then a mistrial may have been necessary. Counsel acknowledged the situation had also caused him

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"some concerns," 162a, but still agreed with Judge Neithercut's decision, even though it guaranteed his concerns would not be addressed and any prejudice to Mr. Davis would not be discovered. Objectively reasonable counsel would have been more concerned about if his client could still receive a fair trial before an impartial jury than with disagreeing with the trial judge or making the jury nervous. See Defense Function Standard 4-1.5 ("defense counsel should take steps necessary to make a clear and complete record for potential review").

Objectively reasonable counsel would have also requested that the jury be instructed on Ms. Frye's identity and her relationship to Mr. Hanson, as well as the reason for the closure. This would have prevented the jury from speculating that Mr. Davis was directly or indirectly responsible for Ms. Frye's actions or the court's closure, and helped ensure the jury would not be prejudiced against Mr. Davis. Judge Neithercut's resolution of the issue ensured the jury would be nervous and would speculate about why, after it reported improper contact in the hallway outside the courtroom, Mr. Hanson's mother was the only person in the gallery for the remainder of the trial. Given the subject matter of the trial, and the inference that the jury could have easily drawn about Mr. Davis and their own safety based on the closure, counsel's failure to insist that the matter be clarified was unreasonable.

Mr. White testified that he opted not to object to the trial's closure for strategic reasons, in that he considered it to be better for Mr. Davis if only Ms. Givens was in the gallery than it would have been if Ms. Givens had been joined in the gallery by the two-to-nine other people who had been ejected from the courtroom by the trial court. Counsel based this on his assumption that the jury believed that everyone else who had been in the gallery previously was there to support Mr. Hanson, not Mr. Davis, and he "didn't have an issue with the jury not seeing anyone but the victim's mother, who they would expect to be here … on the date she testified." 453a. "[I]f she was the only person that they saw, then there would be no prejudice to my client because they wouldn't look at him and say he has no one there supporting him." 453a.

To establish deficient performance, "the defendant must overcome the presumption that, under the circumstances, the challenged [in]action 'might be considered sound trial strategy.' " *Strickland*, 466

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US at 689, quoting *Michel v Louisiana*, 350 US 91, 101 (1955). The Court of Appeals held that "under those circumstances," counsel's failure to object to the closure order was not objectively unreasonable because "there was much logic to counsel's silence." 481a "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Flores–Ortega*, 528 US at 481 (citations omitted)

"Counsel may decide, for strategic reasons, not to object to an obvious error," and "if counsel's strategy is reasonable, then his or her performance was not deficient." *People v Randolph*, 502 Mich 1, 12 (2018), quoting *Gordon v United States*, 518 F3d 1291, 1300 (CA 8, 2008). In this case, Mr. White's explanation for why he did not object to the closure order was not logical and did not qualify as a sound or reasonable strategic decision. It qualified as constitutionally deficient performance.

Whether or not the jury would expect to see Ms. Givens in the gallery on the day she testified, Judge Neithercut explicitly said she, and only she, could attend every day of "the remainder of the trial, all the way into next week," after she had testified and been excused as a witness. 160a. If as he testified, counsel made a strategic decision that Mr. Davis was benefitted by a reduction of Mr. Hanson's loved ones in the gallery, or by fewer people sitting on the victim's side of the gallery, 453a, his failure to object to Ms. Givens' exclusion from the closure order was objectively unreasonable. Ms. Givens was, after all, was the only person who had actually been identified as having any connection to Mr. Hanson, and her sole exclusion from the closure order meant that there would always be more people on the 'victim's' side of the gallery than the 'defendant's' side. Counsel's explanation also failed to address why he did not seek similar exclusions from the closure order for Mr. Davis' family. Based on his analysis, Mr. Davis would have been even more well served by the closure order if two of his supporters came to attend the trial. He knew Mr. Davis hoped that at least his mother would attend, and counsel had apparently never even asked Mr. Davis about his father and sister. 451a. Even though counsel had not spoken to anyone in Mr. Davis' family before the trial, 450a-452a, this did not mean they did not intend to come to the trial. They did. 458a, 464a-465a.

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Beyond the sheer number of people 'supporting' Mr. Hanson in the gallery, Ms. Givens' testimony served little, if any, purpose aside from engendering sympathy from the jury. She was a grieving mother whose son had been killed. Before she testified, Mr. White foresaw that she might have difficulty composing herself, and that her very understandable and human response could prejudice Mr. Davis. 86a. Ms. Givens apparently broke down crying at least once while she was on the witness stand. 102a. Even after she was excused, counsel continued to be concerned that her expressions of grief from the gallery would "influence the jury." 197a. If the presence of any individual in the gallery could influence the jury and prejudice the defense, it was Ms. Givens. Counsel's failure to object to her exclusion from the closure order was objectively unreasonable as it was obvious that her exclusive presence in the gallery would focus the jury's attention on her.

Even if counsel's lack of objection had been sound trial strategy, his representation of Mr. Davis was unreasonable under prevailing profession norms. Criminal defense attorneys should make strategic and tactical decisions "after consultation with the client where feasible and appropriate." Defense Function Standard 4-5.2(d). While a defendant may not need to personally waive his right to a public trial for the waiver to be effective, it is still a fundamental constitutional right that belongs to and exists for the benefit of the defendant. The courtroom's closure had a number of practical consequences for Mr. Davis. It created a real possibility that he would never see anyone he knew again, except from behind bars. Yet in response to Judge Neithercut's order, counsel asked to approach the bench instead of requesting a moment to confer with his client. 160a.

The Sixth Amendment requires public trials "as a safeguard against any attempt to employ our courts as instruments of persecution," *In re Oliver*, 333 US at 270, because "[h]istory had proven that secret tribunals were effective instruments of oppression." *Estes v Texas*, 381 US 532, 538-39 (1963). The Sixth Amendment's guarantee that defendants receive the effective assistances of counsel requires that defense counsel bring to bear the skill and knowledge necessary to "render the trial a reliable adversarial testing process." *Strickland*, 466 US at 688. Counsel's decision to forfeit the safeguards a public trial

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would have provided based on the number of people in the gallery who 'supported' the deceased exposed counsel's lack of knowledge about the benefits of public trials and necessarily rendered the adversarial process less reliable. Counsel's failure to object to the closure order was objectively unreasonable.

B. Mr. Davis was prejudiced by his attorney's failure to object to the closure of his trial to all members of the public except the mother of the deceased.

To show prejudice under *Strickland*, the defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 US at 687. "[T]he concept of prejudice is defined in different ways depending on the context in which it appears," but "the ultimate inquiry must concentrate on "the fundamental fairness of the proceeding." *Weaver*, 137 S Ct at 1911, quoting *Strickland*, 466 US at 694.

"[W]hen a defendant raises a public-trial violation via an ineffective-assistance-of-counsel claim, … the burden is on the defendant to show either a reasonable probability of a different outcome in his or her case or … to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair." *Id.* at 1911. "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland*, 466 US at 694.

In *Weaver*, the United States Supreme Court analyzed *Strickland* prejudice where defense counsel had not objected to an order closing jury selection to the public. The Court held the defendant had not shown prejudice because he could only argue the possibility that "potential jurors might have behaved differently," and "the presence of the jury might have had some bearing on juror reaction." *Id.* at 1912. The Court "recognized that open trials ensure respect for the justice system and allow the press and the public to judge the proceedings that occur in our Nation's courts." *Id.* at 1913. In *Weaver*, however, the closure "was

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limited to the jury *voir dire*," "the trial was not conducted in secret, … … there were many members of the venire who did not become jurors but who did observe the proceedings," and the record did "not indicate any basis for concern, other than the closure itself." *Id.* at 1912. Therefore, the public trial violation "did not pervade the whole trial or lead to basic unfairness." *Id.* at 1913.

Justice Thomas criticized the majority opinion in *Weaver* for its assumption that a defendant could establish prejudice by demonstrating that his attorney's error led to a fundamentally unfair trial, and argued prejudice could only be demonstrated by showing a reasonable probability that the result of the proceedings would have been different but for counsel's error. *Id.* at 1914 (THOMAS, J., concurring). The majority stated it assumed, but did not explicitly reaffirm, that prejudice is also demonstrated by showing the error rendered the trial fundamentally unfair. *Id.* at 1912. It had no need to reaffirm the standard, since it had never been overruled and remains the primary standard for determining prejudice:

> Although those principles [for degerming prejudice], should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Strickland, 466 US at 696. See also *Pickens*, 446 Mich at 309 (defendant must show "that the representation so prejudiced the defendant as to deprive him a fair trial") and *Trakhtenberg*, 493 Mich at 59 ("defense counsel's performance in this case was constitutionally inadequate and rendered defendant's trial unfair and unreliable. Therefore, we reverse…").

Like *Weaver*, *Vaughn*, 491 Mich at 674 also held the defendant failed to establish he had been prejudiced by his counsel's failure to object to the closure of the courtroom during jury selection. *Vaughn* analyzed

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Strickland prejudice in the manner Justice Thomas argued for in *Weaver*, and found the defendant could not show a reasonable probability of a different result if jury selection had been conducted in open proceedings. While this may have been the correct result based on the circumstances of the public trial violation at issue in *Vaughn*, the Court's use an outcome-determinative test predetermined *Vaughn*'s outcome without regard for the circumstances of the violation.

Weaver, 137 S Ct at 1912 explained although the defendant's entire trial was not rendered fundamentally unfair by the closure of the courtroom during jury selection, "[i]n other circumstances a different result might obtain." "If, for instance, 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. At Mr. Davis' trial, not only did the government's main witness testify in a closed courtroom, the majority of its other witnesses did so as well. The jury was unfairly permitted to speculate about the reason for the closure, see Issue I.D.3 above, to Mr. Davis' likely detriment and the decedent's mother was permitted to remain in the gallery, comforted by a support person, as nearly all the evidence against Mr. Davis was presented, the parties made their closing arguments, the jury was instructed, sworn, and ultimately delivered its verdict.

Mr. Davis cannot present evidence that, but for the closure of his trial, Mr. Holiday would have adhered to his original account of Mr. Hanson's death, that the prosecutor would not have claimed that only guilty people pursue plea offers, or that a single juror would have voted to acquit. These possibilities are unknowable and cannot be proven. But an outcome-determinative test is not the only means of proving prejudice under *Strickland* or *Pickens*. Where a defense attorney's deficient performance causes the defendant to be deprived of his right to a public trial, as with any other prejudice analysis, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 US at 670. The circumstances of the closure demonstrate the fundamental unfairness of Mr. Davis' trial.

Mr. Davis' trial was fundamentally unfair because of his attorney's unreasonable failure to object to the trial court's order closing his trial

to all members of the public but the decedent's mother. He is entitled to a new trial.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Donald Wayne Davis respectfully requests that this Honorable Court grant leave to appeal or any other peremptory relief the Court deems just and appropriate.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in Administrative Order No. 2019-6. I certify that this document contains 14,990 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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