RECEIVED by MSC 6/14/2021 6:26:40 PM

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' Reply to Plaintiff-Appellee's Supplemental Brief

Steven Helton (P78141)
Jacqueline J. McCann (P58774)
State Appellate Defender Office
3031 West Grand Boulevard, Suite 450
Detroit, Michigan 48202
(313) 256-9833
shelton@sado.org

Counsel for Donald Wayne Davis

Date: June 14, 2021

RECEIVED by MSC 6/14/2021 6:26:40 PM

TABLE OF CONTENTS

Index of Authorities 3

Reply to Plaintiff-Appellee's Supplemental Brief.....7

I. A retroactive waiver rule would undermine the purpose of requiring timely objections 7

II. Consideration of parol evidence of the judge's intent in issuing an order would cause the same problems as consideration of an attorney's intent in failing to object. It would also transform trial judges into fact witnesses and prevent them from neutrally presiding over post-conviction hearings where their prior rulings are at issue. 9

III. There is no constitutional distinction between a "partially" and "totally" closed trial. 11

IV. A criminal defendant's entitlement to a fair trial and the effective assistance of counsel takes precedence over all statutory and constitutional rights granted to crime victims by the Michigan Constitution and Legislature. 13

Conclusion and Relief Requested 15

RECEIVED by MSC 6/14/2021 6:26:40 PM

INDEX OF AUTHORITIES

Cases

Arizona v Fulminante,
499 US 279 (1991) 13
Boyd v Dutton,
405 US 1 (1972) 8
Crampton v Michigan Dept of State,
395 Mich 347 (1975) 10
Davis v Reynolds,
890 F2d 1105 (CA 10, 1989) 12
Douglas v Wainwright,
714 F2d 1532 (CA 11, 1983) 12
Estelle v Williams,
425 US 501 (1976) 14
Estes v Texas,
381 US 532 (1965) 14
Gibbons v Ogden,
22 US 1 (1824) 13
Goldberg v Kelly,
397 US 254 (1970) 10
Obergefell v Hodges,
576 US 644 (2015) 14
People v Carines,
460 Mich 750 7
People v Grant,
445 Mich 535 (1994) 7, 9
People v Kline,
197 Mich App 165 (1992) 11, 12
People v Kowalski,
489 Mich 488 (2011) 8
People v Micalizzi,
223 Mich 580 (1923) 12
People v Russell,
471 Mich 182 (2004) 13
People v Vaughn,
491 Mich 642 (2012) 13
People v Yeager,
113 Mich 228 (1897) 12
Press-Enter Co v Superior Court of California, Riverside Co,
464 US 501 (1984) 12

Strickland v Washington,
466 US 668 (1984) 15
United States v Olano,
507 US 725 (1993) 7
United States v Simmons,
796 F3d 409 (CA 6, 2015) 12
Wainwright v Sykes,
433 US 72 (1977) 7, 8
Waller v Georgia,
467 US 39 (1984) 12, 13, 14

Statutes and Constitutional Provisions

Const 1963, art 1, § 25 14
MCL 780.761 13
US Const, art VI, cl 2 ..... 13, 14

Rules

FRE 605 11
MRE 802 8

RECEIVED by MSC 6/14/2021 6:26:40 PM

RECEIVED by MSC 6/14/2021 6:26:40 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."
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."
The Court of Appeals Answered:	"No."
The trial court answered:	"No.

RECEIVED by MSC 6/14/2021 6:26:40 PM

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."
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."
The Court of Appeals Answered:	"No."
The trial court answered:	"No."

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."
The Court of Appeals Answered:	"No."
The trial court answered:	"No."

RECEIVED by MSC 6/14/2021 6:26:40 PM

Reply to Plaintiff-Appellee's Supplemental Brief

The prosecution's Supplemental Brief asks the Court to adopt several new rules and exceptions well established rules that would impact Michigan residents' fundamental constitutional rights in order to affirm the Court of Appeals' majority opinion and Donald Davis' convictions. Because it fails to acknowledge the novelty of these proposals, their conflict with binding precedent, or even the most foreseeable consequences that adopting they would have, Mr. Davis addresses these issues in reply.

I. A retroactive waiver rule would undermine the purpose of requiring timely objections

The prosecution concedes that on the trial record, any error in closing Mr. Davis' trial to the public appears to be forfeited, not waived. It asserts, however, that "as soon as Mr. White testified that the decision [not to object] was in fact a conscious and reasoned decision what seemingly constituted forfeiture and rightfully became defined as a waiver." Under the prosecution's theory of waiver, "forfeiture is the failure to make the timely assertion of a right," unless the party has made, or subsequently testifies it made, a "conscious decision not to object," in which case the party's silence constitutes waiver; the "the intentional relinquishment or abandonment of a known right." *People v Carines*, 460 Mich 750, 762 n 7 (1999), *quoting United States v Olano*, 507 US 725, 733 (1993).

The requirement that parties contemporaneously object to errors at trial to preserve them for appellate review contributes to the finality of criminal litigation and prevents parties from harboring error as an appellate parachute. See, e.g., *Wainwright v Sykes*, 433 US 72, 88 (1977) and *People v Grant*, 445 Mich 535, 550 (1994). Allowing parties to present evidence after a trial that a right or error that appears on the record to have been unintentionally forfeited was actually waived through intentional silence would completely undermine "[t]he policy underlying the issue forfeiture rule." *Carines*, 460 Mich at 764. "A contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest, not years later," and "enables the judge who observed the

RECEIVED by MSC 6/14/2021 6:26:40 PM

demeanor of those witnesses to make the factual determinations necessary for properly deciding the federal constitutional question." *Wainwright v Sykes*, 433 US 72, 88 (1977).

Mr. Davis' Supplemental Brief addressed many of the complications for defendants and their trial attorneys that would arise from putting the attorney in a position where their testimony following their client's conviction would dictate whether their silence constituted waiver or forfeiture. The prosecution has not addressed any of those issues, and has also apparently failed to consider the downside of its waiver theory for prosecuting attorneys. Were the Court to agree that postconviction evidence can convert an apparent forfeiture into waiver, presumably parties could also submit evidence that would do the opposite. If evidence of a parties' unstated intent is relevant to issue preservation, defendants could, for example, present evidence that their attorney only "explicitly and repeatedly approved of" deficient jury instructions because he did not realize an element of the offense had been omitted or that it even was an element of the offense. *People v Kowalski*, 489 Mich 488, 503 (2011). If credited, the error would no longer be waived, as the evidence would establish that counsel's endorsement of the instructions was not an "intentional relinquishment or abandonment of," the defendant's right to a properly instructed jury, and any apparent relinquishment of this right was unknown and unintentional. *Id.* As another obvious example, counsel could 'un-extinguish' a violation of his client's right to confrontation by testifying his stipulation to the admission of a police report was only intended to waive the objection under MRE 802, and not under the Constitution.

In the era before hearings were regularly transcribed, remand was often required to determine if a waiver had occurred. See, e.g., *Boyd v Dutton*, 405 US 1 (1972) (remanding for an evidentiary hearing on whether defendant voluntarily waived his right to counsel). Obviously, these proceedings delayed the case's conclusion and could not have been as accurate as a contemporaneous record. Inaccuracies and delays would be amplified were remand required to determine what a party or attorney thought instead of what he or she said. The contemporaneous objection requirement is thought to "obviate the necessity of further legal proceedings." *People v Grant*, 445 Mich 535, 551 (1994). The rule

RECEIVED by MSC 6/14/2021 6:26:40 PM

proposed by the prosecution would necessitate further proceedings, allow for gamesmanship, deteriorating memories, and wounded pride to triumph over accuracy, reality, and finality. It should be rejected.

II. Consideration of parol evidence of the judge's intent in issuing an order would cause the same problems as consideration of an attorney's intent in failing to object. It would also transform trial judges into fact witnesses and prevent them from neutrally presiding over post-conviction hearings where their prior rulings are at issue.

At Mr. Davis' trial, the judge ordered: "For the remainder of the trial, all the way into next week, … [t]he only person allowed to watch this trial is the mother of the young man who died." According to the prosecution, the order did not close the trial to all members of the public except Ms. Givens because ten months after issuing the order the judge said he had misspoken, and had not meant what he said. Mr. Davis' arguments against allowing attorneys' unstated intent to dictate whether an issue was waived are just as applicable to the prosecution's assertion that a trial judge's intent when issuing an order can modify and take priority over the plain language of the order. This proposal is even more dangerous.

As previously explained, in a world in which an order's meaning is dictated by the judge's intent, rather than his words, parties and jurors would be required to speculate about what the judge actually meant and sanctioning non-compliance would become nearly impossible. Further, the prosecution's argument that the judge's intent caused Mr. Davis' trial to remain open cannot be squared with the prosecution's assertion that Mr. Davis was not prejudiced by Ms. Givens' exclusive presence in the gallery throughout his trial because "the jurors were instructed not to allow any sympathy or emotion dictate their deliberations." Presuming jurors follow their instructions is a legal fiction that would become absurd fantasy if what a judge ordered was dictated by his intent and not his words. For this instruction to protect Mr. Davis from being found guilty based on improper considerations, additional evidence demonstrating this was actually the judge's intent when he provided the instruction, and, more importantly, that the jurors understood this to be the judge's intent.

RECEIVED by MSC 6/14/2021 6:26:40 PM

The other readily apparent consequence of allowing judges to 'clarify' their own orders during postconviction hearings is that in doing so, the presiding judge necessarily becomes a fact witness during these hearings. Judge Neithercut was not a sworn witness, and he spoke as a judge from the bench during a *Ginther* hearing at which he was serving as the trier of fact. After stating from the bench that he had misspoken, and had not actually intended to close Mr. Davis' trial to all members of the public except Ms. Givens, Judge Neithercut denied Mr. Davis' motion for a new trial based on his finding Mr. Davis had not been prejudiced by his order or his attorney's failure to object to it.

If appellate courts are permitted to consider a judge's post hoc statement regarding his unspoken intent when issuing an order to determine what the judge ordered, due process requires that they recuse themselves from the postconviction hearing, take an oath as a witness, and subject themselves to cross examination about their intent. See *Goldberg v Kelly*, 397 US 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."). Obviously, the judge's participation as a witness would prevent him from neutrally deciding the defendant's motion. See *Id.* at 271 (decisionmaker "should not … have participated in making the determination under review"). In *Crampton v Michigan Dept of State*, 395 Mich 347, 354 (1975) (quotations omitted), the Court struck down an appellate procedure as "a denial of due process of law not only because the judge in effect became part of the prosecution and assumed an adversary position, but also because as a judge, … he very likely relied on his own personal knowledge and impression of what had occurred, … an impression that could not be tested by adequate cross-examination." Such a procedure is even more problematic when the judge's personal knowledge relates to his own unstated intent.

The Advisory Committee Notes accompanying the 1972 adoption of Rule 605 of the Federal Rules of Evidence explained that the Committee chose to deem judges incompetent to testify in trials over which they preside because this situation raised too many significant questions that did not have satisfactory answers:

RECEIVED by MSC 6/14/2021 6:26:40 PM

> The choice is the result of inability to evolve satisfactory answers to questions which arise when the judge abandons the bench for the witness stand. Who rules on objections? Who compels him to answer? Can he rule impartially on the weight and admissibility of his own testimony? Can he be impeached or cross-examined effectively? Can he, in a jury trial, avoid conferring his seal of approval on one side in the eyes of the jury? Can he, in a bench trial, avoid an involvement destructive of impartiality?

The prosecution has answered none of these questions. The Court should reject such a procedure and hold that, just as jurors are not competent to impeach their own verdicts, judges are not competent to impeach their prior rulings.

III. There is no constitutional distinction between a "partially" and "totally" closed trial.

The prosecution's Supplemental Brief cites *People v Kline*, 197 Mich App 165, 169-170 (1992), and an unpublished 2013 Court of Appeals opinion to support its assertion that "Michigan jurisprudence recognizes that there is a distinction between a partially and fully closed courtroom." Holding that Mr. Davis' trial could be closed to the public without a compelling justification because Ms. Givens was permitted to remain in the gallery would require the Court to overrule more than one hundred years of precedent related to public trials. The prosecution has not provided any justification to do so.

According to *Kline*: "A partial closure occurs where the public is only partially excluded, such as when family members or the press are allowed to remain, or when the closure order is narrowly tailored to specific needs." *Kline*, 197 Mich App at 170 n 2, citing *Davis v Reynolds*, 890 F2d 1105, 1109 (CA 10, 1989) and *Douglas v Wainwright*, 714 F2d 1532, 1539 (CA 11, 1983), rev'd *Wainwright v Doughlas*, 468 US 1206 (1984). *Kline* held that where the closure is only partial, "only a substantial, rather than a compelling, reason for the closure is necessary." *Id. Kline* also held that a trial court's failure to articulate its reasons for closing the courtroom does not require reversal, but merely remand "to supplement the record with the facts and reasoning upon which the partial closure of the courtroom was based." *Id.* at 172.

RECEIVED by MSC 6/14/2021 6:26:40 PM

On numerous occasions this Court has held that the first type of 'partial' closure described by *Kline*, which occurs when not all members of the public are excluded from the courtroom, results in a violation of a defendant's right to a public trial. See *People v Micalizzi*, 223 Mich 580 (1923) and *People v Yeager*, 113 Mich 228 (1897). See also *United States v Simmons*, 796 F3d 409 (CA 6, 2015) (right to public trial violated where court excluded defendant's codefendants from trial during certain witnesses' testimony). The second type of 'partial closure' described in *Kline*, which occurs where the "closure order is narrowly tailored to specific needs," is meaningless. If the "specific need" is an "overriding interest," that cannot be advanced through reasonable alternatives, whether the closure is 'partial' or 'total' is of no consequence. *Waller v Georgia*, 467 US 39, 48 (1984). What is of consequence are *Kline*'s holdings that conflict with state and federal law, which the Court should address and specifically reject.

Kline's conclusion that trial courts may close trials to the public for reasons that are less than compelling and without the necessity that the closure advance an overriding interest is simply wrong. "Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness." *Press-Enter Co v Superior Court of California, Riverside Co*, 464 US 501, 509 (1984). "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." *Id.* at 510 (quotation omitted).

Kline's holding that where the trial court has failed to articulate an adequate basis for closing a trial, the proper remedy is remand to provide the trial judge an opportunity to create a better record so the appellate court can affirm the defendant's conviction also irreconcilably conflicts with all other binding precedent. "If there is a timely assertion of the Sixth Amendment public trial right, the remedy for a violation must be 'appropriate to the violation.'" *People v Vaughn*, 491 Mich 642, 653 (2012), quoting *Waller*, 467 US at 49-50. See also *Arizona v Fulminante*, 499 US 279, 294-295 (1991) (recognizing public trial violations as structural errors requiring automatic reversal when objected to). The United States Supreme Court explicitly rejected the procedure that the *Kline* Court attempted to create when it held that post hoc rationalizations of a closure order "cannot satisfy the deficiencies in the trial court's record." *Waller*, 467 US at 49 n 8.

RECEIVED by MSC 6/14/2021 6:26:40 PM

IV. A criminal defendant's entitlement to a fair trial and the effective assistance of counsel takes precedence over all statutory and constitutional rights granted to crime victims by the Michigan Constitution and Legislature.

The prosecution asserts that MCL 780.761 precludes Mr. Davis' argument that the exclusive presence of Ms. Givens in the gallery through the majority of his trial violated his due process right to a fundamentally fair trial. It also claims the statute would have rendered any objection by his counsel to Ms. Givens' exclusion from the closure order futile, thereby preventing Mr. Davis' from prevailing on his argument that objectively reasonable counsel in a similar situation would have objected to an order that ensured that the decedent's grieving mother would be the only person in the gallery during the trial. The prosecution also demands that when considering Mr. Davis' entitlement to a new trial, "[t]his Court must also consider … the victim's family's right to finality in this matter."

Neither the Michigan Legislature, in enacting MCL 780.761, nor Michigan voters, in amending our Constitution, could undermine the protections afforded to criminal defendants by the United States Constitution. See US Const art VI, cl 2; *Gibbons v Ogden*, 22 US 1, 211 (1824) (MARSHALL, C.J.) (Supremacy Clause invalidates state laws that "interfere with, or are contrary to" federal law); and *People v Russell*, 471 Mich 182, 188 (2004) ("Our Michigan Constitution is not at issue here because the federal Supremacy Clause, US Const, art VI, cl 2, requires that we apply the federal constitutional analogue to the degree that our Constitution provides less protection to a criminal defendant"). See also *Obergefell v Hodges*, 576 US 644 (2015) (invalidating Const 1963, art 1, § 25 as violative of the Due Process and Equal Protection Clauses of the Fourteenth Amendment).

"Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the sine qua non of a fair trial." *Estes v Texas*, 381 US 532, 540 (1965). The trial court not only had the power to exclude Ms. Givens from the trial if it believed doing so was necessary to ensure Mr. Davis' trial was fundamentally fair. It had an obligation to do so. "In the administration of criminal justice, courts must carefully guard against

RECEIVED by MSC 6/14/2021 6:26:40 PM

dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Estelle v Williams*, 425 US 501, 503 (1976).

"[T]he atmosphere essential to the preservation of a fair trial—***the most fundamental of all freedoms***—must be maintained at all costs." *Id.* (emphasis added). This is why, for instance, the constitutional rights of the press, the general, and the defendant "to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial." *Waller*, 467 US at 44.

Had Mr. Davis' counsel objected to the trial court's exclusion of Ms. Givens from its closure order, as objectively reasonable counsel would have done, the court would have plainly erred in overruling the objection based on Ms. Givens' rights under state law, just as it plainly erred when it excluded her from its closure order. As Mr. Davis previously explained, after deciding that closure of the courtroom was necessary to advance whatever interest the court hoped to achieve, its obligation to ensure that Mr. Davis' trial was fundamentally fair required it to also close the courtroom to Ms. Givens, as her exclusive presence in the gallery served as a "constant reminder" of the pain Mr. Davis' was charged with causing, and created an unacceptable risk "of impermissible factors coming into play," in deliberations. *Estelle*, 425 US at 505.

The prosecution's argument that the Court must consider the potential impact of a retrial on Mr. Hanson's family when it resolves Mr. Davis' ineffective assistance of counsel claim fails to recognize that the exacting standard that criminal defendants must satisfy to be entitled to relief under *Strickland v Washington*, 466 US 668, 693 (1984), "reflects the profound importance of finality in criminal proceedings." Courts do not consider the family's interest a second time when deciding if the defendant's Sixth Amendment right to counsel was violated because "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. It should go without saying that if this were a proper consideration, the Court would have to also consider the impact on Mr. Davis and his family and friends, of requiring him to serve a life without parole sentence because of a verdict that was rendered at the conclusion of a fundamentally unfair trial that was inherently flawed.

RECEIVED by MSC 6/14/2021 6:26:40 PM

The Michigan and United States Constitutions guaranteed Mr. Davis the right to a fair and public trial, and to the effective assistance of counsel. He has established that each of these overlapping fundamental rights were violated. Instead of creating novel and ill-considered exceptions to these rights in order to affirm his convictions, as the Court of Appeals majority did, and the prosecution urges this Court to do, the Court should grant him a new trial so that this case can be resolved in the manner guaranteed by our State and Federal Constitutions.

Conclusion and Relief Requested

For the reasons stated above and in his Supplemental Brief, Donald Davis respectfully requests that this Honorable Court grant him a new trial.

Respectfully submitted,

State Appellate Defender Office

/s/ Steven Helton
Steven Helton (P78141)
Jacqueline J. McCann (P58774)
3031 W. Grand Blvd., Suite 450
Detroit, Michigan 48202
(313) 256-9833
shelton@sado.org

Date: June 14, 2021

RECEIVED by MSC 6/14/2021 6:26:40 PM

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 3,177 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.

/s/ Steven Helton
Steven Helton (P78141)
State Appellate Defender Office
3031 West Grand Blvd, Suite 450
Detroit, Michigan 48202
(313) 256-9833
shelton@sado.org