No. 123975

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- TAVARIUS D. RADFORD Defendant-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, No. 3-14-0404. There on appeal from the Circuit Court of the Twenty-First Judicial Circuit, Kankakee County, Illinois, No. 11-CF-662. Honorable Clark Erickson, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

JAMES E. CHADD
State Appellate Defender

PETER A. CARUSONA
Deputy Defender

STEVEN VAREL
Assistant Appellate Defender
Office of the State Appellate Defender
Third Judicial District
770 E. Etna Road
Ottawa, IL 61350
(815) 434-5531
3rddistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

E-FILED
11/4/2019 11:50 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

I. Where the trial court *sua sponte* intentionally excluded from the courtroom all members of the public with the exception of four individuals for the entirety of jury selection in order to create enough space to seat the entire venire in the courtroom at the same time, the court committed a violation of Tavarius Radford's right to a public trial that constituted second-prong plain error.

A. Where the trial court's closure of the courtroom failed to satisfy the overriding interest test, the closure violated U.S. Supreme Court precedent and constituted clear error.

The State does not argue that the closure here satisfied the U.S. Supreme Court's overriding interest test (St. br. at 9–20; Def. br. at 11–12). Instead, the State urges this Court to adopt the "substantial reason test" for partial closures (i.e., closures in which at least one member of the public is allowed to attend) and argues the closure here was justified under that test (St. br. at 11–12, 19).

If the State's argument is accepted, it would severely erode the Sixth Amendment right to a public trial and the First Amendment right of members of the public to attend. Here, the only reason the State offers to support the judge's decision to close a courtroom that could seat 122 people to all but four members of the public for the entirety of jury selection is that the judge may have wanted the entire 118-person venire in the courtroom at the same time in order to provide them with the same preliminary instructions without having to repeat himself (St. br. at 14–15). If that reason, which is solely a matter of convenience, is sufficient, jury selection in every trial in which there is either a small courtroom or a large venire can be closed to every member of the public except for one (Def. br. at 12). If it were more convenient, public attendance during the rest of trial could be so limited. This would indeed eviscerate the right to a public trial and the right of the public to attend (Def. br. at 18–19).

The State has not cited any case applying the "substantial reason test" in such a manner. So, even if this Court were to apply that test, it should find that the only reason the State offers was not a "substantial reason."

Even if the State had identified a "substantial reason," the closure here failed to satisfy the "substantial reason test." According to "[a]ll federal courts" that apply it, the "substantial reason test" is a modified version of the four-factor *Waller* test in which "the 'overriding interest' requirement is replaced by requiring a showing of a 'substantial reason' for a partial closure, *but the other three factors remain the same*." *United States v. Simmons*, 797 F.3d 409, 414 (6th Cir. 2015) (emphasis added). Thus, even under the "substantial reason test," a partial closure is only justified if: it is no broader than necessary to serve the reason for the closure (the second *Waller* factor), the court considers reasonable alternatives (the third *Waller* factor), and the court makes findings adequate to support the closure (the fourth *Waller* factor). *Id.*; *In Interest of G.B.*, 433 P.3d 138, 143–44 (Colo. 2018).

Here, the judge's stated reason for the closure was simply a lack of seating, a problem that the judge himself created by bringing the entire venire into the courtroom at the same time (Def. br. at 3). The State suggests that the judge wanted to give unspecified preliminary instructions to the entire venire. However, under the fourth *Waller* factor, a reason not provided by the judge on the record cannot be used on appeal to justify the closure (Def. br. at 11, 13). *State v. Morales*, 932 N.W.2d 106, 116 (N.D. 2019).

In any event, the judge's preliminary remarks consisted mostly of introducing the parties, estimating the length of the trial, and reading the charges (R650–55). A reasonable alternative would have been to divide the venire into smaller groups

and do this with each group. The judge could have asked some potential jurors to come back at 1:30 and others at 10:30 the next day (R670, 803).

The closure to all but four members of the public for the entirety of jury selection was much broader than necessary. The judge could have briefly had the entire venire in the courtroom to make those remarks and then limited the number of potential jurors in the courtroom. Moreover, he could have limited the scope of the closure by allowing members of the public into the courtroom after a significant number of potential jurors were excused. Since 46 potential jurors had been excused on the first day of jury selection (and 10 jurors sworn) and only 62 potential jurors remained at that time (St. br. at 14 n.3), the court could have accommodated more than four members of the public in a courtroom that seated 122 for part of the first day and all of the second day of jury selection.

Thus, the closure here was unjustified under the "substantial reason test." And there is no reason to adopt it. The overriding interest test already balances the competing interests and was designed to be flexible enough to address any situation. It takes into account the scope of the closure in the second *Waller* factor, that the closure must be no broader than necessary to protect the overriding interest at stake. Thus, it is more likely to permit partial closures than full closures, so long as an overriding interest is involved. *State v. Turrietta*, 308 P.3d 964, 970–71 (N.M. 2013); *People v. Jones*, 750 N.E.2d 524, 529–30 (N.Y. 2001); Kristin Saetveit, Note, *Close Calls: Defining Courtroom Closures Under the Sixth Amendment*, 68 Stan. L. Rev. 897, 923, 927–28, 931–32 (2016) [hereinafter Saetveit].

Where a strong reason exists, the overriding interest test allows closure. Indeed, in many cases in which courts have applied the "substantial reason test,"

(and all of the cases cited by the State in favor of adopting it (St. br. at 11)), the result should have been the same under either test because there was an overriding interest involved, and all of the other factors in the two tests are the same.[1]

The only thing the "substantial reason test" could accomplish is allowing partial closures at any point in a trial for weaker reasons, regardless of whether an objection was made. That conflicts with the U.S. Supreme Court's holding that "'[t]he presumption of *openness* may be overcome only by an *overriding interest* based on findings that closure is essential to preserve *higher values* and is narrowly tailored to serve that interest.'" *Waller v. Georgia*, 467 U.S. 39, 45 (1984) (quoting *Press-Enterprise Co. v. Superior Court of California, Riverside Cty.*, 464 U.S. 501, 510 (1984), emphasis added). The U.S. Supreme Court has never created any exceptions to that rule. Saetveit, 931–92.

The State suggests that *People v. Holveck*, 141 Ill. 2d 84 (1990), and *People v. Falaster*, 173 Ill. 2d 220 (1996), which do not mention the "substantial reason test," are consistent with it (St. br. at 11–13). The State is incorrect. It would not have made sense for this Court to adopt that test in *Holveck* or *Falaster*, as those cases involved partial closures permitted under 725 ILCS 5/115–11 in order to protect the *overriding interest* of preventing psychological trauma to a minor victim testifying about being sexually assaulted. *Holveck*, 141 Ill. 2d at 99–102 (using

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[1] *United States v. DeLuca*, 137 F.3d 24, 31–32, 35 (1st Cir. 1998) (interests involved were protecting those in courtroom from violence and preventing bribery and intimidation of witnesses and jurors in case involving defendants associated with organized crime who had a history of such behavior); *United States v. Osborne*, 68 F.3d 94, 99–100 (5th Cir. 1995) (interest involved was protecting 12-year old victim testifying about being kidnapped and sexually assaulted from psychological trauma); *see also Jones*, 750 N.E.2d at 530 (protecting safety of a witness is an overriding interest).

term "overriding interest" three times); *Falaster*, 173 Ill. 2d at 226–28; *see Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982) ("[S]afeguarding the physical and psychological well-being of a minor . . . is a compelling [interest]."); *see also People v. Taylor*, 244 Ill. App. 3d 460, 465–68 (2d Dist. 1993) (recognizing that *Holveck* applied overriding interest test to partial closure). Thus, in those cases, this Court held that the statute was constitutional because it was narrowly tailored to protect an *overriding interest.*

Illinois courts have applied the overriding interest test to partial closures for 30 years. The majority of state courts that have addressed the issue (of which undersigned counsel is aware) have also done so, *see Turrietta*, 308 P.3d at 970–71; *State v. Mahkuk*, 736 N.W.2d 675, 685 (Minn. 2007); *Jones*, 750 N.E.2d at 529, as has at least one federal court, *Carson v. Fischer*, 421 F.3d 83, 89–92 (2d Cir. 2005). This Court should do so here and find clear error. In the alternative, it should find clear error under the "substantial reason test."

B. Because a public trial violation is a structural error that inherently affects the fairness of defendants' trials and challenges the integrity of the judicial process, it is a reversible error under the Illinois law doctrine of second-prong plain error.

The State acknowledges that this Court has repeatedly held that structural errors, including a violation of the right to a public trial, are considered second-prong plain error (St. br. at 20; Def. br. at 14). However, the State argues that this Court should deviate from that precedent and require a case-by-case showing of prejudice—just as would be required under *Strickland* for a public trial violation raised for the first time in a collateral proceeding—before a public trial violation raised on direct appeal can be found to be second-prong plain error (St. br. at 20–27).

The State's reliance on cases in which a defendant raised a public trial claim for the first time in a collateral proceeding is misplaced (St. br. at 16, 18, 20–24, 26–27, citing *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), *State v. Pinno*, 850 N.W.2d 207, 212 (Wis. 2014), *Pinno v. Wachtendorf*, 845 F.3d 328 (7th Cir. 2017)). More than one justice dissented in both *Weaver* and *State v. Pinno*. Those courts would have reached a different result in a direct appeal (Def. br. at 15). *See State v. Franklin*, No. W2017-00680-CCA-R3-CD, __ S.W.3d __, 2019 WL 2714380, at *34 (Tenn. Ct. Crim. App. June 28, 2019) (*Weaver* "is limited to post-conviction proceedings").

Moreover, the *Weaver* Court's position that structural errors do not "'always or necessarily render a trial fundamentally unfair and unreliable,'" is not new. *Weaver*, 137 S. Ct. at 1908 (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006)). After *Gonzalez-Lopez*, this Court continued to hold that structural errors, including public trial violations, are automatically reversible when raised on direct appeal as second-prong plain error (Def. br. at 14).

It was only logical for this Court to do so since the second prong of the Illinois plain error rule protects a broader set of interests than *Strickland*. *Strickland* focuses solely on whether counsel erred and whether that individual error caused prejudice. *Weaver*, 137 S. Ct. at 1911. By contrast, the second prong of the Illinois plain error rule is not only concerned with errors that cause prejudice to individual defendants, but also with systemic, structural errors—including those committed by judges or prosecutors—that inherently undermine the fairness of defendants' trials and erode the integrity of the judicial process every time they occur, but are not amenable to review for whether they caused prejudice in any particular

case (Def. br. at 14–16). *People v. Clark*, 2016 IL 118845, ¶ 45; *People v. Thompson*, 238 Ill. 2d 598, 608 (2010); *see* Steven W. Becker, *To Review or Not to Review: The Plain Truth About Illinois' Plain Error Rule*, 37 Loy. U. Chi. L. J. 455, 485–489 (2006) [hereinafter Becker] (discussing this Court's use of second-prong plain error to protect constitutional rights and guard the integrity of the judicial process). Structural errors are unique in that they are all "'intrinsically harmful,'" they all pose systemic concerns, and they all have features that "defy an actual-prejudice analysis." *Weaver*, 137 S. Ct. at 1916–17 (Breyer, J., dissenting) (quoting *Neder v. United States*, 527 U.S. 1, 7 (1999), and citing *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991)).[2]

The State essentially seeks to reduce second-prong plain error review to the *Strickland* standard. But that would render second-prong plain error review superfluous and prevent it from protecting against systemic errors.

Contrary to the State's suggestion (St. br. at 25–26), public trial violations inherently affect the fairness of defendants' trials and erode the integrity of the judicial process (Def. br. at 14). The importance of an open jury selection in allowing supporters to help protect defendants like Tavarius against racial bias (Def. br. at 20) cannot be overstated because unfortunately, "most Americans implicitly associate black people with negative attitudes . . . and stereotypes (e.g., aggressive, . . .)." Justice Michael B. Hyman, *Implicit Bias in the Courts*, 102 Ill. B.J. 40, 41 (January 2014). Morever, "open trials are bulwarks of our free and democratic

[2] The State cites several cases that did not involve structural errors (St. br. at 9, 20–21, 23, citing *Puckett v. United* States, 556 U.S. 129, 140–41 (2009), *Johnson v. United States*, 520 U.S. 461, 468 (1997), *People v. Allen*, 222 Ill. 2d 340 (2006), *People v. Hampton*, 149 Ill. 2d 71, 102 (1992), and *People v. Herrett*, 137 Ill. 2d 195, 215 (1990)). Those cases are distinguishable.

government." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 592 (1980) (Brennan, J., concurring). Open proceedings safeguard our political and religious freedom, provide a check against abuse of power, and foster the appearance of fairness that is essential to public confidence in the system (Def. br. at 18). *Id.* Thus, the public trial right is a "cherished right" that "[t]he law guards . . . with utmost vigilance." *People v. Evans*, 2016 IL App (1st) 142190, ¶ 19.

The value of openness and the "intangible" but real "benefits" it provides, *Waller* 467 U.S. at 49 n.9, is harmed through a closure "without justification grounded in the record" (Def. br. at 18). *United States v. Gupta*, 699 F.3d 682, 689 (2d Cir. 2012). That is why, in *Presley*, the U.S. Supreme Court held that a judge is "required to consider alternatives to closure *even when they are not offered by the parties*." *Presley v. Georgia*, 558 U.S. 209, 214 (2010) (emphasis added). The Court reasoned that the Sixth Amendment right of defendants to a public trial is at least as protective as the First Amendment right of members of the public to attend, and that "[t]he public has a right to be present *whether or not any party has asserted the right*." *Id.* at 212, 214 (emphasis added). The Court further reasoned that it is the "*obligat[ion]*" of "*[t]rial courts* . . . to take *every reasonable measure* to accommodate public attendance at criminal trials." *Id.* at 215 (emphasis added); *accord Evans*, 2016 IL App (1st) 142190, ¶ 14 ("[g]iven the seriousness of the potential harm, each *trial judge* must be alert and *proactive* in managing his or her courtroom to prevent violations of th[e] core constitutional right [to a public trial], *regardless of whether the attorneys assist in the process*," emphasis added). The *Presley* Court held that "[a] public-trial violation can occur . . . simply because the trial court omits to make the proper findings before closing the courtroom."

Weaver, 137 S. Ct. at 1909 (citing *Presley*, 558 U.S. at 215). This constitutional obligation of a judge to comply with *Waller* before ordering a courtroom closure, regardless of whether any party objects, *Morales*, 932 N.W.2d at 115–18, protects against the erosion of the integrity of the judicial process and preserves the fairness of trials.

The State complains about the lack of an objection (St. br. at 16–18, 23–24). However, under the Illinois plain error rule, it is irrelevant whether a party objected.[3] In any event, the importance of an objection is greatly reduced in light of a trial court's independent constitutional obligation to satisfy *Waller* before ordering a closure. The lack of an objection does not "deprive" a trial court of the opportunity to make findings, or consider alternatives, as that is required regardless of whether a party objects. Indeed, as the North Dakota Supreme Court has observed, the blame for the failure to make adequate findings lays squarely with the trial court, as "avoiding the need to speculate is precisely why *Waller* requires [a trial court to make] pre-closure findings." *Morales*, 932 N.W.2d at 115–18.

The State raises concerns about "sandbagging" or strategic decisions not to object (St. br. at 16–18, 23–24). This Court has admonished the State that such arguments are "fanciful and denigratory to the defense bar." *Sebby*, 2017 IL 119445,

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[3] Ill. S. Ct. R. 615(a) ("[p]lain errors or defects affecting substantial rights may be noticed *although they were not brought to the attention of the trial court*," emphasis added); *People v. Sebby*, 2017 IL 119445 (finding plain error despite lack of objection); *Clark*, 2016 IL 118845, ¶¶ 16, 44–45 (finding second-prong plain error despite lack of objection, even though the defendant "benefitted from the error"); *People v. Herron*, 215 Ill. 2d 167, 182 (2005) ("plain-error analysis . . . applies where the defendant has failed to make a timely objection"); *People v. Hollahan*, 2019 IL App (3d) 150556, ¶ 17 ("the mere failure to object" does not waive plain error review; to hold otherwise would "render[] [the plain error rule] a nullity"), *petition for leave to appeal allowed* (Sept. 25, 2019) (No. 125091).

¶ 71. In any event, if judges and prosecutors fulfill their own constitutional obligations to safeguard the rights of all members of the public, including defendants, such a tactic will never succeed. *See People v. Oden*, 20 Ill. 2d 470, 483 (1960). Judges and prosecutors who wish to initiate closures not requested by a defendant will ensure that such closures are justified and supported by the proper findings. If they believe that a defendant wants a closure, even though the defendant did not request it, they are free to inform the defendant that he or she has a personal right to a public trial and to seek a waiver of that right from him or her. *Walton v. Briley*, 361 F.3d 431, 434 (7th Cir. 2004). All of this is consistent with trial courts' obligation to *sua sponte* make a record concerning courtroom closures in the service of the fairness of trials and the integrity of the judicial process.

This Court should affirm that structural errors are automatically reversible when raised on direct appeal as second-prong plain error because this rule has been beneficial. Improper exclusions of members of the public and other structural errors are rare. By adhering to current precedent, the fairness of defendants' trials and the integrity of, and confidence in, the judicial process will continue to be preserved. *See* Saetveit, 931.

Negative consequences will result if this Court does not affirm that structural errors are automatically reversible when raised on direct appeal as second-prong plain error. Under the State's theory, defendants subjected to structural errors must show prejudice on a case-by-case basis (St. br. at 26–27). Because it is irrelevant under the plain error rule whether a party objected, the burden of making that showing would apply to all cases involving unpreserved structural errors, including those where trial counsel objected but failed to include the issue in a

post-trial motion. Because the benefits of a public trial are often intangible or unmeasurable, it would be "nearly impossible" for any defendant to meet that burden, no matter how serious the violation. *Weaver*, 137 S. Ct. at 1917 (Breyer, J., dissenting); *see id.* at 1913 (majority opinion) (even if "the government's main witness testifies in secret . . . the burden would remain on the defendant to make the prejudice showing"). Defendants subjected to structural errors due to their counsel's deficient performance would be unable to obtain relief either on direct appeal or in collateral proceedings (in which the same standard would apply). Public trial violations would go uncorrected, which would affect the rights of both defendants and members of the public. *See* Daniel Levitas, Comment, *Scaling Waller: How Courts Have Eroded the Sixth Amendment Public Trial Right*, 59 Emory L.J. 493, 493–94, 499–500 (2009) (courts should reverse public trial violations despite lack of objection because declining to "denigrates core values of individual rights that underlie our system of justice").

The State's position would also task Illinois courts with "the unenviably complex job of deciphering which structural errors really undermine fundamental fairness and which do not," even though "that game is not worth the candle." *Weaver*, 137 S. Ct. at 1917 (Breyer, J., dissenting). This would apply not just to case-by-case determinations as to public trial violations, but to all categories of structural error. It would be nearly impossible for defendants to show prejudice from the denial of the right to self-representation, the denial of the right to counsel of choice, or racial discrimination in grand jury selection. *Weaver*, 137 S. Ct. at 1908; *see Thompson*, 238 Ill. 2d at 609 (listing six categories of structural error); *see also Gonzalez-Lopez*, 548 U.S. at 150 (denial of right to counsel of choice is a structural

error). Thus, despite Illinois precedent to the contrary,[4] defendants would be unable to obtain relief for those violations if counsel failed to fully preserve them.

The State relies on foreign cases (St. br. at 24–25). However, the Illinois plain error rule is broader than the federal rule and is not necessarily the same as that of other states. This Court (1) has not adopted the federal rule, (2) has noted common law differences between the Illinois and federal rules, *Herron*, 215 Ill. 2d at 186, (3) has found that "automatic reversal is *required* . . . when an error is deemed 'structural'" even though it is discretionary in federal courts, *Thompson*, 238 Ill. 2d at 608 (emphasis added); *Puckett*, 556 U.S. at 135, and (4) has recognized types of second-prong plain error that are not among the federal types of structural error. *E.g.*, *Clark*, 2016 IL 118845, ¶¶ 46–47; *People v. Blue*, 189 Ill. 2d 99, 138–39 (2000). And unlike federal courts that are bound by a statutory rule, this Court's supervisory authority allows it full authority over the interpretation of its rules. Ill. Const. 1970, art. VI, § 16; Becker, 488 (also arguing that the more restrictive federal rule would undermine the ability of Illinois courts to protect the integrity of the judicial process). Thus, this Court is not bound by foreign cases. Becker, 488.

In any event, the U.S. Supreme Court has not addressed whether structural errors automatically satisfy the federal rule when raised on direct appeal. *See*

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[4] *See, e.g.*, *People v. Schoonover*, 2019 IL App (4th) 160882, ¶ 45 (public trial violation found to be second-prong plain error); *People v. Albea*, 2017 IL App (2d) 150598, ¶ 28 (same as to denial of right to self-representation); *People v. Hunt*, 2016 IL App (1st) 132979, ¶¶ 15–16 (same); *People v. Burrell*, 228 Ill. App. 3d 133, 142 (1st Dist. 1992) (applying second-prong plain error review to claim of denial of counsel of choice); *People v. Lann*, 261 Ill. App. 3d 456, 469 (1st Dist. 1994) (same as to claim under *Batson v. Kentucky*, 476 U.S. 79 (1986)).

Puckett, 556 U.S. at 140; *Barrows v. United States*, 15 A.3d 673, 679 (D.C. 2011).[5] And at least one federal court has held that structural errors do satisfy the federal plain error test even if raised for the first time on appeal. *United States v. Becerra*, 939 F.3d 995, 999, 1005–06 (9th Cir. 2019).

Other state courts have also found public trial violations to be automatically reversible when raised on direct appeal under their plain error rules. *Morales*, 932 N.W.2d at 116–18 (doing so when issue raised for first time on appeal); *State v. Wise*, 288 P.3d 1113, 1120–21 (Wash. 2012) (same); *Franklin*, __ S.W.3d __, 2019 WL 2714380, at *33. And many of the cases the State cites are from jurisdictions with rules that are more restrictive than the Illinois rule.[6] Of course, as the State recognizes in arguing that the error here was forfeited rather than waived, all of the cases that the State cites that found plain error review to be waived simply by a failure to object (St. br. at 8, 25) are inconsistent with Illinois law.

This Court should continue to hold that automatic reversal is required when a structural error is raised on direct appeal under the second prong of the Illinois plain error rule. This will ensure that structural errors rarely occur, thereby

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[5] That question clearly was not decided by *Levine v. United States*, 362 U.S. 610, 616–17, 619 (1960) (cited in St. br. at 19, 24–25), which addressed whether the closure of a contempt proceeding violated the Due Process Clause of the Fifth Amendment, not the Sixth Amendment (and did so prior to the U.S. Supreme Court's identifying categories of structural error or recognizing a public trial violation as one). *Pinno*, 850 N.W.2d at 250 & n.54 (Crooks, J., dissenting).

[6] St. br. at 25, citing, e.g., *Jeremias v. State*, 412 P.3d 43, 49 (Nev. 2018) (state rule requires showing of "actual prejudice or a miscarriage of justice"); *Robinson v. State*, 976 A.2d 1072, 1084 (Md. 2009) (state rule only allows for discretionary review in "extraordinary" circumstances); *id.* at 1088–89 (Greene, J., dissenting) (but three dissenting justices would have nevertheless reversed even though the defendant did not object to the closure).

protecting the fairness of defendants' trials, and preserving the integrity of, and confidence in, the judicial process. It will also obviate the need for Illinois courts to engage in the complex task of determining on a case-by-case basis which structural errors satisfy the second prong of the plain error rule and which do not.

C. The appellate court majority erred in (1) adopting a "triviality" standard, and (2) finding that the closure in this case—an intentional closure of the courtroom for the entirety of jury selection—was "trivial."

The State argues that all improper partial closures should be found "trivial" because the presence of at least one member of the public "preserves" the "values" protected by the right to a public trial (St. br. at 9, 12). But if the State's argument were accepted, that would indeed eviscerate the right to a public trial and the right of the public to attend (Def. br. at 18–19). It would be far worse than adopting the "substantial reason test," which at least requires the judge to have a "substantial reason" and to narrowly tailor the closure to that reason. If all partial closures were "trivial," then courts could improperly limit public attendance to a single person for the entirety of trial for no reason at all, and defendants (as well as members of the public who were barred) would have no remedy, regardless of whether they objected.

The State even suggests that the presence of people who are required to be present (including members of the venire, court staff, the attorneys, the defendant, and the judge) would be enough to "preserve" the values protected by the right to a public trial (St. br. at 16, 19–20). However, this would make all closures "trivial," since a proceeding during which all people are barred except those who are required to be present is actually the definition of a completely closed, non-public proceeding.

To the extent that the State suggests that *Holveck* and *Falaster* support its position, it is mistaken (St. br. at 12–13). As argued in Issue I.A above, those Courts found closures under Section 115–11 to be justified under the overriding interest test—they did not suggest that such closures would be acceptable without an overriding interest. *Holveck*, 141 Ill. 2d at 99–102; *Falaster*, 173 Ill. 2d at 226–28.

The State notes that the majority of courts have adopted some sort of "triviality" rule (St. br. at 12). However, such "triviality" rules, which vary greatly by jurisdiction, have also been the subject of strong criticism, on the grounds that they are inconsistent with U.S. Supreme Court precedent, unnecessary in light of the overriding interest test, often ad hoc and confusing, and serve to trivialize constitutional violations. Saetveit, 915, 923, 925–26, 931; *State v. Schierman*, 438 P.3d 1063, 1146–52 (Wash. 2018) (Stephens, J., dissenting in part, concurring in part). Thus, this Court should not adopt a "triviality" standard.

In any event, "[w]hen the constitutionally tainted portion of trial encompasses the entire jury-selection process, it has been almost universally held that relief involves a . . . new trial." *Steadman v. State*, 360 S.W.3d 499, 510 & n.41 (Tex. Crim. App. 2012) (citing several cases finding that a partial closure was not "trivial"). Accordingly, even if this Court were to adopt a "triviality" standard, it should find that the trial court's improper exclusion of all but four members of the public (only two of whom could be Tavarius's family, friends, or supporters) for the entirety of the two-day jury selection in this case was not "trivial" (Def. br. at 17–21).

II. Where the term "willfully" is ambiguous and has been interpreted even by some judges to mean "voluntarily," the trial court erred in instructing the jury that the mental state requirement for the offense of child endangerment is satisfied if the defendant acted "willfully." The error denied Tavarius Radford a fair trial where it led the jury to convict him based on a less culpable mental state than "knowledge."

The State concedes that "willfully" can refer to a less culpable mental state than "knowingly" and that judges have found it to mean "recklessly" (St. br. at 38). However, the State ignores that judges have found it to mean "voluntarily" (Def. br. at 25), and that an opinion in *Com. v. Kneeland*, 37 Mass. 206, 243–44 (1838) (Morton, J., dissenting), stated that an instruction with the term "wilful," "would convey to the minds of the jury the impression . . . that their inquiry need not go beyond the question [of] whether the defendant [acted] voluntarily." In this case, it is very likely that at least one juror voted to convict only because he or she viewed the term the same way that some judges have (Def. br. at 27–31).

The State concedes that, in acquitting Tavarius of involuntary manslaughter, the jury found that the evidence failed to prove that he was even aware of a substantial *risk* that his action was likely to cause even *great bodily harm* (St. br. at 40; R2037–39). But the State nevertheless argues that the evidence was not close as to whether he *knowingly* endangered M.R.'s *life* (St. br. at 39–42).

In doing so, the State suggests that Tavarius could have been convicted based on failing to "tak[e] . . . action to ensure that [M.R.] was not in danger" after the fact (St. br. at 39–41). But that was not the basis for the child endangerment charge (C6). In any event, since there was no evidence that medical treatment would have saved M.R.'s life, there was no evidence that this conduct was a proximate cause of M.R.'s death (R2040). Therefore, what the State needed to prove was that Tavarius knew that he was endangering M.R.'s life *at the time he performed the act that was the basis for the charge* (Def. br. at 27–28).

With respect to the act that was the basis of the charge, the State characterizes the evidence in a one-sided manner (St. br. at 2–8, 39–41) that is inconsistent with the way the trial judge viewed the evidence and the way the prosecutor believed the jury viewed the evidence. Among other things, the State ignores the judge's finding that the plaque was not involved in M.R.'s death, the prosecutor's concession that the jury found that Tavarius "didn't think he was doing anything that bad" when he performed the act in question, and the fact that the "eggshell skull" theory endorsed by the judge and the prosecutor meant that an act that no one would believe endangered a child's life could have caused M.R.'s death. The State also relies heavily on isolated snippets from Tavarius's interrogation without placing them in context, and does so without acknowledging the judge's concern with the way the officer applied the Reid technique on a 17-year-old child (Def. br. at 5–8 & n.2, 27–31).

Certainly one or more jurors could have seen the evidence as the prosecutor believed they did and as the judge actually did. This case was undoubtedly close. Tavarius likely was convicted only because of an instruction using a term that even judges have interpreted to require only a voluntary action.

As to Tavarius's claim that the trial court erred in failing to instruct the jury with paragraph 3 of IPI 5.01B defining the term "willfully" as meaning "knowingly," the State argues it was forfeited and that this Court should grant relief if the plain error standard was met (St. br. at 27–28). The State argues that no clear error occurred because the committee notes did not require the court to give that instruction (St. br. at 32–35). The State is incorrect. The third paragraph of the committee note to IPI 5.01B states: "The bracketed third paragraph is for

use in conjunction with offenses including a mental state of 'willfulness.' In such cases, give the bracketed third paragraph defining that term" (copied at Appendix). The State quotes the committee note out of context. When viewed in context, it is evident that the first two paragraphs of the committee note pertain only to whether a definition of "knowledge" should be given.

In suggesting that the lack of a cross-reference to IPI 5.01B in IPIs 11.29 and 11.30 means that paragraph 3 of IPI 5.01B was not a required instruction, the State overlooks the general rule in the IPI user's guide that "[o]ther instructions define certain words used elsewhere in the instructions. These definitions should be given following the instruction in which the defined word is used." IPI User's Guide, viii (4th ed. Supp. 2011); *see People v. Cook*, 2014 IL App (1st) 113079, ¶ 29 & n.2 (following *People v. Hopp*, 209 Ill. 2d 1, 7 (2004), in relying on the user's guide). The court was required to apply that general rule here where IPIs 11.29 and 11.30 included a term defined by IPI 5.01B, the definition of which the committee note to IPI 5.01B clearly stated should be provided.

The State argues that a court need not *sua sponte* provide the definition of a mental state term unless the jury either asks for it or manifests confusion. However, the State's argument relies mostly on the cases cited in *People ex rel. City of Chicago v. Le Mirage, Inc.*, 2013 IL App (1st) 093547, ¶ 101, which all involved the terms of "intentionally" or "knowingly" (St. br. at 34).[7] Consistent

[7] Some of the cases cited by the State did not involve mental state terms (St. br. at 31, 43). The State argues that *People v. Carlson*, 79 Ill. 2d 564, 583 (1980), held that a court was not required to provide a definition of "recklessly" even though the committee notes required it (St. br. at 34, 43). However, even if that were once true, it no longer is. As this Court has recognized, under the user's guide, "[i]f a Committee Note indicates to give another instruction, that is a mandatory requirement." IPI User's Guide, xi; *Hopp*, 209 Ill. 2d at 7; *Cook*,

with the committee notes, a definition of those terms is generally not required because they "have a plain meaning within the jury's common understanding," *People v. Averett*, 381 Ill. App. 3d 1001, 1015 (1st Dist. 2008), *aff'd*, 237 Ill. 2d 1 (2010). However, "[t]he same cannot be said of *willful*. The term's legal meaning is notoriously difficult to pin down." *Le Mirage, Inc.*, 2013 IL App (1st) 093547, ¶¶ 94–95. It is therefore only logical to require trial courts to follow the committee's direction to instruct juries with the definition of the term "willfully."

Because the court's failure to instruct the jury with paragraph 3 of IPI 5.01B was clear error, and because the case was close, this Court need not go on to consider whether the court erred in failing to replace the term "willfully" with "knowingly." However, this Court could reach that alternative argument, despite the State's argument that counsel waived it (St. br. at 27–29). Plain error review should be unavailable only if a defendant "*invites* the error" or "'*inject[s]*'" error into the proceedings by specifically "'*request[ing] to proceed*'" in an errant manner. *Hollahan*, 2019 IL App (3d) 150556, ¶ 17 & n.1 (quoting *People v. Carter*, 208 Ill. 2d 309, 319 (2003), and *People v. Smith*, 406 Ill. App. 3d 879, 886–87 (1st Dist. 2010), emphasis in *Hollahan*). That is because it would offend notions of fair play to allow a defendant to specifically request that a court proceed in one manner and later argue it was error for it to do so. *Carter*, 208 Ill. 2d at 319.

That concern does not apply here. The State tendered the instruction with the term "willfully." Counsel did not request that the court use that term. Rather,

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2014 IL App (1st) 113079, ¶ 29 & n.2 (court erred in failing to provide definition of "recklessness"). And *People v. Marquis*, 54 Ill. App. 3d 209, 214 (4th Dist. 1977) (St. br. at 32–33), held only that the aggravating fleeing or eluding instruction given clearly indicated that a defendant must act "knowingly" despite the omission of the term "willfully."

counsel objected to different language in the instruction, which the parties agreed should be removed. Stating that she had no objection to the amended instruction did not mean that she was requesting the court to use the term "willfully." She simply failed to make an objection, which does not constitute waiver under Rule 451(c) (R1881–84, 1910–12).

Since the trial court committed plain error for each of those reasons, it is not necessary for this Court to reach Tavarius's argument that his counsel was ineffective. However, this Court could reach that issue despite the State's argument that it should be assumed that counsel acted strategically (St. br. at 43–44). Here, the jury was told that child endangerment was the least serious of the offenses (R1952). The jury was then instructed with three different mental state terms, one for each offense. Other than the different mental states, each of the offenses would appear to jurors to have similar elements (R2037–40). This created a high risk that a juror would assume the term "willfully" associated with the least serious offense meant something less than the mental state terms used for the other offenses (as even judges have). Under these unique circumstances, it would not have been a reasonable strategy for counsel to fail to either request IPI 5.01B or an instruction using "knowingly." *See, e.g.*, *People v. McMillin*, 352 Ill. App. 3d 336, 344, 346–47 (5th Dist. 2004) (counsel who makes unreasonable strategic decision is ineffective).

CERTIFICATE OF COMPLIANCE

I, Steven Varel, certify that this reply brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this reply brief, excluding pages containing the Rule 341(d) cover and the Rule 341(c) certificate of compliance is 20 pages.

/s/Steven Varel
STEVEN VAREL
Assistant Appellate Defender

Appendix

5.01B
Knowledge--Willfulness

[1] A person [(knows) (acts knowingly with regard to) (acts with knowledge of)] the nature or attendant circumstances of his conduct when he is consciously aware that his conduct is of that nature or that those circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that the fact exists.

[2] A person [(knows) (acts knowingly with regard to) (acts with knowledge of)] the result of his conduct when he is consciously aware that that result is practically certain to be caused by his conduct.

[3] [Conduct performed knowingly or with knowledge is performed willfully.]

Committee Note
Instruction and Committee Note Approved October 28, 2016

720 ILCS 5/4-5 (West 2016), amended by P.A. 96-710, effective Jan. 1, 2010.

The Committee takes no position as to whether this definition should be routinely given in the absence of a specific jury request. *See People v. Powell*, 159 Ill.App.3d 1005, 512 N.E.2d 1364 (1st Dist. 1987), for the general proposition that the words "intentionally" and "knowingly" have a plain meaning within the jury's common understanding. If given, it should only be given when the result or conduct at issue is the result or conduct described by the statute defining the offense.

In cases where the instruction is given, use paragraph [1] if the offense is defined in terms of prohibited conduct. Use paragraph [2] if the offense is defined in terms of a prohibited result. If both conduct and result are at issue, use *both* paragraphs [1] and [2]. *See People v. Lovelace*, 251 Ill.App.3d 607, 622 N.E.2d 859 (2d Dist. 1993), where the trial court committed reversible error by giving the jury only paragraph [1], and not both paragraphs [1] and [2], when both conduct and result were at issue.

The bracketed third paragraph is for use in conjunction with offenses including a mental state of "willfulness". In such cases, give the bracketed third paragraph defining that term. Also give the first or second paragraph, or both, as appropriate.

When willfulness is an issue, Section 4-6 requires the trial court to determine whether the statute using that word "clearly requires another meaning". If so, the jury should be instructed accordingly.

The bracketed numbers are present solely for the guidance of the court and counsel and should not be included in the instruction submitted to the jury.

Use applicable paragraphs and bracketed material.

No. 123975

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 3-14-0404.
Plaintiff-Appellee,	)	There on appeal from the Circuit Court of the Twenty-First Judicial
-vs-	)	Circuit, Kankakee County, Illinois, No. 11-CF-662.
TAVARIUS D. RADFORD	)	Honorable Clark Erickson,
Defendant-Appellant	)	Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us;

Mr. Thomas D. Arado, Deputy Director, State's Attorneys Appellate Prosecutor, 628 Columbus, Suite 300, Ottawa, IL 61350, 3rddistrict@ilsaap.org;

Mr. Jim Rowe, Kankakee County State's Attorney, 450 East Court Street, Kankakee, IL 60901, JRowe@k3county.net;

Mr. Tavarius D. Radford, 909 W. Park Drive, Kankakee, IL 60901

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On November 4, 2019, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Ottawa, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

/s/Esmeralda Martinez
LEGAL SECRETARY
Office of the State Appellate Defender
770 E. Etna Road
Ottawa, IL 61350
(815) 434-5531
Service via email will be accepted at
3rddistrict.eserve@osad.state.il.us