IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL #26719

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

v.

JEREMY BAUER,
Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE ROBERT A. MANDEL

APPELLANT'S BRIEF

ELLERY GREY
GREY LAW
909 St. Joseph Street, Suite 555
Rapid City, SD 57701

Attorney for Appellant
Jeremy Bauer

MARTY JACKLEY
Attorney General
1302 E. Hwy 14, Suite 1
Pierre, SD 57501

MARK VARGO
Pennington County State's Attorney
300 Kansas City Street, Suite 400
Rapid City, SD 57701

Attorneys for Appellee
State of South Dakota

NOTICE OF APPEAL WAS FILED June 6, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited **Page**

Statutes

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL #26719

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

v.

JEREMY BAUER,
Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this Brief, Defendant and Appellant, Jeremy Bauer, will be referred to as "Defendant" or by name. Plaintiff and Appellee, the State of South Dakota will be referred to as "State." All references to the transcript of the jury trial shall be referred to as "JT" followed by the page number. The alleged victim is this matter, a minor, will be referred to by the initials "I.T.". All other documents within the settled record shall be referred to as "SR" followed by the appropriate number.

JURISDICTIONAL STATEMENT

On May 30, 2012, Mr. Bauer was indicted by a Pennington County Grand Jury with one count of first degree rape a violation of SDCL 22-22-1(1) and, in the alternative, one count of sexual contact with a child under thirteen a violation of SDCL 22-22-7 and 22-22-1.2(2) . SR 1. Each count alleged I.T. as the victim. *Id*. On March 7, 2013 a Pennington County jury returned a verdict of guilty on the first-degree rape count. JT 402. On May 24, 2013 the trial court sentenced Mr. Bauer to serve 30 years in the South

Dakota State Penitentiary. See Judgment at SR 212, also at Appendix B1-B2. The judgment of conviction was filed on May 30, 2013. *Id.*

Notice of appeal from the judgment of conviction was timely filed on June 6, 2013. SR 239. This appeal is brought as a matter of right pursuant to SDCL 23A-32-2.

STATEMENT OF THE LEGAL ISSUES

1. The trial court committed reversible error by failing to canvass Mr. Bauer regarding trial counsel's waiver of his right to a public trial.

   Mr. Bauer's trial counsel did not object to the courtroom closure; therefore, this issue was not addressed by the trial court.

   New York v. Hill, 528 U.S. 110, 120 S.Ct. 659, 145 L.Ed. 560 (1999). *Brookhart v. Janis,* 384 U.S. 1, 7–8, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966) *Gonzalez v. United States*, v. 553 U.S. 242, 128 S.Ct. 1765, 170 L.Ed. 616 (2008).

2. The trial court committed reversible error when it improperly closed the courtroom to the public during the alleged victim's testimony.

   The trial court closed the courtroom pursuant to the state's motion. The Court placed its findings on the record. JT 8. Mr. Bauer's trial counsel did not object to the closure.

   Waller v. Georgia, 67 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31(1984). *Presley v. Georgia*, 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.d 675 (2010). *State v. Rolfe*, 2013 S.D. 2, 825 N.W.2d 901.

3. Mr. Bauer's trial counsel rendered ineffective assistance of counsel by failing to object to the closure of the courtroom during the alleged victim's testimony.

   State v. Thomas, 2011 S.D. 15, 796 N.W.2d 706 *Strickland v. Washington,* 466 U.S. 668, 690, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984)).

STATEMENT OF THE CASE AND FACTS

Background facts of the alleged offense: At trial, I.T. testified that while she was spending the night at a friend's house for a birthday party, Mr. Bauer entered a room where she was laying down and that he digitally penetrated her. JT 30, 32, 34. In response, Mr. Bauer testified that he did not touch I.T. JT at 311. I.T. was nine years old at the time of the birthday party. JT 28.

Although DNA swab samples were collected from I.T., the samples were not tested. J.T. 262-63. Additionally, the State did not present any other type of physical or forensic evidence. I.T. was the only witness who testified to the alleged digital penetration.

The trial ultimately came down to the credibility of I.T.'s claim that she was penetrated by Mr. Bauer.

Trial proceedings related to courtroom closure: Prior to the commencement of trial, the State filed a motion seeking to close the courtroom while I.T. testified. SR 97. Apparently, trial counsel did not file any responsive pleading.

During the morning of the first day of trial, outside the presence of the jury, the trial court inquired about the State's motion seeking courtroom closure. The State confirmed that it was seeking closure while I.T. testified "…so that the child is the most comfortable a child can be in a setting like this, and that the fewer people in here, the less of a chilling effect there will be on her ability to recall and testify truthfully about the events for which she's here." JT 7. Defense counsel on several occasions informed the court that he had no objection and waived the taking of any testimony related to State's motion. JT 4, 7, 8. See, JT 4-9 for complete record related to closure, also reproduced at appendix C1-C7.

Later, after opening statements and in the presence of the jury, the State moved to close the courtroom to "all but the media and the State's victim assistant". JT 26. Defense counsel yet again informed the trial court that he had no objection. Id. The court then removed at least one spectator from the courtroom in the presence of the jury. JT 27.

At no point did the trial court canvass Mr. Bauer about his trial counsel's waiver of the Sixth Amendment right to public trial.

ARGUMENTS

1. The trial court committed reversible error by failing to canvass Mr. Bauer regarding trial counsel's waiver of his right to a public trial.

Summary: The precise question this issue presents is whether or not trial counsel has authority to waive a criminal defendant's right to a public trial without his client's consent. The Supreme Court of the United States has not answered this question. However, the Supreme Court has found that certain rights are "basic" and "fundamental" and cannot be waived by trial counsel without his client's approval (i.e. the right to a jury trial, the right to testify, and the right to plead not guilty).

The right to a public trial is a "basic fundamental right" of the highest order along with the right to a jury trial or the right to plead not guilty and belongs in same category as these rights; therefore, trial counsel should not be permitted to waive his client's right to a public trial without his client's consent.

Additionally, a violation of the Sixth Amendment right to a public trial is a structural error and therefore prejudice is not required to establish reversible error. The proper remedy for the Sixth Amendment violation that occurred in this case is a new jury trial on the grounds the violation occurred during a jury trial.

Standard of review: The waiver of a federally guaranteed constitutional right is controlled by federal law. *Brookheart v. Janis*, 384 U.S. 1, 4, 86 S.Ct. 1245, 1247 (1966). Given that trial counsel did not object to the courtroom closure, this issue is reviewed under the plain error standard. SDCL 23A-44-15. In this case, the Court is permitted to review this issue, as any error concerning a criminal defendant's Sixth Amendment right to a jury trial affects his substantial rights. *See Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed. 2d. 35 (1999) (recognizing that the depravation of the right to a public trial is structural error).

A. Does trial counsel have the authority to waive his client's Sixth Amendment right to a public trial without his client's express consent?

Legal Authority and Analysis: Although the Supreme Court has not addressed the precise question of whether or not counsel may waive a client's Sixth Amendment right to a public trial, the Court has frequently addressed the issue of waiver of constitutional rights. As a starting point, the law presumes against the waiver of a constitutional right. *Glasser v. United States*, 315 U.S. 60, 70-71, 62 S.Ct. 457, 464-465, 86 L.Ed. 680, (1942). Ordinarily, in order for a waiver to be effective, the record must clearly established that there was "an intentional relinquishment or abandonment of a known right or privilege" *on the part of the defendant*. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938) (emphasis added).

Although counsel can waive certain rights on behalf of a client, other rights are "basic" and "fundamental" and may only be waived by the defendant himself. The Supreme Court has summarized the applicable law in this area as follows:

> What suffices for waiver depends on the nature of the right at issue. '[W]hether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the

> defendant's choice must be particularly informed or voluntary, all depend on the right at stake.' *United States v. Olano,* 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). For certain fundamental rights, the defendant must personally make an informed waiver. See, *e.g., Johnson v. Zerbst,* 304 U.S. 458, 464–465, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) (right to counsel); *Brookhart v. Janis,* 384 U.S. 1, 7–8, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966) (right to plead not guilty). For other rights, however, waiver may be effected by action of counsel. 'Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial.' *Taylor v. Illinois,* 484 U.S. 400, 417–418, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). As to many decisions pertaining to the conduct of the trial, the defendant is 'deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney." ' *Link v. Wabash R. Co.,* 370 U.S. 626, 634, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) (quoting *Smith v. Ayer,* 101 U.S. 320, 326, 25 L.Ed. 955 (1880)). Thus, decisions by counsel are generally given effect as to what arguments to pursue, see *Jones v. Barnes,* 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), what evidentiary objections to raise, see *Henry v. Mississippi,* 379 U.S. 443, 451, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965), and what agreements to conclude regarding the admission of evidence, see *United States v. McGill,* 11 F.3d 223, 226–227 (C.A.1 1993). Absent a demonstration of ineffectiveness, counsel's word on such matters is the last." *Ibid.* *Gonzalez v. United States*, v. 553 U.S. 242, 249, 128 S.Ct. 1765, (2008), citing *New York v. Hill*, 528 U.S. 110, 114-115, 120 S.Ct. 659 (1999).

The question then is whether the Sixth Amendment right to a public trial is a basic fundament right as described in *New York v. Hill, supra*.

The Supreme Court has not strictly defined the term "basic fundamental right" in this context. However, the Court has found the following rights to be basic and fundamental and thus may not be waived by counsel acting alone: 1) the right to persist in a not guilty plea, *Brookhart v. Janis,* 384 U.S. 1, 7–8, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966); 2) the right to representation by counsel, *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); 3) the right to decline counsel and represent one's self, *Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); 4) the right to

elect between testifying at trial or declining to do so, *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (internal citation omitted); 5) the right to a jury trial, *Id.*; 6) the right to decide whether or not to appeal. *Id.*

The right to a public trial is of the same character and importance as the other fundamental rights listed above, this Court should therefore find the right to a public trial to be a fundamental right that may not be waived by counsel without a defendant's consent.

Turning to the nature and importance of the right to a public trial, the Supreme Court has found that the right to a public trial is implicit in the concept of ordered liberty and has incorporated this right into the Fourteenth Amendment making it applicable to the states. *See In re Oliver*, 333 U.S. 257, 273, 68 S.C.t 499, 92 L.Ed. 682 (1948). "It is 'the law of the land' that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a *public* tribunal." *In re Oliver* at 278 citing Chambers v Florida, 309 U.S. 227, 236, 237, 60 S.Ct. 472, 477, 84 L.Ed. 716. (emphasis added).

Additionally, the Supreme Court has frequently written on the great importance of the public trial guarantee including:

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions. *In re Oliver*, 333 U.S. 257, 270, n. 25, 68 S.Ct. 499, 506 n. 25, 92 L.Ed. 682 (1948), quoting T Cooley, Constitutional Limitations 647 (8th ed. 1927).

The Supreme Court has also found that a public trial encourages witnesses to come forward and that it also discourages perjury. *Waller v. Georgia*, 467 U.S. 39, 46, 104 S.C.t 2210, 81 L.Ed.2d 31 (1984). Additionally:

> Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings. *Estes v. Texas*, 381 U.S. 532, 588, 85 S.Ct. 1628, 1662, 14 L.Ed. 2d 543 (1965) (Harlan, J. concurring).

The Court has also frequently acknowledged this nation's disdain for the notorious Star Chamber's practices of conducting portions of trial in secret. *See In re Oliver*, 333 U.S. 257, 273, 68 S.C.t 499, 92 L.Ed. 682 (1948). (Some authorities have said that trials in the Star Chamber were public, but that witnesses against the accused were examined privately with no opportunity for him to discredit them.) *Watts v. State of Ind.,* 338 U.S. 49, 54, 69 S.Ct. 1347, 1350, 93 L.Ed. 1801 (1949) (Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end.)

More importantly, the Court has also held that the right to a public trial is so vital, that if a courtroom is improperly closed, the error that results is structural in nature. *Arizona v. Fulminante,* 499 U.S. 279, 310, 111 S.Ct. 1246, 1265, 113 L.Ed.2d 302 (1991). *See also Waller v. Georgia,* 467 U.S. 39, 49 n. 9, 104 S.Ct. 2210, 2217 n. 9, 81 L.Ed.2d 31 (1984). (" 'Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." (Internal citations omitted).

Regarding the significance of structural error the Court has written:

> Indeed, we have found an error to be "structural," and thus subject to automatic reversal, only in a "very limited class of cases." *Johnson v. United States,* 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (citing *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (complete denial of counsel); *Tumey v. Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (biased trial judge); *Vasquez v. Hillery,*

> 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (racial discrimination in selection of grand jury); *McKaskle v. Wiggins,* 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (denial of self-representation at trial); *Waller v. Georgia,* 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (denial of public trial); *Sullivan v. Louisiana,* 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (defective reasonable-doubt instruction)). *Neder v. United States*, 527 U.S. 1, 8, 119 S.Ct. 1827, 1833, 144 L.Ed.2d 34 (1999).

In contrast to the structural error aspect of the right to a public trial, the Supreme Court in recent years has found that counsel can waive a defendant's right to have a federal district judge preside during *voir dire* and allow a magistrate judge to do so, even without the express consent of his client. *Gonzalez v. United States*, 553 U.S. 242, 128 S.C.t 1765, 170 L.Ed.2d 616 (2008). Additionally, the Supreme Court has ruled that counsel may waive a client's right to trial within 180 days under the Interstate Agreement on Detainers, without his client's express consent. *New York v. Hill,* 528 U.S. 110, 120 S.Ct. 659, 145 L.Ed.2d 659 (1999). In support of both of these holdings the Court recognized:

> [D]ecisions by counsel are generally given effect as to what arguments to pursue, see *Jones v. Barnes,* 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), what evidentiary objections to raise, see *Henry v. Mississippi,* 379 U.S. 443, 451, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965), and what agreements to conclude regarding the admission of evidence, see *United States v. McGill,* 11 F.3d 223, 226–227 (C.A.1 1993). *Gonzalez v. United States*, v. 553 U.S. 242, 249, 128 S.Ct. 1765 (2008), citing *New York v. Hill*, 528 U.S. 110, 114-115, 120 S.Ct. 659, (1999).

Using the Court's analysis from *Gonzalez supra* as a benchmark, clearly, the right to public trial is more "basic" and "fundamental" then the statutory right to have a trial within 180 days or the right to have a judge preside over jury selection. Additionally, the right to a public trial is much more than a mere tactical decision regarding evidentiary objections or stipulations concerning evidence.

To the contrary, the right to a public trial belongs to the defendant and it is his constitutional guarantee that ensures that the "public may see he is fairly dealt with and not unjustly condemned". Clearly, the right to a public trial is a right of the first magnitude and it is just as important, basic, and fundamental as the right of a defendant to select between a jury trial or a court trial, or his decision on whether or not to testify. Counsel should not be permitted to "tactically waive" such an important right without his client's consent.

B. What is appropriate remedy for the Sixth Amendment violation in this case?[1]

Legal analysis and authority: If the Court holds that Mr. Bauer's trial counsel did not have authority to waive his right to a public trial, without his consent, the question then becomes: "what is the remedy for a violation of the Sixth Amendment right to a public jury trial?" In *State v. Rolfe*, 2013 S.D. 2, 825 N.W.2d 901, this Court found that Mr. Rolfe's right to a public jury trial was violated when the trial court closed the courtroom while the alleged victim testified. *Rolfe* at ¶ 26. However, this Court declined to grant Mr. Rolfe's request for a new trial and held that the appropriate remedy for the Sixth Amendment violation was to remand the action with instructions "to hold an inquiry consistent with [the Court's] opinion." *Id*. This Court cited *Goldberg v. U.S.*, 425 U.S. 94, 111, 96 S.Ct. 1338, 1348, 47 L. Ed. 2d 603 (1976) in support of its holding. However, with respect, the *Goldberg* decision addressed the issue of a discovery violation, as opposed to a violation of the Sixth Amendment right to public trial.

A review of controlling and persuasive case law demonstrates the appropriate remedy for a violation of the Sixth Amendment right to public trial is a new trial as

[1] The issue is also before Court in *State v. Rolfe*, appeal # 26724. As both appeals present essential the same issue, both briefs are nearly identical on this issue.

opposed to any other remedy. Firstly, a review of *Waller v. Georgia*, 67 U.S. 39, 104 S.Ct. 2210 (1984) and *Presley v. Georgia*, 558 U.S. 209, 130 S.Ct. 721 (2010) establish that the appropriate remedy for a Sixth Amendment violation is a new trial. Secondly, an overwhelming majority of courts that have reviewed this issue have found that the proper remedy for a Sixth Amendment violation is a new trial.

Waller and Presley: The two seminal United States Supreme Court decisions on point to answer the question of what is the proper remedy for a violation of the Sixth Amendment right to a public trial are *Waller v. Georgia* and *Presley v. Georgia supra*. For a proper reading of *Waller* and *Presley* it must be kept in mind that a violation of the Sixth Amendment right to a public trial is a structural defect." *Arizona v. Fulminante,* 499 U.S. 279, 310, 111 S.Ct. 1246, 1265, 113 L.Ed.2d 302 (1991). A "structural defect affect[s] the *framework within which the trial proceeds*, rather than simply an error in the trial process itself"; therefore a structural error does not require a showing of prejudice in order to establish reversible error. *Id*. (emphasis added).

In *Waller*, the United States Supreme Court found that a trial court violated a criminal defendant's right to public jury trial when the courtroom was closed to the public during a suppression hearing. On appeal, the defendant sought a new jury trial as the remedy for the violation. However, the Supreme Court ordered that a new suppression hearing take place rather than a new jury trial based on the fact that the violation occurred during a suppression hearing as opposed to during a jury trial. The Court wrote:

> The question that remains is what relief should be ordered to remedy this constitutional violation. Petitioners argue that a new trial on the merits should be ordered. The Solicitor General, appearing on behalf of the United States as *amicus curiae*, suggests that at most only a new

> suppression hearing be directed. The parties do not question the consistent view of the lower federal courts that the defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee. [Footnote 9 appears at this point in the Court's opinion.] We agree with that view, but we do not think it requires a new trial *in this case*. Rather, the remedy should be appropriate to the violation. If, after a new suppression hearing, essentially the same evidence is suppressed, a new trial presumably would be a windfall for the defendant, and not in the public interest. *Waller* at 49 (emphasis added).

The Court's language "appropriate to the violation" and "in this case" is particularly important because it strongly implies that the remedy for a Sixth Amendment violation is tied to the type of hearing where the violation occurred. For example, if the violation occurs at a suppression hearing, a new suppression hearing is granted. If the violation occurs during a jury trial, a new jury trial should be granted.

In support of this reading, at footnote 9 in *Waller*, the Supreme Court cited *State v. Sheppard*, 182 Conn. 412, 418, 438 A.2d 125, 128 (1980) and *People v. Jones*, 47 N.Y.2d 409, 416, 418 N.Y.S.2d 359, 364, 391 N.E.2d 1335, 1340 (1979). Both of these decisions found violations of a criminal defendant's Sixth Amendment right to a public trial during the course of a jury trial. Both courts ordered new jury trials as the remedy. Additionally, the Supreme Court cited *United States ex rel. Bennett v. Rundle*, 419 F.2d 599 (3rd Cir.1970) a case where the Third Circuit found a violation of a defendant's Sixth Amendment right to public trial where a suppression hearing was closed to public. The Third Circuit ordered a new suppression hearing as the remedy.

Importantly, in *Waller*, the Supreme Court did not remand the case back to a lower court to have the record supplemented regarding the merits of the courtroom closure. To the contrary, the Court simply ordered that a new suppression hearing take place to remedy the structural defect.

The Supreme Court's decision in *Presley* also supports the proposition that a new trial is the mandatory remedy that must be granted where a Sixth Amendment violation occurs during a jury trial. In *Presley*, the Court found a violation of a criminal defendant's Sixth Amendment right to a public trial where the trial court removed the defendant's uncle from the courtroom during *voir dire*. The Supreme Court found that the trial court failed to *sue sponte* consider reasonable alternatives to the courtroom closure which is one of the factors outlined for proper courtroom closure in *Waller*.

> Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials. Nothing in the record shows that the trial court could not have accommodated the public at Presley's trial. Without knowing the precise circumstances, some possibilities include reserving one or more rows for the public; dividing the jury venire panel to reduce courtroom congestion; or instructing prospective jurors not to engage or interact with audience members. *Presley* at 215.

Specifically, the Supreme Court reversed the judgment of the Supreme Court of Georgia and remanded the case for further proceedings not inconsistent with the Court's opinion. *Id*. at 216.

Even though the Supreme Court was without "know[ledge] of the precise circumstances" *Id*., the Supreme Court did not order the case remanded for further inquiry into the merits of the courtroom closure. Had the Supreme Court believed that the structural defect of courtroom closure could be remedied by a rehearing on the merits, the Supreme Court would have announced such.

Importantly, after the Supreme Court remanded the conviction in *Presley,* the Supreme Court of Georgia and Court of Appeals of Georgia ordered a new trial based upon their reading of the Supreme Court's decision. *Presley v. State*, 695 S.E.2d 68, 287 Ga. 34 (2010), and *Presley v. State*, 706 S.E.2d 103, 307 Ga.App. 706 (2011).

Under a plain reading of *Waller* and *Presley* the mandated remedy for a Sixth Amendment violation is clear: A *new hearing* of the type where the violation occurred. As the Sixth Amendment violation in this case occurred during the jury trial, pursuant to *Waller* and *Presley,* the only cure for this structural defect is a new trial.

Legal analysis as to why the remedy must be a new trial: When a violation of the Sixth Amendment occurs during a jury trial, the only legally appropriate remedy is a new trial. Beyond the holding in *Waller*, the Supreme Court has recognized that a violation of the Sixth Amendment right to a public trial is a structural error and has written: " '[w]ithout these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.' " *Fulminante,* 499 U.S. at 310, 111 S.Ct. at 1265 (quoting *Rose v. Clark,* 478 U.S. 570, 577–78, 106 S.Ct. 3101, 3106, 92 L.Ed.2d 460 (1986)).

As structural error undermines the trial, the resulting verdict cannot "reliably serve its function as a vehicle for determination of guilt or innocence" remanding the case for further inquiry cannot restore confidence or reliability to the verdict. To the contrary, once a structural error has been found, the only way to now have a reliable determination of guilt or innocence is to have a new trial without the structural error.

While this brief contains numerous authorities that at least implicitly recognize this analysis, a minority of appellate courts, under certain circumstances, have found the proper remedy for a Sixth Amendment violation in some instances should be a remand of the case for a post-hoc articulation of the reasoning for the trial court's decision. *See State v. McRae*, 494 N.W.2d 252, 260 (Minn. 1992), *accord State v. Rollins*, ___ N.C.

App. ___, 729 S.E.2d 73 (2012). Cases of this line seem to hold that a structural constitutional error can be cured by new findings that support the courtroom closure. *Id.* at 77-79.

This split in authority was most recently addressed by the Supreme Court of Kansas in *State v. Cox*, ___ Kan. ___, 304 P. 2d 327 (2013). In *Cox*, the trial court "wholesale" closed the courtroom while pictures of an alleged rape victim's genitals were being published to the jury. *Id.* at 332. On review, the Supreme Court of Kansas found that the courtroom closure was conducted in violation of the defendant's right to a public trial on the grounds the trial court did not adequately address the factors set forth by the Court in *Waller*. When turning to the issue of the proper remedy, the Supreme Court of Kansas rejected the prosecution's argument that the case should be remanded to allow the trial court an opportunity to supplement the record. The Supreme Court of Kansas wrote:

> We also do not find persuasive the reasoning of a minority of our sister state courts holding that failure to make findings to support closure can be remedied by remand. *State v. McRae*, 494 N.W.2d 252, 260 (Minn.1992) (granting new trial for combination of errors; suggesting that "[i]f a remand for a hearing on whether there was a specific basis for closure might remedy the violation of closing the trial without an adequate showing of the need for closure," then initial remedy remand, not retrial); *State v. Rollins*, —— N.C.App. ——, 729 S.E.2d 73, 77–79 (2012) (noting split of authority concerning remedy; state statute permits exclusion of public during victim's testimony in sex crime case). These cases were focused on finding an appropriate remedy for a trial court's failure to make adequate findings to justify closure under the fourth prong of the *Waller* test. Here, the district judge failed to meet any of *Waller*'s requirements. Where there has been structural error in the trial, we will not retain jurisdiction or remand for a district judge to manufacture an after-the-fact rationale that is constitutionally defensible. There is no cure short of reversal and remand for new trial here. *Id.* at 335.

Other courts have also specifically rejected a prosecution's request to remand a case for further supplementation of the record in the face of a Sixth Amendment

violation. *See Carter v. State*, 356 Md. 207, 224, 738 A.2d 871, 880 (1999), *Okonkwo v. Lacy*, 104 F.3d 21, 26 (2nd Cir.1997) (Rev'd on other grounds), *State v. Klem*, 438 N.W.2d 798, 802 (N.D. 1989), *State v. Bone-Club*, 128 Wash.2d 254, 906 P.2d 325 (1995) (disproving appellate court engaging in post-hoc analysis).

In Mr. Bauer's case, the courtroom was closed without his express consent. If the court finds that closure was improper based on lack of trial counsel's authority, the only available remedy to cure this structural error is a new trial.

Additional Persuasive authority: The appendix of this brief contains citations to additional persuasive authorities regarding how other courts have addressed the issue of the question of the proper remedy in the context of a violation of the right to a public trial. The overwhelming majority of appellate courts that have addressed this issue have found that the proper remedy is a new trial, as opposed to any other remedy.

2. <u>The trial court committed reversible error when it improperly closed the courtroom to the public during the alleged victim's testimony</u>.

Summary: The trial court is charged with an independent duty to protect both the defendant's and the public's right to a public trial. Before any courtroom is closed, the trial court must first find that a compelling interest exists to close the courtroom. This issue will also require the Court to address the question of partial courtroom closure versus complete or total closure as the trial court found the closure that took place was only a partial closure on the grounds that the media was not excluded.

In this case, neither the State nor the trial court properly identified a compelling interest. Therefore, Mr. Bauer's conviction should be reversed and remanded for new trial.

Standard or review: This Court reviews a trial court's findings of fact under the "clearly erroneous" standard. A trial court's application of law is reviewed *de novo*. *Rapid City Journal v. Delaney*, 2011 S.D. 55, ¶ 9, 804 N.W.2d 388, 392.

Legal analysis and authority Regarding Complete or Partial Closure[2]: Since *Waller*, several appellate courts have made a distinction between the courtroom closure that was addressed by *Waller* and what has been termed a "partial closure". The appellate courts accepting the partial closure doctrine have found that in the case of a partial closure a "significant interest" test is applied as opposed to the "overriding interest" test mandated by the Supreme Court in *Waller*. *See, e.g., State v. Garcia*, 561 N.W.2d 599, 605 (N.D. 1997) (holding that when a court orders a partial closure as opposed to a full closure, a "substantial reason" can justify the courtroom closure.)

At trial, the State argued, and the trial court found, that the courtroom was only partially closed, on the grounds that representatives of the media were not barred from the courtroom. JT 7-8. However, this Court will need to decided if the doctrine of partial closure is viable under the Supreme Court's controlling authority in this area. Moreover, Mr. Bauer respectfully maintains that the courtroom in this case was completely closed as opposed to only partially closed; therefore the *Waller* compelling interest test is applicable. Alternatively, as will be addressed in the next section, even under the significant interest test, the State still failed to establish the closure was proper.

Turning to the issue of the doctrine of partial closure, this Court in *dicta* addressed the issue in *State v. Rolfe,* 2013 S.D. 2, 825 N.W.2d 901. However, the Court

[2] This issue is also identical to the issue presented in Mr. Rolfe's second appeal (# 26724), therefore this section of this brief is also substantially similar to Mr. Rolfe's on this issue.

did not provide a specific determination on this issue. This case presents the occasion for this Court to specifically address the partial closure doctrine.

The first issue this Court will need to address is whether or not the concept of a partial closure is constitutionally viable. The Supreme Court has never addressed this issue, let alone adopted the doctrine. Additionally, several appellate courts have specifically rejected the concept. *See, Guzman v. Scully*, 80 F.3d 772 (2nd Cir. 1996); *State v. Mahkuk*, 736 N.W.2d 675 (Minn.2007) (declining to apply different tests in partial closure context).

Alternatively, if this court believes that the Supreme Court will adopt this doctrine, this Court must then go on to articulate the standard or test whereby a partial closure can be distinguished from a complete closure. In *Rolfe*, this Court cited a number of cases that addressed the issue. Specifically, this Court cited *Douglas v. Wainwright*, 739 F.2d 531 (11th Cir. 1984) (per curiam), cert. denied, 469 U.S. 1208, 105 S.Ct. 1170, 84 L.Ed. 2d 321 (1985):

> The most important distinguishing factor is that *Waller* involved a total closure, with only the parties, lawyers, witnesses, and court personnel present, the press and public specifically having been excluded, while *Douglas* entailed only a partial closure, as the press and family members of the defendant, witness, and defendant were all allowed to remain. Moreover, the closure in *Waller* was for the entire seven days of the suppression hearing although the playing of the disputed tapes lasted only two-and-one-half hours, whereas in *Douglas* the partial closure was limited to the one witness's testimony. *Douglas,* therefore, presented this court with a fact situation different and unique from that faced by the *Waller* Court. *Rolfe* at n. 2 citing 739 F.2d 531, 532 (11th Cir.1984).

Importantly, in the *Douglas* case, the Eleventh Circuit in finding that only a partial closure took place, noted that not only was the press allowed to remain in the courtroom, but also the defendant's family members as well as the family members of the

testifying witness and the defendant. *Douglas* at 532.

Other forums have defined a "partial closure" as being "one that generally 'results in the exclusion of certain members of the public while other members of the public are permitted to remain in the courtroom.'" *Garcia*, 561 N.W.2d at 605 (*citing State v. Sams*, 802 S.W.2d 635, 639-640 (Tenn. Ct. Crim. App. 1990). Another stated it as occurring "where a judge has excluded spectators during a witness's testimony for a justified purpose. *United States v. Sherlock*, 962 F.2d 1349, 1356 (9th Cir.1992).

Examples of courts finding a partial closure include: *United States v. Osborne*, 68 F.3d 94, 99 (5th Cir.1995) (affirming rejection of total closure where all spectators were allowed to remain while the minor victim testified, except the victim's aunt—defendant's sister—who may have traumatized the minor victim); *State v. Turrietta*, 258 P.3d 474 (N.M. 2011) (affirming partial closure where two gang members who had previously threatened a witness were excluded from the courtroom, while allowing defendant's family members to remain); *United States v. Farmer*, 32 F.3d 369 (8th Cir.1994) (a "partial closure" had properly occurred where rape victim was a minor who feared defendant and his family); *Sherlock, supra* (finding that the trial court had properly declined to completely close the courtroom, but rather had only excluded defendant's family—a ruling not made known to the jury—during victim's testimony after the court had observed those family members making faces at victim while she testified); *Garcia, supra* (partial closure affirmed where public was excluded during minor's testimony but where defendant's family was allowed to remain, and where a cautionary instruction was read to the jury.) *Ex Parte Easterwood (In re Todd Olen Easterwood v. State of Alabama)*, 980 So.2d 367 (2007) (rejecting request to find partial closure and writing: "A

partial closure usually contemplates that the defendant's family, friends, and members of the press will remain in the courtroom.") *Compare*, *United States v. Davis*, 890 F2d1105 (10th Cir.1989) (conviction reversed after total, rather than partial, closure had taken place where closure order did not allow for a member of the press or the defendant's family to remain while minor rape-victim testified).

If this Court chooses to adopt the doctrine of partial closure, it should do so by adopting the standard most likely to pass the Supreme Court's Constitutional review. Such a standard would carefully protect the fundamental right of both the public's and a defendant's right to a public trial, while at the same time, allowing a courtroom judge to remain in control of the courtroom, with the understanding that a courtroom can still be closed under the *Waller* test.

Seemingly, the best articulation of such a standard was announced by the Ninth Circuit in *United States v. Sherlock*, 962 F.2d 1349, 1356 (9th Cir.1992), where that court articulated a partial closure as being: "where a judge has excluded spectators during a witness's testimony for a justified purpose." In other words, a trial court may remove specific spectators for cause, as opposed to generally closing the courtroom to all members of the public with some exceptions.

This standard allows trial judges to maintain control of the courtroom by utilizing the "significant interest test" where the trial judge needs to exclude certain individuals as opposed to closing the courtroom to "all persons" such as provided in SDCL 23A-24-6. Importantly, should the trial judge need to completely close the courtroom, the option is still available under *Waller*.

Under this proposed standard, a complete closure generally excludes all members of the public unless the court finds an exception. Therefore, under the proposed standard SDCL 23A-24-6 would be a statute permitting complete closure as opposed to limited closure. This would seem to be in keeping with legislature's intent in passing the statute.

The State's position is that if a member of the media, and the personal supporters of the alleged victim are allowed to remain in the courtroom during the closure, only a partial closure has taken place. However, allowing a member of the media to remain in the courtroom does not adequately protect a defendant's right to a public trial. Under very similar factual circumstances appellate courts have reversed convictions and granted new trials. *State v. Hightower*, 376 N.W.2d 648 (Iowa 1985) (new trial granted where trial court cleared courtroom of all spectators except alleged victim's "support crew" including her parents and counselor); *State v. Klem*, 438 N.W.2d 798 (N.D.1989) (new trial ordered where closure removed all spectators except for a member of the media); *People v. Holveck*, 171 Ill.App3d 38, 121 Ill. Dec. 25, 524 N.E.2d 1073 (1988) (new trial ordered where closure involved all spectators "except the media"); *State v. Sheppard*, 182 Conn. 412, 418, 438 A.2d 125, 128 (1980) (new trial ordered where closure excluded all members of the

public except the mother of complaining witness and the press); *U.S. v. Kobli*, 172 F.2d 919 (3rd Cir. 1949) (granting *habeas corpus* relief and ordering new trial where courtroom was closed of all spectators except a member of the press). *Compare, State v. Tucker*, 231 Ariz. 125, 290 P.3d 1248 (2012) (trial courts closing defendant's trial to the public with the exception of the press, due to concerns regarding spectators' alleged

misconduct involving the use of cellular telephones, violated defendant's rights to public trial.) *Compare, Thompson v. People of the State of Colorado*, 156 Colo. 416, 399 P.2d 776 (1965) (reversing conviction where defendant was denied constitutional right to public trial where spectators, including parties' friends but not including press, court officials, and parties' relatives, were excluded.)

Under the Standard that has been advanced in this brief, the courtroom was obviously completely closed when I.T. testified. The record clearly reflects that at least one spectator was removed from the courtroom without a specific reasons related to the spectator.

Applicable law regarding courtroom closure: Considerations of an alleged victim's age and the nature of the offense involved support a closure only when they form part of a careful case-by-case analysis of each individual situation. *Rolfe* at ¶ 19. These types of factors do not justify an automatic, general exclusion of the public in every case involving a young victim even when the case involves sordid or heinous allegations. Thus, the Supreme Court rejected a Massachusetts statute requiring mandatory courtroom closure in cases involving minor victims of sexual crimes. *Globe Newspaper Co. v. Superior Court for Norfolk County,* 457 U.S. 596, 607-08, 102 S.Ct. 2613, 2620-21, 73 L.Ed.2d 248 (1982) (mandatory blanket closure violates First Amendment right to access to criminal proceedings); *see Waller v. Georgia,* 467 U.S. at 46, 104 S.Ct. at 2215 ("[T]he explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public.")

Before a courtroom may be closed:

> [1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader

> than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure. *Waller, supra,* at 48, 104 S.Ct. at 2216-17; *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501, 509-10, 104 S.Ct. 819, 823-24, 78 L.Ed.2d 629 (1984).

Argument: The State has failed to establish that the *Waller* factor of compelling interest has been met. In this case, the State's primary justification for the closure was,

> …so that the child is the most comfortable a child can be in a setting like this, and that the fewer people in there, the less of chilling effect there will be on her ability to recall and testify truthfully about the events for which she's here. JT 7.

However, this type of concern does not rise to the level of a compelling interest (or significant interest) sufficient to justify the closure of the courtroom.

Numerous appellate courts that have reviewed this precise issue have found that the ordinary hardships of a child testifying, bad as they may be, do not justify an automatic, general exclusion of the public in every case involving a young victim, even where sordid or heinous allegations are involved. Moreover, these courts have found that the typical embarrassment associated with a child testifying and the sensitive nature of the allegations is not sufficient to justify a closure of the courtroom. *See State v. Hightower*, 376 N.W.2d 648, 650 (Iowa 1985) ("While we are very aware of the embarrassment and sensitivity of a ten-year-old testifying, mere reference to the 'sensitive nature of the testimony' will not be sufficient in denying the defendant his constitutional right to a

public trial.") *State v. Klem*, 438 N.W.2d 798, 802 (N.D. 1989) ("The trial court's post hoc rationalization is similarly unavailing here. While the child victim's testimony was of a sensitive nature, it is apparent that the trial court's post hoc rationale for why it would

have closed the trial had it held a hearing is insufficient.") *People v. Holveck*, 171 Ill.App.3d 38, 121 Ill. Dec.25, 524 N.E.2d 1073, 1083 (1988) (rejecting closure on the basis of the "unnerving effect" on the children if the courtroom were crowded and the state's wanting to make the unpleasant experience of testifying as pleasant as possible for them.) *State v. Cote*, 143 N.H. 368, 725 A.2d 652 (1999) (alleged victim's fear of defendant was insufficient to exclude public form post-trial hearing). *See also*, *Davis v. Reynolds*, 890 F.2d 1105, 1110 (10th Cir.1989)

> [t]he prosecutor's best articulation of the government's interest in the closure of Davis's trial was that "we are trying to save [the witness] some problem and embarrassment." Although the prosecutor hinted at some vague psychological problems that could possibly accompany the witness's testifying, it is not clear from the record what specific problems were foreseen, why they would have occurred, or whether those problems would in any way be ameliorated by closing the courtroom.

In this case, the State did not present any concerns related to I.T. testifying beyond those that are typical in any case where a 10-year-old child is testifying about rape allegations.

Ultimately, the State sought the courtroom closure in an attempt to make the courtroom more comfortable for I.T. while she testified. JT 7. However, this interest is not a compelling one. Therefore, Mr. Bauer is entitled to a new trial based on the improper closure.

3. Mr. Bauer's trial counsel rendered ineffective assistance of counsel by failing to object to the closure of the courtroom during the alleged victim's testimony.

Summary: Without objection, Mr. Bauer's trial counsel allowed the courtroom to be closed while the alleged victim testified. To compound the issue, trial counsel also failed to object to a member of the public being removed from the courtroom in the presence of the jury. This closure, under these circumstances, presented no conceivable benefit to Mr. Bauer. To the contrary, this closure prejudiced his fundamental right to a public trial and to a fair trial. Trial counsel was so ineffective in this regard that his performance fell below an objective standard of reasonableness. Mr. Bauer is therefore, entitled to a new trial.

Standard of review: Where an issue has not been preserved by objection at trial, this Court's review is limited to whether the trial court committed plain error. SDCL 23A-44-15, *see also*, *State v. Bowker*, 2008 SD 61, ¶ 45, 754 N.W.2d 56, 69.

Additionally, this Court will not ordinarily review a claim of ineffective assistance of counsel on direct appeal. *State v. Arabie,* 2003 S.D. 57, ¶ 20, 663 N.W.2d 250, 256. This rule is in place to allow trial counsel the opportunity to explain or defend his actions and to provide this Court with a complete record for review. This Court will "depart from this principle only when trial counsel was 'so ineffective and counsel's representation so casual as to represent a manifest usurpation of [the defendant's] constitutional rights.' " *Id.* (quoting *State v. Dillon (Dillon I),* 2001 S.D. 97, ¶ 28, 632 N.W.2d 37, 48 (quoting *State v. Hays,* 1999 S.D. 89, ¶ 14, 598 N.W.2d 200, 203)). Such a situation is presented here.

Legal analysis and authority: This Court recently addressed an ineffective assistance of counsel claim on direct appeal in *State v. Thomas*, 2011 S.D. 15, 796

N.W.2d 706. In *Thomas*, the Court succinctly stated the law regarding ineffective assistance of counsel:

> To be entitled to relief on a claim of ineffective assistance of counsel, a defendant must show that his counsel provided ineffective assistance and that he was prejudiced as a result. *Steichen,* 2009 S.D. 4, ¶ 24, 760 N.W.2d at 392. To establish ineffective assistance, a defendant must show that counsel's representation fell below an objective standard of reasonableness. *Dillon v. Weber (Dillon II),* 2007 S.D. 81, ¶ 7, 737 N.W.2d 420, 424. The question is whether counsel's representation "amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington v. Richter,* —— U.S. ——, 131 S.Ct. 770, 788, 178 L.Ed.2d 624 (2011) (quoting *Strickland v. Washington,* 466 U.S. 668, 690, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984)). "There is a strong presumption that counsel's performance falls within the wide range of professional assistance and the reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all circumstances." *Steichen,* 2009 S.D. 4, ¶ 25, 760 N.W.2d at 392–93. *Thomas* at § 21.

In *Thomas,* this court addressed the failure of trial counsel to request appropriate jury instructions regarding accomplice liability. This Court reversed the conviction in part due to it's finding that "counsel [could not] claim that he withheld a request for a cautionary instruction as part of a legitimate trial strategy." *Id*. at § 25. The Court also found that a proper cautionary instruction was particularly important due to the fact that the jury's decision was based almost entirely upon a credibility dispute between witnesses.

Similarly, in Mr. Bauer's case, the jury was called upon to determine the case based upon the credibility of I.T.'s claims against Mr. Bauer, who denied them while testifying. Given that the issue for the jury in this case was to determine credibility, there was possible benefit that trial counsel could have obtained on Mr. Bauer's behalf by allowing the courtroom to be closed.

SDCL 23A-24-6, the statute the State cited in support of the closure, is designed for the alleged victim's benefit. The State argued that the Courtroom needed to be closed to allow for I.T.'s comfort and to avoid the chilling aspect of a public trial. JT 7. Although the trial court made reference to the closure also being to Mr. Bauer's benefit (JT 8), nothing in the record supports this assertion. Clearly Mr. Bauer received no benefit from the closure, especially in light of the observation that as a general rule judges, lawyers, witnesses, and jurors "will perform their respective functions more responsibly in an open court than in secret proceedings." *Estes v. Texas*, 381 U.S. 532, 588, 85 S.Ct. 1628, 1662, 14 L.Ed. 2d 543 (1965) (Harlan, J. concurring).

Not only was Mr. Bauer prejudiced by the closure itself, he was also prejudiced by the fact the courtroom was cleared of spectators in the presence of the jury. JT 26-7. Allowing the courtroom to be cleared in the jury's presence allowed them to conclude that I.T. was so traumatized or victimized by Mr. Bauer that she required special circumstances to be able to testify. This gave the appearance that the trial court believed I.T.'s claims or least otherwise supported her. In other words, the trial court did not treat I.T. as an *alleged* victim; it treated her as though she was a victim.

Additionally, allowing the courtroom to be closed in front of the jury also placed special emphasis on I.T.'s testimony over and above Mr. Bauer's as the courtroom was not closed while he testified. I.T. received special consideration to accommodate her while Mr. Bauer did not. This issue is particularly important in this case given that the trial largely came down to a question of credibility between I.T. and Mr. Bauer.

Trial counsel should have objected to the closure, but barring that, counsel should have requested that the public not be dismissed while the jury was in the courtroom. Mr.

Bauer's trial counsel's failure to object to the closure or in the very least to request that the courtroom be cleared outside the presence of the jury amounted to incompetence under prevailing professional norms similar to trial counsel's omission in *Thomas, supra*.

CONCLUSION

Based on the forgoing Mr. Bauer's conviction should be reversed and a new trial should be granted.

REQUEST FOR ORAL ARGUMENT

Mr. Bauer respectfully requests oral argument on all issues.

Dated this _____ day of October, 2013.

GREY LAW

_____

Ellery Grey
909 St. Joseph Street, Suite 555
Rapid City, SD 57701
(605) 791-5454

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL # 26719

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

v. CERTIFICATE OF SERVICE

JEREMY BAUER,
Defendant and Appellant.

The undersigned hereby certifies that he served two true and correct copies of Brief of Defendant/Appellant Jeremy Bauer upon the persons herein next designated all on the date shown by mailing said copies in the United States Mail, first-class postage prepaid, in envelopes addressed to said addresses; to wit:

Marty Jackley
Attorney General
1302 E. Hwy 14, Suite 1
Pierre, SD 57501

Mark Vargo
Pennington County State's Attorney
300 Kansas City Street, Suite 400
Rapid City, SD 57701

Which addresses are the last known addresses of the addressees known to the subscriber.

Dated this _____ day of October, 2013.

GREY LAW

_____
Ellery Grey
909 St. Joseph Street, Suite 555
Rapid City, SD 57701
(605) 791-5454

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL #26719

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

v. CERTIFICATE OF COMPLIANCE

JEREMY BAUER,
Defendant and Appellant.

Pursuant to SDCL 15-26A-66, Ellery Grey, counsel for Defendant/Appellant, does submit the following:

The Appellant's Brief is 27 pages in length. It is typed in proportionally spaced typeface Baskervillle 12 point. The word processor used to prepare this brief indicates that there are a total of 8,755 words in the body of the brief.

Dated this _____ day of October, 2013.

GREY LAW

_____
Ellery Grey
909 St. Joseph Street, Suite 555
Rapid City, SD 57701
(605) 791-5454

APPENDIX

Table of Contents

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 26719

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JEREMY BAUER,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE ROBERT A. MANDEL
Circuit Court Judge

APPELLEE'S BRIEF

MARTY J. JACKLEY
ATTORNEY GENERAL

Craig M. Eichstadt
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

Ellery Grey
Grey Law Office
909 St. Joseph Street, Suite 555
Rapid City, SD 57701
Telephone: (605) 791-5454

ATTORNEY FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed June 6, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 26719

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

JEREMY BAUER,

Defendant and Appellant.

PRELIMINARY STATEMENT

In this brief, Plaintiff and Appellee, State of South Dakota, calls Defendant and Appellant, Jeremy Bauer, "Defendant," and calls itself "State." The State calls the nine-year-old victim either "victim" or "I.T."

The State identifies the three volumes trial transcripts as "T" plus page number; the Plaintiff's Exhibits as "EXH" plus exhibit number; and Pennington County Criminal File No. 12-1975 as "R" plus page number. The State makes no reference to Defendant's single exhibit, nor to the contents of the sealed documents envelope.

JURISDICTIONAL STATEMENT

Defendant appeals from the Judgment and Sentence of the trial court, the Honorable Robert A. Mandel, Circuit Court Judge, Seventh Judicial Circuit, Pennington County, South Dakota. This Judgment sentenced Defendant to thirty years for conviction of the crime of First-

Degree Rape, a Class C felony. The trial court signed, attested, and filed the Judgment on May 30, 2013. R 212-13. Defendant filed his timely Notice of Appeal on June 6, 2013. R 239. This Court's jurisdiction on appeal arises under SDCL §§ 23A-32-2 and 23A-32-15.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

DID THE TRIAL COURT IMPROPERLY EXCLUDE MEMBERS OF THE PUBLIC FROM DEFENDANT'S TRIAL?

The trial court held that the courtroom was properly closed, but allowed members of the media, the parties and counsel, and a victim-witness assistant to remain in the courtroom.

State v. Rolfe, 2013 S.D. 2, 825 N.W.2d 901

Rapid City Journal v. Delaney, 2011 S.D. 55, 804 N.W.2d 388

Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)

Presley v. Georgia, 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010)

II

DID DEFENDANT'S COUNSEL COMMIT THE TYPE OF INEFFECTIVE ASSISTANCE THAT THIS COURT WILL CONSIDER ON DIRECT APPEAL WHEN HE FAILED TO OBJECT TO CLOSURE OF THE COURTROOM?

The trial court did not rule on this issue.

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)

State v. Dillon, 2001 S.D. 97, 632 N.W.2d 37

Commonwealth v. Lavoie, 464 Mass. 83, 981 N.E.2d 192 (2013)

Purvis v. Crosby, 451 F.3d 734 (11th Cir. 2006)

STATEMENT OF CASE AND FACTS

A. *Statement of Case.*

On May 30, 2012, the Pennington County grand jury charged Defendant with alternative counts of First-Degree Rape in violation of SDCL 22-22-1(1) and Sexual Contact with a Child Under Thirteen in violation of SDCL §§ 22-22-7 and 22-22-1.2(2). First-Degree Rape is a Class C felony with a minimum sentence of fifteen years, and Sexual Contact with a Child Under Thirteen is a Class 3 felony with a minimum sentence of ten years. The court set bond at $250,000 plus no contact with the victim. R 4-5. The Sheriff arrested Defendant on June 6, 2012, R 4, and he posted bond on July 9, 2012. R 15-16.

After a change of judge, R 6-7, and numerous motions by the State and Defendant, the Honorable Robert A. Mandel, Circuit Court Judge, Seventh Judicial Circuit, Pennington County, South Dakota, held a trial to a jury on March 5, 6, and 7, 2013. *See generally* T 1-404. At the time of trial, the court held, pursuant to the State's written motion, R 48, that the courtroom would be partially closed for testimony of the victim, who was nine at the time of the crime and ten at the time of her testimony. T 8-9.

Defense counsel specifically stated that he had no objection to the motion. T 7. When asked for his position, defense counsel stated that he would leave the matter to the court's discretion and that he had no objection if the court felt there was a finding that supports closure of the courtroom. R 4.

The court considered the points required in this Court's case, *State v. Rolfe*, 2013 S.D. 2, 825 N.W.2d 901; T 4-5, 8-9. The court allowed a partial closure of the courtroom, excluding members of the public only, but allowing media representatives to remain. The court found no reasonable alternatives, although it did consider at least one alternative. T 8-9. From the transcript, it appears that only one unidentified member of the public was excluded. T 27.

The jury found Defendant guilty of First-Degree Rape. T 402; R 152. The court sentenced Defendant to thirty years in the South Dakota State Penitentiary, gave credit for 112 days served in the Pennington County Jail, and ordered Defendant to pay assessments and restitution. R 212-13.

B. *Statement of Facts.*

On April 6-7, 2012, I.T., at the time a nine-year-old girl, attended a birthday party at the home of a friend, K.B. T 30, 66, 68, 311, 321. During the party, I.T. went upstairs to lie down in K.B.'s room. T 32. Defendant, K.B.'s father, followed I.T. up the stairs as she was going to K.B.'s room. T 32, 313. I.T. lay down in K.B.'s bed. T 33. As she did so,

she was facing the wall. *Id.* Defendant lay down beside I.T., with his body touching hers. *Id.* Both were facing the wall in the same direction. *Id.* Defendant was behind I.T. T 33-34. No one except Defendant and I.T. was there. T 34. I.T. was wearing pajamas and underwear. *Id.* Defendant "put his finger down my pants" [I.T. speaking]. T 34. Defendant then "put it [his finger] inside my private area" [I.T. speaking]. T 34. Defendant's hand was under I.T.'s clothes when he did this. T 34. I.T. explained that the private area she was talking about was "where you pee at." T 34. When Defendant put his finger in I.T.'s private area it hurt. T 35. When I.T. went to the bathroom, after Defendant had raped her, it hurt. T 37. I.T. confronted Defendant, telling him that he had touched her, to which Defendant replied that he was downstairs with the girls the whole time. T 38.

Defendant testified at the time of trial and denied touching or raping I.T. T 311. He admitted, however, that he was present in the home at the time of the crime, and that he was with I.T. in his daughter's bedroom. T 314. Defendant also denied that I.T. confronted and accused him. T 314. In spite of Defendant's testimony, however, the jury found him guilty of First-Degree Rape. T 402.

The court sentenced Defendant to thirty years in the South Dakota State Penitentiary, gave him credit for time served, and ordered him to pay assessments and restitution. R 212-13. Defendant filed a timely Notice of Appeal. R 239.

SUMMARY OF ARGUMENTS

Defendant states the issues as three, including failure to canvass a public trial right with Defendant, erroneously closing the courtroom, and ineffective assistance when trial counsel failed to object to closure of the courtroom. In the State's view, the first two issues are actually a single issue, dealing with the nature of the right to a public trial, whether that right was violated in this case, and, if there was a violation, what the appropriate remedy should be. The State argues that there was no violation, and that the Court may review only for plain error where Defendant did not object before the trial court. Even if there was a violation, closure of the courtroom involved a partial closure only, which is subject to less intense scrutiny than a total closure. *State v. Rolfe*, 2013 S.D. 2, 825 N.W.2d 901. In any event, Defendant would be entitled to no more than a remand in accordance with the holding of *Rolfe*.

Defendant's ineffective assistance issue is without merit, since there was no manifest usurpation of Defendant's rights and Defendant can show neither prejudice nor deficient performance as required by *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

ARGUMENTS

I

THE TRIAL COURT PROPERLY ORDERED A PARTIAL CLOSING OF THE COURTROOM FOR THE VICTIM'S TESTIMONY, BUT EVEN IF THE TRIAL COURT'S ACTION

WAS IMPROPER AND REVERSIBLE, A REMAND FOR SPECIFIC FINDINGS AND CONCLUSIONS IS THE APPROPRIATE REMEDY.

A. *Standard of Review.*

The court determined its standard of review in *Rolfe* at ¶¶ 13-15, 825 N.W.2d at 905-06. Under *Rolfe*, constitutional interpretation is a question of law and thus reviewable de novo (citing *Steinkruger v. Miller*, 2000 S.D. 83, ¶ 8, 612 N.W.2d 591, 595 and *State v. Beck*, 1996 S.D. 30, ¶ 6, 549 N.W.2d 811, 812). Likewise, statutory interpretation is a question of law that is reviewed under the de novo standard, *Rolfe* at ¶ 15, 825 N.W.2d at 905 (citing *State v. Wilson*, 2004 S.D. 33, ¶ 9, 678 N.W.2d 176, 180 and *Steinberg v. South Dakota Department of Military and Veteran's Affairs*, 2000 S.D. 36, ¶ 6, 607 N.W.2d 596, 599). Statutes are presumed constitutional and the challenger has the burden to prove beyond a reasonable doubt that a statute violates a constitutional provision. *Steinkruger*, 2000 S.D. 83 at ¶ 8, 612 N.W.2d at 595 (citing *Kyllo v. Panzer*, 535 N.W.2d 896, 898 (S.D. 1995) and *Specht v. City of Sioux Falls*, 526 N.W.2d 727, 729 (S.D. 1995)). The court will review the constitutionality of a statute only when it is necessary to resolve the specific matter before it, and then only to first decide if the statute can be reasonably construed to avoid an unconstitutional interpretation. *Steinkruger* at ¶ 8, 612 N.W.2d at 595 (citing *City of Chamberlain v. R.E. Lein*, 521 N.W.2d 130, 131 (S.D. 1994)).

Rolfe also recognizes that a violation of the right to a public trial is a structural defect affecting the framework within which the trial proceeds, rather than simply impairing in the trial process itself (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 1265, 113 L.Ed.2d 302 (1991)). This means that if an otherwise reversible error in denying a public trial is found, there can be no harmless error, and the case must be reversed without consideration of whether the Defendant can prove prejudice.

The trial court's decision to close a proceeding must constitute an abuse of discretion before it will be reversible. *Rolfe* at ¶ 15, 825 N.W.2d at 905-06 (citing *Rapid City Journal v. Delaney*, 2011 S.D. 55, ¶ 9, 804 N.W.2d 388, 392). Application of a standard of law to the facts is reviewed de novo. *Id.*

B. *There was no Violation of Defendant's Right to a Public Trial.*

1. *Introduction.*

Defendant begins with an argument about "failing to canvass [Defendant] regarding trial counsel's waiver of his right to a public trial." Defendant's Brief (DB) at 4. Defendant's first issue begs the question of whether there was any violation of his rights. The State believes the first question is whether the a trial court properly considered the necessary factors from *Rolfe* in light of the fact that no one objected to the request that the courtroom be closed. If the trial court appropriately considered the matter and there was no error, then consideration of waiver of the

error becomes unnecessary. If, hypothetically, there was a violation, then the court would consider the extent to which the right may be waived by failing to assert it. The final question, if one assumes that the violation can be waived by counsel, is whether counsel rendered ineffective assistance in waiving the issue. The State's first issue will consider the first two questions, whether the trial court properly considered and ruled, and also the extent to which this Court may review any violation if, in fact, one occurred. The effectiveness of trial counsel is considered in the second issue of this brief.

2. *The trial court appropriately ordered a limited, partial closure.*

The right to a public trial arises under the Sixth Amendment to the United States Constitution and South Dakota Constitution Article VI, § 7. In general, the right to a public trial is for the benefit of the accused. When trials are conducted publicly, the public may see that a defendant is fairly dealt with and not unjustly condemned and spectators may keep the triers of fact and law keenly alive to a sense of their responsibility and the importance of their functions. *Rolfe* at ¶ 17, 825 N.W.2d at 906 (quoting *Waller v. Georgia*, 467 U.S. 39, 46, 104 S.Ct. 2210, 2215, 81 L.Ed.2d 31 (1984) (quoting *Gannett Company v. DePasquale*, 443 U.S. 368, 380, 99 S.Ct. 2898, 2906, 61 L.Ed.2d 608 (1979)). The public has the right to be present at trial whether or not any party has asserted the right. *Rolfe* at ¶ 16, 825 N.W.2d at 906 (quoting *Presley v. Georgia*, 558 U.S. 209, 130 S.Ct. 721, 724-25, 175 L.Ed.2d 675 (2010)).

This right to access a criminal trial is not absolute. The right to an open trial may give way in specific cases to other rights or interests, such as defendant's right to a fair trial or the government's interest in inhibiting disclosure sensitive information. *Presley*, 558 U.S. 209, 130 S.Ct. at 724 (quoting *Waller*, 467 U.S. at 45, 104 S.Ct. at 2215). *Presley* and *Waller*, as quoted in *Rolfe* at ¶ 18, 825 N.W.2d at 906, state that such circumstances will be rare. They can include, however, the circumstance where a child victim is testifying about sexual abuse. *Rolfe* at ¶ 19, 825 N.W.2d at 906. *Rolfe*, in quoting *Globe Newspaper Company v. Superior Court*, 457 U.S. 596, 608, 102 S.Ct. 2613, 2621, 73 L.Ed.2d 248 (1982), calls for weighing factors such as the victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives.

In the same paragraph, the *Rolfe* court cites SDCL 23A-24-6, which allows the trial court discretion to determine who should remain in the courtroom when a child testifies about sexual abuse. The statute also, *Rolfe* at ¶ 19, 825 N.W.2d at 906-07, allows a trial court to minimize the number of spectators in the courtroom during testimony while allowing for public observation of the trial by way of the news media. *Rolfe* at ¶ 20, 825 N.W.2d at 907 sets out the factors from *Waller*, 467 U.S. at 48, 104 S.Ct. at 2216 that must be fulfilled and on which the trial court must enter findings, so that a reviewing court can determine whether closure of the trial was proper. In *Rapid City Journal*, 2011 S.D.

55, ¶ 29, 804 N.W.2d 388, 399, this Court determined that the trial court had failed to articulate findings specific enough so that a reviewing court could determine whether the closure order was properly entered. This was also the case in *Rolfe* at ¶ 25, 825 N.W.2d at 908-09. This Court found it sufficient in *Rolfe* that the case be remanded to the trial court with directions to supplement the record with specific findings and reasoning. The trial court was to address the *Waller* factors and, after making findings in accordance with them, enter a new final Judgment of Conviction if the *Waller* factors had been satisfied. If the trial court found them not satisfied, it was to order a new trial. *Rolfe* at ¶ 26, 825 N.W.2d at 909.

The *Rolfe* court adopted the factors from *Waller*. These include the following: (1) the party seeking closure of the proceeding must advance an overriding interest that is likely to be prejudiced; (2) the closing must be no broader than necessary to protect that interest; (3) the trial court must consider reasonable alternatives to closing the proceeding; and (4) the trial court must make findings adequate to support the closure. *Rolfe* at ¶ 20, 825 N.W.2d at 907 (citing *Waller*, 467 U.S. at 48, 104 S.Ct. at 2216).

The *Rolfe* court then adopted the holdings of a number of federal cases that differentiate total closure of a courtroom from partial closure.

Id. at ¶ 22, 825 N.W.2d at 907-08.[1] If a courtroom is only partially closed, these authorities state that the party requesting closure must state a substantial reason, but not an overriding interest, to justify closure of the courtroom.[2] This Court, in *Rolfe*, reversed because the trial judge did not make specific findings about the four *Waller* factors. *Rolfe* at ¶ 25, 825 N.W.2d at 909. This Court directed the trial court to make findings on whether the courtroom was "closed or partially closed," *Id.* at ¶ 26, 825 N.W.2d at 909, thus holding that the courtroom could be partially closed if there was a substantial reason.

Defendant cites almost none of the partial closure cases, which this Court so prominently featured. He states, further, that the Court's holding on partial closure is dicta. DB 17. This is not the case, as is evidenced by the Court's statements on how the trial court is to proceed on remand.

The cases cited and adopted by this Court, as well as the *Rolfe* holding itself, allow exclusion of a portion of the public for reasons that

---

[1] The cases included *United States v. Petters*, 663 F.3d 375, 382-83 (8th Cir. 2011); and *United States v. Farmer*, 32 F.3d 369, 371 (8th Cir. 1994); (quoting *Woods v. Kuhlmann*, 977 F.2d 74, 76 (2d Cir. 1992)); *United States v. Sherlock*, 962 F.2d 1349, 1356-58 (9th Cir. 1989); *Nieto v. Sullivan*, 879 F.2d 743, 749-54 (10th Cir. 1989), *cert. denied*, 493 U.S. 957, 110 S.Ct. 373, 107 L.Ed.2d 359 (1989); and *Douglas v. Wainwright*, 739 F.2d 531 (11th Cir. 1984) (per curiam), *cert. denied*, 469 U.S. 1208, 104 S.Ct. 1170, 84 L.Ed.2d 321 (1985).

[2] Other cases to the same effect are *United States ex rel. Latimore v. Sielaff*, 561 F.2d 691 (7th Cir. 1977), *cert. denied*, 434 U.S. 1076, 98 S.Ct. 1266, 55 L.Ed.2d 782 (1978); and *People v. Fallaster*, 173 Ill. 2d 220, 670 N.E.2d 624 (1996).

include "the ordeal of describing an unwanted sexual encounter before persons with no more than a prurient interest in it," *Sielaff*, 561 F.2d at 694-95 or "the protection of minor victims of sex crimes from further trauma and embarrassment" as well as "the encouragement of victims to come forward and testify in a truthful and credible manner," *Globe Newspaper Company v. Superior Court*, 457 U.S. 596, 607, 102 S.Ct. 2613, 2620, 73 L.Ed.2d 248 (1982). In so doing, the trial court must consider such matters on a case by case basis, and cannot make the closure mandatory. *Id.* at 608, 102 S.Ct. at 2621. But when the trial courts consider matters on a case by case basis, the interest of safeguarding the physical and psychological well-being of a minor is compelling. *Id.* at 607, 102 S.Ct. at 2620. *Rolfe* and the cases it cites require that the party seeking closure show a substantial reason rather than an overriding interest to justify closure of the courtroom. *Rolfe* at ¶ 22, 825 N.W.2d at 907-08.

The court below specifically considered and found that the *Waller* and *Rolfe* factors were present.[3] T 8-9. The court found, first, that there was a substantial reason to partially close the trial, allowing members of the news media to remain, and excluding members of the general public. The State argued substantial reasons at T 6-7 and R 97. These are the

[3] In *Rolfe*, this Court noted at ¶ 24, 825 N.W.2d at 908, n.3, that the North Dakota Supreme Court requires that a motion to close the trial be made prior to trial. While the *Rolfe* court did not require such a motion in South Dakota, the State made a motion to partially close the trial on February 20, 2013, 25 days before trial.

same substantial reasons set out in *Sielaff* and *Globe Newspaper Company*, safeguarding the physical or psychological well-being of a minor and encouraging victims to come forward and testify in a truthful and credible manner. *Globe Newspaper Company*, 457 U.S. at 607, 102 S.Ct. at 2620. The record supports these reasons by statements of the deputy state's attorney setting out the expected testimony of the victim's mother if she were called to testify. The child was ten-years-old, and was testifying about sexual abuse. The mother would have stated that her daughter is somewhat less mature than other girls her age, and the child wished to have no more people present at her testimony than necessary. The parents and relatives desired that she not be required to talk about the sexual abuse in front of more people than absolutely necessary, and the child did become emotional and *reluctant to talk* about the issue before more people than necessary. The interest of "ability of the child to recall and testify truthfully," T 7, also supports a partial closure. These are precisely the interests recognized in the cited cases, particularly, *Sielaff* and *Globe Newspaper Company*.

Second, the trial court below explicitly considered other factors from *Rolfe* and *Waller*. The court found, first, that the lesser "substantial reason" standard from *Rolfe* is applicable in this case. The court found that one interest protected was "accurate presentation of the evidence and the ability of the defense to properly cross examine." T 8.

Based on these findings, the court believed that failing to close would prejudice both parties. The ability of Defendant to cross examine is just as likely to be prejudiced as the State's ability to conduct direct examination.

The court found that closure was not broader than necessary to protect the interests it identified. In particular, the court found that the news media would be present and could present particulars of the examination to the public. T 8-9. This is the same holding as in *Sielaff*. It fulfills a *Waller* factor. The court stated that presence of the media "at least presents the case to the public." T 8.

The court likewise considered reasonable alternatives to closing the proceeding, such as the possibility of "testifying by video." T 8-9. But the court found it both impractical and of no additional benefit for the victim. T 9. Based on the substantial reasons it found, the trial court ordered the partial closure by removal of members of the public, but allowed members of the media and all known representatives of the parties to remain. T 8-9.

The trial court considered and made findings on all of the factors contained in *Waller* and *Rolfe*. This careful and explicit consideration of the individual case differentiates this case from *Rolfe* and fulfills the

requirements of *Waller*. The trial court did not abuse its discretion in its application of SDCL 23A-2-6.[4]

C. *Failure to Object to the State's Proposed Closure of the Courtroom Waived This Issue and Makes it Subject to Plain Error Review Only.*

1. *Principles of waiver.*

Failure to object to the trial court's action can lead to a waiver, and a waiver limits this Court's review to plain error.[5] Defendant asserts, however, that failure to object to closure of the courtroom is not waivable by the attorney for failure to object and the trial court was required to go into an extended canvassing of this right with Defendant before accepting such a waiver. In making this argument, DB 4-9, Defendant equates the right to a public trial with certain other rights such as right to plead not guilty, right to representation of counsel, right to testify or decline doing so, right to a jury trial, and right to decide on whether the defendant should appeal. *See* DB 6. Defendant engages in extended analysis about why this should be. His analysis and contentions are without merit for two reasons: (1) the case law does not support the contention,

[4] *Rolfe* specifically upheld the constitutionality of this statute where trial courts have properly weighed the factors and competing interests under it. *Rolfe*, 825 N.W.2d at 909. Defendant is wrong when he states at DB 20 that SDCL 23A-24-6 is a statute "permitting complete closure as opposed to limited closure." *Rolfe* specifically holds the contrary.

[5] *State v. Viays*, 402 N.W.2d 697 (S.D. 1987) (failure to object to closing argument); *State v. Muetze*, 368 N.W.2d 575 (S.D. 1985) (restriction of a line of questioning); *State v. Willis*, 370 N.W.2d 193 (S.D. 1985); *State v. West*, 344 N.W.2d 502 (S.D. 1984) (failure to object to jury instruction); and *State ex rel. Ruffing v. Jamison*, 80 S.D. 362, 123 N.W.2d 654 (1963) (failure to object to error at time of trial prohibits defendant from asserting it on habeas corpus).

in that neither the State nor Defendant has found any case that holds the right to a public trial to be of the same fundamental nature as the other enumerated rights; and (2) whether to hold a public trial or, on behalf of defendant, to allow a partial or limited closure of a trial, is a matter of strategy that counsel may reasonably control.

2. *The right to a public trial may be waived by counsel.*

Defendant engages in extensive analysis and argument on why he believes the right to a public trial is so fundamental that it may be waived only by Defendant personally. DB 4-9. At page 6 of DB 2, Defendant sets out several rights that courts have held sufficiently fundamental that they may not be waived by counsel without concurrence of the defendant personally. The right to a public trial is not among them, and Defendant has cited no case holding that it is. After considerable research, the State has found no case support for Defendant's proposition.

While Defendant's discussion is interesting, he makes it without citing a single case that supports the underlying proposition. The case law either holds or suggests that a waiver may occur where counsel fails to object. *See, e.g., United States v. Hitt*, 473 F.3d 146, 155 (5th Cir. 2006). In that case, a trial court closed a suppression hearing and also closed the testimony of a minor victim of sexual abuse. The Fifth Circuit held that defense counsel's failure to object waived the issue. The court specifically considered *Waller*, and stated, *Id.* at 155, that in *Waller* the

defendant made an objection. To the same effect, the court cited *Levine v. United States,* 362 U.S. 610, 618-19, 80 S.Ct 1038, 4 L.Ed.2d 989 (1960), which held that although defendant had a constitutional right (pursuant to the Fifth Amendment) to openness of certain portions of a criminal contempt trial arising out of a grand jury proceeding, failure to object, or to request that the courtroom be opened, waived the issue. Also of interest is *United States v. Sorrentino*, 175 F.2d 721, 722-23 (3d Cir. 1949). The court set out eight separate rights that defendants have during a trial. Several of the rights are rights that may be waived by failure to object, and some are rights that are not waived. The court holds that the right to a public trial may be waived. Further, *Id.* at 723-24, the court holds that where defendant had three lawyers who did not object, but defendant contended that he alone had the right to waive a public trial, the contention was without merit. *Lacaze v. United States*, 391 F.2d 516, 520-21 (5th Cir. 1968) finds meritless a contention that defendant was denied a public trial where one courtroom door was locked. In the course of so holding, the court finds it significant that defense counsel did not object. *Id.* at 521. The case of *Commonwealth v. Adamides,* 37 Mass. 339, 639 N.E.2d 1092 (1994) differentiates between trials where there has, or has not been, an objection to a closed courtroom. The court states, *Id.* at 341, 639 N.E.2d at 1094, that the trial judge relied on the defendant's consent in closing the trial and

indicated that he had not made the findings necessary to close the trial over the defendant's objection.

In the case at bar, the trial court made the findings required in *Waller*, and Defendant failed to object to closing the courtroom. In accordance with these cases, Defendant may not explicitly refuse to object, as did defense counsel here, and then later contend that the right he has failed to preserve is grounds for reversal.

In *Commonwealth v. Williams*, 379 Mass. 874, 401 N.E.2d 376 (1980), the court acknowledged that defendant need not demonstrate prejudice for reversal if he asserts his right to a public trial. *Id.* at 876, 401 N.E.2d at 378. The court remanded for findings on issues of (1) whether the public trial right was waived by what may have been a trial tactic of counsel; and (2) the extent of defendant's understanding of his right to a public trial. *Id.* The case makes it plain that trial strategy may provide an acceptable reason for waiver of this right.

It is plain from all of these cases that the right to a public trial is not of the same character as the basic fundamental rights cited at DB 6. The cases Defendant cites to support his analysis do not so hold. It does not appear that Defendant's contention is supported by any of the case law that the parties have cited. For these reasons, the undisputed fact that defense counsel intentionally refused to object to the limited, partial closing of the courtroom shows that Defendant's contention is waived.

Action by trial counsel or trial strategy are sufficient reasons to find a waiver by failure or refusal to object.

3. *Plain error is not present on this record.*

Since Defendant has not preserved the issue of public trial by objecting in the trial court, the issue should be reviewed for plain error only. *State v. Brende*, 2013 S.D. 56, ¶ 18, 835 N.W.2d 131, 139-40. Plain error review is discretionary with this Court, and should be invoked cautiously and only in exceptional circumstances. To demonstrate plain error, a defendant must establish that there was: (1) error; (2) that it is plain; (3) that it affects substantial rights, and only then will the court exercise its discretion to notice the error if (4) it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.* (citing *State v. Olvera*, 2012 S.D. 84, ¶ 9, 824 N.W.2d 112, 115). Brende asserted an error of a duplicitous indictment. O*lvera* involved an allegation that the State had breached a plea agreement.

The Court should not find plain error in this case. First, as argued above, the trial court considered all the factors required in *Waller*, and the record therefore contains no error at all. Even if there were error, it is certainly not plain. The record shows the trial court considered the *Waller* factors before partially closing the trial. Other cases permit closure of a trial, on a case by case basis, where a child victim is testifying to allegations of sexual abuse of that victim. The trial court's ruling was not plainly incorrect.

Third, while the right to a public trial is certainly a substantial right, the trial court's ruling did not affect this right where the closure was partial, there was no objection, and there may have been a reason for trial counsel's failure to object, as the trial court specifically found.

Finally, the limited partial closing of this trial does not seriously affect the fairness, integrity, or public reputation of judicial proceedings. Defendant has made no showing that he was unfairly tried. While he does not need to show specific prejudice, he needs to show unfairness for a finding of plain error. There is no evidence that the integrity of the proceeding was compromised by this limited, partial closure. A press representative remained in the courtroom. The public reputation of the judicial proceeding is protected by the presence of the press, as well as the openness of the remainder of the trial. Defense counsel's failure to object is a significant factor in showing that the trial court did not compromise his substantial rights. *Brende*, 2013 S.D. 56 at ¶ 18, 835 N.W.2d at 139-40. Plain error cannot be demonstrated.

D. *Even if Defendant's Right to a Public Trial was Violated, the Appropriate Remedy is Remand.*

Defendant pursues an argument at pages 10-16 of his brief that amounts to a request that *Rolfe* be overruled, insofar as it holds that remand for additional findings is an appropriate remedy if the Court finds that the right to a public trial may have been violated. The State contends that *Rolfe* was correctly decided, and that it should not be overruled. Even if the trial court's findings closing I.T.'s testimony were

insufficient, no more than a remand is required under the principles of *Rolfe*.

While Defendant cites many cases that he believes support the proposition that there must be a new trial if the court finds a public trial violation, the rationale of many of these cases does not support Defendant. For example, in the quotation from a Kansas court contained at DB 15, the court states that the cases with which it disagrees were "focused on finding an appropriate remedy for a trial court's failure to make adequate findings to justify closure," *State v. Cox*, 304 P.2d 327, 335 (Kan. 2013). This is the correct focus if the trial court failed to make adequate findings. As in *Rolfe*, there would be no reason to hold a new trial if closure of I.T.'s testimony was justified. That is the reason that this Court allowed a remand in *Rolfe*. Defendant's argument is that even if closure of the trial was justified, since the trial court did not make all the findings that *Waller* requires, Defendant should get a new trial. The Kansas court refused to allow a trial judge to "manufacture an after the fact rationale that is constitutionally defensible." But a remand, as ordered in *Rolfe*, cannot lead to findings of any facts that did not already exist at the time of trial. This Court is requiring the trial court to make a decision on the issue of whether it appropriately closed the trial, because this Court cannot determine whether the closure was proper or improper on the present record. Additional findings would allow this Court to

make that decision, if the Court believes the present findings are inadequate.

In addition, as even Defendant admits, this Court is not alone in its holding that a remand for additional findings may be appropriate if the present findings are inadequate. For example, *Commonwealth v. Williams*, 379 Mass. at 876, 401 N.E.2d at 378, remanded the case for consideration of the extent to which the trial was closed, the extent, if any, to which defendant understood whether his right to a public trial, and whether he had waived that right. If findings on the *Waller* factors are inadequate, requiring a new trial where it is unknown if a violation occurred would be a waste of resources.

Moreover, it is apparent, from the second full paragraph at DB 15, that Defendant is assuming the correctness of his argument that his counsel had no authority to waive objection to a partial, limited closure of his trial without extensive canvassing. He states "if the court finds that closure was improper based on lack of trial counsel's authority" then a new trial must be granted. The State has already refuted the "lack of trial counsel's authority" in a preceding section of this brief. There is no case law supporting this proposition, and Defendant's only support is his own analysis. On the other hand, the case law cited supports the argument that failure to object does not adequately preserve the error. There is no plain error in this case. For the reasons stated, Defendant's argument that remand is inappropriate must be rejected.

II

DEFENDANT'S COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE IN FAILING TO OBJECT TO THE PARTIAL, LIMITED CLOSURE, AND HE MAY HAVE HAD STRATEGIC REASONS. INEFFECTIVE ASSISTANCE SHOULD NOT BE CONSIDERED ON DIRECT APPEAL.

A. *Introduction.*

Defendant argues that trial counsel rendered ineffective assistance by failing to object to the partial, limited closure of the courtroom. Defendant cannot, however, demonstrate either deficient performance or prejudice required in this Court's decisions citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Defendant also is unable to show a manifest usurpation of his rights, because there may have been strategic reasons why counsel did not object to closure of the courtroom. *See State v. Dillon*, 2001 S.D. 97, ¶ 28, 632 N.W.2d 37, 48.

B. *Standard of Review.*

Defendant sets out the appropriate standard of review from this State's cases at DB 24-25. Before the Court will consider a claim of ineffective assistance on direct appeal, trial counsel must have been so ineffective and his or her representation so casual as to represent a manifest usurpation of the defendant's constitutional rights. *Dillon*, (quoting *State v. Hayes*, 1999 S.D. 89, ¶ 14, 598 N.W.2d 200, 203).

Moreover, this Court follows the two pronged rule of *Strickland*. In order to gain relief on a claim of ineffective assistance of counsel, a

criminal defendant or habeas petitioner must show that counsel provided constitutionally inadequate representation and that the defendant or petitioner has been prejudiced as a result of the constitutionally inadequate representation. *Steichen v. Weber*, 2009 S.D. 4, ¶ 24, 760 N.W.2d 381, 392. Under this standard there is a strong presumption that counsel's performance falls within the wide range of professional assistance, and the reasonableness of counsel's performance must be evaluated from counsel's perspective at the time, and not in hindsight. *Id.* at ¶ 25, 760 N.W.2d at 392-93.

C. *Ineffective Assistance is not Shown on This Record.*

While denial of a public trial is a structural defect, and showing it does not require prejudice, Defendant cannot claim ineffective assistance of counsel without showing that he was prejudiced to the extent that had counsel behaved differently, the result of the proceeding likely also would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. Defendant cannot make such a showing on this record. Defendant claims first that he was prejudiced by the mere fact that the courtroom was closed. He cannot show, however, that if there had been no closure, the result of the trial likely would have been different. This is the standard of *Strickland.*[6]

[6] Several courts have held that a defendant must show prejudice for relief based on ineffective assistance of counsel where the allegation is that the courtroom was closed because of counsel's ineffectiveness. *Commonwealth v. Lavoie*, 464 Mass. 83, 89-90, 981 N.E.2d 192, 198-99 (2013) (finding of no deficient performance, court acknowledged need for

Defendant also claims that he was prejudiced because his testimony was treated differently than that of his alleged victim. This is entirely speculative. Defendant presents nothing on the issue of how this may have affected the outcome.

It is just as likely that defense counsel's showing of consideration and understanding to the victim and thus sensitivity to her needs and desires as a ten-year-old child may have been to Defendant's benefit. Objecting in front of the jury almost certainly would have turned the jury against Defendant; allowing consideration for the victim could certainly have been to Defendant's benefit. This is at least as likely as Defendant's speculation that removing one member of the public from the audience would somehow prejudice the jury against him or show the jury that the trial court was exercising favoritism. DB 26. The jury certainly already understood, from common human experience, that it is difficult for a ten-year-old child to describe sexual abuse. It is therefore a meritless argument to state that the clearing of the courtroom for the victim's testimony amounted to "place[ing] special emphasis on I.T.'s testimony over and above [Defendant's] as the courtroom was not closed while he testified." DB 26.

---

prejudice, but did not decide whether there was prejudice in the case); *Purvis v. Crosby*, 451 F.3d 734, 741 (11th Cir. 2006); *Reid v. State*, 286 Ga. 484, 487, 690 S.E.2d 177 (2010); *Commonwealth v. Horton*, 434 Mass. 823, 831-33, 753 N.E.2d 119, 127-28 (2001); *State v. Butterfield*, 784 P.2d 153, 157 (Utah 1989); and *People v. Vaughn*, 491 Mich. 642, 674, 821 N.W.2d 288, 308 (2012).

A contrast between Defendant's testimony and the victim's testimony is inherent in the differences between them, and does not require action on the part of the court or the parties to make it plain. Defense counsel may well have sensed this, and it is not, therefore, deficient performance to fail to object either to the closure of the courtroom itself or to one member of the public being removed in front of the jury.

Aside from this, it is not manifest on this record that counsel's conduct deprived Defendant of constitutional rights. *Hayes*, 1999 S.D. 89 at ¶ 14, 598 N.W.2d at 203. First, counsel could well have acted in the way he did to show consideration, understanding, and sensitivity toward the obvious plight of a ten-year-old girl testifying to sex acts. As the trial court further observed, T 8, lines 13 and 14, the ability of the victim to testify includes the ability of the defense to properly cross examine her. It may well have been that defense counsel realized he was more likely to be able to appropriately cross examine the victim if the courtroom was partially closed during her testimony. Based on the ability to appropriately cross examine, the trial court found, T 8, lines 14-16, that failure to close the courtroom prejudiced both parties. The right to confrontation and cross examination is a right at least as fundamental as the general, unfocused right to a public trial. The trial court appropriately balanced these rights, and there is no manifest usurpation of rights on this record. *See Dillon*, 2001 S.D. 97 at ¶ 28,

632 N.W.2d at 48. Defendant also has completely failed to allege prejudice in the *Strickland* sense nor has he shown deficient representation in the absence of counsel's lack of an opportunity to explain his conduct. Defendant's allegation of ineffective assistance on direct appeal must, therefore, be rejected.

CONCLUSION

The State respectfully requests that the trial court's judgment and sentence in this matter be affirmed.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

Craig M. Eichstadt
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Brief contains 6,688 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this _____ day of December, 2013.

_____
Craig M. Eichstadt
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this _____ day of December, 2013, two true and correct copies of Appellee's Brief in the matter of *State of South Dakota v. Jeremy Bauer* were served by United States mail, first class, postage prepaid, upon Ellery Grey, Grey Law Office, 909 St. Joseph Street, Suite 555, Rapid City, SD 57701.

_____
Craig M. Eichstadt
Assistant Attorney General

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL #26719

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

v.

JEREMY BAUER,
Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE ROBERT A. MANDEL

APPELLANT'S REPLY BRIEF

ELLERY GREY
GREY LAW
909 St. Joseph Street, Suite 555
Rapid City, SD 57701

Attorney for Appellant
Jeremy Bauer

MARTY JACKLEY
Attorney General
1302 E. Hwy 14, Suite 1
Pierre, SD 57501

MARK VARGO
Pennington County State's Attorney
300 Kansas City Street, Suite 400
Rapid City, SD 57701

Attorneys for Appellee
State of South Dakota

NOTICE OF APPEAL WAS FILED June 6, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited **Page**

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL #26719

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

v.

JEREMY BAUER,
Defendant and Appellant.

PRELIMINARY STATEMENT

Defendant and Appellant, Jeremy Bauer, hereby responds to the arguments set forth by the Appellee, State of South Dakota, in its Appellee's brief as follows:

Mr. Bauer challenges his conviction for First Degree Rape on the grounds that the courtroom was improperly closed to the public during the testimony of the alleged victim, I.T. Specifically, Mr. Bauer maintains that his conviction should be reversed and a new trial granted on the grounds that 1) the trial court failed to canvas him on his waiver of his right to public trial, 2) that the State, as the moving party, failed to establish either a compelling interest or alternatively, a significant interest sufficient to justify the closure, and 3) that trial counsel was ineffective by failing to object to the State's motion for courtroom closure. The State, in response, has reorganized the issues as 1) Whether or not the trial court properly ordered a partial closure and 2) Whether or not defendant's trial counsel was ineffective for failing to object to the courtroom closure. For the sake of clarity and consistency, Mr. Bauer will adopt the State's organization and respond accordingly.

The State's Appellee's Brief will be referenced by the initials SB followed by the corresponding page number. Mr. Bauer's Appellant's Brief will be referenced by the initials DB followed by the corresponding page number. All other abbreviations will be continued for Mr. Bauer's Appellant's Brief.

STATEMENT OF THE LEGAL ISSUES

1. The trial court's closure of the courtroom during the alleged victim's testimony was plainly erroneous and a new trial should be granted.

   The trial court closed the courtroom based on the State's motion. The Court placed its findings on the record. JT 8. Mr. Bauer's trial counsel did not object to the closure.

   Waller v. Georgia, 67 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31(1984).
   Presley v. Georgia, 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.d 675 (2010).
   State v. Rolfe, 2013 S.D. 2, 825 N.W.2d 901.

2. Mr. Bauer's trial counsel rendered ineffective assistance of counsel by failing to object to the courtroom closure.

   This issue was not brought before the trial court. Therefore, no lower court ruling is present on the record regarding this issue.

   State v. Thomas, 2011 S.D. 15, 796 N.W.2d 706.
   Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984).
   Harrington v. Richter, —— U.S. ——, 131 S.Ct. 770, 788, 178 L.Ed.2d 624 (2011).

ARGUMENTS

1. The trial court's closure of the courtroom during the alleged victim's testimony was plainly erroneous and a new trial should be granted.

Mr. Bauer challenges his conviction of First Degree Rape on the grounds that the courtroom was improperly closed during the testimony of the alleged victim, I.T. Specifically, neither the State as the proponent of the courtroom closure, nor the trial court articulated either a compelling interest or alternately a significant interest sufficient

to justify the closure. However, at the trial court level, Mr. Bauer's counsel failed to object to the courtroom closure. JT 4-8. Therefore, the State argues that this Court's review of this issue is limited to plain error analysis. SB 16. Although Mr. Bauer will set forth an alterative and independent argument below seeking reversal of the conviction based upon his trial counsel's failure to object to the courtroom closure, the courtroom closure that took place in this case amounts to plain error.

Plain error. As the State correctly sets forth in its brief, to demonstrate plain error, a defendant must establish 1) error; 2) that is plain; 3) that it affects substantial rights, and only then will this Court exercise its discretion to notice the error if 4) it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *State v. Brende*, 2013 S.D. 56 P 18, 835 N.W.2d 131, 139-40 (internal citations omitted). SB 20. Additionally, the plain error rule, though recognized in exceptional cases, must be applied cautiously; it does not encompass every error at trial, but only those errors which are both obvious and substantial and rise to the level of plain error. *State v. Dace*, 333 N.W.2d 812 (S.D. 1983).

The Supreme Court has recognized that a criminal defendant's right to a public trial is fundamental and that a violation of that right amounts to structural error. *Arizona v. Fulminante,* 499 U.S. 279, 310, 111 S.Ct. 1246, 1265, 113 L.Ed.2d 302 (1991). *See also Waller v. Georgia,* 467 U.S. 39, 49 n. 9, 104 S.Ct. 2210, 2217 n. 9, 81 L.Ed.2d 31 (1984). ("'Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." (Internal citations omitted). Based upon the structural nature of the right to a public trial, if error can be established, such error would

affect the substantial rights of Mr. Bauer and would additionally, seriously affect the fairness, integrity, or public reputation of judicial proceedings.

Complete closure vs. partial closure. Although Mr. Bauer maintains that the trial court failed to articulate either a compelling or significant interest to support the courtroom closure, as an preliminary matter, this Court should decide if the courtroom closure that took place in this case was the type of closure that was described in *Waller* or, alternatively, if a partial closure took place. The Supreme Court has not addressed the partial closure issue. Although this Court in *State v. Rolfe* discussed the partial closure issue, it did not announce if the closure that took place in that case was only a partial closure and did not set forth a standard to distinguish a partial closure from a total closure. *State v. Rolfe*, 2013 S.D. 2, 825 N.W.2d 901.

In Mr. Bauer's Appellant's Brief, the argument was set forth that the courtroom closure that took place in this case was a total closure rather than a partial closure and that simply allowing a member of the news media to remain in the courtroom during I.T's testimony did not render the closure merely partial. Mr. Bauer also proposed that this Court adopt the rational of the *Sherlock* court (a decision this Court cited in *Rolfe*), for distinguishing a complete closure from a partial closure. Specifically, the *Sherlock* court found a partial closure "where a judge has excluded spectators during a witness's testimony for a justified purpose." *United States v. Sherlock*, 962 F.2d 1349, 1356 (9th Cir.1992). DB 18.

In response, the State maintains that the courtroom in this case was only partially closed. SB 12-13. In support of this argument, the State cites this Court's decision in *Rolfe* and a number of the federal appellate decisions cited by this Court in *Rolfe*.

However, the State does not appear to have provided any precise analysis on why the courtroom should be considered to have only been partially closed beyond the fact that members of the media were permitted to remain in the courtroom while I.T. testified.

Moreover, the State did not attempt to distinguish the persuasive authorities cited by Mr. Bauer that provided examples of where other courts had addressed the issue of distinguishing a total closure as opposed to a partial closure. See *United States v. Davis,* 890 F2d1105 (10th Cir.1989) (conviction reversed after total, rather than partial, closure had taken place where closure order did not allow for a member of the press or the defendant's family to remain while minor rape-victim testified); *Ex Parte Easterwood* (*In re Todd Olen Easterwood v. State of Alabama*), 980 So.2d 367 (2007) (rejecting request to find partial closure and writing: "A partial closure usually contemplates that the defendant's family, friends, *and* members of the press will remain in the courtroom.") (Emphasis added).

In this case, it is important to note that the trial court made no provision for Mr. Bauer's supporters, family members, or other relatives to remain in the courtroom while I.T. testified. Additionally, neither the trial court nor the state advanced any reason to have any particular person excluded from the courtroom. Rather, while making this motion before the trial court the State requested as follows: "Specifically what the State is asking is that members of the general public not be in here. The State is not asking that the media be excluded." JT 6. Although the State calls this request a partial closure, simply calling this request a limited closure does not make it so. The State's request is nearly identical to the prosecution's request in *See People v. Holveck,* 171 Ill.App.3d 38, 121 Ill. Dec.25, 524 N.E.2d 1073, 1083 (1988) (rejecting closure on the basis of the

"unnerving effect" on the children if the courtroom were crowded and the state's wanting to make the unpleasant experience of testifying as pleasant as possible for them.)

Impropriety of the courtroom closure. In Mr. Bauer's Appellant's Brief, the argument was set forth that the State failed to advance either a compelling or significant interest sufficient to justify the closure. DB 22-23. In response, the State maintains that closure was proper based upon the facts that I.T. was ten years old at the time she testified, somewhat less mature than other girls her age, and reluctant to talk about the allegations in front of more people than necessary due to her potential emotional reaction. SB 14.

In addition to filing a pretrial brief (SR 97), at the trial level the State articulated the grounds for its request as follows:

> …so that the child is the most comfortable a child can be in a setting like this, and that the fewer people in there, the less of chilling effect there will be on her ability to recall and testify truthfully about the events for which she's here. JT 7.

On appeal, the State cites *Globe Newspaper Company v. Superior Court*, 57 U.S. 596, 607, 102 S.Ct. 2613, 2620, 73 L.E.d2d 248 (1982) in support of its position that the closure in this case was proper. The State writes: "…when the trial courts consider matters on a case by case basis, the interest of safeguarding the physical and psychological well-being of a minor is compelling."[1] SB 13. While safeguarding the

[1] The State also cites *Latimore v. Sielaff*, 561 F.2d 691 (7th Cir. 1977), in support of its position, however, the analysis in *Latimore* seems to require a defendant to demonstrate prejudice in order to establish a violation of the Sixth Amendment right to a public jury trial. ("…the exclusion of spectators… leads us to the question of whether the defendant actually was prejudiced by that action." *Id*. at 695.) Such a showing was rejected by the

physical and psychological well-being of a minor *may* serve as a compelling interest in certain cases, numerous courts have rejected closing a courtroom on the grounds of the ordinary hardship associated with a minor testifying in open court. *See State v. Hightower*, 376 N.W.2d 648, 650 (Iowa 1985) ("While we are very aware of the embarrassment and sensitivity of a ten-year-old testifying, mere reference to the 'sensitive nature of the testimony' will not be sufficient in denying the defendant his constitutional right to a public trial.") *People v. Holveck*, 171 Ill.App.3d 38, 121 Ill. Dec.25, 524 N.E.2d 1073, 1083 (1988) (rejecting closure on the basis of the "unnerving effect" on the children if the courtroom were crowded and the state's wanting to make the unpleasant experience of testifying as pleasant as possible for them.)

The State, which bears the burden of establishing both the legal and the factual grounds in support of the closure, did not below and does not now, establish how testifying in this case was going to cause I.T. physical or psychological injury. The record reflects that the State's request was nearly identical to the prosecution requests that were rejected by the *Hightower* and *Holveck* courts, *supra*.

Moreover, the trial court only removed one spectator from the courtroom before I.T. testified. JT 26-27. Presumably, when I.T. testified the courtroom was occupied by 12 jurors, the judge, court reporter, both prosecutors, victim's assistant, bailiff, perhaps a member of the media, defense counsel, and the defendant for a total of between 20 and 21 persons. In this particular case, the question remains how removing one person would allow I.T. to testify more openly or freely. The question also remains how removing one person would have preserved her physical or psychological well-being.

Supreme Court several years later in *Waller*. Therefore, *Latimore* has little persuasive value on this issue.

Without answers to these important questions in the record, the State has failed to establish that closing the courtroom was proper under either a compelling or significant standard. The State has only articulated concerns that will be present in every case where a child witness is testifying regarding sexual abuse. More is required by the Sixth Amendment before a courtroom may be properly closed.

Ultimately, the record related to this issue is clear. The trial court committed plain error when it improperly closed the courtroom. Further, this error affects the fundamental constitutional rights of Mr. Bauer, and impacts the very heart of the public's First Amendment's right to attend criminal trials. Although Mr. Bauer's trial counsel failed to object to the courtroom closure, plain error has been established.

Proper remedy for the Sixth Amendment violation. Mr. Bauer maintains that the authority cited in Appellants Brief is clear: When the Sixth Amendment is violated by an improper courtroom closure, the remedy is for a new hearing of the type where the violation occurred. Particularly illustrative is the Supreme Court's decision in *Presley v. Georgia*, 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.d 675 (2010) where the Court reversed a conviction when the trial judge failed to *sua sponte* consider alternatives to a courtroom closure. Importantly, the Supreme Court did not remand the case to have the trial court reconsider the record to determine if other alternatives to the courtroom closure were possible. Additionally, if the proper remedy for failing to address one of the *Waller* requirements was to remand the case for the record to be supplemented, the Supreme Court had the opportunity to announce as much in *Presley*. *See also, Drummond v. Houk*, ___ F.3d ___, 2013 WL 4505144 (6th Cir. 2013) ("In the instant case the public-

trial violation occurred during the trial itself. We have limited options to remedy a structural error occurring during the trial itself. Unlike a suppression hearing, we have no means to order that a small portion of Drummond's trial be redone. Thus, the most appropriate remedy is a new trial."). Despite this authority, the State argues that in this case the appropriate remedy for a violation is to remand the case and supplement the record. SB 21-23. The State cites this Court's decision in *Rolfe* as authority for the remedy of remand.

Mr. Bauer respectfully asserts that *Rolfe* was incorrectly decided concerning the issue of the proper remedy for a Sixth Amendment violation. Mr. Bauer's Appellant's Brief contains analysis and argument related to the binding authority of *Waller v. Georgia* and *Presley v. Georgia* and additional citation to numerous persuasive authorities, including *Carter v. State*, 356 Md. 207, 224, 738 A.2d 871, 880 (1999), (rejecting prosecution request for remand to allow trial court to conduct *ad hoc* rational to support trial closure).

In any event, Mr. Bauer's case is distinguishable from *Rolfe* in at least one important respect: unlike in *Rolfe* where the trial court did not address the *Waller* factors, in this case the State presented grounds in support of its motion for closure and the trial court addressed the *Waller* factors and made findings. In *Rolfe*, this Court found the proper remedy to be a remand so that the trial court could conduct a hearing and to make appropriate findings related to the closure issue. Such a remedy is not warranted here as the State has already had ample opportunity to make its record. A review of the transcript reveals that the State elected to make an offer of proof, had its witnesses

available, and was not otherwise prevented from presenting its complete augment and presentation on this issue. JT 4-9. If error occurred, remanding the case for a further hearing would do nothing to supplement the record as the State has already been given the opportunity to make its record and has done so. At this point, the only remedy available is a new trial.

Failure to canvas defendant's waiver of public trial as independent ground for new trial. At the trial level, the court failed to canvas Mr. Bauer on the waiver that took place of his right to a public trial. Mr. Bauer's Appellant's brief contains persuasive authority and analysis in support of the proposition that the failure of a trial court to properly canvas a criminal defendant on counsel's waiver of the right to public trial should result in reversal of the conviction. In response, the State correctly notes that no authority exists for this precise proposition. SB 16-17. However, the Supreme Court has not ruled on this precise question, and the issue has yet to be decided. The mere fact that the Supreme Court has not had occasion to answer the question is not fatal to Mr. Bauer's position.

Turning to the Supreme Court's analysis in *Gonzalez v. United States*, 553 U.S. 242, 128 S.Ct. 1765, (2008) regarding fundamental rights, the right to a public trial should be regarded as fundamental and unwaivable by trial counsel. Mr. Bauer has previously argued that the right to a public trial belongs to the defendant and that it is his constitutional guarantee that ensures that the "public may see he is fairly dealt with and not unjustly condemned". The right to a public trial is a right of the first magnitude and it is just as important, basic, and fundamental as the right of a defendant to select between a jury trial or a court trial, or his decision on whether or not to testify. Counsel should

not be permitted to "tactically waive" such an important right without his client's consent.

In response, the State argues that this court should find that trial counsel may waive the public portion of his client's right to a public trial. The State cites several appellate cases in support of its position. SB 17-19. However, many of these decisions were announced before the Supreme Court decided *Waller*. Therefore, these appellate courts did not have the benefit of the Supreme Court's analysis related to structural error and courtroom closure. Additionally, the State cites *United States v Hitt*, 473 F.3d 146, 155 (5th Cir. 2006). Although the Fifth Circuit has found that defense counsel can waive a defendant's right to a public jury trial, this question still has yet to be resolved by the United States Supreme Court. Importantly, the *Hitt* court did not address the issue as to whether or not the right to a public trial is fundamental, as the term is used in *Gonzalez, supra*. The defendants in *Hitt* do not appear to have raised the issue as to whether or not their respective attorneys could waive their right to a public trial. Therefore, the Hitt decision is not precisely on point.

The State also argues, in effect, that the waiver issue is moot if the courtroom was properly closed. However, the trial court seems to have closed the courtroom, at least in part, due to the fact that Mr. Bauer's trial counsel did not object to the courtroom closure. "Well, given that the defendant is not objecting to this [closure] and given that it's not a total closure…. I am going to order it [the closure]…JT 8-9.[2] If this Court finds that the right to a public trial is fundamental as the term is used by the Supreme Court in

[2] The trial court's rational in support of the closure occupies nearly one and one half pages of transcript and contains reasons and analysis beyond the fact that the defense counsel did not object.

Gonzalez v. United States, 553 U.S. 242, 128 S.Ct. 1765 (2008), then reversal of the conviction is the proper remedy to preserve this fundamental right.

2. Mr. Bauer's trial counsel rendered ineffective assistance of counsel by failing to object to the courtroom closure.

Ordinarily, this Court will not review a claim of ineffective assistance of counsel on direct appeal. *State v. Arabie*, 2003 S.D. 57, ¶ 20, 663 N.W.2d 250, 256. The Court will "depart from this principle only when trial counsel was 'so ineffective and counsel's representation so casual as to represent a manifest usurpation of [the defendant's] constitutional rights.' " *Id.* (internal citation omitted). The question is whether counsel's representation "amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington v. Richter*, ___ U.S. ___, 131 S.Ct. 770, 788, 178 L.Ed.2d 624 (2011) (internal citations omitted).

In this case, Mr. Bauer's trial counsel not only failed to object to the courtroom closure, he also failed to object the closure taking place in the presence of the jury. These failures individually and collectively amount to incompetence under prevailing professional norms as they prevented Mr. Bauer from having a public trial. Additionally, closing the courtroom in the presence of the jury gave the appearance that the trial court believed that I.T. needed special treatment and was not an ordinary witness. See *United States v. Sherlock*, 962 F.2d 1349, 1356 (9th Cir.1992) (finding that the trial court had properly declined to completely close the courtroom, but rather had only excluded defendant's family—*a ruling not made known to the jury*—during victim's testimony after the court had observed those family members making faces at victim while she testified). The seriousness of this error is so apparent that even the State's response to this point—discussed below—tacitly confesses it. Presenting I.T. as a special witness is

particularly damaging here, as this case came down to a matter of credibility between I.T. claims and Mr. Bauer's denial.

In response, the State argues that "…defense counsel's showing of consideration and understanding to the victim and the sensitivity to her needs and desires as a ten-year-old child may have been to Defendant's benefit. Objecting in front of the jury almost certainly would have turned the jury against the Defendant…" SB 26. This argument has a number of problems. First, as mentioned above, when the State attempts to argue here that an objection "in front of the jury . . . would have turned the jury against the defendant" it tacitly grants Mr. Bauer's argument that closing the trial in the presence of the jury was a serious error. Second, the argument presupposes that I.T. was, in fact, a victim of rape. The defense position at trial was that I.T. was not raped and that Mr. Bauer was factually innocent. JT 311. Though the State asserts that the *act of objecting* in the presence of the jury might be a non-starter for the members of the jury—an immaterial position even so far as it goes, the objection could well be made out of the jury's presence—nowhere does the state even attempt to argue that *the closure itself* could present a strategic advantage for the defense.

At the very least, defense counsel should have requested that the jury not be present when the court ordered the courtroom closed. This half-measure would have avoided the appearance of the trial court providing special treatment for I.T. Defense counsel had opportunity to make this motion outside the presence of the jury while State's motion for closure was being heard. JT 4-9. As the record now stands, trial counsel's error is comparable to that of the attorney in *Thomas* who failed to object to

jury instructions regarding accomplice liability. *State v. Thomas*, 2011 S.D. 15, 796 N.W.2d 706.

Ultimately, trial counsel's failure to object to the courtroom closure prejudiced Mr. Bauer's right to a public trial and further prejudiced his right to a fair trial by allowing the jury to observe the court closing the courtroom for I.T.'s benefit.

CONCLUSION

In the final analysis, Mr. Bauer's conviction was secured in violation of his right to a public trial. The trial court improperly permitted the courtroom to be closed during the most significant portion of the trial, the testimony of the complaining witness. On top of this, Mr. Bauer's trial counsel failed to object. The only remedy for this structural error is to remand the case for a new trial where the evidence can be fairly viewed in the setting of a truly public trial as guaranteed by the Sixth Amendment.

REQUEST FOR ORAL ARGUMENT

Defendant Bauer again requests that oral argument be granted on these issues.

Dated this 14th day of January, 2014.

GREY LAW

_____/s/_____
Ellery Grey
Attorney for Appellant
909 St. Joseph Street, Suite 555
Rapid City, SD 57701

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL # 26719

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

v.

CERTIFICATE OF SERVICE

JEREMY BAUER,
Defendant and Appellant.

The undersigned hereby certifies that he emailed a true and correct copy of Reply Brief of Defendant/Appellant Jeremy Bauer upon the persons herein next designated all on the date shown below to the email addresses as provided; to wit:

Marty Jackley
Attorney General
1302 E. Hwy 14, Suite 1
Pierre, SD 57501
Marty.Jackley@state.sd.us

Mark Vargo
Pennington County State's Attorney
300 Kansas City Street, Suite 400
Rapid City, SD 57701
vargo.mark@gmail.com

Dated this 14th day of January, 2014.

GREY LAW

_____/s/_____
Ellery Grey
909 St. Joseph Street, Suite 555
Rapid City, SD 57701
(605) 791-5454
ellery@ellerygreylaw.com

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL #26719

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

v. CERTIFICATE OF COMPLIANCE

JEREMY BAUER,
Defendant and Appellant.

Pursuant to SDCL 15-26A-66, Ellery Grey, counsel for Defendant/Appellant, does submit the following:

The Appellant's Reply Brief is 14 pages in length. It is typed in proportionally spaced typeface Baskervillle 12 point. The word processor used to prepare this brief indicates that there are a total of 4,111 words in the body of the brief.

Dated this 14th day of January, 2014.

GREY LAW

_____/s/_____
Ellery Grey
909 St. Joseph Street, Suite 555
Rapid City, SD 57701
(605) 791-5454