A20-1638

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

Respondent,

vs.

Abraham Isaac Bell,

Appellant.

APPELLANT'S BRIEF

KEITH M. ELLISON
Minnesota State Attorney General
1800 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101

RON HOCEVAR
Scott County Attorney
TODD P. ZETTLER
Assistant County Attorney
Scott County Judicial Center
200 Fourth Avenue West
Room JC340
Shakopee, MN 55379-1220

ATTORNEYS FOR RESPONDENT

OFFICE OF THE MINNESOTA APPELLATE PUBLIC DEFENDER

REBECCA IRELAND
Assistance State Public Defender
License No. 0393076

540 Fairview Avenue North
Suite 300
St. Paul, MN 55104
(651) 219-4444

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

MINNESOTA STATUTES

MINNESOTA DECISIONS

STATE CASES

FEDERAL CASES

CONSTITUTIONAL PROVISIONS

OTHER

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PROCEDURAL HISTORY

November 30, 2019	Date of offense.
December 2, 2019	The state charges appellant Abraham Bell with first-degree aggravated robbery.
June 10, 2020	Bell objects to the district court's pretrial plan to prohibit all members of the public from attending trial in the courtroom and moves for a public trial.
June 18, 2020	Motions hearing before the Honorable Christian Wilton. The court denies Bell's public-trial motion. Complaint is amended to aiding and abetting first-degree aggravated robbery.
June 22-24, 2020	Jury trial. The jury finds Bell guilty as charged.
June 26, 2020	The district court files a written order denying Bell's public-trial motion.

September 30, 2020	The district court sentences Bell to 105 months' imprisonment.
December 27, 2021	The court of appeals affirms.
March 15, 2022	This Court grants Bell's petition for further review and stays further proceedings.
September 28, 2022	This Court dissolves the stay of proceedings and orders that the matter proceed with review of the public-trial issue.

ISSUE PRESENTED

A public trial within the meaning of the Sixth Amendment is one where the defendant is afforded the benefit of the public's presence at trial—such that interested members of the public can observe the trial and be observed by the trial participants. As such, two-way observation between the public and trial participants is fundamental to a public trial. A defendant is further entitled to the presence of family and friends at trial.

Did the district court violate Bell's right to a public trial when, due to the COVID-19 pandemic, it closed the courtroom for his entire trial and failed to afford Bell a public audience that could observe and be observed by trial participants?

Ruling below: Bell objected to the district court's pretrial plan to close the courtroom to the public and moved to have a limited number of family or friends present at trial. (Doc. No. 33; June 18, 2020 Tr. 25–26). The district court denied Bell's motion. (*Findings of Fact, Conclusions of Law, and Order*, Doc. No. 64 at 4–5; Add. 4–5). Instead of allowing public attendance at trial, the court arranged a live one-way video that would allow spectators to observe the trial courtroom. (*Id.*). The court of appeals affirmed, holding that the courtroom closure was justified under *Waller*. *State v. Bell*, slip op., A20-1638 (Minn. App. Dec. 27, 2021) (Add. 9–19).

Apposite authority:
U.S. Const. amend. VI
In re Oliver, 333 U.S. 257 (1948)
Waller v. Georgia, 467 U.S. 39 (1984)
State v. Schmit, 139 N.W.2d 800 (Minn. 1966)

STATEMENT OF THE CASE

On December 2, 2019, the state charged appellant Abraham Isaac Bell with one count of first-degree aggravated robbery under Minn. Stat. § 609.245, subd. 1 (2018), later amended to aiding and abetting under Minn. Stat. § 609.05, subd. 1 (2018).

In June 2020, the Honorable Christian Wilton adopted a protocol to govern Bell's upcoming jury trial. The protocol called for closing the courtroom to all members of the public for the entirety of Bell's trial and arranging a live video and audio of trial for interested spectators. Bell objected on Sixth Amendment grounds and moved for a public trial, requesting that one or two members of his family or friends be present at his trial. The district court denied Bell's motion. On June 22, 2020, the matter proceeded to jury trial. In lieu of the public's attendance at trial, Judge Wilton provided a live one-way video feed that played in a separate room so spectators could see what happened at trial. The jury found Bell guilty of aiding and abetting first-degree aggravated robbery, and Judge Wilton sentenced Bell to 105 months' imprisonment.

Bell appealed, raising both speedy and public trial claims. The court of appeals affirmed in an unpublished opinion. *State v. Bell*, slip op., A20-1638 (Minn. App. Dec. 27, 2021) (Add. 9–19).

This Court granted further review of Bell's public-trial claim.

STATEMENT OF THE FACTS

In December 2019, Bell was charged in connection with an armed robbery that took place in Prior Lake. (Doc. Nos. 1, 44). Bell pleaded not guilty. (March 31, 2020 Tr. 3).

On March 13, 2020, the governor declared a peacetime emergency because of the COVID-19 pandemic. On March 20, 2020, the Chief Justice issued an order prohibiting the district courts from commencing new jury trials before April 22 in light of the peacetime emergency. *Continuing Operations of the Courts of the State of Minnesota Under a Statewide Peacetime Declaration of Emergency*, No. ADM20-8001, Order at 3 (Minn. filed Mar. 20, 2020). Two subsequent orders extended this prohibition. *Continuing Operations of the Minnesota Judicial Branch Under Emergency Executive Order No. 20-33*, No. ADM20-8001, Order at 3 (Minn. filed April 9, 2020); *Continuing Operations of the Minnesota Judicial Branch Under Emergency Executive Order No. 20-33*, No. ADM20-8001, Order at 2 (Minn. filed May 1, 2020).

On May 15, 2020, the Chief Justice issued an order authorizing a transitional phase for gradually increasing the number of in-person proceedings and a pilot program for jury trials. *Order Governing the Operations of the Minnesota Judicial Branch Under Emergency Executive Order Nos. 20-53, 20-56*, No. ADM20-8001, Order at 2–3 (Minn. filed May 15, 2020). Under this order, district courts were required to adhere to the Judicial Branch COVID-19 Preparedness Plan and, in counties approved to participate in the jury trial pilot program, to submit a jury trial plan for approval of the Judicial Council. *Id.* at 2.

After several continuances, Bell's trial was scheduled to commence in late June 2020 before the Honorable Christian Wilton as a part of the jury trial pilot program. (Doc. No. 118; May 22, 2020 Tr. 4; June 1, 2020 Tr. 4).

Citing his Sixth Amendment rights, Bell filed a motion for a public trial and objected to the Scott County jury trial plan expected to govern his upcoming trial.[1] (Doc. No. 33). In his filing, Bell argued that the district court's trial plan that would bar the public from the trial courtroom and require all spectators, including his family, to watch a live video feed of the trial proceedings in a satellite room violated his right to a public trial. (*Id.* at 1). Relying on the governing caselaw, Bell asserted that the court's complete exclusion of the public from the trial courtroom was overly restrictive: "[T]he Court is erring too far on the side of protecting the jury, the parties, court staff, and the public (a worthy goal . . .) while ignoring the firmly established constitutional rights of Mr. Bell." (*Id.* at 3).

At a hearing on this and other pretrial motions, the district court first explained that a "public trial" would take place because public spectators would be able to "see and hear everything that's happening within the courtroom." (June 18, 2020 Tr. 24). Bell argued that these circumstances were inadequate because "a public trial means that the witness can see the public and that the defendant can see and have family support," and that the court's jury trial plan would not allow spectators, including Bell's family, to be present in the trial courtroom. (*Id.* at 25). The defense argued that as a constitutional matter "some

[1] The Scott County jury trial plan was not submitted into the record but it is readily apparent that the parties and Judge Wilton reviewed this jury trial plan prior to trial and at the time Bell made his public-trial motion and related objection. *See* Doc. No. 33 at 1.

accommodation must be made to have some people from the public in the courtroom." (*Id.* at 25–26). Bell further reiterated the importance of "having witnesses testify in front of actual people from the public and [so] they can see them." (*Id.* at 26). Acknowledging the need for social distancing, the defense suggested that having just one or two seats available to Bell's family would suffice to vindicate his public-trial right. (*Id.* at 25).

Judge Wilton denied Bell's motion from the bench, explaining that safety required a six-foot buffer between every person in the courtroom. (*Id.* at 26). The court noted that the public-trial right was to allow the public "to see what is happening within our court system." (*Id.*). Based on this reasoning the district court assumed the courtroom was "[i]in fact . . . open" and assured Bell that the public would get to see everything by video and that the audio would be "very good because I want [the public] to be able to hear everything." (*Id.* at 26–27).

Trial began on June 22, 2020. (Doc. No. 50; June 22, 2020 Tr. 2). The district court held an in-person trial with COVID-related safety measures. (*See* June 22, 2020 Tr. 5 (wiping surfaces down), 11 (everyone except the judge will wear a mask), 188 (spacing people out)). Pursuant to the court's pretrial ruling, the courtroom was off limits to the public for the entirety of Bell's trial. (June 18, 2020 Tr. 25–27). At the conclusion of trial, the jury found Bell guilty of aiding and abetting first-degree aggravated robbery. (Doc. No. 59). Bell was sentenced to 105 months' imprisonment. (Doc. No. 77).

After trial, the district court issued a written order denying Bell's motion to have a limited number of his family or members of the public attend trial. (Doc. No. 64). The district court reasoned that it had collaborated extensively with public-health officials in

devising the safety protocols to protect trial participants and "[b]ecause there is no way to safely accommodate members of the public or Defendant's family inside the courtroom, the Court has instead arranged for live-streaming of the trial in an adjacent courtroom which will be open to the public." (*Findings of Fact, Conclusions of Law, and Order*, Doc. No. 64 at 4–5, Add. at 4–5).

Bell appealed, raising both speedy and public trial claims under the Sixth Amendment. The Minnesota Court of Appeals affirmed in an unpublished opinion, holding that no speedy-trial violation occurred and that the courtroom closure was justified under *Waller v. Georgia*, 467 U.S. 39 (1984). *State v. Bell*, slip op., A20-1638 (Minn. App. Dec. 27, 2021) (Add. 9–19).

This court granted further review of Bell's public-trial claim.

ARGUMENT

THE DISTRICT COURT VIOLATED BELL'S RIGHT TO A PUBLIC TRIAL BY CLOSING THE COURTROOM TO THE PUBLIC FOR HIS ENTIRE TRIAL AND AFFORDING BELL NO PUBLIC AUDIENCE THAT COULD OBSERVE AND BE OBSERVED BY TRIAL PARTICIPANTS.

Appellant Abraham Bell is entitled to a new trial because he was denied his constitutionally protected right to a public trial. Bell asserted his right to a public trial, objected to the district court's pretrial decision to exclude the public from in-person attendance at his trial, and proffered a more a narrowly tailored solution to serve public-health interests while protecting his right to have some public audience that could observe and be observed by trial participants. Acknowledging the need to limit courtroom attendance because of the pandemic, he moved the court to accommodate just one or two family members or friends of his in the courtroom. The court denied this request. The court instead provided a "public trial" by offering a remote live video of the trial available to interested spectators. This protocol fails to provide a public trial within the constitutional sense and constitutes an extraordinary and sweeping intrusion on Bell's right to a public trial, one that was not justified even by virtue of the public-health imperatives of the COVID-19 pandemic. While the circumstances of the pandemic required the district court to take measures to protect the safety of trial participants, the court did so in overly broad fashion and without proper consideration of less restrictive measures. A new trial is required.

A. Standard of review

This Court reviews claims of a violation of the right to a public trial de novo. *State v. Brown*, 815 N.W.2d 609, 616 (Minn. 2012). An objected-to violation of the right to a public trial is a structural error that is not subject to a harmless-error review. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1909, 1910 (2017); *State v. Bobo*, 770 N.W.2d 129, 139 (Minn. 2009).

Here, the public-trial issue relates to the closure of the courtroom for the entirety of the jury trial. In such a case, where there is an objection at trial and when preserved for appeal, the unconstitutional denial of the right to a public trial generally requires "automatic reversal" regardless of the error's actual effect on the outcome. *Weaver*, 137 S. Ct. at 1910 (quotation omitted); *see also Pulczinski v. State*, 972 N.W.2d 347, 356 n.2 (Minn. 2022) (noting in dicta that defendant would be entitled to automatic reversal if he had objected to the courtroom closure and if the closure was not justified under the *Waller* factors). The reason objected-to structural errors like the one that occurred in this case require automatic reversal is because "such errors affect the framework within which the trial proceeds" and "harm to the defendant is irrelevant, either because [the Court] protect[s] the right for reasons independent of preventing harm to the defendant, the harm flowing from the violation of the right is simply too hard to measure, or the violation of the right always results in fundamental unfairness." *Id.* at 358 (Minn. 2022) (citing *Weaver*, 137 S. Ct. at 1907–08).

B. The Sixth Amendment right to a public trial includes the right have a public audience present at trial

The public character of a criminal trial is a bedrock principle in our English common law heritage that predates the Norman Conquest. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 565–67 (1980). The presumptive openness of trial is "one of the essential qualities of a court of justice" that remained a constant in the common-law trial system and carried over to the early judicial systems of colonial America. *Id.* at 567 (citation omitted). America's adoption of the practice of conducting trial in the open grew out of the traditional Anglo-American distrust for the secret trials of Europe. *In re Oliver*, 333 U.S. 257, 270 (1948).

The open and public nature of trial was later enshrined in the Sixth Amendment to the United States Constitution and article I, section 6 of the Minnesota Constitution, which provide that the criminally accused "shall enjoy the right to a . . . public trial." Preserving the public-trial guarantee in the constitution "reflects the founders' wisdom of the need to cast sunlight—the best of disinfectants—on criminal trials." *State v. Silvernail*, 831 N.W.2d 594, 607 (Minn. 2013) (Anderson, J., dissenting).

The scope of the public-trial right can only be understood in light of its purposes. *United States v. Allen*, 34 F.4th 789, 795 (9th Cir. 2022). Precedent has "uniformly recognized the public trial guarantee as one created for the benefit of the defendant." *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979). This means "**all possible benefits** that a trial open to the public is designed to assure." *State v. Schmit*, 273 Minn. 78, 86, 139 N.W.2d 800, 806 (1966) (emphasis added). The public-trial guarantee 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." *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979)). Furthermore,

> 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. A fair trial is the objective, and public trial is an institutional safeguard for attaining it.

Estes v. Texas, 381 U.S. 532, 588 (1965) (Harlan, J., concurring) (citation omitted) (internal quotation marks omitted). "In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury." *Waller*, 467 U.S. at 46. The U.S. Supreme Court has also recognized, part and parcel of the public-trial tradition, "without exception all courts have held that an accused is **at the very least entitled** to have his friends, relatives, and counsel present" in a trial that decides guilty and innocence. *In re Oliver*, 333 U.S. at 271–72.

Fundamentally, then, the purposes of the public-trial right are advanced by the public's *presence* at trial, such that the public may observe what happens at trial but also witnesses and other trial participants face and observe the public. *See Waller*, 467 U.S. at 46 (describing the safeguarding function that the "presence of interested spectators" plays in the fairness of the proceedings). This Court's decision in *State v. Schmit*, nearly twenty years before *Waller*, reflects the importance of the public's presence at trial in serving the purposes of the public-trial requirement:

> The **presence of an audience** does have a wholesome effect on trustworthiness since witnesses are less likely to testify falsely before a **public gathering**. Further, the possibility that some spectator drawn to the trial may prove to be an undiscovered witness in possession of critical evidence cannot be ignored. It is not unrealistic even in this day to believe that public inclusion affords citizens a form of legal education and hopefully promotes confidence in the fair administration of justice.

Schmit, 273 Minn. at 86–88, 139 N.W.2d at 806–07 (1966) (footnotes omitted) (emphasis added). This Court's characterization of trial as a "public gathering" reinforces that public spectators are not mere passive onlookers in a proceeding, but that they play an affirmative role in ensuring a fair process by virtue of their presence at the proceeding. *See id.*

The foundational caselaw contemplates that the aims of the public trial are served not just through the public's access to the proceedings but through and because of the public's actual presence and attendance at the proceeding. Put differently, live two-way observation between the public audience and the trial participants is central to the well-established meaning of a public trial and achieving its constitutional aims.

C. The *Waller* factors

Like other constitutional rights, the public-trial right is not absolute and may give way to other interests or other rights. *State v. Fageroos*, 531 N.W.2d 199, 201 (Minn. 1995). The U.S. Supreme Court articulated the standard for reviewing the constitutionality of courtroom closures in *Waller v. Georgia*, 467 U.S. 39 (1984). To justify a closure to the public

> the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

Id. at 48; *see also Fageroos*, 531 N.W.2d at 201 (adopting the *Waller* standard).

D. Bell's trial was closed

The first question in reviewing a claim of a public-trial violation is whether there has been a non-trivial, or true, closure of the courtroom necessitating review under *Waller*.[2] *State v. Lindsey*, 632 N.W.2d 52, 660–61 (Minn. 2001). In making this determination, this Court considers whether (1) the courtroom was cleared of all spectators; (2) the trial remained open to the general public and press; (3) there was no period of trial in which members of the public were absent; and (4) and at no time was the defendant, his family, his friends, or any witness improperly excluded. *Id.* at 661.

Here, a true closure occurred. No spectator was allowed in the courtroom at any moment of trial. The public and press were barred from the courtroom based on the pretrial ruling of the court citing public-health measures and protocols that would govern trial. Even a limited number of Bell's family, over objection, were excluded from being present in the proceeding. There was no period in which the public was not absent from the courtroom.

The only public access to trial was through a separate viewing room where a one-way video feed of the trial courtroom played. While this protocol allowed members of the

[2] Some courtroom restrictions are deemed too trivial to implicate the Sixth Amendment and *Waller*. Trivial closures have included requiring spectators show photo identification for entry to trial courtroom, *State v. Taylor*, 869 N.W.2d 1, 12 (Minn. 2015); locking the courtroom door for closing argument, *State v. Silvernail*, 831 N.W.2d 594, 601 (Minn. 2013); and excluding potential witness from voir dire, *State v. Zornes*, 831 N.W.2d 609, 620 (Minn. 2013).

public to view the trial courtroom, it did not allow any trial participants at any moment to see a public audience watching the proceedings. As such, in troubling fashion, no means for the public's presence in the trial was afforded, even for Bell's family members, and certainly no means for observation between the public and trial participants was effectuated. Because all members of the public were excluded from the courtroom for all phases of trial, and the court's video feed failed to provide two-way observation between the viewing room and the trial courtroom, a true closure occurred. This necessitates scrutiny under *Waller*.

The court of appeals held that a partial closure occurred, determining that the court's protocol of closing the courtroom and providing spectators a video feed of trial required evaluation under *Waller*. *State v. Bell*, slip op., A20-1638 at 9 (Minn. App. Dec. 27, 2021) (Add. 17). Minnesota courts apply the *Waller* test to both partial and complete closures.[3] *State v. Mahkuk*, 736 N.W.2d 675, 685 (Minn. 2007). Therefore, even if this Court agrees with the court of appeals and concludes that only a partial closure occurred, application of the *Waller* factors is required.

E. The closure violated Bell's right to a public trial

Applying *Waller*, this Court must find that the restrictions imposed on the public's presence at Bell's trial violated his right to a public trial.

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[3] By contrast, nearly all federal courts of appeal apply a lower "substantial reason" test in reviewing the constitutionality of "partial" closures, by which the federal courts mean a closure to specific individuals, not the exclusion of all spectators from the courtroom. *United States v. Simmons*, 797 F.3d 409, 413 (6th Cir. 2015).

1. Minimizing the spread of COVID-19 is an overriding governmental interest but that interest was not likely to be prejudiced by allowing one family member to attend trial

Curbing the spread of the COVID-19 virus is, as a general matter, an overriding interest. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (concluding that stemming spread of COVID-19 is "unquestionably a compelling interest"); *cf. State v. Paige*, 977 N.W.2d 829, 843 (Minn. 2022) (recognizing "unprecedented risks posed by the COVID-19 pandemic"). Bell disputes neither the seriousness of the COVID-19 pandemic nor the legitimacy of the district court's public-health concerns vis a vis pandemic. But the standard under the first *Waller* factor is not whether there is a general overriding interest but whether that overriding interest is "likely to be prejudiced" without the specific closure at issue. Here, the interest in minimizing the spread of COVID-19 was not likely to be prejudiced by allowing merely one or two family members in the courtroom for trial—all that Bell requested—and certainly would not be prejudiced by providing a less restrictive video feed that afforded two-way observation between the public and the trial participants.

"[E]ven in a pandemic, the constitution cannot be put away and forgotten." *Diocese of Brooklyn*, 141 S. Ct. at 68 (blocking state COVID-19 restrictions in First-Amendment context); *see also id.* at 69 (Gorsuch, J., concurring) ("Government is not free to disregard [the constitution] in times of crisis."). Even though the government and the courts have an interest in reducing the spread of COVID-19, the public-health emergency does not suspend constitutional rights or even lower the court's burden to uphold them. *See Tandon v. Newsom*, 141 S. Ct. 1294, 1296–98 (2021) (per curiam) (enjoining state COVID-19

restrictions that contravene well-settled standard protecting free exercise of religion as "[t]hat standard is not watered down," even in the pandemic); *see also Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2604 (2020) (Alito, J. dissenting) ("We have a duty to defend the Constitution, and even a public health emergency does not absolve us of that responsibility.").

Clearly, there is no pandemic exception to the time-honored guarantee of a public trial, which affords the public's presence in trial, or the corresponding requirement that any restriction on this right be narrowly tailored. Because the overriding interest in preventing the spread of the COVID-19 virus was not likely to be prejudiced by the specific requests made by Bell, the closure was not justified under the first *Waller* factor.

2. *The courtroom closure and video protocol used in Bell's trial was overly broad*

Waller demands that any restriction on an open trial be essential and narrowly tailored to the overriding interest. *Waller*, 467 U.S. at 45. A courtroom closure is narrowly tailored when it is "no broader than necessary to protect that interest." *Id.* at 48.

There is limited guidance from this Court on what precise circumstances bear on the determination of whether a restriction on the right to a public trial, or other fundamental right, is narrowly tailored to serve an overriding interest. But in considering whether a restriction on a constitutional right is narrowly tailored, the U.S. Supreme Court will look to "different methods that other jurisdictions have found effective" in addressing the same problem "with less intrusive tools." *McCullen v. Coakley*, 573 U.S. 464, 494 (2014) (considering less restrictive measures used in free-speech context); *see also, e.g.*, *Holt v.*

Hobbs, 574 U.S. 352, 368 (2015) (considering, in religious-freedom context, the less restrictive measures used by other correctional institutions to further the same interest in prison health and safety with less burden on religious freedom).

The U.S. Supreme Court has already applied this approach in the context of COVID-19. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). In *Dioceses*, the supreme court considered a state order that imposed restrictions on religious-service attendance aimed at minimizing the spread of COVID-19. *Id.* The supreme court determined that the state "unquestionably" had a compelling interest in reducing the spread of the virus but that the restrictions could not be viewed as narrowly tailored, in part, because they were "tighter than those adopted by many other jurisdictions hard-hit by the pandemic." *Id.* at 67.

The Ninth Circuit Court of Appeals recently applied this approach in reviewing the constitutionality of COVID-19 related public-trial restrictions. *United States v. Allen*, 34 F.4th 789 (9th Cir. 2022). In *Allen*, the appellate court concluded that the trial court's protocol of closing the courtroom and providing to the public an audio feed of suppression and trial proceedings was not narrowly tailored because federal and state courts "throughout the country addressed the same issue" but with less restrictive measures to provide a trial "open for public attendance and observation." *Id.* at 798 (reasoning that many courts, even in the early part of the pandemic, consistently provided greater access

to trial, either by video means or allowing a limited number of spectators to be present in the courtroom, a less restrictive burden on the public-trial right).[4]

Accordingly, where every U.S. jurisdiction during the pandemic faced the same problem of balancing public-health interests and the requirement of the public trial, it is instructive to consider the policies and protocols other courts have implemented and the extent to which those measures maintained or curtailed public access and attendance. Such comparative review reveals that (1) courts have routinely safeguarded the defendant's right to have some public presence at trial, in particular that of family and friends, even during the pandemic and (2) courts have used two-way video technology to afford mutual observation between the public audience and trial participants where limitations on courtroom attendance were necessary due to the risks of COVID-19. These practices of other jurisdictions, although not binding, support the conclusion that the restrictions imposed on the public-trial right in Bell's case were overly broad, and therefore unconstitutional.

a. Courts have served the overriding health interests of the pandemic while ensuring the defendant be afforded some public attendance, especially that of family members, in the courtroom

Decisions from both Minnesota and other jurisdictions show that courts do ensure that the defendant **at least be allowed some family** in the courtroom, while limiting and

[4] While the *Allen* court determined that providing the public video access to a court proceeding is clearly a less restrictive intrusion on the public-trial right than an audio feed of that proceeding, the court did not opine whether, or under what circumstances, a video feed alone would be constitutionally sufficient.

even barring all other public attendance to serve the public-health demands of the COVID-19 pandemic and to meet the requirement of the public trial.

The trial of Derek Chauvin in Hennepin County is one such example. In that case, the Honorable Peter A. Cahill and the Hennepin County District Court followed stringent public-health safeguards to protect all persons in the courtroom and authorized video and audio recording in the courtroom as well as televised and internet broadcasting of the proceedings. Still, the district court ensured there could be spectators in the courtroom each day. (*See State v. Chauvin*, 27-CR-20-12646, *Trial Management Order*, Doc. No. 354 at 1–2). **Two family members** (one each from the defendant's and victim's families) and two members of the media were permitted to be present **inside the courtroom**, each day of trial. (*Id.*). That the district court considered it necessary to guarantee a public audience in the courtroom, albeit a limited one, is underscored by the vast number of trial participants involved in that case and the serious public-health interests implicated by gathering those trial participants for weeks and even months for a lengthy trial during a pandemic. (*Id.*) Even with the constraints of social distancing and the public-health interests at stake, not to mention the public's access to TV and internet broadcasting of the entire trial, Judge Cahill deemed it essential and inviolable that the defendant be afforded his family in the courtroom.

Other Minnesota courts, in less extraordinary cases, have followed suit and have amended jury trial protocols to allow family members to attend trial. *State v. Colgrove* is one such example. Dist. Ct. No. 15-CR-20-329, Doc. No. 167 at 114–25. In *Colgrove*, the prosecution objected to the district court's jury trial protocol as it would preclude the

victim's family and other interested members of the public from attending trial and create constitutional issues for appeal. *Id.* at 120–21. The state moved to "allow[] the public to be in the courtroom for the proceedings as required by law." *Id.* at 122. Following discussion regarding the recent surge of COVID-19 infections, filling all but 2 of the 15 local ICU beds, the court acknowledged that Minnesota had recently moved "backwards" with curbing COVID-19 and that a new variant was "front and center now." *Id.* at 122–24. Even so, the court amended the jury trial plan to allow the public to attend trial, explaining: "I look at this primarily through the eyes of the **defendant and the victim's families** and loved ones. And I think they are entitled to be in the same room where the trial proceedings are undertaken." *Id.* at 124 (emphasis added). The defendant's and victim's families and other members of the public were permitted to attend trial and other safety measures were maintained to serve public-health interests. *Id.* at 124–25.[5]

Likewise, federal courts have served the public-health interests of the COVID-19 pandemic while consistently ensuring the defendant be afforded some public attendance, in particular that of family members, in the courtroom. *See, e.g.*, *United States v. Bledson*, 2021 WL 1152431, at *3 (M.D. Ala. Mar. 25, 2021) (finding the court's "plan to close trial proceedings to spectators, **except for the Defendant's family members**, while making the trial available for viewing through a live video stream" meets the court's interest in preventing the spread of COVID-19) (emphasis added); *United States v. Richards*, 2020

[5] This Court can take judicial notice of these public records of the district court. *See Eagan Econ. Dev. Auth. v. U–Haul Co. of Minn.*, 787 N.W.2d 523, 530 (Minn. 2010) (stating that appellate courts have inherent power to look beyond the record and take judicial notice of public records where the orderly administration of justice commends it).

WL 5219537, at *1 (M.D. Ala. Sept. 1, 2020) (finding the court's interest in limiting the potential spread of COVID-19 amongst the trial participants and within the broader public requires the proceedings be "closed to in-person spectators **except for the Defendant's family members**") (emphasis added); *United States v. Fortson*, 2020 WL 4589710, at *1 (M.D. Ala. Aug. 10, 2020) (finding that the court's interest in limiting the potential spread of COVID-19 necessitates a sua sponte order that the "courtroom be closed to in-person spectators **except for Defendant's family members**") (emphasis added); *United States v. Trimarco*, 2020 WL 5211051, at *2 (E.D.N.Y. Sept. 1, 2020) (taking "very seriously a defendant's right to have family members and friends present at trial" and reserving isolated courtroom seat for **defendant's sick father** and a separate room in courthouse with live video feed of trial); *see also United States v. Holder*, 2021 WL 4427254, at *8, 9 (D. Colo. Sept. 27, 2021) (allowing **limited members of public** in the courtroom in pandemic jury trial pilot, a justified partial closure).

Other jurisdictions have followed in step. *See Lappin v. State*, 171 N.E.3d 702, 707 (Ind. Ct. App.), *transfer denied*, 175 N.E.3d 273 (Ind. 2021) (upholding courtroom restrictions where trial court provided public access to voir dire only via audio streaming yet opened courtroom to four members of the public for the remainder of the trial); *Strommen v. Larson*, 401 Mont. 554 (2020) (upholding trial restrictions that allowed "a small number of the public" in the courtroom and a live video feed of trial on grounds the court adequately sought to "protect [the defendant's] constitutional rights while maintaining the public's health and safety").

These examples across federal and state courts, including Minnesota's courts, reflect the undeniable importance that a defendant be allowed some public attendance in court and "in the very least" have the support of family and friends in trial, and that a pandemic does not alter this right.

b. Courts throughout the pandemic have minimized intrusions on the public-trial right by using two-way video feeds that afford two-way observation between the public and trial participants when courtroom attendance is limited

The closure in Bell's case was overly broad for a second reason: the video set-up did not have a two-way feed that would have provided the opportunity for the trial participants to see a public audience, a vital feature of the Sixth Amendment right. Trials held early in the pandemic in both Minnesota and other jurisdictions used such two-way video feeds.

Where the federal courts have implemented a video feed in conjunction with limitations on in-person courtroom attendance, they generally have ensured the video provides *two-way observation*, where the trial participants can see and be seen by the public audience, so as not to offend the constitutional principle of an open trial. *See United States of Am. v. Antoine Davis*, 2021 WL 2020479, at *2 (D. Alaska May 20, 2021) (ordering **two-way live video** feed between trial courtroom and public viewing room so that the public and press can view the trial **and** those in "[the trial courtroom] may see the public," to minimize the breadth of the closure); *United States v. Sapalasan*, 2021 WL 2080011, at *2 (D. Alaska May 24, 2021) (same **two-way video protocol** to narrowly tailored the courtroom restrictions, plus court will remind jury and all witnesses that the public is

present via the video feed): *United States v. Babichenko*, 2020 WL 7502456, at *3 (D. Idaho Dec. 21, 2020) (ordering **two-way live video** such that "the trial will not proceed in secret, and those interested will have an opportunity **to observe – and be observed by** – those participating in the trial") (emphasis added); *United States v. Huling*, 2021 WL 2291836, at *2–*3 (D.R.I. June 4, 2021) (allowing the public to attend trial virtually over Zoom, a two-way video conferencing software, in addition to the option of courthouse viewing room). The use of a two-way video in these cases is clearly not incidental. Rather, providing the opportunity for mutual observation between the public and trial participants was critical in narrowly tailoring the intrusion on the right to a public trial and to ensure a fair process.

Minnesota courts have too relied upon two-way video feeds to narrowly tailor restrictions on the public-trial right where courtroom attendance is limited in service of public health. In *State v. McClendon*, the Ramsey County District Court held a jury trial in August 2020 where it closed the trial to in-person public attendance due to the COVID-19 pandemic and used two-way video between the trial courtroom and adjacent public viewing room. No. A21-0513, 2022 WL 996549, at *1, *7 (Minn. App. Apr. 4, 2022), *review denied* (June 21, 2022). There, the district court displayed a screen at the front of the trial courtroom that allowed those in the courtroom to see the public gallery in the viewing room. *See id.* at *7 (upholding the two-way video protocol as narrowly tailored closure); *see also, e.g.*, Dist. Ct. No. 13-CR-18-923, Doc. No. 143 at 10–11 (two-way video implemented for public viewing and attendance of an August 2020 Chisago County jury trial).

A slightly different scenario is the practice of using of a two-way video conferencing software, such as Zoom, for remote pretrial hearings where the public can attend the proceeding virtually. *See, e.g.*, *Vazquez Diaz v. Commonwealth*, 487 Mass. 336, 339–40, 350-51 (2021) (concluding "the use of two-way video conferencing technology, where all the parties were virtually present [for the suppression hearing]" and the public could attend, did not violate confrontation or public-trial rights).

These decisions show that less restrictive means were available to serve public-health imperatives (primarily, limiting courtroom attendance) while minimizing the intrusion on the public-trial right. A court's use of a two-way video for public viewing is a more narrowly tailored approach to the overriding problem of stemming the spread of COVID-19 than the approach of used in Bell's case because a two-way video simply provides greater openness in the proceedings than a one-way video. Specifically, it affords mutual observation between the public and the trial participants, central to what makes a trial "public" in the constitutional sense. *See Schmit*, 139 N.W.2d at 806–07; *see also Waller*, 467 U.S. at 46. As demonstrated by the examples cited here, a two-way video allows witnesses, jurors, and the defendant to see the remote public audience in the viewing room in real time, in addition to the public seeing the live trial courtroom. A video feed protocol that allows for such mutual observation in effect creates the public's "presence," albeit virtually, in the courtroom. And that presence of audience is achieved with no increased public-safety risk. Put differently, the public-health interests at stake in the pandemic are just as effectively served with a two-way video than the more restrictive approach of providing just one-way public observation of trial.

c. The closure of Bell's trial and related public-viewing protocol was not narrowly tailored

These examples from federal and state courts show that the closure in Bell's case was too far reaching. Unlike the protocols and policies used by other courts, no public attendance—whether virtual or in-person—was allowed at Bell's trial. Bell was denied all family support in the courtroom, over his objection, and in violation of the time-honored principle that he be afforded that benefit if brought to trial. Where other courts more narrowly tailored courtroom limitations on public attendance, Bell's right to an open trial was not vindicated because the courtroom was closed for the entirety of his trial and not even one family member was allowed present in the courtroom, despite his precise request.

What's more, the one-way video feed provided in this case was constitutionally deficient because it afforded no presence of the public in the courtroom, even if just virtually. While the court's video set up allowed interested public to see the trial proceedings in Judge Wilton's courtroom, this arrangement precluded the accused and witnesses and jurors from seeing the public, and with no increased public-health benefit. In so doing, the court overlooked a paramount requirement of the public trial: that the accused see the public and benefit from their presence in the courtroom, not just vice versa. *See Waller*, 467 U.S. at 46 (contemplating two-observation as fundamental to the purpose of the public-trial right); *see also Schmit*, 139 N.W. at 806–07 (describing the "wholesome effect" that "the presence of an audience" has on witnesses). It is constitutionally

insufficient that the public from a different location could see what happened at trial.[6] The restrictions on the public-trial right that the district court imposed in this case were broader than necessary to protect the safety of the trial participants and did so at the cost of Bell's right to have the public in attendance at his trial. As such, the restriction on Bell's right was not narrowly tailored and his trial was not a public trial in the constitutional sense.

In sum, Bell's constitutional right to a public trial was violated because the court's closure and public-viewing protocol was broader than necessary to stem the spread of the virus. The video feed used in Bell's trial was insufficient to vindicate his public-trial right as demonstrated by less restrictive and eminently safe video feeds routinely used throughout the pandemic that afforded two-way observation between the public and trial participants.

3. The district court did not consider alternatives to its one-way video protocol for public viewing

The district court was also obligated to consider reasonable alternatives to the imposed courtroom restrictions, even beyond any proffered by the parties. *Presley v. Georgia*, 558 U.S. 209, 214 (2010) (holding courts are obligated to sua sponte consider

[6] Bell is unaware of any non-Minnesota decision that has held the use of a one-way video in lieu of public attendance at trial was constitutionally sufficient under *Waller*. And Bell has located only one decision of a court of last resort that has upheld the closing a trial courtroom to all members of the public due to the pandemic without any live access. *See Henson v. Commonwealth*, 2021 WL 5984690, at *2 (Ky. Dec. 16, 2021) (holding no public-trial violation where no public was allowed in the courtroom, due to the pandemic, and a digital recording of the trial was released to the public after trial). *Henson* was wrongly decided, is wholly inconsistent with Minnesota and federal law and traditions, and should not be followed.

alternatives to closure before ordering a closure "even when they are not offered by the parties"). The court failed to meet this obligation. Here, the court put together a pretrial plan to use a one-way video for all public viewing in Bell's trial. (*See* Doc. No 33 objecting to jury trial plan). The court considered how to handle jury selection, what doors witnesses should enter and leave through, cleaning procedures during trial, where to install plexiglass, and how the lay out of the courtroom. (June 18, 2020 Tr. 3; June 22, 2020 Tr. 4, 5, 11, 20, 188). The district court also used a jury trial checklist that required mapping out the courtroom, enforcing for social distancing, utilizing technology to avoid physical handling of exhibits, planning for court attendees, working with public-health professionals for guidance, and other logistical considerations. (*MJB Jury Trial Pilot Checklist*, Doc. No. 118). None of those considerations, however, explicitly address the defendant's Sixth Amendment right or Bell's specific request to have one or two family members in the courtroom. (*Id.*) It is simply not evident that the court ever considered doing anything other than following its pretrial decision to limit public viewing to a one-way video. And courts must consider alternatives to closing a courtroom before ordering a courtroom closed. *Presley*, 558 U.S. at 214.

While the court heard Bell's motion objecting to the court's one-way video protocol, tellingly the court maintained its view throughout that this objected-to protocol was not a closure at all. (June 18, 2020 Tr. 25 "[I]t's my position that I'm not closing the courtroom. In fact, it's open.") It follows that court would not have considered alternatives to closure if the court failed to recognize a closure in the first instance. What appears to have transpired is that the district court made a pretrial plan to use a one-way video feed in lieu

of any public attendance at trial and never entertained taking a different approach to limit the intrusion on Bell's rights. And the court's ultimate conclusion that "there is no way" to accommodate the public in the courtroom does not show that the court considered any other protocol—such as a less restrictive two-way video protocol—before resting on its plan.

Several reasonable alternatives to the closure and viewing protocol used in Bell's trial were worthy of consideration. A two-way video is a reasonable alternative to the video protocol used and one that would have been less restrictive on Bell's right to a public trial. Other examples of reasonable alternatives the court may have considered to avoid excluding all public from the courtroom include omitting one court staff person to allow one public spectator; a change of location to secure a larger space for trial either within the courthouse or elsewhere in the county; or imposing additional restrictions for admission to the courtroom as such requiring attendees pass temperature checks and complete health-screening questionnaires, *see Trimarco*, 2020 Wl 5211051, at *3 (implementing these additional safety measures while maintaining that defendant's father could attend trial in the courtroom). None of that weighing of alternatives happened here.

Importantly, the inquiry under the third *Waller* factor is not whether the court could or even should have implemented any alternative protocol, but simply whether any were considered. *See Bobo*, 770 N.W.2d at 141 (demonstrating this factor was satisfied where the district considered and rejected as "untenable" the less restrictive alternative of screening the public audience to identify and exclude only certain gang members or others who might intimidate trial witness); *see also Bledson*, 2021 WL 1152431, at *3 (court

considered allowing, in addition to defendant's family, "a limited number of other spectators in the courtroom with household groups spaced out at least six feet apart," yet ultimately found the alternative untenable due to a recent COVID-19 outbreak in the county). The district court did not consider less restrictive means for holding a safe trial, such as using a two-way video for public attendance. As such, the courtroom closure was unjustified.

4. The district court's findings do not support the breadth and nature of the closure

The final consideration under *Waller* is whether the Court's findings support "the decision to close the courtroom, the breadth of the closure, and the absence of reasonable alternatives to closure." *See Bobo*, 770 N.W.2d at 141 (recognizing this factor is satisfied when these conditions are met). The court's findings support having some limitation on public attendance but they do not support the extent of the restrictions placed on Bell's right to have witnesses testify before public spectators and to have some family support at trial.

In denying Bell's motion to have one or two family members attend trial, the district court noted space limitations and the need to space all people six feet apart. Specifically, the court found that if it had either "a square mile courtroom" or "100 more feet" it may be able to grant Bell's motion. (June 18, 2020 Tr. 26, 27). The court also noted, in its written order,

> The Court has collaborated extensively with public health officials to institute safety protocols to protect all necessary parties. Because there is no way to safely accommodate members of the public or Defendant's family

> inside the courtroom, the Court has instead arranged for live-streaming of the trial in an adjacent courtroom which will be open to the public.

(Doc. No. 64 at 4–5). The importance of social distancing is unarguable but Bell's request for just one or two spots in the courtroom for his family was reasonable and would certainly not require 100 more feet of courtroom. (*Id.* at 25). And while the court stated there was "no way" accommodate the public inside the courtroom, that finding does not address, let alone justify, the court's decision to implement a one-way video over a less restrictive viewing system that would have afforded a more open trial with the mutual observation between the public and the trial participants. Bell clearly asserted that his right to a public trial included the right to have witnesses **see** the public, not just vice versa. (June 18, 2020 Tr. 25, 26). The court's findings do not support curtailing Bell's right to two-way observation and, as such, the courtroom closure is not justified.

The district court further rationalized its courtroom restrictions based on a frankly troubling view of the scope and purpose on the public-trial guarantee. At the hearing on Bell's public-trial motion, the district court repeated its view that it was "not closing the courtroom," that the courtroom was "[i]in fact . . . open," and that a "public trial" would be held because the public would get to see and hear everything that happened in the trial. (*Id.* at 24, 26–27). The court explained how these conditions would satisfy the requirement of a public trial: "My take on the importance of the public trial is so that [the public] can see what is happening within our court system. That they can make their own determination on what the witnesses have said and whether it's fair, etc." (*Id.* at 25). Likewise, in its

written order supporting its closure decision, the court found, "[T]he live stream video satisfies the predominant policy considerations involved here." (Doc. No. 64 at 5).

The court's closure decision is based on an erroneous view of law. The right to a public trial exists not so the public has benefit of determining what witnesses say. It is so witnesses testify in front of members of the public, aware they are in the public eye, because that discourages lying and in turn provides a fair process for the defendant. Discouraging perjury, one of the primary functions of the public trial, is conferred by the *presence* of the public in the trial setting so that witnesses know they are testifying in front of the public. *See Waller*, 467 U.S. at 46 (describing how a trial with the presence of public spectators discourages perjury). While the public's education regarding what happens in the criminal justice system is one related aim of the public trial, that exists alongside myriad benefits bestowed on a defendant when a public audience is present, such that witnesses, jurors, the defendant, and others trial participants see the public audience in the proceeding.

The court's findings fail to justify the breadth of the closure. They do not adequately support the decision to merely provide one-way remote viewing of the proceedings and do not explain why less restrictive alternatives, such as two-way video viewing or allowing on family member to attend in lieu of one court staff, could not have been effectuated. What's more, any perceived space limitations of the Scott County courthouse notwithstanding, the pandemic does not relieve the court of its obligation to hold a public trial where "in the very least" Bell can have some family support.

F. Bell was not afforded a public trial, and a new trial is required

The objected-to closure of Bell's trial was unjustified, even in light of the pandemic. The court's closure and limitations on the public's access to trial were not essential and narrowly tailored, as evidenced by less restrictive means other courts have used throughout the pandemic to serve the general overriding interest in stemming the spread of COVID-19. The district court further failed to consider less restrictive measures and to make findings that support the breadth of the intrusion on the public-trial right in this case. Moreover, the video feed offered in a viewing room neither vindicated nor replaced the right to the actual "presence of an audience" or the two-way observation that the constitution affords. *See Schmit*, 139 N.W.2d at 806–07; *see also Waller*, 467 U.S. at 46. Curtailing Bell's public-trial right in overly broad fashion by reason of the pandemic fails constitutional scrutiny.

Importantly, Bell asserted his right to have a limited public presence at his trial—just one or two family members is all he requested. And the pandemic does not "water down" that right. The court erred in denying Bell a public trial. A new trial is warranted.

CONCLUSION

Bell is entitled to a new trial because he was denied his constitutionally protected right to a public trial.

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Respectfully submitted,

OFFICE OF THE MINNESOTA
APPELLATE PUBLIC DEFENDER

Rebecca Ireland
Assistant State Public Defender
License No. 0393076
540 Fairview Avenue North, Suite 300
St. Paul, MN 55104
(651) 219-4444

ATTORNEY FOR APPELLANT