

ORIGINAL

NO. 2011-1921

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IN THE SUPREME COURT OF OHIO

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CAPITAL CASE, APPEAL FROM  
THE CUYAHOGA COUNTY COURT OF COMMON PLEAS  
NO. CR-530885

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STATE OF OHIO

Plaintiff-Appellee,

-vs-

ANTHONY SOWELL

Defendant-Appellant

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**APPELLEE'S RESPONSE BRIEF PER 9/3/2014 ENTRY**

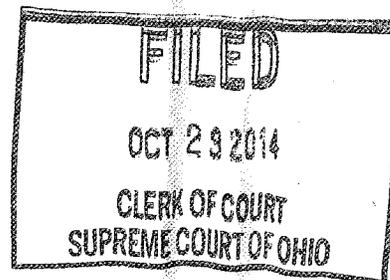
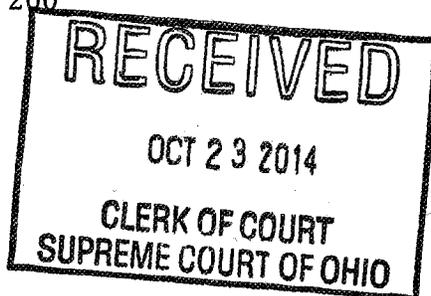
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## LAW AND ARGUMENT

Anthony Sowell repeatedly asked the trial court to close the courtroom for an “in camera” individual voir dire. He now seeks to take advantage of the trial court’s attempt to protect his right to a fair trial by retroactively claiming that the actions he requested violated a right that he waived. This Court should not entertain this type of gamesmanship and should affirm Sowell’s convictions and death sentence.

### **In response to question 2:**

**The trial court made all of the requisite findings to close the courtroom during individual voir dire.**

#### **1. The trial court’s found an overriding interest likely to be prejudiced.**

The record in this case demonstrates that the trial court went through each of the four *Waller* factors, on the record, and made each of the requisite findings to justify closing the courtroom. First, the trial court found that the failure to close individual voir dire would likely prejudice Sowell’s overriding interest in a fair trial:

“As to the first factor identified in *Presley*, the Court states that the overriding interests likely to be prejudiced if the Witherspooning process was open to the general public is the defendant’s right to a trial by an impartial jury under the 6th and 14th Amendments to the U.S. Constitution.

Individually sequestered voir dire is used by courts in this and other states to encourage prospective jurors to express their opinions on the death penalty and other sensitive matters free from potential embarrassment and influence and opinions of others. The reasoning behind this practice is simple. Is it more likely or less likely that a juror would feel free to express his or her true opinions in a confidential environment or one where those same opinions would expose the juror to ridicule if it appeared in the evening news or morning newspaper. This Court, the State of Ohio, and the defendant believe it is the former.”

(Tr. 5152-5153). The United States Supreme Court has recognized that protecting a juror’s privacy is a compelling interest. “The jury selection process may, in some circumstances, give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters

that person has legitimate reasons for keeping out of the public domain.” *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 511, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). As Sowell argued in his motion requesting individual sequestered voir dire: “[Q]uestions about jurors’ attitudes on race, the death penalty, and the effect of the media coverage are somewhat personal. Privacy may allow for more candid answers.” See Request for Individually Sequestered Voir Dire, filed 1/27/2010, at p. 6.

Sowell argues that the trial court’s reasoning was inadequate because “this potential exists whenever the public is present during *voir dire*.” See Appellant’s Supplemental Merit Brief, at p. 16. But as the trial court noted, this was a rare case in which the parties had to ask the jurors sensitive questions about their beliefs regarding the death penalty. The State, the defense, and the trial court all agreed that jurors were more likely to be forthcoming in their answers if they were in a private setting. The trial court made that finding on the record and did so without objection from the parties. This was sufficient to constitute an overriding interest likely to be prejudiced.

**2. The trial court found that closure was no broader than necessary.**

Under the second *Waller* factor, the court also found that the closure was no broader than necessary:

“Also, as required by *Presley*, the Court has taken steps to ensure that the closure is no broader than necessary to protect the privacy and interests of the jurors and the defendant’s right to select an impartial jury. The Court’s order regarding the Witherspooning portion of the voir dire process closes the courtroom only for individual questioning of jurors.

The public and the media were allowed into the courtroom for the Court’s orientation and introduction to the process used in Ohio for death penalty cases. It was only after the jury was instructed to retire to the jury room and wait to be called back into the courtroom that the public and media were asked to leave. This procedure was tailored to protect only the individual questioning of jurors and no more.”

(Tr. 5153). Sowell responds that the courtroom was completely closed for portions of individual voir dire. See Appellant's Merit Brief, at p. 17. But the mere fact that the courtroom was closed does not mean that the closure was inherently broader than necessary. Trial courts would be absolutely prohibited from closing the courtroom if that were the case. The trial court correctly noted that the courtroom was not closed for the entirety of individual voir dire, which was a less broad alternative than complete closure.

Moreover, the trial court took further measures to ensure the closure was no broader than necessary by ordering the transcripts of individual voir dire unsealed for the public and media to review on request. (Tr. 5155). As the *Press-Enterprise* Court recognized, in at least some circumstances, "the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceeding available within a reasonable time." *Press-Enterprise*, 464 U.S. at 512.<sup>1</sup>

### **3. The trial court considered reasonable alternatives.**

Third, the trial court considered reasonable alternatives by noting that it did not completely close the proceedings. (Tr. 5154). It was the defense who had originally proposed the idea of doing individual voir dire "in camera[.]" (Tr. 534). Defense counsel further asked to conduct individual voir dire in the judge's chambers. (Tr. 534-535). The trial court considered these requests and chose to conduct individual voir dire in the courtroom. The trial court also considered and adopted the idea of closing the court only for those portions of the proceedings in which the

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<sup>1</sup> Sowell asserts, without explanation, that the trial court's decision to release the transcripts after the conclusion of individual voir dire somehow "belied" its finding that the need to obtain forthcoming answers from potential jurors was an overriding interest likely to be prejudiced. See Appellant's Supplemental Merit Brief, at p. 18. But the trial court did not release the transcripts until after the parties had completed individual voir dire. By that time, the parties had obtained all the answers that they needed and the overriding interest in closing the proceedings no longer existed.

individual jurors were questioned, and to release the transcripts of all of individual voir dire immediately prior to the start of general voir dire.

**4. The trial court made findings on the record to justify closure.**

Fourth, and as outline above, the trial court made findings adequate to support the closure. The trial court scrupulously adhered to the four-part *Waller* test. Sowell's defense apparently found the trial court's on-the-record findings sufficient because they did not object to the findings at any point. The trial court thus properly closed the courtroom during individual voir dire. Additionally, this Court will not need to reach this question because Sowell waived his right to a public trial, and as a result, no findings were required.

**In response to question 3:**

**Sowell waived his right to a public trial during individual voir dire by repeatedly requesting the courtroom be closed.**

Sowell waived his right to a public trial during individual voir dire on two independent bases. First, Sowell's failure to object to the closure of the courtroom during individual voir dire constitutes a waiver of the right to a public trial. See *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038; *Peretz v. United States*, 501 U.S. 923, 936, 111 S.Ct. 2661, 115 L.Ed.2d 808 (1991); *Singer v. United States*, 380 U.S. 24, 35, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965); *Levine v. United States*, 362 U.S. 610, 619, 80 S.Ct. 1038, 4 L.Ed.2d 989 (1960). Second, Sowell affirmatively waived his right to a public trial by requesting, on numerous occasions, that the trial court close the courtroom during individual voir dire. Under either basis – Sowell's failure to object or his affirmative requests for a closed courtroom – this Court should find that Sowell waived his right to a public trial during individual voir dire.

**1. Sowell's supplemental brief concedes that the failing to object to closing the courtroom waives a defendant's right to a public trial.**

Sowell's supplemental brief filed on October 3, 2014 does not address the third direct question this Court asked the parties to brief: "*Does the appellant's failure, on both occasions, to object at the time the closure orders were made waive appellate review of these closures?*" The answer to this question is yes – a defendant's failure to object at the time the trial court closes the courtroom waives the right to a public trial. If this Court thus finds from its review of the record that Sowell failed to object, it appears to be undisputed that doing so waived his right to a public trial. This Court should not permit Sowell to make any new arguments as to why this Court should not follow this caselaw in his responsive brief, to which the State will not have an opportunity to respond prior to argument.<sup>2</sup>

**2. Defense counsel's statement that, "We waive nothing, your Honor" was not an objection and it could not retroactively assert Sowell's right to a public trial.**

Sowell claims that he did, in fact, object to the closure of the courtroom at one point after the completion of individual voir dire. On June 22, 2011, the parties appeared in court to begin general voir dire in open court. At that time, the State raised the issue of the trial court's decision to close the courtroom during individual voir dire. The prosecutor stated:

"It is my understanding, speaking with counsel for Mr. Sowell that Mr. Sowell is not willing to waive his 6th Amendment right to a public trial, irrespective of the request he has made upon this Court to conduct individual voir dire in a private manner in which to encourage forthright answers from those prospective jurors about their views on the death penalty."

(Tr. 5155-5156). In an abundance of caution, and based on this Court's decision in *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, the prosecutor asked the trial court to

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<sup>2</sup> Parties are forbidden from raising new arguments for the first time in reply briefs. *State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110, 2008-Ohio-5041, at ¶ 61. This is because a "reply brief is not to be used by an appellant to raise new assignments of error or issues for consideration; it is merely an opportunity to reply to the appellee's brief." *State v. Singh*, 12th Dist. No. CA2000-05-097, 2001 WL 322714, at \*3, fn. 1.

inquire of defense counsel as to whether they would make an explicit waiver of Sowell's right to a public trial after-the-fact. (Tr. 5156). The trial court then asked defense counsel if they had any comment with respect to the State's position. Defense counsel responded, "We waive nothing, your Honor." (Tr. 5156).

Sowell's argument before this Court is that counsel's statement that "[w]e waive nothing" is an objection sufficient to assert and preserve his right to a public trial in proceedings that had already concluded. There are two problems with Sowell's reliance on counsel's statement that "[w]e waive nothing[.]" First, this statement is not an objection. An objection is "[a] formal statement opposing something that has occurred, or is about to occur, in court and seeking the judge's immediate ruling on the point." Black's Law Dictionary (9th ed. 2009). Counsel's statement did not indicate opposition to anything and did not seek any ruling from the judge. It expressed no position on whether Sowell wanted the courtroom closed, whether the trial court had properly or improperly done so, or even whether Sowell disagreed with the prosecutor's statement that it was Sowell who requested the courtroom be closed. Nor did counsel's statement ask the trial court to make any ruling.

Second, by the time counsel made this statement, the statement was simply untrue. Sowell had already waived his right to a public trial during individual voir dire both by failing to object over a period of two weeks and by repeatedly requesting the proceedings be closed as early as 16 months before trial. A defendant cannot retroactively undo his waiver of the right to a public trial only after the judge has completed individual voir dire in a closed courtroom at the defendant's insistence and with the defendant's acquiescence.

An objection should be made "at the earliest possible opportunity." *Cruz v. Hauck*, 515 F.2d 322, 331 (5th Cir.1975). Otherwise, a party would be able to obtain a "second bite at the

apple” by withholding his objection until he believed it tactically beneficial to make. *Id.* The Sixth Circuit has also noted:

“the unfairness of allowing [a defendant] to raise for the first time on appeal conduct that he acquiesced in below. Such acquiescence lulled the district court into believing that [the defendant] had no objection \* \* \*. To now allow the ex parte communications to be objected to after-the-fact is a form of ‘sandbagging’ that we will not permit \* \* \*.”

*U.S. v. Carmichael*, 232 F.3d 510, 518 (6th Cir.2000). This Court should not permit such an attempt either. “If a slip has been made, the parties detrimentally affected must act expeditiously to cure it, not lie in wait and ask for another trial when matters turn out not to their liking.” *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 918 (1st Cir.1988). To allow Sowell to assert his right to a public trial only after individual voir dire was completed in a closed courtroom at his request would be “classic sandbagging of the trial judge, as [defendant] complains for the first time on appeal about a decision by the trial court to which he did not object at the time.” *U.S. v. Bansal*, 663 F.3d 634 (3d Cir.2011).

It is both inconsistent and misleading for Sowell to repeatedly ask over a period of 16 months that the courtroom be closed for individual voir dire, and only after the trial court has granted his request and completed two weeks of individual voir dire in a closed courtroom without objection, to declare that he has not waived his right to a public trial. Even after declaring that he had waived nothing, Sowell still chose not raise the issue in either his direct appeal or post-conviction proceedings, further corroborating the fact that the closure was done at his request. Only after this Court ordered supplemental briefing did Sowell attempt to take advantage of this issue. But an objection made for the first time on appeal, and only after the reviewing court has asked the parties to brief the issue, is insufficient to assert the right to a public trial in the court below. Counsel’s statement that “[w]e waive nothing” was not an objection and it was not true.

**3. Sowell waived his right to a public trial by affirmatively requesting on multiple occasions that the trial court conduct individual voir dire in a closed setting.**

Even if this Court were to disregard the holdings of *Drummond*, *Peretz*, *Singer*, and *Levine* that a defendant waives his right to a public trial by failing to object to closure, Sowell did not simply remain silent. Sowell affirmatively requested that the trial court close the courtroom for individual voir dire. During pretrial proceedings in this case, Sowell made the following requests:

- On January 27, 2010, Sowell filed a written motion requesting “individual sequestered voir dire within the Court’s chambers.” See Request for Individually Sequestered Voir Dire, filed 1/27/2010, at p. 8.
- At a pretrial on November 23, 2010, defense counsel asked the trial court to conduct individual voir dire “individually and in camera,” because “[m]y experience is it encourages the jurors to be more forthright \* \* \* [w]ithout the camera in chambers[.]” (Tr. 534-535). The trial court stated that its first preference was to hold individual voir dire in the courtroom, but that “if I have a problem with the media, then I will chose to retreat to chambers.” (Tr. 538).
- At a pretrial on February 14, 2011, defense counsel asked the trial court to indefinitely seal the juror questionnaires that the parties would use to question jurors during individual voir dire: “It’s our position that these questionnaires are not open to the press or to the public; that these are confidential responses for the attorneys to be used in selecting a fair jury.” (Tr. 735).
- At a pretrial on February 14, 2011, defense counsel reiterated that it was his “understanding we’re going to have portions of the voir dire in chambers, individually and then a portion in open Court[.]” (Tr. 736-737).

- At a pretrial on June 1, 2011, defense counsel stated that, “It’s our position that [individual voir dire] needs to be done in chambers. \* \* \* If it’s going to be in the courtroom individually, then I would ask that there be no cameras allowed whatsoever in the courtroom for that proceeding.” (Tr. 1177).

In several instances, the trial court responded that it intended to comply with Sowell’s requests by closing the courtroom. (Tr. 737, 1177).

**4. Sowell’s motion for individual sequestered voir dire requested closure because it specified that Sowell wanted voir dire done “in chambers.”**

Sowell now claims that he never actually requested a closure the proceedings. Sowell first argues that his written motion requesting individual, sequestered voir dire “neither addressed nor suggested that the courtroom should be closed to the public or media.” (at p. 4). This is incorrect. Sowell’s motion asked for individual voir dire to be conducted “within the Court’s chambers.” See Request for Individually Sequestered Voir Dire, filed 1/27/2010, at p. 8. This was a request for a complete closure.

“Conducting the individual questioning in the judge’s chambers constituted a full closure in the constitutional sense.” *Commonwealth v. Grant*, 78 Mass.App.Ct. 450, 457, 940 N.E.2d 448 (2010). Sowell’s request actually went above and beyond merely closing the courtroom; it asked the trial court to remove proceedings from the courtroom altogether and to conduct them in the secrecy of his own chambers. This request, had it been granted, would have resulted in the exclusion of both the public and the media from the proceedings. See *State v. Wise*, 176 Wash.2d 1, 288 P.3d 1113 (2012) (en banc), at ¶ 15 (“there was a closure of the trial in Wise’s case when the trial court questioned prospective jurors in chambers. The questioning occurred in a room that is ordinarily not accessible to the public”). The trial court confirmed that it likewise understood

Sowell's request to involve a complete closure by stating, "if I have a problem with the media, then I will chose to retreat to chambers." (Tr. 538).

**5. Defense counsel explicitly requested closure of individual voir dire by asking that the proceedings be done "in camera."**

Defense counsel clarified any ambiguity as to what he was asking for at the November 23, 2010 pretrial by stating that, "it was my impression we were going to do [questions regarding] publicity and death qualifications individually and **in camera** \* \* \*." (Tr. 534) (emphasis added). To conduct a proceeding "in camera" means either "[i]n the judge's private chambers[.]" or "[i]n the courtroom with all spectators excluded." *Chapman v. Chapman*, 2d Dist. No. 21652, 2007-Ohio-2968, at ¶ 12, quoting Black's Law Dictionary (7th Ed.). Trial counsel was an experienced litigator who had argued many times in this Court in death penalty cases. He knew what "in camera" meant.

**6. Sowell declined numerous opportunities to challenge the prosecutor and the trial court's characterization of his request as a complete closure.**

Even if all of the above was incorrect, and both the State and the trial court had somehow misunderstood what Sowell was asking for (as he now claims for the first time in his Supplemental Merit Brief), Sowell refused to challenge their characterization of his position. When the State raised the issue on June 22, 2011, the trial court stated that it had closed the proceedings "in accordance with the defendant's request[.]" and that "the defendant in this case asked for individual sequestered voir dire." (Tr. 5149, 5151). The State agreed that the closure was a result of the "request [Sowell] has made upon this Court to conduct individual voir dire in a private manner[.]" (Tr. 5155-5156).

Sowell had the opportunity at any point to object, or to attempt to correct the trial court by claiming that this was not, in fact, what he had asked for. But the defense never did so, even after the trial court asked them to comment. (Tr. 5159). Sowell's continuing silence after the prosecutor

raised the issue and the trial court invited him to speak is strongly corroborative of the fact that he knew the proceedings had been closed only at his request.

**7. Sowell was aware more than a year before trial that the trial court intended to close the courtroom.**

Sowell attempts to rewrite the history of this case by portraying the closure of the courtroom during individual voir dire as a last-minute surprise sprung upon the unsuspecting parties. See Appellant's Supplemental Merit Brief, at p. 5 ("As of the opening of court for the beginning of jury selection the following Monday, there had been exactly no indication that the court would be closed \* \* \*"). This attempt to reframe the events in the trial court is untrue.

The record demonstrates that all of the parties in Sowell's case understood well in advance of trial that individual voir dire would be closed to the public. For example, at the November 23, 2010 pretrial, defense counsel stated that it was his impression that individual voir dire would be done "in camera[.]" (Tr. 534). At the February 14, 2011 pretrial, defense counsel said that it was his understanding that "we're going to have portions of the voir dire in chambers, individually and then a portion in open Court[.]" (Tr. 736). The trial court responded, "[I]f I can close the courtroom for Individual voir dire, I would prefer to conduct it that way." (Tr. 737). And on June 1, 2011, the week before trial, defense counsel asked that, "there be no cameras allowed whatsoever in the courtroom for that proceeding." (Tr. 1177). The trial court responded, "Well, it is called individual sequestered voir dire, so the sequestration part does indicate that there would be an in-camera proceeding, whether held in the courtroom or in chambers[.]" (Id.) It is extremely misleading for Sowell to now, in this Court, attempt to portray the closure of the courtroom as unexpected or done without the acquiescence of the parties.

**In response to Sowell's supplemental assignment of error:**

**Sowell's newly-raised ineffectiveness claim is without merit.**

In his Supplemental Merit Brief, Sowell claims – for the first time – that “if counsel did not properly object” to the closing of the courtroom during individual voir dire, his defense counsel was constitutionally ineffective. Sowell does not cite any cases for the proposition that counsel is ineffective for either requesting a court proceeding be closed or for merely failing to object to its closure, nor does he explain why counsel performed deficiently in doing so. See Appellant's Supplemental Merit Brief, at p. 26. The State further notes that Sowell's attempt to raise a new ineffectiveness claim is beyond the scope of this Court's September 3, 2014 order. But in the interests of justice, and because this Court has expressed a desire to address potential issues in this case on direct appeal, the State will answer Sowell's ineffectiveness claim on the merits.

**1. Legal Standard for Ineffective Assistance of Counsel.**

A defendant must satisfy a two-prong test to succeed on a claim of ineffective assistance. The defendant must demonstrate (1) “that counsel's performance was deficient,” and that (2) “the deficient performance prejudiced the defense so serious[ly] as to deprive the defendant of a fair trial.” *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

To determine whether defense counsel was deficient under the first prong of *Strickland*, a defendant must show that “counsel's performance was so deficient that the attorney was not functioning as the counsel guaranteed by the Sixth Amendment \* \* \*.” *State v. Johnson*, 8th Dist. No. 99620, 2013-Ohio-5744, at ¶ 18, citing *Strickland*, at 687. In making this determination, *Strickland* requires courts to “[apply] a heavy measure of deference to counsel's judgments.” *Strickland*, at 691. Under that standard, reviewing courts may not second-guess decisions of counsel that can be considered matters of trial strategy. *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985).

To establish prejudice under the second prong of *Strickland*, a defendant must show a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, at 694. A “reasonable probability” is a probability “sufficient to undermine confidence in the outcome.” *Id.* “The likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 792, 131 S.Ct. 770, 791, 178 L.Ed.2d 624 (2011).

**2. Sowell cannot establish deficient performance where counsel made a strategic decision supported by caselaw to request that voir dire be closed because counsel believed it would encourage the jurors to be more forthcoming.**

Sowell cannot demonstrate deficient performance under the first prong of *Strickland* because counsel’s strategy was objectively reasonable. Sowell’s argument is identical to one that the First Circuit rejected in *Horton v. Allen*, 370 F.3d 75, 80-83 (1st Cir.2004). In *Horton*, the trial court conducted individual voir dire in an anteroom outside the presence of the public. *Id.*, at 80. Horton’s defense counsel did not object to this procedure. *Id.* On appeal, Horton argued that his counsel was ineffective by failing to object to the individual voir dire procedure on public trial grounds. On appeal from a denial of habeas relief, the First Circuit held that Horton’s counsel was not defective for failing to object to the closure:

“In some circumstances, defense counsel’s interest in protecting the accused’s right to a completely public trial may give way to other concerns, such as maximizing the accused’s chance of obtaining a favorable jury composition. For this reason, the defendant may have an ‘interest in protecting juror privacy in order to encourage honest answers to the voir dire questions.’ *Press-Enterprise*, 464 U.S. at 515, 104 S.Ct. 819 (Blackmun, J., concurring). \* \* \*

While Horton may have had a right to insist that the entire voir dire be conducted publically, *see State v. Torres*, 844 A.2d 155, 158 (R.I.2004), the strategic advantage that he received from the individual voir dire taking place in private cannot be ignored. Defense counsel’s decision to agree to a closed individual voir dire was an objectively reasonable strategy designed to elicit forthcoming responses from the jurors about racial bias. Accordingly, we cannot conclude that defense counsel was ineffective in failing to object to the voir dire procedure.”

*Id.*, at 82-83 (footnote omitted).

Similarly, Sowell's defense counsel reasonably believed that they could obtain more honest answers from potential jurors if individual voir dire was closed. Federal courts have repeatedly noted that jurors are more likely to be forthcoming as to potential biases if questioned in a private setting. See *In re S. Carolina Press Ass'n*, 946 F.2d 1037, 1043 (4th Cir.1991) ("fear of publicity that might be given to answers of venirepersons during voir dire may so inhibit or chill truthful responses that an accused is denied the fair trial to which he is entitled under the Fourteenth Amendment"); *United States v. Colabella*, 448 F.2d 1299, 1304 (2d Cir.1971) ("It is too much to expect of human nature that a juror would volunteer in open court, before his fellow jurors, that he would be influenced in his verdict by a newspaper story of the trial") (internal quotations and citations omitted); *United States v. Koubriti*, 252 F.Supp.2d 424, 431 (E.D.Mich.2003) ("The potential jurors will be more candid in their responses if they do not have to worry about what the public's opinion of those responses might be.") (internal quotations and citations omitted).

Defense counsel made a strategic choice to pursue a more comprehensive voir dire conducted in a private setting as opposed to taking the risk that potential jurors might not answer questions honestly in a public setting. Such "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable" on appeal. *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052, 80 L.Ed.2d 674. Appellate counsel apparently believed that trial counsel's decision was reasonable as well, given that they chose not to challenge it on appeal.

In his supplemental brief, Sowell does not articulate why he believes counsel's decision to request that individual voir dire be closed was deficient performance. Instead, Sowell makes the sweeping, blanket assertion that: "Failure to raise and preserve for later review reversible, constitutional error such as the violation of the right to a public trial is deficient performance in

any criminal case.” See Appellant’s Supplemental Merit Brief, at p. 27. This claim ignores the fact that the lack of an objection in the record was not the result of laziness or inattention on the part of counsel, but rather was the result of a deliberate strategic choice to request closure.

Sowell’s position, if this Court were to adopt it, would mean that a defendant could never waive the right to a public trial because doing so would always “fail[] to raise and preserve for later review reversible, constitutional error[.]” *Id.* Under *Drummond*, *Peretz*, *Singer*, and *Levine*, that is not the law. Like any other right, the right to a public trial is the defendant’s to assert or waive as he chooses:

“In each of these instances a defendant may well conclude that in his particular situation his interests will be better served by foregoing the privilege than by exercising it. To deny the right of waiver in such a situation would be ‘to convert a privilege into an imperative requirement’ to the disadvantage of the accused.”

*U.S. v. Sorrentino*, 175 F.2d 721, 723 (3d Cir.1949), quoting *Patton v. U.S.*, 281 U.S. 276, 298, 50 S.Ct. 253, 74 L.Ed. 854 (1930). In this case, the defendant chose to waive that right, both by failing to object and by affirmatively requesting the courtroom be closed. Sowell has provided this Court with no basis on which to classify this decision as deficient performance and this Court should decline to do so.

**3. Sowell is required to demonstrate prejudice in an ineffectiveness claim and his inability to do so fails the second prong of the *Strickland* test.**

Finally, Sowell makes no attempt to demonstrate prejudice. There is no evidence in the record that prejudice occurred. Instead, the record indicates that most jurors were very forthcoming in their answers to defense counsel, who succeeded in having numerous jurors removed for cause over the State’s objection based on the jurors’ answers. Absent a showing of prejudice, Sowell cannot demonstrate ineffective assistance under the second prong of *Strickland*.

Sowell’s argument that this Court should presume prejudice because the erroneous denial of the right to a public trial is structural error is also without merit. Federal appellate courts are

currently split on the question of whether a claim of ineffective assistance resulting from an unpreserved structural error requires a showing of prejudice. See *U.S. v. Dharni*, 757 F.3d 1002, 1014 (9th Cir.2014) (Wallace, J., dissenting) (“Most of our sister circuits follow *Vansickel* and refuse to reverse convictions automatically on direct or habeas review based on unpreserved structural errors, instead requiring that the defendant actually demonstrate how he was prejudiced”). This Court – if it reaches the question of prejudice – should refuse Sowell’s invitation to create a new category of ineffectiveness claims for which prejudice is presumed.

In *Strickland*, the United States Supreme Court identified only three circumstances under the Sixth Amendment where a defendant is not required to show prejudice: (1) where there is an actual or constructive denial of counsel, (2) state interference with counsel’s assistance, and (3) where counsel has an actual conflict of interest. *Strickland*, 466 U.S. at 683, 104 S.Ct. 2052, 80 L.Ed.2d 674. Aside from the three exceptions noted in *Strickland* – none of which is present here – the Supreme Court requires that prejudice must be shown in all claims for ineffective assistance of counsel. See *United States v. Cronin*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) (“[a]part from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt”).

Moreover, the Utah Supreme Court has explained that courts should require a showing of actual prejudice in this very circumstance to prevent gamesmanship by criminal defendants:

“We decline to do away with the requirement of a showing of prejudice for an ineffective assistance of counsel claim. Were we to hold otherwise, defense counsel could freely refrain from objecting to an improper closure order and then, if the verdict is adverse, raise the issue on appeal for the first time under the rubric of an ineffective assistance of counsel claim. Absent a prejudice requirement, a retrial would be automatic. We decline to adopt a rule that would encourage such manipulation.”

*Utah v. Butterfield*, 784 P.2d 153, 157 (Utah 1989). See also *Com. v. LaChance*, --- N.E.3d ---, 2014 WL 5325792, at \*4 (Mass.2014) (even where the defendant claims structural error from the closure of the courtroom, “prejudice must be shown in a claim for ineffective assistance of counsel”); *Reid v. State*, 286 Ga. 484, 690 S.E.2d 177 (2010) (“where, as here, the issue of a courtroom closure is raised in the context of an ineffective assistance of counsel claim, prejudice will not be presumed”). This Court should follow the approaches of its sister supreme courts and require Sowell to demonstrate actual prejudice. Because Sowell has made no attempt to do so, this Court should reject his new ineffectiveness claim.

### **CONCLUSION**

Based on the foregoing, the State of Ohio requests that this Honorable Court affirm Anthony Sowell’s convictions and death sentences.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing *Supplemental Merit Brief of Appellee* was sent via regular U.S. mail this 22<sup>nd</sup> day of October, 2014, to:

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