Sample Case Note 1

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TORTS: No Statutory Interpretation Required—*Guzick v. Kimball*, 869 N.W.2d 42 (Minn. 2015).

I. Introduction

In *Guzick v. Kimball*,[1] a legal malpractice case, the Minnesota Supreme Court held that a plaintiff's case should be dismissed with prejudice because the plaintiff's first attempt to provide expert opinion on an element of legal malpractice was deficient.[2] *Guzick* upheld the court's jurisprudence on accounting malpractice—when expert opinion is severely deficient on an element of malpractice that requires expert support, courts can dismiss cases before trial and without granting the plaintiff any time to remedy the deficiency.[3]

This case note begins with a history of legal malpractice and the statutory framework underlying *Guzick*. The facts and procedural history of *Guzick* follow. The analysis of this note argues that *Guzick*'s unforgiving approach to defective expert opinions is at odds with a plain reading of the underlying statute.[4] Furthermore, to make the law more predictable and open to potentially meritorious claims, the court should adopt a plain reading of the statute and overrule *Guzick*'s interpretation.[5]

II. History

The Minnesota Supreme Court has long held that if an attorney's negligence causes damages to a client, the attorney is responsible for the damages.[6] The court recognized early that it is not always clear when an attorney-client relationship exists.[7] But when there is an attorney-client relationship, the court has articulated that the scope of a lawyer's duty to her client is to act "in good faith to the best of [her] skill and knowledge."[8] An attorney abiding by this standard does not breach her duty because of a simple error or mistake.[9]

Putting much of this common law into a modern framework, the court adopted four elements that are required for a prima facie legal malpractice claim:

(1) an attorney-client relationship, (2) a negligent act, (3) proximate causation, and (4) but-for

causation.[10]

In addition, procedural limitations require that expert opinion help establish a legal malpractice claim.[11] As the discussion below explores, medical malpractice law influenced the development of these procedural limitations.[12]

A. *Minnesota's Tort Reform Act and Section 145.682*

Section 145.682 was drafted partly to reduce frivolous medical malpractice lawsuits and was part of Minnesota's Tort Reform Act of 1986.[13] The statute requires two affidavits of expert opinion in support of the malpractice claim.[14] The first affidavit—the affidavit of expert review—is usually filed with the plaintiff's complaint[15]and must only disclose that an expert read the facts and concluded that the defendant breached a duty, and this breach caused damages.[16] Second, an affidavit of expert disclosure must be served within 180 days of the commencement of discovery.[17] This second affidavit must identify the expert and provide the substance and grounds of the opinion.[18] In place of a formal affidavit of expert disclosure, answering an interrogatory can also satisfy the statute.[19] If a plaintiff does not meet these requirements, the defendant can submit a motion to dismiss the case.[20]

In *Sorenson v. St. Paul Ramsey Medical Center,*[21] the court interpreted that experts must explain their conclusions in a manner that is consistent with the legislature's purpose of avoiding frivolous lawsuits.[22] In particular, the second affidavit must contain more than general facts from the hospital record followed by conclusory statements of fault.[23] Rather, the affidavit must show adequate causation for a meritorious malpractice suit.[24]

In 2001, section 145.682 was amended because meritorious lawsuits had been dismissed over minor technical errors.[25] The statute now contains a safe harbor provision that provides plaintiffs at least forty five days to correct errors upon service of a motion to dismiss.[26]

B. *The Enactment of Section 544.42*

In 1997, the legislature enacted section 544.42 to expand the scope of section 145.682 to non

medical professionals.[27] Not surprisingly, the language, content, and timing requirements of section 544.42 closely track section 145.682.[28] The two-affidavit requirement is virtually identical.[29] First, the affidavit of expert review, which is typically served with the complaint, only needs to verify that an expert reviewed the facts of the case and found probable negligence.[30] Then, the affidavit of expert disclosure, which outlines the expert's reasoning, must be served within 180 days of discovery commencing.[31] An answer to an interrogatory can serve as an affidavit of expert disclosure.[32] If a plaintiff fails to meet these requirements, the defendant can move to dismiss the case.[33]

Section 544.42 was enacted with a safe harbor provision, which can provide the plaintiff sixty days to remedy any deficiencies upon service of a motion to dismiss.[34] Unlike section 145.682, the safe harbor period is not automatic—the court triggers safe harbor by providing the plaintiff notice of the affidavit's deficiencies.[35]

Analogously to *Sorenson*'s interpretation that conclusory statements do not satisfy the second affidavit under section 145.682, *Brown-Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P.*[36] held that an attorney's conclusory allegations did not meet the affidavit's minimum standards under section 544.42.[37] As interpreted by *Brown-Wilbert*, the minimum standards are that the second affidavit must contain (1) the expert's identity and (2) the expert's opinion supporting the elements of a prima facie malpractice case.[38] The court applies this standard to determine whether to grant a party sixty days of safe harbor or grant pretrial dismissal of the case.[39] The court reasoned that allowing conclusory affidavits to pass safe harbor would render the 180-day requirement meaningless presumably because nearly anything would qualify as an affidavit.[40]

After *Brown-Wilbert*, it was clear that an expert did not always need to support each element of a prima facie malpractice case—support of one or two elements could be enough.[41] However, because *Brown-Wilbert* was an accounting malpractice case, it was not entirely clear how it applied in a legal malpractice context.[42] *Guzick*, however, took up this very question in 2015.[43]

III. The *Guzick* Decision

A. *Facts and Procedural History*

Colleen Bennett ("Bennett") was the legal assistant of attorney Larry Kimball ("Kimball") at Kimball Law Office.[44] In 2008, Louis Nyberg ("Tony") asked Bennett to draft a power of attorney form that would allow Tony to act as attorney-in-fact of behalf of his uncle, George Nyberg ("George").[45]

Per office procedure, Bennett printed a standard form and filled in George's information.[46] The form contained a pre-checked box that would allow Tony full access to all of George's property.[47] Bennett gave the form to Tony, who obtained George's signature.[48] However, neither Bennett nor Kimball determined whether George read and understood the form.[49] In fact, Kimball did not even see the form.[50]

In early 2009, Tony used the power of attorney form at a Wells Fargo branch to add his name to two of George's bank accounts as a joint owner with a right of survivorship.[51] A few days later, George died.[52] Around this time—before and after George's death—Tony transferred $226,524 to bank accounts he shared with his wife.[53]

Representing George's estate, Timothy Guzick sued Kimball for legal malpractice and alleged that Kimball had a duty to supervise Bennett and also had an independent duty to meet with George to discuss the legal consequences of the power of attorney.[54] Kimball moved for summary judgment against Guzick's claims on the basis that Guzick did not provide a satisfactory affidavit of expert disclosure within the required 180-day timeframe.[55] Although Guzick referenced the affidavit of expert review in answering Kimball's interrogatories, Kimball argued that this was inadequate because the expert's opinion was conclusory and did not establish any of the four elements of legal malpractice.[56]

The district court agreed with Kimball and granted the motion for summary judgment.[57] It held that Guzick's answers to Kimball's interrogatories were "grossly deficient in meeting the statutory requirements."[58] The court also held all four elements of legal malpractice should have been supported by expert opinion and that Guzick supported none of them.[59]

Guzick appealed the decision, and the court of appeals reversed. First, the court held that expert opinion

was only required to fulfill two elements of legal malpractice—a negligent act and proximate causation.[60] Second, the court held that Guzick's affidavit was sufficient to satisfy these two elements.[61]

B. *The Minnesota Supreme Court's Decision*

Kimball appealed the court of appeal's decision, and the Minnesota Supreme Court reversed on the basis that Guzick's second affidavit was conclusory and failed the *Brown-Wilbert* standards.[62] First, the court noted that Guzick procedurally met the 180-day limit on the second affidavit by answering Kimball's interrogatories.[63] As such, he potentially qualified for safe harbor, which would have given him notice of deficiencies in the affidavit and sixty days to remedy those deficiencies.[64] As a result, *Brown-Wilbert* applied, and the court considered whether Guzick satisfied the minimum standards.[65] Guzick plainly satisfied the first *Brown-Wilbert* element—disclosure of the expert to be called upon.[66] Consequently, the case hinged on which elements of legal malpractice required expert opinion and whether Guzick's affidavit was satisfactory for each of these elements under *Brown-Wilbert*.[67]

Generally, the court noted that whether an expert is required for each element of legal malpractice is determined on a "case-by-case" basis.[68] The court found that Guzick needed an expert to establish a negligent act and proximate cause.[69] This is because the parties did not dispute that an expert was required to establish these elements.[70] The parties disputed whether an expert must establish but-for causation and the existence of an attorney-client relationship,[71] but the court determined an expert was not needed to establish but-for causation[72] and deemed it unnecessary to discuss the requirements for an attorney-client relationship.[73]

The court addressed two elements in its analysis: but-for causation and proximate cause.[74] First, in determining that but-for causation did not require an expert, the court considered whether the facts relating to but-for causation were "within an area of common knowledge and lay comprehension such that they can be adequately evaluated by a jury in the absence of an expert."[75] The court ruled that a lay juror could make causal inferences about whether Kimball's negligent acts were a but-for cause of the overbroad power of attorney form and whether this form was a but-for cause of the vulnerability of George's funds.[76] Second, the court

considered proximate cause, and this is what decided the case. Since Guzick did not dispute the necessity of expert opinion for proximate cause, *Brown-Wilbert* applied, and the court ruled that Guzick's second affidavit was plainly conclusory because it only stated that Kimball's negligence "caused damages."[77] Consequently, this defect in the affidavit precluded Guzick from safe harbor under *Brown Wilbert*.[78]

IV. Analysis

A. *Guzick Should Have Overruled Brown-Wilbert Because Brown-Wilbert Unjustifiably Abandons Plain Statutory Language*

In 2011, the Minnesota Supreme Court declined to extend *Brown-Wilbert* to medical malpractice in *Wesely v. Flor*.[79] The court reasoned that, under the plain language of section 145.682, the triggering of the forty-five day safe harbor period is entirely procedural and automatic.[80] Thus, there is no place for a substantive *Brown-Wilbert* analysis of an affidavit's content.[81] In contrast, under section 544.42, the court triggers the safe harbor period and issues specific deficiencies in the affidavit.[82] *Brown-Wilbert*, therefore, fits into the statutory framework of section 544.42.[83]

Wesely is persuasive regarding the differences in the statutes. Under section 544.42, the court identifies the deficiencies and grants the plaintiff sixty days of safe harbor.[84] Under section 145.682, the defendant identifies the deficiencies and the plaintiff has at least forty-five days to remedy the affidavit upon service of the motion.[85] In sum, the court is involved in the safe-harbor process in 544.42, but all references to the court are absent from the plain statutory language of 145.682.[86]

However, the differences in the two statutes are not enough for *Guzick* to uphold *Brown-Wilbert*. Section 544.42 does not state that the court plays a substantive role in granting safe harbor.[87] Subdivision 6(c) states that "an initial motion to dismiss an action . . . shall not be granted, unless after notice by the court, the nonmoving party is given 60 days to satisfy the disclosure requirements in subdivision 4."[88] This language suggests that the court's role is limited to granting notice that the sixty days have started.[89] And, while the court

must issue deficiencies in the affidavit, these deficiencies do not require remedy until after the sixty days have expired.[90]

Brown-Wilbert reasoned its interpretation of the statute was necessary because allowing affidavits with little or no content would render the 180-day requirement meaningless.[91] After all, a plaintiff could submit a "placeholder" affidavit to delay submitting a proper affidavit.[92] However, *Wesely* convincingly explained that this is unlikely because the first affidavit requires that the plaintiff already "[be] in contact with an expert."[93] Therefore, the plaintiff would usually have little reason to use such a tactic.[94] Moreover, even if a plaintiff uses this tactic, it is risky because it only leaves sixty days to submit an affidavit, and a failure to submit an affidavit in good faith could shift the defendant's attorney fees and other costs to the plaintiff.[95] Thus, *Brown-Wilbert* does not provide a compelling argument to deviate from the plain statutory language, and *Guzick* missed an opportunity to return the court to the plain statutory language of section 544.42.

B. *Moving to the Statute's Plain Language Will Make Minnesota Law More Predicable and Open to Meritorious Lawsuits*

Guzick noted that the court should determine whether but-for causation requires expert support by considering whether the facts relating to but-for causation fall within an area of common understanding for a lay juror.[96] Presumably, the court would apply this standard to the legal malpractice elements of attorney client relationship and proximate cause as well.[97]

When this inexact standard is combined with the power to dismiss a case early under *Brown-Wilbert*, its immediate application may unjustifiably dismiss the cases of unsuspecting plaintiffs.[98] *Brown-Wilbert* and *Guzick* do not require the court to specify its expectations for expert opinion before deciding a motion to dismiss. However, plaintiffs need to know the expectations of the presiding court and must have adequate notice to abide by these expectations.[99] After all, what falls within the common understanding for a lay juror might change over time and different courts might have different interpretations. Indeed, as the procedural history of *Guzick* demonstrates, the district court and the court of appeals disagreed about what elements of a prima facie legal malpractice case require expert testimony.[100]

Considering that the current case law might lead to unpredictable and unjust results, it may make sense to consider adopting the plain statutory language of section 544.42.[101] If the plain statutory language applied, plaintiffs would have sixty days to remedy any defects.[102] The plain language of section 544.42 is more forgiving and less likely to dismiss meritorious lawsuits.[103]

V. Conclusion

Guzick considered which elements of legal malpractice require expert support and how to evaluate the adequacy of expert opinion for these elements.[104] Following *Brown-Wilbert*, *Guzick* determined that a plaintiff provided an inadequate expert opinion and, as a result, dismissed the plaintiff's case without granting any time to remedy the inadequacies.[105] This is a harsh outcome that might lead to the dismissal of meritorious cases.[106] Consequently, the court might consider the lead of *Wesely* in the medical malpractice context and adopt the plain language of the underlying statute,[107] which is more forgiving and less likely to preclude meritorious cases.[108]

1. 869 N.W.2d 42 (Minn. 2015).

2. *Id.* at 51.

3. Brown-Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P., 732 N.W.2d 209, 217–18 (Minn. 2007).

4. *Guzick*, 869 N.W.2d at 52–56 (Lillehaug, J., concurring).

5. *See id.*

6. *See, e.g.*, Schoregge v. Bishop, 29 Minn. 367, 371, 13 N.W. 194, 196 (1882) ("The attorney is answerable to his clients in damages for any abuse of his trust, or the consequences of his ignorance, negligence, or indiscretion.").

7. *See* Ryan v. Long, 35 Minn. 394, 29 N.W. 51, 51 (1886) (holding that an attorney-client relationship existed when an attorney provided solicited legal advice); *see also* Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686, 692 (Minn. 1980) (recognizing *Ryan* as the first Minnesota case to question whether an attorney-client relationship existed).

[8.] Sjobeck v. Leach, 213 Minn. 360, 365, 6 N.W.2d 819, 822 (1942) (quoting 5 AM. JUR. *Attorneys at Law* § 125 (1936)).

[9.] *Id.*

[10.] *Togstad*, 291 N.W.2d at 692 (citing Christy v. Saliterman, 288 Minn. 144, 150, 179. N.W.2d 288, 294 (1970)).

[11.] *See* MINN. STAT. § 544.42 (2015).

[12.] *See House v. Kelbel*, 105 F. Supp. 2d 1045, 1051 (D. Minn. 2000) (stating that the Minnesota legislature used a medical malpractice statute "as a blueprint" for a statute relating to legal malpractice).

[13.] *See* Parker v. O'Phelan, 414 N.W.2d 534, 537 (Minn. Ct. App. 1987), *aff'd*, 428 N.W.2d 361 (Minn. 1988) (stating that the primary purpose of the statute was to reduce "nuisance malpractice suits"); *see generally* E. Curtis Roeder, Note, *Introduction to Minnesota's Tort Reform Act*, 13 WM. MITCHELL L. REV. 277, 303–06 (1987), available at http://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=2484&context=wmlr.

[14.] MINN. STAT. § 145.682, subdiv. 2 (2015).

[15.] *Id.* § 145.682, subdiv. 2(1).

[16.] *Id.* § 145.682, subdiv. 3(a).

[17.] *Id.* § 145.682, subdiv. 2(2).

[18.] *Id.* § 145.682, subdiv. 4(a).

[19.] *Id.*

[20.] *Id.* § 145.682, subdiv. 6(a).

[21.] 457 N.W.2d 188 (Minn. 1990).

[22.] *Id.* at 193 (explaining that "empty conclusions . . . can mask a frivolous claim").

[23.] *Id.* at 192; *see also* Stroud v. Hennepin Cty. Med. Ctr., 556 N.W.2d 552, 556 (Minn. 1996) (holding that the second affidavit—the affidavit of expert disclosure—was insufficient because it only provided "broad, conclusory statements as to causation").

[24] *Sorenson*, 457 N.W.2d at 192.

[25] *Brown-Wilbert*, 732 N.W.2d at 217 (citing *Sen. Debate on S.F. 0936*, 82d Minn. Leg., May 16, 2001 (audio tape) (statement of Sen. Neuville, author of the bill)). Before the enactment of the safe harbor provision, it was well established that section 145.682 could have harsh outcomes. *See generally* Jason Leo, Comment, *Torts—Medical Malpractice: The Legislature's Attempt to Prevent Cases without Merit Denies Valid Claims,* 27 WM. MITCHELL L. REV. 1399, 1419–22 (2000), available at http://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1767&context=wmlr.

[26] MINN. STAT. § 145.682 (6)(c)(2) (2015). ("[T]he time for the hearing of the motion is at least 45 days from the date of service of the motion."). The Minnesota Supreme Court interprets this statute as giving the forty-five days automatically before the court even considers if the second affidavit contains a deficiency. Wesely v. Flor, 806 N.W.2d 36, 41 (Minn. 2011).

[27] *House*, 105 F. Supp. 2d at 1051; *see also* MINN. STAT. § 544.42 (2015) (defining "professionals" as attorneys, architects, accountants, engineers, land surveyors, and landscape architects).

[28] Meyer v. Dygert, 156 F. Supp. 2d 1081, 1090 (D. Minn. 2001) ("[T]he statutory language for both statutes is, in major substance, the same."); *House*, 105 F. Supp. 2d at 1051 (discussing that the two statutes have "nearly identical" content).

[29] *Compare* MINN. STAT. § 145.682, subdiv. 2 (2015), *with* MINN. STAT. § 544.42, subdiv. 2 (2015).

[30] MINN. STAT. § 544.42, subdiv. 3(a)(1) (2015).

[31] *Id.* § 544.42, subdiv. 4(a).

[32] *Id.*

[33] *Id.* § 544.42, subdiv. 6(a).

[34] *Id.* § 544.42, subdiv. 6(c).

[35] *Wesely*, 806 N.W.2d at 41; *see also* MINN. STAT. § 544.42, subdiv. 6(c) (2015).

[36] 732 N.W.2d 209 (Minn. 2007).

[37] *See id.* at 219.

[38] *Brown-Wilbert*, 732 N.W.2d at 219. These standards are considered objectively—subjective intent to submit an affidavit in good faith is irrelevant. *Id.* at 216. *But see House*, 105 F. Supp. 2d at 1053 (stating that courts can take alternative action to dismissal when an affidavit is "submitted in good faith").

[39] *Brown-Wilbert*, 732 N.W.2d at 218–19.

[40] *Id.* at 217–18; *see also House*, 105 F. Supp. 2d at 1051 (noting that having no minimum requirement would grant a plaintiff 240 days to file). *But see Wesely*, 806. N.W.2d at 42 (arguing that a plaintiff would not be inclined to use a "placeholder affidavit" with no information to cheat the 180-day affidavit requirement).

[41] *Brown-Wilbert*, 732 N.W.2d at 219; *see also* Hill v. Okay Const. Co., 312 Minn. 324, 337, 252 N.W.2d 107, 116 (1977) ("[E]xpert testimony is not necessary when the matters to be proven are within the area of common knowledge and lay comprehension."). Before *Guzick*, the only element of legal malpractice that generally required expert testimony was the establishment of a negligent act, which consists of a duty and breach. *Guzick*, 869 N.W.2d at 166 (citing *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 116 (Minn. 1992)).

[42] *See Guzick*, 869 N.W.2d at 44 (stating that the court had only discussed the necessity for expert testimony in a legal malpractice context on "a few occasions").

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.* Before suing Kimball, Guzick sued Tony and Tony's wife for conversion. *Id.* They filed for bankruptcy, and Guzick won a sum in bankruptcy court. *Id.* Guzick also sued Wells Fargo. *Id.* Wells Fargo settled the case. Brief of Appellants Larry Alan Kimball, Kimball Law Office, and Kimball and Undem at 4, *Guzick*, 869 N.W.2d 42 (No. A14-0429), 2015 WL 1070344, at *4. One of Kimball's defenses was that these previous lawsuits showed the damages were the result of third parties, and so Kimball could not be liable. *Id.* at *8.

[55] *Guzick*, 869 N.W.2d at 45; *see also* MINN. STAT. § 544.42 (2015).

[56] *Guzick*, 869 N.W.2d at 45–46.

[57] Guzick v. Kimball, No. 11-CV-13-689, 2014 WL 9963420, at *2 (Minn. Dist. Ct. 2014), *rev'd*, No. A14-0429, 2014 WL 4957973 (Minn. Ct. App. 2014), *rev'd*, 869 N.W.2d 42 (Minn. 2015).

[58] *Id.*

[59] *Id.*

[60] Guzick v. Kimball, No. A14-0429, 2014 WL 4957973, at *6 (Minn. Ct. App. 2014), *rev'd*, 869 N.W.2d 42 (Minn. 2015).

[61] *Id.* at *11.

[62] *Guzick*, 869 N.W.2d at 51.

[63] *Id.* at 51.

[64] MINN. STAT. § 544.42, subdiv. 6(c) (2015).

[65] *Guzick*, 869 N.W.2d at 48.

[66] *Id.*

[67] *See Guzick*, 869 N.W.2d at 49–50 (stating the main issue as whether or not the affidavit was satisfactory for

the elements requiring expert opinion).

[68] *Id.* at 48–49.

[69] *Guzick*, 869 N.W.2d at 48.

[70] *Id.*

[71] *Id.* at 49–50.

[72] *Id.* at 50–51.

[73] *Id.* at 48 n.5.

[74] *Id.* at 50–51

[75] *Id.* at 50 (citing *Hill* 252 N.W.2d at 116).

[76] *Id.* at 50.

[77] *Id.* at 51. The court also noted that Guzick should not be allowed safe harbor because he had been pursuing other lawsuits, which were based on the same facts, for multiple years. *Id.*

[78] *Id.* at 51–52; *see also* MINN. STAT. § 544.42, subdiv. 6(c) (2015).

[79] *Wesely*, 806 N.W.2d at 42.

[80] *Id.* at 41.

[81] *Id.* at 42.

[82] *Id.*

[83] *See id.*

[84] MINN. STAT. § 544.42, subdiv. 6(c) (2015).

[85] MINN. STAT. § 145.682, subdiv. 6(c)(2) (2015).

[86] *See Wesely*, 806 N.W.2d at 41.

[87] *Guzick*, 869 N.W.2d at 53 (Lillehaug, J., concurring); *see also* MINN. STAT. § 544. 42, subdiv. 6(c) (2015).

[88] MINN. STAT. § 544.42, subdiv. 6(c) (2015); *Guzick*, 869 N.W.2d at 53 (Lillehaug, J., concurring) (citing MINN. STAT. § 544.42, subdiv. 6(c) (2015)).

[89.] *Guzick*, 869 N.W.2d at 53 (Lillehaug, J., concurring). In *Guzick*'s only concurring opinion, Justice Lillehaug noted that *Brown-Wilbert* singlehandedly invented the court's authority to substantively decide an affidavit's merits before granting sixty days of safe harbor. *Id.* at 53–54. Provided that the language of section 544.42 unambiguously provides sixty days of safe harbor before a motion can be dismissed, this "judicial concoction" is unwarranted. *Id.* Thus, while he reluctantly concurred with the majority's application of *Brown-Wilbert*, Justice Lillehaug argued that the court should eventually return to the plain language of the statute. *Id.* at 55–56.

[90.] MINN. STAT. § 544.42, subdiv. 6(c) (2015); *see also Guzick*, 869 N.W.2d at 53 (Lillehaug, J., concurring).

[91.] *Brown-Wilbert*, 732 N.W.2d at 217–18.

[92.] *Wesely*, 806 N.W.2d at 42. *Brown-Wilbert* does not explicitly express the worry that a plaintiff might submit a "placeholder" affidavit, but it is implied. *See Brown-Wilbert*, 732 N.W.2d at 217–18.

[93.] *Wesely*, 806 N.W.2d at 42.

[94.] *Id.*

[95.] *Id.*; *see also* MINN. STAT. § 544.42, subdiv. 7 (2015). One of *Brown-Wilbert*'s holdings was that the standard of good faith does not apply to the affidavit of expert disclosure under section 544.42. *Brown Wilbert*, 732 N.W.2d at 216. Rather, *Brown-Wilbert* judges the affidavit's requirements objectively. *Id.* However, in the medical malpractice context, *Wesely* noted that the good faith standard applies to both affidavits. *Wesely*, 806 N.W.2d at 42. This discrepancy makes little sense. *See Brown-Wilbert*, 732 N.W.2d at 227 (Anderson, J., concurring in part and dissenting in part). Subdivision 7 of sections 145.682 and 544.42 contain essentially the same language, and both allow sanctions if the plaintiff or the plaintiff's attorney certifies the "affidavit or answers to interrogatories" in good faith. *Compare* MINN. STAT. § 544.42, subdiv. 7 (2015)*, with* MINN. STAT. § 145.682, subdiv. 7 (2015). The fact that subdivision 7 includes answers to interrogatories, which can only serve as an affidavit of expert disclosure under subdivision 4, suggests that *Wesely*'s interpretation is right—the good faith standard should apply to both affidavits. *Wesely*, 806 N.W.2d at 42.

[96.] *Guzick*, 869 N.W.2d at 50 (citing *Hill*, 252 N.W.2d at 116).

[97.] *Guzick* only indicated that expert testimony is generally required to establish a negligent act. *Id.* at 49. *Guzick* distinguishes this from the other elements of legal malpractice by stating that the court has "never required expert testimony on the other elements of a prima facie case of legal malpractice." *Id.* Expert testimony is generally required to establish a negligent act in many jurisdictions outside Minnesota. *See* George L. Blum, Annotation, *Admissibility and Necessity of Expert Evidence as to Standards of Practice and Negligence in Malpractice Action Against Attorney—Conduct Related to Procedural Issues*, 59 A.L.R. 6th 1 (2010).

[98.] *See Brown-Wilbert*, 732 N.W.2d at 228 (Anderson, J., concurring in part and dissenting in part) ("[C]ourts are to consider and utilize less drastic alternatives than dismissal when a plaintiff has identified experts and given some meaningful disclosure of the expert's testimony.")

[99.] Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning."). Notably, Arizona's courts have recognized the need to provide adequate notice to plaintiffs—Arizona's analogous statute on legal malpractice requires courts to give "fair notice to a plaintiff and an opportunity to cure . . . an expert deficiency." Kaufman v. Jesser, 884 F. Supp. 2d 943, 955 (D. Ariz. 2012); *see also* Warner v. Sw. Desert Images, LLC, 180 P.3d 986, 994 (Ariz. Ct. App. 2008) ("Section 12–2602(E) provides that when a trial court determines an affidavit is required, it must 'set a date and terms for compliance.'" (quoting ARIZ. REV. STAT. ANN. § 12-2602, subdiv. E (West, Westlaw through 2016 legislation))).

[100.] *See Guzick*, 869 N.W.2d at 45–46.

[101.] *See id.* at 53 (Lillehaug, J., concurring).

[102.] MINN. STAT. § 544.42, subdiv. 6(c) (2015).

[103.] *See Guzick*, 869 N.W.2d at 53 (Lillehaug, J., concurring) (citing *Wesely*, 806 N.W.2d at 41); *see also Brown-Wilbert*, 732 N.W.2d at 228 (Anderson, J., concurring in part and dissenting in part).

[104.] *Guzick*, 869 N.W.2d at 44.

[105.] *Id.* at 51.

[106.] *See Brown-Wilbert*, 732 N.W.2d at 228 (Anderson, J., concurring in part and dissenting in part).

[107.] *Guzick*, 869 N.W.2d at 53 (Lillehaug, J., concurring) (citing *Wesely*, 806 N.W.2d at 41).

[108.] *See id.*; *see also Brown-Wilbert*, 732 N.W.2d at 228 (Anderson, J., concurring in part and dissenting in part).

Sample Case Note 2

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CRIMINAL LAW: Behind Closed Doors: Expanding the Triviality Doctrine to Intentional Closures-- ***State v. Brown***

I. Introduction

The Minnesota Supreme Court recently held in *State v. Brown*[1] that the intentional locking of a courtroom during jury instructions does not implicate a defendant's right to a public trial.[2] The majority found that the trial court's actions were too trivial to affect any of the defendant's public trial rights.[3] Because the court adopted the triviality doctrine, it did not apply the traditional test for alleged Sixth Amendment violations.[4]

This case note begins by exploring the history of the right to a public trial in America.[5] Then it discusses the facts of *Brown* and the court's rationale for its decision.[6] Next, it argues that the court expanded the triviality doctrine's scope beyond its proper application.[7] Finally, this note concludes that *Brown* will lead to many unwarranted courtroom closures.[8]

II. History of the Right to a Public Trial in the United States

A. Origins of the Right to a Public Trial

The guarantee to a speedy and public trial is generally seen as a common law privilege originating in England.[9] English judges consistently applied the guarantee throughout the late seventeenth and eighteenth centuries.[10] At the time, the right was not seen as a benefit for the accused[11] but rather a way to reinforce the

legitimacy of convictions.[12]

B. The Public Trial Guarantee in the United States

The founding fathers recognized that the public trial guarantee provided important safeguards to freedom and chose to adopt it into the Bill of Rights.[13] The Sixth Amendment of the U.S. and Minnesota Constitutions state that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."[14] A public trial is defined as a "trial that anyone may attend or observe."[15] The guarantee is seen as a benefit for the accused.[16] The guarantee is not absolute[17] and at times it must yield to important government interests.[18] Though courts took up the issue prior to the twentieth century,[19] *Davis v. United States* provided the initial framework for modern jurisprudence.[20] The court in *Davis* held that alleged public trial violations were not harmless errors.[21] Therefore, the defendant need not show actual harm in order to prevail.

C. The Waller Test

In 1984, the Supreme Court ruled unconstitutional the broad courtroom closure of a seven-day suppression hearing during a criminal trial.[22] Writing for the majority, Justice Powell outlined the current test for alleged Sixth Amendment violations.[23] He held that the party seeking to close the courtroom must: "[1] advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure."[24] The Court held that a violation of the public trial guarantee does not necessarily require a new trial.[25] Rather, the "remedy should be appropriate to the violation."[26] The Supreme Court recently reaffirmed this rule and applied it to every stage of a trial.[27]

D. The Public Trial Guarantee in Minnesota

Minnesota has generally followed the *Waller* test[28] though recent jurisprudence has allowed more opportunities for courtroom closure.[29] Specifically, Minnesota now recognizes that some closures are too trivial to amount to a violation of the Sixth Amendment.[30]

III.The *Brown* Decision

A. Facts and Procedural Posture

On August 29, 2008, Darius Miller was shot and killed outside Whispers Gentlemen's Club in Minneapolis.[31] The State charged Brown with first-degree premeditated murder, first-degree premeditated murder committed for the benefit of a gang, second-degree intentional murder, and second-degree intentional murder committed for the benefit of a gang.[32]

The State presented evidence that just prior to the murder, three of Brown's acquaintances attacked Miller.[33] During the fight, someone yelled, "You better go get a gun."[34] Immediately preceding the gunshots, an eyewitness reported seeing an individual wearing a white undershirt, a large necklace, and his hair in a ponytail come up the club stairs.[35] The State introduced jail security camera footage that showed Brown leaving jail twelve hours before Miller's murder, with his hair in a ponytail and wearing a large necklace, white tank top, and dark pants.[36] Additionally, the State presented evidence showing that a car seen near the murder was registered to the sister of one of Brown's acquaintances.[37] The State had an expert testify that a bullet casing recovered from a shooting that Brown pled guilty to in 2008 matched that of a casing found near Miller's body.[38]

Following closing arguments, the trial court ordered the courtroom door be locked for the duration of the jury instructions.[39] In explaining the situation, the judge stated on the record:

> For the benefit of those in the back, I am going to begin giving jury instructions. While that is going on the courtroom is going to be locked and people are not going to be allowed to go in or out. So, if anybody has to leave, now would be the time. You are welcome to [s]tay. But I just want to make sure that everybody knows that the courtroom is going to be locked. We are all good? Deputy?[40]

For the duration of the jury instructions, no spectators were let in or allowed out.[41] The jury found Brown guilty on all four counts of murder.[42] The trial court sentenced him to life imprisonment for first-degree murder plus an additional year of imprisonment based on the murder being committed for the benefit of a gang.[43]

B. The Supreme Court's Decision

Before the Minnesota Supreme Court, Brown argued that he was entitled to a new trial for five reasons.[44] This note focuses on the court's reasoning in regards to the public trial issue. The court also

addressed the admissibility of evidence, jury instructions, testimony, and impeaching evidence.[45] The court ruled in favor of the State on all five issues.[46]

The court noted that denials of the public trial guarantee constitute structural error and are not subject to harmless error review.[47] The court then addressed the purpose of the public trail guarantee, citing the *Waller* standard.[48] The court explained that not all courtroom restrictions implicate a defendant's right to a public trial.[49] The court focused on two recent Minnesota decisions which found that certain closures can be "too trivial to amount to a violation of the [Sixth] Amendment."[50] The court cited several factors for determining that the trial court's actions were trivial, including that the courtroom was never cleared of all spectators and that the trial remained open to the general public and press.[51] Thus, the Minnesota Supreme Court found that locking the courtroom doors did not implicate Brown's right to a public trial.[52] The majority concluded by noting that in future cases, the trial court should expressly state on the record why it locked courtroom doors.[53]

IV. Analysis

A. The Triviality Doctrine

The majority erred by applying the triviality doctrine to a case where the judge intentionally closed the courtroom to additional spectators.[54] The majority should have found that the closure implicated the defendant's Sixth Amendment rights and remanded the case for further proceedings to determine whether the closure satisfied the *Waller* test.[55]

The triviality standard used in *Brown* was developed from the often-cited *Peterson v. Williams*.[56] In that case, a courtroom was closed during the testimony of an undercover agent.[57] The judge inadvertently forgot to reopen the courtroom prior to the next testimony.[58] Thus, for fifteen to twenty minutes, the defendant testified in a closed courtroom.[59]

The *Peterson* court did not articulate a specific test for determining triviality, but held that because the closure was extremely short, followed by a helpful summation, and entirely inadvertent, the defendant's Sixth Amendment rights were not infringed upon.[60] The court found that a defendant's Sixth Amendment rights are

only implicated when a closure affects the values served by that right.[61] Thus, trivial closures are not subject to the *Waller* test.[62]

B. Scope of the Triviality Doctrine

Courts are reluctant to make a specific test for determining whether a closure is trivial.[63] Instead, the determination is a fact intensive issue for each case.[64] Jurisdictions across the country have addressed the issue differently.[65] Some courts are extremely hesitant to broaden the scope [66] or even recognize[67] the doctrine. The doctrine is most often cited in cases involving unintentional closures for short periods of time.[68]

The majority in *Brown* relied heavily on the analysis of past Minnesota cases.[69] The *Brown* case presented unique facts that distinguished it from controlling precedent.[70] Therefore, the court erred by not delving further into the purpose and scope of the triviality doctrine.[71]

C. Intentional Closures

The triviality doctrine allows closures which do not undermine the "values served by the Sixth Amendment."[72] The values protected by the guarantee are to "1) ensure a fair trial; 2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions; 3) to encourage witnesses to come forward; and 4) to discourage perjury."[73] The second value is an effective restraint on possible abuse of judicial power.[74] As Justice Meyers correctly stated in her dissent, an intentional courtroom closure goes against the values protected by the Sixth Amendment.[75]

Courts do not agree about the implication of judicial intent for courtroom closures. [76] Some courts have questioned the applicability of *Peterson* to intentional courtroom closures.[77] A recent case in Florida held that intentionally locking courtroom doors amounted to a partial closure, [78] subject to the less stringent substantial reason test. [79] A partial closure occurs when access to the courtroom is retained by some spectators but denied to others. [80] Though many jurisdictions do recognize the distinction between partial and total closures, [81] Minnesota does not. [82] Locking a courtroom's doors contravenes the presumption of openness in criminal proceedings.[83] Therefore, regardless of the partial and total closure distinction, "if a court intends to exclude the

public from a criminal proceeding, it *must* first analyze the *Waller* factors and make specific enough findings with regards to those factors."[84]

The U.S. Supreme Court has been firm in its protection of the public trial guarantee.[85] Any closure by a trial court judge must satisfy the four requirements of the *Waller* test.[86] The Minnesota Supreme Court's ruling allows trial courts to ignore the *Waller* test, so long as the closure is small.[87] The better precedent would be to apply the *Waller* test to any intentional courtroom closure.[88] It would provide appellate courts a better opportunity to review the case and promote public confidence in the judiciary.[89]

D. Brown's Impact on Future Decisions

At the end of the public trial section in the *Brown* opinion, the court appears to acknowledge that its new precedent could create the appearance that "Minnesota's courtrooms are closed or inaccessible to the public."[90] Thus, the court draws on the *Waller* test and requires future closures to have express reasons stated on the record.[91] But the *Brown* court affirmed the trial court's decision, which lacked any articulated reason for the closure.[92] Therefore, the *Brown* decision sets a low threshold for courtroom closures and leaves questions about how future decisions will be addressed.[93] There is a strong potential that "creeping courtroom closures" may become commonplace in Minnesota courts.[94] In fact, a recent Minnesota Supreme Court decision relied on *Brown* to uphold a locked courtroom only for the stated reason that "[g]oing in and out [during a proceeding] obviously creates some disruptions and distractions."[95]

The better course of action in *Brown* would have been to acknowledge the implication of the public trial guarantee and to remand the case for an evidentiary hearing to further address the issue.[96] A remand does not necessarily mean that the closure was unconstitutional, as courts have found maintaining order during jury instructions is an important interest.[97] Rather, a remand sets the precedent that judges are not allowed overbroad discretion to close the courtroom without being subject to the *Waller* test.[98]

V. Conclusion

The court was presented with the difficult question of determining whether the intentional locking of

a courtroom during closing arguments violated the defendant's Sixth Amendment rights.[99] The court determined that this was too trivial to be considered a closure and therefore the defendant's rights were not implicated.[100] The majority failed to analyze the reasons behind the triviality doctrine when it applied it to intentional closures. Though the decision put in checks for future cases, *Brown* sets a very low standard that could lead to many unwarranted courtroom closures in the future.[101]

1. 815 N.W.2d 609 (Minn. 2012).

2. *Id.* at 617-18.

3. *Id.*

4. *Id.*

5. *See infra* Part II.

6. *See infra* Part III.

7. *See infra* Part IV.

8. *See infra* Part V.

9. Max Radin, *The Right to a Public Trial*, 6 TEMP. L. Q. 381, 381 (1932). *See generally* JOSEPH *JACONELLI*, OPEN JUSTICE: A CRITIQUE OF THE PUBLIC TRIAL 5 (2002) (tracing public trials from common law England to colonial America).

10. Radin, *supra* note 9, at 389 ("But any feature of the common law was sure to be noted as a merit, especially in the seventeenth century. . . . [I]n the eighteenth century . . . the "open and public trial" of the common law [was given] something of an order of sanctity.").

11. *Id.* at 384.

12. Daniel Levitas, Note, *Scaling Waller: How Courts have Eroded the Sixth Amendment Public Trial Right*, 59 EMORY L.J. 493, 501 (2009).

13. Kleinbart v. United States, 388 A.2d 878, 881 ("The guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of prosecution."); Radin, *supra* note 9, at 386 ("The

[Sixth Amendment right to a public trial] is one of the important safeguards that [was] soon deemed necessary to round out the Constitution . . . ." (quoting Davis v. United States, 247 F. 394, 394 (8th Cir. 1917))); Fair Trial Guarantees, 32 C.F.R. § 151.7(p) (2012) (citing public trials as important safeguards to fair trials).

[14.] U.S. CONST. amend. VI; *accord* MINN. CONST. art. I, § 6.

[15.] BLACK'S LAW DICTIONARY 1644 (9th ed. 2009).

[16.] Waller v. Georgia, 467 U.S. 39, 46 (1984) (quoting *In re* Oliver, 333 U.S. 257, 270 (1948)). *See generally* SUSAN N. HERMAN, THE RIGHT TO A SPEEDY AND PUBLIC TRIAL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION, at xviii (2006) (discussing the purpose of the Sixth Amendment); 23 C.J.S. *Criminal Law* § 1542 (noting that the requirement that criminal trials be public is for the benefit of the accused).

[16.] *E.g.*, Waller, 467 U.S. at 39; People v. Colon, 71 N.Y.2d 410, 416 (N.Y. 1988).

[17.] Waller, 467 U.S. at 46. *See generally* Gerhard O. W. Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings*, 110 U. PA. L. REV. 1, 1-3 (1961) (discussing the need to balance defendant's rights to a public trial and the government's need to maintain secrecy in certain situations).

[18.] *See* Davis v. United States, 247 F. 394, 396-98 (8th Cir. 1917) (discussing eleven lower court public trial decisions).

[19.] *Id.* at 398-99 ("A violation of the constitutional right [to a public trial] necessarily implies prejudice and more than that need not appear. Furthermore, it would be difficult, if not impossible, in such cases for a defendant to point to any definite, personal injury.").

[20.] *Id.*

[21.] Waller, 467 U.S. at 50.

[22.] *Id.* at 48.

[23.] *Id.*

[24.] *Id.* at 49-50.

[25.] *Id.* at 50. *See generally* Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM.

L. REV. 79, 113 (1988) (discussing the appropriate remedy for Sixth Amendment violations).

[26.] *See Presley* v. Georgia, 558 U.S. 209, 215 (2010) (holding that a trial court's closure during *voir dire* violated the defendant's Sixth Amendment rights because the court did not take into account alternatives and did not articulate a specific enough finding).

[27.] *See, e.g.*, State v. Mahkuk, 736 N.W.2d 675, 685 (Minn. 2007) (holding that the trial court failed to provide adequate findings for the closure as required by *Waller*); State v. Fageroos, 531 N.W.2d 199, 203 (Minn. 1995) (remanding the case in order for the prosecutor to have the opportunity to establish, if he could, that closure was necessary under *Waller*); State v. McRae, 494 N.W.2d 252, 260 (Minn. 1992) (holding that the trial court did not comply with the requirements of *Waller*).

[28.] *See, e.g.*, State v. Caldwell, 803 N.W.2d 373, 390 (Minn. 2011) (holding that the values sought to be protected by a public trial are not implicated when some spectators are excluded from the courtroom); State v. Lindsey, 632 N.W.2d 652, 660-61 (Minn. 2001) (holding that the closure in question was so trivial that it did not implicate the right to a public trial).

[29.] *See, e.g.*, State v. Brown, 815 N.W.2d 609, 618 (Minn. 2012) (quoting Peterson v. Williams, 85 F.3d 39, 42 (2d Cir. 1996)); *Caldwell*, 803 N.W.2d at 390; *Lindsey*, 632 N.W.2d at 660-61.

[30.] *Appellant's* Brief at 10, *Brown*, 815 N.W.2d 609 (No. A10-0992), 2012 WL8479012 [hereinafter Appellant's Brief].

[33.] *Id.*

[34.] *See* Brown, 815 N.W.2d at 614.

[31.] *Id.*

[32.] *Id.*

[33.] *Id.*

[34.] *Id.*

[35.] Brown, 815 N.W.2d at 614.

[36.] *Id.*

[37] *Id.*

[38] *Id.* at 614-15.

[39] Appellant's Brief, *supra* note 34, at 8.

[40] Brown, 815 N.W.2d at 615.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.* at 616 (citing State v. Bobo, 770 N.W.2d 129, 139 (Minn. 2009)).

[45] *Id. at* 616-17.

[46] *Id.* at 617.

[47] *Id.*

[48] *Id.*

[49] *Id.* at 617-18 ("[T]he courtroom was never cleared of all spectators . . . . The trial remained *open* to the public and press already in the courtroom . . . . [T]he jury instructions did not compromise a proportionately large portion of the trial proceedings.").

[50] *Id.* at 618.

[51] *Id. at* 614.

[52] *See id.* at 627 (Meyer, J., dissenting).

[53] *Peterson* v. Williams, 85 F.3d 29 (2d Cir. 1996).

[54] *Id. at* 42 (protecting the identity of the undercover agent is a valid reason for courtroom closure).

[55] *Id.* (failure to re-open was an oversight).

[56] *Id.* at 41.

[57] *Id.* at 44.

[58] *Id.*

[59] *See id.*

[60] *See, e.g.*, United States v. Gupta, 699 F.3d 682, 689 (2d Cir. 2011) ("Whatever the outer boundaries of our "triviality standard" may be . . . we see no reason to define these boundaries . . . ."); *Peterson*, 85 F.3d at 44. *See generally* Hon. John M. Walker, Jr., *Harmless Error Review in the Second Circuit*, 63 BROOK. L. REV. 395, 403-04 (1997) (discussing the different factors that can be used for determining triviality).

[61] *See Peterson*, 85 F.3d at 44.

[62] *See generally* H.D. Warren, Annotation, *Exclusion of Public During Criminal Trial*, 156 A.L.R. 265 (1945) (discussing triviality cases from different jurisdictions).

[63] *Gupta*, 699 F.3d at 688 ("We have repeatedly emphasized, however, the [triviality] doctrine's narrow application.").

[64] *See* State v. Easterling, 157 Wash. 2d 167, 180 (Wash. 2006) (noting that the a majority of the State's court has never found a public trial right to be de minimis).

[65] Case Comment, *Criminal Law--Sixth Amendment--Second Circuit Affirms Conviction Despite Closure to the Public of a Voir Dire*--U.S. v. Gupta, 125 HARV. L. REV. 1072, 1076 (2012) (finding that in eighteen cases in which a *voir dire* proceeding was closed to the public but found too trivial to implicate the defendant's public trial rights, most involved inadvertent closure (citing *Gupta*, 650 F.3d at 874 (Parker, J., dissenting))).

[66] *See* State v. Brown, 815 N.W.2d 609, 617 (Minn. 2012).

[67] *Compare id.* (intentionally locking courtroom doors to public not in the courtroom at that time), *with* State v. Caldwell, 803 N.W.2d 373, 391 (Minn. 2011) (removing the defendant's mother who had been disruptive throughout the court proceedings), *and* State v. Lindsey, 632 N.W.2d 652, 657 (removing two minors during criminal trial pursuant to Minnesota law).

[68] *See Brown*, 815 N.W.2d at 626 (Meyer, J., dissenting) (arguing that the majority's reasoning was flawed and the actions of the *Lindsey* court were distinguishable).

[69] *Peterson* v. Williams, 85 F.3d 29, 43 (2d Cir. 1996).

[70.] *Id.* (citing Waller v. Georgia, 467 U.S. 39, 46-47 (1984)).

[71.] *Waller*, 467 U.S. at 46 f.4 (citing *In re Oliver*, 333 U.S. 257, 270 (1948)).

[72.] *Brown*, 815 N.W.2d at 626 (Meyer, J., dissenting) ("[T]he values of the public trial guarantee are sufficiently implicated by the facts of this case such that the *Waller* analysis is required."). [72.] *See, e.g.*, Gonzalez v. Quinones, 211 F.3d 735, 737 (2d Cir. 2000) ("In *Peterson*, the problematic closure occurred as the result of the accidental failure to reopen after a properly ordered closure, where as here the door was intentionally locked by court personnel. . . . [I]n view of these differences, we do not believe the closure can be considered trivial . . . ."); Kelly v. State, 6 A.3d 396, 407 f.10 (Md. 2010) ("Some courts do consider whether the closure was inadvertent. Other courts find this irrelevant to the analysis."); State v. Torres, 844 A.2d 155, 162 (R.I. 2004) ("[The closure] was neither brief nor inadvertent, but was an intentional restriction . . . . Under these circumstances, the appropriate relief is the granting of a new trial."). *But see* Walton v. Briley, 361 F.3d 431, 433 (7th Cir. 2004) ("Whether the closure was intentional or inadvertent is constitutionally irrelevant."); State v. Vanness, 738 N.W.2d 154, 158 (Wis. Ct. App. 2007) (holding that the State's intent is irrelevant, so when the courthouse was locked for three hours without the judge's knowledge, it was still a closure).

[73.] *See* Brown v. Kuhlmann, 142 F.3d 529, 541 (2d Cir. 1998) ("It is unclear from the analysis in *Peterson* whether [the intentional closing] would alter the conclusion that no Sixth Amendment violation occurred."); *Peterson*, 85 F.3d at 44 f.8 (questioning whether an intentional closure may threaten a defendant's public trial right, even if the closure is brief).

[74.] *See* United States v. Flanders, 845 F.Supp. 2d 1298, 1302 (S.D. Fla. 2012) (holding that locking courtroom during closing arguments was a partial closure).

[75.] United States v. Sherlock, 962 F.2d 1349, 1357 (9th Cir. 1989) ("[T]he impact of the partial closure did not reach the level of a total closure, and therefore "only a 'substantial' rather than a 'compelling' reason for the closure was necessary." (quoting Douglas v. Wainwright, 739 F.2d 531, 533 (11th Cir. 1984))).

[76.] Judd v. Haley, 250 F.3d 1308, 1314 (11th Cir. 2001).

[77.] *See, e.g.*, United States v. Smith, 426 F.3d 567, 571 (2d Cir. 2005); Nieto v. Sullivan, 87 F.2d 743, 754

(10th Cir. 1989); Com v. Cohen, 921 N.E.2d 906, 921 (Mass. 2010).

[78.] State v. Mahkuk, 736 N.W.2d 675, 685 (Minn. 2007).

[79.] Richmond Newspapers, Inc. v. Virginia 448 U.S. 555, 573 (1980).

[80.] United States v. Gupta, 699 F.3d 682, 687 (2d Cir. 2011).

[81.] Presley v. Georgia, 558 U.S. 209, 214-15 (2010) (explicitly holding that "trial courts are required to consider alternatives" and "make every reasonable measure to accommodate the public.").

[82.] *Gupta*, 699 F.3d at 684-85 ("Because the lower court here did not analyze the *Waller* factors prior to closing the courtroom, the closure was unjustified.").

[83.] *See* State v. Brown, 815 N.W.2d 609, 618-19 (discussing the factors which made the closure too trivial too implicate the defendant's rights).

[84.] *Gupta*, 699 F.3d at 687 ("If a trial court fails to adhere to [the *Waller* test], any intentional closure is unjustified . . . .").

[85.] Compare *Brown*, 815 N.W.2d at 618 (aiming to maintain confidence in the judiciary and facilitate appellate review), *with Gupta*, 699 F.3d at 689 (knowledge that anyone is free to attend a trial inspires confidence), *and* Levitas, *supra* note 12, at 510-11 (noting that the elements of *Waller* create a "suitable record for appellate review.").

[86.] *Brown*, 815 N.W.2d at 618.

[87.] Compare *id.* ("To facilitate appellate review in future cases, we conclude the better practice is for the trial court to expressly state on the record why the court is locking the courtroom doors."), *with* Waller v. Georgia, 467 U.S. 39, 45 (1984) ("The interest [for the courtroom closure] is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.").

[88.] Brown, 815 N.W.2d at 618 (stating on the record that it was "for the benefit of those in the back").

[89.] *See* Benjamin E. Rosenberg, *Appellate Review of Structural Errors in Criminal Trials*, 242 NEW YORK LAW JOURNAL 20 (2009) (discussing the tensions between the triviality doctrine and automatic reversal for structural errors).

[90.] State v. Silvernail, No. A12-0021, 2013 WL 2364094, at *13 (Minn. May 31, 2013) (Anderson, J., dissenting).

[91.] *Id.* at *12.

[92.] *See Brown*, 815 N.W.2d at 627 (Meyer, J., dissenting) (arguing that the appropriate disposition was remand for an evidentiary hearing).

[93.] *Cf.* United States v. Flanders, 845 F.Supp. 2d 1298, 1302 (2012) (preventing the distraction of members of the jury by the public coming in and out of the courtroom is an important government interest).

[94.] 23 Minn. Prac., Trial Handbook for Minn. Lawyers § 2.14 (2012 ed.) ("The appropriate initial remedy for an inadequate record to justify closing a trial is remand for an evidentiary hearing." (citing State v. Fageroos, 531 N.W.2d 199 (Minn. 2005))).

[95.] *Brown*, 815 N.W.2d at 615.

[96.] *Id.* at 618.

[97.] *Silvernail*, 2013 WL 2364094, at *13 f.1 ("[D]uring the 2011-2012 term, [the Minnesota Supreme Court] denied five petitions for review that challenged the district court's decision to close or lock the door during final jury instructions.").