No.

In the Supreme Court of the United States

FERNANDO CABRAL-VARELA,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS

Respondent,

On Petition for a Writ of Certiorari to the Massachusetts Supreme Judicial Court

PETITION FOR A WRIT OF CERTIORARI

Justin Drechsler
Counsel of Record
P.O. Box 1390
Montpelier, VT 05601
617-210-7955
jdlawboston@gmail.com

Attorney for Petitioner

QUESTION PRESENTED

The trial judge barred the Petitioner's nephew from the courtroom for the final three days of trial due to concerns of witness intimidation. The question is: Where there was no risk of witness intimidation for most, if not all, of the Commonwealth's witnesses for the final three days, did the judge deprive the Petitioner of his right to a public trial under the Sixth Amendment to the U.S. Constitution?

LIST OF PARTIES

The parties below are listed in the caption.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Statutes and Other Authorities:

OPINIONS BELOW

The decision of the Massachusetts Appeals Court affirming the Petitioner's conviction on direct appeal appears at Appendix A and is unpublished. *Commonwealth v. Cabral-Varela,* 95 Mass. App. Ct. 1102, 2019 Mass. App. Unpub. LEXIS 168 (Mass. 2019). The decision of the Massachusetts Supreme Judicial Court denying further appellate review appears at Appendix B. *Commonwealth v. Cabral-Varela*, 482 Mass. 1103, 2019 Mass. LEXIS 312 (Mass. 2019).

STATEMENT OF JURISDICTION

The date of the opinion and judgment of the Supreme Judicial Court of Massachusetts for which review is sought is June 6, 2019. This petition is filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

I. The Courtroom Closure

On August 13, 2015, Robert Sparks, Jr. was shot several times on Norton Street in Boston. He survived. The Petitioner, Fernando Cabral-Varela, was arrested and charged with several crimes in connection with that shooting, and was tried over the course of six days in December of 2016.

Prior to trial, the Commonwealth anticipated presenting several civilian percipient witnesses and was concerned with intimidation risks associated with those witnesses. Accordingly, the prosecution filed two motions in limine for additional security at trial. In granting those motions, the judge implemented a sign-in procedure for any courtroom spectators consistent with the Massachusetts Supreme Judicial Court's opinion in *Commonwealth v. Maldonado*, 466 Mass. 742 (2014).

Before the start of the fourth day of trial, the Commonwealth informed the judge that at the conclusion of a civilian witness's testimony the day prior, several police officers allegedly heard the Petitioner's nephew, Wilson Mendes, say words to the effect of "he's a rat, he's ratting" as he walked with a group of individuals in the hallway outside the courtroom. The civilian witness, who left the courtroom by a separate exit, was not present during those statements and was not alleged to have heard them.

The witness also allegedly complained that, later that night, a group of people had gathered on the steps of the building next door to him and were staring at his home, which he described as atypical. Based on those allegations, the prosecutor asked that Mr. Mendes be barred from attending the remainder of the trial. The Petitioner's counsel objected to the exclusion of Mendes from the courtroom.

The trial judge granted the Commonwealth's request:

> Based on that conduct and based on all of the circumstances surrounding the trial of this case and witnesses' expressions of fear leading up to their testimony in this case, I'm, in the exercise of my discretion, barring Wilson Mendes from participating or being present in the courtroom during the remainder of this trial.
>
> Officers, if a Wilson Mendes appears to sign in, please inform him that he is not permitted entrance and should leave the eighth floor of the courthouse.

He wrote and signed a short note to this same effect: "Court bans Wilson Mendes from attending this trial proceeding."

At the time Mendes was barred from the courtroom, the Commonwealth had presented four witnesses and anticipated presenting several more. In

the end, the Commonwealth presented six additional witnesses. They were, in order: 1) Erica Moody, civilian percipient witness; 2) Alexia Miranda, civilian percipient witness; 3) Dr. Tracey Dechert, trauma surgeon at Boston Medical Center; 4) Detective Tyrone Camper of the Boston Police Department; 5) John Green, chief of Forensic A/V Image Analysis Unit at Suffolk County DA's Office; and 6) Detective Kevin Doogan of the Boston Police Department. Mendes was barred from the courtroom for all of those witnesses, in addition to closing arguments and jury instructions.

II. Prior Proceedings

At the close of trial, the Petitioner was convicted of all counts and sentenced to a lengthy term in state prison. He appealed to the Massachusetts Appeals Court, where he argued that his 6th Amendment right to a public trial was violated where the courtroom closure was broader than necessary to protect the interest served by that closure. The court denied relief in an unpublished opinion, writing, among other things, that "Mendes's public comments evinced a substantial enough risk of intimidation with respect to the nonpercipient witnesses, counsel, and the jury to justify Mendes's exclusion for the rest of the trial[,]" and that "the trial judge evidently concluded that Mendes's outburst outside the court room created a substantial risk to the orderliness of the proceedings, and we see no error in this conclusion." *Commonwealth*

v. Cabral-Varela, 95 Mass. App. Ct. 1102, 2019 Mass. App. Unpub. LEXIS 168 (Mass. 2019) (Appendix A).

The Petitioner sought further appellate review with the Massachusetts Supreme Judicial Court on his public trial claim. The Supreme Judicial Court denied further appellate review in a one sentence opinion on June 6, 2019. *Commonwealth v. Cabral-Varela,* 482 Mass. 1103, 2019 Mass. LEXIS 312 (Mass. 2019) (Appendix B).

REASONS FOR GRANTING THE PETITION

I. This Court's lack of jurisprudence on the *Waller* standard for public trial closures under the 6th Amendment has resulted in inconsistent application of that standard across Circuits.

Thirty five years ago, this Court articulated the standard by which courtroom closures would be analyzed under the Sixth Amendment right to a public trial: (1) The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure. *See Waller v. Georgia*, 467 U.S. 39, 47-48 (1984).

Since then, this Court has offered little guidance as to the contours of that standard. Indeed, aside from *Presley v. Georgia,* 558 U.S. 209, 215 (2010), which provided insight into what qualifies as an overriding interest, albeit in dicta, this Court's jurisprudence on the *Waller* standard is bare. And while it is true that courts are always tasked with applying broad standards of law and often don't have precedents directly on point, rarely do they operate without any guideposts at all.

In courtroom closure cases, particularly with reference to the "no broader than necessary" prong, the

lack of any precedent from the Supreme Court has created a situation where that standard has been inconsistently applied across jurisdictions. Nowhere is this clearer than in the jurisprudence surrounding closures for witness intimidation.

At least the 1st and 2nd Circuit Courts of Appeals have framed the "no broader than necessary" standard in very narrow terms, and have looked favorably upon short, witness-specific closures. In *Martin v. Bissonette*, 118 F.3d 871, 875 (1st Cir. 1997), the trial judge closed the courtroom for the testimony of a single witness where there was evidence that the witness was being intimidated. The defendant objected that the closure swept too broadly because his mother, who was not alleged to have engaged in intimidation, was excluded. *Id.* The 1st Circuit rejected the defendant's argument and cited the brevity and specificity of the closure: "The trial court's closure order was neither broader nor longer than was reasonably necessary to end this widespread reign of harassment and secure the witness's accurate testimony." *Id.*

Similarly, in *Woods v. Kuhlmann*, 977 F.2d 74, 77 (2nd Cir. 1992), the 2nd Circuit acknowledged the significance of narrowly tailored closures. Where the defendant's family was excluded from the testimony of just a single witness, the court wrote "the closure order was no broader than was necessary to enable [the witness] to testify...." *Id. See also Guzman v. Scully,* 80 F.3d. 772, 775-76 (2nd Cir. 1996) (holding that risk of

intimidation must be specific to the particular witness in order for closure for that witness's testimony to be justified).

On the other hand, the 10th Circuit has adopted a much broader interpretation. In *United States v. Addison,* 708 F.3d. 1181, 1185-86 (10th Cir. 2013), during the trial of three co-defendants, the judge declared a mistrial for one of them mid-trial. That co-defendant then asked to remain in the courtroom for the remainder of the trial. *Addison,* 708 F.3d. 1181 at 1185-26. The judge refused her request, citing several reasons, including the risk of witness intimidation. *Id.* at 1186.

The 10th Circuit affirmed. While acknowledging the witness-specific approaches of other Circuits, the court upheld the exclusion for the entire trial merely because more than one witness had complained of being intimidated: "While the closure in these cases was limited to the duration of the witness's testimony, it was proper in this case for the court to exclude St. Clair from the entire trial because more than one witness complained of intimidation." *Id.* at 1188.

These two approaches are irreconcilable. One involves the careful parsing of intimidation concerns as they relate to specific individuals before banning a spectator, and the other approves of a blanket ban of an individual – even for portions of the trial where no witnesses will be testifying – who has been accused of

intimidating more than one witness. This inconsistency evinces a fundamental disagreement amongst Circuits about the meaning of the "no broader than necessary" language that begs to be resolved by this Court.

II. This issue is important, involving a constitutional right that triggers the rare structural error standard, and is likely to re-occur in similar contexts to the facts of this case.

The 6th amendment right to a public trial is the most sacred in our criminal justice system. It is this trial right that ensures the guarantee of all others: "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In re Oliver*, 333 U.S. 257, 270 (1948). Encumbrances of that right should be "rare...and the balance of interests must be struck with special care." *Waller*, 47 U.S. at 45.

So critical is the public trial right that infringements are considered structural errors. Structural errors are a "highly exceptional category" of constitutional violations that "undermine the fairness of a criminal proceeding as a whole." *United States v. Davila*, 569 U.S. 597, 611 (2013). Accordingly, courtroom closures are of crucial importance in every case in which they arise.

And such closures regularly occur in contexts similar to the facts of this case. Indeed, a simple

Westlaw search reveals well over 100 published cases from various jurisdictions dealing with courtroom closures related to witness intimidation. The courts are constantly navigating the delicate balance between a defendant's right to a public trial and the prosecution's right to present its witnesses without disruption, and this Court would serve them well by providing clear direction about where that balance is struck.

III. The straightforward facts and clean presentation of this case make it an ideal vehicle for providing much-needed guidance from this Court.

This case presents a perfect opportunity for the Court to resolve the aforementioned inconsistency amongst Circuits and provide direction for future courts in cases involving witness intimidation.

To start, the record is clear. Witness intimidation concerns were at the forefront of this case, and the prosecution thoroughly documented the nature and extent of that intimidation for the judge. This issue was litigated pretrial and during trial, the transcript contains multiple lengthy discussions between counsel and the court, and the judge clearly articulated his reasoning on the record when he banned Mendes. Likewise, there was no ambiguity regarding the breadth of Mendes's ban, and no party has disputed that he was banned for the entirety of the final three days of trial.

Second, the sequence of the Commonwealth's trial witnesses simplifies this Court's analysis of the public trial claim. At trial, there was a clean break between civilian percipient witnesses to the crime, who were at risk being intimidated, and non-percipient witnesses, who were not. None of the Commonwealth's final four trial witnesses were flagged as being at risk for intimidation, yet the Petitioner's nephew was barred from their testimony anyway.

Were that not the case, and had testifying civilians been interspersed with testifying police officers, the logistical difficulties faced by the trial judge would have complicated his decision. Would Mendes be permitted to enter and leave the courtroom/courthouse depending on the witness? Who would be tasked with keeping Mendes informed of when he was permitted back inside? How would the judge prevent intimidation of witnesses in the hallway who were waiting to testify? All of these concerns and others vanished where there was a well-defined point in the trial where the testimony from civilian percipient witnesses was complete. *Cf. Tucker v. Superintendent Graterford Sci,* 677 Fed.Appx. 768, 777-778 (3rd Cir. 2017) (approving complete closure of courtroom where it was impossible to know who was in the gallery because multiple individuals had provided false identities).

Third, this case presents a well-defined contrast between the interpretations of different courts, and

gives this Court an opportunity to provide clear guidance for future cases. Here, the Massachusetts Appeals Court eschewed precedent from its own jurisdiction, *Martin, supra,* in favor of the 10th Circuit's expansive interpretation of the "no broader than necessary" standard in *Addison, supra* .[1] *See Cabral-Varela,* 95 Mass. App. Ct. 1102, 2019 Mass. App. Unpub. LEXIS 168, at *6-7. Had the court adopted the witness-specific approach espoused by at least the 1st and 2nd Circuits, this case would have been decided differently, given the complete dearth of evidence regarding intimidation of the final four trial witnesses.

Because of the clarity with which this question comes before the Court, by granting the petition, this Court can, in one swoop, effectively opine on the correct interpretation of the "no broader than necessary" standard while still issuing a narrow opinion limited to the facts of this case.

CONCLUSION

For all of the reasons stated above, the Petitioner respectfully requests that his petition be granted.

[SIGNATURE ON FOLLOWING PAGE]

---

[1] The court also cited favorably a magistrate-judge's analysis in *Driggins v. Lazarus*, U.S. Dist. Ct., No. 1:14CV919 (N.D. Ohio Sept. 28, 2015).

Respectfully submitted,

/s/ Justin Drechsler

Justin Drechsler
Counsel of Record
P.O. Box 1390
Montpelier, VT 05601
617-210-7955
jdlawboston@gmail.com

Attorney for Petitioner

September 2019