No. 22A-___

# In the Supreme Court of the United States

GIGI JORDAN,

*Applicant*,

v.

AMY LAMANNA,

*Respondent*.

**APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

TO THE HONORABLE SONIA SOTOMAYOR, ASSOCIATE JUSTICE AND CIRCUIT JUSTICE FOR THE SECOND CIRCUIT:

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, applicant Gigi Jordan respectfully requests a 58-day extension of time, to and including November 4, 2022, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case. The Second Circuit denied a timely request for rehearing on June 9, 2022. Unless extended, the time to file a petition for a writ of certiorari will expire on September 7, 2022. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1). Copies of the lower court's opinion and its order denying rehearing are attached.

**1.** This case arises out of a shocking and complete courtroom closure in the midst of applicant Gigi Jordan's closely watched criminal trial. Jordan was charged with crimes in connection with the death of her severely autistic son. C.A. App. 106-107.

Jordan's criminal trial was widely covered by the press and closely followed by the public. Around halfway through the trial and four days before Jordan was set to testify in

her own defense, the trial judge abruptly ejected every member of the public and the press from the courtroom's packed gallery at the prosecutor's request. He ordered a courtroom deputy to guard the closed doors to "make sure no one enters the courtroom" (C.A. App. 19) so that he and the lawyers could hold a private, inquisitorial hearing with Jordan present. Behind the closed courtroom doors, the judge heard repeated defense objections to the closure, contentious allegations by the prosecutor of misconduct by Jordan and the defense team, a motion for corrective jury instructions, and a motion for clarification on a gag order. C.A. App. 22-27, 33. For his part, the judge made direct inquiries of the defense team, admonished the defendant and her lawyers for what he believed were "improper" statements published on a website, and instructed the prosecutor to conduct an investigation. C.A. App. 27-38.

The jury ultimately returned a guilty verdict. At Jordan's sentencing months later, the judge continued to dwell on the subject of the closed hearing. C.A. App. 84. Indeed, it was the last thing he addressed before imposing a sentence of 18 years—more than three times the national average in cases involving a parent ending the life of an autistic child.

Before sentencing, petitioner moved to set the verdict aside, arguing that the courtroom closure had violated her federal constitutional right to a public trial. C.A. App. 112. The trial court denied the motion. C.A. App. 67. The New York Appellate Division affirmed, rejecting Jordan's position in just four sentences:

> Defendant's Sixth Amendment right to a public trial was not violated when the court briefly closed the courtroom during a discussion of a legal matter relating to protecting the jury from exposure to publicity about the case. This was the equivalent of a sidebar, robing room or chambers conference. The right to a public trial does not extend to such conferences, and does not restrict judges "in their ability to conduct conferences in chambers, inasmuch as such conferences are distinct from trial proceedings" (*Richmond Newspapers, Inc. v. Virginia*, 488 U.S. 555, 598 n.23 [1980]; *see People v. Olivero*,

> 289 AD2d 1082 [4th Dept 2001], *lv denied* 98 NY2d 639 [2002]). Moreover, the conference had no impact upon the conduct of the trial other than having the court repeat its previous instructions about trial publicity and minutes and exhibits that had been sealed were unsealed the same day.

C.A. App. 86-87. In quoting from *Richmond Newspapers*, the Appellate Division gave an incorrect citation and failed to acknowledge that it was quoting from a nonbinding concurrence. *See* 448 U.S. at 598 n.23 (Brennan, J., concurring in the judgment). The court also failed to address Jordan's contention that a courtroom closure is a structural error not susceptible to harmless-error review. Jordan later sought and was denied discretionary review before the New York Court of Appeals and this Court. C.A. App. 88-89.

Jordan filed a petition for a writ of habeas corpus in the Southern District of New York. *See* C.A. App. 90-104. The district court granted the petition. C.A. App. 105-146. It first held that the Sixth Amendment applied to the proceeding and that the state courts' conclusion to the contrary was an unreasonable application of clearly established Supreme Court precedent. The district court explained that "Supreme Court precedent afforded the proceedings during Jordan's criminal trial the 'presumption of openness,' unless [the trial court] first found that the four *Waller* factors had been satisfied, which he did not." C.A. App. 129 (citation omitted).

The district court acknowledged that a footnote in Justice Brennan's concurring opinion in *Richmond Newspapers* suggested that sidebars or chambers conferences are not covered by the public trial right. C.A. App. 129. But it explained that "even if some trial events may be held outside of public view, no such bench conference or chambers proceeding occurred here." *Id.* (citation omitted). The district court noted, "just as in *Waller* [v. *Georgia*, 467 U.S. 39 (1984)], the closure here was complete," with each of the many spectators and members of the press exiting the courtroom. C.A. App. 130. Such a "categorical

exclusion of the public necessitated an evaluation, before the courtroom was closed, whether the closure was justified under *Waller*." C.A. App. 131 (citation omitted). The district court concluded that the proper remedy for the Sixth Amendment violation here was a new trial. C.A. App. 145.

A panel of the Second Circuit reversed. The panel noted that deference to the state court was required, but it did not defer to the reasons the Appellate Division actually gave for denying Jordan relief. Instead, the panel cooked up its own alternative reasoning and declared on the basis of that substitute rationale that "it was not unreasonable for the Appellate Division to deny Jordan's claim." Slip op. 18-19. More specifically, the panel held that it is not "clearly established" that the public-trial right attaches "to this sort of wholly ancillary proceeding." Slip op. 19. In the panel's view (not espoused by the state court), *Waller* and *Presley* v. *Georgia*, 558 U.S. 209, 212-213 (2010) (per curiam), establish only that the public-trial right attaches to suppression hearings and jury selection, and not to "unorthodox circumstances" or a "wholly ancillary proceeding" like the one here. Slip op. 16, 19. Not until this Court clearly announces that "a proceeding of this kind is subject to the public-trial right" would habeas relief be appropriate, no matter the reasoning offered by the state court. Slip op. 19 n.4.

**2.** As we will demonstrate in the petition, this case presents a pressing issue worthy of the Court's review. The courtroom closure at issue here was extraordinary—it was not inadvertent or trivial, but rather a deliberate and startling expulsion of the press and public from a packed courtroom gallery in the midst of a criminal trial. The proceeding that took place behind closed doors—with the defendant present, just days before she was to testify—had all the characteristics of a judicial proceeding that requires public scrutiny. There were accusations of misconduct. There were substantive and vigorous motions made,

objections raised, and rulings handed down. There was an introduction of documentary evidence taken into the judicial record. And there was an unmistakable effort to prejudice the judge against the defense team.

It was for circumstances just like these that the Framers included the Public Trial Clause in the Bill of Rights. And this Court has held repeatedly that the public-trial right "extends beyond the actual proof at trial" and that specific findings must be made "before excluding the public from any stage of a criminal trial." *Presley*, 558 U.S. at 212-213. Thus, for example, the Court has held that the public-trial right extends to jury voir dire (*Presley*) and pretrial suppression hearings (*Waller*).

The Second Circuit's contrary holding conflicts with decisions of this Court and other courts of appeals. It is well settled that federal habeas law "does not require state and federal courts to wait for some nearly identical factual pattern before" granting relief; "even a general standard may be applied in an unreasonable manner." *Panetti* v. *Quarterman*, 551 U.S. 930, 953 (2007). Thus, the question that Jordan will present in the petition is whether a habeas petitioner asserting a violation of her public-trial right must identify a prior Supreme Court case holding unconstitutional a courtroom closure for a proceeding of the "same kind." The Second Circuit's affirmative answer conflicts with *Panetti* and the express holdings of other federal courts of appeals, including *Kubsch* v. *Neal*, 838 F.3d 845, 862 (7th Cir. 2016) (en banc), and *Brown* v. *Superintendent Greene SCI*, 834 F.3d 506, 513 (3d Cir. 2016).

The issue is manifestly important; indeed, Your Honor recently dissented from denial of certiorari in a similar case, adopting reasoning perfectly aligned with the district court's decision in this case and rejecting a decision of the Eighth Circuit strongly resembling the Second Circuit's opinion in this case. *See Smith v. Titus*, 141 S. Ct. 982, 989

(2021) (mem.). In your dissent, Your Honor recognized the need for Supreme Court guidance in cases just like this one.

**3.** Additional time is needed for preparing and printing a petition in this important case. Undersigned counsel has several other matters with proximate due dates, including a petition for a writ of certiorari due August 12, 2022 in *Ruiz v. Massachusetts*, No. 21A731; a reply brief in support of judgment on the pleadings due August 5, 2022 in *Medicaid and Medicare Advantage Products Association of Puerto Rico, Inc. v. Carrau-Martinez*, No. 3:20-cv-1760 (D.P.R.); a supplemental brief due in the coming weeks in *Chamber of Commerce v. Franchot*, No. 21-cv-410 (D. Md.); and forthcoming oral arguments in *Greiber v. NCAA*, No. 2021-9616 (N.Y. App. Div.); *Medical Imaging & Technology Alliance v. Library of Congress*, No. 22-cv-499 (D.D.C.); and *Plutzer v. Bankers Trust Co. of South Dakota*, No. 22-561 (2d Cir.). Undersigned counsel also has forthcoming summer travel plans.

For the foregoing reasons, the application for a 58-day extension of time, to and including November 4, 2022, within which to file a petition for a writ of certiorari in this case should be granted.

July 14, 2022

Respectfully submitted.

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