No. 22-6190

IN THE SUPREME COURT OF THE UNITED STATES

KEVIN PATRICK MALLORY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court violated petitioner's Sixth Amendment right to a public trial when it found that the government's compelling interest in preventing the disclosure of classified information justified limiting full disclosure of certain trial exhibits to the jury and the other trial participants, during 30 minutes of defense examination in a courtroom open to the public.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 40 F.4th 166. An earlier order of the district court is reported at 572 F. Supp. 3d. 225.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2022. A petition for rehearing en banc was denied on August 29, 2022 (Pet. App. 17a). The petition for a writ of certiorari was filed on November 28, 2022 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on one count of conspiring to transmit national defense information to a foreign nation, in violation of 18 U.S.C. 794(c); one count of delivering such information, in violation of 18 U.S.C. 794(a); one count of attempting to deliver such information, in violation of 18 U.S.C. 794(a); and one count of making materially false statements to government agents, in violation of 18 U.S.C. 1001(a)(2). Judgment 1; Indictment 8-17. After trial, the district court granted petitioner's motion for judgment of acquittal on the Section 794(a) counts, on the ground that venue was not established. Pet. App. 8a. The court of appeals affirmed the convictions on the remaining counts. Id. at 1a-16a.

1. Petitioner worked for the Central Intelligence Agency (CIA) and Defense Intelligence Agency (DIA) for 20 years, during which time he held a security clearance and was granted access to classified national defense information. Pet. App. 4a. In 2012, petitioner left the government and established his own consulting business. Ibid. By February 2017, petitioner was experiencing serious financial difficulties. Ibid. When a man identifying himself as a Chinese business recruiter contacted petitioner on a professional networking site and said that he could help petitioner find consulting work in China, petitioner expressed interest. Ibid. The recruiter introduced petitioner to Michael Yang, a

Chinese national who indicated he was looking for information about, among other things, the United States' antiballistic missile defense system. Ibid.

Petitioner flew to China twice to meet with Yang. Pet. App. 4a-5a. On his first trip, in March 2017, petitioner met with Yang and Yang's supervisor for several hours, during which time petitioner came to understand that they were Chinese intelligence officers seeking U.S. government secrets. Id. at 5a. Nevertheless, petitioner made a return trip to China the following month to meet again with Yang. Ibid. This time, Yang gave petitioner a covert communications device that had been customized to allow petitioner to encrypt documents and send them to a corresponding phone kept by Yang. Ibid.

While traveling home from his second trip to China, petitioner was interviewed by Customs and Border Patrol agents. Pet. App. 5a. During that interview, petitioner lied to the agents about both the purpose of his trip and the covert communications device (which he claimed to have purchased as a gift for his wife). Ibid. He also failed to report $16,500 in cash that he was carrying in his luggage, instead declaring on a customs form that he was not transporting more than $10,000. Ibid.

A few days after he got home, petitioner scanned onto memory cards nine documents containing classified national defense information. Pet. App. 5a. He sent two of those documents to Yang in May 2017, and agreed to transmit more when Yang received

authorization to pay him more. Id. at 6a. One of the transmitted documents was a "White Paper" that discussed a proposed DIA operation involving two covert human intelligence assets and included information about that intelligence relationship. Ibid. The information was derived from a presentation that petitioner had given during his time at DIA. Ibid. Petitioner thereafter completed the steps on the device to transmit two additional documents containing classified information. Ibid.

In May 2017, petitioner decided to report to the CIA that he had been approached by Chinese intelligence agents, saying that he wanted to get the contact "on the record." Pet. App. 6a. During an ensuing interview with agents from the Federal Bureau of Investigation, petitioner described some of his interactions with Yang and showed the agents the covert communications device that Yang had provided to him. Ibid. Petitioner told the agents that he had never used the device to send classified documents and had only sent a test message. Ibid. But, to petitioner's "'very visibl[e] surprise[],'" while he was demonstrating the use of the device to the agents, "certain secure chat messages he had exchanged with Yang appeared on the phone's screen, including one that referenced a foreign country's intelligence service." Ibid. As one of the agents present later testified, "'it was a fairly significant moment' as '[the agents] realized there was something very different going on here than [they had] first thought.'" Ibid.

2. A grand jury in the Eastern District of Virginia returned an indictment charging petitioner with one count of conspiring to transmit national defense information to a foreign nation, in violation of 18 U.S.C. 794(c); one count of delivering such information, in violation of 18 U.S.C. 794(a); one count of attempting to deliver such information, in violation of 18 U.S.C. 794(a); and one count of making materially false statements to government agents, in violation of 18 U.S.C. 1001(a)(2). Pet. App. 6a.

In advance of trial, the district court held several sealed pretrial hearings under the Classified Information Procedures Act, 18 U.S.C. App.; see § 3, 18 U.S.C. App. 6, which addresses the handling of classified information in criminal cases. Pet. App. 6a-7a. The government asked the court to admit into evidence the nine classified documents that petitioner had copied onto memory cards, as well as the classified information contained in chat messages that petitioner and Yang had exchanged, using the "silent witness rule." Id. at 7a. "The silent witness rule is a technique by which the parties present classified information to each other, to the jury, and to the court but not to the public." Ibid. (citing United States v. Zettl, 835 F.2d 1059, 1063 (4th Cir. 1987)). Petitioner objected at least with respect to one of the documents, arguing that the procedure would prejudice his ability to present a defense -- namely, his intended argument that

information of the sort therein was so openly known that it could not be considered closely held. Ibid.

The district court approved the government's request to use the silent witness rule at trial. Pet. App. 7a. Citing this Court's decisions in Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501 (1984), and Waller v. Georgia, 467 U.S. 39 (1984), the district court stated that "[b]ecause of the burdens the [silent witness rule] places on defendants," the government would need to make four showings in order to justify its use: (i) "'an overriding reason for closing the trial'"; (ii) "'that the closure is no broader than necessary to protect that interest'"; (iii) that there are "no reasonable alternatives * * * to closure"; and (iv) that "'use of the [silent witness rule] provides defendants with substantially the same ability to make their defense as full public disclosure of the evidence.'" 572 F. Supp. 3d 225, 236 (citation omitted).

Applying that standard here, the district court found that "there [wa]s an overriding and indeed compelling reason for closing portions of the trial related to the classified information [petitioner] allegedly passed or attempted to pass to the Chinese"; that "[t]he government's use of the [silent witness rule] [wa]s also narrowly tailored to meet this interest"; and that "[t]here [wa]s no reasonable alternative to use of the [rule]." 572 F. Supp. 3d at 236. The court accordingly determined that use of the rule "in this context" would "allow the government to safeguard

its compelling interest in avoiding disclosure of national security secrets," and would also "preserv[e] [petitioner's] public trial rights and allow[ ] [him] to present substantially the same defense." Id. at 237.

Near the close of the government's case, defense counsel presented the government with a binder of open-source material for potential use during cross-examination of the government's classification expert. Pet. App. 7a. He stated that he intended to use the material to argue that some of the information in the government exhibits was widely known. Ibid. The government objected, explaining that some of the material in the exhibits, once read in open court and combined with the witness's prior testimony, would become classified because it would reveal some of the classified information that was in the classified documents that petitioner had been trying to transmit to the Chinese government. Id. at 7a-8a. To address that possibility, the government proposed extending the use of the silent witness rule to the open-source documents. Id. at 8a.

The district court agreed that extension of the silent witness rule was justified. Pet. App. 8a. It found that disclosing the proffered "public-source documents 'in open court . . . would allow people to connect the dots' and would thus be likely to 'disclose [the] classified information' that the court had previously determined had to be protected" from disclosure. Id. at 12a (brackets in original). Accordingly, to implement the

silent witness rule, each juror was given a binder containing public documents that the defense wanted to use, which were also admitted into evidence. Id. at 8a. Petitioner's counsel and the witness could then refer to particular parts of the documents during the examination, with the jurors referring to those parts of the documents (which were not read aloud) in their own binders. Id. at 8a-9a. Roughly half an hour of questioning then took place under that procedure, with the public remaining in the courtroom throughout. Id. at 11a.

The jury found petitioner guilty on all four counts. Pet. App. 8a. The district court granted petitioner's motion for judgment of acquittal on the two Section 794(a) counts, concluding that the government had presented insufficient evidence to establish venue as to those two counts. Ibid. The court denied petitioner's motion for a new trial, 343 F. Supp. 3d 570, and thereafter sentenced petitioner to 240 months of imprisonment on the remaining two counts, Pet. App. 8a.

3. The court of appeals affirmed. Pet. App. 1a-16a.

Petitioner did not challenge the district court's use of the silent witness rule with respect to the classified material introduced by the government, but did challenge its use of the rule with respect to the open-source documents offered by the defense. Pet. App. 9a. The court of appeals, however, found that petitioner's right to a public trial had not been infringed.

Id. at 9a-12a; see id. at 13a (likewise finding no infringement of petitioner's right to present a complete defense).

At the outset, the court of appeals "question[ed] * * * whether the application of the silent witness rule in this case even implicated the Sixth Amendment right to a public trial." Pet. App. 11a. The court observed that "[n]o member of the public was actually excluded from the courtroom at any point during the trial, and thus there was no literal closure of the courtroom." Ibid. The court then went on to determine that even if petitioner were correct that some sort of closure had occurred, petitioner had not established a violation of his Sixth Amendment rights. Id. at 11a-12a. The court found that at most, use of the silent witness rule had resulted in a partial closure. Id. at 12a. While noting that the circumstances thus "suggest[ed]" that "'a less demanding test'" than the one this Court had established in Waller v. Georgia "for total courtroom closures" should apply, the court of appeals emphasized that the district court here had nonetheless "appl[ied] the more stringent Waller test before utilizing the silent witness rule." Ibid. (citation omitted).

The court of appeals rejected petitioner's claim that the district court had failed to make the requisite findings to support use of the silent witness rule with respect to the open-source documents. Pet. App. 12a. It found that "the district court fully explained the need for this expansion of the rule at trial." Ibid. In particular, the court of appeals observed that district court

had "stated that, given the testimony that had already been elicited, publishing [petitioner's] public-source documents 'in open court . . . would allow people to connect the dots' and would thus be likely to 'disclose [the] classified information' that the court had previously determined had to be protected with use of the silent witness rule." Ibid. (second set of brackets in original). And the court of appeals explained that "the district court's pretrial findings regarding the need to limit the public's access to the classified exhibits were adequate to support the extension of the silent witness rule to the defense's open-source exhibits." Ibid. The court of appeals thus determined that "any limited impingement of [petitioner's] public-trial right was justified by the government's compelling interest in preventing the disclosure of the classified information at issue." Ibid.

ARGUMENT

Petitioner renews his contention (Pet. 9-13) that the district court's use of the silent witness rule for certain defense exhibits violated his Sixth Amendment right to a public trial. The court of appeals correctly rejected that contention after finding that the district court's closure had included the necessary findings and satisfied the standard this Court established for courtroom closure in Waller v. Georgia, 467 U.S. 39, 48 (1984). This case accordingly does not implicate any dispute about whether a less defendant-favorable standard would have been sufficient to evaluate a partial courtroom closure here.

In any event, this Court has recently and repeatedly denied petitions for writs of certiorari raising similar questions. See Huff v. Florida, 142 S. Ct. 2674 (2022) (No. 21-764); Atkinson v. United States, 142 S. Ct. 310 (2021) (No. 20-7796); Kelly v. United States, 142 S. Ct. 310 (2021) (No. 20-7868); Cruz v. United States, 142 S. Ct. 309 (2021) (No. 20-1523); Sistrunk v. United States, 142 S. Ct. 309 (2021) (No. 20-7889); Blades v. United States, 141 S. Ct. 165 (2020) (No. 19-7487). The Court should follow the same course here.

1. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a * * * public trial." U.S. Const. Amend. VI. The public-trial right "is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." Waller, 467 U.S. at 46 (citation omitted); see Presley v. Georgia, 558 U.S. 209 (2010) (per curiam) (exclusion of public from voir dire violated the Sixth Amendment); see also Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573-574 (1980) (plurality) (considering Sixth Amendment in applying similar standards to claim to press access to trial). Observance of the right also "encourages witnesses to come forward and discourages perjury," Waller, 467 U.S. at 46, and public access to criminal trials "fosters an appearance of fairness, thereby heightening public

respect for the judicial process," Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982) (considering press request for access).

This Court has emphasized, however, that the public-trial right is not absolute. In the face of "an overriding interest that is likely to be prejudiced," a court may, after "consider[ing] reasonable alternatives to closing the proceeding," order a "closure * * * no broader than necessary to protect that interest" upon "mak[ing] findings adequate to support the closure." Waller, 467 U.S. at 48; see Weaver v. Massachusetts, 137 S. Ct. 1899, 1909 (2017) (explaining that "the public-trial right * * * is subject to exceptions," including where the trial court "mak[es] proper factual findings in support of the decision to" close the proceedings); cf. Press-Enterprise Co. v. Superior Court of Cal., 464 U.S. 501, 510 (1984) ("The presumption of openness [in the First Amendment right to public trial] may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.").

2. The court of appeals in this case expressly acknowledged the standard that this Court described in Waller. Pet. App. 10a. And, like the district court, it correctly found that application of the standard supported the carefully tailored use of the silent witness rule in the unusual circumstances of this case, where certain defense exhibits became classified when combined with

witness testimony. Id. at 9a-12a. As both lower courts recognized, "any limited impingement of [petitioner's] public-trial right was justified by the government's compelling interest in preventing the disclosure of the classified information at issue." Id. at 12a.

As a threshold matter, any impingement was "far from complete," because "the ability of interested members of the public to remain in the courtroom during the approximately 30 minutes of trial proceedings at issue still helped to ensure 'that the public [could] see' that [petitioner] was being 'fairly dealt with and not unjustly condemned' in a secret proceeding" -- "the core purpose of the Sixth Amendment public-trial right." Pet. App. 11a (quoting Waller, 467 U.S. at 46) (first set of brackets in original). And, in any event, the use of that procedure was "justified by the government's compelling interest in preventing the disclosure of the classified information at issue." Id. at 12a. The "government's interest in inhibiting disclosure of sensitive information" is exactly the type of "overriding interest" mentioned in Waller, id. at 10a (quoting Waller, 467 U.S. at 45, 48) (emphasis omitted), and "the district court's pretrial findings regarding the need to limit the public's access to the classified exhibits were adequate to support the extension of the silent witness rule to the defense's open-source exhibits," id. at 12a.

Petitioner errs in asserting (Pet. 8) that the district court failed to make necessary findings regarding the threat that the relevant exhibits posed to the government's national security interests. The court specifically determined that those exhibits "would allow people to connect the dots" and therefore "be likely to 'disclose the classified information' that the court had previously determined had to be protected with use of the silent witness rule." Pet. App. 12a (brackets omitted). Likewise, contrary to petitioner's assertion (Pet. 12), the courts below did not "conclu[de] that a general concern about the disclosure of sensitive information was sufficient to seal defense-introduced evidence." Instead, the district court found that the documents petitioner wanted to use would, in fact, likely disclose some of the same, specific classified information that the court had previously found the government had a compelling interest in protecting. Pet. App. 12a; see 572 F. Supp. 3d at 236 (pretrial order finding that the government had a "compelling reason" for protecting "the classified information defendant allegedly passed or attempted to pass to the Chinese").

3. Petitioner contends that the Court should grant review to decide whether the Waller standard, or instead a less defendant-favorable standard, applies when a district court orders a partial (as opposed to complete) closure of trial. See Pet. i, 14-18. But this case does not present that question, because the lower courts determined that petitioner could not prevail even under

"the more stringent Waller test." Pet. App. 12a. The question presented accordingly would not have any effect on the outcome of this case. See Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 122 (1994) (per curiam) (dismissing writ as improvidently granted where resolving the question presented would not "make any difference even to these litigants").

Petitioner asserts (Pet. 9) that "[t]he Fourth Circuit's ruling allows the government to circumvent th[e] holdings [of Waller and Presley v. Georgia] in cases characterized as 'partial' closures." That is incorrect. While the court of appeals had its "doubt[s]" about whether the Sixth Amendment was implicated by the silent witness rule, and noted that even if there was a closure, the circumstances "suggest[ed]" that a less stringent standard than Waller could be applied, Pet. App. 12a, it ultimately affirmed the district court's analysis, which was conducted according to "the more stringent Waller test." Ibid. And any dispute about the lower courts' case-specific application of the Waller standard to the unusual circumstances here does not warrant this Court's review. See Sup. Ct. R. 10.

Indeed, while petitioner contends that the "[l]ower [c]ourts [a]re [d]ivided" about the circumstances in which the Waller standard applies, Pet. 14 (emphasis omitted), he identifies no case involving circumstances similar to those presented here. See Pet. 14-18. As an initial matter, none of the decisions on which petitioner relies involved the protection of classified

information. "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." Haig v. Agee, 453 U.S. 280, 307 (1981) (quoting Aptheker v. Secretary of State, 378 U.S. 500, 509 (1964)). Even courtroom-management techniques that some courts have found inappropriate with respect to other governmental interests might therefore be warranted in order to protect classified information -- and a decision from this Court addressing appropriate methods of protecting classified information during trial would not necessarily provide significant guidance to the lower courts about what methods would be appropriate in cases involving distinct governmental interests.

Moreover, the other decisions on which petitioner relies also involved materially different restrictions on public access. For example, petitioner relies extensively on cases in which specific individuals were kept from the courtroom because of concerns for trial witnesses. See Pet. 5, 16-17 (citing, inter alia, United States v. Simmons, 797 F.3d 409, 414 (6th Cir. 2015); Rodriguez v. Miller, 439 F.3d 68 (2d Cir. 2006), vacated and remanded, 549 U.S. 1163 (2007); United States v. Osborne, 68 F.3d 94, 99 (5th Cir. 1995); Woods v. Kuhlmann, 977 F.2d 74, 76 (2d Cir. 1992); United States v. Sherlock, 962 F.2d 1349, 1359 (9th Cir.), cert. denied, 506 U.S. 958 (1992); Douglas v. Wainwright, 739 F.2d 531, 532 (11th Cir. 1984) (per curiam), cert. denied, 469 U.S. 1208 (1985)). He also relies on cases involving trials during the COVID-19 pandemic in which the public was given ways to follow along without being

present in the same courtroom in order to address public-health concerns. Pet. 3-4 (citing, inter alia, United States v. Allen, 34 F.4th 789 (9th Cir. 2022); United States v. Ansari, 48 F.4th 393, 402 (5th Cir. 2022)). Here, in contrast, no one was excluded from the courtroom at any point during petitioner's trial.

Petitioner's reliance on cases involving the use of white-noise machines or other mechanisms to prevent the public from hearing an entire portion of a trial is likewise inapt. See Pet. 14, 17-18 (citing, inter alia, In re Petitions of Memphis Publ'g Co., 887 F.2d 646, 648-649 (6th Cir. 1989); Blades v. United States, 200 A.3d 230, 240 (D.C. 2019), cert. denied, 141 S. Ct. 165 (2020); Commonwealth v. Colon, 121 N.E.3d 1157, 1170 (Mass. 2019); State ex rel. Law Office of the Montgomery Cnty. Pub. Defender v. Rosencrans, 856 N.E.2d 250, 255 (Ohio 2006) (per curiam)). The trial here involved no such restrictions, as "members of the public were able to hear, repeatedly," the defense claims about the exhibits -- namely, that the "exhibits were public government documents" and that they "helped form the basis for the defense expert's opinion that" one of the papers petitioner was charged with disclosing "did not contain national defense information." Pet. App. 11a.

Petitioner was thus able to present his defense with the documents, and the public was able to hear that defense. And petitioner's central objection to limiting disclosure of the precise details of the documents to the trial participants --

namely, that it impeded the public itself from judging whether the documents that petitioner sent to the Chinese government contained classified information, see Pet. 2 -- assumes (contrary to the determination of the jury itself, as well as of the lower courts) that his defense was indisputably valid, and is at most a fact-bound dispute with the lower courts' findings about the risks inherent in publicizing the content of the documents in the context of the trial.

Accordingly, the petition for a writ of certiorari does not implicate, and would not present this Court with an opportunity to resolve, any conflict of authority in the lower courts warranting this Court's review. This Court should deny certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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