No._____

IN THE SUPREME COURT OF THE UNITED STATES

STACY GALLMAN,
PETITIONER,

- VS. -

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

KEITH M. DONOGHUE
Assistant Federal Defender
Counsel of Record

BRETT G. SWEITZER
Assistant Federal Defender
Chief of Appeals

LISA EVANS LEWIS
Chief Federal Defender

Federal Community Defender Office
for the Eastern District of Pennsylvania
Suite 540 West – The Curtis
601 Walnut Street
Philadelphia, PA 19106
(215) 928-1100

Counsel for Petitioner

QUESTION PRESENTED

Following the selection and swearing of a jury at petitioner Stacy Gallman's trial, the district court excluded the public from proceedings during which it heard argument and ruled the defense would not be permitted to cross-examine two police officers concerning a complaint of racial profiling. Later that day, the court closed another hearing at which it heard testimony from a police department representative concerning a second citizen complaint. Gallman was subsequently found guilty and sentenced to a term of imprisonment. On appeal, the Third Circuit ruled the district court did not plainly err in closing the two hearings to the public.

The question presented is:

Whether the Sixth Amendment's public trial guarantee extends to proceedings after a jury has been seated in which the court rules on challenged evidence or cross-examination.

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

> *United States v. Stacy Gallman*, Third Circuit No. 21-2294, judgment entered Jan. 9, 2023.
>
> *United States v. Stacy Gallman*, E.D. Pa. No. 2:20-cr-00298-KSM, judgment entered Oct. 20, 2021.

There are no other proceedings related to this case under Rule 14.1(b)(iii).

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

FEDERAL CASES **PAGE(s)**

TABLE OF AUTHORITIES - continued

PAGE(s)

TABLE OF AUTHORITIES - continued

STATE CASES **PAGE(s)**

STATUTES **PAGE(s)**

No. 22-_____

IN THE SUPREME COURT OF THE UNITED STATES

STACY GALLMAN,
PETITIONER

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

Petitioner Stacy Gallman respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit rendered in this case on January 9, 2023.

OPINION BELOW

The opinion of the court of appeals affirming the judgment of conviction is published at 57 F.4th 122 and attached as Appendix ("Pet. App.") A, 1a-17a.

JURISDICTION

The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. That court issued its opinion and entered judgment on January 9, 2023. This petition is timely filed pursuant to Rule 13.1 and the granting of petitioner's application for an extension of time, docketed at No. 22A887. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties, namely, petitioner Stacy Gallman and respondent United States.

CONSTITUTIONAL PROVISION INVOLVED

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

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial***.

STATEMENT

Petitioner Stacy Gallman stood trial on a charge of unlawfully possessing a gun following conviction of a felony. After a jury was selected and sworn, the district court conducted closed proceedings at which it heard argument, made a finding of fact, and ruled the defense would not be permitted to cross-examine two police officers concerning a complaint of racial profiling in another matter. Mr. Gallman was found guilty and sentenced to three and a half years in prison. On appeal, he urged that the district court's closure of the proceedings in limine deprived him of the public trial guaranteed by the Sixth Amendment. The Third Circuit affirmed.

1. In December 2019, Stacy Gallman was arrested by a team of four Philadelphia police officers conducing a shift of high-impact patrol. The officers pulled over Mr. Gallman and his passenger, both young Black men, after reportedly observing Gallman fail to come to a complete stop at a stop sign. Shortly after pulling over the car, two of the officers, Thomas Nestel and Zachary Stout, recovered a handgun from the passenger. Officer Joshua Kling thereupon ordered Gallman out of the driver's seat and frisked him. Finding nothing, Officer

Kling handed Gallman off to Officer Jesse Rosinski with instructions to detain him in one of the team's two patrol vehicles. Pet. App. 3a; C.A. App. 30, 733.

According to Officer Kling's subsequent testimony, he then returned to the car and immediately saw a handgun at the base of the driver's seat. He instructed Officer Rosinski to remove Mr. Gallman from the patrol vehicle and search him again. Rosinski testified that when he went to do so, he noticed a firearm magazine in the backseat of the patrol vehicle that had not been there before. Rosinski's partner, Officer Stout, testified that he recovered more ammunition from Gallman's car. Pet. App. 3a; C.A. App. 364.

A subsequently returned federal indictment charged Mr. Gallman with possessing a firearm after conviction of a felony in violation of 18 U.S.C. § 922(g)(1). Following denial of a motion to suppress, he stood trial in June 2021.

2. The trial was conducted pursuant to a COVID-19 protocol designed to reduce the number of people in the courtroom. Instead of having members of the public occupy the gallery, the proceedings were streamed by audio-video feed to a designated courtroom on another floor for public viewing.[1] The record indicates that Mr. Gallman's family observed some or all of the four-day trial from the public courtroom. Pet. App. 4a; C.A. App. 62, 397-398, 680.

At two stages, the livestream was not active, resulting in the proceedings' closure to the public. In the throes of trial, there was no objection. The first closure occurred the morning after a day devoted to jury selection, immediately before bringing in the now-seated jury to hear preliminary instructions and opening statements. The closed proceedings principally concerned

[1] Neither party objected to the streaming protocol.

allegations of police misconduct whose substance the prosecution had first disclosed *ex parte* the night before. Pet. App. 5a; Gov't Supplemental C.A. App. 5.[2]

The *ex parte* submission included a memorandum summarizing an investigation of a complaint of racial profiling lodged with the Philadelphia Police Department against Officers Rosinski and Stout. As described by the district court during the closed proceedings, the memorandum stated that the department's Internal Affairs Division had determined not to sustain the complaint, though the investigation did find the officers had failed to maintain their patrol log. According to the materials submitted *ex parte*, the investigation had been closed roughly two months before Mr. Gallman's arrest. Pet. App. 5a; C.A. App. 728-729.

After describing the substance of the memorandum, the district court ruled it did not constitute material evidence favorable to the defense required to be disclosed under *Brady v. United States*, 373 U.S. 83 (1963), or *Giglio v. United States*, 405 U.S. 130 (1972). The court then asked Mr. Gallman whether its ruling "ma[d]e sense." C.A. App. 729. Gallman indicated it did not, because officers engaged in racial profiling would avoid documenting such episodes in their patrol log. He added that the officers had targeted him as well on the basis of race. The court acknowledged Gallman's point regarding the patrol log but adhered to its ruling. C.A. App. 729-730.

Following the court's colloquy with Mr. Gallman about the investigation, defense counsel asked whether the court was "also going to rule that I cannot cross examine officers on it in front of the jury." C.A. App. 730. The court initially stated it would take that question under

---

[2] At the outset of the first closure, the judge engaged Mr. Gallman in a colloquy on an additional subject: whether he wished to stipulate to the fact of his prior conviction so that the jury need not learn the name or nature of the crime. *See Old Chief v. United States*, 519 U.S. 172 (1997). Gallman declined to stipulate. Pet. App. 4a.

advisement, but the Assistant United States Attorney asked if she could be heard, and then urged the court to bar the cross-examination because the profiling complaint had not been sustained and Officers Rosinski and Stout were merely "backup officers." C.A. App. 731-732. Defense counsel argued in response that this "backup officer" characterization was "kind of misleading," because the partners were not called to the scene of an unfolding encounter, but rather were there from the outset after teaming up with the other two officers for a shift of high-impact patrol. C.A. App. 733.

The court agreed with the government and barred cross-examination on the grounds the complaint was deemed unfounded and Officers Rosinski and Stout were "backup officers." Pet. App. 5a. The court noted that it "might be a different scenario if we were dealing with the two officers that actually conducted the stop." *Id*. Mr. Gallman then himself objected to the "backup officer" characterization, reiterating that all four officers "were there at the same time." C.A. App. 734. His attorney interjected that "you cannot make argument," while the judge responded that "you can talk to your lawyer, Mr. Gallman, but that is going to be my ruling here." *Id*. As the sealed hearing neared conclusion, the discussion turned to a second internal investigation of Officer Rosinski, this one still open. The court advised that it had ordered the police department to send a representative to provide more information. *Id*. at 734-735. The jury was then brought in and presentation of the case began.

Over the next few hours, the jury heard preliminary instructions, opening statements, and the direct examination of Officer Kling, after which it was excused for lunch. There followed the second closed portion of the trial proceedings. At this hearing, the police representative summoned by the court testified that the open investigation concerned a complaint that Officer

Rosinski had failed to call a supervisor as requested by a motorist during a traffic stop.[3] The representative had interviewed Rosinski about the complaint and found him credible. He had determined the complaint to be unfounded because Rosinski's partner, Officer Stout, had called a supervisor. That finding remained to be approved by higher-ups. Pet. App. 6a.

After the jury returned from lunch, Officer Kling testified on cross-examination, with testimony from Officers Nestel, Rosinski, and Stout following the next morning. Mr. Gallman later took the stand in his own defense and testified that he had not known of the gun reportedly found in the car. He frequently used the vehicle as a "hack" cab to drive people to a destination for a fare. C.A. App. 521. When the prosecutor asked on cross-examination whether he was saying he had "no idea" where the gun or the magazine in Officer Rosinski's vehicle came from, Gallman testified they could have been planted:

> Are you talking about officers that was in a double district, 22nd and 39th District tactical force, with two officers with police misconduct on them for racial profiling. That wasn't brought up to you guys, but that's the facts of the matter.
>
> Yes, I will believe that it could possibly be a random gun in my car from Officer Rosinski's. The clip that was found in his car and his gun could possibly be planted in my car as well from these misconduct officers.

C.A. App. 525.

---

[3] Before the police representative's testimony commenced, the prosecutor requested the proceedings be "sealed," whereupon the court instructed a member of its staff to "turn off 7B," the livestream to the public courtroom. Pet. App. 6a; C.A. App. 182. The hearing earlier that morning is likewise designated a "discussion under seal" in the transcript, C.A. App. 80, without express reference to the livestream. In briefing and argument before the court of appeals, the government disputed the stream was inactive during the morning proceedings. The court "assume[d] both proceedings were closed for purposes of this appeal." Pet. App. 8a n.1.

The jury returned a guilty verdict and, following imposition of sentence, Mr. Gallman noticed a timely appeal.

3. Before the Third Circuit, Mr. Gallman argued that the closed proceedings deprived him of the public trial guaranteed by the Sixth Amendment. Noting that the right to a public trial is for the benefit of the accused and applies to "any stage of a criminal trial," *Presley v. Georgia*, 558 U.S. 209, 213 (2010), he contended that the closed proceedings, and especially the morning hearing, were within the scope of the constitutional guarantee.

The court of appeals found it a "close question" whether "the Sixth Amendment public-trial right attaches to proceedings like these." Pet. App. 10a; *see also id*. at 8a. The only precedent of this Court it found to supply guidance was *Waller v. Georgia*, 467 U.S. 39 (1984), which held the closure of a suppression hearing to be structural error. The Third Circuit reasoned that some features of the closed proceedings in this case resemble a suppression hearing, while others are less analogous. Pet. App. 9a-10a.

Among the common features were that counsel "argued whether certain evidence should be presented to the jury," the "court excluded that evidence from trial," and the court did so in part "based on the resolution of a factual dispute (whether Rosinski and Stout were backup officers)." Pet. App. 9a. Another parallel was the subject matter: *Waller* observed that suppression challenges "frequently attack the conduct of police and prosecutor," and here too the proceedings concerned police misconduct investigations. *Id.* In this connection *Waller* credited "the salutary effects of public scrutiny," and the Third Circuit recognized that "the same strong public interest is present in this case." *Id.*

Among the disanalogous features was the convening of the morning hearing to resolve whether the Internal Affairs memorandum was subject to disclosure under *Brady* or *Giglio*, a

determination of a kind "routinely handled outside of public view." Pet. App. 10a. During the lunchtime closure, "the parties did not make argument" and the court "did not make an evidentiary or other substantive ruling." *Id*. The proceedings at that juncture therefore did not "resemble a bench trial," and unlike a suppression hearing could not have proven "as important as the trial itself." *Id*. (quoting *Waller*, 467 U.S. at 46-47).

After comparing and contrasting the closures here with the suppression hearing considered in *Waller*, the Third Circuit reviewed its own precedents as well as authorities from four other circuits and a state high court, but found no "consensus" regarding the public trial right's application to "motion in limine hearings." Pet. App. 12a. The court concluded it is not "clear under current law" that the Sixth Amendment public-trial right attached to the closed proceedings, so there did not appear "plain" error subject to correction in the absence of objection below. *Id.* at 13a (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993)). The court added that it did not regard any error to have seriously affected the fairness, integrity, and public reputation of judicial proceedings, so it would not exercise remedial "discretion at prong four of *Olano*." *Id*. at 14a.

This petition follows.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted to better define the contours of the Sixth Amendment right to a public trial and resolve a conflict that appears in the lower courts' decisions. In only two contemporary cases has this Court addressed the public trial right's scope. Both have adopted a broad view, defining the right to reach not only presentation of the case to the jury, but "any stage of a criminal trial." *Presley v. Georgia*, 558 U.S. 209, 213 (2010) (per curiam); *see Waller v. Georgia*, 467 U.S. 39 (1984). But exceptionally little guidance appears as to what constitutes a stage of a criminal trial. A hearing on a motion to suppress evidence is one, *Waller*, 467 U.S. at 47, the voir dire of prospective jurors another, *Presley*, 558 U.S. at 213. Beyond that, the Court has never offered any rule or set out factors for deciding whether the public trial right applies.

In the absence of more fulsome guidance, the lower courts have reached divergent conclusions respecting the right's application to proceedings in limine by which the trial court determines whether the jury will hear challenged evidence or cross-examination. Here, after the jury was seated, the district court closed proceedings during which it ruled the defense would not be permitted to cross-examine two arresting officers concerning a complaint of racial profiling in another matter. The lower courts disagree as to whether proceedings on evidentiary questions this this one are part of the public trial guaranteed by the Sixth Amendment. This case presents opportunity to resolve that conflict and advance resolution of other questions dotting the case law in this area.

Notwithstanding this case's plain-error posture, it is a sound vehicle for deciding the question presented. The Third Circuit's conclusion that present law does not make clear whether the closures were unconstitutional speaks to the need for further guidance from this Court. And because public trials are essential to public "confidence that standards of fairness are being

observed," *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 508 (1984) (*Press-Enterprise I*), it is likely that recognition of error in this case would favor the exercise of prong-four remedial discretion under *United States v. Olano*, 507 U.S. 725, 734 (1993). Whether to do so may be left for the Third Circuit to revisit on remand in light of this Court's determination of the merits.

A. The scope of the Sixth Amendment public trial right is the subject of recurring disagreement.

The Sixth Amendment decrees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." The constitutional guarantee "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." *In re Oliver*, 333 U.S. 257, 271 n.25 (1948). So rooted is the right in this nation's judicial practice that it may fairly be said "a presumption of openness inheres in the very nature of a criminal trial under our system of justice." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (opinion of Burger, C.J.).[4]

"[I]n the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government." *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596,

---

[4] The decision in *Richmond Newspapers* upheld a corollary First Amendment right of public access to proceedings and filings in criminal cases. In both *Waller* and *Presley*, this Court drew extensively upon cases defining this First Amendment corollary right, reasoning "there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." *Waller*, 467 U.S. at 46; *see Presley*, 558 U.S. at 213.

606 (1982); *see generally Neder v. United States*, 527 U.S. 1, 32 (1999) (Scalia, J., joined by Souter and Ginsburg, JJ., dissenting) (recalling that "judges in general, and federal judges in particular … are officers of the Government, and hence proper objects of that healthy suspicion of the power of government which possessed the Framers and is embodied in the Constitution").

The public trial right is not limited to the presentation of the case to the jury, instead extending as well to "any stage of a criminal trial." *Presley v. Georgia*, 558 U.S. 209, 213 (2010). While the right is not absolute, only rarely does there appear the sort of overriding interest that may, with great caution, sometimes be found to justify conducting any part of a criminal trial in secret. *Waller v. Georgia*, 467 U.S. 39, 48 (1984). Before closing trial proceedings, four requirements must be met: the closure "must advance an overriding interest that is likely to be prejudiced," (2) it "must be no broader than necessary to protect that interest," (3) the trial court "must consider reasonable alternatives to closing the proceeding," and (4) the court "must make findings adequate to support the closure." *Id.* It is incumbent upon trial courts to "take every reasonable measure to accommodate public attendance." *Presley*, 558 U.S. at 215.

The public trial right's vital importance to the accused, its deep roots in the nation's historic tradition, and its protection against abuses of judicial power make deprivation of the right a rare instance of "structural" error. *Weaver v. Massachusetts*, 582 U.S. 286, 290 (2017). While public-trial error's structural character means that reversal is automatic, *id.*, reviewing courts have in some cases been able to craft meaningful remedies short of retrial. *See Waller*, 467 U.S. at 50 (directing state trial court to conduct public suppression hearing, with new trial to follow should hearing result in "material change in the positions of the parties"); *United States v. Ramirez-Ramirez*, 45 F.4th 1103, 1112 (9th Cir. 2022) (remanding with instructions to make specific findings of fact in support of guilty verdict in bench trial).

While this Court has given the public trial right robust application, it has not "articulated a clear test for determining the threshold question whether a given proceeding constitutes part of the 'trial[.]'" *Commonwealth v. Jones*, 37 N.E.3d 589, 603 (Mass. 2015); *see also* Pet. App. 10a-11a ("Neither the Supreme Court nor our Court has decided whether the Sixth Amendment public-trial right attaches to proceedings like those at issue in this case[.]"). The lower courts, not surprisingly, have charted divergent courses. One area of recurring disagreement has been whether the right extends to proceedings in limine, after the jury has been seated, to determine whether a party may present evidence, make argument, or conduct a line of examination.

In some jurisdictions, the public trial right has been held to reach such proceedings. The Massachusetts high court so concluded in *Jones* with respect to a hearing to determine the admissibility of a complainant's prior sexual conduct, holding the Sixth Amendment to require the hearing be public unless and until a court makes the requisite *Waller* findings. *Jones*, 37 N.E.3d at 603; *contra*, *e.g.*, *State v. Macbale*, 305 P.3d 107, 122 (Ore. 2013). *Jones* thus effectively enjoined compliance with a state "rape shield" statute commanding that such hearings be conducted in camera. *See* 37 N.E.3d at 602; *see also United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 607-08 (3d Cir. 1969) (en banc) (closure pursuant to state rule of criminal procedure held unconstitutional).

Decisions from some other jurisdictions concur with *Jones* in recognizing the public trial right to reach proceedings in limine on evidentiary questions. *See Rovinsky v. McKaskle*, 722 F.2d 197, 201 (5th Cir. 1984) (upholding right as to hearing on motion to restrict cross-examination of government witness); *State v. Morales*, 932 N.W.2d 106, 116-18 (N.D. 2019) (upholding right as to hearing on admissibility of graphic video of crime scene and conference as to limiting instruction); *State v. Whitlock*, 396 P.3d 310, 311 (Wash. 2017) (upholding right as to

conference on whether cross-examination to be permitted on government witness's dealings with police).

Other decisions have held such proceedings in limine not to constitute stages of a trial. *See*, *e.g*., *United States v. Norris*, 780 F.2d 1207, 1210 (5th Cir. 1986) (public trial right not implicated by conferences to resolve "evidentiary questions" or "technical legal issues"); *United States v. Vazquez-Botet*, 532 F.3d 37, 51-52 (1st Cir. 2008) (right did not extend to offer of proof placed on record to preserve challenge to evidentiary ruling); *State v. Smith*, 876 N.W.2d 310, 330 (Minn. 2016) (right did not extend to hearing at which court barred defense from calling two witnesses); *State v. Reed*, 352 P.3d 530, 542 (Kan. 2015) (right did not extend to hearing at which judge questioned shooting victim concerning willingness to testify and found his refusal to do so made him "unavailable," such that prosecution would be permitted to introduce his prior testimony). Decisions reaching this conclusion have sometimes laid emphasis on whether a proceeding involves factual disputes or findings. *See*, *e.g.*, *Norris*, 780 F.2d at 1210; *but see Whitlock*, 396 P.3d at 315 (rejecting "strict legal-factual distinction").

Those courts that have tolerated the closure of proceedings in limine often rely on what has become known as a "triviality" standard. In the federal courts of appeals, the doctrine has typically been limited to closures that were inadvertent or unknown to the presiding judge; and/or closures that were "partial," in that specific individuals were barred from attending but the public at large was not. *See*, *e.g.*, *United States v. Perry*, 49 F.3d 885, 890-91 (D.C. Cir. 2007); *Braun v. Powell*, 227 F.3d 908, 919 (7th Cir. 2000); *Peterson v. Williams*, 85 F.3d 39, 41-42 (2d Cir. 1996); *United States v. Al-Smadi*, 15 F.3d 153, 154-55 (10th Cir. 1994); *see also United States v. Gupta*, 699 F.3d 682, 687-89 (2d Cir. 2012). But some courts have given the doctrine broader application by judging the actual substance of proceedings too "trivial" to implicate the

public trial right. *United States v. Ivester*, 316 F.3d 955, 960 (9th Cir. 2003); *People v. Lujan*, 461 P.3d 494, 498-99 (Colo. 2020). The triviality doctrine's validity and scope remain unsettled. *See Zornes v. Bolin*, 37 F.4th 1411, 1418 (8th Cir.), *cert. denied*, 143 S. Ct. 411 (2022).

One point of agreement is that when evidentiary disputes are simple enough to resolve at sidebar or very quickly in chambers while the jury remains seated, the court is "not required to allow public or press intrusion upon the huddle." *Richmond Newspapers*, 448 U.S. at 598 n.23 (Brennan, J., concurring in judgment); *see*, *e.g.*, *State v. Smith*, 334 P.3d 1049, 1055 (Wash. 2014). "Sidebars smooth the flow of trial by allowing the court to have succinct, private discussions with counsel without having to remove the jury each time such a conversation is necessary." *Smith v. Titus*, 141 S. Ct. 982, 986 (2021) (Sotomayor, J., dissenting from denial of certiorari). Should they "become too lengthy or too contentious, judges commonly excuse the jury and discuss the matter in open court." *Id.* And though conducted out of earshot, sidebars remain within public view. *Id*. at 986 n.6.

This case provides a fruitful context to engage and resolve the conflict among lower courts as to whether the Sixth Amendment public trial right applies to non-sidebar proceedings in limine, after the jury has been seated, in which the court rules on challenged evidence or cross-examination. In the closed proceedings here, the district court heard argument, resolved a factual dispute, and announced a ruling barring the defense from cross-examining two officers regarding a racial profiling complaint. This subject matter implicated the "strong public interest" in "exposing substantial allegations of police misconduct to the salutary effects of public scrutiny." Pet. App. 9a (quoting *Waller*, 467 U.S. at 47). These several features of the closed proceedings present opportunity to explore and determine how a range of considerations may inform

application of the Sixth Amendment right to a public trial. The contrast between the morning and lunchtime proceedings may offer further opportunity to elucidate the right's scope.

B. The public trial right should be recognized to extend to proceedings in limine of the kind here.

The decision below fails to recognize the considerable public interest in proceedings by which a court bars a party from offering evidence or pursuing a line of cross-examination. When the jury is thus kept from learning of particular evidence or grounds for impeachment, the interest in *public* scrutiny becomes all the more pronounced. *See Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1, 12-13 (1986) (*Press-Enterprise II*) (explaining that absence of jury from preliminary hearing "makes the importance of public access … even more significant"). Equally, the potential for one-sided or idiosyncratic evidentiary rulings heightens the defendant's own interest in letting "the citizenry weigh his guilt or innocence for itself, whatever the jury verdict." *Rovinsky*, 722 F.2d at 201-02. For reasons like these, even if "certain matters related to a criminal trial may be resolved in the privacy of the judge's chambers, an evidentiary ruling on a motion *in limine* is wholly inappropriate to that setting." *Smith*, 141 S. Ct. at 986 n.7 (Sotomayor, J.).

The fact that sidebars are conducted at the bench when necessary to screen their content from the jury does not mean evidentiary questions may be decided behind closed doors when the jury is *not* present. *Rovinsky*, 722 F.2d at 201. Notably, objections resolved while the jury remains seated will tend to concern a discrete line of questioning or item of evidence, whereas broader controversies, such as whether a proposed witness may testify at all, will typically be resolved outside the jury's presence, given the time required for their resolution and greater likelihood they will be anticipated in advance.

Here, the content of the closed proceedings implicated the heightened interest in public scrutiny of substantial evidentiary rulings. During the first span of closed proceedings, the district court barred the defense from cross-examining Officers Rosinski and Stout on the racial profiling complaint after finding the two were merely "backup officers." In doing so, the court rejected defense counsel's argument, and later Mr. Gallman's own protest, that this was a mischaracterization. During the second closure, the court heard testimony that, in tandem with other portions of trial, revealed the police department to have proceeded differently in its investigation of the two citizen complaints: whereas Rosinski was questioned about failing to call a supervisor, he was apparently never asked about the alleged racial profiling.[5]

The district court's evidentiary ruling may hot have been an abuse of discretion. But that does not mean closing court was without cost to the values served by publicity, most importantly its function of ensuring the people are able to participate in and act "as a check upon the judicial process." *Globe Newspaper Co.*, 457 U.S. at 606. Notwithstanding the bounds fixed by the Federal Rules of Evidence and appellate standards of review, a reasonable member of the public could conclude that a formally lodged complaint of racial profiling is of enough significance to warrant airing when an officer's testimony is essential to a prosecution. More broadly, upholding the public trial right allows the public to assess whether evidentiary and procedural rules serve justice, or instead thwart it. Should members of the public come to regard the rules as too strict or not strict enough, they may avail themselves of the political process to pursue appropriate reforms. Should they find the rules reasonable, openness serves to promote confidence in the

---

[5] Officer Rosinski testified at trial to the subject matter of the complaint concerning failure to call a supervisor, as had been detailed by the police representative in the closed lunchtime hearing, *see* C.A. App. 185, 342-343, while indicating in his testimony at the suppression hearing that he was not aware of the substance of any other complaint, *see id*. at 33-34, 37-39.

judicial process all the more directly. "Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise I*, 464 U.S. at 508.

The Third Circuit failed to fully confront those aspects of the closed proceedings that heighten the interest in public scrutiny. In describing the proceedings as "brief, investigatory hearings related to potential *Brady* or *Giglio* material," Pet. App. 11a, the court lost sight of the hearings' additional, evidentiary dimension. The court also took the untenable view that "the hearings here were not on motions in limine; they were not on motions at all." *Id*. at 12a. In fact, defense counsel did effectively move to cross-examine the officers on the racial profiling complaint, and the district court denied that motion when it ruled the defense would not be permitted to do so.

Even while glossing these aspects of the closed proceedings, the Third Circuit was not prepared to say there was no Sixth Amendment error. Instead it deemed any error insufficiently plain to support relief under Federal Rule of Criminal Procedure 52(b), and of insufficient import for the fairness, integrity, and public reputation of judicial proceedings to warrant the exercise of remedial discretion under *United States v. Olano*, 507 U.S. 725 (1993). Pet. App. 12a-14a (holding challenge to fail at second and fourth prongs of plain-error review under *Olano*). The court's reservation of the underlying constitutional issue is telling confirmation of the paucity of guidance to be found in the precedents of this Court, and the conflict among the lower courts in its absence.

C. This case is a suitable vehicle.

This matter's plain-error posture does not mean it fails as a vehicle. The Third Circuit closely examined its own and other jurisdictions' Sixth Amendment precedents before concluding that any error was insufficiently clear to support relief. It drew what guidance it could from *Waller* by reviewing those features the closed proceedings in this case share with suppression hearings. The court's careful engagement with the "close question" presented, Pet. App. 8a, demonstrates the question's significance and invites its further consideration here. Deciding the question's merits would advance sound enforcement of a constitutional guarantee whose scope is not presently clear, as demonstrated by the divide that has emerged among the lower courts.

Should this Court hold one or both closures improper under the Sixth Amendment, it may (consistently with its practice) reverse the judgment and remand to the court of appeals to consider the effect of Mr. Gallman's failure to object. *See Tapia v. United States*, 564 U.S. 319, 335 (2011); *United States v. Marcus*, 560 U.S. 258, 266-67 (2010). With respect to the plain error standard's fourth prong, it bears recalling that public trials are essential to the public's "confidence that standards of fairness are being observed." *Press-Enterprise I*, 464 U.S. at 508. That being so, it is likely this Court's identification of error would lead the Third Circuit on remand to revisit its former conclusion that the error's effect on the fairness and "public reputation" of judicial proceedings does not warrant remedy. *Olano*, 507 U.S. at 736.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Keith M. Donoghue

KEITH M. DONOGHUE
Assistant Federal Defender
Counsel of Record

BRETT G. SWEITZER
Assistant Federal Defender
Chief of Appeals

LISA EVANS LEWIS
Chief Federal Defender

Federal Community Defender Office
for the Eastern District of Pennsylvania
Suite 540 West, Curtis Center
601 Walnut Street
Philadelphia, PA 19106
(215) 928-1100