No. 22-7539

IN THE SUPREME COURT OF THE UNITED STATES

STACY GALLMAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is entitled to plain-error relief on his claim that his Sixth Amendment right to a public trial was violated when the district court twice briefly suspended the live video feed that it was using as part of its COVID-19 protocol.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 57 F.4th 122. The orders of the district court are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 2023. On April 11, 2023, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including May 9, 2023, and the petition was filed on that date. 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 Pennsylvania, petitioner was convicted on one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Pet. App. 7a. The district court sentenced petitioner to 42 months of imprisonment, to be followed by three years of supervised release. Id. at 7a, 19a-20a. The court of appeals affirmed. Id. at 1a-17a.

1. On December 27, 2019, two Philadelphia police officers stopped petitioner's car after he ran a stop sign. Pet. App. 3a. The officers approached the car and saw petitioner and a passenger, who had "a firearm magazine sticking out of" his pocket. Ibid. They restrained the passenger and "recovered a firearm from his waistband." Ibid. The officers also removed petitioner from his car, frisked him, and had two backup officers escort petitioner to a patrol car. Ibid.

One of the officers who had initiated the stop then returned to petitioner's car. Pet. App. 3a. There, he discovered a firearm "at the base of the driver's seat," where petitioner had been sitting. Ibid. Officers also discovered ammunition on the back seat of the patrol car, where petitioner was sitting. Ibid. Petitioner, "who had a prior conviction for first-degree robbery," could not lawfully possess either a firearm or ammunition. Ibid.; see 18 U.S.C. 922(g)(1).

2. A federal grand jury in the Eastern District of Pennsylvania charged petitioner with one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Pet. App. 3a.

Petitioner proceeded to trial "in June 2021 according to a COVID-19 protocol" adopted by the district court. Pet. App. 4a. Under that protocol, the trial took place "in one courtroom and video streamed to another * * * where members of the public and [petitioner's] family were seated." Ibid. Petitioner asserts that two "closures" occurred when the court suspended the video stream to the courtroom reserved for members of the public. Id. at 7a; see id. at 5a-6a.[1] Petitioner did not object on either occasion. Id. at 7a.

The first occasion was just before opening statements, outside the presence of the newly sworn jury. Pet. App. 4a. At that time, the district court discussed two issues with the parties: (1) whether petitioner "wanted to stipulate to the fact of his prior felony conviction" and (2) a complaint of racial profiling against the two backup officers during petitioner's arrest, which the police department had determined to be unsubstantiated. Id. at 4a-5a. On the former issue, petitioner declined to stipulate to his prior conviction. Id. at 4a. On the

[1] Petitioner and the government disagree about whether the district court in fact suspended the video feed on the first occasion. Pet. App. 8a n.1. The court of appeals assumed for purposes of petitioner's appeal that the district court did so. Ibid.

latter, the court agreed with the government that the unsubstantiated complaint concerned only "backup" officers; determined based on its in camera review that the government had no obligation under Brady v. Maryland, 373 U.S. 83 (1963), or Giglio v. United States, 405 U.S. 150 (1972), to disclose the police department's file on the unsubstantiated complaint; and, in response to a question from petitioner's counsel, advised that petitioner could not cross-examine the officers about the unsubstantiated complaint. Pet. App. 5a.

The second occasion was later that same day, again while the jury was out of the courtroom. Pet. App. 6a. At that time, the district court discussed a separate then-pending internal-affairs investigation about one of the backup officers, which stemmed from a complaint about the officer's alleged failure "to call a supervisor to a traffic stop." Ibid. The parties and the court questioned an internal-affairs investigator about the status of the investigation. Ibid. The investigator explained that he had determined that the "complaint was unfounded" because the officer's partner had called a supervisor to the scene, and that the investigation remained pending only because the investigator's "superiors had not yet approved his report." Ibid.

At the close of trial, the jury found petitioner guilty. Pet. App. 7a. The district court sentenced petitioner to 42 months of imprisonment, to be followed by three years of supervised release. Ibid.; C.A. App. 5.

3. On appeal, petitioner claimed for the first time that his right to a public trial had been violated by suspensions of the video feed. Pet. App. 7a. The court of appeals declined to grant plain-error relief. Id. at 1a-17a.

First, the court of of appeals determined that any error in suspending the video feed was not "plain," United States v. Olano, 507 U.S. 725, 734 (1993). See Pet. App. 8a-13a. The court viewed the question whether the Sixth Amendment public-trial right "attaches to proceedings like" the ones at issue here to be "close." Id. at 10a. But the court found no binding precedent from this Court or the Third Circuit that resolved that issue. Id. at 10a-11a. Nor did it find case law from other circuits addressing directly comparable situations, much less a consensus about the correct approach. Id. at 11a-13a. The court of appeals accordingly held that any Sixth Amendment error "was not 'clear under current law.'" Id. at 13a (quoting Olano, 507 U.S. at 734).

Second, the court of appeals separately determined that, "[e]ven assuming that any error was plain and that it affected [petitioner's] substantial rights," the court "would decline to exercise its discretion to grant [petitioner] a new trial." Pet. App. 13a; see Olano, 507 U.S. at 736-737. The court explained that plain-error principles required it to "weigh the costs to the fairness, integrity, and public reputation of judicial proceedings that would result from allowing the error to stand" against "those that would alternatively result from providing a remedy." Pet.

App. 13a (brackets and citation omitted). And the court determined that "the costs of retrial would greatly outweigh any benefit given the brevity and collateral nature of the closed proceedings" in this case. Id. at 14a. The court of appeals emphasized that "the closures here were brief and resulted from the challenges of conducting a trial in the pandemic"; that their substance was "referenced generally" at other open-court proceedings; that the parties prompted the second one; and that petitioner's "trial 'possessed the publicity, neutrality, and professionalism that are essential components of upholding an accused's right to a fair and public trial.'" Id. at 13a-14a (citation omitted).

ARGUMENT

Petitioner renews his claim (Pet. 15-17) that the district court violated his Sixth Amendment public-trial right. The court of appeals correctly declined to grant plain-error relief, and its decision does not conflict with any decision of this Court or another court of appeals. In any event, this Court recently denied review in another case presenting a similar question, see Smith v. Titus, 141 S. Ct. 982 (2021) (No. 20-633), and this case would make for an even poorer vehicle to address the issue, given its posture and the multiple independent grounds that support its result. The petition for a writ of certiorari should be denied.

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. That 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 v. Georgia, 467 U.S. 39, 46 (1984) (citations omitted). Observance of the right "encourages witnesses to come forward and discourages perjury," ibid., and it "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); see id. at 605-606. But the right is not absolute and, even when it applies, "may give way in certain cases to other rights or interests." Presley v. Georgia, 558 U.S. 209, 213 (2010) (per curiam).

While the Sixth Amendment refers to a "public trial," this Court has held that in at least two circumstances, the right "extends beyond the actual proof at trial." Waller, 467 U.S. at 44. In Waller v. Georgia, the Court applied the public-trial right to pretrial suppression hearings, observing that such hearings "often resemble[] a bench trial" in form and "often are as important as the trial itself" because many defendants plead guilty if suppression issues are not resolved in their favor. 467 U.S. at 46; see id. at 46-47. Later, in Presley v. Georgia, the Court held that the public-trial right also "extends to the voir dire of prospective jurors." 558 U.S. at 213. Although the Court left open "the extent to which the First and Sixth Amendment public

trial rights are coextensive," it found precedent applying a First Amendment public-trial right to juror selection indicative that the Sixth Amendment public-trial right would also apply. Ibid.

2. To prevail on plain-error review, a defendant must show an "error" that is "plain" and affected his "'substantial rights'"; if he meets all three of those requirements, then the court of appeals "may grant relief if it concludes that the error had a serious effect on 'the fairness, integrity or public reputation of judicial proceedings.'" Greer v. United States, 141 S. Ct. 2090, 2096-2097 (2021) (citations omitted). The court of appeals in this case correctly determined the petitioner had not demonstrated a "plain" error, and moreover permissibly exercised its discretion in independently determining that relief would be unwarranted even if he had.

a. First, petitioner has not shown that the district court plainly violated his Sixth Amendment public-trial right as understood in Waller and Presley.

As a threshold matter, petitioner has not demonstrated that the first proceeding he challenges -- which concerned his former conviction and a racial-profiling complaint against the backup officers at his arrest -- was even closed. The transcript from that proceeding was sealed, but nothing in the record establishes that the video streaming to the courtroom provided for members of the public was discontinued. Pet. App. 8a n.1. Absent such proof,

petitioner cannot demonstrate a plain violation of his public-trial right at that proceeding.

In any event, even if petitioner could show that both challenged proceedings were closed, nothing in the Sixth Amendment or this Court's decisions interpreting it plainly precludes such closures. As the court of appeals observed, disputes over "whether certain information is subject to disclosure under Brady or Giglio" are "routinely handled outside of public view without any hearing at all," Pet. App. 9a-10a, and evidentiary rulings concerning the scope of cross-examination have long been held "during sidebars," id. at 10a.

Neither Waller nor Presley "addressed whether * * * 'routine evidentiary rulings and matters traditionally addressed during private bench conferences or conferences in chambers' implicate the Sixth Amendment right to a public trial." Smith v. Titus, 958 F.3d 687, 692 (8th Cir. 2020), cert. denied, 141 S. Ct. 982 (2021) (citation omitted); see Richmond Newspapers, Inc., v. Virginia, 448 U.S. 555, 598 n.23 (1980) (Brennan, J., concurring in the judgment) ("[W]hen engaging in interchanges at the bench, the trial judge is not required to allow the public or press intrusion upon the huddle."). Those decisions accordingly provide no clear indication that the discussions here about Brady or Giglio evidence and the scope of cross-examination are the types of matters that had to be addressed in open court. See Pet. App. 10a.

Ultimately, even petitioner acknowledges that this Court "has not 'articulated a clear test for determining the threshold question whether a given proceeding constitutes part of the "trial."'" Pet. 12 (brackets and citation omitted). Petitioner instead asserts (ibid.) "recurring disagreement" among the lower courts about whether the public-trial 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." See Pet. 12-15. Even assuming that such disagreement exists, however, it would simply reinforce the conclusion that any error by the district court was not plain.

Because petitioner did not object to any closures of the courtroom before the district court, the court of appeals found it unnecessary to decide what it viewed as the "close question" of whether the public-trial right attached to the proceedings in question. Pet. App. 10a. Instead, it was enough that "any error in closing the video livestream to the public did not constitute reversible plain error because it was not 'clear under current law' that the Sixth Amendment public-trial right attached to the closed proceedings." Id. at 13a (quoting Olano, 507 U.S. at 734). That limited determination does not conflict with any of the decisions petitioner identifies (Pet. 12-13) in which courts granted relief on properly preserved public-trial claims.[2] And

[2] See Rovinsky v. McKaskle, 722 F.2d 197, 198-199 (5th Cir. 1984) (explaining that state court had "held a hearing in chambers on the state's motion to restrict the cross-examination

petitioner identifies no court that has found plain error in circumstances akin to the district court's review of "police misconduct investigations to determine whether they constituted Brady or Giglio material" at issue in this case. Pet. App. 9a; cf. State v. Morales, 932 N.W.2d 106, 116 (N.D. 2019) (finding that state trial court plainly erred in closing hearing about "whether [a] graphic video of the crime scene was admissible under" the North Dakota Rules of Evidence); State v. Whitlock, 396 P.3d 310, 311 (Wash. 2017) (en banc) (observing that "the trial court rejected the State's request to address its objection to the scope of cross-examination at sidebar," and "[i]nstead * * * adjourned the bench trial proceedings, called counsel into chambers, and discussed [a] critically important and factually complicated issue behind closed doors" and granting relief without addressing plain-error standard).

b. In any event, the court of appeals permissibly determined that, "[e]ven assuming that any error was plain and that it affected substantial rights," the court "would decline to exercise [its] discretion" to grant plain-error relief. Pet. App.

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of a prosecution witness despite the defendant's objection to the procedure as violating his right to a public trial"); United States ex rel. Bennett v. Rundle, 419 F.2d 599, 604-605 (3d Cir. 1969) (en banc) (finding that "there was not only no acquiescence in the exclusion of the public but an objection -- however it was phrased -- to the court's action"); Commonwealth v. Jones, 37 N.E.3d 589, 601 (Mass. 2015) (finding trial court erred in closing courtroom after "[d]efense counsel requested 'that Mr. Jones' family be allowed to be with him during this stage of the trial'").

13a; see Olano, 507 U.S. at 732 ("Rule 52(b) leaves the decision to correct the forfeited error within the sound discretion of the court of appeals, and the court should not exercise that discretion unless the error '"seriously affects the fairness, integrity, or public reputation of judicial proceedings."'") (brackets and citation omitted); see also United States v. Cotton, 535 U.S. 625, 632-633 (2002) (same approach applies to plain-error review of claims of structural error).

The court of appeals reasonably balanced the costs to the judicial system of granting petitioner relief against the costs of denying a remedy. See Pet. App. 14a (considering the closures' brevity and mitigated effects, as well as the overarching "publicity, neutrality, and professionalism" of petitioner's trial). Indeed, even petitioner does not contend that the court abused its discretion in performing that balancing. Instead, he speculates (Pet. 18) that the court of appeals might "revisit its former conclusion" if this Court were to grant review and find that the district court had committed plain error. But that speculation affords no sound basis for further review, given the court of appeals' clear determination that "even assuming plain error here, it would not be appropriate" to grant petitioner relief. Pet. App. 14a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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