No. 22-7539

IN THE SUPREME COURT OF THE UNITED STATES

STACY GALLMAN,
PETITIONER,

VS.

UNITED STATES OF AMERICA,
RESPONDENT.

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

PETITIONER'S REPLY IN SUPPORT OF CERTIORARI

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The government does not dispute the existence of recurring disagreement in the lower courts as to whether the Sixth Amendment public trial right applies to motion in limine hearings outside the presence of a seated jury. It also allows that this Court's precedent presently offers little guidance concerning the scope of the public trial right generally. The government nonetheless opposes review on the ground that petitioner's claim was not preserved, so that ultimately relief will not be granted unless he satisfies the plain error standard fixed by Criminal Procedure Rule 52(b) and *United States v. Olano*, 507 U.S. 725 (1993).

The government's position is not compelling. In criminal cases, this Court regularly engages important questions of law that may ultimately prove not to be dispositive of an appeal. There is no reason to depart from that practice here. To the contrary, there is special cause to adhere to it. In recent years, questions concerning the contours of the public trial right have more than once reached this Court in habeas proceedings where the deference commanded by AEDPA foreclosed plenary review of the merits. Here, by contrast, the plain error standard need not restrain this Court's engagement of the question presented. Doing so stands to provide the lower courts with much-needed guidance concerning the application of a fundamental constitutional guarantee.

A. The important question presented has eluded this Court's review in recent cases.

The government recognizes that neither of the Court's two modern Sixth Amendment public trial precedents addresses whether the constitutional guarantee extends to proceedings in limine to determine whether a seated jury will hear challenged evidence, cross-examination, or argument. *See* Br. 9 (citing *Waller v. Georgia*, 467 U.S. 39 (1984), and *Presley v. Georgia*, 558 U.S. 209 (2010)). As previously set out, *see* Pet. 9-14, disagreements abound in the lower courts due to the spare guidance afforded by *Waller* and *Presley*. The government, for its part, acknowledges decisions from two state supreme courts holding the public trial right to cover proceedings of the same character as those here. *See* Br. 11 (citing *State v. Morales*, 932 N.W.2d 106 (N.D. 2019), and *State v. Whitlock*, 396 P.3d 310 (Wash. 2017) (en banc)). It does not doubt, either, that tension appears looking to the federal cases alone. *See United States v. Vázquez-Botet*, 532 F.3d 37, 52 n.10 (1st Cir. 2008) (declining to follow *Rovinsky v. McKaskle*, 722 F.2d 197, 200 (5th Cir. 1984)).

In just the last three Terms, at least three petitioners have sought review of public trial claims despite AEDPA's limitation of the question presented to an underlying state court decision's reasonableness under this Court's existing precedent. *Jordan v. Lamanna*, 143 S. Ct. 992 (2023) (No. 22-431); *Zornes v. Bolin*, 143 S. Ct. 411 (2022) (No. 22-5714); *Smith v. Titus*, 141 S. Ct. 982 (2021) (No. 20-633); *see* 28 U.S.C. § 2254(d)(1) (limiting review in habeas to whether state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States").[1] In *Smith*, the respondent warden observed that "the question of whether the Sixth Amendment's public

[1] In *Jordan v. Lamanna*, the public trial issue could not receive even AEDPA-bound consideration due to the petitioner's death, which mooted the controversy.

trial guarantee applies to an administrative, sidebar-like ruling on an evidentiary issue" might "deserve a full airing" in a non-AEDPA case. Brief in Opposition, No 20-633, at 14. That airing may be had here, notwithstanding the appeal's plain error posture. *See Tapia v. United States*, 564 U.S. 319, 335 (2011) (resolving circuit split as to merits of unpreserved issue, and remanding for application of plain error standard), *on remand*, 665 F.3d 1059, 1061 (9th Cir. 2011) (noting government's concession that error had become plain, and granting relief). Thus, contrary to the government's submission, Mr. Gallman's appeal is not a "poor[] vehicle" to engage a Sixth Amendment issue that has repeatedly eluded this Court's review. Br. 6.

B. Should this Court identify a public trial violation, remedial considerations may be weighed on remand.

In opposing certiorari based on petitioner's failure to object in the district court, the government argues from the plain error standard's second and fourth prongs—requiring, respectively, that error be clear and that it implicate the fairness, integrity, or public reputation of judicial proceedings. Br. 8-12. But whether or not Mr. Gallman will ultimately win relief for plain error should not dissuade the Court from taking up the question presented. Rather, if this Court holds that one or both of the closures violated the Sixth Amendment's public trial guarantee, it can leave application of the plain error standard for the court of appeals to consider on remand, as it "routinely" does in similar cases. *Hicks v. United States*, 137 S. Ct. 2000, 2000 (2017) (Gorsuch, J., concurring in order granting cert, vacating judgment, and remanding); *see Tapia*, 564 U.S. at 335; *United States v. Marcus*, 560 U.S. 258, 266-67 (2010).

The government resists that approach under *Olano*'s second prong by contending that no error plainly appears because "nothing in the record establishes" the video stream to the public courtroom was discontinued during the morning proceedings. Br. 8-9. But as the government also acknowledges, the transcript of those proceedings was "sealed," *see id.*, and just a few hours

later, when the prosecutor requested proceedings again be "sealed," the court immediately terminated the video stream. C.A. App. 182. This record is sufficient to establish that the stream was discontinued at both junctures, as the court of appeals implicitly recognized in assuming both closures for purposes of the appeal. Pet. App. 8a & n.1.

As to the fourth prong, the government contends that the "court of appeals reasonably balanced the costs to the judicial system of granting petitioner relief against the costs of denying a remedy." Br. 12. It is not self-evident this cost-weighing approach reflects a correct understanding of *Olano*'s directive that remedial discretion be exercised in the interest of the "fairness, integrity, or public reputation of judicial proceedings," particularly as regards structural error in the form of a public trial violation. *See United States v. Negrón-Sostre*, 790 F.3d 295, 306 (1st Cir. 2015) (recognizing improper courtroom closure to compromise proceedings' fairness, integrity, and public reputation).

Regardless, the government is not persuasive in dismissing the possibility the Third Circuit would revisit its prong-four conclusion in the event this Court makes clear the closures deprived Mr. Gallman of his right to a public trial. *See* Pet. 9-10. It is not uncommon for the belated recognition of substantive error to prompt second thoughts about enforcing a procedural bar. *See*, *e.g.*, Brief for the United States, *United States v. Grzegorczyk,* 142 S. Ct. 2580 (2022) (No. 21-5967), at 9-11 (foregoing reliance on waiver enforced by lower courts after newly recognizing defendant's offense not to be "crime of violence" supporting mandatory consecutive sentence under 18 U.S.C. § 924(c)). Notably, the Third Circuit did not suggest a new trial would occasion exorbitant costs of the kind at stake in the case where it first adopted its cost-weighing approach to public trial error. *See United States v. Williams*, 974 F.3d 320, 347 (3d Cir. 2020), *cert. denied sub nom. Cruz v. United States*, 142 S. Ct. 309 (2021).

More fundamentally, the government offers no reason this Court need be detained by the question of whether relief would ultimately be warranted in the event error is identified. What is material at the present juncture is the opportunity this case affords to further the sound enforcement of a constitutional guarantee whose contours the Court has barely traced. The ultimate ramifications for petitioner's appeal of a ruling in his favor can be considered on remand without impairing this Court's engagement of the important question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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