No. 23-7232

IN THE

SUPREME COURT OF THE UNITED STATES

QUOTEZ TYVICK PAIR - PETITIONER

vs.

UNITED STATES OF AMERICA - RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

QUOTEZ TYVICK PAIR

BOP # 94091-083

FCI - FT. DIX

PO BOX 2000

JOINT BASE MDL, NJ 08640

QUESTION(S) PRESENTED

1. CAN A UNITED STATES DISTRICT COURT'S GENERAL ORDER SUSPEND RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES OF AMERICA?

2. DID THE COVID-19 PANDEMIC SUSPEND THE SIXTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES RIGHT TO A SPEEDY TRIAL?

3. DID THE COVID-19 PANDEMIC SUSPEND THE SIXTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES RIGHT TO A PUBLIC TRIAL?

4. WAS THE CONSTITUTION OF THE UNITED STATES FIFTH AMENDMENT RIGHT DUE PROCESS CLAUSE VIOLATED WHEN THE UNITED STATES DISTRICT COURT GRANTED A PLAINTIFF'S ORAL MOTION FOR UPWARD VARIANCE WHILE DENYING DEFENDANT RIGHT TO OBJECT TO ORAL MOTION?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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TABLE OF AUTHORITIES (con't)

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

- The opinion of the United States court of appeals appears at Appendix A to the petition and is

  reported at 84 F.4th 577; 2023 U.S. App. LEXIS 28205

- The order of the United States court of appeals appears at Appendix B to the petition and is

  reported at 2023 U.S. App. LEXIS 31004

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- AMENDMENT V - CONSTITUTION OF THE UNITED STATES

  "No person shall be held to answer for a capital, or otherwise infamous crime...; nor shall be deprived of life, liberty, or property, without due process of law;..."

- AMENDMENT VI - CONSTITUTION OF THE UNITED STATES

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

STATEMENT OF CASE

On January 21, 2020 a Richmond grand jury returned two true bills on two counts of Distribution of Fentanyl against Mr. Pair. On January 30, 2020, DEA agents arrested Mr. Pair. His first appearance was on January 31, 2020. The district court appointed counsel and issued a temporary detention order. On February 5, 2020, Mr. Pair appeared with counsel for his arraignment and was ordered detained. At that time, the district court scheduled Mr. Pair's trial for April 6, 2020 at 9:30am.

On March 13, 2020, the Eastern District of Virginia (E.D.VA) issued its first General Order No. 2020-02 generally continuing all civil and criminal jury trials as a result of the COVID-19 pandemic from March 16 through April 17, 2020. On March 23, 2020, E.D.VA issued General Order 2020-04 pertaining to speedy trial calculation. On March 24, 2020, E.D.VA issued an additional General Order 2020-07 extending the commencement of trials until May 1, 2020.

On March 31, 2020, the Government sought a continuance without objection from Mr. Pair's then-counsel requesting the trial be set for May 27, 2020. On April 6, 2020, the district court granted the Government's motion, set trial for May 27, 2020. On April 10, 2020, E.D.VA issued General Order 2020-12 again postponing criminal in-person trials until June 10, 2020. On April 22, 2020, the district court received Mr. Pair's correspondence requesting new counsel be appointed and advising the district court "no motions were filed on his behalf and his rights have been violated.

On April 23, 2020,counsel filed a motion to withdraw and requested that alternate counsel be appointed to Mr. Pair. On April 29, 2020, the district court granted the motion to withdraw and ordered appointment of new counsel.

On May 25, 2020, counsel moved to withdraw as counsel due to concerns over possible exposure to virus posed by meeting at the jail. On May 26, 2020, the

district court granted motion to withdraw and appointed new counsel.

On July 2, 2020, the district court granted continuance and scheduled trial for September 30, 2020, noting that the parties agreed the speedy trial date is October 12, 2020. On August 21, 2020, the district court filed Mr. Pair's request for new counsel. On August 25, 2020, the district court required each party to file statements as to their position on Mr. Pair's motion. On September 3, 2020, at the request of the Defense, the motion for new counsel was dismissed, and parties continued with preparation for trial. On September 18, 2020, defense counsel filed a motion for continue trial based on need to undergo a necessary medical procedure on September 29, 2020. On Sptember 21, 2020, the district court held a telephonic hearing and defense counsel advised the district court of Mr. Pair's opposition to a continuance, and his desire to be tried as soon as possible.

On September 22, 2020, the district court granted counsel's motion to continue and ordered new counsel be appointed. New counsel was appointed on September 22, 2020 and new trial date was set for December 7, 2020 to permit new counsel adequate time to prepare the case for trial. New counsel did not have opportunity to speak to Mr. Pair before setting a new date. Because counsel had been advised by prior counsel that Mr. Pair would want the matter set expeditiously, counsel did not wish to further delay re-setting the trial. However, Mr. Pair did not affirmatively request or consent to the matter being moved from September 30 to December 7.

On October 8, 2020 counsel was provided a copy of a letter from Mr. Pair again raising a violation of his constitutional rights due to his speedy trial rights were being violated. The district court ordered counsel to address the matter via motion no later than October 23, 2020. Counsel on October 21, 2020 filed motion addressing the violation of Mr. Pair's speedy trial rights. On

November 16, 2020, the E.D.VA once again generally continued criminal jury trials until January 19, 2021 in General Order 2020-22. Mr. Pair noted his objection to this additional continuance.

On December 8, 2020, the district court ordered the parties to file position briefs on the days that were excluded from the speedy trial calculation. On December 9, 2020, prior to the evidentiary hearing, both parties submitted their respective posisitions.

On December 9, 2020, the district court held an evidentiary hearing on Mr. Pair's Motion To Dismiss. Mr. Pair argued he did not request any continuance, and that he consistently voiced his fustration at the delays in setting his trial. Pair contended he had been waiting 222 days - well past the 70 days speedy trial requirement under the Speedy Trial Act, even with the exclusions he agreed with. At this same hearing the district court set trial to be heard on January 19, 2021.

On January 8, 2021, the E.D.VA, again extended criminal jury trials on the basis of the pandemic until February 28, 2021 in GeneralOrder 2021-01. That general order excluded the period of January 8 through February 28, 2021 from speedy trial calculations. The district court continued Mr. Pair's trial and rescheduled it to be heard on March 8, 2021.

On January 27, 2021 and February 26, 2021, the district court denied Mr. Pair's motion to dismiss under the SPeedy Trial Act and constitutional speedy trial rights.

On March 8, 2021, Mr.Pair's trial began. During the testimony the Government called Timothy Newton, a confidential informant used to conduct the controlled buys used to indict Mr. Pair. Mr. Newton was fitted with recording device. The videos were entered into evidence, and at trial Mr. Newton identified Mr. Pair as the person from whom he purchased heroin ffrom the

video. Mr. Newton had previously testified that he did not know Mr. Pair well, but rather from around the neighorhood. Mr. Newton made an in-court identification of Mr. Pair, however Mr. Pair was wearing a mask and was not asked to remove it. Raising questions regarding in-court identification.

From the start to the conclusion, the Public was not allowed into the courtroom to watch. After a two-day trial the jury returned a guilty verdict.

During the sentencing hearing the district court heard an oral motion from the Government for an upward departure. Mr. Pair was not given the opportunity to respond to the oral motion. The district court granted the oral motion and issued an upward departure and sentenced Mr. Pair to 144 months on both counts to run concurrently on May 24, 2021.

REASONS FOR GRANTING THE PETITION

1. CAN A UNITED STATES DISTRICT COURT'S GENERAL ORDER SUSPEND RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES OF AMERICA?
2. DID THE COVID-19 PANDEMIC SUSPEND THE SIXTH AMENDMENT OF CONSTITUTION OF THE UNITED STATES RIGHT TO A SPEEDY TRIAL?
3. DID THE COVID-19 PANDEMIC SUSPEND THE SIXTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES RIGHT TO A PUBLIC TRIAL?

Our constitutional rights are not suspened during a crisis. On the contrary, during difficult times we must remain the most vigilant to protect the consitituional rights of the powerless. Even when faced with limited resources, must fulfill its duty of protecting those in custody. See **MANEY, et al v. BROWN, et al.**, Case No. 6:20-cv-00570-SB, at 3 (ORD Feb. 2, 2021).

The COVID-19 pandemic brought with it "previously unimaginable restrictions on individual liberty" and served as a sort of constitutional stress test. See Justice Alito's Remarks at Federalist Society's annual National Lawyers Convention (Nov. 2020). However, despite the unprecedented scenarios it posed, the United States Supreme Court recognized a line had to be drawn when using the as a reason to restrict individuals' access to their constitutional rights. Justice Gorsuch, in **ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK v CUOMO**, 592 U.S. ___, 141 S.Ct. 63, 208 L.Ed. 2d 206 (2020), emphasized in his concurring opinion that "even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical.

The Eighth Circuit Court of Appeals on a case involving the extension of remarked that "there is no pandemic exception to the Constitution". See **CARSON v SIMON**, 978 F.3d 1051 (8th Cir. 2020).

SPEEDY TRIAL

The Sixth Amendment to the United States Constitution provides the accused

in a criminal prosecution with the right to a speedy and public trial by an impartial jury. The Speedy Trial Clause implements the presumption of innocence afforded the accused by preventing undue and oppressive incarceration prior to trial,...minimizing anxiety and concern accompanying public accusation, and...limiting the possibilities that long delay will impair the ability of an accused to defend himself. The United States Supreme Court has highlighted the importance of this Clause assigned to it by the Framers of the Constitution by citing to the words Sir Edward Coke's Institutes of Laws of England, who wrote that "the innocent shall not be worn and wasted by long imprisonment, but...speedily come to his trial. See **KLOPFER v NORTH CAROLINA**, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed. 2d 1 (1967).

An accused's rights under this Clause are triggered by "either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge." In **BARKER v WINGO**, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 2d 101 (1972), the Supreme Court of the United States devised a four-factor balancing test to determine whether there has been a violation of the accused's constitutional right to have a speedy trial: (1) whehter the delay was uncommonly long; (2) what the reason was for the delay; (3) whether the defendant asserted his right to a speedy trial: and (4) whether prejudice resulted to the defendant.

The issue regarding the Speedy Trial CLause is whether the Eastern District of Virginia violated that speedy trial right with a series of General Orders continuing criminal jury trials due to the COVID-19 pandemic, with some specifically including the period of time covered by the orders would not be included in defendant's speedy trial calculation. To date, the appropriateness of those orders as applied to individual defendant's speedy trial rights does not appear to have yet been addressed. However, as later in this petition the

Ninth Circuit of Appeals addressed the Right to A Public Trial based on similar Orders by District Courts in **UNITED STATES v ALLEN**, 34 F.4th 789, 2022 U.S. App. LEXIS 13098 (9th Cir. 2022).

Mr. Pair contends that the length of the delay was caused largely due to the improper blanket continuances adopted by the district court as a result of the pandemic. The district court acknowledged that the length of delay in this case is "presumptively prejudicial".

There is compelling argument that pandemic-related court closures and continuances are attributable to the federal government. A report published earlier in 2020 on the government's response to COVID-19 crisis concludes that inaction in January, February and March, 2020 allowed the virus to surge unmitigated. See THE BROOKINGS INSTITUTE, "The Federal Governemnt's Coronavirus Response - A Public Health Timelime." Philip A. Wallach and Justus Meyers, March 31, 2020.

Widespread closures, such as the one prompting General Order 2020-02, did not occur until mid-March 2020. In this regard, it is reasonable to attribute the closure and continuance to the federal government. Under that theory, such an extensive delay to trial created by the government's action or inaction would unquestionably violate the Speedy Trial Act and the Sixth Amendment guarantees.

The government will argue that they cannot be responsible for what Executive officials did, however courts have held the government reliable for the actions or inactions of law enforcement officials, medical examiners, and lab techs. The same responsibility can easily be applied here.

The continuance orders related to COVID-19 merely stated the General Orders had been incorporated and simply provided the copy of the text included in those orders. It did not address Mr. Pair's circumstances, the length of his

detention, the presence of the virus in the facility where he was held, or an individualized reasoning as to his continued detention without bond. The lack of indivualized assessment in the continuances are such that these delays should have weighed in Mr. Pair's favor for violation of Speedy Trial Clause.

In its denial of Mr. Pair's motion to dismiss his indictment because of violation of the SPeedy Trial Clause, the district court held it could correct a substantive error in its previous continuance orders for failure to conduct an individualized assessment of Mr. Pair when issuing blanket continuances of his case. Mr. Pair contends it cannot be the case that a district court significantly violates an individual's constitutional rights, and once the accused raises the issue, the district court retroactively corrects its error several months later with nothing in the record to corroborate there was an individualized assessment as to how the blanket continuances affected Mr. Pair and whether they ere properly applied to him.

The district court likened Mr. Pair's case to that of **U.S. v TAYLOR**, 2020 U.S. Dist. LEXIS 232741 (D.D.C. Dec. 10, 2020), for th eproposition that Mr. Pair has never advanced an argument as to how jury trials - as a whole - in the Eastern District of Virginia would have continued taking place had the Government acted with urgency as it related to the pandemic. Mr. Pair contends it is not his nor any defendant's responsibility to bring themselves to trial; that duty rest with the Government. There was ample time for the Government and the Courts to devise a plan, such as that ultimately implemented at Mr. Pair's trial, in which the jury would feel safe, and health of the court personnel, attorneys, jurors, and Mr. Pair was adequately preserved.

The availability of video and telephonic conferences, along with access to electronic communication, provided ample mediums through which a task force devised to come up with a strategy in which an accused's speedy trial rights

were not violated could have been created.

In ALLEN, the Ninth Circuit discussed the scope of the public trial right. the "public trial guarantee" is a right "created for the benefit of the defendant." **GANNETT CO. INC. v DePASQUALE**, 443 U.S. 368,380, 99 S.Ct. 2898, 61 L.Ed. 2d 608 (1979). The open nature of the proceedings protects the defendant by ensuring "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. 257,270 n.25, 68 S.Ct. 499, 92 L.Ed. 682 (1948). There is also a societal interest in public observation of trial proceedings because, among other things, such observation gives "assurance to those not attending trials that others were able to observe the proceedings and enhanced public confidence." **PRESS-ENTERPRISE CO. v SUPERIOR CT. of CALIFORNIA, RIVERSIDE CTY.**, 464 U.S. 501,507, 104 S.Ct. 819, 78 L.Ed. 2d 629 (1984).

The Supreme Court has held that "the right to an open trial may give way in certain cases to other rights or interests." **WALLER v GEORGIA**, 467 U.S. 39,45, 104 S.Ct. 2210, 81 L.Ed. 2d 31 (1984). The test for determining whether a particular closure order violates a defendant's public trial right changes depending on whether the courtroom closure is total or partial. A total closure of the courtroom means that "all persons other than witnesses, court personnel, the parties and their lawyers are excluded for the duration of the hearing." **U.S. v RIVERA**, 682 F.3d 1223,1236 (9th Cir. 2012)(cleaned up). In Mr. Pair's case there was a total closure of the courtroom for the entire duration of the trial.

Before ordering a total closure, the court must determine that there is "an overriding interest based on findings that closure is essential to preserve higher values. **WALLER**, 467 U.S. at 45. Any closure must be "narrowly tailored

to serve" the overriding or substantial interest at issue, and the court must consider reasonable alternatives to a closing the courtroom. **RIVERA**, 682 F.3d at 1235. Courts must sua sponte consider possible alternatives to a closure "even when they are not offered by the parties." **PRESLEY v GEORGIA**, 558 U.S. 209,214, 130 S.Ct. 721, 175 L.Ed. 2d 675 (2010).

The district court characterized its overriding interest as "keeping people safe and limiting the spread of the virus." As the Supreme Court has acknowledged, "stemming the spread of COVID-19 is unquestionably a compelling interest." **ROMAN CATH. DIOCESE OF BROOKLYN bv CUOMO**, 141 S.Ct. 63,67, 208 L.Ed. 2d 206 (2020). Mr. Pair agree that the goal of limiting the transmission of COVID while holding a trial was an overriding interest, however Mr. Pair focus's on the question whether the court's COVID protocols were narrowly tailored to close the courtroom to a public trial.

A courtroom closure is narrowly tailored to a substantial or overriding interest if it is "no broader than necessary to protect that interest. **WALLER**, 467 U.S. at 48. In considering whether a burden imposed on a constitutional right is narrowly tailored, the Supreme Court considers, among other things, "different methods that other jurisdictions have found effective" in addressing the problem "with less intrusive tools." **McCULLEN v COAKLEY**, 573 U.S. 464,494, 134 S.Ct. 2518, 189 L.Ed. 2d. 502 (2014).

In DIOCESE of BROOKLYN, the Court determined that restrictions could not be regarded as narrowly tailored, in part because they were "much tighter than those adopted by many other jurisdictions hard-hit by the pandemic." See **DIOCESE of BROOKLYN**, 141 S.Ct. at 67.

The existence of reasonable alternatives also shed light on whether closure restrictions are narrowly tailored. For instance, instead of closing the entire building, a trial court should consider the reasonable alternative

of "closing only those parts of the hearing that jeopardized the interests advanced." **WALLER**, 467 U.S. at 48. The trial court should have adopted the reasonable alternative of finding additional space in the courtroom to accommodate members of the public who **wished** to attend. **PRESLEY**, 558 U.S. at 215.

In determining whether the district court erred in not adopting less restrictive alternatives here, we begin by considering the policies adopted by other jurisdiction to address COVID issues. See **McCULLEN**, 573 U.S. at 494. In this context, video streaming is to be a less restrictive alternative to audio streaming, because the core of the defendant's Sixth Amendment right is to have his trial open for public attendance and observation. During the pandemic, federal trial courts throughout the country addressed the same issue as the district court here. These courts (including courts that held trials in late 2020, when Mr. Pair had trial date reset) consistently **allowed** some form of visual access to the trial, either by allowing the public to view a live video feed of the trial in a separate room in the courthouse, or by allowing a limited number of spectators to be present in the courtroom.

Courts also adopted a range of measures to minimize **health** risks. Some courts asked for lists of attendees who wanted to observe the trial, or allowed only a small number of public attendees (rather than all interested spectators) to observe the proceedings. Other courts required members of the public attending a proceeding to pass tempature checks, wear a mask, and answer a health questionaire. See attached Exihibit of collected cases by the Ninth Circuit.

Each of the alternatives adopted by other courts was "more narrowly tailored and more protective of constitutional rights" than a total closure of the courtroom. That other jurisddictions could address the pandamic using more

targeted means suggests that the district court here had "too readily forgone options that could serve its interests just well, without substantially burdening" Mr. Pair's public trial and speedy trial rights. **McCULLEN,** 573 U.S. at 490.

In light of the availability of these alternatives, the district court did not articulate such unique reasons to hold a public trial or speedy trial. To meet the requirement of narrow tailoring, the court must show that reasonable alternative measures would fail to achieve the government's interest, not simply that the chosen route is easier. **Id.** at 495. Here the district court cannot show that allowing a limited number of members of the public to view the trial in the courtroom, or via a live-streamed video in a different room, would imperil public health. See **DIOCESE of BROOKLYN,** 141 S.Ct. at 67. Rather, the Supreme Court has indicated that limiting maximum attendence is a reasonable means of minimizing health risks from COVID. **Id.**

When courts order a total closure of the courtroom, "the balance of interests must be struck with special care. **WALLER,** 467 S.Ct. at 45. Because the district court could have addressed its legitimate concerns with rules short of a total ban" on the public's access to the trial, the district court here failed to strike the appropriate balance. **S. BAY UNITED PENTECOSTAL CHURCH v NEWSOM,** 141 S.Ct. 716,718, 209 L.Ed. 2d 22 (2021)(Gorsuch, J., statement).

Mr. Pair contends that in the circumstances presented here, the district court's complete prohibition on the public's visual access to the trial was not narrowly tailored and, accordingly violated Mr. Pair's Sixth Amendment right to a public trial. Mr. Pair contends further that the General Orders issued violated his Sixth Amendment right to a speedy trial. Becasue the remedy should be appropriate to the violation, **WALLER,** 467 U.S. at 50, a defendant whose right to a public trial was violated is entitled to a new public proceeding in

place of the one that was erroneously closed. Id. at 49. The remedy for violation of the Speedy Trial Clause is entitled to dismissal of the charges against him with prejudice, Mr. Pair contends.

4. WAS THE CONSTITUTION OF THE UNITED STATES FIFTH AMENDMENT RIGHT DUE PROCESS CLAUSE VIOLATED WHEN THE UNITED STATES DISTRICT COURT GRANTED A PLAINTIFF'S ORAL MOTION FOR UPWARD VARIANCE WHILE DENYING DEFENDANT RIGHT TO OBJECT TO ORAL MOTION?

During sentencing the Government made an oral motion for an upward variance against Mr. Pair. When trial counsel for Mr. Pair attempted to object and be heard on the oral motion, the district court refused to allow Mr. Pair or counsel to be heard. The district court granted the upward variance.

It has been long established that the fundamental requirement of due process is opportunity to be heard upon such notice and proceedings as are adequate to safeguard rights for which constitutional protection is invoked. see **ANDERSON NAT'L BANK v LUCKETT**, 321 U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692 (1944). One who has acquired rights by administrative or judicial proceeding cannot be deprived of them without notice and opportunity to be heard is of essence of due process of law. **GARFIELD v UNITED STATES**,, 211 U.S. 249, 29 S.Ct. 62, 53 L.Ed. 168 (1908).

The district court set forth a deadline for sentencing memorandums and motions before the sentencing hearing, giving both parties the opportunity to be heard. Yet when the district court disallowed Mr. Pair to object, respond or comment on the oral motion by the Government violated due process of law.

Mr. Pair contends that the adequate remedy for such violation resentencing with the removal of the upward variance that the district court had granted and applied,or in the alternative, conduct a new sentencing hearing and allow Mr. Pair the opportunity to be heard on the previous oral motion submitted by the Government.

CONCLUSION

Mr. Pair contends that there is nothing in the United States Constitution that allows the total suspension of the Constitution and the Rights within. When the many district courts issued General Orders, much as the Eastern District of Virginia did in this case, those General Orders violated the Rights of those awaiting criminal prosecution with total disregard of those constitutional rights.

The Ninth Circuit Court of Appeals have appeared to make a proper balancing act in determining that such Orders violated the Constitution, separating it from other sister Circuits, including the Fourth Circuit.

As such, Mr. Pair believes that the district court violated his Fifth and Sixth Amendment Rights to Due Process of Law, Speedy Trial Clause and Public Trial Clause with the issuance of the General Orders. The Fourth Cicuit consented to these violations when it affirmed the district courts judgment and sentence.

Due to the violations committed, Mr. Pair beleives that the remedies to resolve these violations are complete dismissal with prejudice for violation of the Speedy Trial Clause; remand for a new public trial for violation of Public Trial Clause; and remand for new sentencing hearing, or, reduction of sentence in the amount of the upward departure for violation of the Due Process of Law Clause.

Mr. Pair believes these are just and adequate remedies for these constitutional violations.