No.

IN THE

SUPREME COURT OF THE UNITED STATES

NIDAL M. HASAN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

CAPITAL CASE

PETITION FOR A WRIT OF *CERTIORARI*

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August 1, 2024

CAPITAL CASE

QUESTION PRESENTED

A violation of the public trial guarantee is structural error, defying harmless error review. *Weaver v. Massachusetts*, 582 U.S. 286, 299 (2017). In *Waller v. Georgia*, this Court said the remedy for a breach of the public trial guarantee "should be appropriate to the violation." 467 U.S. 39, 50 (1984). This Court later explained in *Weaver v. Massachusetts* that the appropriate remedy is, generally, "automatic reversal." *Weaver*, 582 U.S. at 299.

The question presented is whether, in this capital case, a court of appeals may afford *no* remedy for a public trial violation where the defendant objected to the closure at trial and raised the issue on direct review?

PARTIES TO THE PROCEEDINGS

Petitioner is Nidal M. Hasan.

The Respondent is the United States of America.

RELATED PROCEEDINGS

Other than the direct appeals that form the basis for this petition, there are no related proceedings for purposes of S. Ct. R. 14.1 (b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Nidal M. Hasan, petitions this Court for a writ of certiorari to review the final order of the Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces is reported at *United States v. Hasan*, 84 M.J. 181 (C.A.A.F. 2024) and reproduced at Petition Appendix ("Pet. App.") 3a-121a. The opinion of the Army Court of Criminal Appeals is reported at 80 M.J. 682 (A. Ct. Crim. App. 2020), *reh'g denied*, 2021 CCA LEXIS 114 (A. Ct. Crim. App. Mar. 15, 2021) and reproduced at Pet. App. 122a-169a.

JURISDICTION

The order of the United States Court of Appeals for the Armed Forces that denied in part and granted in part the petition for reconsideration was entered on March 4, 2024. Pet. App. 1a. On May 23, 2024, Chief Justice Roberts extended the time for petitioner to file a petition for a writ of certiorari to and including August 1, 2024. This Court has jurisdiction over the timely filed petition under 28 U.S.C. § 1259(1).

CONSTITUTIONAL PROVISION

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

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

INTRODUCTION

It is not every day a standby counsel for a pro se capital defendant hands the prosecution his files when he disagrees with the defendant's strategy. But when it does happen, the public has the right to see how the issue is resolved, and the defendant enjoys a right under the Sixth Amendment's Public Trial Clause to insist the public is able to do so. Interested spectators keep the judge and counsel "keenly alive to a sense of their responsibilities and to the importance of their functions," *Waller*, 467 U.S. at 46, and ensure the defendant is being "fairly dealt with." *Id*. For the pro se capital defendant whose "core right" is "to preserve actual control over the case he chooses to present[,]" *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984), this certainly includes ensuring the judge "supervises the protection of [his] right throughout the trial[,]" *id*. at 179, and exposing any unethical attempts by government-employed standby counsel to usurp control of the case to "the salutary effect of public scrutiny." *Waller*, 467 U.S. at 47.

In this capital case, which garnered immense public attention, petitioner Nidal Hasan made the controversial decision to represent himself, but when his standby counsel handed over a trove of information in the middle of trial, including detailed notes of nearly sixty prospective witnesses, and decried Hasan's strategy as "repugnant" in open court, the public never saw how this conflict was resolved. Pet. App. 24a, 178a. Over Hasan's objection and despite his explicit waiver of privilege, the judge cleared the court, leaving the press speculating about a mistrial.[1] Pet. App. 181a-

[1] See Manny Fernandez, *Lawyer Says Fort Hood Defendant's Goal Is Death*, New York Times (Aug. 7, 2013) (noting that "military law experts said releasing privileged information to the prosecution raised the prospect of a mistrial."). Available at https://www.nytimes.com/2013/08/08/us/fort-hood-suspects-

183a. Outside of the public eye, the judge heard details of a discordant relationship existing long before Hasan's pro se request, only to hastily renew Hasan's waiver of counsel and get his waiver for "any issues regarding the release * * * that was filed by * * * standby counsel." Pet. App. 185a, 189a. When open proceedings resumed the next day, the judge described the situation as "simply a matter of standby counsel disagreeing with the way [Hasan] wants to try his case" and moved on. Pet. App. 198a-199a. Hasan made repeated requests for everything to be unsealed to clear his name, but the transcript remained sealed for nine years. Pet. App. 224a.

The Court of Appeals for the Armed Forces (CAAF) assumed, without deciding, that the closure violated Hasan's right to a public trial, but for the first time since this Court's foundational decision in *Waller*, the CAAF denied any relief for this structural error. Pet. App. 32a, 35a. According to the court, it "adhere[d] to [*Waller*'s] ruling" that a "remedy should be appropriate to the violation," Pet. App. 35a, and affirmed Hasan's death sentence because it deemed a new trial "grossly disproportionate" to the violation. Pet. App. 33a. But while the CAAF predicated nearly its entire decision on this one line from *Waller*, that case was ultimately remanded to redo the closed hearing with the potential for an entirely new trial. *Waller*, 467 U.S. at 50. This Court afforded Waller a remedy. The CAAF afforded Hasan nothing.

This case warrants this Court's attention for several reasons. For one, the CAAF's decision showcases a clear split in the courts of appeal. On one side, several federal circuits explicitly hold that a public trial violation *entitles* a defendant to relief, and numerous other jurisdictions accord with these circuits. So, too, did the CAAF until

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this case. Indeed, to affirm Hasan's conviction and death sentence, the CAAF overturned in part its own precedent to the surprise of even government counsel who presented no argument that this structural error could result in no relief.[2]

The CAAF now joins the Second Circuit on the other side of the divide. In these two courts, a violation of the public trial right does not, itself, entitle a defendant to relief. Instead, whether a defendant receives a new trial (or any other remedy) turns on whether a court deems the relief for a *preserved* structural error "disproportionate."

Moreover, the CAAF's analysis in this case flouts this Court's precedents. Specifically, the CAAF indulged in an impermissibly broad reading of *Waller* (a decision that, itself, provided a remedy) and engaged in an *ad hoc* analysis mirroring plain error review to deny relief, undermining *Weaver*'s pronouncement that a preserved violation favors a defendant and generally entitles him to a new trial. That CAAF contravened this Court's precedents in a capital case, where courts must be "particularly sensitive to insure that every safeguard is observed[,]" *Gregg* v. *Georgia*, 428 U. S. 153, 187 (1976), underscores the need for this Court's intervention.

Additionally, resolution of the question presented is a matter of significant importance. The question is likely to reoccur, and the CAAF's current resolution, left undisturbed, poses a palpable threat to erode an essential protection in future cases. Its reach extends far beyond this case.

For these reasons, this Court should grant review and reverse. Alternatively, this Court should grant review and remand to the CAAF for a determination of whether

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[2] *See* The Judge Advocate General's Legal Center and School, Criminal Law Department Presents – CAAF Chats, Ep. 24: *United States v. Hasan* (C.A.A.F. 2023) (Part 1) (Nov. 1, 2023) at 23:00-27:40. Available at: https://www.dvidshub.net/audio/77169/criminal-law-department-presents-caaf-chats-ep-24-united-states-v-hasan-caaf-2023-part-1

a new proceeding limited to a closure like in *Waller* is appropriate in this case. Indeed, the CAAF claimed it "adhere[d]" to *Waller*, but never mentioned or analyzed whether the remedy in that case could remedy the error here.

STATEMENT OF THE CASE

A. Legal Background

1. The Sixth Amendment guarantees the right to a public trial in all criminal prosecutions. U.S. Const. amend. VI. This constitutional guarantee of an open trial extends to servicemembers in military trials, *United States v. Hershey*, 20 M.J. 433, 435 (C.M.A. 1985) (citations omitted), where the rule of openness traces its origins to the time of the Carlovingian Kings when courts-martial were held "*in the open air*." Colonel William Winthrop, Military Law and Precedents, 161 (2d. ed. 1920) (emphasis in the original). Its meaning "is as full and complete as in civilian courts." *United States v. Czarnecki*, 10 M.J. 570, 571 (A.F.C.M.R. 1980) (citing *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977)); *see also United States v. Ortiz*, 66 M.J. 334 (C.A.A.F. 2008).

2. In *Waller*, this Court established the standard to review public trial violations. There, the prosecutor asked to close the suppression hearing to introduce evidence from wiretaps "which [might] involve a reasonable expectation of privacy of persons." 467 U.S. at 41. The trial judge agreed and closed the entire suppression hearing, during which only a few hours were devoted to the wiretap tapes. *Id*. at 42. Waller was convicted, and the Georgia Supreme Court affirmed. *Id*. at 43.

Waller first determined the public trial right applied to the proceeding. *Id*. at 47. It turned to the core values of a public trial, to include ensuring that the public may see the defendant "is fairly dealt" with and that the judge carries out her duties responsibly, and it found these aims and interests were "no less pressing" in a suppression hearing. *Id*. at 46. *Waller* also noted the "strong interest" in exposing

allegations of misconduct to the "salutary effects of public scrutiny." *Id.* at 47.

After determining the public trial right applied, *Waller* next adopted the four-part standard from *Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501 (1984) (*Press Enterprise I*), to justify a court closure:

> [(1)] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [(2)] the closure 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 trial court] must make adequate findings supporting the closure.

Id. at 48 (citing *Press-Enterprise I*, 464 U.S. at 510).

In applying the standard, *Waller* found the closure plainly unjustified. *Id.* at 48. The state's proffer was not clear as to "what privacy interests might be infringed, how they would be infringed, what portions of the tapes might infringe them, and what portion of the evidence consisted of the tapes." *Id.* at 48. This led to overly "broad and general" findings. *Id.* at 48. Moreover, the trial judge failed to consider reasonable alternatives such as asking the state to identify why closure was necessary and subsequently "closing only those parts of the hearing that jeopardized the interests advanced." *Id.* at 48.

Addressing remedy, *Waller* rejected a need to conduct a prejudice review, finding "the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance[.]" *Id.* at 49, n. 9. However, the Court concluded that:

> [W]e do not think [the violation] requires a new trial *in this case*. Rather, the remedy should be appropriate to the violation. If, after a new suppression hearing, essentially the same evidence is suppressed, a new trial presumably would be a windfall for the defendant, and not in the public interest. [* * *] A new trial need be held only if a new, public suppression hearing results in the suppression of material evidence not suppressed at the first trial.

Id. at 50 (emphasis added).

3. While *Waller* predated the development of the modern structural error doctrine, *see Arizona v. Fulminante*, 499 U.S. 279 (1991), this Court has consistently regarded public trial violations as "structural error" since then. *See e.g.*, *McCoy v. Louisiana*, 584 U.S. 414, 427 (2018); *Weaver*, 582 U.S. at 298; *United States v. Davila*, 569 U.S. 597, 611 (2013); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 (2006); *Neder v. United States*, 527 U.S. 1, 8 (1999). This is so for two reasons. First, there is "difficulty in assessing the effect of the error." *Weaver*, 582 U.S. at 298. Second, the right protects not only the interests of the defendant, but the interests of the public and the press. *Id*.

A structural error "def[ies] analysis by harmless error standards[,]" *id*. at 295 (quoting *Fulminante*, 499 U.S. at 309) (alteration in original), and it "means * * * that the government is not entitled to deprive the defendant of a new trial by showing that the error was harmless beyond a reasonable doubt." *Id*. at 299 (internal quotations and citations omitted). While *Waller* afforded a remedy short of a new trial, this Court made plain in *Weaver*, its most recent public trial case, that when the violation is "preserved and raised on direct review, the balance is in the defendant's favor, and a new trial generally will be granted as a matter of right." *Weaver*, 582 U.S. at 305.

B. Factual Background

1. On November 5th, 2009, Hasan, a major in the United States Army, entered the Soldier Readiness Processing center on Fort Hood, Texas, and opened fire, killing thirteen and wounding many more. Pet. App. 122a, 124a. The government charged Hasan with thirteen counts of premeditated murder and thirty-two counts of attempted

premediated murder. Pet. App. 216a-223a. His case was later referred capital. Pet. App. 218a.

Publicity surrounding the case was intense. Even before trial, it was estimated that more than 22,000 articles were published nationally. Pet. App. 211a. In the local area alone, there approximately 1,500 published articles and more than 3,200 televised news stories. Pet. App. 211a.

2. On the eve of trial nearly four years after he was charged, Hasan moved to proceed pro se. Pet. App. 8a-9a. By then, a significant rift divided Hasan, a devout Muslim, and his Government-detailed counsel, who wanted to present a theory offensive to Hasan's deeply held religious beliefs. Pet. App. 9a, 13a. Specifically, counsels' theory was that Hasan's "religious fervor" had kept him from considering the consequences of his acts. Pet. App. 9a, 13a. Counsel explained Hasan's two choices: go with their theory or go without representation. Pet. App. 9a, 13a.

Unaware of what was transpiring between Hasan and his counsel, the judge approved his pro se request. Pet. App. 11a, 14a. His counsel remained on as "standby." Pet. App. 11a.

3. Following the first day of trial, which saw Hasan remain relatively mum during the prosecution's first tranche of witnesses, Hasan's standby counsel filed a motion accusing Hasan of intentionally seeking the death penalty, and asked to "withdraw" from having to assist him in any way while remaining ready, from afar, to reassume his defense. Pet. App. 174a-179a. The body of the motion contained work-product with defense's expert jury consultant. Pet. App. 174a. Enclosed with the motion was standby counsels' "entire mitigation case" it had previously prepared,

including detailed notes relating to nearly sixty prospective witnesses. Pet. App. 24a. Counsel presented the motion to the prosecution in its entirety. Pet. App. 171a.

The following morning, the judge held a hearing where standby counsel publicly decried Hasan's strategy as "repugnant" and accused him of "working in concert" with the prosecution. Pet. App. 178a, 181a. When asked if he had a response he wanted to give *ex parte*, Hasan insisted he wanted to do so publicly, Pet. App. 182a, feeling "compelled to clarify the issue." Pet. App. 183a. He objected to any closure and explicitly waived any privilege. Pet. App. 182a. However, despite his objection, and without making any findings, the judge nonetheless closed the court. Pet. App. 183a.

In the closed hearing, Hasan explained, "[t]his is my reputation, my principles at stake here … I feel compelled to clarify … and say … I'm not crazy." Pet. App. 188a-189a. For Hasan, standby counsel had been compromising his religious principles for years, and he wanted the public to see the true reasons for his actions. Pet. App. 185a. For this reason, he wanted to "unseal everything" about standby counsels' motion and reaffirmed his waiver of privilege. Pet. App. 187a-189a.

Shielded from public view, the judge made an abbreviated effort to resolve the conflict, resecured Hasan's waiver of counsel, and confirmed his preference that standby counsel remain. Pet. App. 194a-195a.

There was still the problem of the unauthorized disclosure. Media reports that day discussed the potential for a mistrial,[3] and the judge took the opportunity of the closed hearing to put that to bed. Without explaining available recourses, the judge got Hasan's waiver to "any issues regarding the release of the motion." Pet. App. 189a.

[3] See Fernandez, *supra* note 1.

The following day, when the trial resumed in open court, the judge offered the following *post hoc*, barebones findings that failed to address Hasan's repeated waiver of privilege:

> I believed that we needed to do that to address some issues that arose between standby counsel and [Hasan], and issues relating to the release of privileged attorney work product, attorney/client, and other privileged communications. There was substantial probability that an overriding interest of retaining the confidentiality of those communications would be prejudiced if the proceedings remained open, and I believed that other means to address the issue were inadequate.

Pet. App. 198a. She then described all what transpired as "simply a matter of standby counsel disagreeing with the way [Hasan] wants to try his case," and denied standby counsels' motion. Pet. App. 198a-199a.

Despite Hasan's requests to unseal everything, the judge renewed her order for the motion and transcript to remain sealed after trial. Pet. App. 195a. The transcript, which itself contained no privileged matters, remained sealed for nine years. Pet. App. 224a.

C. Procedural Background

1. The Army Court of Criminal Appeals affirmed, finding "nothing contained [in the closed hearing] affect[ed] the legal or factual correctness of the findings or sentence in [Hasan's] case." Pet. App. 169a.

2. The CAAF likewise affirmed, but unlike the ACCA, the CAAF assumed error in the closure, just not one deserving of relief. The CAAF "look[ed] to * * * *Waller*, and adher[ed] to its ruling" that the remedy should be appropriate to the violation and not a windfall. Pet. App. 32a.

The CAAF strung together six *ad hoc* factors it claimed demonstrated reversal

was "grossly disproportionate" and a "windfall." Pet. App. 33a-35a. Three of the factors related to the judge's handling of the closure. Pet. App. 33a-35a. According to the CAAF, she explored some reasonable alternatives; she eventually made findings; and her findings were "not inadequate." Pet. App. 34a. The CAAF also relied on the belated unsealing of the transcript *nine years* after Hasan's trial that, to CAAF, showed no one infringed on Hasan's interests; the closure's temporary nature; and the absence of a presentation of evidence. Pet. App. 33a-35a.

Hasan petitioned the CAAF for reconsideration, in part, on the grounds CAAF misapplied *Waller*, subjected the preserved structural error to plain error review, and failed to consider *Waller*'s remedy of a remand. Pet. App. 1a. The CAAF denied the petition as to this part. Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

A. There is a conflict in the courts of appeals over the question presented.

1. At least three federal circuits answer the question presented in the negative as a violation of public trial right *entitles* a defendant to relief. Specifically, the **Eleventh Circuit** has held "[t]he mere demonstration that [a petitioner's] right to a public trial has been violated entitles [him] to relief." *Judd v. Haley*, 250 F.3d 1308, 1315 (11th Cir. 2001). In *Judd,* the judge temporarily cleared the court of all spectators over Judd's objection during a witness's trial testimony. *Id.* at 1311-12. Finding error, the Eleventh Circuit granted Judd's writ of habeas, explaining that "all Judd [needed to] demonstrate [wa]s that the trial court did not comply with the procedures outlined in *Waller* prior to its decision to completely remove spectators from the courtroom." *Id.* at 1319.

The **First Circuit** borrowed from the Eleventh Circuit to find the same. *See Owens v. United States*, 483 F.3d 48, 63 (1st Cir. 2007) ("The mere demonstration that his right to a public trial was violated entitles a petitioner to relief.") (quoting *Judd*, 250 F. 3d at 1315); *see also United States v. Candelario-Sanatana*, 834 F.3d 8, 22 (1st Cir. 2016) ("The mere demonstration that a [defendant's] right to public trial was violated entitles [him] to relief.") (first alteration in original) (citations omitted). Similar to *Judd*, *Candelario-Sanatana* involved an unjustified closure during a witness's trial testimony. *Id.* at 23. The First Circuit vacated Candelario-Santana's conviction on direct review and reversed. *Id.* at 24.

The **Ninth Circuit** accords with the Eleventh and the First Circuits, finding that "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." *United States v. Allen*, 34 F.4th 789, 800 (9th Cir. 2022). *Allen* concerned a COVID-19 restriction where the only public access to Allen's trial was by audio "live stream." *Id*. at 793. The Ninth Circuit held there was error and a new trial was the only appropriate remedy. *Id*. at 801; *see also United States v. Rivera*, 682 F.3d 1223, 1237 (9th Cir. 2012); *United States v. Withers*, 638 F.3d 1055, 1066 (9th Cir. 2011) ("Because violation of the public trial right is a structural error, Withers would have been entitled to automatic reversal of his conviction and a new trial had he established a violation.").

While not as explicit as the First, Ninth, and Eleventh circuits, the **Sixth** and **Tenth Circuits** nonetheless grant relief on error alone. *See United States v. Simmons*, 797 F.3d 409, 413, 416 (6th Cir. 2015); *Davis v. Reynolds*, 890 F.2d 1105, 1112 (10th Cir. 1989). This is also true of decisions from the **Supreme Courts of Washington**, **Wisconsin**, **North Dakota, Colorado, Minnesota, and Michigan**. *See, e.g.*, *State v. Wise*, 288 P.3d 1113, 1122 (Wash. 2012); *State v. Njonge*, 334 P.3d 1068, 1073, n. 3 (Wis. 2014); *State v. Rogers*, 919 N.W.2d 193, 203 (N.D. 2018); *People v. Jones*, 464 P.3d 735, 745 (Col. 2020); *State v. Jackson*, 977 N.W.2d 169, 174-75 (Minn. 2022); *People v. Veach*, 993 N.W.2d 216, 219, n. 8 (Mich. 2023).

The decisions of these courts suggest that the remedy for a public trial violation is a new trial unless the erroneously closed proceeding is severable from the trial and can be "redone" independently as in *Waller*. *See Rivera*, 682 F.3d at 1237; *Wise*, 288 P.3d at 1122 (ordering a new trial for erroneous closure during voir dire; while remand may be appropriate for an "easily separable" part of trial, "we cannot reasonably order a 'redo' of voir dire"); *Njonge*, 334 P.3d at 1073, n. 3 ("Where the error involves only the

closure of a pretrial proceeding that can be repeated without any effect on the trial, a lesser remedy may be appropriate") (citing *Waller*, 467 U.S. at 40); *Rogers*, 919 N.W.2d at 203 (declining to reverse but remanding to reconduct an erroneously closed competency hearing to be "consistent with *Waller*") (citing *Waller*, 467 U.S. at 50); *Jones*, 464 P.3d at 745 ("because such a violation [of the public trial right] constitutes structural error that cannot be cured by a remand in this instance, we reverse Jones' conviction and remand the case for a new trial."); *Jackson*, 977 N.W.2d at 174-75 (remanding for a new *Schwartz* hearing that had been unlawfully closed because a *Schwartz* hearing is more similar to the suppression hearing in *Waller* than to voir dire); *Veach*, 993 N.W.2d at 219, n. 8 (distinguishing *Waller* because the closure occurred during trial when the "constitutional protections of a public trial are at their zenith.").

2. In contrast, the **Second Circuit** and **the CAAF** answer the question presented in the affirmative as a violation of the public trial right does not necessarily entitle a defendant to any relief regardless of whether the proceeding is severable.

For example, in *Jordan v. Lamanna*, the Second Circuit assumed a violation of a preserved public trial violation but denied relief anyway because "no precedent from [this Court] * * * clearly establishes the remedy for a trial court's closure of the courtroom without following * * * *Waller*." 33 F.4th 144, 153 (2d Cir. 2022), *cert. dismissed as moot*, 143 S. Ct. 992 (2024).

Brown v. Kuhlman presents an even starker example. There, the judge closed the court, over Brown's multiple objections, during the trial testimony of a police officer. 142 F.3d 529, 539 (2d Cir. 1997). In determining the remedy, the Second Circuit

admonished, "we should proceed with caution before ordering such disproportionate relief [of a new trial] in a case in which the trial judge did not deliberately enforce secrecy[] in order to be free of the safeguards of the public's scrutiny, . . . and in which the error is not the of the sort that risks and unreliable trial outcome[.]" *Id.* at 539 (citations and quotation marks omitted) (first alteration in original).

Ultimately, the Second Circuit denied Brown relief, in part, on the ground Brown's counsel was not aggressive enough in objecting to the closure. *Id.* at 542. Without "the benefit of [this] effective advocacy," the court continued, "the record persuades us that the judge simply made a good faith mistake[,]" *id.* at 541, and "detracts from the need to set aside the conviction in order to deter violations of the Public Trial Clause." *Id.* at 542. In short, the court in *Brown* was convinced "the error did not affect the outcome or fairness of the trial[.]" *Id.* at 543. *See also Gibbons v. Savage*, 555 F.3d 112, 120-21 (2d Cir. 2009) (discussing that not every structural error warrants relief and denying relief in that instance because "nothing of significance happened" when the court was cleared during voir dire).

Relying on *Jordan* and bearing striking similarities to *Brown*, the CAAF in this case held that the violation of Hasan's right to a public trial did not entitle him to relief because a new trial was "grossly disproportionate" and, therefore, contrary to *Waller*. The CAAF relied in large part on the judge's good faith *efforts* to comply with *Waller*'s standard and on the content of the transcripts, which, to the CAAF, showed that the judge "acted professionally" and "that neither [she] nor standby counsel infringed the rights or interests of [Hasan] in any way." Its analysis binds every military court in future cases.

* * *

Accordingly, there is a clear divide in federal courts regarding the remedy for public trial violations, and whether a defendant receives relief depends on what circuit hears his appeal. This divide alone "mak[es] clear[] that * * * courts are in need of further guidance." *Smith v. Titus*, 141 S. Ct. 982, n. 1 (2021) (Sotomayor, J., dissenting from the denial of cert.).

B. The CAAF's analysis contravenes this Court's precedent.

The CAAF's analysis in this case provides further reason for review. The CAAF assumed a preserved structural error but afforded no relief as it interpreted *Waller* as permitting a court to deny a new trial (or any remedy) so long as it deems it to be "disproportionate." This contravenes this Court's precedents for at least three reasons.

First, the CAAF indulged in an impermissibly broad reading of *Waller*. *See Illinois v. Lidster*, 540 U.S. 419, 424 (2004) (noting this Court's precedents must be read "as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering."). While *Waller* advised "the remedy should be appropriate to the violation" and not a "windfall," *Waller*, 467 U.S. at 49-50, the specific "windfall" *Waller* was warning against was a new trial *if and after* a new public suppression hearing on remand produced no material change. *Id*. at 50. If the outcome of the new (and open) proceeding remained unchanged, then the violation presumably had no effect. In *that* case, ordering a new trial is a windfall because the rights of the defendant and the public have been sufficiently vindicated by the new proceeding. *See United States v. Lee*, 760 F.3d 692, 695 (7th Cir. 2014) ("once [the right is restored], the defendant has

no basis for complaining if the exercise of that right turns out be of no benefit to him."). Thus, *Waller* says no more than *if* there is another remedy that can adequately vindicate a defendant's rights, a new trial is a windfall.[4] The CAAF lost sight of this.

Second, the CAAF's reading of *Waller* undermines *Weaver*'s pronouncement that a preserved violation favors a defendant and generally entitles him to a new trial. *Weaver*, 582 U.S. at 305. The CAAF's *ad hoc* analysis proves this very point. Focusing largely on the judge's good faith *efforts* and the content of the transcripts, the CAAF's analysis mirrors other courts' plain error review.[5] If what is a "disproportionate" remedy for a preserved error is measured by an analysis akin to plain error, then contrary to *Weaver*, a defendant receives no favor for his objection and new trials will rarely—not generally—be granted. *See Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1329 (11th Cir. 1999) ("Only in rare cases will a trial court be reversed for plain error.").

Third, the CAAF's reading would present an anomaly in this Court's jurisprudence: a preserved structural error without any remedy. *See Peck v. Jenness*, 48 U.S. 612, 623 (1849) ("A legal right without a remedy would be an anomaly in the

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[4] The cases *Waller* cites for its guidance underscore this very point. *See Goldberg v. United States*, 425 U.S. 94, 111 (1976) (declining to remand for new trial because Goldberg's "rights [were] fully protected by a remand to the trial court with direction to hold an inquiry consistent with [the] opinion."); *Jackson v. Denno*, 378 U.S. 368, 394 (1964) (ordering a new evidentiary hearing, and providing that if the hearing shows Jackson's confession was involuntary, "there must a new trial").

[5] *See, e.g.*, *United States v. Hougen*, 76 F.4th 805, 811 (9th Cir. 2023) (denying relief for Hougen's unpreserved public trial error under plain error review because the transcripts were available and showed he was "fairly dealt with"); *Charboneau v. United States*, 702 F.3d 1132, 1138 (8th Cir. 2013) (noting that that applying *Waller* to certain testimony is "not easy" and the trial court made "at least an abbreviated attempt to do so" that was "sufficient to withstand plain error review"); *Barrows v. United States*, 15 A.3d 673, 680 (D.C. 2011) (relying on the neutral, though insufficient, reason that justified the closure to deny relief under plain error); *see also United States v. Mendoca*, 88 F.4th 144, 157 (2d Cir. 2023) (relying on *Brown's* preserved error analysis as "instructive" for plain error review).

law"); *Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("every right, when withheld, must have a remedy").

C. The resolution of the question presented is a matter of significant importance.

Review is also warranted due to the significance of the question presented. For one, the question of the remedy for a public trial violation will continue to reoccur as closures occur with frequency. *See, e.g.*, *Titus*, 141 S. Ct. at 988-89 (Sotomayor, J., dissenting from the denial of cert.) (noting that "[j]ustices of the Minnesota Supreme Court * * * have expressed alarm about 'creeping courtroom closure' in Minnesota trial courts."); *see also Ayala v. Speckard*, 131 F.3d 62, 82 (2d Cir. 1997) (Parker, J., dissenting) ("It is galling to my sense of fairness that courtroom closure is such a routine practice in New York buy-and-bust cases"); Zach Cronen, *Behind Closed Doors: Expanding the Triviality Doctrine to Intentional Closures – State v. Brown*, 40 Wm. Mitchell L. Rev. 252, 266 (2013) (noting that locking court doors during jury instructions has become "a relatively common procedure in state courts.").

The significance of the question, however, is underscored by the palpable threat the CAAF's approach poses. Left undisturbed, the CAAF's decision threatens to significantly erode this essential protection. This case is the most recent in a growing line of decisions willing to "excuse public trial violations when the trial, on the whole, seems fair enough." *State v. Schiermann*, 438 P.3d 1063, 1151 (Wash. 2018) (Stephens, J., dissenting); *see also* Daniel Levitas, *Scaling Waller: How Courts Have Eroded the Sixth Amendment Public Trial Right*, 59 Emory L. J. 493, 505, 545 (2009); Kristin Saetviet, *Close Calls: Defining Courtroom Closures under the Sixth Amendment*, 68 Stan. L. Rev. 897, 931 (2016). But the CAAF's decision is, perhaps, one of the most

consequential. Focusing on remedy rather than error to deny relief, its newly minted analysis mirroring plain error review threatens to force the general rule of automatic reversal into the margins for *all* violations.

D. This case presents the ideal vehicle to decide the issue.

This petition is in the optimal procedural posture. Unlike most public trial violations, the violation here was preserved at trial and raised on direct review.

Additionally, this is a capital case, and this Court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (citations omitted). *See also Gregg*, 428 U. S. at 187 ("When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed"); *Zant* v. *Stephens*, 462 U. S. 862, 885 (1983) ("[T]he severity of the [capital] sentence mandates careful scrutiny in the review of any colorable claim of error").

Lastly, this case is of great public interest and import, and the trial was the focus of the national press. It is precisely the type of case the Founders had in mind when they enshrined the right of a public trial in our Constitution, not only as a right of the defendant, but also a right preserved for the public and the press.

CONCLUSION

For all these reasons, this Honorable Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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