No. 24-5225

IN THE SUPREME COURT OF THE UNITED STATES

NIDAL M. HASAN, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

SARAH M. HARRIS
Acting Solicitor General
Counsel of Record

ANTOINETTE T. BACON
ANN O'CONNELL ADAMS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

CAPITAL CASE

QUESTION PRESENTED

Whether the Court of Appeals for the Armed Forces permissibly declined to order a new trial on petitioner's claim that his Sixth Amendment right to a public trial had been violated, where a military judge conducted a 34-minute ex parte hearing with petitioner and his standby defense counsel to discuss standby counsel's motion to withdraw, which implicated petitioner's privileged information and in which the judge agreed with petitioner's position opposing withdrawal.

ADDITIONAL RELATED PROCEEDINGS

General Court-Martial (Fort Hood, Tex.):

United States v. Hasan (Aug. 28, 2013, approved, Mar. 27, 2017) (no docket number assigned)

United States Army Court of Criminal Appeals:

United States v. Hasan, No. 20130781 (Dec. 11, 2020)

United States Court of Appeals for the Armed Forces:

United States v. Hasan, No. 21-0193 (Mar. 4, 2024)

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 3a-121a) is reported at 84 M.J. 181. The opinion of the United States Army Court of Criminal Appeals (Pet. App. 122a-169a) is reported at 80 M.J. 682.

JURISDICTION

The judgment of the court of appeals (Pet. App. 2a) was entered on March 4, 2024. On May 23, 2024, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 1, 2024, and the petition was

filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(1).

STATEMENT

Following a trial before a general court-martial, petitioner was convicted on 13 specifications of premeditated murder, in violation of Article 118 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918(1); and 32 specifications of attempted premeditated murder, in violation of Article 80 of the UCMJ, 10 U.S.C. 880. CAAF App. 59-71. The court-martial sentenced petitioner to death. Id. at 63, 798. The convening authority approved the adjudged sentence. Id. at 64. The Army Court of Criminal Appeals (Army CCA) affirmed. Pet. App. 122a-169a. The Court of Appeals for the Armed Forces (CAAF) affirmed. Id. at 2a-121a.

1. On November 5, 2009, petitioner, an Army major, murdered 13 people and wounded 31 others at a crowded Soldier Readiness Processing (SRP) center at Fort Hood, Texas. Pet. App. 4a & n.2.

Petitioner "carefully planned and prepared for his attack." Pet. App. 4a. In July 2009, he purchased an advanced FN Five-seven semiautomatic handgun, laser sights, and magazine-extension kits that increased the firing capacity to 30 rounds per magazine. Ibid. In October 2009, petitioner began target practice at a firing range, where he obtained instruction on "speed loading" the weapon and became proficient at kill shots at 100 yards. Id. at 5a. After being informed that he would be deployed to Afghanistan

and would need to process through the SRP center, petitioner told a coworker: "They've got another thing coming if they think they are going to deploy me." Ibid. (citation omitted). Petitioner then made seven to nine unscheduled visits to the SRP center for no (legitimate) purpose in the two weeks before his attack. Ibid.

On the day of the attack, petitioner entered the SRP center with his weapon and nearly 400 rounds of ammunition. Pet. App. 5a. He pulled out his weapon, yelled "Allahu Akbar!", and began shooting at his fellow soldiers using speed-reloading techniques. Ibid. Petitioner fired at soldiers as they ran toward the center's front and back doors; walked across the facility and shot several soldiers in the back; and then exited the SRP center to pursue other fleeing soldiers. Id. at 5a-6a. Once outside, petitioner engaged law-enforcement officers in a firefight, was shot in the chest, and was apprehended. Id. at 6a.

2. Petitioner was charged with 13 specifications of premeditated murder and 32 specifications of attempted premeditated murder. CAAF App. 51-58. The convening authority referred the case to a general court-martial as a capital case. Pet. App. 6a. As trial approached, petitioner and his three military defense attorneys disagreed about trial strategy. Id. at 8a-9a. Defense counsel wanted to argue that the murders were not premeditated because petitioner had been overwhelmed by "religious passion,"

but petitioner wanted to argue that his attack was justified to protect Taliban members from imminent harm. Id. at 9a.

After counsel advised petitioner that his "theory did not constitute a legally viable defense under the facts of the case," petitioner requested to represent himself. Pet. App. 9a. The military judge granted his request after ensuring that petitioner's waiver of his right to counsel was knowing, intelligent, and voluntary. Id. at 10a-11a. The judge, however, appointed petitioner's three original attorneys to serve as standby counsel. Id. at 11a-12a.

3. Shortly after trial proceedings began, standby counsel moved to withdraw because they determined that they could not, consistent with their professional obligations, provide petitioner even procedural assistance in light of their view that petitioner's conduct indicated that he was trying to obtain a death sentence. Pet. App. 24a. Their motion -- which included "an enclosure containing counsel's entire mitigation case" -- was served on government counsel. Id. at 24a, 170a. The judge promptly held a hearing on the motion with both sides in open court, id. at 170a-183a (transcript), before closing the courtroom and continuing ex parte with petitioner and his standby counsel, id. at 184a-197a (ex parte hearing transcript).

a. At the outset of the open hearing, petitioner requested "an in camera hearing" on standby counsel's motion. Pet. App.

170a. The military judge responded that she "underst[ood] the sensitivities here"; thought she "m[ight] be able to address [his] concerns"; and would "revisit [his] request in just a moment." Ibid. The judge then questioned government counsel, determining that two of the motion's exhibits contained only publicly available materials and that the government had not examined the other two privileged exhibits (Exhibits 1 and 3). Id. at 170a-172a. The judge stated that, "in an abundance of caution," she was "order[ing] the entire motion, and all of its attachments, sealed"; noted that the "body of the motion itself" "appears to contain privileged work product"; and directed the government to return all the materials. Id. at 172a-173a.

The military judge then questioned petitioner about what he knew in advance about the motion. Pet. App. 173a-175a. Petitioner stated that he had known generally about the motion and had given counsel permission to file it, but that he did not understand that the motion would contain "privileged material" between him and his jury consultant. Id. at 173a-174a. The judge informed petitioner that "any privilege belongs to [him]" and asked petitioner whether he had "waive[d] or agree[d] to release the information." Id. at 175a. Petitioner responded, "No, ma'am." Ibid.

The military judge turned to standby counsel to discuss their motion generally but warned counsel not to "get into the specifics in this forum." Pet. App. 175a-181a. Counsel stated that, in their

view, petitioner's trial conduct showed that "his goal [wa]s to remove impediments or obstacles to the death penalty" and was "encouraging or working towards a death penalty." Id. at 176a. Petitioner objected, stating "[t]hat's a twist of the facts." Ibid.

After discussing the motion generally with standby counsel, the military judge offered petitioner the opportunity to respond to her, ex parte, "in writing," noting that petitioner had "said that [he]'d like to present something ex parte." Pet. App. 181a. Petitioner stated that he'd "like to do that right now"; the judge observed that "we're not in an ex parte setting"; and petitioner stated that he had "wanted to start ex parte" but that he wanted to respond now. Id. at 181a-182a. The judge observed that she had been "very careful here not to go into any type of specifics" and "d[id not] know what you're planning on going into," reiterating that she was allowing petitioner to "present matters to me [the judge] ex parte" "in writing." Id. at 182a. Petitioner "object-[ed]" and stated he would "like to do that briefly," prompting the judge to ask him whether he was "waiving any privileges" and "want[ed] to discuss this matter in a non-ex parte setting." Ibid. Petitioner responded affirmatively, contradicting his earlier statement that he did not waive any privileges. Ibid.; see id. at 175a. When the judge again reiterated that she would give petitioner the opportunity to respond to her in writing "in an ex parte forum," petitioner stated that he "just want[ed] to clarify [stand-

by counsel's] assertion of [petitioner] seeking the death penalty." Id. at 182a. The judge emphasized that she "prefer[red]" that petitioner submit his views "in writing," but petitioner again "object[ed]" and stated that he would not submit "anything in writing." Ibid. Petitioner then proceeded to tell the judge why standby counsel's statements had been "[in]accurate," but the judge cut him off, stating: "Hold on. I'm going to conduct the rest of this hearing as an ex parte hearing" (without government counsel) and that she was "clear[ing] the courtroom." Id. at 183a.

b. Neither petitioner nor his standby counsel objected to that plan, and the hearing proceeded ex parte with only the military judge, petitioner, his three standby counsel, and a court reporter present. Pet. App. 184a. The judge ordered that the ex parte hearing transcript be sealed and asked petitioner, "what would you like to tell me?" Ibid. Petitioner responded that "I am a Mujahid -- I'm proud of that" -- and it is a "fact" that "the Mujahideen love death more than they love life." Ibid. Petitioner then stated that "[his] actions on November 5th [we]re centered squarely" on his view that, as a Mujahid, he is "trying to establish the perfect religion of Almighty Allah as supreme" and "[t]hat's why [he] fe[lt] obligated to protect * * * the Taliban in Afghanistan, Al-Qaeda, the Mujahideen in Iraq post-Saddam Hussein, Hamas, Hezbollah, the Ayatollah in Iran." Ibid. Petitioner added, "I'm one of them." Ibid.

Petitioner explained that his disagreement with his standby counsel was "a matter of principle," namely, that he did not "need to hide that [he is] a Mujahid" and felt like he was being required to "compromise [his] principles." Pet. App. 185a. Petitioner stated that "[his] goal" was "to have a fair, accurate representation of who [he is]," "not who the defense wants [him] to be." Ibid. The military judge noted that she had granted petitioner's request proceed pro se and asked whether he was "presenting the case as [he] s[aw] fit, without interference from standby counsel." Ibid. Petitioner responded, "Yes, ma'am." Ibid.

The military judge then explored what privileged information might have been disclosed, noting that the government had not reviewed either Exhibit 1, which contained documents prepared for voir dire, or Exhibit 3, which had been marked as sealed "work product," Pet. App. 187a-188a, and which, petitioner later stated, "contained essentially [the] defense's entire mitigation case," Pet. CAAF Br. 28. And the judge did not "see how any disclosure" of Exhibit 1 "would [have] be[en] prejudicial" because voir dire was finished. Pet. App. 188a; cf. id. at 174a. Petitioner interrupted, stating: "I'm asking right now if you'd unseal it." Id. at 188a. But when the judge asked petitioner if he "believe[d] that there's any remedial action that's warranted, based on standby counsel's disclosure of that information," petitioner responded, "No, ma'am." Ibid.

Petitioner stated that "part of the unsealing" issue was that he had preferred to "do[] this in camera," but that "[his] reputation, [his] principles [were] at stake" "now that the whole idea that [he was] seeking the death penalty is out" and he "fe[lt] compelled to clarify" that he is "not crazy" and that "this is just a matter of principle." Pet. App. 188a-189a. Petitioner requested that standby counsel explain his views, and counsel agreed that petitioner "is not crazy." Id. at 189a-190a. But counsel added that petitioner "ha[d] made it clear that he is seeking what a death penalty brings," such as feeling "better and safer on the death[-]sentence tier" at Fort Leavenworth compared to "the threat" he could face in the "general [prison] population." Id. at 190a. Petitioner interrupted, stating "That's enough," noted that was not "exactly what [he] had in mind," and objected to "any further" discussion from counsel on the matter. Ibid.

Petitioner then explained that he had been "vacillating back and forth" between two views on "seeking the death penalty." Pet. App. 193a-194a. Pointing one way, petitioner explained, "we" -- "the Mujahideen" -- "believe in being martyred" and his "thought was that of a martyr" "when [he] initially committed the act on November 5th," except that "[he] didn't die." Id. at 193a. Petitioner added that he had "underst[ood]" that "[he] would still be considered a martyr" if the court-martial "gave [him] the death penalty." Ibid. But pointing the other way, petitioner continued,

"the Muslim community ha[d] criticized [him]" by stating that he "did it wrong" by "br[eaking] [his] oath of office" because "the Qu'ran clearly states that you have to keep your oaths." Id. at 193a-194a. Petitioner observed that the "Muslim community" had indicated that "what [he] should've done [wa]s resign[]" from the military first, then "le[ave] the country and * * * f[i]ght." Id. at 194a. And petitioner stated that if he "didn't do it Islamically," then "being executed" would "not [be] considered martyrdom" and would "just [be] dying because [he had] done a criminal act." Id. at 193a-194a. Petitioner stated that his "dilemma" was that he did not "know if [he] would be a martyr if [he were] executed." Id. at 194a.

In response to questions from the military judge, petitioner expressed his opposition to counsel's motion to withdraw by stating that he "still want[ed]" ongoing assistance from "[his three] standby counsel." Pet. App. 194a-195a. Petitioner then asked the judge if he could "make a statement that the public would hear" about "seeking the death penalty," adding that it would be "[j]ust like what I read to you." Id. at 195a. The judge did not prohibit petitioner from making such a public statement, responding instead that she would "take some time to consider all this" and "figure out how" to proceed. Ibid. The judge confirmed that petitioner had nothing further and concluded the hearing. Id. at 196a-197a.

4. The next morning, in open court, the military judge stated that she had held "an ex parte [Article] 39(a) session" "pursuant to Rule for Court[s]-Martial 806." Pet. App. 198a; see id. at 27a; cf. 10 U.S.C. 839(a). Rule 806 "general[ly]" provides that "courts-martial shall be open to the public," R.C.M. 806(a) (emphasis omitted), but authorizes closed proceedings where (A) "a substantial probability [exists] that an overriding interest will be prejudiced" by open proceedings; (B) "closure is no broader than necessary to protect [that] interest"; (C) "reasonable alternatives to closure were considered and found inadequate"; and (D) "the military judge makes case-specific findings on the record justifying closure," R.C.M. 806(b)(2) (2012) (now R.C.M. 806(b)(4)).

The military judge explained that she had determined that closure had been necessary "to address" both "issues that arose between standby counsel and [petitioner]" and "issues relating to the release of privileged attorney work product, attorney/client, and other privileged communications." Pet. App. 198a. She observed that "[t]here was substantial probability that an overriding interest [in] retaining the confidentiality of those communications would [have] be[en] prejudiced if the proceedings remained open" and that "other means to address the issue were inadequate." Ibid.

The military judge then denied standby counsel's motion to withdraw or modify their roles, vindicating petitioner's position on that motion. Pet. App. 198a-199a. After the government pre-

sented its case-in-chief, petitioner declined to present either a defense case or any closing argument. Id. at 7a. The court-martial convicted petitioner on all specifications and, after a capital-sentencing hearing, sentenced petitioner to death. Ibid. The convening authority, after considering clemency filings, approved the sentence. Ibid.

5. While petitioner's appeal to the Army CCA was pending, his new appellate counsel moved to examine certain sealed materials, including the ex parte hearing transcript. CAAF Supp. App. 1600. During oral argument on the motion, the court asked petitioner's counsel whether "[petitioner] consent[ed] to the disclosure of [the sealed materials]," but "counsel declined to respond" and did not otherwise indicate that petitioner had "waive[d]" his "privilege relating to the [materials]." Ibid. The Army CCA denied counsel's motion. Id. at 1600-1601 (order); see Pet. App. 167a-168a.

Petitioner did not argue to the Army CCA that closing the hearing violated his public-trial right. Pet. CAAF Br. 51 n.14. The Army CCA affirmed without addressing that issue. Pet. App. 122a-169a. Petitioner's capital sentence then triggered mandatory CAAF review, 10 U.S.C. 867(a)(1); while that review was pending, petitioner's counsel moved to unseal the ex parte hearing transcript, CAAF Supp. App. 1584-1604, with an affidavit representing that petitioner wanted the materials unsealed, id. at 1603. The

CAAF granted the motion and unsealed the transcript, which is now public. Pet. App. 28a n.11, 224a.

6. The CAAF affirmed. Pet. App. 2a-121a. Among other things, the CAAF rejected petitioner's argument -- made for "the first time in [the CAAF]," id. at 28a -- that the military judge violated his public-trial right by closing the courtroom during the ex parte hearing. Id. at 23a-35a.

The CAAF noted that its precedent had extended the Sixth Amendment right to a public trial to courts-martial and that Rule for Courts-Martial 806 independently supplies "a regulatory right to open courts-martial." Pet. App. 28a. The CAAF observed, however, that both the Sixth Amendment and Rule 806 "make exceptions to the right to have a public trial" and that Rule 806(b)(2) "mirrors" Waller v. Georgia, 467 U.S. 39 (1984), which explained that proceedings may be closed to "'advance an overriding interest that is likely to be prejudiced'" if the closure is "'no broader than necessary'" and the trial court "'consider[s] reasonable alternatives to clos[ure]'" and "'make[s] findings adequate to support the closure.'" Pet. App. 29a-30a (quoting Waller, 467 U.S. at 48).

The CAAF identified several reasons supporting the courtroom closure during the ex parte hearing here. Pet. App. 30a-31a. The court observed that "the military judge was presented with a difficult situation" and "was trying to protect [petitioner] from publicly disclosing information that might be damaging to his own

defense." Ibid. The court added that the judge's "concern was heightened" because the issues being discussed "involved matters pertaining to attorney-client privilege"; "standby counsel's motion contained privileged information"; and petitioner's "stance on whether he waived his privilege regarding such matters was confusing." Id. at 31a. But rather than resolve whether the proceedings had been permissibly closed, the court "assume[d] without deciding" that the judge had erred. Ibid.

The CAAF determined, however, that even if petitioner's public-trial right had been violated, petitioner was "not entitled to have his findings and sentence set aside" because that remedy would be an unjustified "'windfall'" that "would not 'be appropriate to the [alleged] violation,'" Pet. App. 31a, 35a (quoting Waller, 467 U.S. at 50). See id. at 31a-35a. The court observed that this Court in Waller had emphasized that a court's "'remedy should be appropriate'" to "'a violation of the [Sixth Amendment's] public-trial guarantee'" and had "warned against imposing a remedy that 'would be a windfall for the defendant, and not in the public interest.'" Id. at 31a (quoting Waller, 467 U.S. at 49-50). And while the court recognized that this Court has described a Sixth Amendment public-trial violation as a "'structural error'" and that structural errors are not subject to a "'harmlessness analysis,'" the CAAF observed that Waller had "made clear * * * that not all public trial structural errors lead to automatic reversal"

and that this Court has not overruled Waller's remedial holding. Id. at 31a-33a & n.16 (citations omitted).

The CAAF rejected petitioner's argument that "'the only appropriate result is reversal,'" explaining that "[s]uch a remedy would be grossly disproportionate" to any public-trial violation in his case. Pet. App. 33a (quoting Pet. CAAF Br. 67). The court emphasized that (1) the "brief" ex parte hearing involved no "witness testimony," "admission of evidence," or "any other matter directly related to the findings or sentence in this case"; (2) the military judge had "explored reasonable alternatives to clos[ure]" by attempting to have petitioner submit his views in writing and closing the hearing only after the judge "grew concerned" that her attempt to prevent petitioner and standby counsel from "discuss[ing] privileged material" would "not work"; and (3) the judge provided "on the record" reasons with findings sufficient to justify the closure, finding it "clear" that the judge had attempted to "protect[] [petitioner's] rights" in resolving the dispute between standby counsel and a "pro se" defendant who had "no legal training that would help him discern whether the disclosure of potentially privileged material in open court would be harmful to his defense." Id. at 33a-34a. Finally, the court observed that "[e]ven [petitioner] acknowledge[d] that the release of the transcript was a reasonable alternative" and that, now that the CAAF

had "unsealed the transcript," the "public can readily see what happened during that hearing." Id. at 34a-35a & n.17.

ARGUMENT

Petitioner contends (Pet. 18-21) that the CAAF should have granted him relief, asserting that closing the courtroom for a brief ex parte hearing on standby counsel's motion to withdraw was a structural constitutional error violating his Sixth Amendment right to a public trial. The CAAF correctly declined to grant petitioner's requested relief of a new trial, and its decision does not conflict with any decision of this Court or another court of appeals. Moreover, this court-martial case would be a poor vehicle to address the proper remedy for a Sixth Amendment public-trial violation because that Sixth Amendment right does not extend to courts-martial; even if it did, the military judge permissibly closed the courtroom for the ex parte hearing here; and, in any event, petitioner did not properly preserve an objection to that closure. Further review is unwarranted.

1. The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. Amend. VI. That provision, which expressly applies to "all criminal prosecutions" (ibid.), grants a defendant the right to a trial with five characteristics: It must be (1) speedy, (2) public, and (3) by a jury

that is both (4) impartial and (5) from the State and district in which the crime was committed.

It is well settled that the Sixth Amendment's "right to trial by jury" does not apply to "trials by courts-marital." Whelchel v. McDonald, 340 U.S. 122, 127 (1950) (citing Ex parte Quirin, 317 U.S. 1, 40-41 (1942), and Kahn v. Anderson, 255 U.S. 1, 8 (1921)); see Ex parte Milligan, 71 U.S. (4 Wall.) 2, 123 (1866); id. at 137-138 (Chase, C.J., concurring in the judgment). Moreover, the Court has observed that "'cases arising in the land or naval forces' * * * are expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth." Quirin, 317 U.S. at 40 (citing Milligan, 71 U.S. (4 Wall.) at 123, 138-139). "[T]he historical evidence" also "strongly suggests that the provisions of the Bill of Rights were not originally understood to apply to courts-martial." Ortiz v. United States, 585 U.S. 427, 482 & n.4 (2018) (Alito, J., dissenting, joined by Gorsuch, J.). Courts-martial are special Executive Branch tribunals that enforce "military discipline" in the context of a unique legal tradition for military personnel and, as such, their proceedings "are not criminal prosecutions within the meaning of the Constitution." Id. at 482; cf. Davis v. United States, 512 U.S. 452, 463 n.* (1994) (Scalia, J., concurring) (noting the government's position that "court-martial cases are not 'criminal prosecutions' within the meaning of the Sixth Amendment").

The question whether the Sixth Amendment's public-trial right for "criminal prosecutions," U.S. Const. Amend. VI, applies in court-martial cases is not typically dispositive because the President as Commander-in-Chief has independently ordered that, in general, "courts-martial shall be open to the public." R.C.M. 806(a). That regulatory provision, tailored to the military context, includes exceptions that parallel those embodied in the Sixth Amendment. See pp. 11, 13, supra (discussing R.C.M. 806(b)(2) (2012), which is now R.C.M. 806(b)(4)); cf. R.C.M. 806(a) discussion (noting that courts-martial may be "conducted on a ship at sea or in a unit in a combat zone" without public attendance). In this particular case, however, petitioner's position that the 34-minute courtroom closure during his court-martial proceedings was a "structural" constitutional error requiring a new trial is premised on the contested view that the Sixth Amendment's public-trial right applies to courts-martial. Pet. 7, 18-20.

2. Even assuming the Sixth Amendment does apply to courts-martial, petitioner now appears to acknowledge (Pet. 18-19) that a violation of the Sixth Amendment's public-trial guarantee does not require a new trial in every context. And the CAAF correctly found that it did not require one in the specific context of his case.

a. As the Court made clear in Weaver v. Massachusetts, 582 U.S. 286 (2017), "the term 'structural error' carries with it no talismanic significance as a doctrinal matter. It means only 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 (citation omitted). If he both "object[ed] at trial" and "raised [the issue] on direct appeal," a "defendant generally is entitled to 'automatic reversal' regardless of the [structural] error's actual 'effect on the outcome.'" Ibid. (citation omitted). But as Weaver observed, in the context of a "public-trial violation" -- and "despite the structural aspect of the violation" -- the Court has not always "order[ed] a new trial." Id. at 296-297.

Specifically, the Court did not do so in Waller v. Georgia, 467 U.S. 39 (1984). See Weaver, 582 U.S. at 296-297. In Waller, the Court for the first time addressed "the extent to which [the Sixth Amendment's public-trial] right extends beyond the actual proof at trial" by considering whether it applied to a suppression hearing. Waller, 467 U.S. at 44. The Court held that it did, and also determined that the closed suppression hearing in that case, which lasted seven days and resulted in the denial of the defendant's motion to suppress key evidence, had violated the Sixth Amendment. Id. at 42-43, 48-49. The Court further determined that the public-trial violation was a structural error, explaining that "the defendant should not be required to prove specific prejudice in order to obtain relief" and observing that it would be "difficult to prove" such harm. Id. at 49 & n.9. But Waller

specifically rejected the defendant's argument that "a new trial on the merits should be ordered" to "remedy th[e] constitutional violation." Id. at 49; see Weaver, 582 U.S. at 297 (recognizing that Waller "held" that "no new trial" was necessary "despite the structural aspect of the violation").

The Court instead explained that "the remedy should be appropriate to the violation," reflect "the public interest," and should not result in "a windfall for the defendant." Waller, 467 U.S. at 50. Accordingly, the Court ordered "a new suppression hearing" that would be "open to the public" to the extent warranted and emphasized that "[a] new trial need be held only if [the] new, public suppression hearing results in the suppression of material evidence not suppressed at the first trial, or in some other material change in the positions of the parties." Ibid.

b. In light of those principles, the CAAF correctly rejected petitioner's argument based on Weaver that "the only appropriate [remedy] is reversal," Pet. App. 33a (quoting Pet. CAAF Br. 67), which the CAAF appeared to interpret as a demand for a new trial, see, e.g., id. at 35a; see also Pet. CAAF Reply Br. 26 (arguing that the CAAF "should set aside the conviction"). But as in Waller, this case involves a hearing ancillary to "the actual proof at trial" in which a "new trial" would not be warranted unless a new hearing open to the public resulted in some "material change in the positions of the parties," Waller, 467 U.S. at 44, 50.

And here, holding a new hearing on standby counsel's motion to withdraw could not materially change anything in petitioner's favor, because the military judge already denied counsel's motion, fully vindicating petitioner's position on it.

As petitioner now appears to recognize, "[i]f the outcome of the new (and open) proceeding remain[s] unchanged, then the [public-trial] violation presumably had no effect" and "a new trial [would be] a windfall." Pet. 18. Petitioner incorrectly suggests (Pet. 19) that the CAAF's decision reflects "an anomaly" by recognizing "a preserved structural error without any remedy." Even if petitioner had properly preserved the asserted error by "object[ing] at trial" and then raising it "on direct appeal" before the Army CCA, Weaver, 582 U.S. at 299 -- which he did not -- the CAAF simply rejected petitioner's contention that "'the only appropriate result is reversal.'" Pet. App. 33a (emphasis added; citation omitted). To whatever extent the more limited remedy of a new hearing on standby counsel's motion to withdraw might be characterized as a "reversal," cf. Waller, 467 U.S. at 50 (ordering that the "judgments below are reversed, and the cases are remanded for further proceedings not inconsistent with this opinion"), petitioner did not identify that limited remedy in his briefs, and the CAAF did not understand him to be requesting it. See Pet. CAAF Br. 61; Pet. CAAF Reply Br. 26; Pet. App. 30a-35a.

The CAAF therefore "decline[d] to impose the [only] remedy sought by [petitioner]." Pet. App. 35a. Furthermore, as the CAAF observed, "[e]ven [petitioner] acknowledge[d] that the release of the [ex parte hearing] transcript" would have been "a reasonable alternative, at least at the trial level." Id. at 34a n.17; see Pet. CAAF Br. 66 (arguing that the military judge "could have published the transcript" as a "reasonable alternative[]"). The CAAF granted petitioner that exact relief by unsealing the ex parte hearing transcript. Pet. App. 27a & n.11. And because petitioner never sought other relief, the CAAF had no occasion to consider "whether [ordering] a new proceeding" on standby counsel's motion "like in Waller [would have been] appropriate," Pet. 5-6.

3. Petitioner asserts (Pet. 14-16) that the CAAF's decision conflicts with the decisions of other courts of appeals and state supreme courts, which he describes (Pet. 15) as recognizing that a Sixth Amendment public-trial violation entitles a defendant to "a new trial unless the erroneously closed proceeding is severable from the trial and can be 'redone' independently." None of those decisions involved courts-martial. And none conflicts with the CAAF's resolution of the sole remedial issue it considered -- i.e., whether "the only appropriate result [wa]s reversal" in the form of a new trial. Pet. App. 33a (emphasis added; citation omitted).

Three of the decisions that petitioner cites (Pet. 15) grant a "redo" remedy for discrete proceedings within a trial without

directing a new trial.[1] Those decisions do not conflict with the decision below because petitioner appeared to the CAAF to be asserting that nothing short of a new trial would be an appropriate remedy, and the CAAF had no occasion to resolve whether a more limited remedy was warranted. Moreover, none of the three decisions addressed a closed hearing on a discrete matter in which the trial judge ruled fully in the defendant's favor, such that (as here) a "redo" remedy could not result in any "material change in the positions of the parties" that could benefit the defendant, Waller, 467 U.S. at 50.

Petitioner's remaining citations (Pet. 14-15) are even further afield. One decision rejected a public-trial challenge because "the trial court did not close [the] proceedings." State v. Njonge, 334 P.3d 1068, 1071, 1074-1075 (Wash.), cert. denied, 574 U.S. 1065 (2014). Several others determined that a new trial was warranted to remedy courtroom closures during the trial testimony

[1] See United States v. Rivera, 682 F.3d 1223, 1237 (9th Cir. 2012) (finding that resentencing was the "appropriate" remedy where the defendant's family was excluded from the original sentencing proceedings); State v. Jackson, 977 N.W.2d 169, 170-171, 174-176 (Minn. 2022) (finding that a public "Schwartz hearing" to determine whether a juror had "introduced extraneous information" into the deliberations was the proper remedy where the original posttrial evidentiary hearing was partially closed to the public), cert. denied, 143 S. Ct. 500 (2022); State v. Rodgers, 919 N.W.2d 193, 203-204 (N.D. 2018) (finding that a new competency hearing was the proper remedy where the courtroom was not properly closed during the original competency hearing).

of one or more witnesses.[2] Those decisions involving properly preserved challenges to courtroom closures during trial testimony simply reflect that a structural Sixth Amendment error will presumably require a new trial where it involves witness testimony that was actually presented to the jury that ultimately found the defendant guilty. This case does not involve similar considerations.

Finally, petitioner cites (Pet. 14-15) three decisions involving public-trial violations during voir dire. Two of the decisions, which took the view that the structural nature of public-trial errors is itself sufficient to establish prejudice and an entitlement to a new trial in the context of postconviction review,

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[2] See United States v. Allen, 34 F.4th 789, 792, 800-801 (9th Cir. 2022) (ordering new trial based on district court's COVID protocols during trial proceedings); United States v. Candelario-Santana, 834 F.3d 8, 23-24 (1st Cir. 2016) (vacating defendant's convictions where courtroom was closed for a witness's trial testimony), cert. denied, 580 U.S. 1136, and 583 U.S. 831 (2017); United States v. Simmons, 797 F.3d 409, 413-416 (6th Cir. 2015) (ordering new trial where court excluded codefendants from the courtroom during witness's trial testimony); Judd v. Haley, 250 F.3d 1308, 1311, 1319-1320 (11th Cir. 2001) (directing the grant of habeas relief where state court closed its courtroom during victim's trial testimony); Davis v. Reynolds, 890 F.2d 1105, 1107-1108, 1112 (10th Cir. 1989) (similar); People v. Jones, 464 P.3d 735, 742, 745 (Colo. 2020) (ordering new trial where trial court excluded the defendant's parents from the courtroom during his children's trial testimony); People v. Veach, 993 N.W.2d 216, 217-219 (Mich. 2023) (ordering new trial where courtroom was closed during victim's trial testimony), cert. denied, 144 S. Ct. 1342 (2024).

have been abrogated by this Court's contrary decision in Weaver.[3] The final decision concluded that an erroneous closure of voir dire to the public warranted a new trial because -- unlike an "easily separable part of a trial" -- a court cannot "reasonably order a 'redo' of voir dire" given that "it is impossible to speculate" about how the "different[] compos[ition]" of the resulting jury might affect the outcome at trial. State v. Wise, 288 P.3d 1113, 1122 (Wash. 2012). That decision by its own terms does not speak to the proper remedy where, as here, a court closes to the public an "easily separable part of a trial," ibid.

4. In any event, this case would be a particularly poor vehicle to address the proper remedy for a Sixth Amendment public-trial violation because the ex parte hearing here did not violate the Sixth Amendment and, in any event, petitioner failed to preserve his public-trial challenge.

a. First, for petitioner to prevail in this Court on his remedy-focused claim of structural constitutional error, the Court would need to determine whether the Sixth Amendment's pubic-trial

[3] See Weaver, 582 U.S. at 294, 305 (holding that structural nature of error does not obviate need to show actual prejudice needed for ineffective-assistance claim and listing Owens v. United States, 483 F.3d 48, 64-65 (1st Cir. 2007), among decisions that incorrectly failed to require such a showing); United States v. Withers, 638 F.3d 1055, 1065-1066 (9th Cir. 2011) (reversing summary dismissal of procedurally defaulted public-trial claim on ground that a structural public-trial violation would likely itself be sufficient to show prejudice).

right extends to court-martial proceedings and, if it does, whether it applies in materially the same manner as in civilian prosecutions. The CAAF's precedent extending that constitutional right to courts-martial, Pet. App. 28a, would thus be subject to examination by this Court. See Bennett v. Spear, 520 U.S. 154, 166 (1997) ("A respondent is entitled * * * to defend the judgment on any ground supported by the record."). And the Court may well agree with the government, see p. 17, supra, that the Sixth Amendment's public-trial guarantee does not apply to courts-martial.

b. Second, even if the Sixth Amendment's public-trial right were to apply to courts-martial in the same manner as it applies in civilian prosecutions, the military judge's brief courtroom closure to hold an ex parte hearing on standby counsel's motion to withdraw did not violate the Sixth Amendment. Although the CAAF rejected petitioner's request for a new trial without deciding the constitutionality of the ex parte hearing, see Pet. App. 24a ("assum[ing] without deciding" that "constitutional" question), the military judge lawfully closed the courtroom during that ex parte hearing.

As an initial matter, a defendant's "right to insist that [trial proceedings] be public," is subject to "exceptions" which recognize that "'other rights or interests'" may in some circumstances warrant closures, Presley v. Georgia, 558 U.S. 209, 213 (2010) (per curiam) (quoting Waller, 467 U.S. at 45), and this

Court has never held -- and should not hold -- that it applies to a hearing on standby counsel's request to withdraw that implicates privileged attorney-client communications. Indeed, traditional court practices such as "conferences [conducted] in chambers" or nonpublic discussions with counsel "at the bench" have long existed and no judge is "required to allow public or press intrusion upon the huddle." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 598 n.23 (1980) (Brennan, J., concurring in the judgment). The same holds true for the brief ex parte hearing in this case, in which the military judge wisely explored disagreements between petitioner (who was then proceeding pro se) and his standby defense counsel in a private forum without government counsel or public spectators.

Furthermore, even assuming arguendo that a public-trial right might presumptively extend to such ancillary ex parte hearings, this Court has explained that "any stage of a criminal trial" may be closed where "'[1] an overriding interest [exists] that is likely to be prejudiced, [2] the closure [is] no broader than necessary to protect that interest," and the trial court both "[3] consider[s] reasonable alternatives to closing the proceeding" and "[4] make[s] findings adequate to support the closure.'" Presley, 558 U.S. at 213-214 (quoting Waller, 467 U.S. at 48). The brief ex parte hearing in this case satisfies those criteria.

First, the military judge clearly recognized the sensitivity of standby counsel's motion, the exhibits to which contained privileged defense materials, including essentially the entire defense mitigation case. See pp. 5, 7-8, supra. The judge thus concluded that closure was necessary to address "issues that arose between standby counsel and [petitioner]" and "issues relating to the release of * * * [petitioner's] privileged communications," Pet. App. 198a, which, if released, would have lost their privileged status and could have jeopardized petitioner's defense. The record confirms the wisdom of that decision. Petitioner's "stance on whether he waived his privilege" over the information "was confusing." Id. at 31a. And in discussing his disagreements with his own standby counsel, petitioner repeatedly incriminated himself and supplied provocative statements that, if made public during trial, could have undermined his defense. See pp. 7, 9-10, supra. Even petitioner himself objected to standby counsel's explanation of their views, notwithstanding that the hearing before the judge was ex parte and closed. See p. 9, supra.

Second, the closure was appropriately limited to a 34-minute discussion that allowed petitioner to inform the judge of basis for his disagreement with his standby counsel. Given that petitioner refused to supply his views in writing, see p. 7, supra, the closure was no broader than necessary to protect petitioner as a pro se capital defendant.

Third, the military judge "explored reasonable alternatives to clos[ure]" by attempting unsuccessfully to have petitioner submit his views in writing and closing the hearing only after she "grew concerned" that her attempt to prevent petitioner and standby counsel from "discuss[ing] privileged material" would "not work." Pet. App. 33a. The judge thus permissibly concluded that "other means to address the issue were inadequate." Id. at 198a.

Fourth, the military judge made findings in open court that explained her closure decision. See p. 11, supra. As the CAAF noted, those findings were adequate, demonstrating that the judge closed the hearing to protect petitioner's rights and prevent public disclosures that "might [have] be[en] damaging to his own defense" in the context of a "difficult situation" involving "an apparent rift between [petitioner] and his standby counsel." Pet. App. 30a-31a, 34a. The fact that the judge's findings were made shortly after she concluded the ex parte hearing does not undermine their adequacy. Such findings must simply be specific enough in the context of the case to enable "a reviewing court [to] determine whether the closure order was properly entered." Pressly, 558 U.S. at 215 (citation omitted); cf. Weaver, 582 U.S. at 298 (observing based on Pressly that a public-trial violation "can occur" if "the trial court omits to make the proper findings before closing the courtroom" without addressing if findings made shortly

thereafter could be sufficient to serve the function of allowing appellate review).

c. Finally, this Court's review is not warranted for the further independent reason that petitioner failed to preserve his public-trial challenge.

Petitioner himself initially requested that the Court conduct an "in camera hearing" on standby counsel's motion to withdraw, Pet. App. 170a, and stated that he did not waive his privileges over information in that motion and its attachments, id. at 175a. See pp. 4-5, supra. Before the military judge closed the hearing, petitioner objected to having to respond to the judge "in writing" in an ex parte submission and instead expressed his intent to respond to the judge immediately in person. See pp. 6-7, supra. When the judge closed the courtroom to allow petitioner to do exactly that, neither petitioner nor his standby counsel objected. See p. 7, supra. During the ex parte hearing, petitioner asked the judge to unseal exhibits to standby counsel's motion, but he then appears to have promptly withdrawn that request. See p. 8, supra. And when the ex parte hearing was nearly complete, petitioner asked the judge if he could make a "statement that the public would hear," but petitioner did not indicate that he wanted to do so in the same hearing, nor did the judge preclude him from making a public statement. See p. 10, supra.

In sum, petitioner never specifically objected to the closed hearing that facilitated his discussion with the judge and his standby counsel; he could have, for instance, publicly presented his views in closing argument or in some other manner. Nor did he preserve the issue before the Army CCA, instead raising the matter "for the first time" in the CAAF. Pet. App. 28a; see p. 12, supra. As such, this case is a particularly unsuitable vehicle for the Court to consider the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SARAH M. HARRIS
Acting Solicitor General

ANTOINETTE T. BACON
ANN O'CONNELL ADAMS
Attorneys

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