No. 24-5947

IN THE SUPREME COURT OF THE UNITED STATES

ISMAIL SALAAM, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals, on plain-error review, permissibly declined to order a new trial, where one witness's testimony was closed to the public because it included the display of photos and videos depicting child pornography.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Ohio):

United States v. Salaam, No. 16-cr-98 (June 15, 2021)

United States Court of Appeals (6th Cir.):

United States v. Salaam, No. 21-3566 (June 25, 2024)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-27)[1] is available at 2024 WL 3163256.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 2024. A petition for rehearing was denied on August 16, 2024 (Pet. App. 28). The petition for a writ of certiorari was filed on

[1] The appendix to the petition for a writ of certiorari is not consecutively paginated. This brief refers to the appendix as if it were consecutively paginated.

November 6, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted on one count of sex trafficking of a minor, in violation of 18 U.S.C. 1591(a)(1) and (b)(2); and two counts of producing child pornography, in violation of 18 U.S.C. 2251(a) and (e). Judgment 1. He was sentenced to 480 months of imprisonment, to be followed by 15 years of supervised release. Id. at 2-3. The court of appeals affirmed. Pet. App. 1-27.

1. In August 2016, petitioner met J.B., a 16-year-old minor who had run away from home, who began spending nights in his apartment. Pet. App. 2. On the second night, petitioner gave her a drink spiked with "[M]olly" (ecstasy), spent the night with her, recorded a video of her in the shower, and encouraged other men in his apartment to have sex with her. Ibid.

J.B. eventually moved in with petitioner, who encouraged her to engage in prostitution. Pet. App. 2. Petitioner introduced J.B. to Backpage.com, a website that functioned as a marketplace for illicit commercial sex. Ibid. He shot illicit pictures and videos of J.B. using her iPhone and posted them on the website. Ibid. He also sent text messages to J.B. that discussed prostitution, and he used her iPhone to communicate with potential

clients, telling other men not to text J.B. unless they would pay to have sex with her. Id. at 2-3.

After several weeks, J.B. told petitioner that she did not want to continue with the Backpage advertisements. Pet. App. 3. Petitioner retaliated by choking her, pulling her hair, and threatening to leave her bloody in the hotel room they were sharing by that time. Ibid. J.B. then called her mother. Ibid. Law enforcement and the mother arrived at the hotel, but officers allowed J.B. to communicate with petitioner, who instructed her to return to the hotel room. Ibid. J.B. did so, but she and petitioner had another altercation soon thereafter. Ibid.

Hotel staff called law enforcement, who arrested petitioner and J.B. Pet. App. 3. J.B. then disclosed the nature of her relationship with petitioner. Ibid. With J.B.'s consent, officers searched her iPhone and discovered illicit images and videos. Id. at 4.

2. A grand jury in the Southern District of Ohio charged petitioner with one count of sex trafficking of a minor, in violation of 18 U.S.C. 1591(a)(1) and (b)(2); and two counts of producing child pornography, in violation of 18 U.S.C. 2251(a) and (e). Indictment 1-2.

At trial, the government called J.B. to testify about her interactions with petitioner. Pet. App. 5. Before J.B. took the stand, the government advised that her testimony would be

accompanied by the display of child pornography. Id. at 8-9. The district court then closed the courtroom to the public, based on concern that the public gallery could see the monitors installed at counsel's table and the lectern, and would therefore see the explicit materials depicting J.B. as they were displayed to the jury. See id. at 5, 9; 11/8/18 Tr. 26-27. The government did not seek the closure and petitioner did not object to it. Pet. App. 8-9.

The following day, an agent with the Federal Bureau of Investigation offered additional testimony about the same exhibits. Pet. App. 5; 11/8/18 Tr. 26-27. Petitioner objected to closing the courtroom during the agent's testimony. Pet. App. 5. With agreement from the parties, the district court kept the courtroom open but turned off certain monitors to block the gallery from seeing the illicit material. Ibid.

The jury found petitioner guilty on all counts. Pet. App. 5. The district court sentenced him to 480 months of imprisonment. Id. at 6.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1-27.

On appeal, petitioner contended, inter alia, that he was entitled to a new trial on the ground that his Sixth Amendment right to a public trial had been violated by the district court's closure of the courtroom during J.B.'s testimony. Pet. App. 8.

Because petitioner had not objected on that basis in the district court at the time, the court of appeals reviewed his claim for plain error. Id. at 9.

The court of appeals determined that a new trial in this case was not warranted under the plain-error standard. See Pet. App. 9-13. To establish reversible plain error, a defendant must show "(1) 'error,' (2) that is 'plain,' and (3) that 'affects substantial rights.'" Johnson v. United States, 520 U.S. 461, 467 (1997) (quoting United States v. Olano, 507 U.S. 725, 732 (1993)) (brackets omitted). If those first three prerequisites are satisfied, the reviewing court has discretion to correct the error based on its assessment of whether "(4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." Ibid. (quoting United States v. Young, 470 U.S. 1, 15 (1985)) (brackets and internal quotation marks omitted). The court of appeals here found that petitioner had satisfied the first three requirements, but not the fourth. Pet. App. 9.

In the court of appeals' view, the district court committed an error that was plain by "temporarily closing the courtroom to the public" without making the findings necessary to support that closure, which no party had requested. Pet. App. 10. And the court of appeals also took the view that the error affected petitioner's substantial rights "[g]iven the foundational importance of a public trial." Ibid. But the court found that

petitioner had failed to establish that the courtroom closure "compromised the fairness, integrity, or public reputation of his trial." Id. at 11.

The court of appeals observed that "[t]he scope of the courtroom closure was limited such that the vast majority of [petitioner's] trial took place in an open setting." Pet. App. 11 (internal quotation marks and citation omitted). The court also observed that "the temporary courtroom closure had no material effect on the evidence," which included "the illicit pictures and videos of J.B. and the Backpage.com advertisement." Ibid. And the court observed that "the evidence against [petitioner] * * * was overwhelming and would be materially identical if he were tried again," meaning that a new trial would be a "windfall" for petitioner. Id. at 12 (internal quotation marks and citation omitted).

The court of appeals expressly found that "[t]he temporary courtroom closure didn't affect the integrity of the trial." Pet. App. 12. The court noted that "[t]he district court didn't have a nefarious purpose for closing the courtroom -- [the court] wanted to prevent the public from viewing child pornography and likely intended to protect J.B." Ibid. And the court "d[id] not see anything in the record indicating that the jury, judge, or prosecutor failed to approach their duties with the neutrality and

serious purpose that our system demands while the courtroom was closed." Ibid. (internal quotation marks and citations omitted).

Finally, the court of appeals expressly found that "the temporary courtroom closure had no effect on the public reputation of the trial." Pet. App. 12. The court explained that "[t]he transparency interest that an open courtroom protects does not give the general public the right to view the child pornography evidence at issue here" and that "the public's ability to oversee [petitioner's] trial was otherwise vindicated with the release of the transcript of J.B.'s testimony." Ibid. The court found that "no reasonable observer could maintain a doubt about the evidentiary basis for [petitioner's] conviction after reviewing the publicly available trial transcript." Ibid. And the court found that "no miscarriage of justice will result from upholding [petitioner's] conviction," making clear that "[petitioner] got a fair trial, and the public has all necessary assurances of a well-supported guilty verdict." Id. at 13.

Judge Clay dissented. Pet. App. 20-27. He disagreed with the majority's analysis of this case, and also took the view that a violation of the public-trial right should automatically amount to reversible plain error in every case. See ibid.

ARGUMENT

Petitioner renews his contention (Pet. 8-15) that the district court committed reversible plain error by closing the

courtroom during J.B.'s testimony. Petitioner further contends (Pet. 14-15) that the decision below implicates a division of authority in the courts of appeals regarding plain-error review of "structural error." Pet. 14. Those contentions do not warrant further review. The court of appeals permissibly determined that the courtroom closure at petitioner's trial did not "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings," Johnson v. United States, 520 U.S. 461, 467 (1997) (brackets and citation omitted), and therefore did not meet the demanding standard for appellate relief under Federal Rule of Criminal Procedure 52(b). The decision below does not conflict with any decision of this Court or another court of appeals and is intensely fact-bound. This Court recently denied a petition for a writ of certiorari raising a similar issue, see Mendonca v. United States, 144 S. Ct. 2531 (2024) (No. 23-6648), and should follow the same course here.

1. Petitioner did not object when the district court closed the courtroom during J.B.'s testimony. And because petitioner failed to bring any Sixth Amendment error to the court's attention at the time, he may obtain relief on appeal only if he can satisfy the plain-error standard in Rule 52(b). See United States v. Olano, 507 U.S. 725, 733-734 (1993). The court of appeals correctly concluded that he cannot do so. Pet. App. 11-13.

a. "In all criminal prosecutions, the accused shall enjoy the right to a * * * public trial." U.S. Const. Amend. VI. This Court has made clear, however, that the public-trial right is not absolute.

In some cases, the defendant's "right to an open trial may give way * * * to other rights or interests," such as protecting witnesses or jurors. Presley v. Georgia, 558 U.S. 209, 213 (2010) (per curiam) (quoting Waller v. Georgia, 467 U.S. 39, 45 (1984)); see Weaver v. Massachusetts, 582 U.S. 286, 297 (2017) (stating that "courtroom closure is to be avoided, but * * * there are some circumstances when it is justified"). And in the face of "an overriding interest that is likely to be prejudiced," a court may, after "consider[ing] reasonable alternatives to closing the proceeding," order a "closure * * * no broader than necessary to protect that interest" upon "mak[ing] findings adequate to support the closure." Waller, 467 U.S. at 48 (1984)); see Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 511-512 (1984).

This Court has also separately held that a violation of the public-trial right falls within the "very limited class" of "structural" constitutional errors that are not amenable to harmless-error analysis. Neder v. United States, 527 U.S. 1, 8 (1999) (quoting Johnson, 520 U.S. at 468). Thus, under the harmless-error rule that applies to preserved objections, see Fed. R. Crim. P. 52(a), the defendant can obtain relief for such a

violation on appeal without a case-specific showing that the closure affected the defendant's substantial rights.

If, however, a claim of error is "not brought to the [district] court's attention" at the proper time, then a defendant may obtain appellate relief only if he establishes reversible "plain error." Fed. R. Crim. P. 52(b); see, e.g., Greer v. United States, 593 U.S. 503, 507-508 (2021); Puckett v. United States, 556 U.S. 129, 134-135 (2009). To establish reversible plain error, a defendant must show "(1) 'error,' (2) that is 'plain', and (3) that 'affects substantial rights.'" Johnson, 520 U.S. at 467 (quoting Olano, 507 U.S. at 732) (brackets omitted). If those first three prerequisites are satisfied, the reviewing court has discretion to correct the error based on its assessment of whether "(4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." Ibid. (quoting United States v. Young, 470 U.S. 1, 15 (1985)) (brackets and internal quotation marks omitted).

While the Court has held that structural errors warrant reversal "without regard to the mistake's effect on the proceeding" in the context of "preserved error," United States v. Dominguez Benitez, 542 U.S. 74, 81 (2004), it has "declined to resolve whether 'structural' errors * * * automatically satisfy the third prong of the plain-error test" where -- as here -- the error was forfeited. Puckett, 556 U.S. at 140. The plain-error inquiry "is

meant to be applied on a case-specific and fact-intensive basis," id. at 142, and "the defendant has the burden of establishing each of the four requirements for plain-error relief," Greer, 593 U.S. at 508. "Meeting all four" requirements "is difficult, 'as it should be.'" Puckett, 556 U.S. at 135 (citation omitted).

b. Petitioner does not dispute that plain-error review applied in this case. See Pet. 10 n.1. And applying that standard, the court of appeals permissibly determined -- based on its discretionary assessment of whether an error "had a serious effect on the fairness, integrity, or public reputation of judicial proceedings," Pet. App. 9 (internal quotation marks, brackets, and citation omitted) -- that a new trial was not warranted in this case. Petitioner is therefore not entitled to appellate relief.

The court of appeals stated that the district court had "plainly erred" in temporarily closing the courtroom without first making the required findings about the necessity of such closure or any possible alternatives. Pet. App. 10. The court of appeals also acknowledged the "importance" of the public-trial right and concluded that petitioner's substantial rights had been affected. Ibid. But the court then explained that petitioner's claim failed to satisfy the fourth requirement for plain-error relief. Id. at 11-13. Among other things, the court of appeals emphasized that "the vast majority of [petitioner's] trial took place in an open setting," id. at 11 (internal quotation marks and citation

omitted); that "the temporary courtroom closure had no material effect on the evidence" "that formed the primary basis for the guilty verdict, i.e., "the illicit pictures and videos of J.B. and the Backpage.com advertisement," ibid.; and that the district court's purpose in ordering the closure was "to prevent the public from viewing child pornography and likely intended to protect J.B," id. at 12.

The court of appeals' determination not to award plain-error relief on the specific facts of this case accords with this Court's reasoning in Weaver v. Massachusetts, which addressed a postconviction ineffective-assistance-of-counsel claim predicated on counsel's failure to assert a violation of the defendant's right to public voir dire proceedings. See 582 U.S. at 290-305; cf. Presley, 558 U.S. at 213 (confirming "that the Sixth Amendment right to a public trial extends to the voir dire of prospective jurors") (emphasis omitted). In Weaver, the jury pool was so large that not all potential jurors could fit in the courtroom, and the court staff "excluded from the courtroom any member of the public who was not a potential juror," including members of the defendant's family. 582 U.S. at 292. The state supreme court held that even though closing the courtroom to the public during voir dire constituted a "structural" error, the defendant was not entitled to any relief in the collateral proceedings because he could not show that his attorney's failure to raise the structural

error caused him any prejudice. Id. at 293. This Court affirmed, emphasizing that not every public-trial violation renders the trial "fundamentally unfair." Id. at 298. And the Court identified a number of facts about the voir dire proceedings in that case that undercut any claim that "counsel's failure to object rendered the trial" in that particular case "fundamentally unfair." Id. at 304.

This case shares many of the same pertinent facts. First, in this case, as was true in Weaver, the "scope of the courtroom closure was limited." Pet. App. 11; see Weaver, 582 U.S. at 304. Second, "there was a record made of the proceedings that does not indicate any basis for concern, other than the closure itself." Weaver, 582 U.S. at 304; see Pet. App. 12 (noting "the release of the transcript of J.B.'s testimony"). And third, the record contains "no suggestion of misbehavior by the prosecutor, judge, or any other party; and no suggestion that any of the participants failed to approach their duties with the neutrality and serious purpose that our system demands." Weaver, 582 U.S. at 304; see Pet. App. 12 (same). Those similarities confirm that the court of appeals reasonably determined that the public-trial violation in this case did not rise to the level of reversible plain error.

Petitioner's observation (Pet. 13-14) that Weaver considered a claim of ineffective assistance of counsel on collateral review, rather than a standalone claim of public-trial error on direct

review, does not diminish Weaver's salience. The question at issue in Weaver -- i.e., whether the proceeding was "fundamentally unfair" -- is analogous to the fourth requirement of plain error review. And Weaver makes clear that it is both possible and appropriate to evaluate the circumstance-specific implications -- or lack thereof -- of a public-trial error in a particular case.

c. Petitioner does not meaningfully dispute the court of appeals' assessment that any public-trial violation here did not undermine the fundamental fairness or integrity of the proceedings. Petitioner instead contends that notwithstanding the court of appeals' assessment, "a structural error" -- of apparently any stripe -- "is the type of error that will automatically affect the fairness, integrity, and public reputation of a criminal trial." Pet. 13 (emphasis added). Petitioner thus advocates a rule of automatic reversal, in which a defendant could decline to object to an obvious Sixth Amendment violation during trial; wait to see whether the jury finds guilt; and then assert the violation on appeal and be entitled to vacatur and a new trial. This Court's precedent does not support such an approach.

To the contrary, this Court has repeatedly indicated that a defendant must meet all four of the requirements for plain-error relief -- including the requirement of showing that the asserted error seriously affected "the fairness, integrity or public reputation" of the proceedings, Olano, 507 U.S. at 736 (citation

omitted) -- even for what the Court has assumed to be structural errors. Accordingly, the Court has itself applied the fourth plain-error requirement to deny appellate relief irrespective of the potentially structural character of the claimed error. See Johnson, 520 U.S. at 468-470 (applying the fourth plain-error requirement to deny relief on a claim involving the asserted error of failing to submit an element of the offense to the jury); United States v. Cotton, 535 U.S. 625, 632-634 (2002) (similar, where the asserted error consisted of omitting an element of the offense from the indictment).

The Court has also emphasized that the "fourth prong" of the plain-error inquiry "is meant to be applied on a case-specific and fact-intensive basis" and is not reducible to "'per se'" rules. Puckett, 556 U.S. at 142 (citation omitted). And the Court has warned against creating perverse incentives for a defendant to "remain[] silent about his objection" at trial with an eye to "belatedly raising the error only if the case does not conclude in his favor." Id. at 134; see United States v. Vonn, 535 U.S. 55, 73 (2002) (similar). The plain-error standard strikes a "careful balance * * * between judicial efficiency and the redress of injustice," Puckett, 556 U.S. at 135, and "'any unwarranted extension' of the authority granted by Rule 52(b)" threatens to disturb that balance, ibid. (brackets and citation omitted). Petitioner seeks such an unwarranted extension here. Petitioner

does not identify any sound reason to treat a public-trial violation any differently from the other errors, asserted to be structural, to which this Court has applied the fourth plain-error requirement. See Johnson, 520 U.S. at 468-470; Cotton, 535 U.S. at 633-634.

Petitioner's reliance (Pet. 12) on Rosales-Mireles v. United States, 585 U.S. 129 (2018), is misplaced. That case did not involve any structural error. Instead, the Court addressed the application of the fourth plain-error requirement when a sentencing judge miscalculates the defendant's advisory Sentencing Guidelines range; the judge's "miscalculation constituted an error that was plain"; and the error "affected [the defendant's] substantial rights * * * because there was 'a reasonable probability that he would have been subject to a different sentence but for the error.'" Id. at 136 (citation omitted). In those circumstances, the Court concluded that a plain Guidelines error affecting the defendant's substantial rights will "[i]n the ordinary case" also satisfy the "fourth prong" of plain-error review, given the distinctive role of the Guidelines in the sentencing process. Id. at 145. But the Court also emphasized that "any exercise of discretion at the fourth prong * * * inherently requires 'a case-specific and fact-intensive' inquiry," and that "[t]here may be * * * countervailing factors" that warrant denying appellate relief in a given case. Id. at 142

(citation omitted). Rosales-Mireles thus provides no support for petitioner's proposed rule of automatic vacatur here.

2. The decision below does not conflict with any decision of this Court or another court of appeals. As this Court has emphasized, the plain-error standard "leaves the decision to correct the forfeited error within the sound discretion of the court of appeals," Olano, 507 U.S. at 732, and petitioner identifies no decision of this Court or another court of appeals that would preclude a discretionary decision to leave the jury's verdict in place on the facts here.

Petitioner incorrectly contends (Pet. 15) that the Ninth Circuit takes the position that a structural error "will always meet the fourth plain error prong." To the contrary, the Ninth Circuit recently rejected a forfeited courtroom-closure claim at the fourth step of plain-error review. See United States v. Hougen, 76 F.4th 805, 811-814 (2023), cert. denied, 144 S. Ct. 1121 (2024). After examining this Court's case law, the Ninth Circuit in Hougen declined to endorse a rule that would have "require[d] the exercise of [the reviewing court's] discretion to afford relief under plain error review every time there has been a structural error, regardless of any and all case-specific facts relevant to the fairness, integrity, and reputation of the proceedings." Id. at 813.

Petitioner contends (Pet. 15) that the Ninth Circuit adopted his position in its earlier decision in United States v. Ramirez-Ramirez, 45 F.4th 1103 (2022). In Hougen, however, the Ninth Circuit expressly declined to read Ramirez-Ramirez to "preclude[] an individualized fourth prong analysis in cases implicating a structural error." 76 F. 4th at 813. The Ninth Circuit explained that its prior decisions had repeatedly "affirmed that the decision to notice an error under prong four is an exercise of discretion," and were not the product of any categorical rule that all structural errors necessarily undermine the fairness or integrity of the proceedings. Ibid. (citing Ramirez-Ramirez, 45 F.4th at 1109, and United States v. Becerra, 939 F.3d 995, 1006 (9th Cir. 2019)). In any event, any tension within the Ninth Circuit itself would not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").[2]

[2] Petitioner also suggests that the Eleventh Circuit might adopt his preferred rule, citing an opinion from a single judge concurring in the denial of rehearing en banc. See Pet. 15 (citing United States v. Rodriguez, 406 F.3d 1261, 1266 (11th Cir. 2005) (Carnes, J.)). The Eleventh Circuit, however, has thus far declined to address the interplay between structural errors and plain-error review. See United States v. Nelson, 884 F.3d 1103, 1108 ("Whether the structural-error doctrine modifies a defendant's burden to satisfy all four plain-error factors remains unsettled."), cert. denied, 586 U.S. 952 (2018); United States v. Watson, 611 Fed. Appx. 647, 661 (11th Cir. 2015) ("Whether

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2025

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structural error modifies a defendant's burden to satisfy all four plain-error factors remains an open question."), cert. denied, 577 U.S. 1161 (2016).