No. 24-5947

in the

Supreme Court

of the

United States

Term,

ISMAIL SALAAM,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY TO BRIEF IN OPPOSITION

JOSEPH MEDICI
Federal Public Defender Southern District of Ohio

Kevin M. Schad
Appellate Chief
Office of the Federal Public Defender
Southern District of Ohio
250 E. Fifth St. Suite 350
Cincinnati OH 45202
(513) 929-4834
Kevin_schad@fd.org
Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

ARGUMENT

For the entire testimony of the key witness (the named victim of Petitioner Salaam's sex trafficking charges), the district court ordered the courtroom cleared because "it was required [to do so] by law." The Solicitor General concedes that it was not, and that this was structural error in violation of *Waller v. Georgia*. 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). The important issue that this Court should grant certiorari review on is whether this structural error, on direct appeal, always has a serious effect on the fairness, integrity, and public reputation of a criminal proceeding – regardless of whether there was a contemporaneous objection made at trial.

The Solicitor General's response assumes, without any case in support, that even faced with a structural error, a court of appeals may weigh the plain error fourth prong in regular course. It was this Court's decision in *United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) that first articulated that the now familiar fourth plain error prong (if the error seriously affects the fairness, integrity or public reputation of judicial proceedings) applied to Federal Rule of Criminal Procedure Rule 52(b). Even there, this Court hinted that there could be "certain errors" that "affect substantial rights independent of prejudice" for purposes of this fourth prong. *Olano*, 507 U.S. at 737. "Errors of this type are so intrinsically harmful as to require automatic reversal (i.e., "affect substantial rights") without regard to their effect on the outcome." *Neder v. United States*, 527

U.S. 1, 7, 119 S. Ct. 1827, 1833, 144 L. Ed. 2d 35 (1999). The removal of the public from the testimony of the key victim witness qualifies as such error.

Whatever its label, the Sixth Circuit's determination that Petitioner Salaam had failed to prove harm cuts directly against this Court's definition of why "structural error" exists. This Court has defined that structural error "affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 1265, 113 L. Ed. 2d 302 (1991). Without structural error protections, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, [ ] and no criminal punishment may be regarded as fundamentally fair." *Rose v. Clark*, 478 U.S. 570, 577–78, 106 S. Ct. 3101, 3106, 92 L. Ed. 2d 460 (1986). It is therefore inconsistent to on one hand recognize a fundamental breach in the criminal process itself, while at the same time ask the defense to prove that the breach had a specific, demonstrable effect on the proceedings.

The Solicitor General relies on *Weaver v. Massachusetts*, 582 U.S. 286, 137 S. Ct. 1899, 198 L. Ed. 2d 420 (2017) for the proposition that the existence of a structural error does not require reversal in the absence of prejudice, when not contemporaneously raised. However, *Weaver* came to the Court on habeas review. As this Court noted in *Brecht v. Abrahamson*, 507 U.S. 619, 633, 113 S. Ct. 1710, 1719, 123 L. Ed. 2d 353 (1993): "the writ of habeas corpus has historically been regarded as an extraordinary remedy, "a bulwark against convictions that violate

'fundamental fairness.'" Thus, "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." When confined to its proper setting, it is understandable why the Court in *Weaver* ruled the way it did. But that ruling does not affect this case, which is on direct appellate review, not habeas application.

Moreover, the Solicitor General's citation of *Puckett v. United States*, 556 U.S. 129, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009) is misplaced. First, *Puckett* was not a structural error case. 556 U.S. at 141, Moreover, the Court's passing reference, that it had not yet decided whether a structural error could always satisfy the third "plain error" prong, is not the issue before this Court. The Sixth Circuit determined that the third plain error element had been met. (Appendix 1, p.11) Finally, if anything, *Puckett* belies the Solicitor General's argument that this is not a case worthy of certiorari review: the Court's reluctance to resolve the interplay between plain error and structural error since the *Puckett* decision in 2009 shows that this is a recurring issue that needs resolved by this Court.

In a related argument, the Solicitor General contends that this Court recently denied a petition for certiorari raising this identical issue, *Mendonca v. United States*, 144 S. Ct. 2531 (2024) (No. 23-6648), and therefore should follow suit here. But the situation in *Mendonca* was unique and limited – there the district court was dealing with the heart of the COVID-19 pandemic, and the Second Circuit excused the district court's actions in inadvertently shutting down a video feed to the public

during part of the voir dire. "[W]e give considerable weight to Judge Pollak's deliberate efforts to foster a collaborative environment for the court and the parties to figure out how best to complete a fair voir dire under challenging and unusual circumstances." *United States v. Mendonca*, 88 F.4th 144, 156 (2d Cir. 2023). Indeed, in responding to the petition for certiorari in that case, the Solicitor General relied heavily on the unique COVID-19 circumstances as a basis to differentiate that case from other public trial violations. See Brief in Opposition, *Mendonca v. United States*, Case No. 23-6648, p.12) This Court's decision to forgo certiorari in *Mendonca* brings no illumination to the decision here.

And finally, the exclusion of the public in this case cannot be deemed harmless under any standard. The public was excluded from the testimony of the key Government witness – the victim of Salaam's charged offenses. There was no more crucial evidence in the case – this should have had the First and Sixth Amendment protections of a public setting. Yet the district court, without any stated reasoning, closed the courtroom to the public. Therefore, even if somehow the Sixth Circuit was able to weigh the prejudicial effect of this structural error, it did seriously affect the fairness, integrity or public reputation of judicial proceedings.

To be clear: trial errors are subject to harmless error review. See *Hedgpeth v. Pulido*, 555 U.S. 57, 60, 129 S. Ct. 530, 532, 172 L. Ed. 2d 388 (2008). Constitutional errors are subject to harmless error review. See *Chapman v. California*, 386 U.S. 18, 23, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705 (1967). It is only in the "rare case" of a

"structural defect" where automatic reversal is required. *Sullivan v. Louisiana*, 508 U.S. 275, 282, 113 S. Ct. 2078, 2083, 124 L. Ed. 2d 182 (1993), Chief Justice Rehnquist, concurring. Such rare case is presented here. This Court should grant certiorari, and hold that when a structural error is noticed on direct appellate review in a criminal case, that error requires a new trial proceeding.

CONCLUSION

Salaam requests that this Court grant certiorari, reverse the Sixth Circuit's decision, and remand for a new trial.

Respectfully submitted,

JOSEPH MEDICI
Federal Public Defender

Kevin M. Schad
Appellate Chief
Office of the Federal Public Defender
Southern District of Ohio
Appellate Chief
250 E. Fifth St.
Suite 350
Cincinnati OH 45202
(513) 929-4834
Kevin_schad@fd.org
Counsel for Petitioner