No. 25-5537

IN THE SUPREME COURT OF THE UNITED STATES

BENITO M. VALDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT OF COLUMBIA
COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the District of Columbia Superior Court violated petitioner's Sixth Amendment right to a public trial when it conducted voir dire at the bench using a "husher" to encourage candor by individual jurors in answering questions, while allowing members of the public to observe all proceedings.

ADDITIONAL RELATED PROCEEDINGS

District of Columbia Superior Court (D.C. Sup. Ct.):

United States v. Valdez, No. 2016-CF1-2267 (Jul. 9, 2018)

District of Columbia Court of Appeals (D.C.):

Valdez v. United States, No. 18-CF-1340 (Aug. 15, 2024)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 320 A.3d 339.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2024. A petition for rehearing was denied on April 1, 2025 (Pet. App. 48a). On June 24, 2025, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 29, 2025, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATEMENT

Following a jury trial in the District of Columbia Superior Court, petitioner was convicted on three counts of kidnapping while armed, in violation of D.C. Code §§ 22-2101, 22-3202 (1981); one count of sodomy while armed, in violation of D.C. Code §§ 22-3502, 22-3202 (1981); and nine counts of first-degree murder while armed, in violation of D.C. Code §§ 22-2401, 22-3202 (1981). Am. Judgment 1-4. He was sentenced to life imprisonment on the murder counts and term-of-years sentences on the other counts. Ibid. The District of Columbia Court of Appeals affirmed. Pet. App. 1a-35a.

1. On the evening of April 22, 1991, Curtis Pixley and Keith Simmons approached petitioner to buy crack cocaine. See Pet. App. 2a. A dispute arose over a missing crack rock, during which Samantha Gillard, Pixley's friend, joined the men. Id. at 2a-3a. Insisting that Gillard had "to do something for the drugs that are missing," petitioner sexually assaulted her at gunpoint. Id. at 3a. Petitioner then ordered Gillard to get on the ground with Pixley and Simmons. Ibid. While the three were lying face down, petitioner shot and killed them. Ibid. A District of Columbia grand jury charged petitioner with three counts of kidnapping while armed, in violation of D.C. Code §§ 22-2101, 22-3202 (1981); one count of sodomy while armed, in violation of D.C. Code §§ 22-3502, 22-3202 (1981); and nine counts of first-degree murder while armed,

in violation of D.C. Code §§ 22-2401, 22-3202 (1981). See 2016-CF1-2267 Docket entry Nos. 238-251 (Oct. 24, 2017).

Over petitioner's objection, the trial court informed the parties that it would use a white-noise machine (or "husher") for individualized questioning of prospective jurors during voir dire, Pet. App. 37a-47a, noting that under appellate precedent, conducting individual voir dire at the bench "did not offend the basic right to a public trial," id. at 40a. The court "want[ed] to have as much candor from jurors as possible," and was "concern[ed]" about conducting individual questioning in open court "because of some of the sensitive issues in this kind of a case." Id. at 42a. The court believed that the parties "might well get more information from jurors" when they "are more comfortable and not speaking public[l]y about these things." Ibid. The court found that this concern was particularly warranted given its "pretty open[] ended" voir dire questions. Id. at 43a. The court offered that, if there were people who wanted to listen to voir dire, it "could give them headphones," just as it did with petitioner. Id. at 39a. Petitioner's counsel, however, did not know of anyone who wanted to listen. Ibid.

The trial court then conducted a voir dire proceeding in which it asked questions to the full group of jurors, each of whom would write down an answer on a notecard, and then be called up to the bench for individualized questioning with a husher "to try to

protect * * * [each prospective juror's] privacy." Pet. App. 55a; see id. at 53a-55a. Following voir dire, the case proceeded to trial and the jury found petitioner guilty on the charged counts. Am. Judgment 1-4. The court sentenced petitioner to life imprisonment on the murder counts and term-of-years sentences on the other counts. Ibid.

2. The District of Columbia Court of Appeals affirmed.* Pet. App. 1a-35a. In addition to rejecting other claims, the court of appeals observed that its prior decision in Blades v. United States, 200 A.3d 230 (D.C. 2019), cert. denied, 141 S. Ct. 165 (2020), foreclosed petitioner's argument that the trial court's voir dire procedures violated his Sixth Amendment right to a public trial. See Pet. App. 25a n.1. In Blades, the court had recognized that "the husher procedure * * * does not amount to a closure or partial closure of the courtroom, but is more appropriately viewed as an alternative to closure." 200 A.3d at 240. Blades had explained that such a procedure, when combined with the availability of transcripts of the individual juror examinations, "enables the public to see the court proceedings, including facial expressions and body language of at least some of the participants

* The court of appeals concluded that several counts of conviction merged and remanded the case to the trial court for the limited purpose of vacating the merged counts. See Pet. App. 24a-25a.

at the bench, and thus honors the defendant's right to a public trial." Ibid.

ARGUMENT

Petitioner renews his contention (Pet. 8-29) that the trial court's voir dire procedures violated his Sixth Amendment right to a public trial. That contention lacks merit. The procedures were constitutionally permissible, and petitioner does not identify any conflict between the decision below and the decisions of other courts that warrants this Court's review. This case would also be an unsuitable vehicle for addressing the question presented because the findings made by the trial court justify its procedure even under petitioner's standard. This Court has previously denied a petition for a writ of certiorari raising a similar claim, see Blades v. United States, 141 S. Ct. 165 (2020) (No. 19-7487), and the same course is warranted here.

1. a. "In all criminal prosecutions, the accused shall enjoy the right to a * * * public trial." U.S. Const. Amend. VI. The public trial right "is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." Waller v. Georgia, 467 U.S. 39, 46 (1984) (citation omitted). Observance of the right "encourages witnesses to come forward and discourages perjury," ibid., and it

"fosters an appearance of fairness, thereby heightening public respect for the judicial process," Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982); see id. at 605-606.

In Presley v. Georgia, 558 U.S. 209 (2010) (per curiam), this Court confirmed "that the Sixth Amendment right to a public trial extends to the voir dire of prospective jurors." Id. at 213. In doing so, the Court looked to Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984), which "held that the voir dire of prospective jurors must be open to the public under the First Amendment," and Waller v. Georgia, which held that the Sixth Amendment public trial right extends to pretrial suppression hearings. Presley, 558 U.S. at 212. Presley also reiterated, however, that the public trial right is not absolute.

As the Court explained in Presley and Waller, the "right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." Presley, 558 U.S. at 213 (quoting Waller, 467 U.S. at 45); see id. at 215 ("There are no doubt circumstances where a judge could conclude that threats of improper communications with jurors or safety concerns are concrete enough to warrant closing voir dire."); see also Weaver v. Massachusetts, 582 U.S. 286, 298 (2017) (explaining that "the public-trial right * * * is subject to exceptions," including where the trial court "mak[es] proper

factual findings in support of the decision to" close the proceedings). 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; see Press-Enterprise, 464 U.S. at 511-512.

b. The court below recognized and applied those principles in Blades v. United States, 200 A.3d 230 (D.C. 2019), cert. denied, 141 S. Ct. 165 (2020). The court expressly acknowledged that "the guarantee of a public trial extends to the voir dire examination of potential jurors," 200 A.3d at 238 (citing Press-Enterprise, 464 U.S. at 504-510, and Presley, 558 U.S. at 213), and that "it is only under the most exceptional circumstances that limited portions of a criminal trial may be closed even partially to the public," ibid. (quoting Kleinbart v. United States, 388 A.2d 878, 883 (D.C. 1978)). The court determined, however, that under procedures whereby the public was allowed into the courtroom, could hear the initial questions posed to the jurors, could observe the proceedings, and could later review a transcript of the portions of the proceedings that were not contemporaneously audible, the courtroom was not, in fact, "closed" to the public in a manner

that violated the Sixth Amendment. Id. at 238-239 (citation omitted).

The procedures here were substantially similar to the procedures in Blades, see Pet. App. 53a-55a, and contrast sharply with the full courtroom closure in Presley, where the court instructed the lone observer "that prospective jurors were about to enter and * * * that he was not allowed in the courtroom and had to leave that floor of the courthouse entirely," and refused to make any accommodation when defense counsel "objected to 'the exclusion of the public from the courtroom.'" 558 U.S. at 210 (citation omitted); see also Weaver, 582 U.S. at 291-292 (involving public-trial claim based on pre-Presley complete exclusion of public during voir dire). This Court's other public-trial decisions likewise involve complete courtroom closure. In Press-Enterprise, the trial court excluded the public and press from all but three days of a six-week voir dire and denied requests for transcript access. 464 U.S. at 503-504. And in Waller, the trial court ordered a suppression hearing closed to the public. 467 U.S. at 42.

Presley instructs trial courts to "consider alternatives to closure" to address concerns about the public's presence during voir dire. 558 U.S. at 214. Here, the trial court identified a significant concern with conducting voir dire in the manner requested by petitioner -- specifically, that the case implicated

"sensitive issues" and "open[] ended" voir dire questions, Pet. App. 42a-43a; that jurors would "give * * * more information than they might if they were talking about very personal things in an open courtroom," id. at 38a; and that the court wanted "as much candor from jurors as possible," id. at 42a. Numerous courts have recognized similar concerns to be well-founded. See, e.g., United States v. King, 140 F.3d 76, 82 (2d Cir. 1998) (affirming district court's decision to question prospective jurors outside the presence of the public and press when the district court was "concerned not merely with protecting the privacy of the jurors from public disclosure of sensitive, personal matters but also with assuring their candor in responding to questions so that a fair trial would be assured"); In re South Carolina Press Ass'n, 946 F.2d 1037, 1043 (4th Cir. 1991) ("Full and frank answers from potential jurors, when they are questioned on voir dire are essential to the process of selecting [a fair and impartial] jury."); Coppedge v. United States, 272 F.2d 504, 508 (D.C. Cir. 1959) ("It is too much to expect of human nature that a juror would volunteer, in open court, before his fellow jurors, that he would be influenced in his verdict by a newspaper story of the trial."), cert. denied, 368 U.S. 855 (1961). The trial court accordingly adopted an alternative voir dire procedure that mitigated concern while still allowing the public to observe the proceedings in person and obtain transcripts of any obscured dialogue.

The highest courts in other jurisdictions have affirmed, and even encouraged, the use of voir dire procedures similar to those used by the trial court below. The Maryland Court of Appeals, for example, endorsed a "best practice" of asking general questions to the venire as a whole, and then conducting individual follow-up either at the bench or in a conference room where other members of the venire cannot hear the response. Collins v. State, 158 A.3d 553, 562-564 (2017). As that court explained:

> No one can deny that open court is a formal, public place, staffed with authority figures. Persons called for jury service are among strangers and -- except for the rare individual who is familiar with a courtroom setting and the trial process -- may be confused by the process or substance of voir dire, much less its importance to the constitutional guarantee of a trial by an impartial jury. The setting alone is likely to intimidate many venirepersons. It is also likely that many prospective jurors have little or no experience speaking in public, much less in answer to a judge's questions, in the formality of a courtroom, and in the presence of a crowd. Finally, it goes almost without saying that the more intimidating the process, the greater the chance that a prospective juror will simply refuse to answer or shy from responding with complete candor.

Id. at 564; see, e.g., Commonwealth v. Colon, 121 N.E.3d 1157, 1170 (Mass. 2019) (recognizing that conducting individual voir dire of deliberating jurors at sidebar does not violate the right to a public trial because the process occurs in open court).

c. Petitioner errs in reading (Pet. 16-18) this Court's public-trial cases as imposing an inflexibly rigid rule that would foreclose the trial court's procedures here. Indeed, the

implications of that all-or-nothing view of the public-trial right would be untenable.

Petitioner's interpretation of the Sixth Amendment would apply equally not only to the use of a husher during voir dire, but to the universally accepted practice of conducting sidebars at the bench during trial in which the public can see the attorneys, judge, and defendant conferring but cannot hear them. See, e.g., Wilder v. United States, 806 F.3d 653, 660 (1st Cir. 2015) ("no functional difference" between conducting individual voir dire in a jury deliberation room and holding a sidebar conference), cert. denied, 578 U.S. 985 (2016). Petitioner proposes to exempt sidebar proceedings from his framework on the view that "they are distinct from trial proceedings to which the right of public access attaches." Pet. 21 (citation and internal quotation marks omitted). But he fails to explain how such a distinction can be drawn. Sidebars commonly address critical trial issues -- like peremptory challenges to potential jurors, difficult evidentiary rulings, and matters that might prejudice the defendant if heard by the jury -- that are not readily distinguishable from the trial. See, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 598 n.23 (1980) (Brennan, J., concurring in the judgment) ("[W]hen engaging in interchanges at the bench [during public trials], the trial judge is not required to allow public or press intrusion upon the huddle.").

Petitioner also identifies no authority suggesting that a trial court closes the courtroom, or must make the sort of Waller findings necessary to do so, every time it conducts such a sidebar. See, e.g., United States v. Valenti, 987 F.2d 708, 713 (11th Cir.) (recognizing that a court need not "articulate findings that a closed bench conference is necessary and narrowly tailored to preserve higher values before a closed bench conference occurs"), cert. denied, 510 U.S. 907 (1993); United States v. Smith, 787 F.2d 111, 114-115 (3d Cir. 1986) (recognizing that a trial court is permitted to satisfy the "public interest in observation and comment" on sidebar rulings "in the next best possible manner" by releasing a transcript of the hearing instead of allowing "contemporaneous observation"). Such a rule would be impractical and debilitating to standard courtroom practice. Likewise, the trial court here was not foreclosed from adopting its analogous voir dire procedure.

2. Contrary to petitioner's assertion (Pet. 10-14), no conflict exists between the decision below and the decision of another court that warrants this Court's review.

Two of the three cases petitioner cites (Pet. 11-12) as conflicting with the decision below did not address procedures like those at issue here. In Cable News Network, Inc. v. United States, 824 F.2d 1046 (D.C. Cir.) (per curiam), cert. denied sub nom. Deaver v. Cable News Network, Inc., 484 U.S. 914 (1987), the

D.C. Circuit considered only whether conducting voir dire "in camera" -- outside the courtroom, in a private jury room from which the public was excluded entirely -- violated the public-trial right. 824 F.2d at 1047; see Cert. Pet., Deaver v. Cable News Network, Inc., 1987 WL 954872, at *9-*14 (1987) (No. 87-331). Indeed, neither the parties nor the media in that case objected to a prior stage of voir dire more similar to the procedure here, in which the court discussed individual jurors' answers to questions at the bench out of the public's earshot. Id. at *5-*7. And in People v. Virgil, 253 P.3d 553 (2011), cert. denied, 565 U.S. 1236 (2012), the Supreme Court of California stated that "as a general rule, the questioning of prospective jurors should be conducted in open court," but noted that it was aware of "no case that holds sidebar conferences to discuss sensitive or potentially prejudicial matters are akin to a closure of the courtroom." 253 P.3d at 578.

Petitioner notes (Pet. 10-11) that in a single decades-old decision, In re Petitions of Memphis Publishing Co., 887 F.2d 646 (1989), a divided panel of the Sixth Circuit found that the use of a husher during voir dire constituted a courtroom closure that violated the Constitution. But any shallow conflict between Memphis Publishing and the decision below does not warrant this Court's intervention. The brief majority opinion in Memphis Publishing concluded only that "the naked assertion by the district

court in this case that defendant's Sixth Amendment right to a fair trial 'might well be undermined'" without the husher, "without any specific finding of fact to support that conclusion, was insufficient to justify closure." Id. at 648-649. The Sixth Circuit did not analyze whether the husher procedure was, in fact, an "alternative[] to closure," Presley, 558 U.S. at 214, rather than a closure itself, see Memphis Publishing, 887 F.2d at 649, 651 (Norris, J., concurring in part and dissenting in part), nor did it address concerns like those articulated by the trial court here concerning juror candor.

3. This case would, in all events, be an unsuitable vehicle to consider the question presented. Even if petitioner were correct that the courtroom was effectively closed during voir dire, that closure was justified based on the trial court's findings.

Under Waller, the public may be excluded from a trial when (1) "the party seeking to close the hearing * * * advance[s] an overriding interest that is likely to be prejudiced"; (2) "the closure [is] no broader than necessary to protect that interest"; (3) "the trial court * * * consider[s] reasonable alternatives to closing the proceeding"; and (4) the trial court "make[s] findings adequate to support the closure." 467 U.S. at 48. If, as petitioner contends (Pet. i), that test applies, then the trial court's explanation of the husher procedure satisfied it.

First, the trial court adequately described the "overriding interest that [wa]s likely to be prejudiced," Waller, 467 U.S. at 48, if individual voir dire was contemporaneously audible, by explaining at some length the court's concerns about juror candor. See, e.g., Pet. App. 38a, 42a-43a; p. 3, supra. Second, the court's procedures were precisely tailored to mitigate that concern, while leaving the public able to observe individual jurors during the voir dire and obtain transcripts of the proceedings at the bench. See Waller, 467 U.S. at 48 (explaining that closure "must be no broader than necessary to protect" the "interest that is likely to be prejudiced"). The court even offered that if "there w[ere] some other person who wanted to hear" the voir dire proceedings, "we could conceivably give them headphones." Pet. App. 39a.

Third, the trial court considered petitioner's proposed "alternative[] to closing the proceeding," Waller, 467 U.S. at 48 -- conducting voir dire in open court -- but determined that it would not reasonably assure the full candor of prospective jurors when responding to the court's "pretty open[] ended" voir dire questions, including questions about their involvement in past criminal matters or experiences as either a witness or victim of a similar crime, Pet. App. 43a; see id. at 37a. And fourth, the court "ma[d]e findings adequate to support" the asserted "closure." Waller, 467 U.S. at 48. The court based its decision

on published case law in its jurisdiction, see Pet. App, 39a-41a, the experiences of other judges in the courthouse, id. at 40a-41a, and an explanation that prospective jurors were more likely to be candid in answering the court's sensitive questions at the bench rather than in open court, id. at 38a, 42a-43a.

Thus even if petitioner were correct that the trial court's procedures amounted to a courtroom closure implicating the Sixth Amendment and requiring Waller findings, he would not prevail on this record. The question presented in the petition is therefore not outcome-determinative, and no further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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