No. 12-1212

In the Supreme Court of the United States

AMILCAR GOMEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
MYTHILI RAMAN
Acting Assistant Attorney General
JOHN M. PELLETTIERI
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the exclusion of petitioner's family from the courtroom during jury selection "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings," *Johnson* v. *United States*, 520 U.S. 461, 467 (1997) (internal quotation marks and citation omitted), when defense counsel initially suggested the exclusion.

2. Whether prejudice should be presumed for purposes of determining ineffective assistance of counsel under *Strickland* v. *Washington*, 466 U.S. 668 (1984), when defense counsel's conduct allegedly resulted in structural error.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-26) is reported at 705 F.3d 68.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 2013. The petition for a writ of certiorari was filed on April 6, 2013. 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 Eastern District of New York, petitioner was convicted of conspiring to conduct the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d); murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1); and possessing a firearm during and in relation to a crime of

violence, in violation of 18 U.S.C. 924(c)(1)(A)(i). Pet. App. 4. He was sentenced to life imprisonment for the murder conviction and to lesser terms of imprisonment for his conviction on the other counts. *Ibid.* The court of appeals affirmed. *Id.* at 1-26.

1. Petitioner, who was the leader of a chapter of the violent international street gang La Mara Salvatrucha (MS-13), participated in the March 2003 murder of a rival gang member. Pet. App. 3; see *ibid.* (noting that petitioner did not challenge the sufficiency of the evidence on appeal). Petitioner confessed to his participation in the murder on three occasions. He first confessed to agents of United States Immigration and Customs Enforcement (ICE) while in immigration custody in April 2005. *Ibid.* After he agreed to help ICE agents investigate MS-13 and was released from immigration custody, petitioner repeated his confession and admitted to various other criminal activities during two June 2005 meetings with investigators at the U.S. Attorney's Office for the Eastern District of New York. *Id.* at 4.

2. Because petitioner failed to comply with ICE instructions that he "inform ICE of any plans to attend gang meetings or interact with gang members," Pet. App. 22-23, petitioner was taken into custody, *id.* at 4. A federal grand jury returned an indictment charging petitioner with, *inter alia*, racketeering conspiracy, murder in aid of racketeering, and unlawful firearm possession. C.A. App. 13-21. On the day trial was scheduled to commence, petitioner directed his attorney to request an adjournment so that petitioner could speak with additional defense witnesses. Pet. App. 5. After defense counsel made that request, the following colloquy ensued:

> THE COURT: Okay. The application's denied. We're going to trial.
>
> Now, who are those people in the rear?
>
> MR. AUSTER [defense counsel]: Those, I believe, are some of my client's family. I will speak to them and advise them that they should leave during the course of jury selection.
>
> THE COURT: Well, what I want them to do, because I'm going to need those seats for the jurors who are going to come up, we're going to select the jurors. So, we'll ask them to step out and then we'll select the jurors and then they can come back in.
>
> MR. AUSTER: Okay.
>
> THE COURT: Okay?
>
> MR. AUSTER: Yeah. Now—I meant "yes," your Honor.

Pet. App. 42-43.

Defense counsel then alerted the court to a "scheduling matter." Pet. App. 43. Counsel explained that his father-in-law had recently been hospitalized and asked if the trial could be adjourned for the day after the government put on certain witnesses who were present and could not appear on another trial day. *Id*. at 43-44. The following colloquy ensued:

> THE COURT: No problem.
>
> MR. AUSTER: I appreciate that, your Honor.
>
> THE COURT: So, you'll have the family step out when the jury comes in 'cause we're going to need those seats. Then when the jury's selected, they can come back in.

MR. AUSTER: Okay.

THE COURT: Okay.

Id. at 44. After the court granted the government's request for permission for a federal agent who would be testifying to "see some of the rest of the trial from the gallery," the prosecution indicated that it was ready to bring the prospective jurors into the courtroom. *Id.* at 45. Defense counsel then informed the district court that he would "go speak to the family," and the court agreed with counsel's assessment that it would be reasonable to tell "[t]he family to come back in two hours." *Id.* at 46.

The jury that was selected found petitioner guilty of racketeering conspiracy, murder in aid of racketeering, and unlawful firearm possession. Pet. App. 4. The district court sentenced petitioner to life imprisonment, see C.A. App. 121, the mandatory minimum sentence for murder in aid of racketeering, see 18 U.S.C. 1959(a)(1).

3. The court of appeals affirmed (Pet. App. 1-26), rejecting petitioner's arguments that reversal of his conviction was required because the exclusion of his family from the courtroom violated his Sixth Amendment right to a public trial and because he received ineffective assistance of counsel when his lawyer failed to object to that alleged error.

The court of appeals noted that the Sixth Amendment gives a criminal defendant a right to a public trial, which "extends to the *voir dire* of prospective jurors." Pet. App. 7 (quoting *Presley* v. *Georgia*, 558 U.S. 209, 213 (2010) (per curiam)). That right, the court recognized, is not absolute: it "may give way" to other interests, provided that the trial court makes appropriate findings. *Id.* at 8 (quoting *Waller* v. *Georgia*, 467 U.S. 39, 45 (1984)); see *id.* at 9. As a general matter, the court ex-

plained, a violation of the right to a public trial "is a structural error that is not subject to harmless-error review." *Id.* at 10. Accordingly, a defendant who objects to a courtroom closure "need not demonstrate specific prejudice in order to obtain relief" on direct appeal. *Ibid.*

"'Whether an error can be found harmless,' however, 'is simply a different question from whether it can be subjected to plain-error review.'" Pet. App. 10 (quoting *Puckett* v. *United States*, 556 U.S. 129, 139 (2009)). The court observed that Federal Rule of Criminal Procedure 52(b) provides for the consideration of an error to which no objection was raised at trial, but only if there was "(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" Pet. App. 11 (quoting *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997)). If those three conditions are met, the court noted, an appellate court may "exercise its discretion to notice a forfeited error but only if (4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* at 12 (quoting *Johnson*, 520 U.S. at 467) (brackets in original).

In this case, the court stated, petitioner did not object to the exclusion of his family during jury selection. Pet. App. 12. Instead, not only did petitioner's counsel "fully acquiesce[] in the exclusion of the family," he volunteered "that he would tell the family to leave the courtroom for the course of the voir dire." *Ibid.* Accordingly, the court of appeals concluded that it would review the district court's exclusion of the family members for plain error. *Ibid.* The court found no such error. Had petitioner timely objected to the exclusion of his family, the court of appeals explained, the district court "might well have adopted an alternative" to ad-

dress the courtroom congestion. *Id.* at 13. Alternatively, the trial court would have been alerted to the need to make appropriate findings to support its action. *Ibid.* But "[i]nstead of objecting," petitioner's "attorney volunteered to tell [petitioner's] family to leave." *Ibid.* Under these circumstances, the court of appeals held that any error could not be viewed as one affecting the fairness, integrity, or public reputation of judicial proceedings: "To the contrary, the fairness and public reputation of the proceeding would be called into serious question if a defendant were allowed to gain a new trial on the basis of the very procedure he had invited." *Id.* at 13-14; see *id.* at 12 ("[W]e have been especially reluctant to reverse for plain error when it is 'invited.'") (internal citation omitted).

The court of appeals also rejected petitioner's contention that petitioner's Sixth Amendment right to effective assistance of counsel had been violated by defense counsel's failure to object to the exclusion of petitioner's family. To prevail on such a claim, the court observed, a defendant must establish that his counsel's performance was "so deficient that, 'in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance,'" Pet. App. 23 (quoting *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984)), and prejudice, *i.e.*, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Ibid.* (quoting *Strickland*, 466 U.S. at 694). The court of appeals held that petitioner failed to show that he received ineffective assistance of counsel because he failed to establish prejudice. "The arguments presented in [petitioner's] briefs on appeal," the court explained, "provide no indication that if [petitioner's] family had

been present for the voir dire, there is any reasonable probability that the result of the proceeding would have been different." *Id.* at 25.

ARGUMENT

Petitioner contends that the district court's exclusion of petitioner's family from the courtroom during jury selection constituted reversible plain error and that his counsel's failure to object constituted ineffective assistance of counsel. The court of appeals' decision is correct, and no further review is warranted.

1. a. This Court has recognized that "most constitutional errors" committed during a criminal trial "can be harmless." *Neder* v. *United States*, 527 U.S. 1, 8 (1999) (quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 306 (1991)). Accordingly, when a defendant preserves a constitutional objection, courts of appeals review for harmless error, reversing only if the error prejudiced the defendant by affecting his "substantial rights." Fed. R. Crim. P. 52(a); see, *e.g., Washington* v. *Recuenco*, 548 U.S. 212, 218 (2006). A limited class of errors, however, has been held to "defy harmless-error review." *Neder*, 527 U.S. at 8. Such "structural" errors "contain a 'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" *Ibid.* (quoting *Fulminante*, 499 U.S. at 310). A properly preserved structural error is "subject to automatic reversal." *Ibid.*

Constitutional errors are forfeited if not preserved in the district court. See *United States* v. *Olano*, 507 U.S. 725, 731 (1993) ("No procedural principle is more familiar to this Court than that a constitutional right * * * may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.") (quoting

Yakus v. *United States*, 321 U.S. 414, 444 (1944)). A defendant may obtain relief on a forfeited constitutional claim only by satisfying the requirements of Federal Rule of Criminal Procedure 52(b). The defendant must first establish "(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights." *Johnson* v. *United States*, 520 U.S. 461, 467 (1997) (quoting *Olano*, 507 U.S. at 732) (brackets in original). Even then, the court of appeals has discretion on whether to correct the error and may not do so unless it determines that "(4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Ibid.* (quoting *United States* v. *Young*, 470 U.S. 1, 15 (1985)) (internal quotation marks omitted) (brackets in original). Forfeited constitutional claims are subject to plain-error review regardless of whether the error is structural. See *id.* at 466 (declining to create an "exception" to Rule 52(b) for structural errors).[1]

As the court of appeals recognized (Pet. App. 10), the deprivation of the right to a public trial is structural error. See *United States* v. *Marcus*, 130 S. Ct. 2159, 2165 (2010) (citing *Waller* v. *Georgia*, 467 U.S. 39 (1984)). The public trial right "extends to the *voir dire* of prospective jurors." *Presley* v. *Georgia*, 558 U.S. 209, 213 (2010) (per curiam). But petitioner did not object to the district court's exclusion of his family from the courtroom during jury selection. See Pet. App. 12. Thus, petitioner's claimed violation of the right to a

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[1] Accordingly, petitioner is mistaken in suggesting that the Court has "expressly reserved [the] question of whether structural errors can be forfeited." Pet. 20; see Pet. 2. The Court has, however, reserved the question whether structural errors "automatically satisfy the third prong of the plain-error test." *Puckett* v. *United States*, 556 U.S. 129, 140 (2009). That question is not at issue in this case.

public trial is subject to plain-error review, as petitioner apparently concedes. See Pet. 24. Plain-error review is intended to "to correct only 'particularly egregious errors.'" *Young*, 470 U.S. at 15 (quoting *United States* v. *Frady*, 456 U.S. 152, 163 (1982)). Reversal for plain error "is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'" *Ibid.* (quoting *Frady*, 456 U.S. at 163 n.14). This Court has "repeatedly cautioned that '[a]ny unwarranted extension' of the authority granted by Rule 52(b) would disturb the careful balance it strikes between judicial efficiency and the redress of injustice." *Puckett* v. *United States*, 556 U.S. 129, 135 (2009) (quoting *Young*, 470 U.S. at 15) (brackets in original).

The court of appeals held that the district court's exclusion of petitioner's family during the two-hour jury selection did not constitute reversible plain error because even assuming the exclusion was error, "it cannot be viewed as one that affected the fairness, integrity, or public reputation of judicial proceedings" because defense counsel "volunteered to tell [petitioner's] family to leave" and "fully acquiesced in the exclusion of the family." Pet. App. 12, 13. That conclusion is correct.

Defense counsel's conduct at trial can be a central consideration in determining whether an error should be reversed under Rule 52(b). Thus, for example, in *Young*, *supra*, this Court held that it was not plain error for a prosecutor to have expressed his belief that the defendant was guilty of the charged crime. The Court made it clear that the prosecutor's expression of personal opinion was error. 470 U.S. at 6-8. But, the Court cautioned, "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be

viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." *Id.* at 11. The prosecutor made the inappropriate remark in response to defense counsel's own misconduct. See *id.* at 17 (explaining that the prosecutor intended his remarks "to answer defense counsel's accusation that no member of the prosecution team believed that respondent intended to defraud" the victim). "Viewed in context," the Court concluded, "the prosecutor's statements, although inappropriate and amounting to error, were not such as to undermine the fundamental fairness of the trial and contribute to a miscarriage of justice." *Id.* at 16.

Similarly viewed in context, the district court's exclusion of petitioner's family during the jury selection did not undermine the fundamental fairness of petitioner's trial or constitute a miscarriage of justice. Petitioner's counsel volunteered to ask the family to leave "in response to the court's simple inquiry as to who the seated persons were." Pet. App. 12; see *id.* at 42. When the district court then agreed that the family should "step out," *id.* at 43, to make room for the prospective jurors, petitioner's counsel "fully acquiesced," *id.* at 12; see *id.* at 44, 46. Under these circumstances, the district court's action cannot reasonably be described as a "particularly egregious error[]." *Young*, 470 U.S. at 15 (quoting *Frady*, 456 U.S. at 163). Accordingly, the court of appeals correctly concluded that the district court's temporary exclusion of petitioner's family did not "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings," *Johnson*, 520 U.S. at 467 (1997) (internal quotation marks omitted), and so did not constitute plain error. That fact-bound determination does not merit this Court's review. See *Puckett*, 556 U.S. at

142 ("The fourth prong [of plain-error analysis] is meant to be applied on a case-specific and fact-intensive basis.").

b. Petitioner argues (Pet. 11-21) that the court of appeals' determination that petitioner had not established plain error "merges the concepts of waiver and forfeiture" (Pet. 12). In doing so, petitioner contends, the court of appeals "denie[d petitioner] recourse to Rule 52(b) simply *because* of the forfeiture." Pet. 21. That argument is mistaken.

As petitioner explains (Pet. 14), "forfeiture is the failure to make the timely assertion of a right." *Olano*, 507 U.S. at 733. By contrast, "waiver is the 'intentional relinquishment or abandonment of a known right.'" *Ibid.* (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)). While a forfeited right may be reviewed for plain error under Rule 52(b), a waived right may not be, because a district court does not err if a defendant intentionally relinquishes a known right. *Id.* at 732-733. Many courts of appeals have held that a defendant's intentional request that a district court take some action that would otherwise be error constitutes "invited error," a form of waiver. See, *e.g.*, *United States* v. *Quinones*, 511 F.3d 289, 321 (2d Cir. 2007), cert. denied, 555 U.S. 910 (2008); *United States* v. *Hamilton*, 499 F.3d 734, 736 (7th Cir. 2007), cert. denied, 552 U.S. 1129 (2008); *United States* v. *Teague*, 443 F.3d 1310, 1314 (10th Cir.), cert. denied, 549 U.S. 911 (2006); *Virgin Islands* v. *Rosa*, 399 F.3d 283, 290-291 (3d Cir. 2005); *United States* v. *Perez*, 116 F.3d 840, 845 (9th Cir. 1997).

In considering petitioner's claim that the district court committed reversible error in excluding petitioner's family during jury selection, the court of appeals explained that it has been "especially reluctant to re-

verse for plain error when it is 'invited.'" Pet. App. 12 (internal citation omitted). And in explaining its determination that the exclusion did not seriously affect the fairness, integrity, or public reputation of judicial proceedings, the court stated: "To the contrary, the fairness and public reputation of the proceeding would be called into serious question if a defendant were allowed to gain a new trial on the basis of the very procedure he invited." *Id.* at 13-14. Petitioner contends that the court's references to "invited error" show that the court ascribed to petitioner a knowing waiver of his public trial rights, see, *e.g.*, Pet. 17, 20, 24, which had the "effect" of "not allowing Rule 52(b) review," Pet. 24. Petitioner mischaracterizes the court's decision.

The court unambiguously reviewed petitioner's public-trial argument under Rule 52(b)'s plain-error standard and concluded that the exclusion of petitioner's family did not constitute reversible plain error because it did not satisfy the fourth prong of that analysis. Pet. App. 11-14. There would have been no need for that inquiry had the court concluded that petitioner knowingly and voluntarily relinquished his right because, in that event, there would have been no error, as petitioner recognizes. See *Olano*, 507 U.S. at 732-733 ("Deviation from a legal rule is 'error' unless the rule has been waived."); Pet. 14 (stating that had petitioner waived his public trial right "there would be no error at all and the plain-error analysis would be unnecessary"); Pet. 21. Accordingly, the court of appeals' decision does not conflict with the distinction this Court has drawn between forfeiture and waiver. Cf. Pet. 13. Rather, the court properly took into account petitioner's acquiescence in what he now challenges as error in exercising discretion, on the fourth prong of plain-error review, not

to set the conviction aside. And petitioner does not contend that the court of appeals' consideration of his conduct on plain-error review implicates any disagreement among the courts of appeals.

2. The court of appeals also correctly held that petitioner did not establish that he received ineffective assistance of counsel as a result of his attorney's failure to object to the exclusion of petitioner's family during jury selection.

a. "[L]egal representation violates the Sixth Amendment if it falls 'below an objective standard of reasonableness,' as indicated by 'prevailing professional norms,' and the defendant suffers prejudice as a result." *Chaidez* v. *United States*, 133 S. Ct. 1103, 1107 (2013) (quoting *Strickland* v. *Washington*, 466 U.S. 668, 687-688 (1984)); see also *Strickland*, 466 U.S. at 694 (holding that to show prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). The general requirement that the defendant affirmatively prove prejudice is justified because "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." *Id.* at 693. In addition, an "infinite variety" of attorney errors may occur, which are "as likely to be utterly harmless in a particular case as they are to be prejudicial." *Ibid.* For those reasons, "[e]ven if a defendant shows that particular errors of counsel were unreasonable * * * the defendant must show that they actually had an adverse effect on the defense." *Ibid.*

The Court has identified only a few exceptional circumstances in which actual prejudice need not be shown. Prejudice is presumed when a defendant is actually or

constructively denied the assistance of counsel at a critical stage of trial, *Strickland*, 466 U.S. at 692; see *United States* v. *Cronic*, 466 U.S. 648, 659 (1984); when the state interferes with counsel's assistance, *Strickland*, 466 U.S. at 692; or when defense counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing," *Cronic*, 466 U.S. at 659. A "more limited" presumption of prejudice applies if a defendant demonstrates that his counsel "actively represented conflicting interests" and that the conflict "adversely affected his lawyer's performance." *Strickland*, 466 U.S. at 692 (quoting *Cuyler* v. *Sullivan*, 446 U.S. 335, 348, 350 (1980)). Those situations represent fundamental breakdowns in the role of counsel, in which counsel's conduct (or the absence of counsel) inherently threatens the fairness of proceedings.

Petitioner's claim that he had ineffective assistance of counsel as a result of his attorney's failure to object to the exclusion of petitioner's family members during jury selection does not fall within the limited class of cases in which this Court presumes prejudice. Nor is a failure to object to a limited exclusion of the sort that occurred here a circumstance that is "so likely to prejudice the accused that the cost of litigating" its effect is unjustified. *Cronic*, 466 U.S. at 658; *Strickland*, 466 U.S. at 692 (prejudice may be presumed only when "case-by-case inquiry into prejudice is not worth the cost"). In the court of appeals, petitioner suggested that had his family been present during jury selection, "[i]t is possible that jurors might have been more forthcoming about biases and past experiences" and "[i]t is possible that * * * a more impartial jury" would have been selected. Pet. C.A. Br. 42. But such speculation is not enough to demonstrate that a defense attorney's conduct adversely

affected the defendant's representation. See *Strickland*, 466 U.S. at 693 ("It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding."). The court of appeals correctly concluded that petitioner failed to establish that, had his family been present for jury selection, there is a reasonable probability that the result of the proceeding would have been different. Pet. App. 25.

b. Petitioner argues (Pet. 27-30) that prejudice should be presumed when defense counsel's failure to object led to structural error. According to petitioner, such a presumption is justified because structural "error necessarily 'infects the entire trial process'" and so "necessarily prejudice[s]" a defendant when it is caused by his attorney. Pet. 28, 29 (quoting *Neder*, 527 U.S. at 8). That argument is mistaken.

Structural errors are "constitutional error[s]" that "affect the framework within which the trial proceeds." *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) (quoting *Fulminante*, 499 U.S. at 310). Because the effect of structural errors is difficult to assess, see *id.* at 149 n.4, structural errors are not subject to harmless-error review and require automatic reversal if preserved, *Neder*, 527 U.S at 8. But that prejudice is presumed in harmless-error analysis does not dictate it be presumed in assessing whether a defense counsel's assistance was constitutionally defective. "The requirement that a defendant show prejudice in effective representation cases arises from the very nature of the specific element of the right to counsel at issue there—*effective* (not mistake-free) representation." *Gonzalez-Lopez*, 548 U.S. at 147. For that reason, "[c]ounsel cannot be 'ineffective' unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that

they have). Thus, a violation of the Sixth Amendment right to effective representation is not 'complete' until the defendant is prejudiced." *Ibid.*

The difficulty of identifying the effect of a structural error may present challenges for a defendant seeking to establish that his counsel's failure to object to the error caused him prejudice. But that possibility does not justify relieving a defendant of the obligation to demonstrate prejudice in the absence of "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S. at 658. That is because "the requirement of showing prejudice in ineffectiveness claims stems from the very definition of the right at issue; it is not a matter of showing that the violation was harmless, but of showing that a violation of the right to effective representation *occurred*." *Gonzalez-Lopez*, 548 U.S. at 150. Moreover, "[s]urmounting *Strickland*'s high bar is never an easy task." *Harrington* v. *Richter*, 131 S. Ct. 770, 788 (2011) (quoting *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1485 (2010)). That is as it should be because "[a]n ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial." *Ibid.* Presuming prejudice any time defense counsel forfeits an objection to structural error would lead to "intrusive post-trial inquiry" that will "threaten the integrity of the very adversary process the right to counsel is meant to serve." *Ibid.* (quoting *Strickland*, 466 U.S. at 689-690).[2]

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[2] Requiring a defendant to show that his attorney's failure to object to structural error caused actual prejudice also is congruent with the requirement that a defendant establish actual prejudice to avoid procedural default of a claimed structural error. A defendant seeking to raise in postconviction proceedings a procedurally defaulted claim

c. Petitioner further contends (Pet. 21-23) that certiorari should be granted to resolve a conflict among the courts of appeals over how to evaluate *Strickland* prejudice when defense counsel's alleged error resulted in structural error. Petitioner claims that the First, Sixth, and Eighth Circuits have presumed that structural errors prejudice a defendant for *Strickland* purposes. Pet. 21 (citing *Johnson* v. *Sherry*, 586 F.3d 439 (6th Cir. 2009), cert. denied, 131 S. Ct. 87 (2010); *Owens* v. *United States*, 483 F.3d 48 (1st Cir. 2007); *McGurk* v. *Stenberg*, 163 F.3d 470 (8th Cir. 1998)). He notes that the Fifth and Eleventh Circuits (and, although not mentioned by petitioner, the Second Circuit in this case) have required a defendant to show actual prejudice to establish ineffective assistance of counsel resulting from a failure to object that is claimed to have resulted in structural error. Pet. 22-23 (citing *Purvis* v. *Crosby*, 451 F.3d 734 (11th Cir.), cert. denied, 549 U.S. 1035 (2006); *Virgil* v. *Dretke*, 446 F.3d 598 (5th Cir. 2006)).

Any tension among the court of appeals on whether to presume prejudice when counsel's deficient performance results in structural error does not warrant resolution at this time. Other than the Second Circuit, only two courts of appeals have resolved the issue in the

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of race discrimination in the selection of the grand jury must show "cause and actual prejudice." See *Francis* v. *Henderson*, 425 U.S. 536 (1976); *Davis* v. *United States*, 411 U.S. 233 (1973). Race discrimination in the selection of a grand jury is structural error that obviates an inquiry into prejudice under harmless-error review. See *Vasquez* v. *Hillery*, 474 U.S. 254 (1986). Although prejudice is presumed when such a claim is properly preserved, "[t]he presumption of prejudice which supports the existence of the right is not inconsistent with a holding that actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner." *Davis*, 411 U.S. at 245.

context of courtroom closings. Compare *Purvis*, 451 F.3d at 740-743 (declining to presume prejudice for *Strickland* purposes when defense counsel failed to object to a courtroom closure) with *Owens*, 483 F.3d at 66 (presuming prejudice in that context); see *Sherry*, 586 F.3d at 446-447 (suggesting in dicta that prejudice likely would be presumed when defense counsel fails to object to a courtroom closing).[3] And that issue is unlikely to recur with any frequency given this Court's 2010 decision in *Presley* and the possible tactical reasons that may justify counsel's performance. As for ineffective assistance claims based on other situations in which counsel's conduct may produce different structural errors, each context warrants its own analysis, and review here is not warranted to address failures involving biased jurors, racially discriminatory jury selection, or deprivation of a jury trial.

In any event, this case is not an appropriate vehicle for addressing that issue, as it is unclear whether any structural error occurred.[4] In *Presley*, this Court held that closing the courtroom during jury selection violates a defendant's right to a public trial. 558 U.S. at 213; see *Marcus*, 130 S. Ct. at 2165 (identifying violation of right

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[3] The government was unable to pursue an appeal in *Owens* after the district court presumed prejudice on remand and granted the defendant's petition under 28 U.S.C. 2255, see *Owens* v. *United States*, 517 F. Supp. 2d 570 (D. Mass. 2007), because the defendant died shortly thereafter.

[4] Petitioner contends that the United States "conceded the error when it argued the error's triviality" in its court of appeals brief. Pet. 12; see Pet. 14. That is mistaken. The government argued, under existing circuit precedent, that "a closure may be 'too trivial' to constitute a Sixth Amendment violation." Gov't C.A. Br. 27-28 (quoting *Morales* v. *United States*, 635 F.3d 39, 43 n.7 (2d Cir.), cert. denied 132 S. Ct. 562 (2011)).

to public trial as structural error). In that case, there was no question that the district court had closed the courtroom during jury selection. 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." *Presley*, 558 U.S. at 210. And the district court refused to make any accommodation when defense counsel "objected to the exclusion of the public from the courtroom." *Ibid.* (quotation marks omitted). In this case, by contrast, the district court indicated its desire that petitioner's family leave the courtroom during jury selection, to make room for prospective jurors, only after petitioner's counsel suggested that they would do so. Pet. App. 42-43.[5] The district court did not state that it was closing the courtroom generally, and there is no indication in the record that, after petitioner's family left, members of the public could not enter the courtroom during jury selection. Cf. *id.* at 41 ("In open court; all parties present.") (courtroom reporter's notation). It is, perhaps, for that reason that the court of appeals decided petitioner's appeal on other grounds, without resolving whether the exclusion of petitioner's family violated petitioner's public trial rights. See *id.* at 13 (holding that "even if the exclusion of [petitioner's] family members during the voir dire in this case was error,"

[5] Petitioner repeatedly implies that counsel made that suggestion because he was "preoccupied with a relative's congestive heart failure." Pet. i; see, *e.g.*, Pet. 5, 10, 11, 15, 25. But petitioner cites nothing in the record to support that speculation, and other, innocuous explanations are possible. For example, petitioner's counsel may have known that petitioner's family wished to attend petitioner's trial but not the pre-trial proceedings.

it did not satisfy the fourth prong of plain-error analysis).

Thus, no court has determined whether, on these facts, the exclusion of petitioner's family from the courtroom during jury selection violated petitioner's right to a public trial. If this Court chooses to address whether prejudice should be presumed when the defective performance of counsel leads to structural error, it should do so in case in which the court of appeals passed on the alleged structural error. See *Decker* v. *Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1335 (2013) ("[W]e are a court of review, not of first view.") (quoting *Arkansas Game & Fish Comm'n* v. *United States*, 133 S. Ct. 511, 521-522 (2013)); see also *Chaidez*, 133 S. Ct. at 1113 n.16.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
MYTHILI RAMAN
Acting Assistant Attorney General
JOHN M. PELLETTIERI
Attorney

JUNE 2013