No. _____

In The
Supreme Court of the United States

JERI-ANN SHERRY,
Petitioner,

v.

WILLIAM D. JOHNSON
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In a State trial court, the counsel for William Johnson agreed to close the courtroom for the testimony of three witnesses who were afraid because two other witnesses had been murdered during the pendency of the case. The Michigan courts concluded that there was no ineffective assistance of counsel for agreeing to the closure of the courtroom. The U.S. Court of Appeals for the Sixth Circuit determined that counsel may have been ineffective and that any prejudice should be presumed if the State trial court would not have closed the courtroom but for the agreement of counsel. The question presented is as follows:

> Where there is a conflict of circuits on whether a criminal defendant must prove actual prejudice for ineffective assistance that relates to a structural error, did the Michigan courts unreasonably apply clearly established Supreme Court precedent under 28 U.S.C. § 2254(d) in rejecting the claim of ineffective assistance of counsel because it did not affect the outcome?

PARTIES TO THE PROCEEDING

Petitioner is Jeri Ann Sherry, Warden of a Michigan Correctional Facility. Petitioner was respondent-appellee in the U.S. Court of Appeals for the Sixth Circuit. The petition will refer to Petitioner as the State of Michigan.

Respondent is William Johnson, an inmate in the Michigan Department of Corrections. Respondent was the petitioner-appellant in the Sixth Circuit.

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The decision of the Sixth Circuit, *Johnson v. Sherry*, reversing the district court's denial of habeas corpus relief is reported at 586 F.3d 439 (6th Cir. 2009). Pet. App. 2a-24a. The order of the Sixth Circuit denying a motion for rehearing is unpublished. Pet. App. 1a. The district court decision is also unpublished. Pet. App. 25a-66a.

For the State court decisions, the decision of the Michigan Court of Appeals in *People v. Johnson* is unpublished. Pet. App. 67a-91a. The Michigan Supreme Court denied leave in an unpublished decision.

JURISDICTION

On January 28, 2010, the Sixth Circuit entered an order denying the State of Michigan's motion for rehearing with a suggestion for rehearing en banc. The decision that the State asked the Sixth Circuit to rehear was entered on November 13, 2009. This Court has jurisdiction to review this writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Sixth Circuit determined that the performance of Johnson's counsel may be deficient for agreeing to the closure of the courtroom for three of the eighteen witnesses who testified at trial. The Sixth Amendment provides an accused the right to a public trial and the right "to have the assistance of counsel for his defense" in all criminal prosecutions.

Regarding the relevant statutory provisions, the prisoner challenged the basis of his confinement under

28 U.S.C. § 2254(e)(1) of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) in habeas corpus, which provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

With regard to factual determinations by the State court under 28 U.S.C. § 2254(e)(1), the federal courts must accord a presumption of correctness unless rebutted by clear and convincing evidence:

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

William Johnson was convicted in State court in Michigan following a jury trial in 2003 of second-degree murder and three counts of assault with intent to murder. During the course of the trial, the prosecution moved to close the courtroom because three of its witnesses were fearful of reprisals. During the pendency of the case, two eyewitnesses to the crime had been murdered. Before ruling on the motion to close the courtroom for these fearful witnesses, the counsel for Johnson acquiesced to the motion and later asked persons from Johnson's family to remain outside the courtroom for their testimony. The Sixth Circuit determined that this consent to close the courtroom may have been deficient performance – remanding to the district court on that issue – and that it would presume prejudice if the federal district court concludes on remand that the State trial court would not have closed the courtroom in the absence of consent.

1. The Crime

On March 3, 2002, Carlos Davis was shot and killed outside of a dance hall in Hamtramck, Michigan, a city enclosed within the City of Detroit. Pet. App. 67a. There were three other assault victims – Robert Richards, James Mathis, and Larry Lewis. Pet. App. 67a. Mathis was shot in the face, Trial, January 7, 2003, Vol. II, p. 13, and Lewis was shot in the stomach, Vol. II, p. 52. The shooting occurred after a brawl had broken out among persons who attended a party at the dance hall that night. Pet. App. 67a.

Only two witnesses reported to seeing the shooter. Richards told the police that he saw the shooter and gave the police a detailed description of his clothing. Pet. App. 68a. From photographs that the police obtained from his description, Richards then identified Johnson as the shooter. Pet. App. 68a. Richards identified Johnson at the preliminary examination, but was murdered after the preliminary examination and so his transcript was read at trial. Pet. App. 68a.

The other witness, Damon Ramsuer, signed a statement that he saw the shooter, identifying Johnson from the photographs taken from the party. Pet. App. 68a. Ramsuer failed to appear for Johnson's preliminary examination. At trial, Ramsuer denied seeing the shooter, denied informing the police that he saw the shooter, and denied making any identification. Pet. App. 68a. He was impeached with his signed statement at trial. Pet. App. 68a.

The jury convicted Johnson of second-degree murder and three counts of assault with intent to murder.

2. The Closing of the Courtroom

On the first day of trial, the prosecution moved to close the courtroom for the testimony of Mathis, Lewis, and Ramsuer. Pet. App. 68a. The prosecution explained that two other witnesses, Elvin Robinson, an eyewitness from the scene of the shooting, and Robert Richards had been murdered during the pendency of the case. The prosecution explained the justification:

> [Mr. Robinson] was murdered in his car outside of a bar prior to his testimony of the preliminary exam. So he's one witness who was murdered.
>
> We have a second witness [Robert Richards] who was murdered in his bed after he testified. So there are two witnesses who were killed under very suspicious circumstances. [Trial, January 6, 2003, Vol. I, pp. 135-136.]

The prosecution explained the exceptional nature of the request:

> [T]he level of paranoia from the witnesses is not unfounded. To have two witnesses murdered prior to testifying or after testifying is unprecedented in my experience.
>
> And the witnesses are literally terrified. One witness we transported out of state. We set up a residence out of state.
>
> There are witnesses who are cowering, refusing to come to court, even under threat of being arrested, because they are afraid for their lives.
>
> So I would ask as a precautionary measure, just for a couple of civilian witnesses[.] [Vol. I, p. 137.]

In response to the request, the State trial court had initially stated that the prosecution was "treading on some very dangerous ground" in seeking to close the courtroom for the three witnesses. Vol. I, p. 135. After the factual presentation by the prosecution, the counsel for Johnson noted that he had spoken to Johnson and did not oppose the closure as long as the jury was not tipped off to the fact:

> Judge, let me make this very simple. Mr. Johnson and I have discussed this issue since Mr. Moran [State trial prosecutor] brought it to my attention.
>
> If the Court wants to do that, we don't really have any objection to it for those certain witnesses. The only thing I'm concerned about is that we do it well away from the jury; that either we excuse, you know, so it doesn't look like it's some weird circumstance. I mean, I don't have any problem. [Vol. I, p. 138.]

The State trial court thereby agreed to this process by which it would ensure that the jury was not aware that the courtroom was closed for these three witnesses. Vol. I, pp. 138-139.

The testimony of these three witnesses occurred on the second day of trial of a three-day jury trial. The testimony of the first witness, James Mathis, began at 9:49 a.m., Vol. II, p. 6, and the testimony of the third witness, Damon Ramsuer, was completed at 11:31 a.m. on that same day, Vol. II, p. 115. Thus, the courtroom was closed for one hour and forty two minutes during

this three-day trial that continued into the morning of the fourth day.

The counsel for Johnson indicated that he had asked the people from Johnson's family to arrive around 11:00 a.m. on that day of trial and to sit outside until the testimony of the third witness was complete. Vol. II, p. 6.

3. The State Courts on Direct Review

On direct review, among his other issues, Johnson claimed that he was deprived of the right to a public trial under the Sixth Amendment and that he was deprived of his right to effective counsel by his attorney's decision to agree to closing the courtroom. The Michigan Court of Appeals rejected both claims.

Regarding the right to a public trial, the Michigan Court of Appeals noted that Johnson "expressly waived his right by assenting to the trial court's decision to close the courtroom during the three witnesses' testimony." Pet. App. 69a-70a.

Moreover, the Court of Appeals determined that the State trial court properly closed the courtroom, citing the four factors from this Court's decision in *Waller v. Georgia* regarding courtroom closure.[1] The State court rested its decision on the safety concerns for the two witnesses:

> Here, the record discloses that these four [*Waller*] requirements were satisfied. The

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[1] *Waller v. Georgia*, 467 U.S. 39, 46 (1984).

> prosecutor showed that there was an overriding interest because three key witnesses, including two complainants, were justifiably afraid to testify because two other witnesses had been killed under suspicious circumstances. The closure was not broader than necessary to protect these witnesses' safety, and defendant did not propose an alternative means of protecting their safety. And, though the trial court did not specifically articulate findings in support of the closure, it is apparent from the record that the trial court's decision was based on the suspicious deaths of Richards and Robinson. . . . We are satisfied that the suspicious deaths of two other witnesses were sufficient to justify concerns for the witnesses' safety. [Pet. App. 71a (citations omitted).]

Regarding the issue of ineffective assistance of counsel, the Michigan Court of Appeals determined that there was no deficient performance because the courtroom closure was "justified" under the circumstances of the case. Pet. App. 79a. The Michigan Court of Appeals also determined that this decision to acquiesce to the closure was not "outcome determinative." Pet. App. 79a-80a. The Michigan Supreme Court denied leave to appeal on the issue.

4. The Federal Courts in Habeas Corpus Review

On habeas corpus, the federal district court denied Johnson's claims that he was deprived of his right to a public trial and the right to the effective assistance of counsel. The district court determined that Johnson "waived his right to a public trial by his acquiescence, through his attorney, to the closure." Pet. App. 41a. The district court also determined that the State appellate court's application of *Waller* was reasonable. Pet. App. 42a.

On the ineffective assistance claim, like the Michigan courts, the federal district court concluded that Johnson had failed to show that the failure to object fell outside the range of competent professional assistance under the first prong of *Strickland.* Pet. App. 54a.

On appeal, over a cogently written dissent, the Sixth Circuit reversed. The Sixth Circuit acknowledged that the substantive claim of a Sixth Amendment right to a public trial was procedurally defaulted, but examined whether there was a showing of cause and prejudice to excuse this default. Pet. App. 13a. The Sixth Circuit then examined this question together with Johnson's claim of ineffective assistance of counsel.

Contrary to the State courts and the federal district court, the Sixth Circuit majority concluded that it was "far from convinced" that this was one of the rare circumstances in which a courtroom closure was justified. Pet. App. 15a. Rather, it stated that it was

"difficult to see how the failure to object to the closure could have been strategic." Pet. App. 17a. It remanded for an evidentiary hearing on that issue. Pet. App. 20a. The Sixth Circuit never addressed the fact that the Michigan Court of Appeals had determined that the closure of the courtroom was justified under *Waller*, and also failed to address the federal district's conclusion that this determination was "reasonable."

On the issue whether there was any showing of prejudice, the Sixth Circuit determined that prejudice would be presumed as long as the State trial court would have closed the courtroom over an objection if Johnson's counsel had objected. Pet. App. 17a. If the State trial court would not otherwise have closed the courtroom, the Sixth Court stated that prejudice would then be presumed because the right to a public trial was a structural guarantee. Pet. App. 17a-18a.

In dissent, Sixth Circuit Judge Kethledge reasoned that there was no ineffective assistance of counsel demonstrated by the record because there was an apparent strategic basis for Johnson's counsel to agree to the closure:

> The question before us is whether that decision was so far outside the bounds of competent representation as to amount to constitutionally ineffective assistance of counsel. I do not think the decision can possibly be seen that way. Having reviewed the trial transcript, it seems to me instead that the decision was *correct*. Johnson's counsel essentially agreed to close the courtroom during the testimony

> of three witnesses, out of a total of 18 witnesses at trial. Strategically the net effect of that closure, as Johnson now describes it, was that several of his "female relatives" did not witness the testimony of those three witnesses. In return, Johnson's counsel deflected the trial judge from a line of inquiry—as to why, exactly, these three witnesses were so terrified to testify against Johnson—that almost certainly would have reflected poorly on his client.
>
> That avoidance appears all the wiser given that it emerged at Johnson's sentencing—and perhaps could have emerged sooner, had Johnson's counsel fought the closure—that Richards was shot to death with ammunition from the same lot that Johnson used to kill Davis and wound Lewis and Mathis. The Constitution, suffice it to say, permitted this strategic choice. [Pet. App. 22a-23a (emphasis in original; paragraph break added).]

Judge Kethledge further explained that there is a conflict in the circuits on whether a habeas petitioner must make a showing of prejudice when claiming that the attorney was ineffective related to the issue of one's right to a public trial. Pet. App. 24a.

REASONS FOR GRANTING THE PETITION

There are two reasons why this Court should grant this writ of certiorari, both of which indicate that the decision of the Sixth Circuit was not based on clearly established Supreme Court precedent under 28 U.S.C. § 2254(d).

First, the Sixth Circuit determined that where the claim of ineffective assistance of counsel related to the right to a public trial – a claim that the ineffective assistance caused a structural error – that the prejudice prong of *Strickland* is presumed. The Sixth Circuit employed this same analysis to resolve Johnson's procedural default, allowing him to demonstrate cause and presume prejudice to avoid the default. This Court has not held that the prejudice prong of *Strickland* is in applicable where the alleged error relates to a defendant's right to a public trial. In fact, this Court has specifically held that a habeas petitioner must still prove actual prejudice to overcome a procedural default even if the claim of error related to a structural error. Thus, the decision of the Sixth Circuit conflicts with this Court's precedent.

Second, there is a circuit split on the issue whether a court should presume prejudice in these circumstances. The Eleventh Circuit determined that the actual-prejudice requirement from *Strickland* applies for a claim that the ineffective assistance of counsel allowed the criminal defendant's right to a public trial to be violated, while the First Circuit concluded – as here – that prejudice is presumed in that circumstance. This is a jurisprudentially significant issue and requires this Court's resolution to address the conflict.

1. There is no clearly established Supreme Court precedent that indicates a court should presume prejudice for a claim of ineffective assistance of counsel for a violation of the right to a public trial.

There are two controlling cases that frame this issue. This Court outlined the standard for evaluating whether a criminal defendant is deprived of a right to a public trial in *Waller v. Georgia.* The standard for evaluating an ineffective assistance counsel claim, however, requires proof of actual prejudice under *Strickland.* These decisions do not resolve the inquiry about whether a court should presume prejudice where a criminal defendant claims that his counsel wrongly consented to a closed courtroom.

In *Waller*, this Court noted that the right of a criminal defendant to public trial is based on the fact that on open proceeding will enable the public to see that the defendant is fairly dealt with and not unjustly condemned, and that the criminal defendant's triers will be kept attentive to their responsibility and to the importance of their functions.[2] The right to an open trial may give way to other rights or interests, such as the government's interest in inhibiting disclosure of sensitive information.[3] This Court described the circumstances in which this will occur as "rare" and

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[2] *Waller*, 467 U.S. at 46, citing *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979). This Sixth Amendment right applies to the States through the Fourteenth Amendment. *In re Oliver*, 333 U.S. 257 (1948). *See also Presley v. Georgia*, 558 U.S. ___; 130 S. Ct. 721 (2010).

[3] *Waller*, 467 U.S. at 45.

indicated that the balancing of interests must "be struck with special care."[4]

In evaluating the particular case at issue in *Waller*, this Court identified four factors that a court should consider in determining whether the closure of the courtroom would be justified:

> [1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced,
>
> [2] the closure must be no broader than necessary to protect that interest,
>
> [3] the trial court must consider reasonable alternatives to closing the proceeding, and
>
> [4] it must make findings adequate to support the closure.[5]

This Court noted that where there is a showing of a violation of this right, there would be no requirement of a showing a "specific prejudice."[6] Therefore, such an error is structural in nature.

In contrast, on the issue of the effective assistance of counsel, this Court has identified a two-

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[4] *Waller*, 467 U.S. at 46, citing *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 510 (1984).

[5] *Waller*, 467 U.S. at 48 (paragraph breaks inserted), citing *Press-Enterprise.*

[6] *Waller*, 467 U.S. at 49.

prong standard for showing that a criminal defendant has been deprived of the effective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.
>
> Second, the defendant must show that the deficient performance *prejudiced* the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[7]

The second prong requires proof that the "result of the proceeding would have been different" but for the trial counsel's deficient performance.[8]

The Sixth Circuit majority concluded that where the courtroom closure was "unjustified or broader than necessary, prejudice would be presumed" under *Waller*. Pet. App. 17a-18a. But the majority did not address the point that this Court has not previously issued a decision on whether this presumption of prejudice should apply for a claim of ineffective assistance of counsel in these circumstances.

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[7] *Strickland v. Washington*, 466 U.S. 668, 687 (1984)(paragraph break added; emphasis added).

[8] *Strickland*, 466 U.S. at 694.

On this point, Judge Kethledge in dissent noted that there is no clearly established Supreme Court precedent that provided for this result:

> But I simply do not see how, when Johnson presents a *Strickland* claim and *Strickland* by its terms imposes an *actual-prejudice* standard, we can hold that clearly established Supreme Court precedent required the Michigan state courts to apply a presumed-prejudice standard instead. [Pet. App. 24a (emphasis in original).]

And there was no showing of actual prejudice here.

This Court has identified exceptions to the "general requirement" that a criminal defendant prove prejudice for a claim of ineffective assistance of counsel, but has not identified the right to public trial as one of the claims of error that is an exception.[9] In *Strickland*, this Court described the circumstances under the Sixth Amendment where prejudice is presumed – where there is an actual or constructive denial of counsel, state interference with counsel's assistance, or the counsel has an actual conflict of interest.[10] *Strickland* did not list the right to a public trial.

A plurality of this Court in *Fulminante v. Arizona* noted that the list of structural error includes

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[9] *Strickland*, 466 U.S. at 693.

[10] *Strickland*, 466 U.S. at 691-692.

the right to a public trial among others.[11] But this Court has not identified that ineffective assistance of counsel from a claim of error based on the right to a public trial as being among the list of exceptions to *Strickland* in requiring proof of actual prejudice.

In fact, in an analogous setting, this Court has required proof of a showing of actual prejudice to overcome a procedural bar arising from the failure to challenge a structural error at trial – exclusion of members of the defendant's race from the grand jury. In *Francis v. Henderson*, this Court examined in a habeas corpus proceeding the claim that a habeas petitioner argued that his conviction was obtained improperly because African Americans had been excluded from his grand jury.[12] This claim was procedurally defaulted in State court for his failure to

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[11] *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (Rehnquist, CJ., plurality opinion)"("Since our decision in *Chapman*, other cases have added to the category of constitutional errors which are not subject to harmless error the following: unlawful exclusion of members of the defendant's race from a grand jury, *Vasquez v. Hillery*, 474 U.S. 254 (1986); the right to self-representation at trial, *McKaskle v. Wiggins*, 465 U.S. 168, 177-178, n. 8 (1984); and the right to public trial, *Waller v. Georgia*, 467 U.S. 39, 49, n. 9 (1984). Each of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself."). *See also United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n. 4 (2006) ("Rather, here, as we have done in the past, we rest our conclusion of structural error upon the difficulty of assessing the effect of the error. *See Waller v. Georgia*, 467 U.S. 39, 49, n. 9 (1984) (violation of the public-trial guarantee is not subject to harmlessness review because 'the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance')").

[12] *Francis v. Henderson*, 425 U.S. 536, 538 (1976).

object to the process.[13] This Court concluded that the habeas petitioner must prove "actual prejudice" to avoid the application of the default:

> We conclude, therefore, that the Court of Appeals was correct in holding that the rule of *Davis v. United States* applies with equal force when a federal court is asked in a habeas corpus proceeding to overturn a state-court conviction because of an allegedly unconstitutional grand jury indictment. In a collateral attack upon a conviction that rule requires, contrary to the petitioner's assertion, not only a showing of "cause" for the defendant's failure to challenge the composition of the grand jury before trial, but also a showing of *actual prejudice*.[14]

In citing the decision in *Davis v. United States*, this Court specifically noted that "'[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.'"[15] This decision has not been overruled.

The decision by the Sixth Circuit majority here conflicts with *Henderson*. The Sixth Circuit majority

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[13] *Henderson*, 425 U.S. at 538.

[14] *Henderson*, 425 U.S. at 542 (emphasis added; footnote omitted).

[15] *Henderson*, 425 U.S. 542 n. 6, quoting *Davis v. United States*, 411 U.S. 233, 244-245 (1973).

indicated that the presumption of prejudice would allow Johnson to show prejudice to overcome his procedural default. See Pet. App. 18a.[16] Despite this Court's holding in *Henderson*, the Sixth Circuit majority concluded that prejudice would be presumed for both the default and ineffective assistance of counsel claim if the State trial court would not have ordered the courtroom closed. This conclusion cannot be reconciled with *Henderson*. The rule articulated by *Henderson* ensures that a criminal defendant will raise his claims in a timely fashion, and not harbor error as an appellate parachute.

The significance of the Sixth Circuit's decision here is heightened by this Court's recent decision in *Presley v. Georgia*.[17] This Court reiterated the point that this right under the Sixth Amendment to a public trial applies to the voir dire itself.[18] Therefore, under the Sixth Circuit's decision here, any cases in which the State courts may have closed the courtroom during voir dire to accommodate prospective jurors would be subject to a challenge under *Presley* without any requirement of *proving actual prejudice*. An allegation of deficient performance for failing to object to the

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[16] *Johnson v. Sherry*, 586 F.3d 439, 447 n. 7 (6th Cir. 2009) ("As discussed in *Owens*, 483 F.3d at 64 n.13, Johnson must make two showings of prejudice. First, he must show that counsel's failure to object to the trial closure prejudiced him for purposes of determining whether there was ineffective assistance of counsel. *Strickland*, 466 U.S. at 687. Second, he must show prejudice to excuse his procedural default on the public trial claim. *Coleman*, 501 U.S. at 750. As was true in *Owens*, "[w]e believe that these showings of prejudice overlap, and we [address] them simultaneously." 483 F.3d at 64 n.13[.]").

[17] *Presley v. Georgia*, 558 U.S. ___; 130 S. Ct. 721 (2010).

[18] *Presley*, 130 S. Ct. at 725.

closing of the courtroom may be alone sufficient to establish a claim of ineffective assistance of counsel.

2. The circuits have reached conflicting decisions on this same issue.

Two other circuits that have addressed this issue have reached conflicting conclusions.

In *Owens v. United States*, the First Circuit determined that an ineffective assistance counsel of claim based on the failure to object to a courtroom closure does not require proof of prejudice because the error is structural and is not subject to harmless error analysis:

> If the failure to hold a public trial is structural error, and it is impossible to determine whether a structural error is prejudicial, we must then conclude that a defendant who is seeking to excuse a procedurally defaulted claim of structural error need not establish actual prejudice.[19]

This analysis is rooted in the First Circuit's determination that the nature of the error defies harmless-error analysis.[20] In reaching this conclusion,

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[19] *Owens v. United States*, 483 F.3d 48, 64 (1st Cir. 2007)(citations omitted).

[20] *Owens*, 483 F.3d at 63-64. *See also United States v. Canady*, 126 F.3d 352, 364 (2d Cir. 1997) ("We add that if we were to hold that the error [violating the right to a public trial] was not structural and thus subject to harmless error analysis, it would almost always be held to be harmless.").

however, the First Circuit essentially declined to follow *Francis v. Henderson*, asserting that *Henderson* had been "substantially weakened" in light of subsequent cases including *Fulminante*.[21]

In contrast, in *Purvis v. Crosby*, the Eleventh Circuit determined that the habeas petitioner was required to prove prejudice under *Strickland* in order to prevail on a claim that the State trial court improperly closed the courtroom.[22] The closure in *Purvis* occurred during the testimony of single witness – the young complaining witness – and some members of the public were allowed to remain.[23] Even so, the Eleventh Circuit examined this partial closure as a structural error and determined that *Strickland* required proof of actual prejudice:

> We cannot dispense with the prejudice requirement for attorney error of this type without defying the Supreme Court's clear holding that except in three limited circumstances [described in *Strickland*], which are not present here, a defendant must show that any error his counsel committed "actually had an adverse effect on the defense." *That means he must prove a reasonable probability of a different result.*[24]

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[21] *Owens*, 483 F.3d at 65 n. 14.

[22] *Purvis v. Crosby*, 451 F.3d 734, 741 (11th Cir. 2006).

[23] *Purvis*, 451 F.3d at 740.

[24] *Purvis*, 451 F.3d at 741 (citation omitted; emphasis added).

Significantly, the Eleventh Circuit reasoned that its decision was required by *Henderson* and *Davis* on the standard for showing actual prejudice to overcome a default because otherwise these decisions "would be pointless."[25]

The First Circuit in *Owens* issued its decision under 28 U.S.C. § 2255 and noted that considerations of "comity and federalism might justify the requirement" that a habeas petitioner prove prejudice in its effort to distinguish *Purvis.*[26] There is no basis, however, on which to reconcile the Sixth Circuit's decision here – also a habeas case – with *Purvis.* The Sixth Circuit majority never cited *Henderson* and *Davis*, and did not explain how its procedural default analysis could be reconciled with these decisions. This Court should grant certiorari to resolve this split and to clarify the rule for proving actual prejudice where the underlying claim is structural error (the violation of the right to a public trial) when the claim is either defaulted or subject to a claim of ineffective assistance of counsel, or both. There is no clearly established Supreme Court precedent that supported the Sixth Circuit's decision here.

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[25] *Purvis*, 451 F.3d at 743.

[26] *Owens*, 483 F.3d at 65 n. 14.

CONCLUSION

The State of Michigan respectfully requests that this Honorable Court grant the writ of certiorari.

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