No.

In the Supreme Court of the United States

JAMES ROBERT STACKHOUSE, PETITIONER

v.

STATE OF COLORADO

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has held that "[w]aiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States* v. *Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)).

The question presented is: Whether a criminal defendant's inadvertent failure to object to courtroom closure is an "intentional relinquishment or abandonment of a known right" that affirmatively waives his Sixth Amendment right to a public trial, or is instead a forfeiture, which does not wholly foreclose appellate review?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Colorado Supreme Court (App., *infra*, 1a-28a) is unreported but is available at 2015 WL 3946868. The opinion of the Colorado Court of Appeals (App., *infra*, 29a-47a) is also unreported but is available at 2012 WL 5871029.

JURISDICTION

The judgment of the Colorado Supreme Court was entered on June 29, 2015. On September 21, 2015, Justice Sotomayor extended the time for filing a petition for a writ of certiorari to November 12, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides in relevant part: "Congress shall make no law * * * abridging the freedom of speech."

The Sixth Amendment to the U.S. Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a * * * public trial."

INTRODUCTION

By a divided vote, the Colorado Supreme Court held that a defendant's inadvertent failure to object to the closure of the courtroom during jury selection *affirmatively waives* a criminal defendant's federal constitutional right to a public trial, such that it is not subject to review even under the plain error standard ordinarily available for forfeited claims. The decision is the latest in a series of holdings by

federal and state courts implicating a recognized split over the application of this Court's ruling in *United States* v. *Olano*, 507 U.S. 725 (1993), to the First and Sixth Amendment right to a public trial.

In *Olano*, this Court explained that "[w]hereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *Id.* at 733 (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)). Consistent with that principle, five federal circuits, and the high courts of six states and the District of Columbia, hold that failure to object to the closure of a trial constitutes a forfeiture of the defendant's constitutional right to a public trial, which thus remains subject to review under a heightened standard for unpreserved claims. In contrast, two federal circuits and the high courts of ten states have held that failure to object to closure affirmatively waives the public trial right, extinguishing any constitutional error and precluding appellate review of the closure. The need for review is particularly acute because at least six state high courts have adopted a standard that conflicts with the regional federal circuit, making the level of protection afforded "an indispensible attribute of an Anglo-American trial," *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 569 (1980) (plurality opinion), turn on the happenstance of whether state or federal authorities bring charges.

By equating a defendant's silence with the intentional relinquishment of the public trial right, the Colorado Supreme Court's decision provides scant protection to a fundamental right that promotes

accountability for judges and prosecutors while enhancing public confidence in the criminal justice system. Review is critically important because the closure that occurred in this case is no isolated incident, but part of a "widespread trend[] in audience physical exclusion * * * found in local courthouses, both urban and rural, across the country." Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 Harv. L. Rev. 2173, 2191 (2014).

STATEMENT

1. James Stackhouse was charged under Colorado law with sexual assault on a child, sexual assault on a child by a person in a position of trust, and sexual assault on a child as part of a pattern of sexual abuse. At the outset of trial, after handling preliminary matters involving witnesses, the judge made the following announcement:

> [W]hat I will ask is family members, others, you are going to have to step out of the courtroom while we seat the jury. Although the courtroom—the trial itself, proceedings that we are undertaking will be public, I don't have enough space in the benches to seat 50 jurors. So those in the back benches, you will have to vacate the courtroom until the jury is selected.
>
> Once selected, obviously we will have space. At that point in time there will not be a danger of having family members, others, comingle with jurors, and we will be in a position where there will not be a problem. I simply do not have

> enough space to put 50 jurors and accommodate observers. That will be the order of the Court.

Mar. 1, 2010 Tr. 14-15.

Stackhouse adamantly denied (and denies) the charges, maintaining that any abuse was committed by one of three other men who lived in the victim's house. Stackhouse was convicted of the first two counts, but the jury acquitted on the third after rejecting witness testimony and finding no "pattern of sexual abuse" against the victim. Mar. 3, 2010 Tr. 6. The court sentenced Stackhouse to imprisonment for a term of ten years to life.

2. a. The court of appeals affirmed. App., *infra*, 29a-47a. The court did not reach petitioner's argument that the closure of jury selection violated this Court's decision in *Waller* v. *Georgia*, 467 U.S. 39 (1984), which established a set of factors that trial courts must consider before closing the courtroom during trial, because it ruled that under the Colorado Supreme Court decision *Anderson* v. *People*, 490 P.2d 47, 48 (1971), Stackhouse waived his public trial claim by failing to object to the closure. App., *infra*, 31a-33a.

b. Concurring specially, Judge Gabriel[1] explained that "*Anderson*'s waiver analysis is arguably inconsistent with the approach taken by many courts in the decades since [it] was decided" and that "more

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[1] Judge Gabriel was appointed to the Colorado Supreme Court shortly before its decision in this case. See Colorado Judicial Branch, *Richard L. Gabriel*, https://goo.gl/vPfF1H (last visited on Oct. 18, 2015). There is no indication he participated in that court's decision here.

recent cases raise a question as to whether the issue is really one of forfeiture." App., *infra*, 41a-42a. He "tend[ed] to agree with the Michigan Supreme Court[] * * * that *Olano* controls in a case like this," *id.* at 43a (citing *People* v. *Vaughn*, 821 N.W.2d 288, 301-302 (Mich. 2012)), and that accordingly "it appears that plain error review would be warranted," *id.* at 45a. He therefore "urge[d] the supreme court to take a fresh look at *Anderson*, in light of the developing case law." *Id.* at 47a.

3. a. The Supreme Court of Colorado affirmed by a divided vote. App., *infra*, 1a-28a. The majority reaffirmed *Anderson*, concluding that its "holding that a defendant affirmatively waives his public trial right by not objecting to a known closure" has "not been abrogated by the United States Supreme Court's more recent authority." *Id.* at 2a, 8a. Although the court acknowledged that *Waller* set strict standards for the closure of a trial, and *Presley* v. *Georgia*, 558 U.S. 209 (2010) (per curiam), "confirmed that the Supreme Court's public trial jurisprudence applies to jury selection," App., *infra*, 8a-9a, the majority held that those cases "ha[d] no bearing on our public trial waiver jurisprudence" because in both cases (and unlike here), the defendant had objected to the closure, *id.* at 8a-10a. The majority likewise reaffirmed the "rationale buttressing [*Anderson*'s] waiver policy," stating that "strategic considerations might motivate counsel to not object to a closure." *Id.* at 11a-14a. The majority rejected the suggestion that the closure should be reviewed for plain error, noting that "[o]ur precedent * * * prohibits plain (or harmless) error review of alleged structural errors."

Id. at 7a n.3. "Since a violation of the public trial right is a structural error, either Stackhouse affirmatively waived his public trial right by not objecting to a known closure, or the error requires automatic reversal." *Ibid.* (citation omitted). According to the majority, waiver was therefore "the proper result." *Ibid.*

b. Justice Márquez dissented, App., *infra*, 15a-28a, noting that the majority's decision conflicts with those of "several courts * * * holding that a defendant's right to a public trial is not waived by his silence." *Id.* at 23a n.1. She rejected the majority's conclusion that "*Olano* does not alter Colorado's longstanding rule that not objecting to a known closure constitutes [waiver]," *id.* at 20a (quoting *id.* at 10a n.5), explaining, "that is precisely what *Olano* does" by "distinguish[ing] between a *forfeiture*, which occurs when a defendant fails to object, and a *waiver*, which requires more: specifically, the 'intentional relinquishment' of a 'known right,'" *ibid.* (quoting *Olano*, 507 U.S. at 733). The importance of the right underscored the conclusion that silence is insufficient to constitute waiver: Because "[t]he Sixth Amendment right to a public trial implicates a criminal defendant's right to a fair trial," as well as the public's "First Amendment right to attend criminal trials," *id.* at 21a, 27a, more is "require[d] * * * than the defendant's mere silence before it can be said that the defendant *intentionally* relinquished that right," *id.* at 21a-22a.

Justice Márquez disputed the majority's contention that subjecting closure to plain error review would reward gamesmanship, noting that the

majority "fail[ed] to credit the exacting standards of * * * plain error review," which permits correction of only "particularly egregious errors" that undermine "*fundamental fairness*." *Id.* at 24a, 26a (internal quotation marks omitted). Finally, Justice Márquez concluded that Stackhouse's claim easily satisfied the requirements of plain error review, explaining that it was clear at the time of trial that the trial judge's generalized concerns about "[i]nsufficient courtroom capacity" and about "family members * * * commingl[ing] with the venire" were readily accommodated in other ways and did "not pass constitutional muster." *Id.* at 25a.

REASONS FOR GRANTING THE PETITION

A. There Is An Acknowledged Split Among Federal And State Appellate Courts On Whether The Failure To Object To The Closure Of Trial Waives A Defendant's Sixth Amendment Right To A Public Trial

As the *Georgetown Law Journal*'s Annual Review of Criminal Procedure recognized, "[t]he circuits disagree whether defendants waive their right to a public trial by failing to object to closure." *Sixth Amendment at Trial*, 44 Geo. L.J. Ann. Rev. Crim. Proc. 729, 730 n.1978 (2015); accord Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 Harv. L. Rev. 2173, 2219 n.231 (2014) ("[C]ourts are split over whether a defendant can waive his Sixth Amendment right by failing to object to a known closure."). State courts of last resort are likewise divided over "whether a defendant's failure to object timely to a trial court's alleged violation of the right to a public trial should

be analyzed under the waiver or forfeiture standard." *State* v. *Ndina*, 761 N.W.2d 612, 621 (Wis. 2009).[2] In the face of this split, lower courts have "sought guidance" on the issue, Simonson, *supra*, at 2219 n.231, but have been left without direction as this Court has not resolved the matter. See, *e.g.*, *State* v. *Bauer*, 851 N.W.2d 711, 716 (S.D. 2014); *People* v. *Vaughn*, 821 N.W.2d 288, 296 (Mich. 2012).

"Clear direction on how reviewing courts should evaluate claims of a constitutional violation of the right to a public trial is important to our administration of justice." *Wisconsin* v. *Pinno,* Nos. 2011AP2424–CR, 2012AP918, 2012 WL 6050552, at *4 (Wis. Ct. App. Dec. 5, 2012). This Court's review is needed to provide guidance to courts nationwide and to resolve a mature and entrenched split on this recurring issue.

1. Two Circuit Courts And Ten State High Courts Have Held That A Defendant's Inadvertent Failure To Object To Closure Affirmatively Waives His Sixth Amendment Right To A Public Trial

In the decision below, the Colorado Supreme Court reaffirmed precedent holding that a defendant "waive[s] his right to public trial during voir dire by not objecting to the trial court's known closure." App., *infra*, 4a. The Fifth and Sixth Circuits have likewise held that the failure to object to closure affirmatively waives the defendant's right to a public

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[2] See also App., *infra*, 14a; *id.* at 23a (Márquez, J., dissenting); *Peyronel* v. *State*, 465 S.W.3d 650, 652-653 (Tex. Crim. App. 2015); *Robinson* v. *State*, 976 A.2d 1072, 1082-1083 (Md. 2009).

trial. See *United States* v. *Hitt*, 473 F.3d 146, 155 (5th Cir. 2006) ("Where a defendant, with knowledge of the closure of the courtroom, fails to object, that defendant waives his right to a public trial."). *Johnson* v. *Sherry*, 586 F.3d 439, 444 (6th Cir. 2009) ("While we agree that the right to a public trial is an important structural right, it is also one that can be waived when a defendant fails to object to the closure of the courtroom."). At least ten state courts of last resort have adopted similar rules that failure to object affirmatively waives the defendant's Sixth Amendment right to public trial.[3] See *Wright* v. *State*, 340 So.2d 74, 79-80 (Ala. 1976); *People* v. *Bradford*, 929 P.2d 544, 570 (Cal. 1997); App., *infra*, 1a-15a; *Robinson* v. *State*, 976 A.2d 1072, 1082 (Md. 2009)*; Commonwealth* v. *Morganti*, 4 N.E.3d 241, 247 (Mass. 2014); *People* v. *Alvarez*, 979 N.E.2d 1173, 1176 (N.Y. 2012); *State* v. *Beachum*, 342 S.E.2d 597, 598 (S.C. 1986), overruled on other grounds by *State* v. *Gentry*, 610 S.E.2d 494 (S.C. 2005); *Peyronel* v. *State*, 465 S.W.3d 650, 652-654 (Tex. Crim. App. 2015), petition for cert. filed, No. 15-6267 (Sept. 22, 2015); *State* v. *Butterfield*, 784 P.2d 153, 157 (Utah 1989); *State* v. *Pinno*, 850 N.W.2d 207, 224-226 (Wis. 2014).

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[3] While some of these courts hold that a defendant's failure to object "forfeits" his public trial right, the decision not to afford any appellate review, even for plain error, shows that the court is in fact finding a waiver of the Sixth Amendment. See *Olano*, 507 U.S. at 733. Likewise, where a court holds that a defendant's failure to object "waives" his public trial right, but applies plain error review, it is in fact finding what this Court has deemed a forfeiture. *Ibid.*

Many of these courts rely on the inapposite decision in *Levine* v. *United States*, 362 U.S. 610 (1960), which upheld a finding of criminal contempt against the contemnor's argument that the judge erred by clearing the courtroom during contempt proceedings. But while this Court emphasized in *Levine* that contempt proceedings do not implicate the right to a public trial protected by the Sixth Amendment, *id.* at 616, lower courts construe the decision as a holding that the failure to object to a closure of an ordinary criminal proceeding "waive[s] the defendant's right to a public trial," *Hitt,* 473 F.3d at 155 n.8.[4]

This misreading is compounded by a passing parenthetical reference describing *Levine* in *Peretz* v. *United States*, 501 U.S. 923 (1991), which concerned not the public trial right, but a magistrate judge's supervision of voir dire. *Id.* at 936; see also pp. 17-19, *infra*. While recognizing that parenthetical is at best dicta, see App., *infra*, 10a, courts have nonetheless cited *Peretz* for the proposition that the public trial right may be waived by an inadvertent failure to object. See *ibid.* (citing *Peretz*, 501 U.S. at 936). These courts also sidestep *Olano*'s clear instruction

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[4] Accord *Peyronel*, 465 S.W.3d at 652-653 ("In reaching that conclusion, many courts cite to the Supreme Court's decision in *Levine v. United States,* and although not faced with the issue since, even the Supreme Court has cited *Levine* for that proposition.") (citations omitted); *Pinno*, 850 N.W.2d at 225 ("Although *Levine* was not decided on Sixth Amendment grounds, we find its reasoning persuasive here and decline to allow defendants who failed to object to the closure of a courtroom to raise that issue for the first time after the trial is over.").

by invoking "policy considerations [that] militate toward treating defense counsel's decision not to object to a known closure as an affirmative waiver of the defendant's public trial right," App., *infra*, 10a n.5, including efficiency and finality. See *Morganti*, 4 N.E.3d at 247. Thus, these courts have concluded, *Olano* does not foreclose holding that "not objecting to a known closure constitutes 'intentional relinquishment or abandonment of a known right.'" App., *infra*, 10a n.5.

2. Five Circuits And The High Courts Of Six States And The District Of Columbia Have Held That The Failure To Object To Closure Forfeits The Defendant's Sixth Amendment Claim

In conflict with the decision below, the First, Second, Seventh, Eighth, and Ninth Circuits have all held that the failure to object to the closure of a trial forfeits a defendant's claimed violation of the Sixth Amendment right to a public trial, but does not waive it. See *United States* v. *Espinal-Almeida*, 699 F.3d 588, 600 (1st Cir. 2012); *United States* v. *Gomez*, 705 F.3d 68, 75 (2d Cir. 2013); *Walton* v. *Brilley,* 361 F.3d 431, 434 (7th Cir. 2014); *Charboneau* v. *United States*, 702 F.3d 1132, 1138 (8th Cir. 2013); *United States* v. *Rivera*, 682 F.3d 1223, 1232 (9th Cir. 2012). The highest courts of six states and the District of Columbia have likewise found that the failure to object constitutes forfeiture. See *Barrows* v. *United States*, 15 A.3d 673, 677 (D.C. 2011); *People* v. *Vaughn*, 821 N.W.2d 288, 302 (Mich. 2012); *State* v. *Tapson*, 41 P.3d 305, 310 (Mont. 2011); *State* v. *Addai*, 778 N.W.2d 555, 570 (N.D. 2010); *State* v.

Bethel, 854 N.E.2d 150, 170 (Ohio 2006); *State* v. *Bauer*, 851 N.W.2d 711, 716 (S.D. 2014); *State* v. *Wise*, 288 P.3d 1113, 1120 (Wash. 2012). In these jurisdictions, forfeited closure claims are not deemed waived and are *at a minimum* subject to review for plain error. See Fed. R. Crim. P. 52(b); see also, *e.g.*, *Espinal-Almeida*, 699 F.3d at 600 ("Because none of the defendants objected to the procedure utilized by the court, our review is for plain error."); *Bauer*, 851 N.W.2d at 716 ("Because Bauer's trial counsel did not object to the courtroom closure, we review the trial court's actions for plain error."); *Vaughn*, 821 N.W.2d at 308 ("As a forfeited claim of constitutional error, it can be redressed if the defendant shows that the court's exclusion of members of the public during voir dire was a plain error") (internal quotation marks omitted); *Barrows*, 15 A.3d at 677 (D.C. 2011) ("We proceed therefore to review appellant's claim under the strictures of the plain-error standard."). But see *Wise*, 288 P.3d at 1121 ("a violation of [the] public trial right is per se prejudicial, even where the defendant failed to object at trial").

Many of these courts emphasize the important distinction *Olano* drew between "the failure to assert a right—forfeiture—[and] the affirmative waiver of a right." *Vaughn*, 821 N.W.2d at 302. These courts have explained that inadvertent failure to object at trial does not evince an "*intentional* relinquishment or abandonment of a known right." *Ibid.* (internal quotation marks omitted). Instead, the "failure to assert a constitutional right ordinarily constitutes a forfeiture of that right." *Id.* at 297; accord *Gomez*, 705 F.3d at 75. These courts have rejected reliance

on "dictum" in *Peretz* that "conflates the concepts of waiver and forfeiture." *Vaughn,* 821 N.W.2d at 302.

The Seventh Circuit has explained that Supreme Court precedent "does not support" a waiver rule. *Walton,* 361 F.3d at 433. Judge Bauer, joined by Judges Posner and Easterbrook, concluded that a state prisoner was entitled to federal habeas relief because the closure of his trial violated the Sixth Amendment, although he had not made a contemporaneous objection. The court reasoned that the "presumption of waiver from a silent record is impermissible" because "[t]he Constitution requires that every effort be made to see to it that a defendant in a criminal case has not unknowingly relinquished the basic protections that the Framers thought indispensable to a *fair* trial." *Id.* at 433 (quoting *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 241-242 (1973)). The Seventh Circuit emphasized that the public trial right, like other rights for which this Court has refused to infer waiver from silence, "concerns the right to a fair trial." *Id.* at 434. Public trials serve vital interests in "prevent[ing] perjury" and "unjust condemnation," and "keep the accused's 'triers keenly alive to a sense of their responsibility and to the importance of their functions.'" *Id.* at 432 (quoting *Waller*, 467 U.S. at 46). Public trials also "preserve the integrity of the judicial system in the eyes of the Public." *Ibid.*; accord *Gomez,* 705 F.3d at 73-74 (noting that public trials "ensure a fair trial," as it is "the openness of the proceeding itself, regardless of what actually transpires, that imparts the appearance of fairness so essential to public confidence in the system as a whole"). Because a

public trial is indispensable to fairness, it constitutes a "fundamental trial right" that can be "relinquished only upon a showing that the defendant knowingly and voluntarily waived [the] right." *Walton,* 361 F.3d at 434.

3. Six State Courts' Rules Conflict With Those Of Their Regional Federal Circuits

Underscoring the urgent need for this Court's review, at least *six* state courts of last resort have adopted a rule that conflicts with that of their regional federal circuit. The First Circuit, for example, holds that the inadvertent failure to object constitutes a forfeiture of the defendant's public trial right, see *Espinal-Almeida*, 699 F.3d at 600, but Massachusetts holds the same conduct constitutes a waiver, see *Morganti*, 4 N.E.3d at 247. While the Second Circuit holds that the failure to object is mere forfeiture, see *Gomez,* 705 F.3d at 75, New York holds it to be a waiver, see *Alvarez,* 20 N.Y.3d at 75. Michigan and Ohio both hold the failure to object to be forfeiture, in conflict with the Sixth Circuit's conclusion that it constitutes affirmative waiver. Compare *Vaughn*, 821 N.W.2d at 288, and *Bethel*, 854 N.E.2d at 170, with *Johnson*, 586 F.3d at 444. Similarly, the Seventh Circuit's position that failure to object constitutes forfeiture conflicts with Wisconsin's determination that such inaction is a waiver. Compare *Walton*, 361 F.3d at 434, with *Pinno*, 850 N.W.2d at 224. Finally, while the Ninth Circuit holds that the failure to object forfeits a defendant's claimed violation of his public trial right, see *Rivera,* 672 F.3d at 1232, California holds it constitutes waiver, see *Bradford*, 929 P.2d at 570.

Thus, the level of protection afforded this fundamental constitutional right turns on the happenstance of whether state or federal authorities bring charges. Only this Court's review can establish a national rule that eliminates an intolerably high risk of inconsistent protections. See, *e.g.*, *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 761-762 (1994) (noting certiorari was granted to resolve conflict between the Eleventh Circuit and the Florida Supreme Court over disputed First Amendment standard).

B. The Decision Below Is Wrong

The decision below misapplied this Court's precedent by holding that Stackhouse's failure to object to the trial court's closure of the courtroom "affirmatively waive[d]" his right to a public trial. App., *infra*, 14a. Under *Olano*, "waiver" of a constitutional right is the "intentional relinquishment or abandonment of a known right." *Olano*, 507 U.S. at 733. Because inadvertent failure to object is not an intentional relinquishment of a known right, it is not a waiver. The Colorado Supreme Court's violation of *Olano*'s instructions is especially troubling given the fundamental importance of the public trial right to both the accused and the general public. The decision below should be reversed.

1. There are two ways that criminal defendants may lose their constitutional rights: waiver and forfeiture. "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'"

Olano, 507 U.S. at 733 (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)); see also *Wood* v. *Milyard*, 132 S. Ct. 1826, 1832 n.4 (2012) (noting the "distinction between defenses that are 'waived' and those that are 'forfeited'": "A waived claim or defense is one that a party has knowingly and intelligently relinquished; a forfeited plea is one that a party has merely failed to preserve.").

This distinction matters because waivers and forfeitures have vastly different legal consequences. If a right is waived, there is no legal error, and thus nothing for an appellate court to review. See *Olano*, 507 U.S. at 733-734. "Mere forfeiture," by contrast, "does not extinguish an 'error,'" and thus does not necessarily foreclose appellate review (although it may subject a claim of error to a heightened standard of review). *Id.* at 733.

The decision below rests on a fundamental misunderstanding of this framework. The Colorado Supreme Court held that Stackhouse "affirmatively waive[d]" his public trial right merely because he "was aware of the closure and did not object to it." App., *infra*, 6a-7a. By definition, however, an inadvertent failure to object is not an "intentional relinquishment or abandonment of a known right," and thus does not constitute waiver. *Olano*, 507 U.S. at 733 (quoting *Zerbst*, 304 U.S. at 464). Neither of the courts below found that Stackhouse's failure to object to the closure was an intentional decision made with knowledge of his right under *Presley* v. *Georgia* to public *voir dire* proceedings. See App., *infra*, 11a-12a (hypothesizing "strategic reasons" a defendant might not object to courtroom closure, but not finding

that Stackhouse's failure to object was actually based on such considerations). At most, an inadvertent failure to object is a forfeiture—i.e., a "failure to make the timely assertion of a right." *Olano*, 507 U.S. at 733. The Colorado Supreme Court's holding that mere failure to "objec[t] to a known closure" constitutes "an affirmative waiver of the public trial right," App., *infra*, 14a, thus violates *Olano*'s express instruction that "waiver is different from forfeiture," 507 U.S. at 733.

2. The Colorado Supreme Court relied on *Peretz* v. *United States*, asserting that decision "recognized, albeit in dicta, that a defendant waives his right to a public trial by failing to object." App., *infra*, 10a (citing *Peretz*, 501 U.S. at 936). *Peretz*, however, is clearly inapposite. It held that "[t]here is no constitutional infirmity in the delegation of felony trial jury selection to a magistrate when the litigants consent." *Peretz*, 501 U.S. at 936. *Peretz* did not involve the right to a public trial. Moreover, in stark contrast to this case, there was no doubt in *Peretz* that the asserted "right to have an Article III judge preside at jury selection," *id.*, had been *waived*—not merely forfeited—because petitioner's counsel explicitly and "affirmatively welcomed" the magistrate judge's supervision of *voir dire*, *id.* at 932; see also *id.* at 925 & n.2 (petitioner's counsel affirmatively consented to magistrate conducting *voir dire*, stating he "would love the opportunity" to select a jury before the magistrate (internal quotation marks omitted)).

The conceded "dicta," App., *infra*, 10a, on which the Colorado Supreme Court relied appears in a

parenthetical phrase in the middle of a lengthy string-citation supporting the uncontroversial statement that "[t]he most basic rights of criminal defendants are * * * subject to waiver," *Peretz*, 501 U.S. at 936. In that parenthetical, the Court indicated that *Levine* v. *United States*, 362 U.S. at 619, supported the proposition that "failure to object to closing of courtroom is waiver of right to public trial." *Peretz*, 501 U.S. at 936.[5]

Levine, however, involved a contempt proceeding, which, the Court emphasized, does not implicate the Sixth Amendment. 362 U.S. at 616. Because the public trial claim in *Levine* "derive[d] from the Due Process Clause" rather than "one of the explicitly defined procedural safeguards of the Constitution," the decision "turn[ed] on the particular circumstances of the [petitioner's] case." *Id.* at 616-617. Furthermore, because the contempt arose from petitioner's refusal to answer questions from a grand jury, the case required the Court to balance the interest "in preserving the public nature of court proceedings" against "the interest, sanctioned by history and statute, in preserving the secrecy of

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[5] *Peretz* was decided two years before this Court clarified in *Olano* that "[w]aiver is different from forfeiture," 507 U.S. at 733, and it appears that the decision considered the terms waiver and forfeiture to be largely interchangeable. *Peretz*'s statement that rights are "subject to waiver" is followed by a citation referencing forfeiture. *Peretz*, 501 U.S. at 936-937 ("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") (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)) (emphasis added).

grand jury proceedings." *Id.* at 618. The Court emphasized that the contempt proceedings "properly began out of the public's presence" as the grand jurors' questions were read into the record and again posed to petitioner by the trial court. *Id.* at 613, 619. Because "one stage of [the proceedings] flowed naturally into the next," the Court concluded that "[t]here was no obvious point at which * * * the onus was imperatively upon the trial judge to interrupt the course of proceedings upon his own motion and establish a conventional public trial." *Id.* at 619. By contrast, this case involves the Sixth Amendment's "explicitly defined procedural safeguard[]" of a public trial, *id.* at 616-617, with no countervailing interest "in preserving the secrecy of grand jury proceedings," *id.* at 618. *Levine* thus provides no support for the decision below.[6]

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[6] The other decisions from this Court included in the *Peretz* string-citation are likewise distinguishable. They either involved waiver of non-constitutional rights, forfeiture of constitutional rights, or waiver of constitutional rights by some intentional action of the defendant or counsel. See *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 848-849 (1986) (defense counsel "expressly demanded" adjudication before an administrative judge, evidencing express waiver of constitutional right to have an Article III judge preside over civil trial); *United States* v. *Gagnon*, 470 U.S. 522, 528 (1985) (statutory right to be present at all stages of *in camera* proceeding); *Segurola* v. *United States*, 275 U.S. 106, 111 (1927) (prohibition-era case holding that defense counsel's failure to object to admission of evidence obtained in violation of the Fourth Amendment "worked no prejudice for which a reversal can be granted" because of the weight of other clearly admissible evidence); *Yakus*, 321 U.S. at 444 ("constitutional right may be

The *Stackhouse* majority's mistaken reliance on *Peretz* is hardly unique. *Peretz*'s passing, parenthetical characterization of *Levine* has caused serious mischief in other lower-court decisions holding that mere failure to object affirmatively waives a criminal defendant's public trial right. See, *e.g.*, *Johnson*, 586 F.3d at 444. This Court should grant certiorari to clarify the confusion created by its dicta in *Peretz* and reaffirm the clear distinction between waiver and forfeiture recognized in *Olano*.

The decision below sought to minimize *Olano*'s distinction between waiver and forfeiture by emphasizing *Olano*'s statement that "[w]hether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." App., *infra*, 6a (quoting *Olano*, 507 U.S. at 733). That statement, however, merely explains that different levels of procedural protections can apply in determining whether there has been an "intentional relinquishment" and thus a waiver. *Olano,* 507 U.S. at 733. For example, some rights require a personal waiver by the defendant himself shown in the record. See, *e.g.*, *Brookhart* v. *Janis,* 384 U.S. 1, 7 (1966) (right to jury trial). Others can be waived by the strategic action of counsel. See, *e.g.*, *Taylor* v. *Illinois*, 484 U.S. 400, 418 (1988) (right to cross-examine witnesses). *Olano*'s recognition that the procedures necessary to ensure that a waiver is

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forfeited * * * by the failure to make timely assertion of the right") (emphasis added).

knowing and voluntary may differ depending on the right at stake does not alter the basic fact that the *inadvertent failure to object* is not "the intentional relinquishment or abandonment of a known right." *Olano*, 507 U.S. at 733 (internal quotation marks omitted).

3. The Colorado Supreme Court's conflation of the distinct concepts of waiver and forfeiture is particularly troubling because the public trial right is of fundamental importance to both the accused and the public. The decision below thus violates the basic principle that when fundamental constitutional rights are at stake, courts must "indulge every reasonable presumption against waiver." *Zerbst*, 304 U.S. at 464 (internal quotation marks omitted); see also *Schneckloth*, 412 U.S. at 241-242 ("The Constitution requires that every effort be made to see to it that a defendant in a criminal case has not unknowingly relinquished the basic protections that the Framers thought indispensable to a fair trial.").

"[U]nbroken" and "uncontradicted" history demonstrates that the public trial right is "an indispensible attribute of an Anglo-American trial." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 569, 573 (1980) (plurality opinion); see also *Estes* v. *State of Texas.*, 381 U.S. 532, 583 (1965) (Warren, C.J., concurring) (public trial right is "a necessary component of an accused's right to a fair trial"). Public scrutiny encourages witnesses to come forward and to testify honestly; provides accountability for the judge and prosecutor in their conduct of the trial; and ensures that the members of the jury are aware of their responsibilities as fact-finders and the

importance of their ultimate verdict. *Waller*, 467 U.S. at 46. The public trial right thus affects every actor at every stage of an accused's trial. Indeed, because of its fundamental significance to the accused, violation of the public trial right is a structural error not subject to harmless-error review. See *Neder* v. *United States*, 527 U.S. 1, 8 (1999).

In addition, "the public trial right extends beyond the accused" and serves the public interest; thus, it "can be invoked under the First Amendment." *Presley*, 558 U.S. at 212 (citing *Press-Enterprise Co.* v. *Superior Court of Cal., Riverside Cty.*, 464 U.S. 501 (1984)). Even for those who do not attend, the knowledge that anyone can do so enhances public confidence that the criminal justice system is being administered fairly, and that those deserving punishment are being brought to justice through proper procedures. *Press-Enterprise*, 464 U.S. at 508-509. This confidence is essential for the legitimacy of the criminal-justice system. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Id.* at 509 (internal quotation marks omitted).

Because open courtrooms are fundamentally important to both the accused and the general public, "trial courts are required to consider alternatives to closure *even when they are not offered by the parties*." *Presley*, 558 U.S. at 214 (emphasis added). "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise*, 464

U.S. at 510. Thus, whether a defendant objects to the closure or not, institutional concerns require that the trial court "articulat[e]" the interest at stake and make "findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Ibid.*; see also *Waller*, 467 U.S. at 48. The Colorado Supreme Court's holding that mere failure to object to a courtroom's closure waives the defendant's public trial right erroneously absolves trial judges of their "obligat[ion] to take every reasonable measure to accommodate public attendance at criminal trials." *Presley*, 558 U.S. at 215. Reversal is warranted.

C. This Case Is An Ideal Vehicle For Resolving A Recurring Federal Question Of Substantial Importance

1. In *Presley*, this Court explained that it is "well settled that the Sixth Amendment [public trial] right extends to jury *voir dire*." 558 U.S. at 213. Nevertheless, courts around the country routinely close courtrooms during jury selection. Indeed, there is a "series of widespread trends in audience physical exclusion that are found in local courthouses, both urban and rural, across the country." Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 Harv. L. Rev. 2173, 2191 (2014); see also, *e.g.*, Recent Case, *Second Circuit Affirms Conviction Despite Closure to the Public of a Voir Dire*, 125 Harv. L. Rev. 1072, 1079 n.63 (2012) (an "unfortunate line of cases * * * undercut *Waller*'s clear enunciation of a structural public trial right by refusing to reverse convictions that occur after improper courtroom closures").

Recent decisions reveal a culture of courts routinely blocking public access, of which this case is but one example. Time and again, experienced trial counsel fail to object to routine closures, unthinkingly deferring to the trial judge without considering their clients' Sixth Amendment right to a public trial. For example, the First Circuit recently noted one "[district] court's 'longstanding practice' of excluding the public from jury selection"—a practice that attorneys "accepted * * * as [the] lawful status quo" even though it violated well established precedent. *United States* v. *Negron-Sostre*, 790 F.3d 295, 299, 301-306 (1st Cir. 2015) (holding that courtroom closure warranted new trial despite lack of objections). See also *Parker* v. *Wenderlich*, No. 14-CV-5896 JG, 2015 WL 5158476, at *12 (E.D.N.Y. Sept. 2, 2015) (trial judge said to defendant's wife, "[Y]ou will have an absolute right to be present in the trial at all times. Now, the only issue that may come about is that during the jury selection process we just don't have enough seats for everybody. * * * It's not that you're barred from anything. It's just that physically we don't have enough room."); *People* v. *Hunter*, No. 300689, 2012 WL 3020387, at *1-*2 (Mich. Ct. App. July 24, 2012) (defense counsel did not object when trial court barred defendant's sister from courtroom during *voir dire*, stating "we're going to need that room"); *People* v. *Porter*, No. 298351, 2011 WL 2936790, at *1 (Mich. Ct. App. July 21, 2011) (defense counsel did not object when judge stated prior to *voir dire*, "I have to excuse everyone from the courtroom. Only prospective jurors can be in for this process; okay?").

Even when counsel attempts to protect her client's Sixth Amendment right, those efforts have been peremptorily rebuffed. In a recent Texas case, the court summarily rejected a defendant's request that his mother, grandmother, and friend be permitted to attend *voir dire*:

> [THE STATE]: Judge, there are no seats in the gallery available, and I think that determines whether or not someone can come in and sit and watch a trial. When a courtroom is full, the courtroom is full. * * *
>
> THE COURT: I agree with the state. The motion is denied. Bring the jury in.
>
> [DEFENSE COUNSEL]: Well, Judge, also for the record, the seating chart that I have got has folks sitting on the opposite side of the bar. Jurors number 46 through 50 and 51 through 55 will actually be on the other side of the gallery. Those folks could either be moved over to the jury box—
>
> THE COURT: Denied. Bring the jury in, Sheriff.

Harrison v. *State*, No. 02-10-00432-CR, 2012 WL 1034918, at *7 (Tex. App. Mar. 29, 2012); see also *People* v. *Scott*, No. 320321, 2015 WL 5568327, at *1 (Mich. Ct. App. Sept. 22, 2015) (trial court closed the courtroom to the public during *voir dire* and "[c]ounsel stated that he did not immediately bring the matter to the court's attention because he was not then aware whether jury selection 'was covered under the right to a public trial,' but that he had learned on the way home that it was a structural error" and

defense counsel objected the next day); *People* v. *Floyd*, 988 N.E.2d 505, 506 (N.Y. 2013) (after defense counsel said that defendant's mother had "absolute right to be present," trial judge responded that "because the jury panel was larger than normal, defendant's mother would need to wait outside the courtroom until he could excuse jurors to create room").

Given the prevalence of improper courtroom closures, appellate courts routinely face claims that defendants' public trial rights were violated during *voir dire*. See, *e.g.*, *United States* v. *Gupta*, 699 F.3d 682, 686 (2d Cir. 2012); *United States* v. *Santos*, 501 F. App'x 630, 631-632 (9th Cir. 2012); *Evans* v. *Sec'y, Fla. Dep't of Corr.*, 699 F.3d 1249, 1265 (11th Cir. 2012); *Owens* v. *United States*, 483 F.3d 48, 61 (1st Cir. 2007); *Commonwealth* v. *Cohen*, 921 N.E.2d 906, 911 (Mass. 2010). The recurring nature of public trial violations and the repeated failures of defense counsel to contemporaneously object to the violations highlight the need for this Court's review. Granting certiorari and reversing the decision below will serve as a necessary reminder that "the ultimate responsibility of avoiding 'even the appearance that our nation's courtrooms are closed or inaccessible to the public' lies with the judge." *Negron-Sostre*, 790 F.3d at 306 (quoting *United States* v. *Scott*, 564 F.3d 34, 39 (1st Cir. 2009)).

2. This case presents an ideal vehicle for resolving the important federal question whether a defendant's mere failure to contemporaneously object to the courtroom's closure during *voir dire* waives the defendant's right to argue on appeal that the closure

violated his Sixth Amendment right to a public trial. That issue was squarely presented and thoroughly discussed below. See App., *infra*, 14a-15a ("Defendants in Colorado affirmatively waive their right to public trial by not objecting to known closures."). There are no disputed issues of fact that would interfere with this Court's resolution of the question. Furthermore, "[t]he question of waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law." *Brookhart*, 384 U.S. at 4; accord *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969); see also *Shaw* v. *Collins*, 5 F.3d 128, 132 (5th Cir. 1993) ("It is well settled that determining whether a person has waived a federal constitutional right involves a federal question controlled by federal, not state, law.").[7] The waiver

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[7] Although the decision below includes statements such as "[h]ere in Colorado, a defendant who does not object to a closure is procedurally barred from seeking relief under *Anderson*," that does not indicate that the decision rested on state law. App., *infra*, 9a n.4; see also *id.* at 10a ("In *Anderson*, we determined that such non-objecting defendants have affirmatively waived their public trial rights and are thus barred from seeking appellate relief in Colorado."). The decision below reaffirmed the Colorado Supreme Court's decision in *Anderson*, which focused on the requirements of *federal* law. See *Anderson*, 490 P.2d at 48-49 (citing *Chapman* v. *California*, 386 U.S. 18 (1967)). Statements in the decision below regarding the law "in Colorado," App., *infra*, 9a n.4, 10a, 13a, 14a-15a, merely explain that as the Colorado Supreme Court interprets federal law, a defendant's failure to object to courtroom closure constitutes a waiver. See *Michigan* v. *Long*, 463 U.S. 1032, 1040-1041 (1983) (this Court has jurisdiction when "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law" and there is no "plain statement" that the decision rested on state law). Tellingly, the dissent

issue is dispositive in this case because the Colorado Supreme Court stated that if there was no waiver, Stackhouse would be entitled to reversal. App., *infra*, 7a n.3 ("Since a violation of the public trial right is structural error, either Stackhouse affirmatively waived his public trial right by not objecting to a known closure, or the error requires automatic reversal.") (citation omitted).

3. This case also presents an ideal vehicle for this Court to reaffirm the important distinction between waiver and forfeiture. As the decision below demonstrates, many courts continue to conflate these two distinct concepts. Precise use of the terms is crucial because confusing them can yield drastically different outcomes for defendants. Just as this Court has granted review in several recent cases to correct lower courts' erroneous use of the term "jurisdictional," see, *e.g.*, *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 435 (2011) ("Because the consequences that attach to the jurisdictional label may be so drastic, we have tried in recent cases to bring some discipline to the use of this term."),[8] it should grant review here to correct the Colorado Supreme Court's mistaken holding that Stackhouse's

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characterized the decision as a federal-law holding, without objection from the majority. App., *infra*, 15a ("Today, the majority concludes that a defendant 'affirmatively waives' his Sixth Amendment right to a public trial, not by intentionally relinquishing the right or knowingly abandoning it, but merely through his counsel's failure to raise a contemporaneous objection to a courtroom closure.").

[8] See also *United States* v. *Kwai Fun Wong*, 135 S. Ct. 1625, 1632, 1638 (2015); *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013); *Gonzalez* v. *Thaler*, 132 S. Ct. 641, 648 (2012).

inadvertent failure to object to courtroom closure constituted a waiver of his public trial right.[9]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[9] In recent Terms, this Court has denied certiorari petitions asking the Court to resolve a division of authority over whether the prejudice required to establish ineffective assistance of counsel is presumed in the case of a structural error, such as violation of the public trial right, or whether the defendant must prove actual prejudice. See, *e.g.*, *Commonwealth* v. *LaChance*, 17 N.E.3d 1101 (Mass. 2014), cert. denied, No. 14-1153, 2015 WL 1289572 (Oct. 13, 2015); *Commonwealth* v. *Boshears*, 10 N.E.3d 177 (Mass. App. Ct. 2014), review denied, 23 N.E.3d 106 (Mass. 2014), cert. denied, 135 S. Ct. 2390 (2015); *Commonwealth* v. *Alebord*, 4 N.E.3d 248 (Mass. 2014), cert. denied, 134 S. Ct. 2830 (2014); *United States* v. *Gomez*, 705 F.3d 68 (2d Cir. 2013), cert. denied, 134 S. Ct. 61 (2013). This case, however, is readily distinguishable because it does not involve an ineffective-assistance-of-counsel claim.

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OCTOBER 2015

The Supreme Court of the State of Colorado
2 East 14th Avenue Denver, Colorado 80203

2015 CO 48

Supreme Court Case No. 12SC1029
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 10CA1346

Petitioner:

James Robert Stackhouse,

v.

Respondent:

The People of the State of Colorado

Judgment Affirmed
en banc
June 29, 2015

Attorneys for Petitioner:
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CHIEF JUSTICE RICE delivered the Opinion of the Court.
JUSTICE MÁRQUEZ dissents.

¶1 In this case, we granted certiorari to consider whether the court of appeals erred in concluding that the defendant waived his public trial claim by failing to object to the closure of the courtroom during jury selection. This question turns largely on whether our precedent in *Anderson v. People,* 176 Colo. 224, 490 P.2d 47, 48 (1971)—holding that a defendant affirmatively waives his public trial right by not objecting to a known closure of the courtroom—remains controlling precedent, or whether it has been abrogated by the more recent United States Supreme Court decisions in *Waller v. Georgia,* 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), and *Presley v. Georgia,* 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (per curiam). Because *Waller* and *Presley* relate only to closures that elicit contemporaneous objections from defense counsel, and because the rationale supporting *Anderson* remains sound, *Anderson* is still controlling precedent and remains good law in Colorado. We therefore affirm the court of appeals' judgment.

I. Facts and Procedural History

¶2 The People charged Petitioner James Robert Stackhouse with sexual assault on a child, sexual assault on a child by a person in a position of trust, and sexual assault on a child as a pattern of sexual abuse. At trial, the court required members of the public to leave the courtroom during jury selection because the large jury pool and limited courtroom space created a risk that family members and others would comingle with and potentially bias the jurors. After explaining his reasoning for the closure, the trial judge asked the attorneys if they had "anything further," and Stackhouse did not object to the closure

at that point or at any point during trial. Stackhouse was subsequently tried and was convicted of the first two counts, acquitted of the pattern count, and sentenced to ten years to life. He subsequently appealed his conviction.

¶3 Despite not objecting to the closure at trial, Stackhouse asserted on appeal that the court's exclusion of the public during jury selection without satisfying the four elements established in *Waller* constituted structural error mandating automatic reversal under *Presley*. *People v. Stackhouse,* 2012 COA 202, ¶ 7, —— P.3d ——. The court of appeals disagreed, holding that although denial of public voir dire over a defendant's objection constitutes structural error if the court does not satisfy the *Waller* test, even structural errors are subject to the doctrine of waiver, and Stackhouse waived his right to a public voir dire by not objecting to the closure. *Id.* at ¶¶ 9–10 (citing *Anderson,* 490 P.2d at 48). We granted Stackhouse's petition for certiorari to determine whether the court of appeals erred by relying on our precedent in *Anderson* in light of the United States Supreme Court's decisions in *Waller* and *Presley*.[1]

II. Standard of Review

¶4 Whether Stackhouse waived his public trial claim by not objecting to the known closure is a question of

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[1] Specifically, we granted certiorari to review the following issue: "Whether the court of appeals erred in concluding that the defendant waived his public trial claim by failing to object to the closure of the courtroom during jury selection."

law, and we review such questions de novo. *Kazadi v. People,* 2012 CO 73, ¶ 11, 291 P.3d 16, 20.

III. Analysis

¶5 We hold that the court of appeals did not err: *Anderson* has not been abrogated by more recent United States Supreme Court decisions and remains controlling precedent. Although the United States Supreme Court's precedent on the right to a public trial has evolved since the case was decided, *Anderson* remains legally sound. Thus, we affirm the court of appeals' holding that Stackhouse waived his right to public trial during voir dire by not objecting to the trial court's known closure.

¶6 We begin by discussing the public trial right generally and *Anderson* specifically, and we then demonstrate that *Anderson* does not conflict with United States Supreme Court authority.

A. The Right to Public Trial and *Anderson's* Waiver Principle

¶7 Both the United States and the Colorado Constitutions guarantee criminal defendants the right to a public trial. U.S. Const. amends. VI, XIV; Colo. Const. art. II, § 16. It is well settled that a criminal defendant's constitutional right to a public trial extends to the jury selection process. *Presley,* 558 U.S. at 213, 130 S.Ct. 721. Under *Waller,* the public trial right is violated when a defendant objects to a closure and the court does not satisfy the four factors of the *Waller* test. 467 U.S. at 48, 104 S.Ct. 2210. Such a violation is structural error that requires automatic reversal without individualized

prejudice analysis.[2] *See Neder v. United States,* 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (noting that "we have found an error to be 'structural,' and thus subject to automatic reversal, only in a very limited class of cases," and citing *Waller* as including denial of public trial within the class of structural errors (internal quotation marks omitted)); *accord Hagos v. People,* 2012 CO 63, ¶ 10, 288 P.3d 116, 119 ("[C]ertain errors are structural errors, which require automatic reversal without individualized analysis of how the error impairs the reliability of the judgment of conviction. Examples of these errors include ... denial of the right to a public trial." (citations omitted)); *People v. Hassen,* 2015 CO 49, ¶ 18, —— P.3d —— (stating that "[w]hen the trial court closes the courtroom over a defendant's objection, it must satisfy the four *Waller* factors," then determining that the factors were not satisfied and thus remanding for a new trial). Nevertheless, the right to a public trial is not absolute, but rather "may give way ... to other rights or interests" even over a defendant's objection. *Waller,* 467 U.S. at 45, 104 S.Ct. 2210; *id.* at 48, 104 S.Ct. 2210 (describing

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[2] We note that "automatic reversal" of the lower court's decision does not necessarily mean that the defendant automatically receives a new trial; rather, such a determination depends on the point at which the public was excluded. *See Waller,* 467 U.S. at 50, 104 S.Ct. 2210 (considering a public trial violation that occurred during a suppression hearing and remanding for a new suppression hearing that was open to the public because "the remedy should be appropriate to the violation" and "[i]f, after a new suppression hearing, essentially the same evidence is suppressed, a new trial presumably would be a windfall for the defendant, and not in the public interest").

four factors that must be met to close the courtroom over a defendant's objection).

¶8 Furthermore, even fundamental rights can be waived, regardless of whether the deprivation thereof would otherwise constitute structural error. *See Peretz v. United States,* 501 U.S. 923, 936, 111 S.Ct. 2661, 115 L.Ed.2d 808 (1991) ("The most basic rights of criminal defendants are ... subject to waiver."). "Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *United States v. Olano,* 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Here, we examine the particularities of the public trial right.

¶9 Under *Anderson,* a defendant affirmatively waives his public trial right when he does not object to a known closure. 490 P.2d at 48. In that case, we considered a factual scenario almost identical to that before us now—the whole spectator area of the courtroom was needed to seat the jury pool, and the bailiff restricted access so as to "segregate prospective jurors from witnesses, relatives, and other individuals whose proximity, conversation, or actions might cause the jury to be contaminated to the prejudice of the defendant or the prosecution." *Id.* On these facts, we held that "any right the defendant may have had to object to the exclusion of the public from the courtroom during the selection of the jury was waived" when defense counsel did not object despite being aware of the closure. *Id.* This has been the law in Colorado since we decided *Anderson* in 1971. *See, e.g., People v. Dunlap,* 124 P.3d 780, 818–

19 (Colo. App. 2004) (applying *Anderson's* waiver principle).

¶10 Therefore, because Stackhouse was aware of the closure and did not object to it, *Anderson* would appear to resolve his appeal.[3] Stackhouse argues, however, that Anderson is no longer valid in light of more recent Supreme Court authority. We now address this contention.

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[3] Stackhouse argues that even if he waived his public trial right, we should nevertheless review the closure of the courtroom for plain error. In essence, he contends that his failure to object constituted a forfeiture rather than a waiver. *See infra* ¶14 n.5 (discussing the difference between waiver and forfeiture as articulated in *Olano,* 507 U.S. at 733, 113 S.Ct. 1770). Our precedent, however, prohibits plain (or harmless) error review of alleged structural errors. *See Bogdanov v. People,* 941 P.2d 247, 252–53 (Colo. 1997) ("Structural errors are not amenable to either a harmless or a plain error analysis because such errors affect 'the framework within which the trial proceeds,' and are not errors in the trial process itself." (quoting *Arizona v. Fulminante,* 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991))), *amended,* 955 P.2d 997 (Colo. 1997) (mem.), *disapproved of on different grounds by Griego v. People,* 19 P.3d 1 (Colo. 2001); *Griego,* 19 P.3d at 7 (quoting the *Bogdanov* language above as controlling precedent regarding structural error); *Medina v. People,* 163 P.3d 1136, 1141 (Colo. 2007), *as modified on denial of reh'g* (Aug. 13, 2007) (noting that structural defects are not subject to harmless error analysis, but rather "require automatic reversal"). Since a violation of the public trial right is structural error, *see supra* ¶7, either Stackhouse affirmatively waived his public trial right by not objecting to a known closure, or the error requires automatic reversal. Under our precedent, affirmative waiver is the proper result.

B. *Anderson* Remains Controlling Precedent

¶11 *Anderson's* holding that a defendant waives his public trial right by not objecting to a known closure has not been abrogated by the United States Supreme Court's more recent authority in *Waller* and *Presley*. *Waller* adopted a four-part test that courts must satisfy before closing a courtroom over a defendant's objection, *see* 467 U.S. at 48, 104 S.Ct. 2210, and *Presley* explicitly confirmed that the public trial right extends to the jury selection process, *see* 558 U.S. at 213, 130 S.Ct. 721. Crucially, both cases addressed only closures that elicited contemporaneous objections, and so neither case affected *Anderson's* longstanding waiver principle.

¶12 In *Waller,* the Court considered "the extent to which a hearing on a motion to suppress evidence may be closed to the public *over the objection of the defendant* consistently with the Sixth and Fourteenth Amendment right to a public trial." 467 U.S. at 40–41, 104 S.Ct. 2210 (emphasis added). The Court held that "under the Sixth Amendment any closure of a suppression hearing *over the objections of the accused* must meet the tests set out" in the Court's prior decisions. *Id.* at 47, 104 S.Ct. 2210 (emphasis added). In reaching this conclusion, the Court specifically noted that "[o]ne of the reasons often advanced for closing a trial—avoiding tainting of the jury by pretrial publicity—is largely absent when a defendant makes an informed decision to object to the closing of the proceeding." *Id.* at 47 n.6, 104 S.Ct. 2210 (citation omitted). Thus, although *Waller* holds that a defendant's public trial right is violated if the courtroom is closed *over the defendant's objection* and the Waller test is not satisfied, the Court expressly

and repeatedly limited its holding to closures that elicited a contemporaneous objection from the defendant.[4] As such, Waller has no bearing on our public trial waiver jurisprudence as established in Anderson.

¶13 Subsequently, in *Presley,* the Court merely confirmed that the Sixth Amendment public trial right (and therefore *Waller)* extends to jury selection. *Presley,* 558 U.S. at 213, 130 S.Ct. 721. In that case, the Court specifically noted that "Presley's counsel objected to 'the exclusion of the public from the courtroom,' " and it further declared that "the accused does have a right to *insist* that the voir dire of the jurors be public." *Id.* at 210, 213, 130 S.Ct. 721 (emphasis added). While this "insist" language may not affirmatively endorse Colorado's public trial waiver doctrine, it certainly does not forbid it. Thus, although *Presley* definitively confirmed that the Supreme Court's public trial jurisprudence applies to jury selection, it did not expand *Waller's* mandated test beyond known closures that elicit contemporaneous objections.

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[4] *Waller's* limited applicability is further evidenced by the procedural history of the case, which involved five different petitioners. As the Court noted, although four of the five petitioners' attorneys objected to the closure, the fifth "concurred in the prosecution's motion to close the suppression hearing." *Waller,* 467 U.S. at 42 n.2, 104 S.Ct. 2210. Based on this distinction, the Court remanded that petitioner's case so "[t]he state courts may determine on remand whether [the petitioner who did not object] is procedurally barred from seeking relief as a matter of state law." *Id.* Here in Colorado, a defendant who does not object to a closure is procedurally barred from seeking relief under *Anderson.* 490 P.2d at 48.

¶14 Indeed, the Supreme Court itself has recognized, albeit in dicta, that a defendant waives his right to a public trial by failing to object. *See Peretz,* 501 U.S. at 936, 111 S.Ct. 2661 (citing *Levine v. United States,* 362 U.S. 610, 619, 80 S.Ct. 1038, 4 L.Ed.2d 989 (1960), for the proposition that "failure to object to closing of [the] courtroom is waiver of [the] right to public trial" to support its conclusion that "[t]he most basic rights of criminal defendants are ... subject to waiver"). Therefore, because neither *Waller* nor *Presley* addressed waiving the public trial right by not objecting—and *Peretz* actually endorsed such a rule of waiver—Colorado "may determine" whether a defendant who does not object to a known closure "is procedurally barred from seeking relief as a matter of state law." *See Waller,* 467 U.S. at 42 n.2, 104 S.Ct. 2210. In *Anderson,* we determined that such non-objecting defendants have affirmatively waived their public trial rights and are thus barred from seeking appellate relief in Colorado.[5]

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[5] Stackhouse further asserts that his attorney's decision not to object to a known closure cannot properly be considered waiver under *Olano,* in which the Supreme Court stated that while "forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *See* 507 U.S. at 733, 113 S.Ct. 1770 (internal quotation marks omitted). But as the *Olano* Court recognized, "[w]hether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *Id.* For the right to public trial, several policy considerations militate toward treating defense counsel's decision not to object to a known closure as an affirmative waiver of the defendant's public trial right. *See infra* ¶¶15–16. Therefore, *Olano* does not alter Colorado's longstanding rule

¶15 Not only does *Anderson* remain viable in light of the Supreme Court's more recent precedent, but the rationale buttressing its waiver policy still stands strong. First, only a select few rights are so important as to require knowing, voluntary, and intelligent waiver to be personally executed by the defendant. *See, e.g., People v. Davis,* 2015 CO 36, ¶ 15, —— P.3d —— (recognizing that only knowing, voluntary, and intelligent waiver is sufficient to waive the right to counsel). The right to a public trial is not among these; if it were, then a judge would be unable to close the courtroom over the defendant's objection despite satisfying the *Waller* test. *See Robinson v. State,* 410 Md. 91, 976 A.2d 1072, 1082 n.6 (2009) (noting that if it were true "that the right to a public trial cannot be waived by the defendant's 'inaction' " but rather required knowing, voluntary, and intelligent waiver, then a "defendant's refusal to make an 'intelligent and knowing' waiver of the right would preclude a trial judge from ever closing a courtroom, no matter the circumstances warranting closure"). Rather, the right to a public trial "falls into the class of rights that defense counsel can waive through strategic decisions." *Cf. Hinojos–Mendoza v. People,* 169 P.3d 662, 669 (Colo. 2007) (holding the same regarding the right to confrontation). This is so because there are sound strategic reasons to waive the right to a public trial, as is particularly apparent in the context of Stackhouse's jury selection for his trial on charges of sexual assault on a minor. For example, defense counsel may prefer closure to avoid "tainting of the

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that not objecting to a known closure constitutes "intentional relinquishment or abandonment of a known right."

jury by pretrial publicity," *Waller,* 467 U.S. at 47 n.6, 104 S.Ct. 2210, or may believe that potentially biased jurors will be more frank and forthcoming regarding their biases if jury selection is closed to the public, *see Commonwealth v. Alebord,* 4 N.E.3d 248, 255, 467 Mass. 106 (2014) (noting that the defense attorney "acknowledged that he subscribed to the 'theory' that the privacy or secrecy of an individual voir dire is more conducive to obtaining candid answers from potential jurors, particularly in cases with racial or sexual undertones"), *cert. denied sub nom. Alebord v. Massachusetts,* —— U.S. ——, 134 S.Ct. 2830, 189 L.Ed.2d 793 (2014). Moreover, the trial court's stated reason for closing a portion of Stackhouse's jury selection—to prevent family members and those connected with the trial from intermingling with a large jury pool in a small courtroom—could have inspired defense counsel here to consent to the closure out of concern that the victim's family might communicate with the venire and potentially bias jurors against the defendant. *See Anderson,* 490 P.2d at 48 (closing the courtroom during voir dire to prevent family members from attempting to influence the jury); *cf. Robinson,* 976 A.2d at 1075 (same to prevent attempted influence of a witness). Therefore, because there are sound strategic reasons for a lawyer to waive a client's right to a public trial, the right is among those where "[d]efense counsel stands as captain of the ship." *See Hinojos–Mendoza,* 169 P.3d at 669 (alteration in original) (quoting *People v. Curtis,* 681 P.2d 504, 511 (Colo. 1984)).

¶16 Second, "we presume that attorneys know the applicable rules of procedure," and we thus "can infer from the failure to comply with the procedural

requirements that the attorney made a decision not to exercise the right at issue." *Id.* at 670. By the same token, it has long been the rule in Colorado that defense counsel must object to a known closure to preserve appellate review on public trial grounds. *Anderson,* 490 P.2d at 48. Allowing a defense attorney who stands silent during a known closure to then seek invalidation of an adverse verdict on that basis would encourage gamesmanship, and any "new trial would be a 'windfall' for the defendant, a result that the *Waller* Court explicitly tried to prevent." *See State v. Pinno,* 2014 WI 74, ¶ 61, 356 Wis.2d 106, 850 N.W.2d 207, 225; *cf. Robinson,* 976 A.2d at 1084 (treating the public trial claim as waived "given the possibility that Appellant's lack of objection may have been the product of design, and the fact that the very analysis Appellant complains was not done by the trial court likely would have been done had he brought the matter to the court's attention"). This concern—that attorneys could intentionally not object to a closure as a strategic parachute to preserve an avenue of attack on appeal—specifically motivated our decision in *Anderson* and remains relevant today. *See Anderson,* 490 P.2d at 48 ("It is apparent in this case that the defendant's motion arose as the result of a guilty verdict and not because of the denial of a constitutional right. Only after the defendant was found guilty did hindsight cause defense counsel to decide that the defendant was denied a public trial."). Therefore, because legitimate strategic considerations might motivate counsel to not object to a closure, and because such strategic decisions should not be permitted to provide an appellate parachute to non-objecting defense counsel if the defendant is

convicted, Colorado has long treated defense counsel not objecting to a known closure as an affirmative waiver of the public trial right. We see no reason to deviate from *Anderson* now.[6]

IV. Conclusion

¶17 For the foregoing reasons, we conclude that our longstanding precedent in *Anderson* remains good law: Defendants in Colorado affirmatively waive their

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[6] We note that Colorado is not alone in deeming the public trial right to be waived when defense counsel does not object to a known closure. *See Robinson,* 976 A.2d at 108–10 (collecting an array of state and federal cases holding that defense counsel not objecting to a known closure constitutes waiver of the defendant's public trial right, and holding that, "[c]onsistent with the vast majority of the courts that have spoken on the subject ... a claimed violation of the right to a public trial must be preserved for appellate review by a timely objection at trial, notwithstanding that the allegation implicates structural error"). Moreover, several cases supporting *Anderson's* waiver principle were decided after *Waller,* at least one was decided after *Presley,* and two were denied certiorari by the Supreme Court. *See, e.g., United States v. Hitt,* 473 F.3d 146, 155 (5th Cir. 2006) ("Where a defendant, with knowledge of the closure of the courtroom, fails to object, that defendant waives his right to a public trial."), *cert. denied,* 549 U.S. 1360, 127 S.Ct. 2083, 167 L.Ed.2d 802 (2007); *Alvarez v. State,* 827 So.2d 269, 274, 276 (Fla. Dist. Ct. App. 2002) (stating that "[t]he majority view across the country is that a failure to object to a closure of the trial waives the right to a public trial," and holding the same); *Alebord,* (decided after *Robinson* and *Presley,* and similarly holding that "the right to a public trial may be procedurally waived by a failure to lodge a timely objection to the offending error" and that "trial counsel may waive the right on his own as a tactical decision without informing his client"), *cert. denied sub nom. Alebord v. Massachusetts,* —— U.S. ——, 134 S.Ct. 2830, 189 L.Ed.2d 793. Thus, Colorado remains in good company through our holding that *Anderson's* waiver principle is still controlling precedent.

right to public trial by not objecting to known closures. Thus, the court of appeals correctly held that Stackhouse waived his public trial right by not objecting to the court's known closure during jury selection, and we therefore affirm its judgment.

JUSTICE MÁRQUEZ dissents.

JUSTICE MÁRQUEZ, dissenting.

¶18 Today, the majority concludes that a defendant "affirmatively waives" his Sixth Amendment right to a public trial, not by intentionally relinquishing the right or knowingly abandoning it, but merely through his counsel's failure to raise a contemporaneous objection to a courtroom closure. Maj. op. ¶¶ 1, 9, 17. Because I cannot agree that a defendant's silence necessarily strips him of the fundamental constitutional right to a public trial, I write separately and explain why, under *United States v. Olano,* 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), and this court's own precedent, a defendant's failure to object to a courtroom closure is, at most, a forfeiture—not a waiver—of that right, reviewable on appeal for plain error. In my view, the trial court's intentional exclusion of the public during voir dire in this case amounted to plain error warranting reversal of Stackhouse's conviction. Therefore, I respectfully dissent.

I. The Right to a Public Trial

¶19 The Sixth Amendment to the United States Constitution guarantees an accused the right to a public trial. This right serves four primary interests in our justice system: It allows the public to see that

an accused is "fairly dealt with" and not unjustly condemned; it ensures that judges and prosecutors discharge their duties responsibly; it encourages witnesses to come forward; and it discourages perjury. *Waller v. Georgia,* 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). Although the Sixth Amendment right belongs to the criminal defendant, the United States Supreme Court has held that the right to a public trial "extends beyond the accused and can be invoked under the First Amendment," giving the press and the public, too, a First Amendment right to attend criminal trials. *See Presley v. Georgia,* 558 U.S. 209, 212, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010); *Waller*, 467 U.S. at 44–45, 104 S.Ct. 2210. The First Amendment right to a public trial likewise promotes the fairness of the tribunal and "the appearance of fairness so essential to public confidence in the system." *Press–Enterprise Co. v. Superior Court*, 464 U.S. 501, 508, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). The Supreme Court has made clear that the right to a public trial encompasses not only the trial itself but also other critical proceedings, including jury voir dire. *Waller,* 467 U.S. at 45, 104 S.Ct. 2210 (citing *Press–Enterprise*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629).

¶20 The right to a public trial is not absolute; it must in some situations yield to other rights or interests, including a defendant's right to a fair trial or the state's interest in protecting sensitive information. *Id.* As the Supreme Court has observed, however, such circumstances "will be rare." *Id.*

¶21 The United States Supreme Court addressed the right of the public and the press to attend jury

selection in *Press–Enterprise.* There, the trial court closed the proceeding and, with the consent of both the prosecution and defense, refused to release a transcript of voir dire. *Press–Enterprise,* 464 U.S. at 504, 104 S.Ct. 819. The Court observed that "[n]o right ranks higher than the right of the accused to a fair trial. But the primacy of the accused's right is difficult to separate from the right of everyone in the community to attend the voir dire which promotes fairness." *Id.* at 508, 104 S.Ct. 819. The Court held that "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.* at 510, 104 S.Ct. 819.

¶22 In *Waller,* the Supreme Court relied on *Press–Enterprise* and directly incorporated these factors into its Sixth Amendment analysis of the right, explaining that "there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public. The central aim of a criminal proceeding must be to try the accused *fairly*...." 467 U.S. at 46, 48, 104 S.Ct. 2210 (emphasis added). Thus, to justify closure of the courtroom:

- The party seeking closure must advance an overriding interest that is likely to be prejudiced.

- The closure must be no broader than required to protect this interest.
- The court must consider reasonable alternatives to closure.
- The court must make findings adequate to support closure.

Id. at 48, 104 S.Ct. 2210. Under *Waller,* a defendant's right to a public trial is violated where these factors are not met. *See id.* Importantly, the erroneous deprivation of the right to a public trial is structural error. *Neder v. United States*, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); *People v. Hassen*, 2015 CO 49, ¶ 7, —— P.3d ——; *Hagos v. People*, 2012 CO 63, ¶ 10, 288 P.3d 116, 119; accord maj. op. ¶ 7.

¶23 Despite the importance of the fundamental constitutional right to a public trial and its role in preserving the fairness of the proceeding, and despite the majority's recognition that the erroneous deprivation of this right is structural error, maj. op. ¶ 7, the majority holds that a defendant's failure to object to a courtroom closure "affirmatively waives" his right to a public trial—even where a trial court wholly fails to consider the *Waller* factors in deciding to close the courtroom. Maj. op. ¶1 (relying on *Anderson v. People,* 176 Colo. 224, 490 P.2d 47, 48–49 (1971) (holding that a defendant waives his public trial right by failing to object to closure)).

¶24 Although the majority observes that "the United States Supreme Court's precedent on the right to an open trial has evolved" in the decades since this court decided *Anderson,* the majority concludes that our decision in *Anderson* remains good law because it was not abrogated by the Supreme Court's more recent

decisions in *Waller* and *Presley,* which held that closure of the courtroom over a defendant's objection without satisfying the *Waller* factors requires automatic reversal. Maj. op. ¶¶5, 11. But our holding in *Anderson* has been called into question, not by *Waller* and *Presley,* but by the Supreme Court's decision in *United States v. Olano,* 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). In my view, the majority fails to properly consider the impact of *Olano* on our holding in *Anderson* and wrongly concludes that Stackhouse waived his right to a public trial by failing to object to the court's closure.

II. Waiver Versus Forfeiture of Constitutional Rights

¶25 Many courts have used the terms "waiver" and "forfeiture" interchangeably or have confused the two concepts. *See, e.g.,* 3 Wayne R. LaFave et al., *Criminal Procedure* § 10.2(a) (3d ed. 2014) ("[Failure to make a timely objection] is commonly characterized as a 'waiver' of the constitutional objection, but because such a failure does not ordinarily involve an intentional relinquishment of a constitutional right it is better to view it as a 'forfeiture.' ").

¶26 In *United States v. Olano,* the Supreme Court clarified the difference between waiver and forfeiture. 507 U.S. 725, 733–34, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Waiver, the Court explained, is the "intentional relinquishment or abandonment of a known right." *Id.* at 733, 113 S.Ct. 1770 (internal quotation marks omitted). When a defendant waives a right, constitutional or otherwise, there is no error. *Id.* at 733–34, 113 S.Ct. 1770.

¶27 Mere forfeiture, in contrast, does not extinguish a legal error. *Id.* at 733, 113 S.Ct. 1770. The Court explained that "[n]o procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right...." *Id.* at 731, 113 S.Ct. 1770 (internal quotation marks omitted). Yet, if a legal rule is violated during trial, "and if the defendant did not waive the rule, then there has been an 'error' ... despite the absence of a timely objection." *Id.* at 733–34, 113 S.Ct. 1770. Under plain error review, appellate courts have "limited power" to correct an error when a defendant has forfeited a right, but courts must consider the error, "putative or real, in deciding whether the judgment below should be overturned." *Id.* at 731–32, 113 S.Ct. 1770.

¶28 The majority holds that *"Olano* does not alter Colorado's longstanding rule that not objecting to a known closure constitutes 'intentional relinquishment or abandonment of a known right.' " Maj. op. ¶14 n.5. But that is precisely what *Olano* does. *Olano* plainly distinguishes between a *forfeiture,* which occurs when a defendant fails to object, and a *waiver,* which requires more: specifically, the "intentional relinquishment" of a "known right." 507 U.S. at 733, 113 S.Ct. 1770. This distinction cannot lightly be cast aside.

¶29 This court has embraced *Olano's* principle that "unobjected-to constitutional errors" are reviewed for plain error. *People v. Miller,* 113 P.3d 743, 748, 749–50 (Colo. 2005) (discussing *Olano,* 507 U.S. at 731–33, 113 S.Ct. 1770, in the context of the trial court's failure to instruct the jury properly on an essential

element of the charged crime). Specifically, this court has observed that a defendant "may forfeit his right to fix a constitutional error by failing to make an adequate objection" and has held that if a party raises an unpreserved argument on appeal, "the reviewing court will apply the plain error standard." *Martinez v. People,* 2015 CO 16, ¶¶ 13, 14, 344 P.3d 862, 867, 868 (citing *Olano,* 507 U.S. at 731, 113 S.Ct. 1770, in the context of the trial court's use of a constitutionally deficient jury instruction). We have also acknowledged *Olano's* definition of waiver as the " 'intentional relinquishment or abandonment of a known right.' " *Hinojos–Mendoza v. People,* 169 P.3d 662, 668 (Colo. 2007) (quoting *Olano,* 507 U.S. at 733, 113 S.Ct. 1770, in the context of the Sixth Amendment right to confrontation); *see also People v. Montour,* 157 P.3d 489, 498 (Colo. 2007) (holding that "an intentional relinquishment of a known right or privilege" is required for a defendant to waive his Sixth Amendment right to sentencing by jury).

¶30 The majority correctly points out that not all constitutional rights require a knowing, intelligent, and voluntary waiver "personally executed by the defendant." Maj. op. ¶15. To be sure, some rights, like the right to confrontation, may be waived on behalf of a defendant by his counsel. *E.g., Hinojos–Mendoza,* 169 P.3d at 668. However, in my view, the majority is wrong to conclude, especially after *Olano,* that "a defendant affirmatively waives his public trial right when he does not object to a known closure," maj. op. ¶9. The Sixth Amendment right to a public trial implicates a criminal defendant's right to a fair trial and therefore requires more than the defendant's

mere silence before it can be said that the defendant *intentionally* relinquished that right.

III. Plain Error Review

¶31 The majority acknowledges that "[u]nder *Waller,* the public trial right is violated when a defendant objects to a closure and the court does not satisfy the four factors of the *Waller* test." Maj. op. ¶7. The majority also acknowledges that the erroneous deprivation of the right to a public trial is structural error. *See id.*; *People v. Hassen,* 2015 CO 49, ¶ 7, ––– P.3d –––––; *Hagos v. People,* 2012 CO 63, ¶ 10, 288 P.3d 116, 119; *see also Press–Enterprise Co. v. Superior Court,* 464 U.S. 501, 513, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). It recognizes that structural errors require automatic reversal because they are not amenable to the prejudice analysis inherent in harmless error or plain error review. Maj. op. ¶10 n.3. Yet it concludes that, because the violation of the right to a public trial is structural error, either a defendant affirmatively waives this right by not objecting to a known closure, or the error requires automatic reversal. *Id.* In other words, to avoid automatic reversal associated with structural error, the majority chooses to ignore the potential structural error by automatically treating a defendant's silence as an "intentional" relinquishment of his right.

¶32 In my view, a defendant's silence should not automatically strip him of relief if in fact his constitutional right to a public trial has been violated. Given that we routinely review unpreserved alleged constitutional errors for plain error, I see no principled justification not to review an unpreserved

alleged error of this nature for plain error. *See Hagos*, ¶ 14, 288 P.3d at 120 ("[W]e review all other errors, constitutional and nonconstitutional, that were not preserved by objection for plain error."); *see also United States v. Olano,* 507 U.S. 725, 731, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993); *Martinez v. People*, 2015 CO 16, ¶ 14, 344 P.3d 862, 868; *People v. Miller*, 113 P.3d 743, 748–49 (2005).[1]

¶33 Plain error review is an exacting standard, and for good reason. To ensure an efficient, orderly trial, it is incumbent on defendants to timely object to constitutional violations. *See People v. Rollins,* 892

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[1] The majority cites cases from other jurisdictions to support its assertion that "Colorado remains in good company through our holding that *Anderson's* waiver principle is still controlling precedent." Maj. op. ¶ 16 n.6. Yet several courts have come to the contrary conclusion, holding that a defendant's right to a public trial is *not* waived by his silence. *See, e.g., United States v. Rivera,* 682 F.3d 1223, 1232 (9th Cir.2012) ("[A] defendant may ... forfeit the right [to a public trial], either by affirmatively waiving it or by failing to assert it in a timely fashion." (cited in *United States v. Santos,* 501 Fed.Appx. 630, 632 (9th Cir.2012) (holding that the defendant forfeited his right to a public trial by failing to object and reviewing for plain error under *Olano,* 507 U.S. at 731, 733, 113 S.Ct. 1770))); *Walton v. Briley,* 361 F.3d 431, 433–34 (7th Cir.2004) (applying a heightened standard of waiver to the public trial right and concluding that a defendant must knowingly and voluntarily waive the right); *People v. Vaughn,* 491 Mich. 642, 821 N.W.2d 288, 296–303 (2012) (applying *Olano,* 507 U.S. at 731, 733, 113 S.Ct. 1770, and concluding that an unpreserved objection to closure is subject to plain error review); *State v. Haskins,* 38 N.J.Super. 250, 118 A.2d 707, 710–11 (1955) (holding that the right to a public trial cannot be waived by a defendant's silence); *State v. Bethel,* 110 Ohio St.3d 416, 854 N.E.2d 150, 170 (2006) (same); *State v. Wise,* 176 Wash.2d 1, 288 P.3d 1113, 1120 (2012) (same).

P.2d 866, 874 n.13 (Colo. 1995) ("An accused may not withhold his objections until completion of his trial and after conviction, and later complain of matters which, if he had made a timely objection, would have allowed the trial court to take corrective action."). Thus, where no contemporaneous objection to the asserted error is made at trial, appellate review is limited to determining whether the error or defect constitutes plain error. *Id.*

¶34 Plain error review allows appellate courts to correct "particularly egregious errors." *Hagos,* ¶ 14, 288 P.3d at 120 (internal quotation marks omitted). To be "plain," the error must be "obvious and substantial," and it leads to reversal if it "so undermined the *fundamental fairness* of the trial itself so as to cast serious doubt on the reliability of the judgment of conviction." *Id.* (emphasis added) (internal quotation marks omitted); *see also Puckett v. United States,* 556 U.S. 129, 135, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009) (holding that plain error requires reversal if it "seriously affects the *fairness, integrity or public reputation of judicial proceedings*" (emphasis added) (internal quotation marks omitted)).

¶35 In his special concurrence suggesting that plain error review may be warranted under the circumstances of this case, Judge Gabriel correctly observes that the United States Supreme Court has left open the question whether structural errors automatically satisfy the prejudice prong of the plain error test. *People v. Stackhouse,* 2012 COA 202, ¶ 42, —— P.3d —— (Gabriel, J., specially concurring). In my view, reversal is warranted in this case under a plain error standard.

¶36 First, the trial court committed an "obvious and substantial" error when it sua sponte closed voir dire to family members and the public because it did not have enough space to seat fifty jurors. *See Presley v. Georgia,* 558 U.S. 209, 213–16, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (reversing the defendant's conviction where the trial court closed the courtroom during voir dire because it was "well settled" under *Press–Enterprise,* 464 U.S. 501, 104 S.Ct. 819, that, absent consideration of alternatives, the trial court could not constitutionally close voir dire); *Anderson,* 490 P.2d at 48 ("It is ... undisputed that the right to a public trial includes that stage of the proceedings which is devoted to the selection of a jury.").

¶37 Second, this closure was reversible plain error because, had the trial court applied the *Waller* factors, it is clear on this record that excluding the public during voir dire would not pass constitutional muster. *See Waller,* 476 U.S. at 48, 106 S.Ct. 1683 (holding that the party seeking closure must advance an overriding interest likely to be prejudiced; closure must be no broader than necessary; the court must consider reasonable alternatives; and the court must make adequate findings to support the closure). The trial court made no findings regarding the necessity of closing the courtroom. Indeed, the record indicates only that the court believed that there was not enough space to seat both the public and the fifty potential jurors and that it was concerned that family members would commingle with the venire. Insufficient courtroom capacity does not necessarily rise to the level of an overriding interest, and even "threats of improper communications with jurors or safety concerns" cannot justify a courtroom closure

unless the court articulates specific findings. *Presley,* 558 U.S. at 215, 130 S.Ct. 721. To the extent that the trial court was concerned with the public comingling with the jury, the court should have considered reasonable alternatives such as "reserving one or more rows for the public; dividing the jury venire panel to reduce courtroom congestion; or instructing prospective jurors not to engage or interact with audience members." *Id.*

¶38 Thus, the error here was obvious and affected Stackhouse's substantial right to a public trial. Under Supreme Court case law, an improper closure impairs the fairness, integrity, and public appearance of the proceeding. Therefore, I would hold that the *Waller* factors were not satisfied in this case and that the trial court committed reversible plain error by excluding members of the public from voir dire.

¶39 The majority expresses concern that allowing a defendant to raise an unpreserved public trial right objection on appeal would encourage "gamesmanship" on the part of defense counsel—i.e., attorneys might deliberately not object to a courtroom closure, then claim reversible error on appeal. Maj. op. ¶16. However, the majority fails to credit the exacting standards of our circumscribed plain error review. A defendant may prevail on an unpreserved public trial violation only if the error is so "particularly egregious," *Hagos,* ¶ 14, 288 P.3d at 120, that it is abundantly apparent to a reviewing court that closure of the courtroom did not satisfy the *Waller* factors.

¶40 Importantly, reversal is warranted, in my view, not because the court "erred" by failing to expressly

consider the *Waller* factors, but because the closure was *not in fact justified* under those factors. Where, by contrast, a record on appeal demonstrates that closure of the courtroom would have been appropriate under the *Waller* factors, then such closure is not reversible plain error. And where a record is insufficient for a reviewing court to discern whether the *Waller* factors would have been satisfied, a remand to the trial court for a *Waller* hearing is the appropriate remedy. In short, to review such unpreserved alleged errors is hardly an "appellate parachute" providing a convicted defendant with the windfall of a new trial. *See* maj. op. ¶16.

¶41 Even if I agreed with the majority that Stackhouse's failure to object was the functional equivalent of an intentional relinquishment of *his* public trial right, I would still find the trial court's closing the courtroom during voir dire deeply problematic. As discussed above, the right to a public trial does not belong to the defendant alone. The public and the press have a qualified First Amendment right to attend criminal trials, *see Waller,* 467 U.S. at 44–45, 104 S.Ct. 2210, and, in Colorado, our constitution guarantees crime victims the right to be "present at all critical stages of the criminal justice process," *see* Colo. Const. art. II, § 16a. Just as more is required from a defendant than silence before he waives his right to a public trial, more must be required of a trial court before it can override the interests of the public (including the interests of victims and family members) in being present. Certainly, the qualified right of the public to attend criminal trials must sometimes yield to other interests, such as the defendant's right to a fair trial

or a juror's right to privacy. *See Press–Enterprise,* 464 U.S. at 510, 104 S.Ct. 819. But the *Waller* factors evolved to protect the rights of all stakeholders to a public trial, and a trial court's careful consideration of these factors will satisfy both the Sixth and the First Amendments. Without satisfying these factors, a trial court cannot constitutionally close a courtroom. *See id.* at 511, 104 S.Ct. 819 ("Absent consideration of alternatives to closure, the trial court could not constitutionally close the voir dire [to the public].").

IV. Conclusion

¶42 In my view, the right to a public trial, like other constitutional rights that exist to preserve a fair trial, cannot be affirmatively waived by a defendant's silence. I would hold that Stackhouse's failure to object to the courtroom closure constituted a forfeiture subject to plain error review. Under plain error review, the trial court reversibly erred by excluding the public from voir dire without adequate justification. For these reasons, I respectfully dissent.

COLORADO COURT OF APPEALS 2012 COA 202

Court of Appeals No. 10CA1346
Adams County District Court No. 08CR3237
Honorable Chris Melonakis, Judge

The People of the State of Colorado
Plaintiff-Appellee,
v.
James Robert Stackhouse,
Defendant-Appellant.

JUDGMENT AFFIRMED, SENTENCE AFFIRMED, AND CASE REMANDED WITH DIRECTIONS
Division VI
Opinion by JUDGE VOGT[*]
Lichtenstein, J., concurs
Gabriel, J., specially Concurs
Announced November 21, 2012

John W. Suthers, Attorney General, Erin K. Grundy, Assistant Attorney General, Denver, Colorado, for Plaintiff–Appellee.

Douglas K. Wilson, Colorado State Public Defender, Elizabeth Porter–Merrill, Deputy State Public Defender, Denver, Colorado, for Defendant–Appellant.

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[*] Sitting by assignment of the Chief Justice under provisions of Colo. Const. art.VI, § 5(3), and § 24-51-1105, C.R.S. 2012.

¶1 Defendant, James Robert Stackhouse, appeals the judgment of conviction entered on a jury verdict finding him guilty of sexual assault on a child and sexual assault on a child—position of trust. He also appeals the sentence imposed. We affirm the judgment and sentence and remand for correction of the mittimus.

I. Background

¶2 M.A., the daughter of defendant's girlfriend, was born in 2003. Defendant lived with M.A. and her family from 2005 to 2008 and often cared for M.A. while her mother was at work.

¶3 According to the testimony at trial, on one occasion in 2007, M.A.'s preschool teacher noticed redness and swelling while changing M.A.'s diaper. M.A. screamed when she was wiped and said that "Daddy" had touched her "no-no." In 2008, M.A. and her brothers were removed from their mother's home and went to live with the brothers' aunt. While giving M.A. a bath, the aunt observed M.A. putting bath toys in her vagina. When she asked M.A. whether anyone had ever "touched her in a spot that they shouldn't have touched," M.A. responded that defendant had touched her with his fingers, causing bleeding. The child subsequently told a forensic interviewer that defendant touched her "no-no," making it bleed. When asked what her "no-no" was, M.A. pointed to her vagina.

¶4 M.A.'s foster father testified that the child told him defendant had touched her private parts with his "pee-pee" and made her lick his "pee-pee." Additionally, when M.A. overheard the foster father talking on the telephone with a person named James,

she became upset and said, "Dad, don't take me to James.... I am not a bad girl. Please don't take me back to James. I will be a good girl."

¶5 Defendant was charged with sexual assault on a child, sexual assault on a child by a person in a position of trust, and sexual assault on a child as a part of a pattern of sexual abuse. A jury acquitted him of the pattern of abuse charge but found him guilty of the other charges. He was sentenced to an indeterminate prison term of ten years to life.

II. Public Trial

¶6 On the first day of trial, the trial court asked members of the public to leave the courtroom while the jury was being selected. The court stated that, while the trial itself would be public, there was not enough space to seat the fifty potential jurors and still accommodate observers. After the jury was seated, the court continued, there would no longer be a danger of having family members and others "comingle" with the jurors.

¶7 Defendant did not object to this course of action. Nevertheless, relying on *Presley v. Georgia,* 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010), he contends on appeal that the exclusion of the public during jury selection constituted structural error entitling him to automatic reversal. We disagree.

A. Governing Law

¶8 The right to a public trial, guaranteed by both the United States and Colorado Constitutions, U.S. Const. amends. VI, XIV; Colo. Const. art. II, § 16, extends to the jury selection process. *Presley,* 558 U.S. at —, 130 S.Ct. at 724. However, the right is not

absolute, and it may in some circumstances give way to other rights or interests. *Id.; see also Anderson v. People,* 176 Colo. 224, 226, 490 P.2d 47, 48 (1971) (closing courtroom during voir dire because of limited space and concerns about keeping prospective jurors away from relatives and witnesses was "entirely proper").

¶9 While the denial of a public trial over the defendant's objection is structural error requiring reversal even absent proof of specific prejudice, *see Waller v. Georgia,* 467 U.S. 39, 49–50, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), not every exclusion of the public is a structural defect. *See People v. Whitman,* 205 P.3d 371, 379 (Colo. App. 2007); *People v. Thomas,* 832 P.2d 990, 993 (Colo. App. 1991); *People v. Angel,* 790 P.2d 844, 846–47 (Colo. App. 1989). Further, even structural errors are subject to the doctrine of waiver. *See Anderson,* 176 Colo. at 227, 490 P.2d at 48 (claimed violation of right to public trial was waived where defendant made no contemporaneous objection to exclusion of public during voir dire); *see also Robinson v. State,* 410 Md. 91, 976 A.2d 1072, 1083 (2009) (collecting cases and holding, "[c]onsistent with the vast majority of the courts that have spoken on the subject ... that a claimed violation of the right to a public trial must be preserved for appellate review by a timely objection at trial, notwithstanding that the allegation implicates structural error").

B. Analysis

¶10 Under these authorities, defendant waived his public trial claim by failing to object in the trial court to the closure of the courtroom during jury selection.

¶11 We do not agree with defendant that *Presley* requires a different result. In *Presley,* the Supreme Court held that trial courts must consider reasonable alternatives to closure before excluding the public from voir dire, even when such alternatives are not offered by the parties. 558 U.S. at —, 130 S.Ct. at 724. However, unlike here, the defendant in *Presley* made a contemporaneous objection to the proposed closure, requested "some accommodation," and moved for a new trial based on exclusion of the public from voir dire. *Id.* at —, 130 S.Ct. at 722. There is nothing in the Supreme Court's *Presley* opinion to suggest that it was departing from its prior cases holding that even fundamental rights such as the right to a public trial can be waived by a failure to object. *See Peretz v. United States,* 501 U.S. 923, 936, 111 S.Ct. 2661, 115 L.Ed.2d 808 (1991) (stating that "[t]he most basic rights of criminal defendants are ... subject to waiver," and citing *Levine v. United States,* 362 U.S. 610, 619, 80 S.Ct. 1038, 4 L.Ed.2d 989 (1960), for the proposition that "failure to object to closing of courtroom is waiver of right to public trial"); *see also Robinson,* 976 A.2d at 1083; *State v. Bowen,* 157 Wash.App. 821, 239 P.3d 1114, 1118 (2010) (observing that *Presley* does not "control circumstances where, as here, the defendant did not object to the closure [of the courtroom] at trial," but concluding that reversal was required under applicable Washington precedent).

C. Plain Error

¶12 In his reply brief, defendant argues for the first time that, if his structural error argument is deemed waived, he is nevertheless entitled to reversal because closure of the courtroom constituted plain

error. We disagree. Even if we assume that this argument is properly before us and that the trial court's procedure was flawed, we perceive no basis for concluding that the error, if any, so undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction. *See People v. Miller,* 113 P.3d 743, 750 (Colo. 2005).

III. M.A.'s Statements

¶13 Defendant challenges the admission of M.A.'s statements through her own testimony and through the testimony of other witnesses. We perceive no grounds for reversal.

A. Competency

¶14 Defendant first contends that the trial court erred in allowing M.A. to testify even though she was not competent to do so. We disagree.

¶15 We review the trial court's competency determination for abuse of discretion. *People v. Wittrein,* 221 P.3d 1076, 1079 (Colo. 2009).

¶16 Under section 13–90–106(1)(b)(II), C.R.S.2012, a child may testify in a criminal sexual abuse proceeding "when the child is able to describe or relate in language appropriate for a child of that age the events or facts respecting which the child is examined." A child may be judged competent to testify if, for example, she knows what grade she is in, knows the defendant's name, and is able to observe and relate facts accurately. *See People v. Vialpando,* 804 P.2d 219, 224 (Colo. App. 1990) (seven-year-old witness in sexual assault prosecution was competent to testify; she knew defendant by his first name, knew her grade in school, and told court

she would tell the truth after acknowledging difference between truth and lie).

¶17 Here, the trial court held a competency hearing before trial. When questioned by the court, M.A. knew her name and that she was six years old. She was able to partially spell her last name. She testified that she knew the difference between the truth and a lie, and she was able to answer correctly when the court asked three questions requiring her to identify whether something was the truth or a lie. M.A. stated that she knew what a promise was, and she promised to tell the truth. When defense counsel asked M.A. if she thought she could answer questions "about things that happened before today," even if the courtroom was full of people, M.A. responded that she could.

¶18 After engaging in a colloquy with the child that was similar to that described in *Wittrein,* the court concluded that, under the statutory standard, M.A. was competent to testify. It found that she understood the nature of the oath, the difference between truth and a lie, and the importance of being truthful. Based on its observations of the child's demeanor and responses, the court further found that M.A. was able to describe, in language appropriate for a six-year-old, the events respecting which she was being examined.

¶19 Permitting M.A. to testify was not an abuse of discretion. The trial court assessed the child's competency under the correct standard, and its findings are supported by the record. We also note that, at trial, M.A. was able to relate, in age-appropriate terms, the events about which she was being examined, and she was able to explain what

she meant by those terms when asked to do so.

B. Hearsay

¶20 Defendant next argues that the trial court erred in admitting M.A.'s hearsay statements through other witnesses. He contends that the trial court failed to make findings regarding the reliability of the hearsay, and that the child's inability to remember some of the statements precluded effective cross-examination, thereby violating his confrontation, due process, and fair trial rights. Because defendant did not raise any of these objections at trial, we review for plain error. We find none.

1. Reliability

¶21 When a child sexual assault victim testifies at trial, the child's hearsay statement is admissible if the court finds that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. *People v. Rojas,* 181 P.3d 1216, 1218 (Colo. App. 2008). In determining the admissibility of child hearsay, the court may consider factors such as whether the statement was spontaneous, whether it was made while the child was still upset or in pain, whether the language was likely to have been used by a child of the victim's age, whether more than one person heard the statement, and whether factors such as bias against the defendant, leading questions, or intervening events would suggest that the statement was unreliable. *Id.* at 1218–19; *see also People v. Dist. Court,* 776 P.2d 1083, 1089–90 (Colo. 1989).

¶22 Although the trial court should make specific findings on which factors establish reliability, its decision to admit the child's hearsay statements will

be affirmed even absent such findings if the record shows an adequate factual basis to support the court's determination. *Rojas,* 181 P.3d at 1219.

¶23 Here, the prosecution indicated that M.A. would testify at trial and it would accordingly introduce M.A.'s statements as nonhearsay pursuant to CRE 801(d). The trial court thus did not make specific findings regarding the reliability of the statements. Nevertheless, even if we treat the statements as hearsay, we are satisfied that the circumstances under which they were made, in combination with the similarity of the statements, provide sufficient indicia of reliability to support their admission.

¶24 The statement to the preschool teacher was spontaneous and made while M.A. was upset and in pain after being touched. Similarly, M.A.'s statement to her foster father when she overheard the telephone conversation was a spontaneous outburst reflecting her fear of being returned to defendant. Her initial statement to the forensic interviewer was elicited without a leading question and was consistent with her earlier declarations. Although the statement to the aunt was in response to a leading question, it was consistent with M.A.'s previous statement to the teacher, and there is no indication that the question was motivated by bias against defendant rather than being posed in response to what the aunt had observed. Notably, all of the statements were made in age-appropriate language and there is nothing in the record to suggest that they were influenced by intervening events or were the product of the declarant's bias against defendant.

¶25 We thus conclude that the record contains an

adequate factual basis to establish the reliability of the statements. We also note that the jury was properly instructed as to how it could consider the testimony, and that, as in *Rojas,* defense counsel directed the jurors' attention to inconsistencies in the testimony, which may have led to their verdict acquitting defendant of the pattern charge.

2. M.A.'s Inability to Remember

¶26 At trial, M.A. could not remember the statements she made about defendant to any of the witnesses other than her foster father. Defendant contends that this prevented him from cross-examining her, thereby rendering the statements inadmissible under CRE 801(d) and violating his right of confrontation. We have already concluded that the statements were admissible as hearsay regardless of whether the requirements of CRE 801(d) were satisfied, and we discern no violation of defendant's constitutional rights.

¶27 "[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Crawford v. Washington,* 541 U.S. 36, 59 n. 9, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). In addition, when a witness takes the stand and is available for cross-examination, prior out-of-court statements may be admitted even if the witness does not remember making them. *People v. Argomaniz–Ramirez,* 102 P.3d 1015, 1017 (Colo. 2004); *see also United States v. Owens,* 484 U.S. 554, 560, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988) (introduction of victim's out-of-court identification of assailant does not violate Confrontation Clause when

victim testifies while suffering from memory loss, because "traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness'[s] demeanor satisfy the constitutional requirements").

¶28 Here, M.A. testified at trial regarding the same abuse that was described by the other witnesses. She was available for cross-examination and, notwithstanding her inability to remember having told others about the incidents, defendant in fact conducted an effective cross-examination of her. Defendant's rights to confrontation, to due process, and to a fair trial were not violated.

¶29 In sum, admission of M.A.'s testimony and the testimony of the other witnesses did not, even if considered cumulatively, violate defendant's constitutional rights or constitute an abuse of discretion, much less plain error.

IV. Correction of the Mittimus

¶30 At sentencing, the trial court found that defendant was not a sexually violent predator. The mittimus states, "Sex Offender Status: No SVP Findng Must Reg as SXOF." Defendant argues that this language could be read to indicate that the court did not make an SVP finding. We agree that the language is ambiguous, and therefore remand with directions to amend the mittimus to state: "Defendant found not to be SVP; must register as sex offender."

V. SOLSA

¶31 Defendant contends that the Colorado Sex Offender Lifetime Supervision Act (SOLSA), §§ 18–

1.3–1001 to –1012, C.R.S.2012, is unconstitutional. However, we decline to depart from the decisions of several divisions of this court that have found SOLSA to be constitutional. *See People v. Collins,* 250 P.3d 668, 679 (Colo. App. 2010)(collecting cases).

¶32 The judgment and sentence are affirmed, and the case is remanded for correction of the mittimus.

Judge LICHTENSTEIN concurs.

Judge GABRIEL specially concurs.

Judge GABRIEL specially concurring.

¶33 I concur fully with the majority's holding and analysis. I write separately, however, with respect to Part II of the majority's opinion, which holds that Stackhouse waived his claim that his right to a public trial was violated. Although I believe that this conclusion is mandated by *Anderson v. People,* 176 Colo. 224, 227, 490 P.2d 47, 48 (1971), in which our supreme court found a waiver on virtually identical facts, I am not convinced that *Anderson,* which was decided over forty years ago, is consonant with more recent jurisprudence concerning issues of waiver, structural error, and plain error. Accordingly, although I do not feel that current case law is sufficiently developed to allow me to say that *Anderson* has been superseded, I believe that this case provides an appropriate vehicle to allow our supreme court to reconsider *Anderson,* in light of developments in the law in the decades since that case was decided.

I. *Anderson*

¶34 In *Anderson,* as here, members of the public were excluded from the courtroom during voir dire because the courtroom's limited space would have prevented the court from segregating prospective jurors from witnesses, relatives, and other individuals whose proximity, conversation, or actions might bias the prospective jurors. *Id.* at 225–26, 490 P.2d at 47–48. Although, like here, defense counsel in *Anderson* appears to have been informed of the decision to exclude members of the public during jury selection, he did not contemporaneously object to such exclusion. *Id.* In these circumstances, the supreme court held that the defendant had waived any objection that he may have had to the exclusion. *Id.* at 227, 490 P.2d at 48.

¶35 Because we are bound by *Anderson,* I cannot disagree with the majority's conclusion that Stackhouse waived his objection to the exclusion of the public during the jury selection phase of his trial. Indeed, the facts here are arguably stronger than those in *Anderson,* because unlike in *Anderson,* there is no question that Stackhouse knew that members of the public were asked to leave the courtroom during jury selection, and yet he failed to object. Nonetheless, I question whether the analysis in *Anderson* remains viable in light of more recent trends in the law relating to principles of waiver, structural error, and plain error.

II. Recent Trends

¶36 In my view, *Anderson*'s waiver analysis is arguably inconsistent with the approach taken by many courts in the decades since *Anderson* was

decided. For example, although the court in *Anderson* characterized the issue before it as one of waiver, I believe that more recent cases raise a question as to whether the issue is really one of forfeiture. Thus, in *United States v. Olano,* 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (quoting *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)), the Supreme Court stated, "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.' " *See also People v. Montour,* 157 P.3d 489, 498 (Colo. 2007)(noting that the general standard for the waiver of a constitutional right is "an intentional relinquishment of a known right or privilege"); *People v. Rodriguez,* 209 P.3d 1151, 1160 (Colo. App. 2008) (noting the distinction between waivers and forfeitures), *aff'd,* 238 P.3d 1283 (Colo. 2010); *cf. People v. Arguello,* 772 P.2d 87, 93 (Colo. 1989)(noting that an implied waiver of counsel resulting from a defendant's misconduct is more accurately described as a forfeiture of the right, rather than a deliberate and informed decision to waive the right).

¶37 The *Olano* Court further observed that whether a particular right is waivable, whether the defendant must participate personally in the waiver, whether certain procedures are required for waiver, and whether the defendant's choice must be particularly informed or voluntary depend on the right at stake. *Olano,* 507 U.S. at 733, 113 S.Ct. 1770. Moreover, the Court stated that a forfeiture, as opposed to a waiver, does not extinguish an error under Fed.R.Civ.P. 52(b). *Id.* Accordingly, an error that was forfeited, as

opposed to one that was waived, would be subject to plain error review, notwithstanding the absence of a timely objection. *Id.* at 733–34, 113 S.Ct. 1770.

¶38 In light of the foregoing, I perceive a serious question as to whether Stackhouse should be deemed to have waived his objection to the exclusion of the public from jury selection here, so as to preclude any further appellate review. In my view, this question subsumes a number of related inquiries: (1) whether the right to a public trial is waivable at all; (2) if so, whether Stackhouse's conduct constituted either a waiver or a forfeiture, which turns on whether there was an intentional relinquishment of a known right (a voluntary, knowing, and intelligent failure to make an objection can satisfy this standard); (3) whether Stackhouse had to have participated personally in any waiver; (4) whether certain procedures were required for a waiver, and (5) whether Stackhouse's choice must be particularly informed or voluntary. *See id.* at 733, 113 S.Ct. 1770.

¶39 In making these observations, I acknowledge that in *Peretz v. United States,* 501 U.S. 923, 936, 111 S.Ct. 2661, 115 L.Ed.2d 808 (1991), the Supreme Court cited *Levine v. United States,* 362 U.S. 610, 619, 80 S.Ct. 1038, 4 L.Ed.2d 989 (1960), for the proposition that failure to object to the closing of a courtroom is a waiver of the right to a public trial. I, however, tend to agree with the Michigan Supreme Court's recent observation that the statement in *Peretz* was dictum and that *Olano* controls in a case like this. As the Michigan Supreme Court put it:

> Although *Levine* examined a defendant's right to open criminal contempt proceedings under the Due

> Process Clause of the Fifth Amendment, a subsequent Supreme Court opinion, *Peretz v. United States,* cited *Levine* in dictum for the proposition that the "failure to object to [the] closing of [the] courtroom is [a] waiver of [the] right to public trial."
>
> We decline to follow the dictum of the Supreme Court of the United States because it conflates the concepts of waiver and forfeiture that we have historically recognized in Michigan. Both this Court and the Supreme Court of the United States have distinguished the failure to assert a right—forfeiture—from the affirmative waiver of a right. *Olano* explained that "[w]aiver is different from forfeiture" in that waiver is "the '*intentional* relinquishment or abandonment of a known right.' " A defendant who waives a right extinguishes the underlying error and may not seek appellate review of a claimed violation of that right. "Mere forfeiture, on the other hand, does not extinguish an 'error.' "

People v. Vaughn, 491 Mich. 642, 821 N.W.2d 288, 301–02 (2012) (footnotes omitted; quoting, in order, *Peretz,* 501 U.S. at 936, 111 S.Ct. 2661; *Olano,* 507 U.S. at 733, 113 S.Ct. 1770; and *People v. Carter,* 462 Mich. 206, 612 N.W.2d 144, 149 (2000)); *see also Commonwealth v. Lavoie,* 80 Mass.App.Ct. 546, 954 N.E.2d 547, 553 ("[A]lthough the defendant's assent need not necessarily appear on the trial record, his knowing agreement is required for the valid waiver of the right to a public trial."), *review granted,* 461 Mass. 1101, 958 N.E.2d 529 (2011). *But see Robinson v. State,* 410 Md. 91, 976 A.2d 1072, 1080–83 (2009) (concluding that the defendant waived his objection to the denial of a public trial by failing to object at

trial, at least where the lack of an objection might have been strategic, rather than inadvertent).

¶40 Assuming, then, that under current jurisprudence, Stackhouse would be deemed to have forfeited his objection to the exclusion of the public from jury selection in this case, not to have waived it, the question would become what is the proper nature of any appellate review. Colorado case law has arguably been inconsistent as to whether constitutional issues may be raised for the first time on appeal. *See generally People v. Greer,* 262 P.3d 920, 933–34 (Colo. App. 2011) (J. Jones, J., specially concurring) (collecting case law). In *Johnson v. United States,* 520 U.S. 461, 466, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997), however, the Supreme Court suggested that forfeited errors, even if structural, are subject to plain error review. Here, the parties agree that the denial of a public trial has been deemed structural error requiring reversal without a showing of specific prejudice. *See Waller v. Georgia,* 467 U.S. 39, 49–50, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). Accordingly, assuming that Stackhouse's right to a public trial was violated, *see Presley v. Georgia,* 558 U.S. 209, —, 130 S.Ct. 721, 724, 175 L.Ed.2d 675 (2010) (noting that the right to a public trial extends to the jury selection process), then even if Stackhouse can be deemed to have forfeited his objection, it appears that plain error review would be warranted.

¶41 Indeed, one could read our supreme court's decision in *Anderson* to suggest the propriety of plain error review in a case like this. In *Anderson,* 176 Colo. at 228, 490 P.2d at 49, after concluding that the defendant had waived his objection to the denial of a

public trial, the court went on to say:

> In this instance, due regard for the right to a public trial does not require us to disregard our obligation to sustain a jury verdict that has not been proven to have been remotely influenced by the action taken by the bailiff. The defendant was not the victim of any unjust prosecution, and the limited exclusion of the general public at this trial during the time that a jury was chosen cannot be elevated to the constitutional plateau of reversible error to escape the jury's verdict.

¶42 In my view, this language at least suggests that the supreme court was performing what we would today recognize as part of a plain error analysis, addressing whether the alleged error had any effect on the reliability of the judgment of conviction. *See People v. Miller,* 113 P.3d 743, 750 (Colo. 2005)(noting that plain error review addresses error that is obvious and substantial and that so undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction). A holding that forfeited structural errors are subject to plain error review, however, would also not completely resolve the issue presented here, because the Supreme Court has expressly left open the question of whether structural errors automatically satisfy the third prong of the plain error test. *See, e.g., Puckett v. United States,* 556 U.S. 129, 140, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009); *see also Tumentsereg v. People,* 247 P.3d 1015, 1018 n. 2 (Colo. 2011)(observing that the Supreme Court has recently noted that it has several times declined to resolve the question of whether structural error

automatically satisfies the third prong of the plain error test delineated in *Olano*). Thus, even if plain error review were proper here, a question arises as to whether a structural error could ever fail to satisfy the plain error test.

III. Conclusion

¶43 In light of *Anderson,* which we are bound to follow, I agree with the majority's conclusion that Stackhouse waived his objection to the exclusion of the public from the courtroom during jury selection. For the reasons set forth herein, however, I am not convinced that *Anderson* is consistent with the case law that has developed in the decades since it was decided, or that our supreme court would adhere to the approach taken in *Anderson* if squarely presented with the identical issue today. Accordingly, I respectfully urge the supreme court to take a fresh look at *Anderson,* in light of the developing case law that I have discussed.