No. 12-6142

IN THE SUPREME COURT OF THE UNITED STATES

BONGANI CHARLES CALHOUN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in concluding that the prosecutor's racially improper question did not warrant reversal of petitioner's conviction under the third prong of plain-error review.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-6) is not published in the Federal Reporter but is reprinted in 478 Fed. Appx. 322.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 2012. The petition for a writ of certiorari was filed on September 5, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of conspiring and attempting to possess five kilograms or more of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), 841(b)(1)(A), and 846; and possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c). Pet. App. 1; Gov't C.A. Br. 2. He was sentenced to a total of 180 months of imprisonment, to be followed by five years of supervised release. Pet. App. 3; Gov't C.A. Br. 2-3. The court of appeals affirmed. Pet. App. 1-6.

1. In May 2008, undercover Drug Enforcement Administration agents met with Victor Javier Gonzalez in San Antonio, Texas, and negotiated the sale of at least 25 kilograms of cocaine in exchange for $15,500 per kilogram. Gov't C.A. Br. 3; Presentence Investigation Report (PSR) ¶ 7. Gonzalez told the agents that he would find other buyers in the Houston area to participate in the purchase. PSR ¶ 7. On May 18, 2008, Gonzalez met petitioner and several other potential purchasers at the Crown Plaza Hotel in San Antonio. Gov't C.A. Br. 4. The group of potential purchasers had assembled approximately $400,000, which they delivered to the hotel. Ibid.

The following day, Gonzalez contacted the undercover agents and instructed them to meet him in the parking lot of a Best Buy

store in San Antonio. Gov't C.A. Br. 4. Petitioner and others arrived at the parking lot together. Id. at 5; PSR ¶ 9. Petitioner approached the waiting agents and told them that he had the money for the deal in his car. PSR ¶ 9. An agent walked over to the car where one of the passengers instructed the agent to fold down the rear seat. Ibid. There the agent found a black duffel bag containing more than $400,000. Ibid. Petitioner and the other occupants of the car were arrested. Ibid. At the time of his arrest, petitioner was carrying a loaded .9mm semi-automatic handgun and $2500 in cash. Ibid.; see Gov't C.A. Br. 7.

2. On August 4, 2010, after several co-defendants had pleaded guilty, a superseding indictment was filed against petitioner, charging him with one count of conspiring to possess five kilograms or more of cocaine with the intent to distribute it; one count of attempting to possess five kilograms or more of cocaine with the intent to distribute it; and one count of possessing a firearm during a drug-trafficking crime. C.A. R.E. Tab 3. Petitioner testified at trial, stating on cross-examination that he went to the hotel on May 18, 2008, in order to party and that he thought "something [was] wrong" when a co-defendant brought a large bag of money into the hotel room. 3/8/11 Tr. 124-125 (Tr.). The prosecutor asked petitioner what he thought was happening at that point and petitioner responded that he "didn't know." Tr. 125. Petitioner testified that the presence of the money made him

nervous, but that he did not know whether the other people in the room were going to do something illegal. Tr. 126.

When the prosecutor continued pressing petitioner about what he thought was happening, defense counsel objected that petitioner had already answered the question. Tr. 126. The court warned that the prosecutor was "starting to argue with the witness" and then asked several questions of its own. Tr. 126-127. The court asked petitioner, "Why would somebody bring a bag of money into a room," and petitioner responded, "I don't know." Tr. 127. When the court indicated that the prosecutor could resume his questioning, the prosecutor stated: "You've got African-Americans, you've got Hispanics, you've got a bag full of money. Does this tell you -- a light bulb doesn't go off in your head and say, This is a drug deal?" Ibid. Defense counsel did not object, and petitioner responded, "No, sir." Ibid. The prosecutor continued by asking whether it made petitioner "nervous enough that [he] went and got a room," and petitioner responded, "Yes, sir." Ibid.

In his closing argument later that day, defense counsel criticized the prosecutor for posing a race-based question, stating: "Government thinks that just because [there are] African-Americans and Hispanics in a room that you have a drug deal. And I hope that we open our minds a little more than that and don't consider that." Tr. 160. In his rebuttal, the prosecutor acknowledged defense counsel's implication that he had "racially,

ethnically profil[ed] people" when he posed the question, "Okay, you got African-American and Hispanics, do you think it's a drug deal?" Tr. 167. The prosecutor went to on explain:

> But there's one element that's missing. The money. So what are they doing in this room with a bag full of money? What does your common sense tell you that these people are doing in a hotel room with a bag full of money, cash? None of these people are Bill Gates or computer [magnates]. None of them are real estate investors.

Tr. 167-168. Again petitioner did not object. See Tr. 168.

The jury convicted petitioner on all counts and he was sentenced to 180 months of imprisonment, to be followed by five years of supervised release. Gov't C.A. Br. 2-3.

3. The court of appeals affirmed. Pet. App. 1-6. Petitioner argued for the first time on appeal that the prosecutor's suggestion that having a group of African-American and Hispanic people in a room with a bag of money indicated that a drug deal was taking place "was an egregious, stereotypical, racial, and cultural slur that was legally improper and requires reversal of [petitioner's] conviction." Pet. C.A. Br. 15; see id. at 15-17. Petitioner asserted that the court of appeals should review that question de novo. Id. at 3. In response, the government argued that the court should review the propriety of the prosecutor's statements under the plain-error standard because petitioner had not objected to the remarks at trial. Gov't C.A. Br. 18. The government argued that, "even assuming" the prosecutor's statements

had "crossed the line," reversal was not warranted because petitioner had not shown that the remarks affected his substantial rights. Id. at 20; see id. at 18-22.

The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1-6. The court agreed with the government that plain-error review was appropriate because petitioner "did not object to the prosecutor's question or the prosecutor's explanation of the question in his closing argument." Id. at 2. And the court concluded that petitioner had not satisfied that standard. Ibid. Turning immediately to the third prong of plain-error review –– i.e., whether a forfeited error affected petitioner's substantial rights –– the court considered whether the prosecutor's improper remarks had "cast serious doubt on the correctness of the jury's verdict." Ibid. (quoting United States v. Morin, 627 F.3d 985, 1000 (5th Cir. 2010), cert. denied, 131 S. Ct. 2126 (2011); and United States v. Thompson, 482 F.3d 781, 785 (5th Cir. 2007)).

The court of appeals concluded that the prosecutor's remarks had not affected petitioner's substantial rights. Pet. App. 2-3. First, the court explained that "the improper racial overtone of the question was isolated, and the prosecutor moved on to another line of questioning after [petitioner] responded negatively to the question." Id. at 2. "Second, the prejudicial effect of the prosecutor's remarks was mitigated by the district court's instruction to the jury that the statements and arguments of the

attorneys were not evidence and that the verdict must be based only on the evidence." Id. at 2-3. Third, the court noted that the evidence against petitioner "was strong, as the testimony of several witnesses indicated that he was a knowing participant in the drug transaction." Id. at 3.

Judge Haynes concurred "fully" in the court's conclusion that petitioner "ha[d] not shown reversible plain error as a result of the prosecutor's remarks." Pet. App. 5. She wrote separately, however, to emphasize "that such racially-charged comments are completely inappropriate for any lawyer." Ibid. Judge Haynes stated that it was "hard to think of a more foul blow than implying that the race or national origin of a group of people has anything to do with whether [petitioner] should have known that they were involved in dealing drugs." Ibid. Judge Haynes criticized the government for stating in its appellate brief that, "even assuming the question crossed the line," reversal was not warranted, emphasizing her view that "the question crossed the line" and that "[a]n apology [was] in order." Ibid.

ARGUMENT

Petitioner argues (Pet. 4-7) that the court of appeals erred in reviewing his unpreserved claim of prosecutorial misconduct under the plain-error standard and in concluding that he had not satisfied that standard because he had not shown an effect on substantial rights. The prosecutor's racial remark was unquestion-

ably improper, but the court of appeals correctly held that the error did not require reversal because it did not affect petitioner's substantial rights, i.e., it did not cast doubt on the outcome of the trial. Review is not warranted because the court of appeals' unpublished decision is correct and does not conflict with any decision of this Court or of any other court of appeals.

1. Petitioner first argues (Pet. 4-5) that the prosecutor's improper racially tinged remarks constituted structural error requiring automatic reversal. Petitioner did not argue in the court of appeals that the prosecutor's error was structural, see Pet. C.A. Br. 2, 15-16, and he is mistaken in now urging that it was. He is also mistaken in arguing that the court of appeals' decision conflicts with decisions of any other court of appeals.

a. Federal Rule of Criminal Procedure 52(b) provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the [district] court's attention." This Court has made clear that Rule 52(b) applies to all claims of error, even errors that would otherwise qualify as "structural." See, e.g., Johnson v. United States, 520 U.S. 461, 466 (1997) (explaining that "the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure"); United States v. Olano, 507 U.S. 725, 731 (1993) (reasoning that the plain-error rule applies to "any * * * sort" of error).

While the Court has never conclusively resolved how structural errors would be analyzed under the "substantial rights" prong of plain-error review, it has suggested that "certain errors, termed 'structural errors,' might 'affect substantial rights' regardless of their actual impact on an appellant's trial." United States v. Marcus, 130 S. Ct. 2159, 2164 (2010). Even if that suggestion was adopted, it would not help petitioner because he is incorrect in arguing that the prosecutor's error in this case was structural.

This Court has explained that a structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Johnson, 520 U.S. at 468 (quoting Arizona v. Fulminante, 499 U.S. 279, 310 (1991)). The Court "ha[s] found structural errors only in a very limited class of cases," ibid., where it is "difficult to assess the effect of the error," Marcus, 130 S. Ct. at 2164 (brackets and internal quotation marks omitted) (quoting United States v. Gonzalez-Lopez, 548 U.S. 140, 149 n.4 (2006)). In Johnson, Marcus, and Neder v. United States, 527 U.S. 1, 8-11 (1999), the Court identified a handful of defects that rise to the level of structural error –– i.e., a total deprivation of counsel, see Gideon v. Wainwright, 372 U.S. 335 (1963), a biased trial judge, see Tumey v. Ohio, 273 U.S. 510 (1927), the denial of a defendant's right to represent himself at trial, see McKaskle v. Wiggins, 465 U.S. 168 (1984), a violation of a defendant's right to a public

trial, see Waller v. Georgia, 467 U.S. 39 (1984), racial discrimination in the selection of the grand jury, Vasquez v. Hillery, 474 U.S. 254 (1986), and an erroneous instruction on reasonable doubt that affected all of a jury's findings, see Sullivan v. Louisiana, 508 U.S. 275 (1993). See also Gonzalez-Lopez (denial of the right to be represented by retained counsel of choice). Such structural errors generally concern matters that define the framework for the trial, rather than matters that take place in the presentation of evidence to the jury. Even very serious constitutional errors in the presentation of the case to the jury are amenable to case-specific analysis for prejudice and are not deemed "structural." E.g., Fulminante, 499 U.S. at 306-307. "Indeed, * * * 'if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred' are not 'structural errors.'" Marcus, 130 S. Ct. at 2166 (quoting Rose v. Clark, 478 U.S. 570, 579 (1986)).

The error at issue in this case is the prosecutor's improper suggestion that African-American and Hispanic persons gathered together in a room with a large amount of cash would likely be engaged in a drug deal. However egregious the error, it did not relate to the overall framework of petitioner's trial. Rather, it took place during the presentation of the case to the jury and was amenable to analysis in light of the nature and effect of the

improper comment in the context of the entire evidentiary presentation. It therefore was not structural error and did not automatically affect substantial rights. The court of appeals thus correctly applied plain-error review by asking whether the prosecutor's statements affected petitioner's substantial rights on the facts of this case.* Indeed, the court of appeals applied that circuit's heightened review for cases involving "improper prosecutorial remarks." Pet. App. 2.

b. Petitioner argues (Pet. 5-6) that the Court should grant his petition for a writ of certiorari in order to settle a conflict among the courts of appeals about "whether the use of racial prejudice in a criminal proceeding * * * requires an automatic reversal." Pet. 5. But none of the cases on which petitioner relies held or suggested that a prosecutor's racially objectionable questions or statements in closing argument require automatic reversal of a defendant's conviction (without a showing that the defendant's substantial rights were affected), let alone when the defendant failed to object to the remarks.

* As the Court has explained, the substantial-rights inquiry under plain-error review requires the same type of inquiry into an effect on the outcome of the proceedings as preserved-error review under Rule 52(a), "with one important difference: It is the defendant rather than the Government who has the burden of persuasion with respect to prejudice." Olano, 507 U.S. at 734; United States v. Dominguez-Benitez, 542 U.S. 74, 81-83 (2004).

In support of his argument that the court of appeals' decision conflicts with decisions of other courts of appeals, petitioner relies (Pet. 5) primarily on the Fourth Circuit's decision in Miller v. North Carolina, 583 F.2d 701 (1978). Miller involved the conviction in North Carolina state court of three African-American men for the rape of a white woman. Id. at 703-705. The defendants filed petitions for federal habeas corpus relief based on the state prosecutor's repeated (but unobjected-to) racial comments at closing argument, including his suggestion that no white woman would ever consent to sexual activity with an African-American man. Id. at 704. The court of appeals reversed the district court's denial of habeas relief. But in doing so, it had no occasion to apply Rule 52(b)'s plain-error rule –– and therefore had no occasion to consider whether the prosecutor's improper statements required automatic reversal without regard to whether the defendants had made the required showing under Rule 52(b). Instead, the court applied "the North Carolina procedural rule concerning the preservation of error in a North Carolina criminal proceeding," which excused a defendant's failure to object to an error in a capital case "if argument of counsel . . . is so grossly improper that removal of its prejudicial effect, after a curative instruction, remains in doubt." Id. at 705 (quoting State v. Miller, 220 S.E.2d 326, 339 (N.C. 1975)). No curative instruction was given in that case and the Fourth Circuit concluded that

"[t]he blatant appeal to racial prejudice in the assertion that no white woman would consent to sexual intercourse with a black man could not have had an insubstantial effect on the jury's verdict were it otherwise disposed to be persuaded by the defense." Id. at 707-708.

Although the Fourth Circuit in Miller did state that "automatic reversal" was warranted in that case under the harmless-error standard announced in Chapman v. California, 386 U.S. 18 (1967), its conclusion was dependent on the particular facts of that case. 583 F.2d at 707-708. The court explained that, "[w]here the jury is exposed to highly prejudicial argument by the prosecutor's calculated resort to racial prejudice on an issue as sensitive as consent to sexual intercourse in a prosecution for rape, we think that the prejudice engendered is so great that automatic reversal is required." Id. at 708. But the court did not purport to announce a broad new category of structural-error cases that would require automatic reversal when a prosecutor makes improper racial remarks without a showing that such remarks affected a defendant's substantial rights. That decision therefore does not conflict with the court of appeals' decision in this case.

The other court of appeals decisions on which petitioner relies (Pet. 5 & n.4) also do not conflict with the decision in this case. In United States v. Sanchez, 482 F.2d 5 (1973), for example, the Fifth Circuit applied Rule 52(b) in determining that a

prosecutor's multiple inflammatory remarks warranted reversing the defendant's conviction because it was "impossible to conclude that the prosecutor's remarks did not weigh heavily with the jury in bringing about appellant's conviction." Id. at 9. The same was true in United States v. Doe, 903 F.2d 16 (1990), in which the D.C. Circuit applied the plain-error doctrine of Rule 52(b) and reversed the defendant's conviction because of the prosecutor's improper remarks, but only after concluding, based on the particular facts of the case, that the remarks satisfied the substantial-rights prong of the plain-error analysis. Id. at 27-28.

In fact, each court of appeals decision petitioner cites (Pet. 5-6 & nn.4, 7-9) followed the same analytical path, inquiring whether a prosecutor's improper remarks prejudiced the defendant, when viewed in the context of his trial as a whole. See Bains v. Cambra, 204 F.3d 964, 978 (9th Cir.) ("The errors that occurred at trial do not provide sufficient reason to doubt * * * the district court's final conclusions as to the legitimacy of the process and the correctness of the outcome of [the defendant's] trial."), cert. denied, 531 U.S. 1037 (2000); Smith v. Farley, 59 F.3d 659, 665 (7th Cir. 1995) ("[W]e cannot say that this single, ambiguous sentence in a long closing argument" was "enough to warrant a conclusion that Smith was denied a fair trial."), cert. denied, 516 U.S. 1123 (1996); United States v. Vue, 13 F.3d 1206, 1213 (8th Cir. 1994) ("[A]fter having read and reread the

transcript of all of the questioning and testimony * * * , we cannot say * * * that we do not have grave doubt with respect to whether the outcome of the trial was substantially influenced by the introduction of that evidence."); McFarland v. Smith, 611 F.2d 414, 417, 419 (2d Cir. 1979) (acknowledging that "not * * * every race-conscious argument is impermissible," but finding that the prosecutor's improper statements were not harmless in that case); Withers v. United States, 602 F.2d 124, 126-127 (6th Cir. 1979) (noting that "[p]rosecutorial abuse does not always require vacating a jury verdict," but concluding that the "record" in that case "demonstrated" that the misconduct was not harmless). That is exactly the approach that the court of appeals took in this case, determining whether acknowledged error had a sufficiently adverse effect on the trial as a whole to warrant reversal. Pet. App. 2-3. The fact that different courts, applying the same legal standards to disparate sets of facts, have reached different conclusions is no surprise and does not constitute a circuit split. Here, the court of appeals correctly concluded that, although the prosecutor's error was plain, it did not affect petitioner's substantial rights because the prosecutor's statements were "isolated," the effect of the statements was "mitigated" by the court's instructions to the jury, and the totality of the evidence against petitioner was "strong." Ibid. There is no reason to

believe that the result of petitioner's appeal would have been different in any other circuit.

2. Petitioner also argues (Pet. 7-8) that the court of appeals misapplied this Court's decision in Marcus when it determined that petitioner had not demonstrated that the prosecutor's plain error affected petitioner's substantial rights. Petitioner is incorrect. In Marcus, the Court emphasized that, in order to satisfy the third prong of the plain-error standard, a defendant has the burden to demonstrate that the clear or obvious error affected his substantial rights, "which in the ordinary case means it affected the outcome of the district court proceedings." 130 S. Ct. at 2164 (quoting Puckett v. United States, 556 U.S. 129, 135 (2009)) (internal quotation marks omitted). And, as discussed at pp. 9-10, supra, the Court acknowledged that structural errors "might 'affect substantial rights' regardless of their actual impact on an appellant's trial." Ibid.

If anything, the court of appeals' application of plain-error review was more generous to petitioner than Marcus required. The court of appeals did not require petitioner to establish that the prosecutor's improper comments affected the outcome of his trial. See Pet. App. 2. Instead, because the error involved improper remarks by a prosecutor, the court inquired "whether the prosecutor's remarks cast serious doubt on the correctness of the jury's verdict." Ibid. (quoting United States v. Morin, 627 F.3d

985, 1000 (5th Cir. 2010), cert. denied, 131 S. Ct. 2126 (2011)). Although the court of appeals referred to that as a "high bar," ibid., it is presumably easier for a defendant to show that a prosecutor's error "cast serious doubt" on the verdict than it is to show that the prosecutor's error "affected the outcome" of the case. The court of appeals' fact-bound conclusion that petitioner did not satisfy his burden of showing that the prosecutor's improper statements cast serious doubt on the verdict does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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