No. 16-240

In the Supreme Court of the United States

KENTEL MYRONE WEAVER,
Petitioner,
v.
COMMONWEALTH OF MASSACHUSETTS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a defendant asserting ineffective assistance of counsel that results in a structural error must, in addition to demonstrating deficient performance, show that he was prejudiced by counsel's ineffectiveness, or whether prejudice is presumed in such cases.

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STATEMENT

1. In 2006, a Massachusetts jury convicted Petitioner of first-degree murder by deliberate premeditation in violation of Mass. Gen. Laws ch. 265, § 1, and of unlawful possession of a firearm in violation of Mass. Gen. Laws ch. 269, § 10(a). Pet. App. 1a, 5a, 42a. The convictions arose from the fatal shooting of fifteen-year-old Germaine Rucker in 2003. Pet. App. 1a. The evidence at trial included testimony that Petitioner admitted to police that he shot the victim. Pet. App. 1a, 4a. Jurors also heard, among other things, that a witness saw a young man carrying a pistol and discarding a hat while fleeing the area, that the pistol described was consistent with the type of gun that would have been used to shoot the victim, and that the hat contained DNA matching Petitioner's profile and resembled one that police previously saw Petitioner wearing. Pet. App. 2a-4a.

2. In 2011, Petitioner moved for a new trial, claiming that his trial counsel was ineffective in two ways. Pet. App. 1a-2a, 42a. The first was that the attorney did not adequately pursue Petitioner's claim that his admissions to police were coerced, and the second was that the attorney failed to object to a closure of the courtroom during jury selection. Pet. App. 1a-2a, 42a. In light of the trial judge's retirement, the parties agreed to bifurcate the motion, with the two ineffective-assistance claims being assigned to different judges. Pet. App. 2a, 27a, 42a-43a, 48a n.3.[1]

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[1] Petitioner is incorrect in stating that his motion for a new trial was filed "[f]ollowing an unsuccessful direct appeal." Pet.

a. The judge assigned to hear the courtroom-closure ineffectiveness claim held an evidentiary hearing. Pet. App. 38a, 43a-54a. She found as follows.

During the two days of jury selection in Petitioner's case, the courtrooms utilized were very crowded. Pet. App. 38a-39a, 43a-47a, 53a. They were not "large enough to provide seats" for the "large venire[s]" required for murder cases, which are "usually between sixty and 100 persons." Pet. App. 50a. On the first day, approximately ninety venire members assembled, and "every available seat" was taken. Pet. App. 38a-39a, 43a. The trial judge commented that "'the courtroom is almost but not quite large enough to accommodate everyone,'" and he referred to people "standing [] for some period of time." Pet. App. 43a-44a. "[T]hose standing were taken into the hall . . . to wait for open seats." Pet. App. 44a. On the second day, "the courtroom crowding was the same," "though perhaps less so" "[a]fter the lunch break." Pet. App. 44a-45a, 47a, 53a. When the proceedings began, the trial judge thanked "all of [those who had] been waiting out in the hallway," as it was "not the most comfortable place to wait." Pet. App. 44a-45a.

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7. Rather, it was filed and disposed of during the pendency of his direct appeal in accordance with Massachusetts procedure. Pet. App. 2a. *See* Mass. Gen. Laws ch. 278, § 33E (appeals and new-trial motions in first-degree-murder cases); Mass. R. App. P. 15(d) (new-trial motions in first-degree-murder cases), 19(d) (appeals and new-trial motions in first-degree-murder cases); Mass. R. Crim. P. 30 (post-conviction motions), 38(c) (judicial unavailability following conviction); Mass. Super. Ct. R. 61A (post-conviction motions and judicial unavailability).

On each of the two days, Petitioner's mother and at least one other interested person were denied entry to the courtroom by a court officer who told them it was closed for jury selection. Pet. App. 39a, 48a-53a, 56a. "[T]he courtroom remained closed to them and other members of the public for the duration of the empanelment." Pet. App. 52a-54a, 56a. "The sole reason . . . was the crowded condition in the courtroom." Pet. App. 39a, 53a.

At the end of the first day, "[Petitioner's mother] informed [defense counsel] that she had been refused entry." Pet. App. 49a. Then, "after the morning recess [on the second day], the [prosecutor] alerted the judge to the presence of the defendant's family and other interested parties outside the courtroom." Pet. App. 45a, 60a. He specifically referenced one individual who had "'testified on the grand jury,'" was "'a trial witness['s] boyfriend,'" and was "'seated amongst all the prospective jurors'"—adding that he did not "think it [was] appropriate that [the individual] be out in the hallway with any other friends or associates of the defendant.'" Pet. App. 45a-46a. "Echoing [the prosecutor's] point of view, defense counsel stated, 'If you want me to go out there and tell [the individual] to pick some other floor, I'd be glad to.'" Pet. App. 46a (noting that "[n]othing in the record, however, suggest[ed] any safety or jury-tampering issues involving" such individuals).

"[T]he defendant was unaware that the courtroom was closed or that he had a right to a public trial." Pet. App. 50a, 62a. And, "[b]ecause of his belief that the closure was constitutional, [defense counsel] did not discuss the matter with the

defendant[,] suggest to him that his right to a public trial included the empanelment," or object. Pet. App. 39a-40a, 46a-49a & n.1, 60a. "[T]he failure to object was not a strategic choice." Pet. App. 49a-50a, 62a. "Nor did any party or the court voice any concern that the defendant's family was outside rather than inside the courtroom." Pet. App. 46a. "Understandably, the court's attention was focused on conducting an efficient, fair and uneventful empanelment without undue inconvenience to prospective jurors." *Id.*

b. The motion judge arrived at the following conclusions. "[T]here was a full closure of the courtroom, rather than a partial closure," and it was not trivial or de minimis. Pet. App. 39a, 56a-58a. The closure could not "be justified as a valid limitation of the defendant's Sixth Amendment rights" under the test established by *Waller v. Georgia*, 467 U.S. 39, 48 (1984). Pet. App. 39a, 56a, 58a-60a.[2] But "the closure did not prejudice the defendant's case" Pet. App. 39a.

"[T]he defendant, unaware of his right to a public trial, did not intentionally waive this right." Pet. App. 62a. And "[c]ounsel's failure to object to the courtroom closure, stemming from a misunderstanding of the law governing the defendant's right to a public trial, was [] the product of 'serious incompetency, inefficiency, or inattention'

[2] Under the *Waller* test, "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." 467 U.S. at 48.

to the defendant's Sixth Amendment right to a public trial, and was not objectively reasonable." Pet. App. 40a, 63a-64a (quoting *Commonwealth v. Chleikh*, 82 Mass. App. Ct. 718, 722, 978 N.E.2d 96, 100 (2012)). But Petitioner did not "offer[] any evidence or legal argument establishing prejudice" in the sense of "a substantial likelihood of a miscarriage of justice." Pet. App. 40a, 64a. Thus, relief was denied. Pet. App. 43a, 65a.

c. Petitioner lodged an appeal of the motion judge's decision. Pet. App. 2a. It was consolidated with his direct appeal of his convictions, as well as an appeal from a decision denying his coerced-admission ineffectiveness claim, in the Massachusetts Supreme Judicial Court ("SJC"). *Id.* The SJC addressed Petitioner's challenges in a July 20, 2016 opinion. Pet App. 1a-41a.

At the outset of its analysis rejecting the coerced-admission ineffectiveness claim, the SJC set forth Massachusetts's distinct standard for evaluating ineffective assistance claims on direct review of first-degree-murder convictions:

> Where a defendant has been convicted of murder in the first degree, the court evaluates a claim of ineffective assistance [] to determine whether "there exists a substantial likelihood of a miscarriage of justice[.]" The court asks "[1] whether there was an error in the course of trial (by defense counsel, the prosecutor, or the judge), and, [2] if there was, whether that error was likely to have influenced the jury's conclusion[.]" This standard is more favorable than the constitutional standard for

> determining ineffectiveness of counsel. The court considers the defendant's claim "even if the action by trial counsel does not constitute conduct 'falling measurably below that ... of an ordinary fallible lawyer[.]' "

Pet. App. 30a-31a (citations omitted; third, fourth, and sixth alterations in original) (quoting *Commonwealth v. Williams*, 453 Mass. 203, 204, 900 N.E.2d 871, 874 (2009), *Commonwealth v. Lang*, 473 Mass. 1, 19, 38 N.E.3d 262, 276 (2015) (Lenk, J., concurring), and *Commonwealth v. Gonzalez*, 443 Mass. 799, 808-09, 824 N.E.2d 843, 852 (2005), respectively).[3] The SJC also noted the finding of the judge who denied that claim—"after three days of evidentiary hearings"—that Petitioner's "trial counsel [was] a very experienced and highly regarded defense attorney" who "ha[d] practiced law for over forty years and handled over one hundred murder trials at the trial and appellate level." Pet. App. 27a-28a.

With respect to the courtroom-closure ineffectiveness claim, the SJC described certain findings of the motion judge as "supported by the evidence." Pet. App. 38a. Included were findings regarding the crowding, the closure, and the failure to object. *Id.* The court also agreed that there was "a full, rather than partial, closure." Pet. App. 39a. It noted, but did not expressly ratify, the judge's

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[3] As the SJC's opinion in this case shows, the standard applies equally to appeals of motions for a new trial that are consolidated with the direct appeal. Pet. App. 30a-31a. *See, e.g.*, *Commonwealth v. Spray*, 467 Mass. 456, 471-72, 5 N.E.3d 891, 904-05 (2014).

determination that the *Waller* test was unmet. Pet. App. 38a.

The SJC recognized that a public-trial violation "constitutes structural error," and that "[w]here a meritorious claim of structural error is timely raised, the court presumes 'prejudice, and reversal is automatic.'" Pet. App. 39a (quoting *Commonwealth v. Jackson*, 471 Mass. 262, 268, 28 N.E.3d 437, 442 (2015)). But the SJC also affirmed that:

> "Where the defendant has procedurally waived his Sixth Amendment public trial claim by not raising it at trial, and later raises the claim as one of ineffective assistance of counsel in a collateral attack on his conviction, the defendant is required to show prejudice from counsel's inadequate performance (that is, a substantial risk of a miscarriage of justice) and the presumption of prejudice that would otherwise apply to a preserved claim of structural error does not apply."

Pet. App. 40a (quoting *Commonwealth v. LaChance*, 469 Mass. 854, 856, 17 N.E.3d 1101, 1104 (2014)). The court declined Petitioner's invitation to "revise the *LaChance* rule" and presume prejudice. *Id.*

In the SJC's view, the motion judge "correctly determined that counsel's inaction was the product of 'serious incompetency, inefficiency, or inattention to the defendant's Sixth Amendment right to a public trial, and was not objectively reasonable,' but that the defendant otherwise failed to show that trial counsel's conduct caused prejudice warranting a new

trial." *Id.* It noted that Petitioner "d[id] not dispute [on appeal] that he failed to demonstrate prejudice," and "ha[d] not advanced any argument or demonstrated any facts that would support a finding that the closure subjected him to a substantial likelihood of a miscarriage of justice." Pet. App. 40a-41a.

Pursuant to the special provisions of Massachusetts law governing first-degree-murder appeals—which "require[the SJC] 'to consider all issues apparent from the record, whether preserved or not'" and give it "extraordinary power"—the court "reviewed the record," but "discern[ed] no basis on which to reduce the verdict of murder in the first degree or to order a new trial." Pet. App. 2a, 8a, 41a (citing Mass. Gen. Laws ch. 278, § 33E, and quoting *Commonwealth v. Randolph*, 438 Mass. 290, 294, 780 N.E.2d 58, 64 (2002)).[4] The SJC affirmed Petitioner's convictions and the denial of both parts of his motion for a new trial. Pet. App. 2a, 8a, 41a.[5]

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[4] While Mass. Gen. Laws ch. 278, § 33E refers to first-degree-murder cases as "capital cases," "since capital punishment is not a penalty currently recognized by the laws of the Commonwealth, [those convicted] actually are not 'capital' defendants within the ordinary meaning of the term." *Dickerson v. Attorney Gen.*, 396 Mass. 740, 741-44 & n.1, 488 N.E.2d 757, 758-60 & n.1 (1996) (describing broad plenary review under the statute).

[5] The SJC, however, remanded the case to the trial court so that it could correct the mittimus to reflect that Petitioner's "life sentence . . . carrie[d] with it the opportunity for parole consideration after fifteen years" in light of his juvenile status. Pet. App. 41a.

ARGUMENT

Petitioner asks this Court to address whether a defendant may be required to prove prejudice in order to obtain relief on a claim that his counsel provided ineffective assistance resulting in a structural error. While he maintains that the lower courts are deeply divided on that issue, the division is not so pronounced. The Massachusetts SJC's view that prejudice is not to be presumed, but must be shown by the defendant, is consistent with this Court's precedent and rightly prevails. The few courts that purportedly disagree have already begun correcting their error or can do so, or are not actually in conflict with the SJC. This Court's intervention is therefore unnecessary.

Moreover, contrary to Petitioner's contention, this case does not present a clean vehicle for addressing the question presented. A ruling for Petitioner here might not lead to relief on remand in the SJC. That court did not expressly find counsel's performance inadequate under the federal standard. Instead, the court seems to have applied a more protective state standard. Facing on remand the application of a federal presumptive-prejudice rule, the SJC might choose to decide in the first instance whether counsel's performance was actually inadequate under federal law—and reject that claim.

I. Any disagreement among the lower courts is overstated.

The Petition overstates the extent of disagreement in the lower courts as to whether a defendant is required to prove prejudice in order to

establish an ineffectiveness claim involving a structural error. Most federal appellate courts and state high courts to have addressed the issue, like the SJC, recognize such a requirement. They understand what this Court has made clear—that courts should not conflate two distinct issues. One is whether to forgo a harmlessness analysis upon proof of a structural error, and the other is whether to presume the prejudice that is an essential element of establishing a denial of effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). Meanwhile, decisions that Petitioner cites for a contrary view reflect the conflation error that this Court has warned against, have been called into doubt, or did not espouse such a view at all.

1. The prevailing view among federal circuit courts and state high courts is that prejudice must be shown. *See United States v. Gomez*, 705 F.3d 68, 80 (2d Cir. 2013); *Purvis v. Crosby*, 451 F.3d 734, 738-44 (11th Cir. 2006); *Reid v. State*, 286 Ga. 484, 487-89, 690 S.E.2d 177, 180-81 (2010); *Commonwealth v. LaChance*, 469 Mass. 854, 856-60, 17 N.E.3d 1101, 1104-07 (2014); *People v. Vaughn*, 491 Mich. 642, 671-74, 821 N.W.2d 288, 306-08 (2012); *Commonwealth v. Rega*, 620 Pa. 640, 657, 70 A.3d 777, 787 (2013); *State v. Butterfield*, 784 P.2d 153, 157 (Utah 1989); *State v. Pinno*, 356 Wis.2d 106, 151-56 & nn.24-28, 850 N.W.2d 207, 229-32 & nn.24-28 (2014).

2. These decisions are in harmony with this Court's admonition that forgoing harmlessness review must be kept distinct from presuming *Strickland* prejudice. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-51 (2006). The reasons

make sense: "the requirement of showing prejudice in ineffectiveness claims stems from the very definition of the right at issue; it is not a matter of showing that the violation was harmless, but of showing that a violation of the right to effective representation *occurred*." *Id.* at 150 & n.5 (distinguishing "[a] choice-of-counsel violation," which "occurs *whenever* the defendant's choice is wrongfully denied"); *see also id.* at 147 ("The requirement . . . arises from the very nature of the specific element of the right to counsel at issue there—*effective* (not mistake-free) representation. Counsel cannot be 'ineffective' unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have). Thus, a violation of the Sixth Amendment right to *effective* representation is not 'complete' until the defendant is prejudiced."); *cf. Premo v. Moore*, 562 U.S. 115, 128-30 (2011) (stating, within discussion of performance prong of ineffectiveness test, that the "prejudice" or "harmless-error" analysis applied on direct appeal in *Arizona v. Fulminante*, 499 U.S. 279 (1991), "presumes a constitutional violation, whereas *Strickland v. Washington* seeks to define one," and "*Fulminante* says nothing about prejudice for *Strickland* purposes"); *Lockhart v. Fretwell*, 506 U.S. 364, 370 n.2 (1993) ("Harmless-error analysis is triggered only after the reviewing court discovers that an error has been committed. And under [*Strickland*], an error of constitutional magnitude occurs in the Sixth Amendment context only if the defendant demonstrates (1) deficient performance and (2) prejudice.").[6]

[6] To be sure, certain of this Court's structural-error cases

Indeed, this Court requires a greater degree of prejudice for a defendant to establish ineffectiveness than to overcome harmlessness. *See Kyles v. Whitley*, 514 U.S. 419, 436 & n.9 (1995) (explaining that more is required to establish prejudice under *Strickland* than harm under the standard of *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), applied in habeas corpus actions); *United States v. Dominguez Benitez*, 542 U.S. 74, 81 n.7 (2004) (explaining that more is required to show harm under *Brecht* than harm under the standard of *Chapman v. California*, 386 U.S. 18, 24 (1967), applied on direct review); *id.* at 86 (Scalia, J., concurring) (observing that *Strickland* prejudice standard is "less defendant-friendly" than harmlessness standards of *Brecht* and *Chapman*); *cf. Premo*, 562 U.S. at 129-30 (explaining that the "prejudice" or "harmless-error" standard applied "on direct review following an acknowledged constitutional error" "cannot apply to determinations of whether inadequate assistance of counsel prejudiced a defendant who entered a plea agreement"). So, presuming that an error is harmful does not necessarily warrant treating counsel's failure to raise the error as prejudicial for ineffectiveness purposes.

Moreover, in the limited circumstances in which this Court has held that prejudice may be

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have used the term "prejudice." *See, e.g.*, *Waller v. Georgia*, 467 U.S. 39, 49-50 & n.9 (1984); *Tumey v. Ohio*, 273 U.S. 510, 524, 530 (1927). But there is no doubt that they were discussing what is now more commonly referred to as a "harmlessness" inquiry—that is, an evaluation of whether to excuse a demonstrated constitutional violation on the ground that its impact was limited.

presumed for ineffective-assistance claims, it has done so based on factors different from those found to warrant dispensing with a harmlessness inquiry. The Court has relied on a variety of rationales for forgoing the harmlessness inquiry for structural errors, including "the difficulty of assessing the effect of the error," "fundamental unfairness," "the irrelevance of harmlessness," and the extent to which the error bears on the framework of the trial. *Gonzalez-Lopez*, 548 U.S. at 148-50 & n.4. By contrast, this Court has presumed prejudice in the ineffective-assistance context only where the nature of the error creates a high likelihood of prejudice. *See United States v. Cronic*, 466 U.S. 648, 658-66 (1984) (explaining that a showing of prejudice has been found unnecessary where there were "circumstances that [we]re so likely to prejudice the accused that the cost of litigating their effect in a particular case [was] unjustified"); *accord Strickland*, 466 U.S. at 692-93 (adding that "such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent").[8] And in fact, unlike

[8] Petitioner correctly states that "*Strickland* itself identifies certain contexts in which prejudice is presumed—such as when defense counsel 'is burdened by an actual conflict of interest.' That is because, 'it is difficult to measure the precise effect on the defense' of conflicted representation." Pet. 20 (citations omitted) (quoting 466 U.S. at 692). However, *Strickland* does not suggest that prejudice should be presumed whenever it would be difficult to measure an error's effect. The Court singled out an "actual conflict" claim as "[o]ne type" deserving of distinct treatment for a number of reasons, only one of which was the difficulty of measuring the effect. *Strickland*, 466 U.S. at 692. Others included the fact that conflicted counsel "breaches the duty of loyalty," "the obligation of counsel to avoid

its approach to structural error and harmlessness, this Court has not instructed the lower courts to forgo entirely considering the extent to which counsel's conduct affected the trial; rather, it has simply held that, in certain circumstances, an adverse effect is so likely that it may be presumed.[9]

3. Petitioner focuses on six decisions that, according to him, reflect the view that a defendant need not show prejudice when claiming ineffectiveness involving an underlying structural error: *Owens v. United States*, 483 F.3d 48, 63-66 & n.13 (1st Cir. 2009); *Johnson v. Sherry*, 586 F.3d 439, 447-48 (6th Cir. 2009); *Winston v. Boatwright*, 649

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conflicts of interest," and "the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts." *Id.* "Even so," this Court added, "the rule is not quite [a] per se rule of prejudice"; "[p]rejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Id.* (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348-50 (1980)).

[9] In addition, there are differences among structural errors and the manner in which they are to be remedied. For example, in *Waller*, the Court agreed that "the defendant should not be required to prove specific prejudice in order to obtain relief," but concluded that "the remedy should be appropriate to the violation" and a new suppression hearing would be sufficient, at least initially. 467 U.S. at 49-50 & n.9 (adding that "[a] new trial need be held only if a new, public suppression hearing results in the suppression of material evidence not suppressed at the first trial, or in some other material change in the positions of the parties"). This provides a further reason why the various presumptions of prejudice in the harmlessness context cannot be mechanically carried over to the *Strickland* context.

F.3d 618, 632-34 (7th Cir. 2011); *McGurk v. Stenberg*, 163 F.3d 470, 475 & n.5 (8th Cir. 1998); *Littlejohn v. United States*, 73 A.3d 1034, 1043-44 (D.C. 2013); *State v. Lamere*, 327 Mont. 115, 124-26 ¶ 28, 112 P.3d 1005, 1013-14 ¶ 28 (2005). Pet. 11-15. Three of the six involve the conflation error described above—but one is nearly two decades old and has already begun to be corrected by the circuit, and the others can be left to the lower courts to correct. The remaining three of the six actually reflect no disagreement with the prevailing view.

a. The Eighth Circuit's 1998 *McGurk* decision—which did not even involve an underlying public-trial claim—was based on the conflation error described above, but the court has begun to rectify its own mistake. 163 F.3d at 475 & n.5. The *McGurk* panel viewed *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993), as "dictat[ing] the conclusion that the Nebraska Court of Appeals erred in requiring a showing of actual prejudice [from counsel's failure to inform his client that he was entitled to a trial by jury]." 163 F.3d at 475 & n.5. However, *Sullivan* announced only that "harmless-error analysis does not apply" to a "'structural defect'" involving "[d]enial of the right to a jury verdict of guilt beyond a reasonable doubt." 508 U.S. at 282-82 (quoting *Fulminante*, 499 U.S. at 309). *Sullivan* did not concern prejudice for ineffectiveness. *Id.*

The Eighth Circuit has since narrowly confined *McGurk*. In fact, the court declined to apply its holding to a habeas claim alleging that trial counsel was ineffective for consenting to a courtroom closure. *Addai v. Schmalenberger*, 776 F.3d 528, 535-36 (8th Cir. 2015) (concluding that "requiring

[the petitioner] to demonstrate prejudice would not have been contrary to or an unreasonable application of clearly established federal law," where "[he had] failed to demonstrate clearly established federal law"). The court reasoned in part that "*McGurk* involved the right to a jury trial—not the temporary closure of the courtroom"; that the *McGurk* opinion "expressly noted 'the extremely limited circumstances in which it is appropriate to presume prejudice'"; and that both prior and subsequent Eighth Circuit decisions were in tension with *McGurk*. *Id.* *See also United States v. Kehoe*, 712 F.3d 1251, 1254-55 (8th Cir. 2013) (rejecting argument that "defense counsel's decision to select the jury in a racially discriminatory manner should result in a presumption of prejudice," "[n]otwithstanding . . . *McGurk*"); *Charboneau v. United States*, 702 F.3d 1132, 1138 (8th Cir. 2013) (finding *McGurk* inapplicable to habeas claim alleging ineffectiveness of appellate counsel for failure to raise a public-trial issue).[10]

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[10] Indeed, *McGurk*'s indication that a presumption of prejudice is "dictate[d]" by this Court's precedent, 163 F.3d at 475, seems difficult to reconcile with *Addai*'s conclusion that requiring a showing of prejudice is not "contrary to" any "clearly established federal law," 776 F.3d at 535-46. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000) (Stevens, J., for the majority) (essentially equating precedent that is "clearly established" with that which is "dictated" under *Teague v. Lane*, 489 U.S. 288 (1989)); *id.* at 379-84 (Stevens, J., concurring) (same); *id.* at 405-06, 412-13 (O'Connor, J., for the majority) (explaining that "[a] state-court decision will certainly be contrary to [this Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [the Court's] cases," such as where the state court calls

Owens and *Littlejohn* reflect the same conflation error and likewise are subject to correction. Like the *McGurk* court, the First Circuit in *Owens* maintained that, "[i]f . . . it is impossible to determine whether a structural error is prejudicial, *Sullivan*, 508 U.S. at 281, we must then conclude that a defendant who is seeking to excuse a procedurally defaulted claim of structural error need not establish actual prejudice." 483 F.3d at 64-65 & n.13 (parallel citation omitted) (explaining, where defendant alleged a public-trial violation, that the court "believe[d] that [the] showings of prejudice [for ineffective assistance and excusing procedural default] overlap, and [the court would] resolve them simultaneously"). And in *Littlejohn*, the District of Columbia's Court of Appeals held that "[r]equiring Littlejohn to prove actual prejudice as a result of trial counsel's waiver of his public trial right would be inconsistent with the Supreme Court's holdings that prejudice is presumed when the constitutional error is a structural defect . . . ." 73 A.3d at 1043-44.

But this Court need not step in to correct these isolated errors. As the Eighth Circuit's example suggests, these courts can correct themselves, based on this Court's precedents.

b. Petitioner's three remaining cases do not reflect disagreement with the prevailing view of federal law. *See Johnson*, 586 F.3d at 447-48; *Winston*, 649 F.3d at 627-34; *Lamere*, 327 Mont. at 124-26 ¶ 28, 112 P.3d at 1013-14 ¶ 28.

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for a defendant to make a higher showing of prejudice on an ineffectiveness claim than *Strickland* requires).

The Sixth Circuit in *Johnson* did not hold that prejudice for ineffective-assistance purposes should be presumed where an attorney fails to object to a violation of the right to a public trial. 586 F.3d 439. Rather, the court stated that, "[b]ecause the right to a public trial is a structural guarantee, if the closure were unjustified or broader than necessary, prejudice would be presumed." *Id.* at 447. For that proposition the court cited portions of *Waller* and *Gonzalez-Lopez* dealing with whether prejudice or harm must be shown before a demonstrated public-trial violation can be remedied. *Id.* (citing *Waller*, 467 U.S. at 49 n.9, and *Gonzalez-Lopez*, 548 U.S. at 149 n.4). Critically, the *Johnson* court next stated this: "Consequently, if evidence reveals that counsel's failure to object fell below an objective standard of reasonableness, there is a *strong likelihood* that counsel's deficient performance *would be deemed prejudicial*." *Id.* (emphasis added). The court confirmed that it was not mandating a presumption of prejudice for ineffectiveness purposes by remanding the case "for an evidentiary proceeding to determine whether the trial closure was justifiable, whether trial counsel was constitutionally ineffective for failing to object, and *whether the cause and prejudice components of Johnson's public trial claim can be satisfied*." *Id.* at 447-48 (emphasis added).[11] And the Sixth Circuit has since confirmed *Johnson*'s limited reach. *See Ambrose v. Booker*, 684

[11] The court was not suggesting that prejudice must be assessed only as part of the cause-and-prejudice analysis for procedural default and not for ineffective assistance. As it explained, it saw the two prejudice inquiries as "'overlap[ping].'" *Johnson*, 586 F.3d at 447-48 & n.7 (quoting *Owens*, 483 F.3d at 64 n.13).

F.3d 638, 651 (6th Cir. 2012) (describing *Johnson* as "suggest[ing] a 'strong likelihood' that if the performance was deficient, it would be deemed prejudicial, reasoning in part that the right to a public trial is a structural guarantee," and noting the "tentative and conditional nature of this language").[12]

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[12] Numerous judges in the Sixth Circuit have recognized the same. *See, e.g.*, *Hunter v. Bergh*, 2015 WL 5139358, at *5 (E.D. Mich. 2015) (unpublished) (Levy, J.) ("Petitioner relies on language in [*Johnson*] to argue that prejudice should be presumed based on the violation of his right to a public trial. But the Sixth Circuit has already rejected that notion [in *Ambrose*]."), *certificate of appealability denied*, 2016 WL 790966, at *3 (6th Cir. 2016) (unpublished) (noting that petitioner "ha[d] not provided any Supreme Court precedent requiring such a presumption" of prejudice); *Durr v. McLaren*, 2015 WL 927455, at *7-9 (E.D. Mich.) (unpublished) (Roberts, J.) (finding *Johnson* not controlling in part because it "did not definitively resolve the prejudice issue," its presumption-of-prejudice statement was dicta, and it is at odds with *Premo*), *certificate of appealability denied*, 2015 WL 5101751, at *2-3 (6th Cir. 2015) (unpublished) (focusing on lack of deficient performance in addressing ineffective-trial-counsel claim, and lack of prejudice in addressing ineffective-appellate-counsel claim); *Harrison v. Woods*, 2014 WL 6986172, at *7-9 (E.D. Mich. 2014) (unpublished) (Borman, J.) (finding *Johnson* not to control for same reasons stated in *Durr* district-court decision), *certificate of appealability denied*, 2015 WL 4923099, at *2 (6th Cir. 2015) (unpublished) (stating that "the fact that a structural error might have occurred does not mean that counsel's performance presumptively prejudiced [the petitioner]," with citation to *Premo*, and that "the Supreme Court has never held that an attorney's failure to object to the closure of the courtroom is" among the "limited circumstances" in which "*Strickland* prejudice is considered so likely that it is presumed"); *Porter v. Tribley*, 2014 WL 6632123, at *7-9 (E.D. Mich. 2014) (unpublished) (Goldsmith, J.) (finding *Johnson* not binding for same reasons provided in *Durr* district-court

Nor has the Seventh Circuit adopted Petitioner's rule. *Winston* did not involve public-trial issues, but instead resolved a state prisoner's habeas claim that his counsel was ineffective for striking prospective jurors based on gender in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). 649 F.3d at 632-34. To be sure, the court did fault the Wisconsin state court for "fail[ing] to see the *link* between the analysis of prejudice in the structural error cases and the analysis of prejudice in the *Strickland* line of cases." *Id.* at 632-33 (emphasis added).

However, far from issuing a sweeping ruling that equated harm and *Strickland* prejudice or that applied to all structural errors, the Seventh Circuit undertook a lengthy analysis of the nature of *Batson* error and concluded that, where defense counsel causes a *Batson* violation, the risk of prejudice is so great that it should be presumed under the *Cronic* line of cases. *See id.* at 633 (citing *Cronic* and its progeny and concluding that "[t]he same result, in our view, must hold for *Batson* errors"). Accordingly, the case is best read as recognizing a new category of cases in which prejudice is so likely that it can be presumed under *Strickland* and *Cronic*—not a holding that prejudice simply should be presumed any time counsel's deficiency results in a structural error. *See id.* And indeed, Respondent has uncovered no decision within or outside the Seventh Circuit that has since cited *Winston* for the notion that *Strickland* prejudice must be presumed in

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decision), *certificate of appealability denied*, No. 14-2523, slip op. at 3 (6th Cir. June 1, 2015) (unpublished) ("[T]he Supreme Court has never held that an attorney's failure to object to the closure of the courtroom results in a presumption of *Strickland* prejudice.").

circumstances involving an underlying structural error.[13]

Finally, in *Lamere*, defense counsel was alleged to have been inattentive not to a public-trial issue, but to potential bias issues in jury selection. 327 Mont. at 124-26 ¶ 28, 112 P.3d at 1013-14 ¶ 28. And the Montana Supreme Court offered no indication that its holding was based on its view of federal law. *Id.* The court cited only a state-court opinion concerning the presumption of prejudice or harm that arises when a structural error has been shown, and it extended the concept to the ineffective-assistance context. *Id.* (citing two state decisions that concerned harmlessness, not prejudice for ineffectiveness, and relied largely on state law).

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[13] Of course, the claimed structural error at issue in this case, unlike the *Batson* error at issue in *Winston*, is not the type of error that is so prejudicial to the trial's outcome that prejudice should be presumed under *Cronic*. That said, contrary to Petitioner's contentions, it would not be *impossible* for any defendant to prove prejudice from a failure to object to a courtroom closure during jury selection. A defendant can submit affidavits from his counsel and himself. He can also offer sworn statements from venire members, to the extent permitted. *See, e.g.*, *Commonwealth v. Rice*, 427 Mass. 203, 207-08, 692 N.E.2d 28, 31-32 (1998); 75B Am. Jur. 2d Trial § 1640: *Bias, Prejudice, or Disqualification Not Disclosed on Voir Dire*. A defendant can further provide an analysis of the questions asked in the selection process and their relationship to the issues in the case. However, Petitioner below "[did] not dispute that he failed to demonstrate prejudice" or "advance[] any argument or demonstrate[] any facts that would support a finding that the closure subjected him to a substantial likelihood of a miscarriage of justice." Pet. App. 39a-41a, 64a.

In sum, a few tribunals' misunderstanding of a distinction recognized by this Court can be pointed out by litigants and commentators, and corrected through the refinement of decisions in the lower courts—a process that is already under way. Such isolated mistakes do not warrant this Court's intervention.

II. This case is not a clean vehicle for addressing the question presented.

Petitioner describes this case as "a perfect vehicle for addressing the question presented." Pet. 20. Not so. In fact, it is not certain that a ruling for Petitioner here would lead to relief on remand, because the SJC did not clearly indicate that it found his counsel deficient under the federal standard, as opposed to a more protective state standard. Even if this Court were to adopt Petitioner's proposed rule, the SJC might be disinclined to grant relief without first finding counsel deficient under federal law. Such a finding is not guaranteed. Indeed, the SJC has declined to find defense attorneys deficient in multiple, similar situations.

To be sure, the SJC in Petitioner's case agreed that defense counsel erred. Pet. App. 30a-31a, 40a. But the court did not reference federal ineffectiveness law. *Id.* And, although the court was also not entirely clear about which of two state standards it applied, in either case, it was one that was more generous to Petitioner.

In discussing Petitioner's coerced-admission ineffectiveness claim earlier in its opinion, the SJC cited the Massachusetts standard applicable in direct

appeals of first-degree-murder convictions, stating that, "[w]here a defendant has been convicted of murder in the first degree, the court evaluates a claim of ineffective assistance [] to determine whether 'there exists a substantial likelihood of a miscarriage of justice[.]'" Pet. App. 30a (quoting *Commonwealth v. Williams*, 453 Mass. 203, 204, 900 N.E.2d 871, 874 (2009)). But, in addressing defense counsel's failure to object to the courtroom closure, the SJC repeated language from the general state constitutional ineffectiveness standard that it applies in other cases. The court indicated that the "motion judge's analysis . . . correctly determined that counsel's inaction was the product of 'serious incompetency, inefficiency, or inattention to the defendant's Sixth Amendment right to a public trial, and was not objectively reasonable[.]'" Pet. App. 40a. *See, e.g.*, *Breese v. Commonwealth*, 415 Mass. 249, 252, 612 N.E.2d 1170, 1172 (1993) (recognizing "serious incompetency, inefficiency, or inattention" standard as state constitutional test).

If the SJC utilized Massachusetts's special standard for first-degree-murder cases, then it applied one that, as it explained, "is more favorable than the constitutional standard for determining ineffectiveness of counsel." Pet. App. 31. That is, it is "more favorable to a defendant than the Federal or State constitutional standards." *Commonwealth v. Mosher*, 455 Mass. 811, 827, 920 N.E.2d 285, 299 (2010); *accord Knight v. Spencer*, 447 F.3d 6, 10-11, 15 (1st Cir. 2006). Indeed, "[t]he court considers the defendant's claim 'even if the action by trial counsel does not constitute conduct 'falling measurably below that . . . of an ordinary fallible lawyer[.]'" Pet. App. 31a (quoting *Commonwealth v. Gonzalez*, 443 Mass.

799, 808-09, 824 N.E.2d 843, 852 (2005), which was comparing special standard to usual standard).

But, even if the SJC applied the usual state standard for cases other than first-degree-murder direct appeals, Petitioner still benefited from a test more protective than *Strickland*. With respect to effectiveness of counsel, Massachusetts "grant[s] more expansive protections under [its own constitution] than have been required of States under the Sixth Amendment.'" *Commonwealth v. Marinho*, 464 Mass. 115, 124, 981 N.E.2d 648, 657 (2013) (citations omitted) (quoting *Commonwealth v. Rainwater*, 425 Mass. 540, 553, 681 N.E.2d 1218, 1227 (1997); and observing that "[s]atisfying [the usual state standard] necessarily satisfies the Federal standard articulated in [*Strickland*] for evaluating the constitutional effectiveness of counsel"); *see also Commonwealth v. Lykus*, 406 Mass. 135, 138-39, 546 N.E.2d 159, 162 (1989) ("[T]he right to effective assistance of counsel, afforded a defendant by [the state constitution], 'provide[s] greater safeguards than the Bill of Rights of the United States Constitution.'" (second alteration in original) (quoting *Commonwealth v. Hodge*, 386 Mass. 165, 169, 434 N.E.2d 1246, 1249 (1982)); *Commonwealth v. Pena*, 31 Mass. App. Ct. 201, 202, 575 N.E.2d 774, 775 (1991) (reciting above statement from *Hodge*). The court has also historically "emphasize[d] that [it] will be the arbiter of the [state] standard . . . and will not be bound by Federal precedent when deciding that issue." *Commonwealth v. Urena*, 417 Mass. 692, 695-696, 632 N.E.2d 1200, 1202-03 (1994); *accord*

Commonwealth v. Corcoran, 69 Mass. App. Ct. 123, 129 n.12, 866 N.E.2d 948, 954 n.12 (2007).[14]

Moreover, despite the SJC's conclusions about defense counsel's conduct under state law, there would be reason for it to find that Petitioner has not shown deficient performance in the *Strickland* sense. As the court noted, the judge who heard the coerced-admission ineffectiveness claim found that defense counsel was "very experienced and highly regarded," having "handled over one hundred murder trials at the trial and appellate level." Pet. App. 27a-28. And the motion judge who addressed the courtroom-closure ineffectiveness claim thoroughly discussed the severe crowding during jury selection. Pet. App. 38a-39a, 43a-54a. The record also reflects certain concerns about interaction between prospective jurors and interested individuals in the courthouse, and defense counsel's sensitivity to the issue. Pet. App. 45a-46a.

Indeed, in several other cases, the SJC has found experienced attorneys who failed to object to a courtroom closure not to have performed deficiently, even though they were unaware that the public-trial

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[14] It is true that "[the First Circuit has] described the [usual state standard] as 'functionally identical to the *Strickland* standard.'" *Mello v. DiPaulo*, 295 F.3d 137, 144-45 & nn.6,7 (1st Cir. 2002) (quoting *Scarpa v. DuBois*, 38 F.3d 1, 7 n.4 (1st Cir. 1994)). But, of course, that court's pronouncement of state law is not determinative, especially where the state's highest court has taken a different view. *See, e.g.*, *Riley v. Kennedy*, 553 U.S. 406, 425 (2008) ("A State's highest court is unquestionably 'the ultimate exposito[r] of state law' . . . [and] the prerogative of the [state's] Supreme Court to say what [state] law is merits respect in federal forums." (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975))).

right extended to jury selection. *See, e.g.*, *Commonwealth v. Celester*, 473 Mass. 553, 578 & nn.33,34, 45 N.E.3d 539, 559-60 & nn.33,34 (2016) (rejecting defendant's argument "that trial counsel and counsel handling his first motion for a new trial provided ineffective assistance because they were unaware that exclusion of the public from jury selection violated the defendant's Sixth Amendment right" (citing *Commonwealth v. Morganti*, 467 Mass. 96, 97-98, 103-05, 4 N.E.3d 241 (2014), and *Commonwealth v. Alebord*, 467 Mass. 106, 114, 4 N.E.3d 248 (2014), in which experienced counsel who were unaware that public-trial right applied to jury selection and did not object to closure were found not deficient)); *Commonwealth v. Fritz*, 472 Mass. 341, 346-47, 34 N.E.3d 705, 710 (2015) (similar).

Thus, there is no guarantee that the SJC would find Petitioner's counsel to have performed deficiently under the more demanding federal ineffectiveness standard and grant relief under a presumptive-prejudice rule on remand. Petitioner is thus mistaken in describing this case as a suitable vehicle for addressing the issue presented.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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