No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Because "most constitutional errors can be harmless," this Court has "adopted the general rule that a constitutional error does not automatically require reversal of a [criminal] conviction" and instead is subject to a "harmless-error analysis." *Arizona* v. *Fulminante*, 499 U.S. 279, 306 (1991). Among the constitutional violations subject to such analysis is ineffective assistance of counsel. See *Strickland* v. *Washington*, 466 U.S. 668 (1984).

At the same time, the Court has identified a category of "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Fulminante*, 499 U.S. at 309. The consequences of such errors are "necessarily unquantifiable and indeterminate" and are therefore not susceptible to a harmless-error inquiry. *Sullivan* v. *Louisiana*, 508 U.S. 275, 281-282 (1993).

The question presented is whether a defendant asserting ineffective assistance that results in a structural error must, in addition to demonstrating deficient performance, show that he was prejudiced by counsel's ineffectiveness, as held by four circuits and five state courts of last resort; or whether prejudice is presumed in such cases, as held by four other circuits and two state high courts.

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Other Authorities

Kentel Myrone Weaver respectfully petitions for a writ of certiorari to review the judgment of the Supreme Judicial Court of Massachusetts in this case.

OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts (app., *infra*, 1a-41a) is reported at 54 N.E.3d 495. The opinion of the Suffolk Superior Court (app., *infra*, 42a-65a) is unreported.

JURISDICTION

The final judgment of the Supreme Judicial Court of Massachusetts was entered on July 20, 2016. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, * * * and to have the Assistance of Counsel for his defence.

STATEMENT

The lower courts are deeply divided over whether a criminal defendant must prove actual prejudice resulting from ineffective assistance of counsel when the consequence of the ineffective assistance is a structural trial defect. The conflict is the result of an acknowledged tension between "two competing lines of authority from [this] Court." *Winston* v. *Boatwright*, 649 F.3d 618, 622 (7th Cir. 2011).

On the one hand, the Court said in *Strickland* v. *Washington*, 466 U.S. 668 (1984), that in order to obtain relief on the basis of ineffective assistance of counsel, a criminal defendant must show not only that

his counsel's performance was deficient, but also "that the deficient performance prejudiced the defense." *Id.* at 687. That makes sense: A deficiency that makes no practical difference ordinarily should not be a basis for scrapping an entire trial and starting over from scratch.

On the other hand, the Court has identified a category of "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Arizona* v. *Fulminante*, 499 U.S. 279, 309 (1991). The "precise effects" of structural rights on the course of a trial are "indeterminate" and "unmeasurable." *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993). Such rights include (among others) the right to trial by jury, the right to a loyal attorney, the right to an impartial judge, and the right to a public trial; without observance of these rights, "a criminal trial cannot reliably serve its function." *Ibid.*

The lower courts are in conflict over how to reconcile these two doctrines when they intersect—that is, when a trial lawyer's incompetence results in a structural error. The First, Sixth, Seventh, and Eighth Circuits and the highest courts in Montana and the District of Columbia have held that the prejudice required by *Strickland* must be presumed when ineffective assistance leads to a structural error. But the Second, Third, Fifth, and Eleventh Circuits, as well as the highest courts of Georgia, Massachusetts, Michigan, Wisconsin, and Utah disagree.

This issue is not academic—in this case and all others like it, the defendant's entitlement to a new trial hangs in the balance. Here, petitioner's trial counsel incompetently failed to object to a two-day closure of the courtroom during jury empanelment—a textbook structural error. The lower court nevertheless denied

petitioner relief because he could not show actual prejudice from his lawyer's deficient performance—a holding that placed petitioner in the Catch-22 of having to prove something that the First Circuit has said is "impossible" to prove. *Owens* v. *United States*, 483 F.3d 48, 65 (1st Cir. 2007). In any of the six jurisdictions on the other side of the conflict, the outcome would have been different: prejudice would have been presumed, and petitioner would have gotten his new trial.

Further review is therefore imperative. The question presented arises frequently and is critically important in each case in which it arises. Moreover, this case presents a clean and fully-developed vehicle for addressing the question. The petition accordingly should be granted.

A. Structural errors and trial errors

This Court's cases recognize two broad categories of constitutional errors in criminal trials: trial errors (as to which prejudice must be demonstrated) and structural errors (as to which prejudice is presumed).

1. A trial error is a discrete error that "'occur[s] during presentation of the case to the jury.'" *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) (quoting *Fulminante*, 499 U.S. at 307-308). Trial errors include admission of evidence obtained in violation of the Fourth Amendment (*Chambers* v. *Maroney*, 399 U.S. 42 (1970)), a prosecutor's comment on the defendant's silence in violation of the Fifth Amendment (*Chapman* v. *California*, 386 U.S. 18 (1967)), and a restriction on a defendant's right to cross-examine a witness in violation of the Sixth Amendment (*Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986)). See *Fulminante*, 499 U.S. at 306-307 (collecting examples).

Trial errors like these are ordinarily isolated, and analyzing "'their effect on the factfinding process at trial'" is not especially difficult. *Sullivan*, 508 U.S. at 279 (quoting *Van Arsdall*, 475 U.S. at 681). It is easy enough to determine, for example, whether there was sufficient evidence to support a conviction separate and apart from evidence entered in violation of the Constitution. Such errors may "'be qualitatively assessed in the context of other evidence presented in order to determine'" whether the error affected the outcome. *Gonzalez-Lopez*, 548 U.S. at 148 (quoting *Fulminante*, 499 U.S. at 308). Thus trial errors are generally understood to be "amenable to harmless-error analysis" and will not support a grant of relief unless the defendant can show that the violation "'contribute[d] to the verdict obtained.'" *Sullivan*, 508 U.S. at 279 (quoting *Chapman*, 386 U.S. at 24).

Ineffective assistance of counsel is typically a trial error. Thus, to obtain relief under *Strickland*, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694.

2. Structural errors are different in two ways. First, structural defects "'affect the framework within which the trial proceeds,'" and are not "'simply an error in the trial process itself.'" *Gonzalez-Lopez*, 548 U.S. at 148 (quoting *Fulminante*, 499 U.S. at 309-310). Thus they strike at the fundamental fairness of the trial. "'Without [the] basic protections [of structural rights], a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'" *Fulminante*, 499 U.S. at 310 (quoting *Rose* v. *Clark*, 478 U.S. 570, 577-578 (1986)). "'The harmless

error rule,'" which is focused on narrow, case-specific considerations, is inapt "'to gauge the great, though intangible, societal loss that flows'" from structural errors of this type. *Waller* v. *Georgia*, 467 U.S. 39, 49 n.9 (1984) (quoting *People* v. *Jones*, 391 N.E.2d 1335, 1340 (N.Y. 1979)).

Second, structural errors simply "defy analysis by 'harmless-error' standards." *Fulminante*, 499 U.S. at 309. "[T]he usual harmless error analysis of looking at all the evidence and assessing the strength of the case simply does not answer the question of whether reversal is necessary in these cases, since the problem is not with the quantity or quality of evidence, but rather with some other [inherent] aspect of the process." Amy Knight Burns, *Insurmountable Obstacles: Structural Errors, Procedural Default, and Ineffective Assistance*, 64 Stan. L. Rev. 727, 733 (2012). The "precise effects" of structural errors are, in other words, "unmeasurable" and "unquantifiable" and "indeterminate." *Sullivan*, 508 U.S. at 281-282. Because "the effect of [a structural] violation cannot be ascertained," structural errors are "not amenable to harmless-error review." *Vasquez* v. *Hillery*, 474 U.S. 254, 264 (1986).

Take, for example, the "Sixth Amendment right to counsel of choice." *Gonzalez-Lopez*, 548 U.S. at 148. "Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument." *Id.* at 149. The choice of attorney therefore does make a practical difference to the course of a trial. But "[i]t is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings."

Id. at 150. "Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." *Ibid*.

Take, as another example, the closure of a courtroom—the structural error at issue here. "In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury." *Waller* v. *Georgia*, 467 U.S. 39, 46 (1984). Thus, an open and public trial also makes a practical difference. But as with the right to counsel of choice, evaluating the effect of a courtroom closure on the outcome of a trial would entail a "speculative inquiry into what might have occurred in an alternate universe" (*Gonzalez-Lopez*, 548 U.S. at 150), implicating an endless chain of what-ifs and imponderable counterfactuals. "[U]nguided speculation" of this sort is not an acceptable basis "to judge intelligently the impact" of an error on a trial. *Holloway* v. *Arkansas*, 435 U.S. 475, 491 (1978).

For these reasons, the consequences of structural errors are *presumed* to be prejudicial, requiring "automatic reversal." *Brecht* v. *Abrahamson*, 507 U.S. 619, 629 (1993).

B. The courtroom closure

Fifteen-year-old Germaine Rucker was shot and killed. App., *infra*, 1a. Petitioner, then just sixteen, was indicted and tried for the murder. App., *infra*, 1a.

During the two-day empanelment of the jury, "a court officer informed" interested members of the public "that the courtroom was 'closed' during the jury selection." App., *infra*, 50a. "[T]he courtroom remained closed to [all] members of the public for the duration of the [two-day] empanelment." *Id*. at 52a. Accord *id*. at 53a ("I find that a court officer * * * closed the court-

room to the defendant's family and other members of the public during the entirety of the empanelment.").

C. Proceedings below

1. Petitioner was convicted of murder and possession of an unlicensed firearm. App., *infra*, 42a. Following an unsuccessful direct appeal, he obtained new counsel and filed a motion for a new trial. The motion alleged among other things that trial counsel's failure to object to petitioner's Sixth Amendment right to a public trial amounted to ineffective assistance. *Ibid.*

Following a hearing that included live witness testimony, the trial court denied the motion. App., *infra*, 42a-65a. With respect to the relevant facts, the trial court found "that a court officer * * * closed the courtroom to the defendant's family and other members of the public during the entirety of the empanelment." *Id.* at 53a. It found further that "there was a full closure of the courtroom, rather than a partial closure" because there was "no indication that the courtroom was open to some limited number of spectators during empanelment, or that any spectators were in fact present in the courtroom." *Id.* at 57a "The sole reason for the closure," moreover, "was the crowded condition in the courtroom." *Id.* at 53a.

With respect to the law, the trial court recognized that court closures narrowly drawn to serve an "overriding interest" do not violate the Sixth Amendment. App., *infra*, 57a-58a (citing *Waller*, 467 U.S. at 48). But, the trial court held, "courtroom crowding falls short as a justification for the closure at issue here." *Id.* at 58a. "[E]ven if management of the crowded conditions in the courtroom rose to the level of 'overriding interest,'" the court went on, "the closure in this case was far broader than necessary in both time and

reach." *Id*. at 59a. Thus, the trial court concluded, "the closure in this case cannot be justified as a valid limitation of the defendant's Sixth Amendment rights," and "[a] structural error * * * occurred during the empanelment." *Id*. at 58a, 64a.

The trial court held further that "defense counsel's failure to object did not result from the exercise of his tactical or strategic prerogatives in managing the trial" but rather "stemm[ed] from a misunderstanding of the law" and reflected "'serious incompetency.'" App., *infra*, 62a-63a. Defense counsel's performance was therefore deficient. *Ibid*. And for his part, petitioner was "unaware of his right to a public trial, [and] did not intentionally waive this right." App., *infra*, 62a. Indeed, he raised it at the first possible opportunity.

The trial court nevertheless denied petitioner's motion for a new trial because dictum appearing in *Commonwealth* v. *Dyer*, 955 N.E.2d 271 (Mass. 2011), "expressly declin[ed] to apply [a] 'structural error' analysis" to ineffective assistance claims involving structural errors and instead called for an actual prejudice inquiry. App., *infra*, 64a (citing *Dyer*, 955 N.E.2d at 280-281). Because "[t]he defendant has not offered any evidence or legal argument establishing prejudice," the court denied the motion. *Ibid*.

2. Petitioner appealed to the Supreme Judicial Court of Massachusetts. See Mass. Gen. Laws ch. 278, § 33E. While the appeal was pending, the court decided *Commonwealth* v. *LaChance*, 17 N.E.3d 1101 (Mass. 2014), cert. denied, 136 S. Ct. 317 (2015). The court in *LaChance* approved the dictum in *Dyer*, holding that criminal defendants may not avail themselves of "the presumption of prejudice that would otherwise apply to a preserved claim of structural error" in the context of

a *Strickland* claim predicated on a failure to raise the structural error. *Id.* at 1105-1107.

Two justices dissented in *LaChance*, stating that the majority's decision had "effectively foreclose[d] vindication of [a] constitutional right on collateral review, even in cases where trial counsel has rendered constitutionally deficient performance * * * and neither the defendant nor his counsel knowingly waived his right to a public trial." *LaChance*, 17 N.E.3d at 1107 (Duffly, J., dissenting). In the dissenting justices' view, "the very nature of a right to which presumptive prejudice attaches—such as the right to an open court—is that a showing of prejudice is not possible" as a practical matter. *Id.* at 1108-1109. Requiring proof of prejudice will therefore effectively preclude vindication of the right in virtually every case. *Ibid.*

3. Relying on *LaChance*, the Supreme Judicial Court affirmed the denial of a new trial in this case. App., *infra*, 1a-41a. Although the court agreed that "counsel's inaction" in failing to object to the closure "was the product of 'serious incompetency,'" it concluded that the trial court's denial of a new trial was not erroneous because petitioner "failed to show that trial counsel's conduct caused prejudice." *Id.* at 40a. Although the "violation of [petitioner's] Sixth Amendment right to a public trial constitutes structural error," the court reasoned, the trial court correctly "anticipated the rule announced in *LaChance*" and thus correctly denied relief because "the defendant * * * [had] failed to show that trial counsel's conduct caused prejudice warranting a new trial." *Id.* at 39a-40a (emphasis omitted).

REASONS FOR GRANTING THE PETITION

There is a deep, well-recognized conflict among the lower courts regarding the standard for determining prejudice when ineffective assistance of counsel leads to a structural violation. Some courts have concluded that prejudice must be presumed if the defendant establishes deficient performance resulting in a structural error. Other courts hold that actual prejudice must be established notwithstanding the unquantifiable consequences of structural errors. As a result, identically-situated criminal defendants are being treated fundamentally differently—some are being granted new trials, while others are not.

The courts holding that prejudice must be presumed have the better of the argument. Structural errors are defects in the trial mechanism itself, and their consequences are necessarily indeterminate. If defendants were required to demonstrate prejudice in ineffective-assistance cases involving structural errors, relief would effectively be impossible to obtain. The issue is important, frequently recurring, and cleanly presented for this Court's review. The petition should be granted.

A. There is a deep and acknowledged conflict over the question presented

Courts have widely acknowledged the conflict of authority implicated here. The Michigan Supreme Court, for example, has recognized the division among "the United States Courts of Appeals for the First and Eighth Circuits," which "have ruled that a structural error automatically satisfies the *Strickland* prejudice prong," and "the United States Court of Appeals for the Eleventh Circuit and the Georgia and Utah Supreme Courts," which "have held that an ineffective assis-

tance of counsel claim premised on a structural public trial right violation still requires a defendant to demonstrate actual prejudice." *People* v. *Vaughn*, 821 N.W.2d 288, 307-308 (Mich. 2012).

Recognizing the same division of authority, the Massachusetts Supreme Judicial Court stated in *LaChance* that it "do[es] not agree with the reasoning of [the First Circuit] in this context" and instead is "more aligned with that of the United States Court of Appeals for the Eleventh Circuit." *LaChance*, 17 N.E.3d at 1106. Similarly, Judge Kethledge of the Sixth Circuit recognized that although the Sixth Circuit's answer to the question presented comports with a decision of the First Circuit, it "directly conflicts" with a decision of the Eleventh Circuit. See *Johnson* v. *Sherry*, 586 F.3d 439, 449 (6th Cir. 2009) (Kethledge, J., dissenting).

In fact, the split is far deeper than any of these courts has acknowledged: Whereas six circuits and state high courts hold that actual prejudice must be presumed in cases like this one, nine circuits and state high courts hold that prejudice may not be presumed. In the face of such an entrenched conflict, this Court's intervention is desperately needed.

1. Six circuits and state high courts hold that actual prejudice must be presumed in cases like this one

Four courts of appeals and two state high courts have held—contrary to the ruling below—that when a defendant claims ineffective assistance of counsel resulting in a structural error, the reviewing court must apply the same presumption of prejudice that governs the structural error on direct review.

In the **First Circuit**, "a defendant who is seeking to excuse a procedurally defaulted claim of structural error need not establish actual prejudice." *Owens* v. *United States*, 483 F.3d 48, 64 (1st Cir. 2007). Citing this Court's determinations that it is impossible to identify prejudice resulting from structural errors, including violations of a defendant's right to a public trial, the First Circuit concluded that it would "not ask defendants to do what the Supreme Court has said is impossible," by requiring that they show prejudice where ineffective assistance of counsel leads to a structural error. *Id.* at 65. "If the failure to hold a public trial is structural error, and it is impossible to determine whether a structural error is prejudicial, we must then conclude that a defendant who is seeking to excuse a procedurally defaulted claim of structural error need not establish actual prejudice." *Id.* at 66 (citations omitted).

The **Sixth Circuit** reached the same conclusion in *Johnson* v. *Sherry*, 586 F.3d 439 (6th Cir. 2009), with respect to a state habeas petitioner's claim that his counsel had been constitutionally ineffective in failing to object to a courtroom closure during testimony at trial. *Id.* at 445. The court ordered an evidentiary hearing and observed that, under *Strickland*, a habeas petitioner who "establish[es] that counsel's performance was deficient" is also "required to demonstrate that he was prejudiced by the error." *Id.* at 446-447. The court held, however, that if the defendant on remand succeeded in showing that his trial counsel's performance was deficient and resulted in a structural denial of the defendant's public trial right, "prejudice

would be presumed" for purposes of the *Strickland* analysis. *Id.* at 447.[1]

The **Seventh Circuit** took a similar approach in *Winston* v. *Boatwright*, 649 F.3d 618 (7th Cir. 2011). There, the court of appeals held that "Winston's lawyer's performance was constitutionally inadequate," resulting in a jury-composition error under *Batson* v. *Kentucky*, 476 U.S. 79 (1986). 649 F.3d at 632. But the court noted that the interplay between *Batson* and *Strickland* presented "a problem: while a direct *Batson* claim would be viewed as a structural error and thus not subject to a harmless-error rule, a *Strickland* argument requires an examination of prejudice." *Ibid.* After weighing the competing considerations and recognizing that "[u]nconstitutional juror strikes, like other structural errors, create the kind of problem that 'def[ies] analysis by harmless error standards,'" the court there held that "prejudice automatically flows from a deliberate *Batson* violation" in the context of a claim for ineffective assistance of counsel under *Strickland*. *Id.* at 633.[2]

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[1] *Johnson* involved a federal habeas petitioner challenging a state-court conviction. That posture required the petitioner to make "two showings of prejudice"—one called for by *Strickland* and the other required by *Coleman* v. *Thompson*, 501 U.S. 722 (1991), under which a habeas petitioner must show cause and prejudice to overcome a state procedural default (including waiver caused by ineffective assistance). 586 F.3d at 447 n.7. The Sixth Circuit agreed with the First Circuit's conclusion in *Owens* that the two prejudice requirements "overlap" and thus addressed them as one and the same. *Ibid.*

[2] The court in *Winston* ultimately denied relief because the case involved review of a state-court judgment under Section 2254, and the court could not say that this Court had clearly established the structural nature of *Batson* errors at the time the state rendered its judgment. 649 F.3d at 633-634.

The **Eighth Circuit** has adopted the identical rule: "when counsel's deficient performance causes a structural error," that court "will presume prejudice under *Strickland*." *McGurk* v. *Stenberg*, 163 F.3d 470, 475 (8th Cir. 1998). Defense counsel in *McGurk* had failed to recognize that his client was entitled to a trial by jury, and as a result deprived him of that right. The Eighth Circuit broadly addressed "structural error," including the right to a public trial, and held that "failure on the part of counsel to ensure that mechanisms fundamental to our system of adversarial proceedings are in place cannot * * * constitute harmless error." *Id.* at 475 & n.5. The Eighth Circuit thus held that the state court in that case had "erred in requiring a showing of actual prejudice" and remanded "with instructions to issue the writ of habeas corpus unless, within a reasonable time to be designated by the district court, the state affords petitioner a new trial." *Id.* at 475.[3]

Two state courts have reached the same conclusion as the First, Sixth, Seventh, and Eighth Circuits. In *Littlejohn* v. *United States*, 73 A.3d 1034 (D.C. 2013), the **District of Columbia Court of Appeals** held that prejudice must be presumed for *Strickland* purposes when the ineffective assistance permits a violation of the public trial right. The court reasoned in particular that, because prejudice is "impossible to identify" when

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[3] The Eighth Circuit more recently affirmed in a court-closure case that "under [its] precedent, 'when counsel's deficient performance causes a structural error, [it] will presume prejudice under *Strickland*.'" *Addai* v. *Schmalenberger*, 776 F.3d 528, 535 (8th Cir.) (quoting *McGurk*), cert. denied *sub nom. Addai* v. *Braun*, 136 S. Ct. 73 (2015). Like the Seventh Circuit in *Winston*, the Eighth Circuit denied relief in *Addai* because the case arose under Section 2254, and the court could not say that the state court's particular error violated "clearly established federal law" under this Court's precedents. *Id.* at 535-536.

the error is structural, requiring the defendant to prove 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." *Id.* at 1043.

The **Montana Supreme Court** reached the same conclusion in *Montana* v. *Lamere*, 112 P.3d 1005 (Mont. 2005). There, the court concluded that "defense counsel's performance was deficient" because he permitted a biased juror to be seated and thereby failed to "secure an impartial jury." *Id*. at 1013. Because the upshot of "counsel's deficient performance" was the introduction of a structural error, the court reasoned, "the integrity of the entire trial" was "undermined," and "prejudice is therefore presumed" for purposes of "the second prong of the *Strickland* test." *Id*. at 1013-1014. Accord *id*. at 1013 ("prejudice is adequately established because a structural error existed, and such errors are presumptively prejudicial"). The court thus concluded that the petitioner had "satisfied both prongs of the *Strickland* test" because "[c]ounsel's failure to ensure that the jury was impartial" was both "deficient" and "produced a structural error, and thus prejudice is presumed." *Id*. at 1014.

Against this backdrop, there can be no doubt that petitioner here would have been granted a new trial if his motion had been filed in the First, Sixth, Seventh, or Eighth Circuits or the courts of the District of Columbia or Montana.

2. Nine circuits and state high courts, including the court below, hold that prejudice may not be presumed

Other lower courts of appeals have reached the same conclusion as the Massachusetts Supreme Judicial Court did in this case, holding that a criminal defendant must demonstrate actual prejudice when a structural-error claim is raised as part of a claim of ineffective assistance of counsel.

The **Eleventh Circuit**, for example, rejected an ineffective assistance claim based on defense counsel's failure to object at trial to a partial courtroom closure, holding that the defendant "has not established that he was prejudiced by his trial counsel's failure to object to the closure of the courtroom." *Purvis* v. *Crosby*, 451 F.3d 734, 738 (11th Cir. 2006). "If counsel had objected in a timely fashion" to the courtroom closure, the court reasoned, "there is no reason to believe that would have changed the victim's testimony." *Id.* at 738-739. The court thus rejected the argument that prejudice should be presumed because of the structural nature of the error at trial:

> It is one thing to recognize that structural errors and defects obviate any requirement that prejudice be shown on direct appeal and rule out an application of the harmless error rule in that context. It is another matter entirely to say that they vitiate the prejudice requirement for an ineffective assistance claim.

Id. at 740. Thus, in the Eleventh Circuit's view, it could not "dispense with the prejudice requirement for attorney error * * * without defying the Supreme Court's clear holding" in *Strickland*. *Id.* at 741.

The **Second, Third, and Fifth Circuits** have reached the same conclusion (*United States* v. *Gomez*, 705 F.3d 68, 79-80 (2d Cir. 2013); *Palmer* v. *Hendricks*, 592 F.3d 386, 397-98 (3d Cir. 2010); *Virgil* v. *Dretke*, 446 F.3d 598, 612 (5th Cir. 2006)), as have the courts of last resort in **Georgia, Michigan, Wisconsin, and Utah**. See *Reid* v. *State*, 690 S.E.2d 177, 180-181 (Ga. 2010); *People* v. *Vaughn*, 821 N.W.2d 288, 306-308 (Mich. 2012); *State* v. *Pinno*, 850 N.W.2d 207, 230-231 (Wis. 2014); *State* v. *Butterfield*, 784 P.2d 153, 157 (Utah 1989).[4]

* * *

The courts of appeals and the state high courts are thus deeply divided on the question presented, and the conflict cannot resolve itself. Worse, the division of authority here puts the First Circuit in conflict with Massachusetts, the Sixth Circuit in conflict with Michigan, and the Seventh Circuit in conflict with Wisconsin. In each of these States, identical constitutional claims are being treated one way in state court (new trials are denied) and another way in federal

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[4] The Ninth Circuit is internally conflicted on the issue. In *Styers* v. *Schriro*, 547 F.3d 1026 (9th Cir. 2008), the court explained that when an ineffective assistance claim "directly implicates [a structural error like] the impartiality of the jury," no "additional or separate showing of prejudice would appear necessary" to establish a *Strickland* violation. *Id.* at 1030 n.5. Yet the court had earlier held that defendants must demonstrate actual prejudice in cases like this. See *Vansickel* v. *White*, 166 F.3d 953, 958-959 (9th Cir. 1999). Judge Reinhardt dissented in *Vansickel*, explaining that "application of such an actual prejudice standard constitutes an impossibility" in ineffective-assistance cases involving structural errors because "the error is one that we have clearly stated is not susceptible of actual prejudice analysis." *Id.* at 961. The apparent conflict within the Ninth Circuit's precedents counsels further in favor of this Court's intervention.

court (new trials are granted). Only this Court can resolve this stark and untoward conflict.

B. *Strickland*'s prejudice requirement is presumptively satisfied when ineffective assistance results in a structural error

Review is furthermore warranted because the decision below is wrong. Requiring a defendant to demonstrate prejudice from the violation of his public trial right is inconsistent with this Court's precedents concerning the unique nature of "structural" errors.

1. Structural errors, unlike trial errors, "defy analysis by 'harmless-error' standards." *Fulminante*, 499 U.S. at 309. Trial errors may "be quantitatively assessed in the context of other evidence * * * in order to determine" whether the error affected the outcome. *Id*. at 308. Structural rights are "markedly different," because they are "defects in the constitution of the trial mechanism" itself. *Id*. at 309. The consequences of denials of structural trial rights are therefore "necessarily unquantifiable and indeterminate." *Sullivan*, 508 U.S. at 282. If defendants were required to make a showing of prejudice in cases involving structural errors, therefore, relief would be impossible to obtain, "for it would be difficult to envisage a case in which [they] would have evidence available of specific injury.'" *Waller*, 467 U.S. at 50 n.9 (quoting *United States ex rel. Bennett* v. *Rundle*, 419 F.2d 599, 608 (3d Cir. 1969) (en banc)).

That is particularly true in cases involving a denial of the right to a public trial. The public trial right serves a vital function in ensuring that "judge and prosecutor carry out their duties responsibly" and "encourag[ing] witnesses to come forward and discourag[ing] perjury." *Waller*, 467 U.S. at 46. More general-

ly, "judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings." *Estes* v. *Texas*, 381 U.S. 532, 588 (1965) (Harlan, J., concurring). While these consequences of a public trial are essential to fundamental fairness—and just as relevant to jury empanelment as to trial itself (*e.g.*, *United States* v. *Negron-Sostre*, 790 F.3d 295 (1st Cir. 2015))—they are also undeniably "intangible," often a "matter of chance," and thus impossible to quantify and prove. *Waller*, 467 U.S. at 49 n.9.

The Court's conclusion that structural errors are by definition errors that "defy" harmless error review applies equally in the ineffective assistance context. Such an analysis would involve a "speculative inquiry into what might have occurred in an alternate universe," just as it does on direct review. *Gonzalez-Lopez*, 548 U.S. at 150.[5] Defendants would be obliged to carry a burden of proving counterfactual details that this Court has recognized is "impossible to know" and "impossible * * * to quantify." *Ibid*. Absent a presumption of prejudice, therefore, a significant category of trial counsel errors would, as a practical matter, be exempted entirely from the Sixth Amendment's critical protection of effective assistance of counsel.

2. No feature of collateral review justifies a different standard for structural errors. In *LaChance*, the Massachusetts Supreme Judicial Court invoked the importance of finality in arguing against a presump-

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[5] Even if it were otherwise, while "[i]t is true enough that the purpose of the rights set forth in [the Sixth] Amendment is to ensure a fair trial," it "does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." *Gonzalez-Lopez*, 548 U.S. at 145 (2006).

tion of prejudice. 17 N.E.3d at 1106. To be sure, finality is an important interest, but *Strickland* itself identifies certain contexts in which prejudice is presumed—such as when defense counsel "is burdened by an actual conflict of interest." 466 U.S. at 692. That is because, "it is difficult to measure the precise effect on the defense" of conflicted representation. *Ibid*. The same conclusion applies with respect to the Sixth Amendment right to a public trial.

The lower court, in *LaChance*, also expressed concern that defense counsel could "'harbor error as an appellate parachute'" by failing to object and then invoking an unpreserved "structural" error to obtain a new trial. 17 N.E.3d at 1107 (quoting *Vaughn*, 821 N.W.2d at 308). But a court applying the deficient performance prong of *Strickland* must consider whether the failure to object was a tactical decision, and therefore not constitutionally defective representation, in determining whether counsel's "identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 689-690. In cases where counsel knowingly decline to raise particular issues for tactical reasons, in other words, there would be no deficient performance to begin with.

C. This case is a perfect vehicle for addressing the question presented

Review is especially appropriate here because this case is a pristine vehicle for addressing the question presented. The trial court made detailed findings of fact and issued thorough conclusions of law concerning the courtroom closure and petitioner's counsel's deficiency. The Supreme Judicial Court accepted the trial court's findings and disposed of the cases as a pure matter of law.

First, the lower courts found that the courtroom was fully closed for two entire days of jury empanelment. The trial court heard testimony from multiple witnesses establishing that "a court officer told [petitioner's mother] that the courtroom was 'closed for jury selection'" during the two days of *voir dire*. App., *infra*, 48a, 50a. Thus, according to the trial judge, "the courtroom remained closed to [all] members of the public for the duration of the empanelment." *Id.* at 52a. Accord *id.* at 53a ("I find that a court officer * * * closed the courtroom to the defendant's family and other members of the public during the entirety of the empanelment."). The Supreme Judicial Court agreed. See *id.* at 39a.

The trial court held, moreover, that "there was a full closure of the courtroom, rather than a partial closure." App., *infra*, 57a. There was "no indication that the courtroom was open to some limited number of spectators during empanelment, or that any spectators were in fact present in the courtroom." *Ibid.* The Supreme Judicial Court, for its part, again "agree[d] with the * * * conclusion that the closure was a full, rather than partial, closure of the court room." *Id.* at 39a.

Second, the lower courts held that this was a structural error. The trial court found that "[t]he sole reason for the closure was the crowded condition in the courtroom" (app., *infra*, 53a) but concluded that "courtroom crowding falls short as a justification for the closure at issue here" (*id.* at 58a). "[E]ven if management of the crowded conditions in the courtroom rose to the level of 'overriding interest,'" moreover, "the closure in this case was far broader than necessary in both time and reach." *Id.* at 59a. Thus, the trial court concluded, "the closure in this case cannot be justified as a valid limitation of the

defendant's Sixth Amendment rights" (*id*. at 58a) and "[a] structural error * * * occurred during the empanelment" (*id*. at 64a).

The Supreme Judicial Court agreed that "[a] violation of the Sixth Amendment right to a public trial constitutes structural error" and accepted the trial court's well-reasoned conclusion that such a violation occurred in this case. *Id*. at 39a (emphasis omitted).

Finally, the lower courts found that the performance of petitioner's lawyer during the trial was constitutionally deficient. The trial court held that "defense counsel's failure to object did not result from the exercise of his tactical or strategic prerogatives in managing the trial" but rather "stemm[ed] from a misunderstanding of the law" and reflected "'serious incompetency.'" App., *infra*, 62a-63a. Defense counsel's performance was therefore deficient. *Ibid*. Nor did petitioner waive this right. He was "unaware of his right to a public trial, [and] did not intentionally waive this right." App., *infra*, 62a. On the contrary, he raised it at the first possible opportunity.

Against this detailed backdrop, the sole basis on which the trial court denied petitioner's motion for a new trial—and the sole basis on which the Supreme Judicial Court affirmed the denial—was the legal conclusion that petitioner was not entitled to a presumption of prejudice and (unsurprisingly) that he could not establish actual prejudice. App., *infra*, 40a, 64a. Declining to overturn *LaChance*, the Supreme Judicial Court therefore affirmed the order denying petitioner a new trial. *Id*. at 40a-41a.

The question presented is thus outcome-determinative here. Petitioner would have been entitled to a new trial if he had pressed his claim in the First, Sixth,

Seventh, or Eighth Circuits or the courts of the District of Columbia or Montana. Because—and *only* because—his claim arose in a jurisdiction on the other side of the split, he was denied that right. Such inconsistency in the application of federal constitutional law should not be tolerated.[6]

D. The question presented is important

The clean presentation of a question of constitutional law over which the lower courts are divided is basis enough for granting the petition. Yet review here is all the more appropriate because proper resolution of the question presented is a matter of tremendous practical importance.

To begin with, the issue arises with considerable frequency. The number of lower appellate courts that have weighed in on the issue—fifteen at last count—is evidence enough of that. And a simple (and surely underinclusive) Westlaw search shows that the issue has arisen in many federal district court cases over the

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[6] We are mindful that the Court has denied review of the question presented in several recent cases. But this case—which involves clearly deficient performance resulting in a clear structural error—includes none of the substantial obstacles to review that were present in those other cases. See, *e.g.*, *Commw.* v. *Jackson*, 28 N.E.3d 437 (Mass. 2015), cert. denied, 136 S. Ct. 1158 (2016) (no Sixth Amendment violation or ineffective assistance); *Commw.* v. *Penn*, 36 N.E.3d 552 (Mass. 2015), cert. denied, 136 S. Ct. 1656 (2016) (no determination of waiver or ineffective assistance); *Wilder* v. *United States*, 806 F.3d 653, 660 (1st Cir. 2015), cert. denied, 136 S. Ct. 2031 (2016) (assistance not deficient); *LaChance*, *supra*, cert. denied 136 S. Ct. 317 (2015) (no determination of waiver or ineffective assistance); *Commw.* v. *Alebord*, 4 N.E.3d 248 (Mass. 2014), cert. denied 34 S. Ct. 2830 (2014) (assistance not deficient); *Commw.* v. *Morganti*, 4 N.E.3d 241 (Mass. 2014), cert. denied 135 S. Ct. 356 (2014) (no Sixth Amendment violation or ineffective assistance).

past several years, to say nothing of state trial court cases.[7]

Beyond its frequent recurrence, the question presented is a matter of crucial importance in every case in which it arises. Structural errors are a "highly exceptional category" of constitutional violations that "undermine the fairness of a criminal proceeding as a whole." *United States* v. *Davila*, 133 S. Ct. 2139, 2149 (2013). Because any case in which the issue is outcome determinative necessarily involves a structural error, every such case implicates principles of fundamental fairness that are essential to the just and proper

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[7] See, *e.g.*, *Galloway* v. *Wenerowicz*, 2016 WL 2894476, at *6 & n.4 (W.D. Pa. 2016), report and recommendation adopted, 2016 WL 2866765 (W.D. Pa. 2016); *Lee* v. *Haas*, 2016 WL 3475324, at *9 (E.D. Mich. 2016); *Martin* v. *United States*, 2016 WL 3676590, at *4 (N.D. W. Va. 2016); *Allen* v. *Perry*, 2015 WL 3917084, at *6 (S.D. Ga. 2015), report and recommendation adopted, 2015 WL 5116778 (S.D. Ga. 2015); *United States* v. *Aguilar*, 82 F. Supp. 3d 70, 87 & n.18 (D.D.C. 2015); *Brown* v. *Price*, 2015 WL 403173, at *8 (N.D. Ala. 2015); *Juniper* v. *Zook*, 117 F. Supp. 3d 780, 792 & n.7 (E.D. Va. 2015); *Harrison* v. *Woods*, 2014 WL 6986172, at *8 (E.D. Mich. 2014); *Porter* v. *Tribley*, 2014 WL 6632123, at *8 (E.D. Mich. 2014); *Christian* v. *Hoffner*, 2014 WL 5847600, at *11 (E.D. Mich. 2014); *Alvarez* v. *United States*, 2014 WL 29383, at *4-5 (D.S.C. 2014); *Brown* v. *Thaler*, 2013 WL 3455713, at *3 & n.3 (N.D. Tex. 2013); *Hestle* v. *United States*, 2013 WL 1147712, at *6 (E.D. Mich. 2013); *Drain* v. *Woods*, 902 F. Supp. 2d 1006, 1026 (E.D. Mich. 2012); *Espada* v. *Sec'y, DOC*, 2011 WL 4459169, at *13-15 (M.D. Fla. 2011); *United States* v. *Kaufman*, 2011 WL 3299937, at *7 (D. Kan. 2011); *Strong* v. *Roper*, 2011 WL 2600241, at *14 (D. Mo. 2011); *Price* v. *Sec'y, Dep't of Corr.*, 2011 WL 2561246, at *8 (M.D. Fla. 2011); *Zimmerman* v. *Davis*, 2011 WL 1233311, at *14 (E.D. Mich. 2011); *Stevens* v. *Beard*, 2010 WL 8266292, at *6 n.3 (E.D. Pa. 2010); *Torres* v. *McNeil*, 2010 WL 5849880, at *19-21 (N.D. Fla. 2010); *Charleston* v. *McDonough*, 2010 WL 780200, at *8 (N.D. Fla. 2010); *Berryman* v. *Wong*, 2010 WL 289181, at *5-6 (E.D. Cal. 2010).

functioning of the criminal justice system. See *Negron-Sostre*, 790 F.3d 295 at 306 (a courtroom closure during jury empanelment "seriously impair[s] the fairness, integrity, or public reputation of the proceedings"). The Supreme Judicial Court openly acknowledged that the basic rules of fairness guaranteed by the Sixth Amendment were violated in this case, and yet it refused to grant relief all the same.

The Eleventh Circuit's decision in *Purvis* and the Utah Supreme Court's decision in *Butterfield* are models of an equally troubling outcome. In those cases, the courts declined even to decide whether counsel had rendered deficient performance, reasoning that it would not make a difference in light of the impossibility of proving the prejudice of a structural error. That is a perverse result. If the structural errors in *Purvis* or *Butterfield* (or this case) had been preserved by competent counsel and raised on direct appellate review, the defendants would have been entitled to new trials automatically, as a matter of law. But because they instead suffered the *added* insult of deficient trial counsel who failed to object to the error, their structural injuries became irrelevant according to those courts. That makes no sense. Further review is manifestly warranted.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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