No. 16-240

In the Supreme Court of the United States

KENTEL MYRONE WEAVER,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Writ of Certiorari to the Supreme Judicial Court of Massachusetts

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a defendant who demonstrates that his lawyer's deficient performance resulted in structural error must show actual prejudice to obtain a new trial under *Strickland* v. *Washington*, 466 U.S. 668 (1984).

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JURISDICTION

The final judgment of the Supreme Judicial Court of Massachusetts (SJC) was entered on July 20, 2016. The petition for a writ of certiorari was filed on August 18, 2016 and granted on January 13, 2017. 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 that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial" and "have the Assistance of Counsel for his defence."

INTRODUCTION

When petitioner's mother arrived at the courtroom early in the morning on the first day of the criminal proceedings against her son, she found the doors closed. She, her minister, and every other member of the public waited in the hallway for the next two days, praying, while the jury that would ultimately convict her son was selected in secret.

As this Court held in *Presley* v. *Georgia*, 558 U.S. 209 (2010) (per curiam), courtroom closures of this kind are clear and unequivocal violations of the Sixth Amendment right to a public trial. But defense counsel failed to object to this unconstitutional closure—not based on a strategic calculation but because he was simply ignorant of the applicable law.

The Supreme Judicial Court of Massachusetts agreed that petitioner's right to a public trial had been violated and agreed further that defense counsel's failure to object to the closure was objectively unreasonable. It nevertheless denied petitioner relief under *Strickland* v. *Washington*, 466 U.S. 668 (1984), because petitioner conceded that he could not prove what this Court has said cannot be proven: that he suffered "actual prejudice" as a result of the complete exclusion of the public from the courtroom.

That is a perverse result. If defense counsel had objected to the violation of petitioner's public-trial right, and the trial court had still failed to open the courtroom, there is no doubt that petitioner would have been entitled to an automatic reversal and remand for a new trial. But because defense counsel incompetently failed to object—an even more troubling path to the exact same outcome—the SJC ignored the resulting structural defect and refused to grant petitioner relief. That's like saying two wrongs make a right.

There is no support in this Court's precedents for such an unfair result. The lower court's decision is inconsistent with the reasoning that underlies *Strickland*'s two-pronged test, imposes on defendants a burden that this Court has already rejected as impossible to satisfy, undermines the integrity of the criminal justice system, and leads to disturbing and unjust outcomes. The judgment below should be reversed and remanded with instructions to grant petitioner a new trial.

STATEMENT

A. Legal background

1. Trial errors and structural errors

This Court's cases have "divided constitutional errors into two classes": trial errors and structural errors. *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148 (2006).

Trial errors are discrete errors that "occur[] during presentation of the case to the jury." *Gonzalez-Lopez*, 548 U.S. at 148 (quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 307-308 (1991)). They include, among other things, the 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 are ordinarily isolated, and analyzing "their effect on the factfinding process at trial" is not especially difficult. *Sullivan* v. *Louisiana*, 508 U.S. 275, 279 (1993) (quoting *Van Arsdall*, 475 U.S. at 681). Such errors may "be quantitatively 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 the grant of a new trial on direct appeal 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).

Structural defects are different in two ways. First, a structural error is not "simply an error in the trial process itself" but instead "affect[s] the framework within which the trial proceeds." *Gonzalez-Lopez*, 548 U.S. at 148 (quoting *Fulminante*, 499 U.S. at 309-310). Structural errors thus affect 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" when it is the product of a structurally defective trial. *Fulminante*, 499 U.S. at 310 (quoting *Rose* v. *Clark*, 478 U.S. 570, 577-578 (1986)). "Errors of this type" are, in other words, "intrinsically harmful" and require "automatic reversal without regard to their effect" on the outcome of the trial. *Neder v. United States*, 527 U.S. 1, 7 (1999) (parenthetical omitted).

Second, structural defects "defy analysis by 'harmless-error' standards" as a practical matter. *Fulminante*, 499 U.S. at 309. Structural errors are "not amenable to harmless-error review" (*Vasquez* v. *Hillery*, 474 U.S. 254, 264 (1986)) because the "precise effects" of such errors are "unmeasurable," "unquantifiable," and "indeterminate," (*Sullivan*, 508 U.S. at 281-282) and thus "cannot be ascertained" (*Vasquez*, 474 U.S. at 263). Measuring the harm inflicted by structural errors on the parties—to say nothing of the criminal justice system and society at large—is simply a "practical impossibility." *Waller* v. *Georgia*, 467 U.S. 39, 49 n.9 (1984) (quoting *State* v. *Sheppard*, 438 A.2d 125, 128 (Conn. 1980)).

Structural errors include, among others, "the total deprivation of the right to counsel at trial," the presence of a presiding judge who is "not impartial,"

the denial of the right to self-representation, "unlawful exclusion of members of the defendant's race from a grand jury," and a violation of the right to a public trial. *Fulminante*, 499 U.S. at 309-310. The consequences of such errors are presumed as a matter of law to be prejudicial, and so they require "automatic reversal." *Brecht* v. *Abrahamson*, 507 U.S. 619, 629 (1993).

2. The right to a public trial

One structural guarantee—the one at issue in this case—is the right to a public trial. Open courtrooms are essential to "the proper functioning of a trial." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 569 (1980). They give "assurance that the proceedings were conducted fairly to all concerned," and "discourage perjury, the misconduct of participants, and decisions based on secret bias or partiality." *Ibid.* Public trials thus "ensur[e] that judge and prosecutor carry out their duties responsibly" and "encourage[] witnesses to come forward." *Waller*, 467 U.S. at 46. "[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" when it is the product of a closed proceeding. *Fulminante*, 499 U.S. at 310 (quoting *Rose*, 478 U.S. at 577-578).

The public-trial right applies to all substantive stages of pretrial and trial proceedings. *Presley*, 558 U.S. at 213-214. There accordingly is no question that "the Sixth Amendment right to a public trial extends to the *voir dire* of prospective jurors." *Id.* at 213.

The denial of the public-trial right is a quintessential structural error, affecting the framework in which the trial proceeds. The practical consequences of

such errors are impossible to determine; there is no way to be sure what different questions would have been asked, what different witnesses would have come forward, what different answers would have been given, or what different rulings would have been handed down if the public had been present. Because a closure of the courtroom infects the trial with unfairness, and because proving the consequences of a closure is a "practical impossibility," prejudice is presumed as a matter of law. *Waller*, 467 U.S. at 49 & n.9. Accord, *e.g.*, *Fulminante*, 499 U.S. at 310.

3. The right to assistance of counsel

Among the other enumerated rights intended by the Framers "to protect the fundamental right to a fair trial" is the "right to counsel." *Strickland*, 466 U.S. at 684. "[T]he right to counsel is the right to the *effective* assistance of counsel."*Id.* at 686 (emphasis added) (quoting *McMann* v. *Richardson*, 397 U.S. 759, 771 n.14 (1970)). Thus criminal defendants are entitled by the Sixth Amendment to "a reasonably competent attorney, whose advice is within the range of competence demanded of attorneys in criminal cases." *United States* v. *Cronic*, 466 U.S. 648, 655 (1984) (quoting *McMann*, 397 U.S. at 770-771). It follows that a lawyer may deprive his or her client of the Sixth Amendment right to counsel "by failing to render 'adequate legal assistance'" in a discrete way. *Strickland*, 466 U.S. at 686 (quoting *Cuyler* v. *Sullivan*, 446 U.S. 335, 344 (1980)). The error must be "so serious that counsel was not functioning as the 'counsel' guaranteed [to] the defendant by the Sixth Amendment" with respect to the error. *Id*. at 687.

Not every attorney error rises to the level of a Sixth Amendment violation, however; the Constitution promises "*effective* (not mistake-free) representation."

Gonzalez-Lopez, 548 U.S. at 147. Thus, the Court in *Strickland* defined "the standards by which to judge" a claim of "actual ineffective assistance of counsel." 466 U.S. at 684. The defendant generally must establish not only that his "counsel's representation fell below an objective standard of reasonableness" but also that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 688, 694.

The second prong of this test (the so-called prejudice prong) is a consequence of the "strong presumption of reliability" that this Court "normally appl[ies] * * * to judicial proceedings." *Smith* v. *Robbins*, 528 U.S. 259, 286 (2000) (citing *Strickland*, 466 U.S. at 696). In most cases, for the defendant to establish that the trial was unfair, he must "overcome" the "presumption of reliability" by proving actual prejudice. *Ibid*.

But the presumption of reliability does not always apply. When the nature of the Sixth Amendment violation "makes the adversary process itself presumptively *un*reliable," there is no contrary presumption of reliability for the defendant to overcome, and thus "[n]o specific showing of prejudice [is] required." *Cronic*, 466 U.S. at 659 (emphasis added). Violations of this magnitude are known as *Cronic* errors. A "complete denial of counsel" is the "[m]ost obvious" *Cronic* error, in which the presumption of reliability is absent. *Ibid*. Because a total denial of counsel "so 'affects the framework within which the trial proceeds' * * * courts may not even ask whether the error harmed the defendant." *Luis* v. *United States*, 136 S. Ct. 1083, 1089 (2016) (plurality opinion). Such an error is instead "legally presumed to result in prejudice." *Strickland*, 466 U.S. at 692.

B. Factual background

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

On the first day of jury empanelment—"first thing in the morning"—petitioner's mother, Iris Weaver, arrived at the courtroom. JA26. When she arrived, she found the courtroom doors closed. *Ibid.* She waited in the hallway outside the courtroom, where her minister and friend, Salvation Army Major Susan Dunigan, met her. *Ibid.*

Potential jurors eventually began arriving and filing into the courtroom. JA27. Petitioner's mother and Ms. Dunigan asked to enter the courtroom with the prospective jurors, but a marshal denied them entry and told them to continue waiting in the hallway "[u]ntil someone told [them] to come in." *Ibid.*

No one ever did. Pet. App. 50a.

Petitioner's mother and Ms. Dunigan waited all day as the empanelment proceeded. Ms. Weaver tried once more to enter the courtroom during a break but was again denied entry. Pet. App. 49a. She did not question or ask why she could not be with her son; she instead "obey[ed] the rules," as instructed by the marshal. JA40. As the hours passed, petitioner's mother and Ms. Dunigan prayed. JA27. At the end of the first day, petitioner's mother "informed [defense counsel] that she had been refused entry" into the courtroom. Pet. App. 49a.

The next Monday morning, when petitioner's mother and Ms. Dunigan returned for the second day of voir dire, "the same process happened" all over again. JA27. Once more they were denied entry to the courtroom, and once more they waited on the benches

in the hallway as jurors filed in and out for the empanelment. JA26-27. See also Pet. App. 44a-46a.

Defense counsel failed to object to the courtroom closure. "[A]fter the morning recess" on the second day, for example, "the [prosecutor] alerted the judge to the presence of the defendant's family and other interested parties outside the courtroom." Pet. App. 45a. He noted that one of the individuals 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." *Id*. at 45a-46a. Rather than objecting to the courtroom closure at that point, defense counsel "[e]cho[ed] that point of view" and offered to the judge: "If you want me to go out there and tell [the individual] to pick some other floor, I'd be glad to," despite that "[n]othing in the record * * * suggest[ed] any safety or jury-tampering issue" in the hallway. *Id*. at 46a.

Neither petitioner's mother, Ms. Dunigan, nor any other member of the public was at any time allowed into the courtroom during the two-day jury empanelment. Pet. App. 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.").

Petitioner was subsequently convicted of murder and unlicensed possession of a firearm. Pet. App. 1a.

C. Procedural background

1. Petitioner obtained new counsel and moved the SJC for a new trial, which at the time had jurisdiction over his then-pending direct appeal. This was the earliest opportunity and exclusive method for petition-

er to raise his public-trial claim. See Mass. Gen. Laws ch. 278, § 33E; Mass. R. App. Pro. 15(d), 19(d). Petitioner alleged that trial counsel had been ineffective for, among other things, failing to object to the closure of the courtroom. Pet. App. 2a.

2. The SJC referred the motion to the trial court (JA1, 3), which denied relief (JA2, 4). Although the trial court found counsel's failure to object to the courtroom closure had been deficient, it denied petitioner's motion because petitioner had not established actual prejudice.

The trial court first concluded that an unjustified courtroom closure had occurred. "Members of the defendant's family and all other members of the public were denied entry for the entirety of the empanelment, even after seating became available as members of the venire departed from the courtroom." Pet. App. 59a. Because there was "no indication that the courtroom was open to some limited number of spectators during the empanelment, or that any spectators were in fact present in the courtroom," there was "a full closure of the courtroom, rather than a partial closure." *Id.* at 57a. What is more, the court explained, "[t]he sole reason for the closure was the crowded condition in the courtroom." *Id.* at 53a. A closure of this sort, explained by courtroom crowding alone, could not "be justified as a valid limitation of the defendant's Sixth Amendment rights." *Id.* at 58a.

The trial judge next concluded the failure to object to the courtroom closure was deficient performance under *Strickland*'s attorney-performance standard. Any competent lawyer should know that closing a courtroom without a *Waller* hearing violates the Sixth Amendment; in this case, "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." Pet. App. 62a-63a. Defense counsel's performance was therefore deficient. *Ibid.*

Petitioner, for his part, was "unaware of his right to a public trial, [and] did not intentionally waive this right." Pet. App. 62a.

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. Pet. App. 64a. Because "[t]he defendant has not offered any evidence or legal argument establishing prejudice," the court denied the motion. *Ibid.*

3. Petitioner appealed the denial of his motion for a new trial; the appeal was consolidated with the direct appeal of his conviction. Pet. App. 2a.

The SJC affirmed. The court agreed with the trial court that there was a "full, rather than partial, closure" of the courtroom and that counsel's performance in failing to object to the closure was "not objectively reasonable." *Id.* at 39a-40a. But, in its view, when a defendant "raises [a public-trial] 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*, 17 N.E.3d 1101, 1104 (Mass. 2014)).

Because petitioner made no claim that the outcome of his trial would have been different absent the courtroom closure, the SJC affirmed the denial of relief. *Id.* at 40a-41a.

SUMMARY OF ARGUMENT

I. The legacy of open trials was inherited by the Colonies and has ever since been regarded by this Court as an essential ingredient to the fairness and reliability of criminal trials. As writers at the time of the Founding explained, public trials deter perjury and forestall misconduct of all kinds by impressing upon all of the participants in the trial the solemnity of the proceeding and the importance of their roles within it. Public trials are also critical to the appearance of justice, and thus to the public's confidence in the fairness and integrity of the criminal justice system.

Against this backdrop, the Court long ago held that denials of the public-trial right amount to structural defects in the trial mechanism, and a trial in which the guarantee of openness is violated is fundamentally unfair and inherently unreliable. The consequences of such violations are, moreover, impossible to measure, not only because one can only speculate what would have happened if the courtroom doors had remained open, but also because closed trials impose broader costs on the judicial system as a whole—costs that a prejudice inquiry is incapable of measuring.

II. The lower court's decision below, requiring petitioner to prove under *Strickland* that he was actually prejudiced by the illegal courtroom closure in this case, is inconsistent with the history and character of the public-trial right in at least two ways.

First, *Strickland* did not establish mechanical rules for their own sake. On the contrary, the prejudice prong of the *Strickland* test was adopted by this Court as a means of identifying those cases in which counsel's deficient performance rendered the proceedings unfair and unreliable. Absent a showing that the attorney error affected the outcome of the trial, there is usually no basis for saying that the error resulted in the sort of unfairness that the Sixth Amendment forbids. But on the face of it, that reasoning does not apply in cases where the attorney error results in a structural defect. Trials infected by structural errors—like the denial of a public trial—are *inherently* unfair and unreliable; no separate showing of actual prejudice is necessary to establish as much.

Second, the SJC's answer to the question presented ignores the impossibility of proving actual prejudice resulting from structural errors. Time and again, this Court has recognized that public-trial violations are structural errors, and time and again it has explained that the consequences of such violations cannot be measured. The court below disregarded all of this, holding defendants like petitioner to the burden of proving what this Court has said cannot be proved.

III. The SJC's decision below will produce intolerable results.

First, the decision below allows violations of the public-trial right to stand uncorrected, undermining the integrity of the criminal justice system. As this Court repeatedly has recognized, the public-trial right promotes confidence in the fair administration of justice and the appearance of fairness that is essential to public confidence in the justice system. The SJC's decision below is inimical to these principals; it both allows courtroom closures to stand uncorrected, risking

real damage to the public's respect for and commitment to the judgments of the judicial branch and—by focusing exclusively on the prejudice to individual defendants—ignores the intangible societal loss that follows from denials of the public-trial right.

Second, the decision below unjustly penalizes criminal defendants for the deficiencies of their lawyers. There is no denying that petitioner's public-trial right *was* denied and that his lawyer's failure to object *was* incompetent. Yet by dint of the holding below, petitioner was denied relief for each error because of the existence of the other error: The violation of his public-trial right went uncorrected because his lawyer incompetently failed to object, and his lawyer's incompetence went uncorrected because it resulted in a structural defect, as to which prejudice can't be proven. This kind of Catch-22 reasoning is inconsistent with the Sixth Amendment's promise of a fair trial.

Although the SJC cited the importance of finality as a reason for concluding otherwise, that concern does not hold up to scrutiny. As an initial matter, finality concerns are weakened in the context of unfair proceedings. And regardless, *Strickland*'s first prong will function as a critical and effective filter, ensuring that a reversal here will not undermine the system's interest in finality in any broad-based way. That is especially so because structural errors are, in any event, rare.

IV. Under these principles, petitioner is entitled to a new trial in this case. The trial court held that there was a complete closure of the courtroom for two days, covering the entire jury empanelment. No overriding interest justified the closure, which took place without a *Waller* hearing. What is more, according to the trial court, counsel's failure to object reflected, not

a strategic decision, but simple ignorance of the law. His performance was therefore objectively unreasonable. The SJC affirmed both of those holdings. No more is required for petitioner to obtain a new trial.

ARGUMENT

I. NO CRIMINAL TRIAL MAY BE REGARDED AS FUNDAMENTALLY FAIR OR RELIABLE IF IT TAKES PLACE BEHIND CLOSED DOORS

Few rights, if any, occupy a more favored position in the constitutional firmament than criminal defendants' right under the Sixth Amendment to a public trial. "For a civilization founded upon principles of ordered liberty to survive and flourish, its members must share the conviction that they are governed equitably." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 594 (1980). This truism "mandates a system of justice that demonstrates the fairness of the law to our citizens," and "[o]ne major function of [a] trial," held open to the public, "is to make that demonstration." *Id*. at 594-595.

1. The public-trial right has as long a history as any right provided by the Constitution. "The roots of open trials reach back to the days before the Norman Conquest," and even as the jury system evolved over the ensuing centuries, "the public character of the proceedings, including jury selection, remained unchanged." *Press-Enter. Co.* v. *Superior Court*, 464 U.S. 501, 505-506 (1984) (*Press-Enter. I*). "This legacy of open justice was inherited by the English settlers in America," and "[t]he earliest charters of colonial government expressly perpetuated the accepted practice of public trials." *Richmond Newspapers*, 448 U.S. at 590. Accord *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 425 (1979); *Press-Enter. I*, 464 U.S. at 505.

By the time the Colonies were being settled, there was more support for public trials than mere deference to tradition. The Framers' "distrust for secret trials" was a response to "the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet*." *In re Oliver*, 333 U.S. 257, 268-269 (1948). "All of these institutions obviously symbolized a menace to liberty." *Id.* at 269. "In the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial." *Id.* at 269-270. And "in comparison of publicity, all other checks [on such abuses] are of small account." *Id.* at 271 (quoting 1 Jeremy Bentham, *Rationale of Judicial Evidence* 524 (1827)).

2. In addition to protecting against despotism, the right to a public trial reflected the Framer's judgment that openness is essential to "assur[ing] the criminal defendant a fair and accurate adjudication of guilt or innocence." *Richmond Newspapers*, 448 U.S. at 593. Thus, "in identifying the function of publicity at common law," both Hale and Blackstone "discussed the open-trial requirement not in terms of individual liberties but in terms of the effectiveness of the trial process." *Gannett*, 443 U.S. at 421.

First, "the requirement that evidence be given in open court deterred perjury, since 'a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal.'" *Gannett*, 443 U.S. at 421 (quoting 3 William Blackstone, *Commentaries on the Laws of England* 373 (1768), and citing Matthew Hale, *The History of the Common Law of England* 343, 345 (6th ed. 1820)). Accord *Waller*, 467 U.S. at 46 (openness "discourages

perjury"). As another contemporary of the founding generation, Jeremy Bentham, put it: "the publicity of the examination or deposition operates as a check upon mendacity." Bentham 522. What is more, an open gallery may "induce unknown witnesses to come forward with relevant testimony" in the first place. *Gannett*, 443 U.S. at 382.

Second, the Framers understood that "the presence of interested spectators" keeps the participants in the proceeding "keenly alive to a sense of their responsibility and to the importance of their functions." *Waller*, 467 U.S. at 46 (quoting *Gannett*, 443 U.S. at 380; in turn quoting *Oliver*, 333 U.S. at 270 n.25; in turn quoting Thomas Cooley, *Constitutional Limitation*s 647 (8th ed. 1927)). Publicity thus ensures the contentiousness of prosecutors, marshals, judges, and jurors, helping to forestall the injustice that may result from indifference or undue passion. *Gannett*, 443 U.S. at 382.

These factors have particular importance to the jury empanelment process, where veniremen are often asked probing questions about their backgrounds and relationships. It is therefore fundamental that the accused has "a right to insist that the *voir dire* of the jurors be public." *Presley* v. *Georgia*, 558 U.S. 209, 213 (2010) (per curiam).

3. The public-trial right also serves recognized social interests, apart from protecting the accused's right to a fair trial. For example, it is now well understood that "the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion" when a crime is committed. *Richmond Newspapers*, 448 U.S. at 571. The Court has "sometimes described [this] as [the] 'community therapeutic value'" of public trials. *Press-*

Enter. I, 464 U.S. at 508. A public demonstration "that society's responses to criminal conduct are underway" helps to ease "the natural human reactions of outrage and protest." *Richmond Newspapers*, 448 U.S. at 570. Open proceedings thus answer the "fundamental, natural yearning to see justice done." *Id.* at 571. But the "community catharsis" brought about by public trials obviously cannot occur "if justice is done in a * * * covert manner." *Ibid.*

Beyond that, public trials promote the appearance of justice, and thus the public's confidence in the criminal justice system. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Press-Enter. Co.* v. *Superior Court*, 478 U.S. 1, 13 (1986) (*Press-Enter. II*) (quoting *Richmond Newspapers*, 448 U.S. at 572). For example, "where the trial has been concealed from public view, an unexpected outcome can [lead the public to believe] that the system at best has failed and at worst has been corrupted." *Richmond Newspapers*, 448 U.S. at 571. By contrast, "the sure knowledge that *anyone* is free to attend [a criminal trial] gives assurance that established procedures are being followed and that deviations will become known." *Press-Enter. I*, 464 U.S. at 508.

Thus, the public-trial right not only serves the interests of criminal defendants, but also "promotes confidence in the fair administration of justice." *Richmond Newspapers*, 448 U.S. at 572. In these ways, "the public trial right extends beyond the accused" and protects both the rights of the public (*Presley*, 558 U.S. at 212) and "the appearance of fairness so essential to public confidence in the system" (*Press-Enter. I*, 464 U.S. at 508).

4. By the same token, measuring the practical effects of a violation of the public-trial right is, as this Court put it in *Waller*, a "practical impossibility." 467 U.S. at 49 n.9 (quoting *Connecticut* v. *Sheppard*, 438 A.2d 125, 128 (Conn. 1980)). Courts thus presume prejudice from violations of the public-trial right because the error "*always*" and "*necessarily*" (*Neder* v. *United States*, 527 U.S. 1, 9 (1999)) undermines the fairness and accuracy of the proceeding.

To begin with, a simple prejudice analysis is inapt to measure the "great, though intangible, societal loss that flows" from structural errors like a denial of the public-trial right. *Waller*, 467 U.S. at 49 n.9 (quoting *People* v. *Jones*, 391 N.E.2d 1335, 1340 (N.Y. 1979)). But even with respect to the individual defendant and the fairness of the trial, inquiring how the participants in a closed proceeding would have behaved if the doors instead had been open—and then attempting to measure the impact of those differences on the ultimate outcome—would be "a speculative inquiry into what might have occurred in an alternate universe." *Gonzalez-Lopez*, 548 U.S. at 150. The parties and judges alike would be left guessing whether different objections would have been raised, different rulings would have been made, different questions would have been asked, or different answers would have been given—and whether and how any of those differences might have affected the outcome.

Thus, this Court has said in the context of direct appeals under *Chapman* that prejudice from a public-trial violation must be presumed. *Waller*, 467 U.S. at 49-50. Such errors, like all structural defects, "defy analysis by harmless-error standards by affecting the entire adjudicatory framework." *Puckett* v. *United States*, 556 U.S. 129, 141 (2009) (quoting *Fulminante*,

499 U.S. at 309). Structural errors are "not amenable to harmless-error review" (*Vasquez* v. *Hillery*, 474 U.S. 254, 264 (1986)) because the "precise effects" of such errors are "unquantifiable" and "indeterminate," (*Sullivan*, 508 U.S. at 281-282) and thus "cannot be ascertained" (*Vasquez*, 474 U.S. at 263). That is assuredly true of violations of the public-trial right. *Fulminante*, 499 U.S. at 309. Prejudice is thus presumed in cases where the courtroom doors are closed in violation of the Sixth Amendment. *Waller*, 467 U.S. at 49-50.

II. WHEN DEFICIENT PERFORMANCE RESULTS IN A STRUCTURAL ERROR, THE DEFENDANT NEED NOT PROVE ACTUAL PREJUDICE TO OBTAIN RELIEF UNDER *STRICKLAND*

The decision below is inconsistent with this history and the meaning and character of the public-trial right in at least two ways. First, when counsel's incompetent performance results in an unchallenged violation of the public-trial right, the trial is rendered fundamentally unfair, and the defendant therefore has no obligation to prove actual prejudice. Second, as this Court has repeatedly held, structural errors like a closed courtroom are simply not amenable to a prejudice analysis; what matters is the nature of the error, not its source. The SJC's approach to the question presented cannot be squared with these settled rules.

A. *Strickland* does not require proof of actual prejudice when circumstances render the trial fundamentally unfair and unreliable

Because trial counsel's incompetent performance resulted in a structural error that rendered the trial fundamentally unfair, petitioner bore no burden to prove actual prejudice under the second prong of *Strickland*'s ineffective assistance test.

1. The general requirement under *Strickland* that a defendant pressing an ineffective assistance claim must establish a reasonable probability of actual prejudice (466 U.S. at 694) does not exist for its own sake. Rather, it is a reflection of the defendant's burden to overcome the "presumption of reliability" that courts ordinarily afford all "judicial proceedings." *Roe* v. *Flores-Ortega*, 528 U.S. 470, 482 (2000) (quoting *Smith* v. *Robbins*, 528 U.S. 259, 286 (2000) (in turn quoting *Strickland*, 466 U.S. at 696)). Unless the presumption of reliability is overcome by a showing of actual prejudice, the proceeding is presumed to have been fair and its outcome accurate, and the Sixth Amendment will not have been violated. See, *e.g.*, *Gonzalez-Lopez*, 548 U.S. at 148.

Thus, the question posed by *Strickland*'s prejudice prong is "whether, *despite* the strong presumption of reliability" accorded all criminal trials, "the result of the particular proceeding is unreliable." *Strickland*, 466 U.S. at 696 (emphasis added). A defendant pressing an ineffective-assistance claim ordinarily must "overcome that presumption" by "show[ing] how specific errors of counsel undermined the reliability of the finding of guilt." *Roe*, 528 U.S. at 482 (quoting *Cronic*, 466 U.S. at 659 n. 26). "Absent some effect of [the] challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Cronic*, 466 U.S. at 658.

2. At the same time, the Court has recognized that structural errors affect the fundamental fairness of a trial: "[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" when it is the product of a structurally defective trial. *Fulminante*, 499 U.S. at 310

(quoting *Rose* v. *Clark*, 478 U.S. 570, 577-578 (1986)). Because structural errors render a trial fundamentally unfair and thus "an unreliable vehicle for determining guilt or innocence" (*Rivera* v. *Illinois*, 556 U.S. 148, 160-161 (2009)), the presence of a structural error displaces the presumption of reliability with a presumption of *un*reliability. In other words, because a structural error contaminates the entire proceeding with unfairness, it "render[s] the proceeding presumptively *un*reliable," and courts "cannot accord any presumption of reliability" to the determination of guilt. *Roe*, 528 U.S. at 483-484 (emphasis added) (failure to file notice of appeal).

It follows that when deficient performance results in a structural error that necessarily renders the proceeding fundamentally unfair, a criminal defendant bears no obligation to prove actual prejudice. After all, a defendant must make "a showing of actual prejudice" only "when the proceeding in question was presumptively reliable" (*Roe*, 528 U.S. at 484); he cannot bear a burden to overcome a presumption when the presumption does not apply. Thus, prejudice must be presumed "with no further showing from the defendant * * * when the violation of the right to counsel rendered the proceeding presumptively unreliable." *Ibid.*

3. This is the rationale underlying *Cronic* errors. In *Cronic*, the Court recognized that "under [certain] circumstances the likelihood that counsel could have performed as an effective adversary [are] so remote as to [make] the trial inherently unfair." 466 U.S. at 660-661. See also *id.* at 662 (trials so infected are "insufficiently reliable to satisfy the Constitution"). Thus, in cases involving *Cronic* errors, "[n]o specific showing of prejudice [is] required" because the nature of the surrounding circumstances "makes the adversary process

itself presumptively unreliable," and "'no amount of showing of want of prejudice [can] cure'" the resulting unfairness and unreliability. *Id*. at 659-661 (quoting *Davis* v. *Alaska*, 415 U.S. 308, 318 (1974)).

Examples include when counsel is burdened by an actual conflict of interest (*Cuyler* v. *Sullivan*, 446 U.S. 335, 348 (1980)), when counsel is prevented from conducting a full cross-examination of key witnesses (*Davis*, 415 U.S. at 317-318), and when counsel's preparation is so hindered by circumstance as to be practically meaningless (*Powell* v. *Alabama*, 287 U.S. 45 (1932)). In all such cases, the "magnitude" of the circumstances destroys the presumption of reliability that a defendant ordinarily would bear the burden of overcoming with a showing of actual prejudice. *Cronic*, 466 U.S. at 659.[1]

4. This settled framework, affirmed time and again in this Court's precedents, resolves the question presented. When defense counsel's deficient performance results in a structural error like an unjustified courtroom closure, the trial in which the error occurs "cannot reliably serve its function." *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993) (citing *Rose*, 478 U.S. at 577). Thus, the presumption of reliability is displaced by a presumption of unfairness and unreliability, and there is no presumption that the defendant bears a

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[1] In fact, *Cronic* permits the reversal of a conviction "without [*either*] inquiring into counsel's actual performance *or* requiring the defendant to show the effect it had on the trial." *Bell* v. *Cone*, 535 U.S. 685, 695 (2002) (emphasis added). Once a defendant shows that *Cronic* applies, in other words, he bears no further obligation to demonstrate that his lawyer rendered deficient assistance in any particular respect.

burden to overcome with a showing of actual prejudice.[2]

That is the case here. "While defense counsel's failure to make a timely [objection] is the primary manifestation of incompetence" in this case, petitioner's claim is that his counsel's deficiency resulted in a "distinct" violation (*Kimmelman* v. *Morrison*, 477 U.S. 365, 374 (1986)) of his public-trial right.

There is no denying that the public-trial right is one of those "basic protections without which a criminal trial cannot reliably serve its function as a vehicle for the determination of guilt or innocence." *Gonzalez-Lopez*, 548 U.S. at 157-158 (Alito, J., dissenting). The "nexus" between "openness" and "fairness" is beyond reasonable debate. *Richmond Newspapers*, 448 U.S. at 570. As we explained *supra* (at 16-17), public trials "ensur[e] that judge and prosecutor carry out their duties responsibly" and "encourag[e] witnesses to come forward" and testify truthfully. *Waller*, 467 U.S. at 46. Indeed, the point of a secret proceeding is that no one can see what takes place—and thus no one can have any confidence that the proceeding was fair or its result reliable. Again, the Framers' insistence on the Public Trial Clause was in part a reaction to the

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[2] This conclusion does not implicate the concern expressed by Justice Thomas in his dissent from the denial of certiorari in *Bell* v. *Quintero*, 125 S. Ct. 2240 (2005). There, Justice Thomas (joined by the Chief Justice) rejected the idea that the presence of a structural error would justify *both* a presumption of prejudice *and also* "a presumption that counsel was ineffective," reasoning that "even competent counsel may fail to object" to a structural error. *Id.* at 2242. That may be true generally, but not in this case. Here, both courts below concluded that counsel's failure to object to the courtroom closure was deficient performance; thus, the question presented in the petition assumes that the first prong of the *Strickland* test is independently satisfied.

historical use of closed proceedings to impose arbitrary punishments; they viewed closed trials as a "menace to liberty." *Oliver*, 333 U.S. at 268-269.

Thus, failure to observe the public-trial guarantee is to deny due process itself, which "demands appropriate regard for the requirements of a public proceeding." *Richmond Newspapers*, 448 U.S. at 574 (quoting *Levine* v. *United States*, 362 U.S. 610, 616 (1960)). Against this background, an unjustified courtroom closure "*always*" and "*necessarily*" (*Neder*, 527 U.S. at 9) undermines the fairness of the proceeding. To conclude otherwise would be to disregard centuries of the Anglo-American legal tradition.

"From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice" (*Richmond Newspapers*, 448 U.S. at 573) and that no proceeding taking place behind closed doors can be regarded as fundamentally fair. Because no court may accord a presumption of reliability to a closed criminal proceeding (*Fulminante*, 499 U.S. at 310), petitioner bore no burden to "overcome" such a presumption with a showing of actual prejudice.

5. The SJC failed to appreciate this basic framework. It instead concluded that "[p]resuming prejudice in this context" would "ignore[] the distinct and well-established jurisprudence which governs claims of ineffective assistance of counsel," which provides that, outside the narrow *Cronic* context, "a defendant * * * must show that counsel's deficiency resulted in prejudice." *LaChance*, 17 N.E.3d at 1105. But as we have just shown, the opposite is true: this Court's "well-established jurisprudence" provides, not that

defendants must always prove actual prejudice, but that they must prove actual prejudice when the judicial proceedings being challenged are entitled to a presumption of reliability. The upshot: actual prejudice need not be shown when circumstances (such as the presence of a structural error) destroy the presumption of reliability.

The SJC's contrary view that *Strickland* inflexibly requires a showing of actual prejudice outside the narrow context of *Cronic* errors (*LaChance*, 17 N.E.3d at 1106) is precisely the sort of rigid and "mechanical" approach to ineffective assistance claims that *Strickland* itself warned against. It is "the principles" underlying *Strickland*'s two-pronged test, the Court warned, and not "mechanical rules," that "should guide the process of decision." 466 U.S. at 696. "[T]he ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged," and not on rote adherence to a two-pronged test. *Ibid*. The decision below cannot be squared with that teaching.

B. The decision below is at odds with this Court's cases holding that actual prejudice from courtroom closures cannot be proved

There is yet another reason that this Court must reject the SJC's answer to the question presented: As this Court has repeatedly held, it is a practical impossibility to prove (and, indeed, even to evaluate) the actual prejudice that might flow from a violation of the public-trial right. Again, because structural errors "affect[] the entire adjudicatory framework" within which the trial proceeds, they "defy analysis by harmless-error standards." *Puckett*, 556 U.S. at 141 (quoting *Fulminante*, 499 U.S. at 309). The "precise effects" of

such errors are simply "indeterminate" and "unmeasurable." *Sullivan*, 508 U.S. at 281.

That conclusion is particularly apparent with respect to the public-trial right. When it comes to trial errors, such as the improper admission of evidence or a discrete error in the jury instructions, "the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury." *Satterwhite* v. *Texas*, 486 U.S. 249, 256 (1988) (quoting *Holloway* v. *Arkansas*, 435 U.S. 475, 490 (1978)). But in the case of a closed courtroom, the evil is not in the evidence presented or the instructions given; it is instead in what the lawyers, witnesses, and judge would have done *differently* if they had not been behind closed doors. See *supra*, 16-17, 19-20.

Inquiring how the participants in a closed proceeding would have behaved if the public-trial right had not been violated, and then trying to sort out the practical impact those differences would have had, would be "a speculative inquiry into what might have occurred in an alternate universe." *Gonzalez-Lopez*, 548 U.S. at 150. There is simply no way to judge intelligently such a counterfactual state of affairs, characterized by imponderable what-ifs and speculative maybes. In other contexts, the Court has held that "guesswork," "conjecture," and "speculation" cannot substitute for "reasoned analysis" in constitutional adjudication. *Yeager* v. *United States*, 129 S. Ct. 2360, 2368 (2009) (Double Jeopardy Clause). Just so here.

In the *Chapman* context, therefore, this Court has said that the task of establishing harmlessness or prejudice from a public-trial violation is "a practical impossibility." *Waller*, 467 U.S. at 49 n.9. Accord, *e.g.*, *State* v. *Shearer*, 334 P.3d 1078, 1083 (Wash. 2014)

("We do not require defendants to show prejudice from public trial rights violations because 'it is impossible to show whether the structural error of deprivation of the public trial right is prejudicial.'").[3] Thus, prejudice from courtroom closures is presumed on direct appellate review under *Chapman*. See *Fulminante*, 499 U.S. at 309. Were it otherwise, relief would never be available for violations of the public-trial right, which would be reduced to a guarantee in name only. See, *e.g.*, *People* v. *Jones*, 391 N.E.2d 1335, 1340-1341 (N.Y. 1979) ("To require the defendant to undertake the wellnigh impossible task of proving prejudice would render the right to a public trial illusory.").

These observations are no less true in ineffective-assistance cases like this one; just as a public-trial violation defies harmless-error standards under *Chapman*, it defies actual-prejudice standards under *Strickland*. Because it is impossible "to judge intelligently" a counterfactual state of affairs (*Holloway*, 435 U.S. at 491) just the same under *Strickland* as under *Chapman*, defendants pressing ineffective assistance claims involving structural errors cannot be required to prove actual prejudice, which would otherwise be an insurmountable barrier to relief.

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[3] See also, *e.g.*, *Owens* v. *United States*, 483 F.3d 48, 64 (1st Cir. 2007) (in a public-trial case, holding that "it is impossible to determine whether a structural error is prejudicial"); *Carson* v. *Fischer*, 421 F.3d 83, 95 (2d Cir. 2005) ("it would be, in most cases, virtually impossible for a defendant to demonstrate that the absence of family members or friends from his trial affected its result"); *Commonwealth* v. *Johnson*, 455 A.2d 654, 658 (Pa. 1982) ("To require proof of actual prejudice would force [a] defendant to prove what the disregard of his Sixth Amendment public trial right has made it impossible for him to learn.") (citing *United States ex rel. Bennett* v. *Rundle*, 419 F.2d 599, 608 (3rd Cir. 1969) (en banc)).

The SJC turned a blind eye to all of this, imposing on defendants like petitioner a burden to prove prejudice from denials of structural rights, including the public-trial right. That holding cannot be reconciled with this Court's conclusion that such a showing is impossible. See *Shearer*, 334 P.3d at 1083-1084 ("requir[ing] [a] defendant[] to show prejudice" would be "in direct conflict with * * * precedent that public trial rights violations are structural error that are not subject to a harmlessness standard").[4]

Strickland accordingly cannot be understood to require defendants, like petitioner, to establish actual prejudice resulting from structural errors. The purpose of *Strickland*'s prejudice prong is to require defendants to overcome the presumption of reliability that applies to most criminal proceedings. But when counsel's incompetence leads to a structural error like a courtroom closure, that presumption does not apply, and there is therefore nothing for the defendant to overcome. Beyond that, proving actual prejudice resulting from structural errors simply is not possible—a recognized limitation with which the decision below conflicts. For each of these reasons, the SJC's decision must be reversed.

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[4] If the SJC's rule were upheld, the practical impossibility of proving a counterfactual would be unlikely to stop defendants from trying. The evidentiary hearings required to evaluate claims of prejudice arising from structural errors like courtroom closures, involving the testimony of the trial's many participants, would be tremendously burdensome. Indeed, the cost of such sprawling evidentiary hearings would, in all likelihood, often eclipse the burden of simply conducting a new trial on the merits of the indictment. Recent statistics indicate that 77% of criminal cases that go to trial in the federal system are resolved in two days or less. *Sourcebook of Criminal Justice Statistics*, Table 5.42.2010, perma.cc/NH8Q-5665.

III. IF NOT CORRECTED, THE DECISION BELOW WOULD PRODUCE INTOLERABLE RESULTS

The infirmities of the lower court's decision do not end there. The SJC's rule, if allowed to stand, would undermine public confidence in the criminal justice system and lead to manifestly unjust results. The SJC's concern for finality does not remotely overcome these intolerable results.

A. Uncorrected violations of the public-trial right undermine the integrity of the criminal justice system

Uncorrected structural errors undermine the appearance of justice and the integrity of the judiciary. In no circumstance is that more evident than in a case like this one, involving a violation of the public-trial right.

"The requirement of a public trial is," of course, "for the benefit of the accused"; it provides "that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Gannett*, 443 U.S. at 380. Accord *Presley*, 558 U.S. at 213. But—as we explained above (at 17-18)—there is also "a strong societal interest in public trials" (*Gannett*, 443 U.S. at 383), so much so that "the primacy of the accused's right is difficult to separate from the right of everyone in the community to attend." *Press-Enter. I*, 464 U.S. at 508.

For one thing, "the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion." *Richmond Newspapers*, 448 U.S. at 571. This so-called "community therapeutic value" (*Press-Enter. I*, 464

U.S. at 508) eases the "natural human reactions of outrage and protest" and answers the "fundamental, natural yearning to see justice done" (*Richmond Newspapers*, 448 U.S. at 571).

For another thing, public trials promote the appearance of justice, and thus the public's confidence in the criminal justice system. "[T]he sure knowledge that *anyone* is free to attend [a criminal trial] gives assurance that established procedures are being followed and that deviations will become known." *Press-Enter. I*, 464 U.S. at 508. Thus, the public-trial right "promotes confidence in the fair administration of justice" (*Richmond Newspapers*, 448 U.S. at 572) and "the appearance of fairness so essential to public confidence in the system" (*Press-Enter. I*, 464 U.S. at 508).

The SJC's answer to the question presented takes no account of the "great, though intangible, societal loss that flows" from structural errors like a denial of the public-trial right. *Waller*, 467 U.S. at 49 n.9 (quoting *Jones*, 391 N.E.2d at 1340). As a consequence, it is certain to inflict damage to the judicial system itself, for "the means used to achieve justice must have the support derived from public acceptance of both the process and its results," which is not possible when violations of the public-trial right are allowed to stand. *Richmond Newspapers*, 448 U.S. at 571. Cf. *Williams-Yulee* v. *Florida Bar*, 135 S. Ct. 1656, 1666 (2015) (because "[t]he judiciary's authority * * * depends in large measure on the public's willingness to respect and follow its decisions, * * * 'justice must satisfy the appearance of justice'") (quoting *Offutt* v. *United States*, 348 U.S. 11, 14 (1954)). The SJC's myopic focus on actual prejudice to the defendant, and its resulting accommodation of the closed proceedings in this case, is thus "profoundly inimical to this demonstrative

purpose of the trial process." *Richmond Newspapers*, 448 U.S. at 595.

B. The decision below unjustly penalizes criminal defendants for the deficiencies of their lawyers

The inconsistency of the lower court's decision with the principles espoused in *Strickland*, and its imposition of impossible burdens on defendants and inadministrable standards on the courts, are reasons enough to reverse the judgment below. It weighs yet further in favor of reversal that the SJC's decision is flatly incompatible with basic principles of fairness.

As this case comes to the Court, petitioner has suffered two injuries of constitutional magnitude. There is no doubt that petitioner's "right to a public trial * * * extend[ed] to the jury selection phase of [his] trial" (*Presley*, 558 U.S. at 212), and thus equally no doubt that his public-trial right was violated when the courtroom was closed for two full days, during the jury's empanelment. This was a constitutional violation of the highest order. Ironically, if petitioner's counsel had lodged an objection and the objection had been denied, petitioner would have been able to raise the public-trial violation in his direct appeal to the SJC, where he would have been entitled to a presumption of prejudice and an automatic reversal and remand for a new trial.

But because petitioner suffered a *second* egregious injury—because he was represented by a lawyer who was ignorant of one of the most basic rights protected by the Sixth Amendment—the SJC *denied* him relief. In other words, petitioner was denied relief for each error because of the existence of the other error: The structural defect went uncorrected because his lawyer

was incompetent and failed to object, and his lawyer's incompetence went uncorrected because it resulted in a structural error and prejudice could not be proven. The Court should not tolerate this kind of no-win result when it comes to such foundational constitutional guarantees.

C. The SJC's concern about the public's interest in finality is unfounded

1. Finally, the SJC was wrong to suggest that the rule we advocate will come at a "great cost to the public interest in the finality of verdicts" (*LaChance*, 17 N.E.3d at 1106), for two reasons.

First, "finality concerns" are "weaker" in cases where the presumption of reliability is called into question (*Strickland*, 466 U.S. at 694), as it necessarily is in any case involving a structural error.

Second, rejection of the SJC's rule would rarely lead to new trials in practice. Even under the rule that we advocate, defendants pursuing ineffective-assistance claims must first establish that counsel's performance in failing to object was deficient. This is a "high bar" that is rarely met. *Knowles* v. *Mirzayance*, 556 U.S. 111, 125 (2009). "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 124 (quoting *Strickland*, 466 U.S. at 688). "Judicial scrutiny of counsel's performance must be highly deferential," and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Ibid.* (quoting same at 669). And "[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Ibid.* (quoting same at 690). In light of this "highly deferential" standard, "[s]ur-

mounting" the "high bar" of *Strickland*'s performance prong is "never an easy task." *Premo* v. *Moore*, 562 U.S. 115, 122 (2011) (quoting *Padilla* v. *Kentucky*, 559 U.S. 356, 371 (2010)).[5]

What is more, structural errors occur only in "a very limited class of cases" (*Johnson*, 520 U.S. at 468) and "necessarily render a trial fundamentally unfair" (*Rose*, 478 U.S. at 577). Such "extreme deprivations of constitutional rights" arise in "rare instance[s]." *United States* v. *Smith*, 240 F.3d 927, 930 n.5 (11th Cir. 2001) (per curiam). Accord *Washington* v. *Recuenco*, 548 U.S. 212, 218 (2006) (structural errors arise "[o]nly in rare cases"); *United States* v. *Talley*, 315 F. App'x 134, 146 n.5 (11th Cir. 2008) ("structural errors are very rare"); *United States* v. *Pursley*, 550 F. App'x 575, 579 (10th Cir. 2013) ("Structural errors are rare indeed.").[6]

Thus the cases in which a presumption of prejudice will result in new trials are doubly unusual, involving both constitutionally deficient performance and a resulting structural error. Cases like that will be few and far between, and granting relief in such limited circumstances will do little, if anything, to imperil "the public interest in the finality of verdicts" (*LaChance*, 17 N.E.3d at 1106).

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[5] There are many possible strategic reasons that defense counsel might decline to object to a courtroom closure. The lawyer may, for example, wish to avoid irritating the trial judge if the closure is part of the court's routine practice. The lawyer may also think that it is possible to seat a more favorable jury without the check of a watchful public.

[6] It also bears mention that, in light of *Presley*, Massachusetts courts no longer utilize a closed-courtroom procedure for jury selection. The particular circumstances of this case are therefore unlikely to come to pass again.

2. The SJC also raised the possibility that trial counsel, aware that a structural error had occurred, may "depriv[e] the trial court of the opportunity to correct the error at the time it occurs" in order to secure an "appellate parachute" later on, in case the trial turns out badly. *LaChance*, 17 N.E.3d at 1107 (citing *People* v. *Vaughn*, 821 N.W.2d 288, 308 (Mich. 2012)). That is nothing but a bogeyman. If counsel declined to raise an objection for tactical reasons like that, performance would not be deficient. And in any event, few lawyers would be willing to gamble with their clients' rights in that way—particularly given that success on that strategy would require the lawyer to accept a finding that he had been incompetent. Unsurprisingly, there is no evidence of such deliberate sandbagging in the six jurisdictions that presume prejudice in cases like this one.

IV. PETITIONER IS ENTITLED TO A NEW TRIAL

For all of the foregoing reasons, a defendant who shows that his lawyer's incompetent performance resulted in a structural error need not prove actual prejudice under the second prong of *Strickland*'s ineffective assistance test. Petitioner is, as a consequence, entitled to a new trial in this case.

1. As both the trial court and the SJC concluded, the complete, two-day closure of the courtroom during jury empanelment violated petitioner's public-trial right.

As a starting point, "the Sixth Amendment right to a public trial extends to the *voir dire* of prospective jurors." *Presley*, 558 U.S. at 213. But there admittedly are "exceptions to this general rule." *Ibid*. "[T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a

fair trial or the government's interest in inhibiting disclosure of sensitive information." *Ibid.* (quoting *Waller*, 467 U.S. at 45). "Such circumstances will be rare, however, and the balance of interests must be struck with special care." *Ibid.* (quoting same).

Waller, in turn, "provided standards for courts to apply before excluding the public from any stage of a criminal trial," including that "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." *Id.* at 213-214 (quoting *Waller*, 467 U.S. at 48).

The closure was patently illegal under this framework. To begin with, there was no overriding interest in play here. On the contrary, "[t]he sole reason for the closure was the crowded condition in the courtroom" (Pet. App. 53a), and "courtroom crowding falls short as a justification for the closure at issue here" (*id.* at 58a). To the extent courtroom crowding was the concern, moreover, there were obvious alternatives to closing the proceeding, including "dividing the jury venire panel to reduce courtroom congestion." *Presley*, 558 U.S. at 215.

Beyond all that, *Presley* makes clear that a trial judge must make *Waller* findings "*before* excluding the public." 558 U.S. at 213 (emphasis added). That did not happen here.

2. Counsel's failure to object to the courtroom closure was, moreover, objectively unreasonable. "The defendant did not raise an objection to the court room closure," according to the SJC, solely "because his

attorney did not understand that the public had a right to be present during the jury empanelment phase of the trial proceedings." Pet. App. 40a. But "[g]iven the state of the law in 2006 when this case was tried, counsel should have been aware of the defendant's right to have his family and other interested members of the public attend the empanelment." *Id*. at 63a. Indeed, this Court in 2010 thought that exact same right "so well settled" by *Press-Enterprise* and *Waller* that it issued a summary disposition in *Presley*. 558 U.S. at 213.

The SJC thus held that the trial court, after a lengthy evidentiary hearing, "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. More specifically, "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" Pet. App. 62a-63a. Thus, counsel's failure to object to the courtroom closure was not made "in the exercise of reasonable professional judgment" (*Strickland*, 466 U.S. at 690) but instead reflected simple incompetence. Petitioner accordingly is entitled to a new trial.

CONCLUSION

The judgment below should be reversed, and the case should be remanded with instructions to grant petitioner a new trial.

Respectfully submitted.

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