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 OF *AMICI CURIAE* THE STEIN CENTER FOR LAW AND ETHICS, *ET AL*.

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INTEREST OF *AMICI CURIAE*

The **Louis Stein Center for Law and Ethics**[1] at Fordham University School of Law[2] examines the critical role of lawyers in building a more just society, and explores how ethical values inform and improve the legal profession. The Stein Center supports a wide range of conferences, publications, and independent research.

Additional *amici curiae* are professors, practitioners, experts, and institutions in the field of legal ethics and criminal defense. *Amici* believe that competence is among the most foundational duties that lawyers owe to their clients, critical to safeguarding public trust in the legal profession and criminal justice system. As such, *amici* have an abiding interest in ensuring that courts honor the standards of lawyer competency required by both the Rules of Professional Conduct and the Sixth Amendment. As experts in the area of professional responsibility, *amici* hope to assist the Court in addressing the important issues presented by this case.

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[1] Pursuant to Rule 37.3 of the Rules of this Court, Petitioner and Respondent have consented to the filing of this brief. This brief was not written in whole or in part by counsel for any party, and no person or entity other than *amici* have made a monetary contribution to the preparation and submission of this brief.

[2] The views expressed herein are not necessarily those of Fordham University or the Fordham University School of Law.

Because of the large number of *amici*, the names and brief descriptions of additional individuals and institutions are attached as an appendix.

SUMMARY OF ARGUMENT

Kentel Weaver demonstrated to the Supreme Judicial Court of Massachusetts that his criminal trial was infected with structural error; however, the court denied him relief because it misguidedly applied harmless-error analysis. For three reasons, *amici* believe that when ineffective assistance of counsel results in structural error, defendants should not be required to prove prejudice.

First, in failing to object to structural error, a lawyer commits a serious breach of his fiduciary and ethical duties. Allowing such incompetence to go unremedied causes individual defendants real harm and degrades trust in both the legal profession and the criminal justice system as a whole.

Second, precedent urges a presumption of prejudice when ineffective assistance of counsel results in structural error. Like other lawyer errors for which this Court already presumes prejudice, structural errors contaminate the entire proceeding and manifest a serious breakdown of the adversarial process. Moreover, presuming prejudice is necessary when the probability of harm to the defendant is high, but the precise effects of the harm are difficult to measure. Finally, a presumption of prejudice is particularly appropriate because structural errors should be obvious to the court and can be easily prevented during trial.

Third, presuming prejudice will not result in defense counsel purposefully failing to object to structural defects in the hopes of winning a new

trial. Intentionally failing to object to structural error violates the Rules of Professional Conduct and risks defense counsel's professional and reputational interests. Furthermore, the trial court and prosecutors have both the ability and the duty to prevent structural error, putting a nearly insurmountable bar on defense counsel's ability to commit intentional mistakes. Significantly, there is no empirical evidence supporting the concern that defense counsel will intentionally create or ignore structural errors.

Therefore, *amici* respectfully urge this Court to presume prejudice in cases in which ineffective assistance of counsel results in structural error.

ARGUMENT

I. INTRODUCTION

It is beyond dispute that Kentel Weaver was denied his constitutional right to a public trial. During jury selection, the courtroom was fully closed for two days, Pet. App. 39a, in clear violation of the Sixth Amendment of the U.S. Constitution, *Waller v. Georgia*, 467 U.S. 39, 45 (1984); *Presley v. Georgia*, 558 U.S. 209, 213 (2010).

The unconstitutional denial of the public trial right is classified as a "structural defect" because, unlike trial errors, "structural defect[s] affect[] the framework within which the trial proceeds." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). In cases where defense counsel raises a timely objection, structural errors are subject to automatic reversal. *Id.* at 309-10. As this Court has observed, "structural defects . . . defy analysis by 'harmless-error' standards," because the precise effects of structural error are difficult to discern. *Id.* at 309. The Supreme Judicial Court of Massachusetts accurately stated this rule when it explained that "[w]here a meritorious claim of structural error is timely raised, the court presumes 'prejudice, and reversal is automatic.'" Pet. App. 39a (quoting *Commonwealth v. Jackson*, 28 N.E.3d 437, 442 (Mass. 2015)).

But Mr. Weaver never received a new trial. Instead, Mr. Weaver's defense counsel failed to object to the courtroom closure—a mistake that the Supreme Judicial Court of Massachusetts found to be "the product of serious incompetency, inefficiency,

or inattention to the defendant's Sixth Amendment right to a public trial" and "not objectively reasonable." Pet. App. 40a (internal quotation marks omitted). Nevertheless, the court demanded that Mr. Weaver demonstrate that his counsel's mistake caused him prejudice, Pet. App. 40a, and denied his motion for a new trial because he could not do so, Pet. App. 40a-41a.

In placing such a burden on Mr. Weaver, Respondent has asked him to prove the impossible. Not only must he show that his counsel was incompetent (which he was), and that his counsel's incompetency resulted in structural error (which it did), but Mr. Weaver must also show that this structural error—which this Court said in *Fulminante* "def[ies] analysis by 'harmless-error' standards"—was not, in fact, harmless. *Fulminante*, 499 U.S. at 310. Defense counsel did not close the courtroom; the trial court did. But in practice, the rule advocated by Respondent means that the denial of Mr. Weaver's constitutional right—in which the defense lawyer, the prosecutor, and the trial judge were equally complicit—cannot be remedied.

Mr. Weaver's lawyer was incompetent, and Mr. Weaver suffered structural error. His injustice was twofold. But the Supreme Judicial Court of Massachusetts refused to grant him relief because, *in addition to* suffering structural error, Mr. Weaver was *also* denied the effective assistance of counsel. Respondent's rule would award less relief as the injury grows. To avoid this perverse result, *amici* urge this Court to grant Mr. Weaver the remedy he would have received but for defense counsel's

incompetent and inexplicable failure to object: a new trial.

II. THIS COURT SHOULD NOT TOLERATE DEFENSE COUNSEL'S GRIEVOUS BREACH OF HIS FIDUCIARY AND ETHICAL DUTIES.

A. Mr. Weaver's Defense Counsel Breached His Duties of Competence and Diligence.

Lawyers owe their clients the fundamental fiduciary duties of competence and diligence. These obligations are foundational to the lawyer-client relationship, and they are enshrined in the American Bar Association's Model Rules of Professional Conduct, the *Restatement (Third) of the Law Governing Lawyers*, and the Rules of Professional Conduct of each of the fifty states. *See* Model Rules of Prof'l Conduct r. 1.1 (Am. Bar Ass'n 2016) ("A lawyer shall provide competent representation to a client."); Model Rules of Prof'l Conduct r. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client."); *Restatement (Third) of the Law Governing Lawyers* § 16 cmt. b (2000) ("A lawyer is a fiduciary . . . . Assurances of the lawyer's competence, diligence, and loyalty are therefore vital."); *see also infra* note 4. These obligations extend to every client, regardless of a client's identity, claim, or ability to pay. An indigent defendant deserves no less diligence or competence than the wealthiest corporate client. *See ABA Standards for Criminal Justice: Prosecution and Defense Function*, Standard

4-1.1(a) (4th ed. 2015) (defining "defense counsel," to whom the standards uniformly apply, as including lawyers "privately retained, assigned by the court, acting *pro bono* or serving indigent defendants in a legal aid or public defender's office"). Lawyers who fail to provide competent representation to their clients breach both their common law fiduciary duties and their ethical obligations under the Rules of Professional Conduct.

To achieve the minimum competency required by their professional obligations, lawyers must possess and exercise "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Model Rules of Prof'l Conduct r. 1.1. The fact that a lawyer has handled similar matters in the past does not automatically make his future representations competent. Furthermore, a generally competent lawyer may, due to a lapse of attention or understanding, perform incompetently in one particular phase or element of a case. *See United States v. Cronic*, 466 U.S. 648, 657 n.20 (1984) ("[T]he type of breakdown in the adversarial process that implicates the Sixth Amendment is not limited to counsel's performance as a whole—specific errors and omissions may be the focus of a claim of ineffective assistance as well.").

Unquestionably, Kentel Weaver did not receive diligent and competent representation as measured by "prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). During the empanelment of Mr. Weaver's jury, court officials closed the courtroom, Pet. App. 38a-39a, in violation of Mr. Weaver's clearly recognized Sixth

Amendment right to a public trial, Pet. App. 39a-40a. But Mr. Weaver's defense counsel raised no objection, Pet. App. 39a, because counsel incorrectly believed that the Constitution would tolerate the closure of a courtroom during *voir dire*, Pet. App. 49a-50a. As the Supreme Judicial Court of Massachusetts explained, Mr. Weaver's lawyer simply "did not understand that the public had a right to be present during the jury empanelment phase of the trial proceedings." Pet. App. 40a.

Such a lapse is inexcusable. One of defense counsel's primary functions is to safeguard his client's constitutional rights, requiring counsel to assiduously pursue avenues of procedural relief. As the ABA Standards for the Defense Function instruct, "Defense counsel should inform the client of his or her rights in the criminal process at the earliest opportunity, and timely plan and take necessary actions to vindicate such rights within the scope of the representation." *ABA Standards for Criminal Justice: Prosecution and Defense Function*, Standard 4-3.7(a). Because Mr. Weaver's defense counsel so utterly failed in these duties, the Supreme Judicial Court of Massachusetts accurately observed 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.

Ignorance is no excuse. To maintain minimal competence, defense counsel must possess or acquire the knowledge necessary to mount an adequate defense, especially when constitutional rights are at issue. *See ABA Standards for Criminal Justice:*

Prosecution and Defense Function, Standard 4-3.7(g) ("Whenever defense counsel is confronted with specialized . . . legal issues with which counsel is unfamiliar, counsel should, in addition to researching and learning about the issue personally, consider engaging or consulting with an expert."). Counsel's unawareness of Mr. Weaver's constitutional rights and counsel's resultant failure to object to the closure of the courtroom fall far short of the competence "reasonably necessary for the representation." Model Rules of Prof'l Conduct r. 1.1; *see also Strickland*, 466 U.S. at 688 (holding that the defendant "must show that counsel's representation fell below an objective standard of reasonableness").

B. Allowing Gross Lawyer Incompetence To Go Unremedied Degrades Trust in the Legal Profession and the Criminal Justice System.

Because of his defense counsel's ignorance, Kentel Weaver is now serving a life sentence for a conviction tainted by structural error. But while the interests of justice prescribe relief for Mr. Weaver, the importance of remedying ineffective assistance of counsel goes beyond safeguarding individual defendants' rights. This case is about more than correcting one error; it is about preventing the degradation of the adversarial process. The courts' role in enforcing lawyers' duties of competence and diligence is essential to the health of the criminal justice system and the independence of the legal profession.

A lawyer's duties of competence and diligence are bedrock principles of the legal profession. Our legal system could not function—or, at least, function justly—any other way. An individual without legal training often cannot competently navigate the justice system alone; instead, he relies on a lawyer to make the justice system intelligible and accessible. *See Restatement (Third) of the Law Governing Lawyers* § 16 cmt. b ("[A]dequate representation is often essential to secure persons their legal rights. Persons are often unable either to know or to secure their rights without a lawyer's help."). A client places absolute trust in his lawyer—trust that the lawyer will safeguard the client's most sensitive information, trust that the lawyer possesses the requisite legal knowledge and skill, and trust that the lawyer will zealously pursue his client's interests.

It is vital that the legal profession earn and steward this trust. Individual clients often cannot monitor their lawyers' performance, because "[a] lawyer's work is sometimes complex and technical, often is performed in the client's absence, and often cannot properly be evaluated simply by observing the results." *Restatement (Third) of the Law Governing Lawyers* § 16 cmt. b. Instead, the legal profession as a whole has made a promise to the public: In exchange for the privilege of self-governance, lawyers and judges take responsibility for establishing, following, and enforcing rules of conduct that fulfill lawyers' special fiduciary obligations. As the Preamble to the ABA Model Rules of Professional Conduct explains, "The legal profession's relative autonomy carries with it special

responsibilities of self-government. . . . Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves." Model Rules of Prof'l Conduct pmbl. cmt. 12.

In particular, public trust in the integrity of the criminal justice system relies on competent defense counsel. This is why the constitutional guarantee of "the assistance of counsel," U.S. Const. amend. VI, requires more than the mere presence of "a person who happens to be a lawyer," *Strickland*, 466 U.S. at 685; *see also McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel."). For the adversarial system to work, defense counsel must provide a reliable counterweight to the prosecution. As this Court stated in *Cronic*, "The right to the effective assistance of counsel is . . . the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. . . . [I]f the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *Cronic*, 466 U.S. at 656-57. Only "access to counsel's skill and knowledge" can guarantee defendants have "the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland*, 466 U.S. at 685 (quoting *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 275 (1942)).

While in principle the Sixth Amendment guarantees effective assistance of counsel, it is the legal community that gives content to this right in practice. As this Court has recognized, "The Sixth Amendment refers simply to 'counsel,' not specifying

particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions." *Strickland*, 466 U.S. at 688.

Strickland's presumption of competency is jeopardized when courts permit ineffective assistance of counsel to result in structural error. Defense counsel must make myriad strategic decisions during the course of their representations, and defendants unacquainted with criminal law and trial tactics must, in the usual case, trust their lawyers to make competent decisions. But the public loses confidence that defense counsel are not committing difficult-to-monitor trial errors when courts fail to redress easily detectible structural errors. The fiduciary promise of the legal profession falls under suspicion when self-regulation so openly and notoriously fails to safeguard defendants' fundamental constitutional rights. Because it is imperative that no court tolerate grave lawyer incompetence that results in structural error, *amici* urge this Court to announce a rule that gives real effect to the fiduciary promise made by lawyers to their clients.

III. THE SAME LOGIC THAT PRECLUDES HARMLESS-ERROR ANALYSIS IN OTHER CONTEXTS COMPELS PRESUMING PREJUDICE WHEN INEFFECTIVE ASSISTANCE OF COUNSEL RESULTS IN STRUCTURAL ERROR.

In keeping with precedent and the judiciary's central role in regulating the legal profession, this Court should presume prejudice when ineffective assistance of counsel results in structural error. The Court traditionally presumes prejudice for three reasons. First, counsel's error contaminates the trial and manifests a "breakdown in the adversarial process." *Cronic*, 466 U.S. at 662. Second, the probability that the error resulted in harm to the defendant is high, but the precise effects of the harm are difficult to measure. *See, e.g.*, *id.* at 658; *Strickland*, 466 U.S. at 692; *Holloway v. Arkansas*, 435 U.S. 475, 488-91 (1978). Third, the trial judge can easily observe, prevent, and remedy the error. *See Strickland*, 466 U.S. at 692. Taken together, these reasons reflect an understanding that public trust is essential to the proper functioning of our legal system and that judges have a substantial role to play in promoting that trust.

A. The Error Infects the Trial and Manifests a "Breakdown in the Adversarial Process."

This Court has frequently presumed prejudice in situations in which counsel's error so contaminated the proceeding that it resulted in a

complete "breakdown in the adversarial process." *Cronic*, 466 U.S. at 662. Whenever a defendant is saddled with counsel who is "[un]able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself." *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980). To determine whether this risk has manifested, *Strickland* ordinarily imposes a prejudice requirement. The purpose of this requirement is to discern "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. However, in certain circumstances, defense counsel's conduct so dramatically exhibits this risk of injustice and consequent breakdown of the adversarial process that any additional showing of prejudice should be unnecessary. This is the case when ineffective assistance of counsel results in structural error.

Two situations in which the Court already presumes prejudice demonstrate this point. First, this Court presumes prejudice when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659. In *Brookhart v. Janis*, 384 U.S. 1 (1966), defense counsel failed to communicate to the defendant that by his agreeing to a *prima facie* trial, he was waiving his right to cross-examination. The Court concluded that the "denial of cross-examination without waiver . . . [was] constitutional error of the first magnitude and *no amount of showing of want of prejudice would cure it*." *Id.* at 3

(emphasis added) (quoting Brief for Respondent at 33).

Second, this Court presumes prejudice when a concurrent conflict of interest "actually affect[s] the adequacy of [a defendant's] representation." *See Cuyler*, 446 U.S. at 349. Because conflicts of interest persist throughout the trial and impair counsel's performance at every stage, the Court has not required defendants to show prejudice. Instead, the Court has assumed that such conflicts automatically undermine the trial's fairness. *See id.* at 349 ("The conflict itself demonstrate[s] a denial of the right to have the effective assistance of counsel." (internal quotation marks omitted)); *Lockhart v. Fretwell*, 506 U.S. 364, 378 (1993) (Stevens, J., dissenting) (explaining that when defense counsel "labors under a conflict of interest that affects her performance, then [the Court] assume[s] a breakdown in the adversarial process that renders the resulting verdict unreliable").

Ineffective assistance of counsel that results in structural error demonstrates a similar contamination of the trial and consequent breakdown of the adversarial process. Structural errors are defects within the "framework" of the trial itself; when they are present, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *Fulminante*, 499 U.S. at 310 (quoting *Rose v. Clark*, 478 U.S. 570, 577-78 (1986)). Like the denial of the right to cross-examination, structural errors fundamentally undermine the adversarial process by depriving the defendant of essential structural protections.

Moreover, much like conflicts of interest, structural errors persist throughout the trial and "infect the entire trial process." *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993). This is especially true where the error involves the closure of the courtroom for *voir dire*. The knowledge that the jury was selected in an unconstitutional manner casts serious doubt upon defendant's conviction.

For these reasons, this Court has abandoned harmless-error analysis for structural defects. So long as defense counsel timely objects to the error, prejudice is presumed. Respondent, however, asks this Court to create a special rule for *unpreserved* structural errors, exempting them from the normal presumption. But to do so would be drawing a distinction without a difference. In both cases, the breakdown in the adversarial system is the same. The fact that trial counsel failed to object to the constitutional infirmity when it first occurred changes nothing.

To impose a heightened burden on individuals with ineffective counsel would be contrary to precedent. Just as importantly, such an imposition would undermine the notion that the legal profession and the courts together establish and enforce standards of conduct to maintain public trust. That trust is based on the belief that criminal status is determined through a fair and uniform process rather than procedural Russian Roulette; a client should not be denied essential structural protections merely because she happens to receive or retain a grossly incompetent lawyer.

Lawyers and judges have a duty to "further the public's understanding of and confidence in the rule of law and the justice system." Model Rules of Prof'l Conduct pmbl. cmt. 6. By presuming prejudice in situations in which defense counsel's error results in a breakdown of the adversarial process, the Court recognizes and affirms this responsibility. Because "legal institutions . . . depend on popular participation and support to maintain their authority," *id.*, it is imperative that the Court safeguard a trial's fundamental structural protections. No structural protection is more important to the legitimacy of the judicial process than the right to a public trial. In an open trial, "[t]he public may see [that the defendant] is fairly dealt with and not unjustly condemned, and . . . may keep [the defendant's] triers keenly alive to a sense of their responsibility and to the importance of their functions . . . ." *Waller*, 467 U.S. at 46 (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979)). Defendants should not need to prove the harm caused by the loss of this right; it is inherent and obvious.

B. Even Though the Precise Harms Are Difficult To Measure, the Probability of Prejudice Is High When the Error Continues To Infect the Proceeding.

The Court has also long recognized the improvidence of requiring defendants to show prejudice in situations where harm is likely albeit difficult to prove. *Strickland*'s prejudice requirement finds its roots in the principle that the

defendant should receive relief when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. However, in cases in which mistakes of counsel result in structural error, the probability of harm to the defendant is both extreme and incalculable. When the Court has encountered this problem in alternative settings, it has traditionally presumed prejudice for two reasons.

First, certain errors "are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S. at 658 (collecting cases). For example, where a defendant has been denied counsel or the State has impermissibly interfered with the provision of counsel, the Court has consistently presumed prejudice on the grounds that the "likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary." *Mickens v. Taylor*, 535 U.S. 162, 166 (2002); *Strickland*, 466 U.S. at 692 ("Prejudice [when counsel is denied or the state interferes with counsel's assistance] is so likely that case-by-case inquiry into prejudice is not worth the cost.").

Second, presuming prejudice is appropriate when an error persists throughout the trial and the particular harms caused by the error are difficult to measure. Determining the amount of prejudice requires courts to establish a baseline in the counterfactual world of adequate assistance. But such analysis is impossible when the defect stems not from some discrete, identifiable error but rather

from the mechanism of the trial itself. The Court presumes prejudice in actual conflict of interest cases for this very reason, explaining that "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." *Strickland*, 466 U.S. at 692. Indeed, the attempt to calculate prejudice in such situations would necessarily require groundless speculation about unpredictable chains of events. For this reason, "a rule requiring a defendant to show that a conflict of interests . . . prejudiced him in some specific fashion would not be susceptible of intelligent, evenhanded application. . . . [T]o assess the impact . . . would be virtually impossible." *Holloway*, 435 U.S. at 490-91; *see also Glasser v. United States*, 315 U.S. 60, 75-76 (1942) ("To determine the precise degree of prejudice . . . is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.").

When ineffective assistance of counsel results in structural error, the same concerns of probable prejudice and improbable proof are present. Harm to the defendant is highly likely, if not inevitable. Furthermore, such harm is difficult, if not impossible, to calculate. Structural errors call into question the entire "framework within which the trial proceeds." *Fulminante*, 499 U.S. at 310. Indeed, as this Court has already recognized, once the Constitution's "basic protections"—including the right to a public trial—have been violated, "no criminal punishment may be regarded as fundamentally fair." *Id.* (quoting *Rose*, 478 U.S. at

577-78). Thus, once a structural error has occurred, the defendant is—by definition—prejudiced.

There is a corresponding parallel between the difficulty of measuring the effects of conflicted counsel and structural error. Unlike ordinary trial errors whose "scope is readily identifiable," *Holloway*, 435 U.S. at 490, the harms of enduring structural error and conflicted counsel are not discrete. In the case of conflicted counsel, the error endures throughout the trial and the harms are based less on what counsel has done and more on what counsel has "refrain[ed] from doing." *Id.* at 475 (emphasis omitted). Thus, an investigation into prejudice necessarily involves counterfactual inquiries and "unguided speculation." *Id.* at 491.

Similarly, whereas the harm caused by a trial error may be "quantitatively assessed," structural errors "defy analysis by 'harmless error' standards." *Fulminante*, 499 U.S. at 308-09. "Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006). The closing of the courtroom, particularly during the critically sensitive process of *voir dire*, could have long-reaching and unpredictable effects on the trial. In a public setting, different issues may have been raised; prospective jurors may have been asked different questions; perhaps even the resulting jury panel itself would have been different. If such possibilities sound speculative, it is because they are. But that is precisely the point. To evaluate the effects of counsel's failure to object to the closure of the

courtroom during *voir dire* is to engage in "unguided speculation." *Holloway*, 435 U.S. at 491. If prejudice is not presumed in this situation, no defendant who raises an ineffective assistance of counsel claim based on structural error will be able to succeed. This Catch-22 should have no place in ineffective assistance of counsel jurisprudence.

Respondent would bar Mr. Weaver from relief precisely because his counsel's error was so insidious. Under Respondent's rule, counsel's trial errors can be remedied upon a showing of prejudice. Counsel's structural errors, on the other hand, are functionally permanent, since prejudice is so difficult to prove. Because this Court has held that structural errors generally require automatic reversal while trial errors do not, this paradoxical standard is inappropriate and unjust.

In addition to breeding injustice at the individual level, Respondent's standard would degrade the integrity of the legal profession and decrease public trust in the system as a whole. If defendants' receipt of full structural protections were made to depend on their ability to retain effective counsel, the criminal justice system would appear arbitrary and poorly regulated. After all, criminal defendants are rarely in a position to know, let alone protect, their own rights; they must rely on their lawyers' knowledge and expertise in this area. In order for the legal system to function in a manner worthy of public confidence, important structural protections, such as the right to a public trial, cannot be made to depend on a lawyer's skill or diligence. The system loses its legitimacy if such protections

rest on the luck of the draw with respect to counsel's competence. As the regulators of our own profession, lawyers and judges have the obligation to maintain professional standards that encourage confidence in the system.

C. The Trial Court Can Easily Police the Error.

In the usual case of ineffective assistance of counsel, the trial judge has few realistic opportunities to avert defense counsel's mistakes. The judge may be unaware of counsel's lapse, for example, when the question is whether counsel conducted an adequate investigation. Alternatively, the judge may perceive a potential lapse, but be unable to inquire into whether that "lapse" was strategic because such an investigation would invade the lawyer-client relationship. Structural errors, however, are different. The primary duty for preventing structural errors rests with the court. Moreover, structural errors are easy to observe and police. In circumstances such as these, where the trial court has both the ability and the responsibility to prevent error, this Court has traditionally presumed prejudice.

For example, this Court has presumed prejudice where the right of counsel was denied or interfered with on the grounds that "such circumstances involve impairments of the Sixth Amendment right that are easy to identify and . . . easy for the government to prevent." *Strickland*, 466 U.S. at 692. The Court has reasoned similarly in concurrent conflicts of interest cases: "Given the

obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice . . . ." *Id.* at 692 (internal citation omitted).

As with the denial of counsel and concurrent conflicts of interest, structural errors cannot occur without the awareness and acquiescence of several parties. Judges are well-equipped and constitutionally obligated to guard against structural errors. All structural errors are observable and involve at least the tacit participation of the judge.[3] Moreover, because structural errors are defects in the framework of the trial itself, the prosecutor should also be expected to recognize and address these errors.

Mr. Weaver's case presents one of the rare circumstances in which the principal responsibility for preventing error lies not with defense counsel, but with the trial court. A public official, acting under the judge's supervision, closed the courtroom

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[3] The complete list of structural errors recognized in *Fulminante* includes the "deprivation of the right to counsel . . . the right to self-representation at trial . . . and the right to public trial;" the "unlawful exclusion of members of the defendant's race from a grand jury;" and trial by a "judge who is not impartial." *Fulminante*, 499 U.S. at 309-10. Since *Fulminante*, the Court has added two additional structural errors to the list: denial of the "right to counsel of choice," *Gonzalez-Lopez*, 548 U.S. at 146, and denial of the "right to a jury verdict of guilt beyond a reasonable doubt," *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993). None of these errors can occur without the court's knowledge and assent.

during *voir dire*. While a competent lawyer could have—and would have—objected to this closure, Mr. Weaver should not be penalized for his counsel's shortcomings. Where the judge, the prosecutor, and the defense counsel all failed to recognize and prevent clear structural error, there has been a grievous failure of the legal system's self-regulation. "No amount of showing of want of prejudice would cure" this triple failure. *Brookhart*, 384 U.S. at 3 (quoting Brief for Respondent at 33). The fact that the judicial system failed to protect Mr. Weaver in the first instance cannot justify his continued suffering on appeal. In keeping with this Court's precedent and the judiciary's historic role in promoting a legal system that engenders public trust, *amici* urge this Court to presume prejudice in Mr. Weaver's case.

IV. APPLYING A PRESUMPTION OF PREJUDICE WILL NOT CAUSE DEFENSE COUNSEL TO MAKE INTENTIONAL MISTAKES.

The Supreme Judicial Court of Massachusetts expressed concern that if unpreserved structural error could be used as a means to win a new trial, counsel would "harbor error as an appellate parachute." *Commonwealth v. LaChance*, 17 N.E.3d 1101, 1107 (Mass. 2014) (quoting *People v. Vaughn*, 821 N.W.2d 288, 308 (Mich. 2012)). This fear is unfounded. Presuming prejudice will not encourage defense counsel to intentionally create structural errors. First, creating an "appellate parachute" would violate the Rules of Professional Conduct. Second, the trial court can easily prevent structural

error, meaning that lawyers cannot intentionally provide ineffective assistance without the court's acquiescence. Finally, there is no evidence demonstrating the widespread use of this "appellate parachute."

A. Purposeful Failure To Object to Structural Error Violates the Rules of Professional Conduct and Directly Conflicts with Defense Counsel's Interests.

The Model Rules of Professional Conduct create several duties that counsel would violate by intentionally allowing their clients to suffer structural error. Rules in every state and federal district court would prohibit such intentional ineffective assistance of counsel.[4]

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[4] A version of the Model Rules of Professional Conduct has been adopted by forty-nine states and the District of Columbia. *See* Am. Bar Ass'n, *State Adoption of the ABA Model Rules of Professional Conduct*, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html. Although not based on the Model Rules, the California Rules of Professional Conduct specially prohibit intentional incompetence. *See* Cal. Rules of Prof'l Conduct r. 3-110 (2015) ("A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence. . . . For purposes of this rule, 'competence' in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service."). Through the adoption of local rules, federal district courts generally apply the Rules of Professional Conduct of the state where they sit.

First, purposefully allowing structural defects would violate defense counsel's obligations of competence and diligence. *See* Model Rules of Prof'l Conduct r. 1.3. In order to act with the required "zeal in advocacy upon the client's behalf," lawyers must object to any structural error at trial. Model Rules of Prof'l Conduct r. 1.3 cmt. 1 ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."). As Judge Duffly's dissent in *LaChance* observed, "I do not accept the court's assumption that a defendant's trial counsel, who was aware of the removal of the defendant's family members from the court room, would engage in conduct that fails to respect the duty of zealous representation owed to a client." *LaChance*, 17 N.E.3d at 1112 (Duffly, J., dissenting).

It is no response to argue that counsel complies with the mandate of zealous advocacy when he surreptitiously creates "appellate parachutes" for his clients. Such a tactic would still violate the Rules of Professional Conduct. If counsel fails to object to structural error for tactical reasons without consulting with his client, counsel would be usurping a decision that rightfully belongs to his client. According to Model Rule 1.2, lawyers must respect their clients' "decisions concerning the objectives of representation" and must "consult with the client as to the means by which they are to be pursued." Model Rules of Prof'l Conduct r. 1.2. Furthermore, to enable clients to make important decisions about their representation, lawyers have an affirmative obligation to clearly and consistently communicate with their clients. Model Rules of Prof'l Conduct r.

1.4 ("A lawyer shall . . . reasonably consult with the client about the means by which the client's objectives are to be accomplished . . . [and] explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."). Certainly, the waiver of the constitutional right to a public trial—the deprivation of which constitutes reversible structural error—would require communication with and approval by the client. By contrast, if the defendant knowingly and voluntarily waives the constitutional right at issue, he cannot later seek a new trial based on either a claim of structural error or ineffective assistance of counsel.

Second, such conduct would violate a lawyer's duties to the court. Withholding an objection to create an "appellate parachute" would "abuse legal procedure[s]," a tactic prohibited by the Model Rules. *See* Model Rules of Prof'l Conduct r. 3.1 cmt. 1 ("The advocate has . . . a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed."). In particular, Model Rule 3.3 requires "Candor Toward the Tribunal." Model Rules of Prof'l Conduct r. 3.3. "This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process." Model Rules of Prof'l Conduct r. 3.3 cmt. 2. Purposefully harboring structural error would violate this rule. Similarly, Model Rule 8.4 declares that "it is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice." Model Rules of Prof'l Conduct r. 8.4; *see also* Model Rules of Prof'l Conduct

pmbl. cmt. 5 ("A lawyer should use the law's procedures only for legitimate purposes . . . .").

A lawyer who willfully permits structural error to permeate a trial would subject himself to discipline, which could include formal reprimand, prohibition against taking on future criminal representations, or disbarment. *See* Model Rules of Prof'l Conduct r. 8.4 cmt. 1. Lawyers in federal court can also be financially penalized for purposefully creating unnecessary appeals. *See* 28 U.S.C. § 1927 (2012) ("Any attorney . . . [who] so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."). Courts have broad powers to impose discipline on lawyers appearing before them. *See In re Snyder*, 472 U.S. 634, 643 (1985) ("Courts have long recognized an inherent authority to suspend or disbar lawyers. . . . This inherent power derives from the lawyer's role as an officer of the court which granted admission." (internal citations omitted)). Additionally, judges who witness or learn about serious breaches of the Rules of Professional Conduct must refer the offending lawyers to the appropriate disciplinary body. *See* Model Code of Judicial Conduct r. 2.15 (Am. Bar Ass'n 2010).

In addition to risking formal sanctions, lawyers who provide constitutionally ineffective assistance of counsel face high reputational costs. As this Court has recognized, "[I]t is virtually inconceivable that an attorney would deliberately invite the judgment that his performance was

constitutionally deficient in order to win federal collateral review for his client." *Kimmelman v. Morrison,* 477 U.S. 365, 382 (1986).

In fact, far greater than the *theoretical* risk that lawyers will intentionally tarnish their reputations for the sake of their clients is the *observed* risk that lawyers will turn against their clients in an attempt to save their reputations. Defense lawyers often vigorously fight against their former clients' ineffective assistance of counsel claims. For example, in *Purkey v. United States*, "[i]n response to [ineffective assistance of counsel] allegations," defense counsel "filed a 117 page affidavit, in which he [went] into extensive detail to refute movant's claims." *Purkey v. United States*, No. 01-00308-01-CR-W-FJG, 2009 WL 3160774, at *2 (W.D. Mo. Sept. 29, 2009), *aff'd,* 729 F.3d 860 (8th Cir. 2013). Similarly, in *Binney v. State*, the former defense counsel gave the Attorney General's Office "petitioner's entire trial file" because he deemed the information "necessary for the defense of his representation." *Binney v. State*, 683 S.E.2d 478, 481 (S.C. 2009). Notably, the lengths to which some lawyers have gone to defend against ineffective assistance of counsel claims recently prompted the ABA Standing Committee on Ethics to issue a formal opinion on the subject. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-456 (2010) (addressing the question of "whether a criminal defense lawyer whose former client claims that the lawyer provided constitutionally ineffective assistance of counsel may . . . disclose confidential information to government lawyers . . . to help the

prosecution establish that the lawyer's representation was competent").

Thus, the purposeful creation of structural error runs directly contrary to the self-interest of defense lawyers. Because of the strong professional disincentives facing defense counsel, forcing defendants to demonstrate prejudice on appeal adds a procedural bar solely to combat a non-existent problem.

B. Because Judges and Prosecutors Have the Ability and Responsibility To Prevent Structural Defects, Defense Counsel Cannot Unilaterally Create Such Errors.

Structural errors can occur only through the court's tacit participation. Unlike trial errors—whose unconstitutionality may only be apparent with knowledge of facts outside the courtroom—structural errors occur in the presence of the court. Crucially, this means that defense counsel cannot indiscriminately create "appellate parachutes" through structural error; the court has the ultimate power to prevent such defects from undermining the integrity of the trial mechanism.

In fact, it is the judge's affirmative duty to prevent such structural errors. Judges have a responsibility to prevent the deprivation of rights guaranteed by the Sixth Amendment. *See ABA Standards for Criminal Justice: Special Functions of the Trial Judge*, Standard 6-1.1(a) (3d ed. 2000) ("The trial judge has the responsibility for

safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice."). Judges also must ensure that all officers of the court endeavor to preserve the defendant's rights. The Model Code of Judicial Conduct mandates that "[a] judge shall require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this Code." Model Code of Judicial Conduct r. 2.15.

This duty extends to prosecutors as well. The Rules of Professional Conduct make it clear that prosecutors also have an obligation to prevent structural errors from occurring. "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate." Model Rules of Prof'l Conduct r. 3.8 cmt. 1. As a minister of justice, the prosecutor owes the defendant—and the criminal justice system writ large—the "obligation[] to see that the defendant is accorded procedural justice." *Id.*

Thus, an "appellate parachute" cannot result from defense counsel's malfeasance unless the judge and prosecutor are also derelict in their professional duties.[5] Because intentional structural errors only result from the simultaneous wrongdoing of defense counsel, judges, and prosecutors, they should not be

[5] Recent cases where this Court has addressed intentional defense counsel mistakes do not involve structural error, so they are distinguishable from the case at bar. *See*, *e.g.*, *Puckett v. United States*, 556 U.S. 129, 133 (2009) (distinguishing failure to object to the violation of a plea agreement from cases involving structural error).

a serious concern. Trial courts, in effect, set the outer limit on the number of structural errors that defense counsel can make.

C. There Is No Evidence To Support the Conjecture that Lawyers Would Intentionally Harbor Error.

Defense counsels' use of "appellate parachutes" has not, and will never, run rampant. Under longstanding precedent, courts must inquire whether a lawyer's purported mistake instead resulted from a strategic decision. *See Strickland,* 466 U.S. at 689 (explaining that judges must give counsel "wide latitude . . . in making tactical decisions"). If a court determines that a lawyer intentionally failed to object to structural error, the defendant cannot make an ineffective assistance of counsel claim. Furthermore, the Model Rules of Professional Conduct would require a lawyer to be honest if questioned about whether his ineffective assistance of counsel was tactical. Model Rules of Prof'l Conduct r. 3.3 ("A lawyer shall not knowingly . . . make a false statement of fact . . . to a tribunal."). Having to admit that his deficient representation was tactical would prevent any gain from using such a strategy in the first place.

Accordingly, the potential benefit of a tactical mistake to the defendant is nil, while the potential cost to the defendant's lawyer is extremely high. Thus, as Justice Brennan observed, the fear of intentional error "is without basis" because "no rational lawyer would risk the 'sandbagging' feared by the Court." *Wainwright v. Sykes*, 433 U.S. 72,

102-03 (1977) (Brennan, J., dissenting). Indeed, Justice Brennan noted that "the Court points to no cases or commentary arising during the past 15 years" that support such a concern. *Id.* at 102. *Amici* are aware of no empirical studies controverting Justice Brennan's claim that have emerged in the intervening decades. In fact, four circuit courts and two state courts[6] have adopted a presumption of prejudice when ineffective assistance results in structural error with no apparent deleterious effects.

The "appellate parachute" is not a common occurrence, but in the few cases where it is unclear whether such a tactic has been used, granting defendants a new trial is far better than the alternative. However this Court decides to treat structural defects resulting from ineffective assistance of counsel, some "error" is inevitable. Either courts will grant a new trial based on the occasional *intentional* mistake, or courts will deny relief after *unintentional* mistakes. Equity clearly favors choosing the first option. Some party must bear the risk of structural error, but defendants should not bear all of it. Giving the benefit of the doubt to the defendant does not mean that a guilty man will go free; it simply means that the defendant will have the opportunity to vindicate his constitutional right to a fair trial. There are many checks preventing the widespread use of "appellate

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[6] *See Winston v. Boatwright*, 649 F.3d 618 (7th Cir. 2011); *Johnson v. Sherry*, 586 F.3d 439 (6th Cir. 2009); *Owens v. United States*, 483 F.3d 48, 64 (1st Cir. 2007); *McGurk v. Stenberg*, 163 F.3d 470, 475 (8th Cir. 1998); *Littlejohn v. United States*, 73 A.3d 1034 (D.C. 2013); *Montana v. Lamere*, 112 P.3d 1005 (Mont. 2005).

parachutes," and the responsibility of the courts to protect defendants' Sixth Amendment rights outweighs the risk that this practice may be used in a small minority of cases.

CONCLUSION

The crucial importance of safeguarding the public's trust in the justice system requires the legal profession to take seriously its professional duties to render effective assistance of counsel. This duty could not be more important than when a defendant's liberty is at stake. For the foregoing reasons, *amici* respectfully urge that the decision of the Supreme Judicial Court of Massachusetts be reversed.

Respectfully submitted,

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APPENDIX A

IDENTIY OF *AMICI CURIAE*[1]

Institutional *Amici*

The **Monroe H. Freedman Institute for the Study of Legal Ethics** at Hofstra University's Maurice A. Deane School of Law serves as a research center for the study of legal ethics. The Freedman Institute sponsors programs and conferences for scholarly inquiry and trains law students to take responsibility for serving others. The Freedman Institute seeks to focus the attention of law students, scholars, judges, and practitioners on today's most significant issues for the legal profession.

The **National Association for Public Defense** (NAPD) is an association of more than 14,000 professionals who deliver the right to counsel throughout all U.S. states and territories, including all staff providing legal representation through the Massachusetts Committee for Public Counsel Services (CPCS) as well as assigned counsel in the Commonwealth. NAPD members include attorneys, investigators, social workers, administrators, and other support staff who are responsible for executing the constitutional right to effective assistance of counsel. NAPD's members are advocates in jails, in courtrooms, and in communities and are experts in theoretical best practices as well as in the practical, day-to-day delivery of services. Their collective expertise represents state, county, and local systems through full-time, contract, and assigned counsel

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[1] The affiliations of the various *amici* are for identification purposes only, and the views expressed in this brief do not necessarily reflect the views of any associated institutions.

delivery mechanisms, dedicated juvenile, capital and appellate offices, and through a diversity of traditional and holistic practice models. NAPD provides webinar-based and other training to its members on the importance of providing vigorous defense advocacy in all phases of litigation, including preservation of trial error to secure the most optimal standard of review during any appellate or post-conviction phase of a case.

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