No. 16-240

In the Supreme Court of the United States

KENTEL MYRONE WEAVER, PETITIONER

v.

COMMONWEALTH OF MASSACHUSETTS

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
KENNETH A. BLANCO
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ANN O'CONNELL
Assistant to the Solicitor General
DAVID M. LIEBERMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a defendant who asserts a claim of ineffective assistance of trial counsel in failing to raise an objection that, if preserved, would constitute structural error must show prejudice in order to establish a violation of *Strickland* v. *Washington*, 466 U.S. 668 (1984).

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INTEREST OF THE UNITED STATES

This case presents the question whether a case-specific showing of prejudice is required to establish ineffective assistance of counsel under *Strickland* v. *Washington*, 466 U.S. 668 (1984), where defense counsel rendered deficient performance in failing to object to an error that would be structural on direct appeal. Because this Court's resolution of that question will affect federal criminal proceedings involving the same issue, the United States has a substantial interest in this case.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime

> shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT

Following a jury trial in the Superior Court of Massachusetts, petitioner was convicted of first-degree murder, in violation of Mass. Gen. Laws. ch. 265, § 1 (2016); and possession of a firearm without a license, in violation of Mass. Gen. Laws ch. 269, § 10(a) (2002). Pet. App. 42a. The trial court sentenced petitioner to life imprisonment on the murder charge and a concurrent term of one year to one year and one day of imprisonment on the firearm charge. *Ibid.*; J.A. 88. Five years after his conviction, petitioner moved for a new trial on the ground that his Sixth Amendment right to the effective assistance of counsel was violated when his attorney failed to object to the closure of the courtroom during jury selection. Pet. App. 1a-2a; see *Presley* v. *Georgia*, 558 U.S. 209, 213-215 (2010) (per curiam). The trial court denied relief. Pet. App. 42a-65a. The Supreme Judicial Court of Massachusetts affirmed. *Id.* at 1a-41a.

1. On August 10, 2003, 15-year-old Germaine Rucker went to Wendover Street in Boston, Massachusetts, to sell jewelry to a woman and her children. After buying jewelry from Rucker, the woman reentered her home and heard two gunshots. When she stepped back outside, she saw Rucker lying in the street on top of his bicycle. The woman's daughter had stayed outside. Just before the shooting, she saw

a group of males gathered at the corner of Dudley and Wendover Streets. The group rushed toward Rucker and began to fight with him. The daughter ran up the steps to her front door and heard two gunshots. Pet. App. 1a-3a.

A witness who lived nearby on Humphreys Street was sitting on his second-floor front porch when he heard gunshots from the direction of Wendover Street. He saw a young man run down Humphreys Street wearing dark jeans and trying to pull off one of his shirts. The young man stumbled and pulled a pistol with a flat handle and a long silver barrel from his pants leg. As this happened, a white baseball cap fell off the young man's head. Pet. App. 3a.

A ballistics expert concluded that the shell fragments recovered from Rucker's head and body were fired by a revolver, consistent with the witness's description of the gun carried by the young man seen running down Humphreys Street. The police retrieved the white baseball cap that had fallen from the suspect's head, and the hatband contained DNA that matched petitioner's profile. Pet. App. 3a-4a. The police also recognized the distinctive hat (a Detroit Tigers cap with airbrushed "Ds" on the sides) as belonging to petitioner from previous interactions with him. *Id.* at 3a, 12a. Petitioner confessed—first to his mother and then to the police—that he had shot Rucker. *Id.* at 1a, 15a-16a.

2. A grand jury in Suffolk County, Massachusetts, returned an indictment charging petitioner with first-degree murder, in violation of Mass. Gen. Laws ch. 265, § 1 (2016); and possession of a firearm without a license, in violation of Mass. Gen. Laws ch. 269, § 10(a) (2002). J.A. 94; see Pet. App. 1a.

At the beginning of trial, the trial court assembled a venire of approximately 90 people. Pet. App. 43a. The courtroom was "not quite large enough to accommodate everyone," forcing some prospective jurors to move into the hallway "to wait for open seats" after the judge gave initial instructions to everyone in the courtroom. *Id.* at 43a-44a (citation omitted). Petitioner's mother and other interested persons sought entry into the courtroom, but a court security officer explained that the courtroom was "closed for jury selection." *Id.* at 48a. At the end of the day, petitioner's mother told his counsel that she had been denied entry into the courtroom. *Id.* at 49a. Counsel did not object and later testified that he "believed that a courtroom closure for empanelment was constitutional and that an objection would [have been] futile." *Ibid.*

Jury selection continued into a second day, with venire members again waiting in the hallway because of crowding in the courtroom. Pet. App. 44a-45a. Petitioner's mother and another interested individual also were present at the courthouse on the second day of jury selection and were again told by a court officer not to enter the courtroom. *Id.* at 50a.

The case proceeded to trial. Having unsuccessfully moved to suppress petitioner's confession, the defense strategy at trial was to argue that petitioner's confession was involuntary and the result of coercion due to lengthy questioning by the police and petitioner's mother. Pet. App. 1a, 4a, 28a. On April 26, 2006, the jury found petitioner guilty on both counts. *Id.* at 5a, 42a. The trial court sentenced petitioner to life imprisonment on the murder charge and a concurrent term of one year to one year and one day of imprisonment on the firearm charge. *Id.* at 42a; J.A. 88.

3. In 2011, five years after the trial was complete, petitioner filed a motion for a new trial on the ground that, *inter alia*, his counsel provided ineffective assistance by failing to object to the closure of the courtroom during jury selection. Pet. App. 1a-2a, 38a. The trial court denied the motion. *Id.* at 42a-65a.

The trial court explained that "[t]he right to a public trial, granted by the Sixth Amendment[,] * * * extends to pretrial proceedings, including jury selection." Pet. App. 54a (citing *Presley*, 558 U.S. at 211-213). The court further explained that the right to a public trial is not absolute and that a court may exclude the public from the courtroom "[only for cause shown] that outweighs the value of openness." *Ibid.* (quoting *Press-Enter. Co.* v. *Superior Court*, 464 U.S. 501, 509 (1984)). After an evidentiary hearing, the trial court found that a court security officer had fully closed the courtroom to petitioner's family and the public due to the crowded conditions. Pet. App. 53a, 55a-57a; see *id.* at 38a-39a. The court concluded that those conditions did not justify closing the courtroom under the criteria announced in *Waller* v. *Georgia*, 467 U.S. 39 (1984). Pet. App. 58a-60a.[1]

The trial court concluded that counsel's failure to object to the closure "stemm[ed] from a misunderstanding of the law governing [petitioner's] right to a

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[1] The factors set out in *Waller*, the trial court explained, are (1) whether the party seeking to close the hearing can advance an overriding interest that is likely to be prejudiced; (2) whether the closure is no broader than necessary to protect that interest; (3) whether the trial court considered reasonable alternatives to closing the proceedings; and (4) whether the trial court made findings adequate to support the closure. Pet. App. 58a (citing *Waller*, 467 U.S. at 48).

public trial"; was "the product of 'serious incompetency, inefficiency, or inattention' to [petitioner's] Sixth Amendment right to a public trial"; and "was not objectively reasonable." Pet. App. 63a (citation omitted). The court further concluded, however, that counsel's performance did not cause prejudice warranting a new trial. *Id.* at 64a. The court noted that "violation of the right to a public trial is structural error" and that a defendant who has preserved such an error therefore "need not show prejudice to obtain a new trial." *Id.* at 54a-55a (citing *Commonwealth* v. *Downey*, 78 Mass. App. Ct. 224, 229, review denied, 458 Mass. 1110 (2010)). The court acknowledged that because defense counsel did not object to the courtroom closure, "[petitioner] is prejudiced in the sense that he cannot now claim the benefit of the presumption of prejudice from the structural error that occurred during the empanelment." *Id.* at 64a. The court concluded, however, that "prejudice must flow from a source other than the waiver itself," and it denied relief because "[petitioner] ha[d] not offered any evidence or legal argument establishing prejudice." *Ibid.*

4. The Supreme Judicial Court of Massachusetts consolidated petitioner's appeal of the denial of his new trial motion with his pending direct appeal and affirmed. Pet. App. 1a-41a. As relevant here, the court explained that "[a] violation of the Sixth Amendment right to a public trial constitutes structural error" and that "[w]here a meritorious claim of structural error is timely raised, the court presumes prejudice, and reversal is automatic." *Id.* at 39a (internal citations, quotation marks, and emphasis omitted). The court further explained, however, that

where a "defendant has procedurally waived his Sixth Amendment public trial claim by not raising it at trial, and later raises the claim as one of ineffective assistance of counsel in a collateral attack on his conviction, the defendant is required to show prejudice from counsel's inadequate performance (that is, a substantial risk of a miscarriage of justice) and the presumption of prejudice that would otherwise apply to a preserved claim of structural error does not apply." *Id.* at 40a (quoting *Commonwealth* v. *LaChance*, 17 N.E.3d 1101, 1104 (Mass. 2014), cert. denied, 136 S. Ct. 317 (2015) (emphasis omitted)). Because petitioner did "not advance[] any argument or demonstrate[] any facts that would support a finding that the closure subjected him to a substantial likelihood of a miscarriage of justice," the court held that petitioner was not entitled to relief. *Id.* at 40a-41a.

SUMMARY OF ARGUMENT

A. In *Strickland* v. *Washington*, 466 U.S. 668 (1984), this Court held that legal representation violates the Sixth Amendment if counsel's performance falls below an objective standard of reasonableness and the defendant suffers prejudice as a result. To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The prejudice component of *Strickland* reflects the purpose of the Sixth Amendment guarantee of counsel, which is to ensure that the defendant has the assistance of counsel necessary to justify reliance on the proceeding.

B. The Court has dispensed with a showing of prejudice in situations of actual or constructive denial of counsel on the ground that prejudice in those cir-

cumstances "is so likely that case-by-case inquiry into prejudice is not worth the cost." *Strickland*, 466 U.S. at 692. The Court has also recognized a limited presumption of prejudice where counsel is burdened by a conflict of interest arising from multiple concurrent representation, and the defendant can show that an actual conflict of interest adversely affected his lawyer's performance. In contrast to the above situations, none of which exists in petitioner's case, when counsel is present and no external circumstances constrain his performance, a defendant alleging that his counsel was constitutionally ineffective must show prejudice under *Strickland*.

C. Petitioner contends that the Court should dispense with *Strickland*'s prejudice requirement in cases where counsel's deficient performance results in a structural error, *i.e.*, an error not requiring a showing of prejudice if preserved and raised on direct appeal. That departure from *Strickland*'s prejudice requirement is unwarranted.

The occurrence of a structural error does not create circumstances similar to other scenarios where the Court has dispensed with a showing of prejudice. For example, courts conducting *Strickland* prejudice analysis have recognized that structural errors do not categorically lead to unreliable trial outcomes where the error caused by counsel's deficient performance is the denial of an impartial judge or the use of race-based peremptory strikes during jury selection. Petitioner's case, in which spectators were excluded from the courtroom during jury selection, illustrates that structural errors do not inevitably create circumstances where a different trial outcome is so likely that litigating prejudice case by case is unjustified.

Nor does the difficulty of proving the effect of a structural error justify dispensing with a showing of prejudice under *Strickland*. On direct appeal, a preserved claim of structural error results in automatic reversal without regard to the effect of the error on the outcome of trial. In that context, the court has already found a constitutional error, and the difficulty of proving the effect of the error leaves the government unable to satisfy its burden of showing the error was harmless beyond a reasonable doubt. But where counsel fails to raise a timely objection and the defendant later attempts to obtain relief for the structural error through an ineffective-assistance claim, the defendant has the burden to show prejudice as a necessary component of completing his Sixth Amendment claim. Identifying the effect of a structural error may be difficult, but if no reasonable likelihood exists that an objection would have changed the outcome of trial, then the defendant has suffered no unfairness that is protected by the Sixth Amendment right he asserts.

Strickland's guidance on how to conduct a case-specific prejudice analysis is flexible enough to encompass consideration of attorney errors that result in structural defects. Structural errors, including violation of the public-trial right, come in all shapes and sizes, and courts can consider prejudice to the defendant in a specific case based on the strength of the evidence supporting the verdict and whether the effect of the error was pervasive or isolated.

D. If the Court were to dispense with *Strickland*'s prejudice requirement in the case of structural errors, defendants would be able to evade procedural rules governing contemporaneous objections and to instead

raise ineffective-assistance claims in collateral proceedings where the judge and the prosecutor no longer have the ability to quickly remedy the perceived structural error. Dispensing with *Strickland*'s prejudice requirement would also undermine society's legitimate interest in the finality of judgments.

ARGUMENT

PETITIONER MUST SHOW THAT COUNSEL'S FAILURE TO OBJECT TO THE COURTROOM CLOSURE DURING JURY SELECTION PREJUDICED HIS DEFENSE

A. The Sixth Amendment's Guarantee Of Effective Assistance Of Counsel Is Offended Only Where The Criminal Defendant Suffers Prejudice From Counsel's Deficient Performance

In *Strickland* v. *Washington*, 466 U.S. 668 (1984), this Court held that "'legal representation violates the Sixth Amendment if it falls 'below an objective standard of reasonableness,' as indicated by 'prevailing professional norms,' and the defendant suffers prejudice as a result." *Chaidez* v. *United States*, 133 S. Ct. 1103, 1107 (2013) (quoting *Strickland*, 466 U.S. at 688). To establish prejudice, the "defendant must show * * * 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Ibid.* Where, as here, a criminal defendant challenges his convictions, the defendant satisfies that standard by showing that "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695.

"It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. Otherwise, "[v]irtually every act or omission of counsel would meet th[e] test," and "not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Ibid.* Nor does the defendant need to show "that counsel's deficient conduct more likely than not altered the outcome in the case." *Ibid.* Instead, the defendant's proof must "undermine confidence in the outcome" by demonstrating that an objectively "reasonabl[e], conscientious[], and impartial[]" decisionmaker might well have reached "a result more favorable to the defendant" absent counsel's error. *Id.* at 694-695. "[T]he ultimate focus of inquiry," the Court emphasized, "must be on the fundamental fairness of the proceeding whose result is being challenged," *id.* at 696, as informed by the objective merits of the defense strategy that counsel's errors foreclosed, see *id.* at 694-695.

The prejudice component reflects "[t]he purpose of the Sixth Amendment guarantee of counsel," which is to "ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Strickland*, 466 U.S. at 691-692. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. As this Court has explained, given the "purpose" of "the right to effective representation"—to "ensur[e] a fair trial"—"[c]ounsel cannot be 'ineffective' unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they

have)." *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 147 (2006).

B. The Court Has Dispensed With A Requirement Of Showing Prejudice Only In Very Limited Circumstances That Are Not Present In Petitioner's Case

1. Because counsel is presumed to be "competent to provide the guiding hand that the defendant needs," the burden rests on the defendant to show that his right to effective assistance of counsel has been violated. *United States* v. *Cronic*, 466 U.S. 648, 658 (1984). The Court has dispensed with a showing of prejudice in situations of actual or constructive denial of counsel or a conflict of interest arising from multiple concurrent representation. But absent those circumstances, when counsel is present and no external circumstances constrain his performance, a defendant alleging that his counsel was constitutionally ineffective must show prejudice under *Strickland*.

a. The Court has concluded that a defendant is not required to show prejudice when he has been actually or constructively denied the assistance of counsel at a critical stage of trial. *Strickland*, 466 U.S. at 692; see *Cronic*, 466 U.S. at 659 & n.25 (citing, *e.g.*, *Hamilton* v. *Alabama*, 368 U.S. 52, 54 (1961) (capital defendant was denied counsel at arraignment); *Williams* v. *Kaiser*, 323 U.S. 471, 474-476 (1945) (court accepted defendant's guilty plea after denying his request for counsel)). "[V]arious kinds of state interference with counsel[]" are also "legally presumed to result in prejudice." *Strickland*, 466 U.S. at 692; see *Cronic*, 466 U.S. at 659 n.25 (citing, *e.g.*, *Geders* v. *United States*, 425 U.S. 80, 91 (1976) (court prohibited defendant from consulting his counsel about anything during a 17-hour overnight recess in the trial between

his direct and cross-examination); *Herring* v. *New York*, 422 U.S. 853, 863-865 (1975) (court denied defense counsel the opportunity make a summation of evidence)). And no showing of prejudice is required where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659.

The Court has dispensed with a showing of prejudice in those circumstances on the ground that "[p]rejudice * * * is so likely that case-by-case inquiry into prejudice is not worth the cost." *Strickland*, 466 U.S. at 692; see *Cronic*, 466 U.S. at 658 (circumstances are "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified"). Where the defendant is denied counsel or the State interferes with counsel's assistance, the presumption of prejudice arises from the principle that "counsel's assistance is essential," and the absence of counsel thus "requires [a court] to conclude that a trial is unfair." *Cronic*, 466 U.S. at 659. And where counsel fails to subject the government's case to meaningful adversarial testing, the presumption is justified because that type of total breakdown in the role of counsel makes "the adversary process itself presumptively unreliable." *Ibid.*

b. The Court has also recognized a "similar, though more limited, presumption of prejudice" in cases where counsel was "burdened by an actual conflict of interest." *Strickland*, 466 U.S. at 692 (citing *Cuyler* v. *Sullivan*, 446 U.S. 335, 348-350 (1980)). A limited presumption is justified in those circumstances, the Court has explained, because counsel has "breache[d] the duty of loyalty, perhaps the most basic of counsel's duties," *ibid.*, and because of "the high probability of

prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice," *Mickens* v. *Taylor*, 535 U.S. 162, 175 (2002). A conflict of interest does not create a *per se* rule of prejudice. Rather, "[p]rejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Strickland*, 466 U.S. at 692 (quoting *Cuyler*, 446 U.S. at 350).

c. The Court identified the above categories in the process of defining ineffective assistance of counsel. Those categories of pervasive or fundamental denials of counsel, however, are distinct from ineffective-assistance claims targeting specific areas of attorney performance. See *Perry* v. *Leeke*, 488 U.S. 272, 279-280 (1989) (explaining that the Court's discussion in *Strickland* of denial-of-counsel cases was "intended to make clear that '[a]ctual or constructive denial of the assistance of counsel altogether' * * * is not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective.") (brackets in original) (quoting *Strickland*, 466 U.S. at 692). In contrast to claims of actual or constructive denial of counsel, ineffective-assistance claims "alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." *Strickland*, 466 U.S. at 693. "Even if a defendant shows that particular errors of counsel were unreasonable," the Court explained, "the defendant must show that they actually had an adverse effect on the defense." *Ibid.*

2. Petitioner's ineffective-assistance claim does not fall within any of the categories recognized in *Strickland* where no showing of prejudice is required. Petitioner's counsel was present for the entire proceeding and no external circumstances constrained his advocacy. Nor did counsel "entirely fail[] to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659. Defense counsel was "a very experienced and highly regarded defense attorney" who had handled more than 100 murder trials. Pet. App. 27a-28a. His deficient performance occurred at a single point—during jury selection—and not throughout the entire trial. As the Court explained in *Bell* v. *Cone*, 535 U.S. 685 (2002), "[w]hen we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete." *Id.* at 696-697. And, finally, petitioner does not contend that his trial counsel was burdened by any conflict of interest that would trigger the more limited presumption of prejudice recognized in *Cuyler*. See *Strickland*, 466 U.S. at 692.

C. The Court Should Not Dispense With *Strickland*'s Prejudice Requirement Where Counsel's Deficient Performance Results In A Structural Error

Petitioner contends (Br. 20-26) that the Court should dispense with *Strickland*'s prejudice requirement in cases where counsel's deficient performance results in a structural error, *i.e.*, an error not requiring a showing of prejudice if preserved and raised on direct appeal. He contends (*ibid.*) that a presumption of unreliability—akin to a *Cronic* error—should arise in those circumstances and that he therefore should be relieved of showing prejudice in this case, where

his attorney's error resulted in a violation of the public-trial right. That departure from *Strickland*'s prejudice requirement is unwarranted.

1. Deficient attorney performance that results in structural error does not necessarily undermine the reliability of the trial outcome

In arguing for an exemption from *Strickland*'s prejudice requirement, petitioner relies on cases (Br. 21-25) in which this Court has described structural errors in general as violations of constitutional protections without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991) (citation omitted); *Neder* v. *United States*, 527 U.S. 1, 8-9 (1999) (citation omitted); see *Sullivan* v. *Louisiana*, 508 U.S. 275, 281-282 (1993). The occurrence of a structural error, however, does not create circumstances similar to other scenarios where the Court has dispensed with a showing of prejudice, *i.e.*, circumstances that 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.

a. The Court has distinguished between two types of constitutional errors. A "trial error" is a discrete error that "occur[s] during [the] presentation of the case to the jury." *Gonzalez-Lopez*, 548 U.S. at 148 (quoting *Fulminante*, 499 U.S. at 307). A "'structural' error," on the other hand, refers to a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Johnson* v. *United States*, 520 U.S. 461, 468 (1997) (quoting *Fulminante*, 499 U.S. at 310). The Court "ha[s] found structural errors only in a very limited class of cases,"

ibid., in which it is typically "difficult to assess the effect of the error," *United States* v. *Marcus*, 560 U.S. 258, 263 (2010) (brackets and internal quotation marks omitted) (quoting *Gonzalez-Lopez*, 548 U.S. at 149 n.4).

Constitutional trial defects found by this Court to be structural errors include: a total deprivation of counsel, see *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); the denial of an impartial judge, see *Tumey* v. *Ohio*, 273 U.S. 510 (1927); the denial of a defendant's right to represent himself at trial, see *McKaskle* v. *Wiggins*, 465 U.S. 168 (1984); a violation of a defendant's right to a public trial, see *Waller* v. *Georgia*, 467 U.S. 39 (1984); racial discrimination in the selection of the grand jury, *Vasquez* v. *Hillery*, 474 U.S. 254 (1986); an erroneous instruction on reasonable doubt that affected all of a jury's findings, see *Sullivan*, 508 U.S. at 275; and the denial of the right to be represented by retained counsel of choice, see *Gonzalez-Lopez*, 548 U.S. at 150. See *Marcus*, 560 U.S. at 263-264; *Gonzalez-Lopez*, 548 U.S. at 149-150; *Neder*, 527 U.S. at 8; *Johnson*, 520 U.S. at 468-469; see also *Williams* v. *Pennsylvania*, 136 S. Ct. 1899 (2016) (participation of a biased judge on a multi-member panel); *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 809-814 (1987) (plurality opinion) (appointment of an interested party as contempt prosecutor). The Court has also recognized a non-constitutional structural error where a magistrate judge presides over jury selection in a felony trial over the defendant's objection. See *Gomez* v. *United States*, 490 U.S. 858, 873-875 (1989).

b. Courts conducting *Strickland* prejudice analysis have recognized that structural errors do not categor-

ically lead to unreliable trial outcomes but can be analyzed for case-specific prejudice.[2] For example, the Eleventh Circuit found no reasonable probability of a different trial outcome in a case where a judge had conducted a "private investigation[]" into extra-record and *ex parte* materials, because the jury "never had access to information beyond the record" and the judge's consideration of additional materials did not "alter[] the strong evidence pointing to [the defendant's] culpability." *Vining* v. *Secretary*, 610 F.3d 568, 574-575 (2010), cert. denied, 563 U.S. 977 (2011). The Third Circuit, in contrast, found a reasonable probability that counsel's failure to request recusal of a biased trial judge affected the outcome of the trial where the judge conducted a bench trial and "[t]here [wa]s evidence in the record from which an impartial judge could have found a lesser degree of homicide." *McKernan* v. *Superintendent Smithfield SCI*, 849 F.3d 557, 567 (2017).

The Eighth Circuit has concluded that defense counsel's failure to object to a prosecutor's race-based peremptory strikes of jurors did not constitute ineffective assistance because the defendant had "not shown a reasonable probability that the results of the proceeding would have been different" had counsel objected and the African American jurors been seat-

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[2] As the Court has recognized, trial errors may be classified as structural for a variety of reasons, including the difficulty of assessing the error; fundamental unfairness caused by the error; or "the irrelevance of harmlessness," such as in cases where the defendant has been denied the right to self-representation—a right that, when exercised, usually increases the likelihood of an undesirable trial outcome. *Gonzalez-Lopez*, 548 U.S. at 149 n.4. Structural errors do not "*always* or *necessarily* render a trial fundamentally unfair and unreliable." *Ibid.*

ed. *Young* v. *Bowersox*, 161 F.3d 1159, 1161 (1998), cert. denied, 528 U.S. 880 (1999). The court explained that if the jurors who were seated were impartial, then no reasonable probability of a different trial outcome existed had the violation of *Batson* v. *Kentucky*, 476 U.S. 79 (1986), not occurred. *Bowersox*, 161 F.3d at 1161 (citing *Wright* v. *Nix*, 928 F.2d 270, 274 (8th Cir.) (Arnold, J., concurring), cert. denied, 502 U.S. 838 (1991)). The Eleventh Circuit has similarly concluded that, despite counsel's deficient performance in failing to raise an objection, the result of a trial was reliable even though the prosecution had used preemptory strikes to exclude African Americans from the jury. *Jackson* v. *Herring*, 42 F.3d 1350, 1362, cert. dismissed, 515 U.S. 1189 (1995). The court explained that it "would have more confidence in the verdict had it been delivered by a constitutionally composed jury, with both black and white members." *Ibid.* But having conducted a thorough review of the record, the court found no reasonable probability of a different outcome no matter who sat on the jury. *Ibid.*

c. Petitioner's case demonstrates rather clearly that structural errors do not inevitably create circumstances where a different trial outcome is so likely that litigating prejudice in every case is unjustified. The error in petitioner's case does not implicate any of the reasons why closed-courtroom trials are thought to be unreliable mechanisms for determining guilt or innocence. The public-trial right protects against perjury, as witnesses are more likely to tell the truth in a public and solemn tribunal than in a secret proceeding. Pet. Br. 16-17 (citing *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 421 (1979) (opinion of Blackmun, J.)). But that concern is not implicated here. The

courtroom was open to the public during the presentation of evidence to the jury, and no witness testified during jury selection. Public trials also help to ensure the reliability of criminal trials by "induc[ing] unknown witnesses to come forward with relevant testimony." *Id.* at 17 (quoting *Gannett*, 443 U.S. at 382). But again, petitioner's trial was open to the public after the jury was selected and observers had the opportunity to learn about the government's evidence against petitioner and to come forward with any additional information they might have about the crime.

The public-trial right also serves to keep a defendant's "triers keenly alive to a sense of their responsibility and to the importance of their functions." *Waller*, 467 U.S. at 46 (citation omitted); Pet. Br. 17. It is theoretically possible that the exclusion of members of the public from the courtroom during jury selection caused the judge, prosecutor, or potential jurors to be less conscientious or sensitive to the importance of their roles (although that seems highly unlikely given that all seats in the courtroom were filled with members of the community who were observing and participating in the jury selection process). That theoretical possibility is an insufficient foundation on which to ground a claim that, had counsel objected to the closure, a different trial outcome "is so likely that case-by-case inquiry into prejudice is not worth the cost." *Strickland*, 466 U.S. at 692. As explained in *Strickland*, "not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Id.* at 693.

Petitioner notes (Br. 17-18, 30-32) that the public-trial right also protects the rights of the public by giving the criminal-justice system the appearance of

fairness and by satisfying the community's need to see that justice is being done. Those important underpinnings of the public-trial right have no bearing on a *Strickland* prejudice analysis, which is concerned only with whether counsel's errors affected the jury's guilty verdict. 466 U.S. at 694. Petitioner acknowledges (Br. 17) that these broader societal interests do not protect the accused's right to a fair trial.

***2. The difficulty of proving the effect of a structural error does not justify dispensing with a showing of prejudice under* Strickland**

Petitioner further contends (Br. 26-29) that no showing of case-specific *Strickland* prejudice should be required because the effect of a structural error on a trial is difficult to prove. He notes (Br. 19-20, 27-28) that in the harmless-error context, *i.e.*, the standard used to review preserved claims of structural error on direct appeal, this Court has not conducted a case-specific inquiry into whether the error harmed the defense. The difficulty of proving the effect of structural error does not justify dispensing with a showing of prejudice under *Strickland*.

a. Whether a defect qualifies as "structural error" affects the manner in which an appellate court reviews a defendant's criminal conviction on direct appeal. This Court has explained that "most constitutional errors can be harmless," *Neder*, 527 U.S. at 8 (quoting *Fulminante*, 499 U.S. at 306), meaning that a constitutional error does not justify reversal if the government demonstrates that its influence on the jury's verdict was "harmless beyond a reasonable doubt," *Chapman* v. *California*, 386 U.S. 18, 24 (1967); see *Gonzalez-Lopez*, 548 U.S. at 148; see also Fed. R. Crim. P. 52(a). Structural errors, by contrast, "defy

analysis by 'harmless-error' standards" because they "affec[t] the framework within which the trial proceeds" and are not "simply an error in the trial process itself." *Gonzalez-Lopez*, 548 U.S. at 148 (quoting *Fulminante*, 499 U.S. at 309-310) (brackets in original).

This Court has described the effect of structural errors as being "unmeasurable," "unquantifiable," and "indeterminate." *Sullivan*, 508 U.S. at 281-282; see *Vasquez*, 474 U.S. at 263-264. Accordingly, on direct appeal, a preserved claim of structural error results in "automatic reversal * * * without regard to [its] effect on the outcome." *Neder*, 527 U.S. at 7.[3]

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[3] The harmless-error standard applies only where the defendant lodged a timely objection at trial, thereby preserving the claim for appellate review. See, *e.g.*, *Neder*, 527 U.S. at 7. If the defendant fails to contemporaneously object, he forfeits the claim and, in federal court, may obtain relief on appeal only by satisfying the rigorous requirements of the plain-error standard. See Fed. R. Crim. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."). To warrant relief under that rule, a defendant must establish (1) an error that (2) was "plain," "clear," or "obvious" and (3) "affect[ed] [his] substantial rights." *United States* v. *Olano*, 507 U.S. 725, 732-734 (1993) (citations omitted). If those conditions are met, "an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *United States* v. *Cotton*, 535 U.S. 625, 631-632 (2002) (quoting *Johnson*, 520 U.S. at 467) (citations omitted; brackets in original).

A defendant seeking to satisfy *Olano*'s third prong "[n]ormally * * * must make a specific showing of prejudice"—that is, a showing that the error "affected the outcome of the district court proceedings." 507 U.S. at 734-735. Since *Olano*, the Court has not exempted any forfeited error from the general rule that a defendant must make a specific showing of actual prejudice to establish an

b. The rule of automatic reversal for structural errors in harmless-error analysis does not justify relieving a defendant from showing actual prejudice under *Strickland*. When a court conducts harmless-error analysis on direct appeal, the court has already concluded that a constitutional error occurred, and the defendant has preserved an objection to that error. *Neder*, 527 U.S. at 7; *Chapman*, 386 U.S. at 24; see *Presley* v. *Georgia*, 558 U.S. 209, 210, 213-215 (2010) (per curiam) (preserved objection to closure of courtroom during voir dire); *Waller*, 467 U.S. at 42, 48-49 & n.9 (preserved objection to closure of courtroom during suppression hearing); cf. *Gonzalez-Lopez*, 548 U.S. at 150 ("A choice-of-counsel violation occurs *whenever* the defendant's choice is wrongfully denied."). The question then becomes whether "the State c[an] show 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Sullivan*, 508 U.S. at 279 (quoting *Chapman*, 386 U.S. at 24). The government cannot satisfy that burden in the case of a structural error because "the effect of the violation cannot be ascertained." *Vasquez*, 474 U.S. at 263. The defendant is thus automatically entitled to appropriate relief irrespective of whether he suffered any prejudice from the violation. *Sullivan*, 508 U.S. at 279.

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effect on his substantial rights. The Court has, however, "declined to resolve whether 'structural' errors * * * automatically satisfy th[is] * * * prong of the plain-error test." *Puckett* v. *United States*, 556 U.S. 129, 140 (2009). The Court avoided that question in two cases by concluding that, where the evidence against a defendant is overwhelming, the defendant could not satisfy *Olano*'s fourth prong. *Cotton*, 535 U.S. at 632-633; *Johnson*, 520 U.S. at 469-470.

But where counsel fails to raise a timely objection and the defendant later claims that the failure to object violated his Sixth Amendment guarantee of the effective assistance of counsel, the court must assess whether "a violation of the right to effective representation *occurred*," which requires a showing of prejudice. *Gonzalez-Lopez*, 548 U.S. at 150. "The requirement that a defendant show prejudice in effective representation cases arises from the very nature of the specific element of the right to counsel at issue there—*effective* (not mistake-free) representation." *Id.* at 147. Accordingly, "a violation of the Sixth Amendment right to effective representation is not 'complete' until the defendant is prejudiced." *Ibid.*; *Lockhart* v. *Fretwell*, 506 U.S. 364, 369 n.2 (1993) ("Harmless-error analysis is triggered only *after* the reviewing court discovers that an error has been committed. And under *Strickland* * * * , an error of constitutional magnitude occurs in the Sixth Amendment context only if the defendant demonstrates (1) deficient performance and (2) prejudice.").

The difficulty of identifying the effect of a structural error may present challenges for a defendant seeking to establish that his counsel's failure to object to a structural error caused him prejudice. See *Sullivan*, 508 U.S. at 282 (harms from structural errors are often "unquantifiable and indeterminate"). That difficulty will frequently be present where the structural error was a violation of the right to a public trial. See *Waller*, 467 U.S. at 49 n.9 ("[T]he benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance."). But that possibility does not justify relieving criminal defendants of the obligation to demonstrate prejudice in the absence of "circum-

stances that 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.

In the case of preserved claims of structural error challenged on direct appeal, the unknown effect on the outcome of trial works against the government, because the government is unable to show that the error was harmless beyond a reasonable doubt. But the tables are turned when the defendant bears the burden of showing prejudice from counsel's deficient performance. There, the difficultly of proving the effect of a structural error may leave the defendant unable to satisfy his burden of proving prejudice. The Court has made clear, however, that in the *Strickland* prejudice analysis, "[i]t is not enough for the defendant to show that [an] error[] had some conceivable effect on the outcome of the proceeding." 466 U.S. at 693.[4]

The prejudice component of *Strickland* serves "[t]he purpose of the Sixth Amendment guarantee of counsel," which is to "ensure that a defendant has the assistance necessary to justify reliance on the out-

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[4] Petitioner skips over this burden-shifting problem by describing the burden in harmless-error analysis as being on the defendant to show that "the violation 'contribute[d] to the verdict obtained.'" Br. 3 (quoting *Sullivan*, 508 U.S. at 279) (brackets in original). He reasons (Br. 28) that because prejudice is presumed for structural errors in that context based on difficulty of proof, prejudice should be presumed under *Strickland* for the same reason. The government, however, has the burden to prove harmlessness in the harmless-error context. See *Sullivan*, 508 U.S. at 279 (question in harmless-error analysis is whether "*the State* c[an] show 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'") (citation omitted; emphasis added). The defendant bears the burden to show prejudice under *Strickland*.

come of the proceeding." 466 U.S. at 691-692. If no reasonable likelihood exists that an objection would have changed the outcome of trial, then the defendant has suffered no unfairness that is protected by the Sixth Amendment right he asserts. See *Gonzalez-Lopez*, 548 U.S. at 147.

c. Finally, the Court should reject the premise (Pet. Br. 19-20, 26-29) that it will always be impossible for a defendant to show case-specific prejudice under *Strickland* where a structural error has occurred. *Strickland*'s guidance on how to conduct a case-specific prejudice analysis is flexible enough to encompass consideration of attorney errors that result in structural defects. The Court explained that, in making the case-specific prejudice determination, "a court * * * must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. "Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture," the Court explained, "and some will have had an isolated, trivial effect." *Id.* at 695-696. And "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696. Structural errors appear in a variety of shapes and sizes and can be evaluated on a case-by-case basis using those guidelines.

d. With respect to the public trial right in particular, a trial might be conducted completely in secret; the courtroom may be closed only for jury selection or a pre-trial suppression motion (see *Presley*, 558 U.S. at 213-215; *Waller*, 467 U.S. at 46); or the courtroom may be partially or fully closed during the testimony of one trial witness (see, *e.g.*, *United States* v. *Char-*

boneau, No. 09-cr-7, 2011 WL 5040717, at *5 (D.N.D. 2011) (collecting cases where courtroom was closed to protect sexual assault victims), aff'd, 702 F.3d 1132 (8th Cir. 2013); *Owens* v. *United States*, 483 F.3d 48, 62 (1st Cir. 2007) ("Most justifications for trial closure have involved the need to protect witnesses or maintain courtroom order.") (citing *United States* v. *Sherlock*, 962 F.2d 1349, 1356 (9th Cir.) (collecting cases), cert. denied, 506 U.S. 958 (1992); *Purvis* v. *Crosby*, 451 F.3d 734, 735 (11th Cir.) (courtroom cleared of "most of the public" during victim testimony in a child molestation case), cert. denied, 549 U.S. 1035 (2006); *People* v. *Jones*, 391 N.E.2d 1335, 1337-1338 (N.Y.) (courtroom closed during testimony of undercover police officer), cert. denied, 444 U.S. 946 (1979)). If any such closure is found to be unjustified, courts can consider prejudice to the defendant on a case-by-case basis based on "the totality of the evidence before the judge or jury," whether the error "had a pervasive effect on the inferences to be drawn from the evidence" or instead had only an "isolated" effect, and the strength of the evidence supporting the verdict. *Strickland*, 466 U.S. at 695-696.

D. Petitioner's Proposed Framework Evades Established Rules Governing Waiver And Forfeiture Of Issues Not Presented At Trial

The Court has applied the *Strickland* standard, including its prejudice component, "with scrupulous care" because otherwise "[a]n ineffective-assistance claim can function as a way [for defendants] to escape rules of waiver and forfeiture and raise issues not presented at trial." *Harrington* v. *Richter*, 562 U.S. 86, 105 (2011). Petitioner's call to abandon *Strickland*'s prejudice inquiry in the case of structural er-

rors contravenes that principle by allowing defendants to evade procedural rules governing contemporaneous objections and to instead raise claims in collateral proceedings where the judge and the prosecutor no longer have the ability to quickly remedy the perceived structural error.

1. State prisoners seeking federal habeas review of their convictions under 28 U.S.C. 2254 must generally present their constitutional claims to state courts for resolution. If not, the claims are procedurally defaulted, and federal habeas relief is foreclosed unless the prisoner further demonstrates "cause" for the default and "prejudice" from it. *Edwards* v. *Carpenter*, 529 U.S. 446, 451 (2000). The same rule of preservation in the trial court applies to federal prisoners seeking post-conviction relief under 28 U.S.C. 2255. See *Bousley* v. *United States*, 523 U.S. 614, 622 (1998).

The Court has held that "prejudice" in this setting means "actual prejudice." *United States* v. *Frady*, 456 U.S. 152, 168 (1982). Federal courts may grant relief only where the procedurally defaulted claim "worked to [the defendant's] *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* at 170. This standard imposes "a significantly higher hurdle" than would exist had the defendant preserved his claim for review on direct appeal. *Id.* at 166.

Under that framework, a defendant seeking to raise a procedurally defaulted claim of structural error in a post-conviction proceeding must show "actual prejudice" from that error. *Francis* v. *Henderson*, 425 U.S. 536 (1976), illustrates that principle. There, the petitioner had alleged a structural error—namely, that African Americans had been systemati-

cally excluded from the grand jury in his case. See *Vasquez*, 474 U.S. at 262-263. He procedurally defaulted that claim for purposes of federal habeas review because he did not raise any objection before the trial court or the state appellate courts. See *Francis*, 425 U.S. at 537-538. This Court refused to excuse the procedural default. It explained that, "[i]n a collateral attack upon a conviction[,] th[e] rule requires * * * not only a showing of 'cause' for the defendant's failure to challenge the composition of the grand jury before trial, but also a showing of actual prejudice." *Id.* at 542.

The Court in *Francis* recognized that the petitioner could have obtained relief without a showing of prejudice if he had properly preserved and presented his claim challenging the composition of the grand jury to the state courts. But where a claim has not been properly preserved, "[t]he presumption of prejudice which supports the existence of the right is not inconsistent with a holding that actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner." 425 U.S. at 542 n.6 (quoting *Davis* v. *United States*, 411 U.S. 233, 245 (1973)).

2. a. The standard for prejudice in a procedural default analysis is at least as onerous for a defendant as the standard for prejudice under *Strickland*. Cf. *Strickler* v. *Greene*, 527 U.S. 263, 282 (1999) (unless undisclosed information is "material" under *Brady* v. *Maryland*, 373 U.S. 83 (1963), suppression could not cause "prejudice" sufficient to overcome procedural default). The Court's refusal to relax the "actual prejudice" condition for structural errors in the pro-

cedural-default setting, *Francis*, 425 U.S. at 542, should apply equally to *Strickland* prejudice.

A contrary result would offer defendants an easy path to "escape rules of waiver and forfeiture." *Harrington*, 562 U.S. at 105. "Any defendant who could not make the prejudice showing necessary to have a defaulted claim of structural error considered could bypass that requirement by merely dressing th[e] claim in ineffective assistance garb and asserting that prejudice must be presumed." *Purvis*, 451 F.3d at 743. It is true that a *Strickland* claim requires a showing of deficient performance, which is a high hurdle. But in cases of obvious structural error, dispensing with a showing of prejudice under *Strickland* would bypass *Francis*, incentivizing defendants to funnel procedurally defaulted structural-error claims into the *Strickland* framework.

b. More fundamentally, the prejudice component of procedural default and *Strickland* advances "society's legitimate interest in the finality of the judgment." *Frady*, 456 U.S. at 164; see *Strickland*, 466 U.S. at 693 (emphasizing "the profound importance of finality in criminal proceedings"). In the criminal justice system, the trial is a "decisive and portentous event" during which "the accused is in the courtroom, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify." *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977). "To the greatest extent possible all issues which bear on th[e] [criminal] charge should be determined in this proceeding." *Ibid.*

Where a defendant contemporaneously objects to a perceived structural error, the trial court can respond immediately. "That court is ordinarily in the best

position to determine the relevant facts and adjudicate the dispute." *Puckett* v. *United States*, 556 U.S. 129, 134 (2009). If no violation is found, the proceedings can continue apace. Alternatively, the court "can often correct or avoid the mistake so that it cannot possibly affect the ultimate outcome." *Ibid.* In this case, for instance, had a timely objection to the courtroom closure been lodged, the trial court could have amended its procedures to accommodate the spectators who wished to observe jury selection.

But where the defendant raises a structural-error objection for the first time years later in a post-conviction motion, the costs to the system are significant. Courts cannot necessarily conduct a full inquiry into the facts relevant to the objection. In this case, for example, the trial judge had retired in the time between the trial and petitioner's new-trial motion and he "ha[d] no memory of the empanelment process." Pet. App. 48a n.3. Two court security officers assigned to the case likewise lacked "any specific memory of the empanelment or the case." *Id.* at 50a. And, if relief were granted, the passage of time—13 years in this case—impairs the prospect of retrial. "[T]he erosion of memory and dispersion of witnesses * * * prejudice the government and diminish the chances of a reliable criminal adjudication." *McCleskey* v. *Zant*, 499 U.S. 467, 491 (1991) (citation and internal quotation marks omitted). *Strickland* sanctions that outcome in only cases where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the [original] proceeding would have been different." 466 U.S. at 694.

The Court has cautioned that "[c]ases involving Sixth Amendment deprivations," no less than cases

involving other constitutional rights, "are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). Granting *Strickland* relief to a defendant who has not shown a reasonable probability that he would not have been convicted absent the error would infringe, entirely unnecessarily, on an interest that *Strickland* identified as one of "profound importance"—the interest in "finality in criminal proceedings." 466 U.S. at 693-694. As the Court has explained, "[e]very inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice." *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979) (citation omitted). *Strickland*-based attacks on a criminal judgment are therefore limited to attorney errors that affected the outcome of a criminal proceeding.

3. In petitioner's case, the Commonwealth presented to the jury, *inter alia*, eyewitness testimony; ballistics evidence showing that the gun that killed Rucker matched the description of a gun carried by a young man who lost his hat while running down the street after gunshots were fired; DNA evidence showing that the hat belonged to petitioner; and evidence that petitioner had confessed to the crime. No reasonable probability exists that the outcome of petitioner's trial would have been any different had petitioner's mother or other members of the public been admitted to the courtroom during jury selection. It is difficult to conceive of any way in which the courtroom

closure in this case could have affected the outcome of trial, and petitioner has never tried to make such a showing. This case exemplifies just how disruptive that departure from *Strickland* would be and illustrates why it should be rejected.

CONCLUSION

The judgment of the Supreme Judicial Court of Massachusetts should be affirmed.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
KENNETH A. BLANCO
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ANN O'CONNELL
Assistant to the Solicitor General
DAVID M. LIEBERMAN
Attorney

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