No. 16-240

In The
Supreme Court of the United States

KENTEL MYRONE WEAVER,

Petitioner,

v.

MASSACHUSETTS,

Respondent.

On Writ Of Certiorari To The Massachusetts Supreme Judicial Court

BRIEF OF THE STATE OF ARKANSAS, STATE OF ALABAMA, STATE OFARIZONA, STATE OF COLORADO, STATE OF CONNECTICUT, STATE OF DELAWARE, STATE OF FLORIDA, STATE OF GEORGIA, STATE OF HAWAII, STATE OF IDAHO, STATE OF INDIANA, STATE OF KANSAS, COMMONWEALTH OF KENTUCKY, STATE OF LOUISIANA, STATE OF MAINE, STATE OF MARYLAND, STATE OF MICHIGAN, STATE OF MISSISSIPPI, STATE OF MISSOURI, STATE OF MONTANA, STATE OF NEBRASKA, STATE OF NEVADA, STATE OF NEW MEXICO, STATE OF NORTH CAROLINA, STATE OF NORTH DAKOTA, STATE OF OHIO, STATE OF OKLAHOMA, COMMONWEALTH OF PENNSYLVANIA, STATE OF RHODE ISLAND, STATE OF SOUTH CAROLINA, STATE OF SOUTH DAKOTA, STATE OF TENNESSEE, STATE OF TEXAS, STATE OF UTAH, STATE OF WASHINGTON, STATE OF WEST VIRGINIA, STATE OF WISCONSIN, AND STATE OF WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI* STATES

The 38 *Amici* States have important interests that could be affected by the Court's decision. We have a keen interest – from both a law enforcement and public fisc perspective – in the finality of criminal proceedings. We also have a keen interest – on behalf of our governments and on behalf of our citizens – in the proper application of the Sixth Amendment's right to Assistance of Counsel. The preservation of the *Strickland* standard and the rejection of the incredibly broad presumption of prejudice being proposed by Petitioner are critical to maintaining the proper balance between the interests of finality and the interests of reliably accurate trials reflected in the Sixth Amendment's guarantee of counsel. Finally, as detailed by the certiorari-stage *amicus* brief supporting Petitioner, the Court's decision in this ineffective assistance of counsel case will likely guide how lower courts address various types of collateral attacks of state convictions in federal court. Federalism concerns make it important for us to ensure that the law in this area continues to strictly circumscribe the circumstances in which a federal court may second-guess a state conviction.

INTRODUCTION AND SUMMARY OF ARGUMENT

Even the most ardent supporters of the most robust conception of the Sixth Amendment right to counsel concede that the right has expanded far beyond its

original confines. *See* John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 Harv. C.R.-C.L. L. Rev. 1, 8 (2013) ("It is generally understood . . . that the drafters did not intend to afford those charged with crimes an affirmative right to counsel, but rather the right to retain counsel at their own expense."); *Accord Scott v. Illinois*, 440 U.S. 367, 370 (1979) ("There is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense.") (citation omitted). The modern expansion of the right to counsel required this Court to strike a delicate balance between this right and other critical aspects of our justice system – namely finality. The Court struck this essential balance in *Strickland v. Washington*, 466 U.S. 668 (1984) and *United States v. Cronic*, 466 U.S. 648 (1984).

Petitioner seeks to undo the balance crafted by this Court in *Strickland* and *Cronic*. In doing so, Petitioner is attempting to wield the outer reaches of the right to counsel as a bludgeon against the long-standing and important interests of the states, the federal government, and the justice system itself in finality. Importing a wide-ranging presumption of prejudice into the *Strickland* test would seriously undermine the contemporaneous objection requirement, invite second and third bites at the apple in cases of waived structural error, and encroach on the independence and dignity of state courts. This Court should decline to take

such a leap. *Cf. Scott*, 440 U.S. at 372 ("As a matter of constitutional adjudication, we are, therefore, less willing to extrapolate an already extended line when, although the general nature of the principle sought to be applied is clear, its precise limits and their ramifications become less so.").

In Part I of this brief, *Amici* States analyze the intentional middle-path chosen in *Strickland* and *Cronic* to resolve the tension between constitutional fairness and finality. Vital to this endeavor was the Court's adoption of its two-pronged test to determine whether a particular error of counsel amounted to a Sixth Amendment violation. The Court particularly emphasized the importance of the prejudice prong to this determination. And it rejected the notion of allowing a legal presumption of prejudice except in an extremely narrow, limited, and defined set of circumstances – none of which are at issue in this case.

In Part II of this brief, *Amici* States argue for the preservation of the balance struck in *Strickland* and *Cronic*. Petitioner's position – that the Court should automatically presume prejudice whenever counsel's deficiency results in an error that this Court has previously classified as structural – conflates and undermines the essential distinctions between direct review and collateral attack. A greatly-expanded number of categories where prejudice is automatically presumed for purposes of *Strickland* would subvert the contemporaneous objection rule, incentivize gamesmanship by defense counsel, and significantly undermine the

finality of criminal convictions. The context of a collateral attack strongly counsels that each specific alleged error (and not the far more abstract "category of error") should be judged on its own terms and in the context of the specific proceedings at issue.

In this case, prejudice should not be presumed from the closure of the jury selection process, especially where a public transcript of the proceedings exist. And Petitioner admits that he provided no evidence of prejudice whatsoever. *Amici* States therefore request that this Court find in favor of Respondent, the Commonwealth of Massachusetts.

ARGUMENT

I. *Strickland v. Washington* and *United States v. Cronic* represent an important balance between finality and constitutional fairness.

In *Strickland* and *Cronic*, this Court labored to reasonably cabin the enlarged right to counsel in a way that balanced the animating purpose of the right with the need to prevent the right from swallowing the rules of waiver and finality. After setting forth the now-familiar two-prong test and placing significant parameters on the deficiency prong, the Court explained that a constitutional violation of the Sixth Amendment does not occur unless "any deficiencies in counsel's performance [are] prejudicial to the defense." *See Strickland*, 466 U.S. at 692. The Court concluded that the prejudice requirement comported with "the purpose of the Sixth

Amendment guarantee of counsel," which the Court explained is to "ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Id.* at 691-92. The Court also concluded that the prejudice requirement was necessary to identify which failures of counsel "are sufficiently serious to warrant setting aside the outcome of [a] proceeding." *Id.* at 693.

With respect to the prejudice prong, the Court set forth two important points of law that have survived the last 30-plus years. *First*, the Court formulated a middle-ground test for prejudice. *See id.* at 693-94. The Court rejected the "impaired the presentation of [a] defense" standard as too low because "not every error that conceivably could have influenced the outcome undermines the reliability of the result of [a] proceeding." *Id.* at 693. At the same time, the Court rejected as too high a requirement that the defendant show "counsel's deficient conduct more likely than not altered the outcome [of] the case." *See id*. at 693-94. The Court explained that such a standard is inappropriate where the defendant is asserting "the absence of one of the crucial assurances that the result of the proceeding is reliable." *Id.* at 694. The Court settled on a middle-ground prejudice test that requires the defendant to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (defining "reasonable probability" as "a probability sufficient to undermine confidence in the outcome" of the case).

Second, the Court rejected a presumption of prejudice in nearly all cases of ineffectiveness predicated on an attorney's voluntary action or omission at trial. The Court carefully and forcefully restricted the cases in which prejudice could be presumed to two areas: (1) where the state affirmatively interfered with counsel's assistance,[1] and (2) where counsel was either actually or constructively absent from the trial "altogether." *See id.* at 692; *see Cronic*, 466 U.S. at 658-59.[2] The Court went to great lengths in both decisions to juxtapose these wholesale denials of counsel with claims of ineffectiveness predicated on an attorney's own specific acts or omissions at trial. *See id.* at 659 n.26 ("Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific

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[1] Presuming prejudice is unsurprising in this context. Preventing the state from actively interfering with a defendant's right to retain or use counsel is far closer to what everyone understands as the original meaning of the Sixth Amendment right to counsel. *See supra* at pp. 1-2. In such circumstances, as we approach the core constitutional right, there is less need or justification for a prejudice test. *Cf. United States v. Gonzalez-Lopez*, 548 U.S. 140 at 146-48 (2006).

[2] The "more limited" presumption of prejudice referenced in *Strickland* regarding actual attorney conflicts of interest is best read as a subgroup of the second grouping. *See Strickland*, 466 U.S. at 692-93. *See also Cronic*, 466 U.S. at 659-60 ("Circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.").

errors of counsel undermined the reliability of the finding of guilt."). *See also id.* at 666 n.41 (emphasizing that specific errors of counsel at trial should be analyzed under the *Strickland* standard). *See Strickland*, 466 U.S. at 693 (noting the importance of the prejudice requirement where "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence"). The Court emphasized that such errors "cannot be classified according to likelihood of causing prejudice." *Id*. Rather, each case must be evaluated on its own terms and in its own context to decide if a particular error "actually had an adverse effect on the defense." *Id*.

The Court's decision to carefully and narrowly limit the availability of presumption of prejudice was not taken lightly. Indeed, a principal argument in Justice Marshall's vigorous dissent in *Strickland* was the propriety and importance of a presumption of prejudice. *See id.* at 711 (Marshall, J., dissenting). Relying on *Chapman v. California*'s discussion of certain constitutional rights that are "so basic to a fair trial that their infraction can never be treated as harmless error," Justice Marshall argued that any "showing that the performance of a defendant's lawyer departed from constitutionally prescribed standards requires a new trial regardless of whether the defendant suffered demonstrable prejudice." *Id.* at 711-12. Justice Marshall essentially argued that the prejudice prong was inappropriate (or should in every case be presumed) because the right to counsel is critical to ensuring a

fundamentally fair framework in which to have a trial. *See id.* The Court, of course, rejected this view in favor of its more balanced approach.

II. The balance struck in *Strickland* and *Cronic* should be preserved.

Petitioner's position today echoes Justice Marshall's position in dissent in *Strickland*. While not seeking to eradicate the prejudice prong from all ineffective assistance claims, Petitioner seeks to eradicate it in a significant number of cases. Doing so would upset the important balance between finality and reliability struck by the Court in *Strickland* and *Cronic*. Moreover, in light of *Strickland*'s liberal threshold for showing prejudice, there is little advantage and significant risk in the absolute presumption rule advanced by Petitioner.

Petitioner's basic argument is that the Court should automatically presume prejudice whenever counsel's deficiency results in a constitutional error that the Court has previously classified as "structural error" in direct review cases. Pet. Br. 22. But the purpose, scope, and interests to be vindicated on direct review are very different from the purpose, scope, and interests to be vindicated in a collateral attack. There is thus no good reason to entangle the two different areas of jurisprudence.

In the direct review situation, all of the equities weigh on the side of reversal for preserved constitutional error, including constitutional errors whose

impacts are of an indeterminate nature and those that protect values other than the accuracy and reliability of the trial. Accordingly, a demanding burden of proof on the State to prove harmlessness beyond a reasonable doubt coupled with broad categories of constitutional errors that are completely excluded from harmless-error review comports with the goals of the direct review system. *See Chapman v. California*, 386 U.S. 18, 23-24 (1967) (burden); *see also Gonzalez-Lopez*, 548 U.S. at 148-50 (listing the broad categories excluded from harmless-error review).

But a collateral attack – including a claim of ineffective assistance of counsel – is far different. *Cf. Brecht v. Abrahamson*, 507 U.S. 619, 633-37 (1993) (emphasizing the different interests to be taken into account on collateral review).[3] The underlying constitutional error is waived and no longer directly at issue. A court is instead addressing an entirely different question about whether counsel's conduct or omission together with the result of that conduct or omission was so severely problematic as to amount to a practical lack of assistance of counsel and thus a violation of the

[3] *Amici* acknowledge that in this specific case, because of the unique nature of the Commonwealth of Massachusetts' procedural rules, the ineffective assistance of counsel claim is, as a purely technical matter, part of Petitioner's direct appeal. Resp. Br. in Opp. at 5-6. This is a distinction without a difference. First, whether part of the direct appeal or not, a claim of ineffective assistance of counsel like the one at issue here (concerning a specific error by counsel) is by definition a collateral, as opposed to a frontal or direct, attack on the conviction. Second, in many states, ineffective assistance of counsel claims like the one here can only be brought in a completely collateral proceeding.

Sixth Amendment. *See Gonzalez-Lopez*, 548 U.S. at 146-47 (explaining the significant distinction in the question). And this is precisely what the two-pronged *Strickland* test is intended to analyze. On this question, the equities flip from the direct review context; the presumption of constitutionality and the importance of finality of judgments have significant weight. In this situation, the goals of the system are undermined, not furthered, by broadly conceived categories of errors where prejudice is simply presumed as part of determining whether there is a constitutional violation in the first place. Attaching a presumption of prejudice to numerous broad categories of error will allow a petitioner to obtain a new trial in numerous instances where there is no factual prejudice, thus no unreliable outcome, thus no actual constitutional violation. This undermines finality without any concomitant benefit to reliability and accuracy.

It also undermines the contemporaneous objection rule, by making failure to object virtually risk-free for any structural error. The contemporaneous objection rule serves undeniably critical functions in our judicial system.[4] But defense counsel will have strong incentive *not* to object contemporaneously if that failure to

[4] The contemporaneous objection rule "enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest, not years later in [collateral proceedings]. It enables the judge who observed the demeanor of those witnesses to make the factual determinations necessary for properly deciding the federal constitutional question." *Wainwright v. Sykes*, 433 U.S. 72, 88 (1977). And the rule "may lead to the exclusion of the evidence objected to, thereby making a major

object is deemed *per se* prejudicial. This Court has long recognized that courts' willingness to hear unasserted claims "may encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims" in a collateral proceeding "if their initial gamble does not pay off." *Sykes*, 433 U.S. at 89. That concern is magnified if the failure to raise the claim is *per se* prejudicial – particularly where the constitutional violation did not remotely increase the likelihood of conviction. Why wouldn't counsel allow the courtroom to be closed for, say, one hour during *voir dire* if that failure to object essentially guarantees his client a "get out of jail free" card?[5]

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contribution to finality of criminal litigation." *Id*. On top of that, "a timely objection will sometimes yield benefits by spurring the prosecutor to supplement the record, or prompting the trial court to seek additional information, make predicate factual findings, or state on the record the basis for decisions that might otherwise go unexplained." Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 Yale L.J. 922, 958 (2006).

[5] In *Kimmelman v. Morrison*, 477 U.S. 365 (1986), this Court discounted concerns about counsel sandbagging potential Fourth Amendment claims because "when an attorney chooses to default a Fourth Amendment claim, he also loses the opportunity to obtain direct review under the harmless-error standard of *Chapman v. California*. . . . By defaulting, counsel shifts the burden to the defendant to prove that there exists a reasonable probability that, absent his attorney's incompetence, he would not have been convicted." *Id*. at 382 n.7. That reasoning does not apply to structural errors if Petitioner's theory is adopted. By defaulting a plain error, counsel guarantees that, should his client be convicted, the conviction will be overturned. This Court should not adopt a rule that encourages gamesmanship and discourages compliance with the contemporaneous objection rule.

Petitioner argues the broad categories of "structural error" must be presumed prejudicial for *Strickland* purposes because the Court has previously said the impacts of structural errors cannot be measured and it would therefore be impossible to know if counsel's deficiency changed the outcome of the case. But this ignores the compromise standard for prejudice set forth in *Strickland*. As detailed *supra* at pp. 4-5, Petitioner does not need to show that error resulting from counsel's deficiency was outcome determinative. Rather, Petitioner needs only to "undermine the confidence" in the trial by meeting a lower threshold – showing a "reasonable probability" that the outcome would have been different. At the very least, this lower and easier-to-meet standard mitigates the need for broad categories where prejudice is presumed. If this generous standard cannot be met, a defendant simply does not deserve relief on a collateral attack of the conviction.

Perhaps anticipating this objection, Petitioner also argues that the broad categories of structural error must be presumed prejudicial in this context because those errors affect the entire framework of the trial and thereby always and automatically undermine confidence in the outcome of the trial. Pet. Br. 19. But there is no reason to think that is true of every circumstance within the broad categories already deemed "structural error."

Consider for example two different results of a deficiency of counsel regarding the right to a public trial: (1) a full closure of all portions of a ten-day trial with

a sealed transcript; and (2) a closure to the family of the defendant of only a few hours during jury selection, with a full public transcript and the presence of a member of the press in the courtroom during the jury selection process.[6] Petitioner's position would require courts to presume prejudice equally in both situations. But that completely ignores the reality that one situation is far more likely than the other to undermine the outcome/reliability of the trial. And it would be a significant stretch to say that the second situation fits within the line of "structural error" cases addressing serious framework problems. *Contrast Gonzalez-Lopez*, 548 U.S. at 150 (finding denial of choice of counsel "bears directly on the framework within which the trial proceeds" because of the "myriad aspects of representation" that combine to affect the trial) (citation omitted). Unlike in *Gonzalez-Lopez*, where it is beyond all doubt that two attorneys would act differently in numerous large and small ways over the course of a trial, it is nothing more than speculation to suggest a prospective juror (or any other person in the courtroom) would have acted differently in any meaningful way during the jury selection process if the courtroom were open to all members of the public.

Indeed, even on direct review, this Court has never held that closure of the courtroom during the jury selection process is a "structural error." The Court's direct review references to the denial of a public trial

[6] This example is drawn from the facts of a recent case in Arkansas decided by the State Supreme Court. *See Schnarr v. Arkansas*, 2017 Ark. 10, at *8.

constituting structural error are limited to either closure of the actual trial or a closure of pre-trial hearings where testimony is taken from witnesses. *See Waller v. Georgia*, 467 U.S. 39, 46-47 (1984) (emphasizing that "a public trial encourages witnesses to come forward and discourages perjury," that "[t]hese aims and interests are no less pressing in a hearing to suppress wrongfully seized evidence," that "a suppression hearing often resembles a bench trial" insofar as "witnesses are sworn and testify, and . . . counsel argue their positions," and that "[t]he outcome frequently depends on a resolution of factual matters"). There is no reason to assume the Court would come to the same conclusion (even on direct review, let alone collateral attack) where the closure was limited to the jury selection process, as in *Presley v. Georgia*, 558 U.S. 209 (2010), and there was thus far less chance of infection of the overall framework of the trial.

At bottom, *amici*'s point is that broadly conceived categories of error for which prejudice is presumed are inappropriate, unnecessary, and harmful in the context of collateral attacks like ineffective assistance of counsel. Such broad categories would run headlong into *Strickland*'s and *Cronic*'s explicit intention to very narrowly curtail the availability of a presumption. *Amici* do not believe there is any need or justification to expand the availability of a presumption of prejudice beyond the incredibly limited circumstances expressly identified in *Strickland* and *Cronic*. But even if the Court disagreed, it should expand the availability of the presumption surgically, and only after considering

the specific error at issue at a very detailed level. The Court should not decide the issue at the abstract level of an entire category of error (e.g., the right to a public trial) but rather at the more specific level (e.g., the closure during jury selection with the existence of a public transcript). And at that level of specificity, this Court should not presume prejudice from a closure of the jury selection process, especially where, like here, a public transcript of the proceedings exists.

CONCLUSION

For the foregoing reasons, the 38 *Amici* States respectfully request this Court to find in favor of Respondent.

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