No. 16-240

In the Supreme Court of the United States

KENTEL MYRONE WEAVER, PETITIONER

v.

COMMONWEALTH OF MASSACHUSETTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF FOR CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN, ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE, GEORGIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICI CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICI CURIAE*

Since its founding in 1976, Criminal Defense Attorneys of Michigan (CDAM) has been the statewide as-

* No counsel for a party authored this brief in whole or in part, and no person other than amici, their members, or their counsel has made a monetary contribution intended to fund the preparation or submission of the brief. Amici timely notified all parties of their intention to file this brief, and letters of consent from all parties to the filing of this brief have been submitted to the Clerk.

sociation of criminal defense lawyers in Michigan, representing the interests of the criminal defense bar in a wide array of matters. CDAM has more than 400 members. As reflected in its bylaws, CDAM exists to "promote expertise in the area of criminal law, constitutional law and procedure and to improve trial, administrative and appellate advocacy," "provide superior training for persons engaged in criminal defense," "educate the bench, bar and public of the need for quality and integrity in defense services and representation," and "guard against erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws." Toward these ends, CDAM regularly conducts training seminars for criminal defense attorneys, publishes a newsletter with articles relating to criminal law and procedure, and provides information to the state legislature regarding contemplated legislation. CDAM is often invited to file amicus curiae briefs by the Michigan appellate courts.

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training, and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

The Georgia Association of Criminal Defense Lawyers (GACDL), a frequent amicus curiae in state and federal courts, is a not-for-profit association composed of many members of Georgia's criminal defense bar. Its approximately 1500 members include both public defenders and private counsel. Among other goals, GACDL is dedicated to improving the fair administration of criminal justice and to securing and preserving defendants' constitutional rights in criminal prosecutions. This dedication is particularly important in cases that address issues of ineffective assistance of counsel and defendants' right to a public trial.

The Washington Association of Criminal Defense Lawyers (WACDL) is an association of attorneys practicing criminal defense law in Washington. WACDL was formed in 1987 to improve the quality and administration of justice. The objectives and purposes of WACDL are to protect and ensure by rule of law those individual rights guaranteed by the United States and Washington Constitutions, and to resist all efforts made to curtail such rights; to improve the professional status of all lawyers and to encourage cooperation between lawyers engaged in the furtherance of its objectives through publications, education, and mutual assistance; and to engage in all activities on a local, state, and national level that will advance the purposes for which the organization is formed in order to promote justice and the common good of the citizens of the United States. One of the ways WACDL carries out these objectives is filing amicus briefs in cases that affect the fundamental constitutional rights of the defendant. WACDL has been active in protecting a de-

fendant's constitutional right to a public trial and has filed amicus briefs in other cases addressing this issue.

The Wisconsin Association of Criminal Defense Lawyers (WACDL) is an organization composed of criminal defense attorneys practicing in the State of Wisconsin, with a membership of both private and public defender attorneys totaling more than 400 attorneys, and whose members appear regularly before all Wisconsin state and federal courts. WACDL, by its charter, is organized to foster and maintain the integrity of the criminal defense bar, to promote the proper administration of criminal justice, and to uphold the protection of individual rights and due process of law. WACDL and its members, consequently, have an abiding professional and ethical commitment to ensure that criminal defendants receive the due process of law to which they are entitled.

As petitioner explains (Pet. 8-9), the Supreme Judicial Court of Massachusetts acknowledged that a violation of a defendant's Sixth Amendment right to a public trial is a structural error, but declined to apply a presumption of prejudice when presented with a claim of ineffective assistance of counsel. Pet. App. 40a. The decision below contributes to a deep division among the lower federal courts and state courts that leads to inequitable outcomes for similarly situated defendants.

Because of their commitment to protecting the constitutional rights of the citizens of Michigan, Arizona, Georgia, Washington, and Wisconsin, amici have a substantial interest in the issues presented in this case.

SUMMARY OF ARGUMENT

This Court has explained that structural errors undermine the fairness of a criminal trial, that it is impossible to assess the ensuing harm, and that the presence of a structural error requires automatic reversal of a conviction. *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148-151 (2006). Inherent tension exists between this presumption of prejudice for structural errors and the analytical framework used to determine whether defense counsel was constitutionally ineffective under *Strickland* v. *Washington*, 466 U.S. 668 (1984), which requires a defendant to show prejudice. Courts frequently struggle to reconcile these two doctrines when defense counsel unreasonably fails to object to a structural error or causes one.

As petitioner has correctly explained (Pet. 18-20), the decision of the Supreme Judicial Court of Massachusetts is erroneous. It also contributes to a well-developed split among the lower federal courts and state courts (Pet. 10-17) on whether prejudice can be presumed when a claim for ineffective assistance of counsel involves a structural error, such as a violation of a defendant's right to public trial. This conflict is unlikely to be resolved through additional percolation.

Amici write separately to emphasize that this Court's guidance on the precise question presented—whether it is necessary to demonstrate prejudice from structural errors in the *Strickland* context—would also clarify how the lower federal courts and state courts should approach unpreserved structural errors in other procedural contexts currently mired in deep confusion and discord.

These contexts include federal and state postconviction review of procedurally defaulted structural claims, belated claims of structural error under Federal Rule of Criminal Procedure 12, and unpreserved structural errors subject to plain-error review on direct appeal. Defendants must prove prejudice in each context. But because of deep confusion among the lower federal courts and state courts, some defendants enjoy a presumption of prejudice, while others are forced to assess the impact of errors that are exceptionally difficult—if not impossible—to quantify.

The disparate approaches to analyzing unpreserved claims of structural error lead to widespread inequity. This Court's intervention is needed now.

ARGUMENT

A. Clarifying whether prejudice from structural error is presumed under *Strickland* will guide evaluation of unpreserved structural error claims in other procedural contexts

Lower federal courts and state courts recognize the differences between trial errors and structural errors. They similarly agree in their treatment of preserved structural error. Yet they are deeply divided in their approach to unpreserved structural errors, whether raised in an untimely pretrial motion, a claim of ineffective assistance of counsel, or a federal habeas proceeding in which the petitioner seeks to overcome procedural default. Each procedural context requires defendants to make a distinct showing, such as cause or deficient performance, ultimately to prevail on the merits. But each also involves a prejudice inquiry that forces courts to grapple with how to evaluate the

prejudice of structural error. Such prejudice inquiries should not differ substantially.

The similarity in the prejudice inquiry for each procedural context highlights the importance of the question presented and the need for greater clarity about how to approach a structural federal constitutional error that occurred but was not preserved in a criminal trial.

1. Structural errors are fundamentally different from trial errors

This Court has defined two classes of error—trial error and structural error. *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148 (2006). Trial errors arise during the presentation of evidence to the jury and are amenable to qualitative assessment "in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt." *Ibid.* (quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 307-308 (1991)). When a trial error occurs, courts must ignore the error unless it contributed to the guilty verdict. *Chapman* v. *California*, 386 U.S. 18, 24 (1967). A defendant is entitled to a new trial only if a trial error is harmful.

Structural errors, in contrast, "affect[] the framework within which the trial proceeds." *Fulminante*, 499 U.S. at 310. An error is structural if it "necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence," *Neder* v. *United States*, 527 U.S. 1, 9 (1999) (emphasis omitted), if it "def[ies] analysis by harmless-error standards" and "affect[s] the entire adjudicatory framework," *Puckett* v. *United States*, 556 U.S. 129, 141 (2009) (citation and internal quotation marks omit-

ted), or if it is difficult—if not impossible—to assess, *ibid.* (citing *Gonzalez-Lopez*, 548 U.S. at 149 n.4). Examples of structural error recognized by this Court include an illegally constituted grand jury, see *Vasquez* v. *Hillery*, 474 U.S. 254, 263 (1986), "the denial of counsel, the denial of the right of self-representation, the denial of the right to public trial, and the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction," *Gonzalez-Lopez*, 548 U.S. at 149 (internal citations omitted).

When a structural error occurs at trial over the defendant's objection, the defendant is entitled to a new trial regardless of whether the error contributed to the verdict. In other words, even when the jury reached the "right" result, a new trial is necessary; prejudice is presumed whenever a structural error occurs. *Neder*, 527 U.S. at 34 (Scalia, J., dissenting) (citing *Rose* v. *Clark*, 478 U.S. 570, 578 (1986)).

2. Courts confront whether to presume prejudice for unpreserved claims of structural error in multiple procedural contexts

a. Federal courts apply a cause-and-prejudice standard in federal habeas proceedings when a petitioner has procedurally defaulted a constitutional claim. *Bousley* v. *United States*, 523 U.S. 614, 622 (1998) (citing *Murray* v. *Carrier*, 477 U.S. 478, 485 (1986); *Wainwright* v. *Sykes*, 433 U.S. 72, 87 (1977)). Habeas petitioners seeking relief in federal court must therefore prove prejudice before a district court may review their defaulted constitutional claims. See *ibid.* (requiring proof of cause and prejudice when a federal

prisoner filed a motion for relief under 28 U.S.C. 2255); see also *Sykes*, 433 U.S. at 87 (requiring proof of cause and prejudice for a state prisoner to obtain federal review under 28 U.S.C. 2254). Petitioners in state postconviction proceedings often are similarly required to prove cause and prejudice before defaulted claims may be considered. See, *e.g.*, *People* v. *Jackson*, 633 N.W.2d 825, 829-830 (Mich.) (requiring "good cause" and "actual prejudice" for postconviction relief under Mich. Ct. R. 6.508(D)), reh'g denied and opinion modified (Nov. 8, 2001); *Berryhill* v. *State*, 603 N.W.2d 243, 245 (Iowa 1999) (requiring "sufficient reason or cause" and "actual prejudice" for postconviction relief); *Turpin* v. *Todd*, 493 S.E.2d 900, 905 (Ga. 1997) (requiring "adequate cause" and "actual prejudice" for postconviction relief under Ga. Code § 9-14-48(d)).

b. The same cause-and-prejudice standard applies in the context of Federal Rule of Criminal Procedure 12, which requires parties to file pretrial motions addressing certain defects, some of which may be structural errors. See *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 116-117 (2007) (Scalia, J., dissenting) (contending that defects in an indictment are structural errors even though the majority declined to address the question); *United States* v. *Du Bo*, 186 F.3d 1177, 1179-1180 (9th Cir. 1999) (holding that the failure to allege an element or critical facts in an indictment requires automatic reversal of a conviction). Defendants who fail to file such motions before the deadline must establish "good cause" before a district court may consider a late motion. Fed. R. Crim. P. 12(c)(3). The good-cause standard requires the tardy movant to show cause and prejudice. See *Davis* v. *United States*,

411 U.S. 233, 243-245 (1973); *United States* v. *Edmond*, 815 F.3d 1032, 1044 (6th Cir. 2016).

c. The prejudice analysis required to obtain review of a procedurally defaulted claim or an untimely Rule 12 motion is similar, if not identical, to the prejudice inquiry for demonstrating ineffective assistance of counsel. A lawyer's errors amount to violations of a defendant's Sixth Amendment right to counsel only when the lawyer's acts or omissions are not "the result of reasonable professional judgment," and such professionally unreasonable conduct affected the judgment. *Strickland* v. *Washington*, 466 U.S. 668, 690-691 (1984). Thus, if a court concludes that counsel's performance was professionally unreasonable, it must evaluate whether the error was prejudicial. That analysis mandates consideration of whether it is possible to evaluate the harm of a structural error caused or overlooked by counsel.

d. In each of these three contexts—procedural default in habeas proceedings, untimely pretrial motions, and claims of ineffective assistance of counsel—courts confront whether they can quantify the supposedly unquantifiable structural error. As petitioner explains (Pet. 10-17), there is a clear and deep split of authority about whether prejudice may be presumed when counsel's unprofessional conduct causes or defaults a structural error.

Federal courts of appeals are equally divided on whether prejudice may be presumed when a structural error has been procedurally defaulted. The Fifth, Sixth, and Eleventh Circuits require habeas petitioners to prove that procedurally defaulted structural error impacted the outcome of the trial. See *Ambrose* v.

Booker, 684 F.3d 638, 652 (6th Cir. 2012) (remanding procedurally defaulted claims of a fair cross-section violation to the district court to determine "what would have happened" had the venire been properly constituted); *Hollis* v. *Davis*, 941 F.2d 1471, 1480 (11th Cir. 1991) (requiring petitioner, who was tried, convicted, and sentenced to death by a jury drawn from a racially discriminatory pool, to establish "actual prejudice" to overcome the procedural default of his claim); *Huffman* v. *Wainwright*, 651 F.2d 347, 350 (5th Cir. 1981) (remanding for the district court to evaluate whether an improperly drawn venire impacted the outcome of the trial).

In contrast, the First and Ninth Circuits presume prejudice when the defaulted error is structural. *United States* v. *Withers*, 638 F.3d 1055, 1065-1066 (9th Cir. 2010) (presuming prejudice for procedurally defaulted claim of improper courtroom closure); *Owens* v. *United States*, 483 F.3d 48, 64 (1st Cir. 2007) (holding that actual prejudice requirement does not apply to defaulted structural errors).

* * *

Resolution of the question presented will provide guidance to courts struggling with whether to presume prejudice in all of these procedural contexts.

3. Prejudice is also implicated by plain-error review of unpreserved claims of structural error

Resolving the question presented may also help reconcile a long-acknowledged dispute concerning plain-error review when the forfeited error is structural. A defendant forfeits a claim of error by failing to

timely assert it, and the forfeited claim is subject to plain-error review on appeal. *United States* v. *Olano*, 507 U.S. 725, 733 (1993).

To obtain relief under plain-error review, the claimed error must actually be an error, meaning "some sort of [d]eviation from a legal rule." *Puckett*, 556 U.S. at 135 (citation and internal quotation marks omitted). "Second, the legal error must be clear or obvious, rather than subject to reasonable dispute." *Ibid.* Third, the error must affect the defendant's "substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the district court proceedings." *Ibid.* (citation and internal quotation marks omitted). Only after those three criteria have been satisfied may appellate courts exercise their "discretion to remedy the error"—discretion limited to those circumstances where the "error seriously affect[ed] the fairness, integrity or public reputation of [the] judicial proceedings." *Ibid.* (citation and internal quotation marks omitted; emphasis omitted).

The third step of plain-error review thus resembles the prejudice inquiries involved when evaluating whether to review procedurally defaulted claims or whether counsel was constitutionally ineffective. Courts inevitably engage in a prejudice inquiry when applying plain-error review and therefore must confront whether to presume prejudice for plain structural errors.

The majority of federal courts of appeals presume prejudice when a defendant asserts a plain structural error for the first time on appeal. See, *e.g.*, *United States* v. *Negron-Sostre*, 790 F.3d 295, 305-306 (1st Cir. 2015) (presuming the prejudice of a structural error

satisfies the third and fourth prongs of plain-error review); *United States* v. *Yamashiro*, 788 F.3d 1231, 1236 (9th Cir. 2015) (noting that evaluation of the third prong of plain-error review differs "where there has been a finding of structural error"); *United States* v. *Ramirez-Castillo*, 748 F.3d 205, 215-216 (4th Cir. 2014) (presuming a structural error affected the defendant's substantial rights); *United States* v. *Turner*, 651 F.3d 743, 748 (7th Cir. 2011) (noting that when a structural error occurs, "[i]t is not a long step to argue that prejudice also should be presumed (or need not be shown independently) under the plain error standard"); *United States* v. *Barnett*, 398 F.3d 516, 526-529 (6th Cir. 2005) (presuming the prejudice of a structural error satisfies the third and fourth prongs of plain-error review); *United States* v. *Syme*, 276 F.3d 131, 154-155 (3d Cir. 2002) (applying a rebuttable presumption of prejudice after concluding the error was structural).

In contrast, many state courts do not presume prejudice on plain-error review of structural errors. See, *e.g.*, *People* v. *Vaughn*, 821 N.W.2d 288, 304 (Mich. 2012) (concluding that although wrongful courtroom closure is structural error, defendants must still prove it seriously affected the integrity, fairness, or public reputation of the proceedings); *Barrows* v. *United States*, 15 A.3d 673, 680 (D.C. 2011) (concluding that structural error of courtroom closure during voir dire did not seriously affect the fairness, integrity, or public reputation of the proceedings). But see *State* v. *Valverde*, 208 P.3d 233, 236 (Ariz. 2009) ("If an appellate court finds structural error, reversal is mandated regardless of whether an objection is made below or prejudice is found.").

This Court has acknowledged that the prejudice inquiry for structural errors on plain-error review remains unresolved. *Puckett*, 556 U.S. at 140-141 (recognizing dispute but not deciding whether structural errors automatically impact a defendant's substantial rights under the third prong of the plain-error test).

* * *

The lower federal courts and state courts need guidance explaining how to approach the prejudice inquiry when a structural error is unpreserved. They confront this issue in multiple procedural contexts, each of which imposes its own standard for actually obtaining relief. But the unique nature of structural errors, which by definition are not amenable to harmless error review, suggests that the prejudice component of those standards should not vary by context. The petition provides an ideal opportunity to reconcile the structural-error doctrine with a prejudice requirement.

B. Disparate approaches to presuming prejudice for unpreserved claims of structural error lead to inequitable results

As petitioner observes (Pet. 17-18), in the context of ineffective assistance of counsel, several federal courts of appeals and state high courts within those circuits take incongruous approaches to unpreserved claims of structural error. As a result, a defendant in federal court receives a new trial while a defendant in state court has no remedy, even though the failure to preserve the structural error is the same in both jurisdictions. This dissonance between state and federal jurisprudence is amplified when considering unpre-

served structural errors in other procedural contexts. A defendant's ability to vindicate important constitutional rights should not depend on whether he or she is charged by the state or federal government—which often share concurrent jurisdiction to prosecute the same conduct. See Robert Heller, *Selective Prosecution and the Federalization of Criminal Law*, 145 U. Pa. L. Rev. 1309, 1312 (1997).

A decision from this Court regarding how to assess prejudice from structural error in the *Strickland* context would provide an analytical framework for the lower federal and state courts to use when confronting unpreserved structural errors in other procedural postures, thereby helping to remedy inconsistent and inequitable outcomes.

1. Inequitable outcomes result from inconsistent approaches to the prejudice inquiry

In many instances of unpreserved structural error, defendants receive different constitutional protections depending on whether their trial occurs in state or federal court. A comparison of the inconsistency between Michigan and the Sixth Circuit, Wisconsin and the Seventh Circuit, and Massachusetts and the First Circuit demonstrates this inequity.

a. In certain procedural contexts, federal courts in Michigan grant a new trial to defendants raising unpreserved claims of structural error, but state courts provide no remedy. For example, the Sixth Circuit presumes prejudice for purposes of *Strickland* and procedurally defaulted habeas claims when the alleged error is structural. *Johnson* v. *Sherry*, 586 F.3d 439, 447 & n.7 (6th Cir. 2009) (right to public trial). Recog-

nizing that it is difficult if not impossible to measure the impact of structural errors on trial outcomes, the court held that prejudice should be presumed. *Id.* at 447 (citing *Gonzalez-Lopez*, 548 U.S. at 149 n.4). If a courtroom closure is not justified under *Waller* v. *Georgia*, 467 U.S. 39 (1984), defendants in the Sixth Circuit will receive a new trial without having to prove that the outcome of their trial would have been different.

Should defendants present a similar unpreserved public trial claim in Michigan state court, they must demonstrate actual prejudice to successfully pursue a claim for ineffective assistance of counsel. See *Vaughn*, 821 N.W.2d at 308. Even though an unjustified courtroom closure is a well-established structural error, which "def[ies] analysis by 'harmless-error' standards," *Fulminante*, 499 U.S. at 309, a defendant in Michigan state court must show that "the courtroom's closure during voir dire affected the voir dire process and tainted the ultimate jury chosen." *Vaughn*, 821 N.W.2d at 308. No such showing is required in federal court in the same location.

The conflict between the Michigan Supreme Court and the Sixth Circuit also spans direct appeals of unpreserved structural errors on plain-error review. The Sixth Circuit has held that defendants appealing an unpreserved structural error need not establish that the error affected their substantial rights or seriously affected the fairness of the proceedings, ordinarily the third and fourth prongs of plain-error analysis. See *United States* v. *Mahbub*, 818 F.3d 213, 224 (6th Cir. 2016) (racial discrimination in jury selection); *United States* v. *McAllister*, 693 F.3d 572, 582 n.5 (6th Cir.

2012) (same). Yet the Michigan Supreme Court requires defendants in the same circumstances to show that the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People* v. *Cain*, 869 N.W.2d 829, 833-834 (Mich. 2015) (quoting *Vaughn*, 821 N.W.2d at 297). This requirement ignores the nature of structural errors, which "infect the entire trial process" and "necessarily render a trial fundamentally unfair." *Id.* at 848 (Viviano, J., dissenting) (quoting *Neder*, 527 U.S. at 8) (internal quotation marks omitted). As a result, a Michigan defendant's ability to obtain relief on direct appeal from a trial tainted by unpreserved structural error will often turn on whether he or she was charged in federal or state court.

b. The Seventh Circuit has concluded that intentional racial discrimination during jury selection is structural error requiring automatic reversal because it "persists throughout the proceeding and relates to the framework in which a trial proceeds." *Winston* v. *Boatwright*, 649 F.3d 618, 628 (7th Cir. 2011). In the context of a claim of ineffective assistance of counsel, the court explained that structural errors "inevitably 'undermine[ ] confidence in the outcome' of a proceeding." *Id.* at 632 (quoting *Strickland*, 466 U.S. at 694). For that reason, "[p]rejudice * * * is automatically present when the selection of a petit jury has been infected with a violation of *Batson* [v. *Kentucky*, 476 U.S. 79 (1986)] or *J.E.B.* [v. *Alabama*, 511 U.S. 127 (1994)]." *Ibid.*

In contrast, the Wisconsin Supreme Court has rejected a presumption of prejudice for structural errors. The court held in no uncertain terms that the

"categorization of the denial of the public trial right as structural error does not create a presumption of prejudice in ineffective assistance of counsel claims." *State* v. *Pinno*, 850 N.W.2d 207, 213 (Wis.), cert. denied, 135 S. Ct. 870 (2014). In so concluding, the court posited that a defendant's right to a public trial—the denial of which is an unquestioned structural error—was not as "structural" in nature as other structural defects: "[W]e have difficulty with a label—structural error—that equates the right to a completely open criminal trial with the right to an attorney or the right to an unbiased judge." *Id.* at 223. The court refused to presume prejudice for purposes of *Strickland* because "the denial of the right to a public trial does not always lead to unfairness or prejudice." *Id.* at 230. Because neither defendant could show actual prejudice, the court denied their claims for ineffective assistance of counsel. *Id.* at 231-232. Had the defendant in *Pinno* been prosecuted in federal court, he would have received a new trial.

c. The First Circuit presumes prejudice for claims that ineffective assistance of counsel resulted in the forfeiture of a public trial claim. *Owens*, 483 F.3d at 64. Structural errors implicate the fairness of "the entire trial process." *Ibid.* (quoting *Neder*, 527 U.S. at 8). The court emphasized the difficulty of weighing the prejudicial effect of a structural error, which carries "consequences that are necessarily unquantifiable and indeterminate." *Ibid.* (quoting *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993)). For that reason, the court held that a defendant need not show actual prejudice to excuse a procedurally defaulted claim or to demonstrate ineffective assistance: the court refused to "ask

defendants to do what the Supreme Court has said is impossible." *Id.* at 65.

The Massachusetts Supreme Judicial Court expressly departed from the reasoning in *Owens*, instead choosing to follow the Eleventh Circuit's insistence on showing actual prejudice to satisfy *Strickland*. See *Commonwealth* v. *LaChance*, 17 N.E.3d 1101, 1104 (Mass. 2014), cert. denied, 136 S. Ct. 317 (2015); see also *Purvis* v. *Crosby*, 451 F.3d 734, 740-741 (11th Cir. 2006). The court believed it possible to "demonstrate prejudice in the context of a closed jury empanelment process." *LaChance*, 17 N.E.3d at 1106 n.3. Without any finding that defense counsel deliberately chose to forgo objection for strategic gain, the court also noted its desire to avoid providing the defendant with an "appellate parachute" for failing to preserve a structural right implicating the fairness of the trial. *Id.* at 1107. The court below relied on the recent decision in *LaChance* to deny petitioner's claims. Pet. App. 40a.

The First Circuit and the Massachusetts high court also disagree about what a Massachusetts defendant must show in a postconviction challenge to overcome prior procedural default. Defendants who fail to fully exhaust a claim of structural error in Massachusetts state court lose their ability to bring that claim in a state postconviction challenge. See *Mains* v. *Commonwealth*, 739 N.E.2d 1125, 1128-1129 (Mass. 2000). But federal defendants in Massachusetts who fail to take an appeal due to the dereliction of counsel obtain a new direct appeal through a postconviction motion for relief, even when they cannot show any meritorious issue exists for appellate consideration. See *Bonneau* v. *United States*, 961 F.2d 17, 23 (1st Cir. 1992).

The gulf between state and federal case law shows that citizens of Massachusetts receive different constitutional protections for structural errors. In federal court, a defendant will receive a new trial for an unjustified closure of the courtroom or a new appeal for unexhausted claims. But in state court, the rights protected by structural error analysis yield to a defendant's ability to show actual prejudice should counsel fail to raise the error in the first instance.

* * *

Such inequity is not mitigated by a state defendant's potential recourse to federal habeas review. A state defendant must exhaust state remedies before pursuing federal habeas, *Sykes*, 433 U.S. at 87, a process that can take ten years or more as in *Winston*, 649 F.3d at 624, before potentially receiving a new trial. Moreover, a defendant's claim in federal court must overcome the deference accorded to state court decisions under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which permits relief only when the state court's determination "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. 2254(d)(1). This is exactly what occurred in *Winston*: the court determined that a *Batson* error occurred, that the error was structural, and that prejudice was "automatically present" because the trial was infected by structural error, yet the court still did not grant relief because the legal principle that "prejudice automatically flows from a deliberate *Batson* violation" had not been clearly established by this Court. 649 F.3d at 628-629, 632, 633-634.

Guidance from this Court regarding presumptive prejudice for unpreserved structural errors would have the additional benefit of establishing precedent on which lower federal courts can rely when considering claims subject to AEDPA deference, which require certainty from this Court.

2. There is widespread conflict and confusion regarding the presumption of prejudice for unpreserved claims of structural error

These disparities between state and federal courts sharing the same geographic location are not anomalous: there is widespread inequity in how lower federal courts and state courts analyze unpreserved claims of structural error. Courts are in tension over (1) when to apply a presumption of prejudice in cases involving unpreserved claims of structural error, and (2) which factors bear on whether to do so.

Many courts, including state high courts, presume prejudice for unpreserved structural errors in a variety of contexts, largely because the nature of structural error means that requiring proof of prejudice is tantamount to categorically denying relief. See, *e.g.*, *Yamashiro*, 788 F.3d at 1236 (presuming prejudice for

claim for denial of counsel during victim allocution subject to plain-error review).[1]

Other courts reach the opposite conclusion. See, *e.g.*, *United States* v. *Gomez*, 705 F.3d 68, 79-80 (2d Cir. 2013) (requiring showing of actual prejudice for claim for ineffective assistance of counsel under *Strickland* for denial of right to public trial).[2]

And whatever the outcome in these cases, they are frequently controversial and generate substantial disagreement among jurists.[3]

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[1] See also, *e.g.*, *Withers*, 638 F.3d at 1065-1066 (*Strickland*, public trial); *United States* v. *Noel*, 581 F.3d 490, 503 (7th Cir. 2009) (plain error, right to allocute); *Miller* v. *Dormire*, 310 F.3d 600, 603 (8th Cir. 2002) (*Strickland* and procedural default, right to jury trial); *Syme*, 276 F.3d at 154 (plain error, constructive amendment); *Littlejohn* v. *United States*, 73 A.3d 1034, 1043 (D.C. 2013) (*Strickland*, public trial); *State* v. *Wise*, 288 P.3d 1113, 1115 (Wash. 2012) (plain error, public trial); *Savoy* v. *State*, 22 A.3d 845, 859 (Md. 2011) (plain error, reasonable doubt instruction).

[2] See also, *e.g.*, *Purvis*, 451 F.3d at 743 (*Strickland*, public trial); *Vansickel* v. *White*, 166 F.3d 953 (9th Cir. 1999) (*Strickland* and procedural default, jury composition); *Stackhouse* v. *People*, __ P.3d __, 2015 WL 3946868, at *3 (Colo. June 29, 2015) (plain error, public trial), cert. denied, 136 S. Ct. 1513 (2016); *LaChance*, 17 N.E.3d at 1106-1107 (*Strickland* and procedural default, public trial); *People* v. *Allen*, 856 N.E.2d 349, 353-354 (Ill. 2006) (plain error, use of electronic stun belt without manifest need); *State* v. *Carprue*, 683 N.W.2d 31, 43 (Wis. 2004) (*Strickland*, judicial bias).

[3] See, *e.g.*, *Yamashiro*, 788 F.3d at 1238 (Bea, J., dissenting); *Withers*, 638 F.3d at 1071-1072 (Noonan, J., dissenting); *Noel*, 581 F.3d at 505 (Easterbrook, J., concurring); *Vansickel*, 166 F.3d at 960 (Reinhardt, J., dissenting); *Stackhouse*, 2015 WL 3946868, at *6 (Márquez, J., dissenting); *LaChance*, 17 N.E.3d at 1107-1110 (Duffy, J., dissenting); *Pinno*, 850 N.W.2d at 251-252 (Crooks, J., dissenting); *Littlejohn*, 73 A.3d at 1047 (Pryor, J., dissenting); *Wise*, 288 P.3d at 1124 (Madsen, C.J., dissenting); *Allen*, 856 N.E.2d at 361 (Freeman, J., dissenting).

Finally, without a guiding analytical framework for evaluating prejudice from unpreserved claims of structural error, some state courts have rested their decisions on unwarranted assumptions instead of sound legal analysis. For example, the Supreme Courts of Utah and Georgia have held that a defendant must show actual prejudice from an unpreserved claim of structural error to satisfy *Strickland*. See *Reid* v. *State*, 690 S.E.2d 177, 181 (Ga. 2010) (right to public trial); *State* v. *Butterfield*, 784 P.2d 153, 157 (Utah 1989) (same). Both courts reached this conclusion primarily due to their concern that a presumption of prejudice would encourage sandbagging by defense counsel: instead of objecting contemporaneously, the defense could strategically delay raising the issue and obtain automatic reversal on appeal if the jury issued an adverse verdict. See *Reid*, 690 S.E.2d at 181; *Butterfield*, 784 P.2d at 157. Yet neither opinion cites any evidence that such sandbagging has actually occurred. And for good reason: this Court has explained that "counsel's client has little, if anything, to gain and everything to lose through such a strategy." *Kimmelman* v. *Morrison*, 477 U.S. 365, 382 n.7 (1986); see *Winston*, 649 F.3d at 631 (responding to Wisconsin's allegation of defense counsel gamesmanship by observing that "[d]efense counsel is limited to 'legitimate, lawful conduct,'" and that "[w]e do not know where the state is getting its data from, but we hope that it is mistaken about the frequency of deliberate constitutional violations on the part of the defense bar" (citation omitted)); see also Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128, 1196-1199 (1986) ("[C]ommentators * * *

are nearly unanimous in agreeing that the risk of deliberate withholding of claims * * * is very small."). In any event, structural errors are limited in scope and should be obvious to the trial court (and the prosecution), such that they should never be committed, even with an acquiescing defendant.

A decision from this Court establishing a framework for how to evaluate *Strickland* prejudice for the denial of a defendant's right to a public trial, a paradigmatic structural error, would provide much needed guidance to the lower federal courts and state courts for a range of procedural contexts in which claims of unpreserved structural errors arise, and will help remedy stark inequities that currently exist for defendants based on the forum in which they are prosecuted or the happenstance of where they live.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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