No. 14-1153

In The
Supreme Court of the United States

EDMUND LACHANCE, JR.,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Petition For A Writ Of Certiorari To The Massachusetts Supreme Judicial Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a defendant asserting ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984), based upon counsel's failure to raise an error that may be classified as structural for purposes of whether its harmlessness should be assessed, must – in addition to demonstrating deficient performance – show that he was prejudiced by counsel's ineffectiveness, or whether prejudice is presumed.

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STATEMENT

1. In October 1999, Petitioner lured a Massachusetts woman who spoke virtually no English into his car, and drove her to a large, fenced-in, trailer truck terminal. He then held a knife to her neck and forcibly raped her. When she got out of the car, he drove away with the bag she had been carrying and left her stranded. *Brief and Supplemental Record Appendix for the Commonwealth*, *Commonwealth v. LaChance*, No. 02-P-443, Mass. App. Ct., 2002 WL 32757911, at *4-9 (Oct. 30, 2002).

2. Petitioner was convicted by a Massachusetts jury of aggravated rape, kidnapping, indecent assault and battery, and assault by means of a dangerous weapon in 2001. Pet. App. 1a, 27a. Represented by new counsel, he failed to persuade the Massachusetts Appeals Court to disturb his convictions, or the Commonwealth's Supreme Judicial Court ("SJC") to grant further appellate review. Pet. App. 1a, 28a. This Court denied certiorari. *LaChance v. Massachusetts*, 540 U.S. 1202 (2004) (mem). In addition to seeking other forms of post-conviction relief, Petitioner requested a new trial in state court in 2003 and 2004, but he was unsuccessful. Pet. App. 1a-2a, 28a.[1]

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[1] *See also Commonwealth v. LaChance*, 58 Mass. App. Ct. 1111, 792 N.E.2d 718, 2003 WL 21800943 (unpublished) (affirming convictions), *rev. denied*, 440 Mass. 1104, 797 N.E.2d 379 (2003) (table), *rev. denied as to denial of reh'g*, 444 Mass. 1102, 826 N.E.2d 201 (2005) (table); *Commonwealth v. LaChance*, 63 Mass. App. Ct. 1108, 824 N.E.2d 487, 2005 WL 678468

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3. It was not until a motion for a new trial in 2011 that Petitioner first claimed that members of his family were asked to exit the courtroom during jury selection for his trial a decade earlier. Pet. App. 2a, 22a, 23a, 28a. Represented by yet another attorney, Petitioner "presented his own affidavit and affidavits from his mother, his uncle, and his trial and former appellate attorneys." Pet. App. 2a.

> Trial counsel averred that he believed that the court room was closed during jury empanelment, as was the practice in the Middlesex County Superior Court at the time, and that he did not object to the alleged closure. Trial counsel further averred that he did not discuss the matter with the defendant and was not aware at the time of the trial that the Sixth Amendment right to a public trial extended to jury empanelment. The defendant's former appellate counsel averred that he had no tactical or strategic reason not to raise the issue of court room closure in any of the defendant's appeals or prior motions for a new trial, noting that it did not occur to him that closure was an issue in the case.

Pet. App. 3a.

(unpublished), *rev. denied*, 444 Mass. 1104, 829 N.E.2d 225 (2005) (table); *Commonwealth v. LaChance*, 63 Mass. App. Ct. 1114, 826 N.E.2d 794, 2005 WL 1106683 (unpublished), *rev. denied*, 444 Mass. 1105, 830 N.E.2d 1088 (2005).

The motion judge, who was also the trial judge, did not find, but only "assumed *arguendo* that a courtroom closure occurred." Pet. App. 23a; *accord* Pet. App. 28a n.2.[2] Based on Petitioner's failure to raise the claim previously, the judge determined that it was waived. Pet. App. 3a, 23a, 28a-32a. Thus, in accordance with state waiver law, he considered whether "the alleged closure resulted in a substantial risk of miscarriage of justice." Pet. App. 23a; *accord* Pet. App. 3a, 25a, 33a-35a. Petitioner maintained that, "because a public trial violation is a structural error," the court must presume that two of the four prongs of the substantial-risk test – "prejudice [and] material influence on the verdict" – had been satisfied. Pet. App. 33a. "Based on this, [Petitioner]

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[2] Accordingly, Respondent disputes Petitioner's assertions that: the defense team's "[a]ffidavits . . . demonstrate that a courtroom closure occurred on April 10, 2001," Pet. 2; "public-trial right violations . . . occurred during voir dire," Pet. 4; and "the [SJC] in this case . . . openly acknowledged that the basic rules of fairness guaranteed by the Constitution have all been violated," Pet. 15. Respondent also does not concede that Petitioner's family members: "were in the courtroom, waiting for voir dire to begin, when a court officer ordered them to leave the room"; "waited outside in the lobby for several hours"; and "attempted to reenter the courtroom in the afternoon," but were not "allow[ed by a court officer] . . . to observe the proceedings." Pet. 3. Respondent further disputes that the affidavits by Petitioner's attorneys clearly state their reasons for not raising a courtroom-closure issue. That is, Respondent does not agree that Petitioner's trial counsel averred that "he failed to object to the courtroom closure *because* it was then customary," and that his appellate counsel expressly averred that he failed to raise the issue *because* it did not occur to him. Pet. 3.

argue[d] that he ha[d] demonstrated that he likely suffered a substantial miscarriage of justice because a closure of constitutional magnitude occurred and because his trial and appellate attorneys had no tactical reason for failing to object to the closure" – the remaining two prongs of the test. Pet. App. 33a. "The court disagree[d]." Pet. App. 33a. The judge found that Petitioner's presumption argument was foreclosed by SJC precedent and indicated that:

> LaChance's affidavits and motion do not indicate that he suffered any prejudice as a result of his family's removal from the court room. Nor do the affidavits identify any unfairness that would have been prevented had his family been present during the voir dire. Thus, "in light of the defendant's consent to the procedure, his presence throughout the voir dire, and the fact that the less public setting for the voir dire in all likelihood helped rather than harmed the defendant, [the court] find[s] no prejudice to the defendant from the setting in which this voir dire was conducted."

Pet. App. 34a-35a (citations omitted; alterations in original) (quoting *Commonwealth v. Horton*, 434 Mass. 823, 833, 753 N.E.2d 119, 128 (2001)); *accord* Pet. App. 23a. The judge denied relief. Pet. App. 2a, 3a, 22a, 23a, 27a-35a. Petitioner moved for reconsideration, but was unsuccessful. Pet. App. 22a.

4. Petitioner thereafter filed a renewed motion for reconsideration, which was heard by the same

judge. Pet. App. 3a, 22a. He asserted the same courtroom-closure claim and that his trial counsel was ineffective for failing to object to the alleged closure without having a tactical reason. Pet. App. 24a. The judge again declined to find that there had been a closure, and also refrained from deciding whether the deficient-performance prong of the ineffective-assistance test was met. Instead, he "[a]ssume[d] that a closure occurred, [and] further assume[d] that counsel's actions fell below that which might be expected from an ordinary fallible lawyer" and amounted to "a deficient performance." Pet. App. 3a-4a, 23a n.2, 24a-25a. Based on SJC precedent, the judge rejected Petitioner's argument that the prejudice prong of the ineffectiveness test must be presumed satisfied in light of the structural nature of a public-trial violation. Pet. App. 3a, 4a, 25a. He further observed that Petitioner had "failed to show that he suffered any prejudice due to counsel's actions," as his "affidavits and motion [did] not provide specific evidence [of such] prejudice as a result of his family's removal from the courtroom." Pet. App. 4a, 25a. The judge added that Petitioner "ha[d] not established either: (1) a substantial risk of a miscarriage of justice; or (2) 'that justice may not have been done.'" Pet. App. 25a-26a (quoting Mass. R. Crim. P. 30(b)); *accord* Pet. App. 4a. He denied the motion. Pet. App. 3a-4a, 22a, 24a, 26a.

5. On appeal, the SJC concluded that:

> [W]here the 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.

Pet. App. 4a.

The court reasoned that "[p]resuming prejudice in this context ignores the distinct and well-established jurisprudence which governs claims of ineffective assistance of counsel." Pet. App. 7a. It recognized that this Court has presumed prejudice in the context of ineffectiveness claims "only in limited circumstances where the essential right to the assistance of counsel itself has been denied," such as "'[a]ctual or constructive denial of the assistance of counsel altogether,'" "'state interference with counsel's assistance,'" and "'an actual conflict of interest'" on counsel's part – none of which circumstances existed in Petitioner's case. Pet. App. 7a-9a (quoting *Strickland v. Washington*, 466 U.S. 668, 692 (1984), and citing *United States v. Cronic*, 466 U.S. 648, 659 & n.25 (1984)). Moreover, "[w]hile a jury empanelment closed to spectators (other than jurors) and the defendant's family may be a structural error, it will rarely have an 'effect on the judgment,' or undermine our 'reliance on the outcome of the proceeding.'" Pet. App. 8a (quoting *Strickland*, 466 U.S. at 691, 692).

The court added that "to say that requiring a showing of prejudice forecloses the possibility of a remedy 'ignore[s] – at great cost to the public interest in the finality of verdicts – the established rule that public trial rights may be waived,' and that claims of ineffective assistance of counsel merit a new trial only where the error may have affected the verdict." Pet. App. 8a-9a (citation omitted) (quoting *Commonwealth v. Dyer*, 460 Mass. 728, 735 n.7, 955 N.E.2d 271, 281 n.7 (2011), and citing *Strickland*, 466 U.S. at 691). The court concluded that "[a]lthough it may be difficult to demonstrate prejudice in the context of a closed jury empanelment process," it would not "rule out that possibility." Pet. App. 8a n.3. The denial of the new trial motion was thus affirmed. Pet. App. 9a.

Justice Duffly, joined by Justice Lenk, dissented. Pet. App. 9a-21a. They would have "h[e]ld that a defendant is entitled to a presumption of prejudice where a defendant raises an ineffective assistance of counsel claim and has established that, in failing to object to a court room closure, counsel's performance fell below that of an ordinary, fallible attorney." Pet. App. 12a n.7. The dissenters relied in part on this Court's public-trial-right case law holding that a harmlessness analysis may be dispensed with once a defendant has established a violation of the right. Pet. App. 12a-13a, 15a, 19a-20a.

REASONS FOR DENYING THE PETITION

A defendant who claims that his right to the effective assistance of counsel has been infringed must normally prove that his attorney's errors likely affected the outcome of his trial. Petitioner asks this Court to consider waiving that requirement whenever a defendant claims that his counsel failed to raise any of a wide range of errors that share a common classification as "structural." While he maintains that the lower courts are deeply divided on whether that step is warranted, the division is not so pronounced. The Massachusetts SJC's view, which is compelled by this Court's precedent, rightly prevails. All but two of the courts that purportedly disagree either have already begun correcting their error or did not actually reject the prevailing view at all. This Court's intervention is therefore unnecessary. In any event, this case does not present a suitable vehicle for addressing the question. Key predicate findings have never been made, and a decision for the Petitioner might not affect his conviction.

I. Any disagreement among the lower courts is overstated.

The petition overstates the extent of disagreement in the lower courts. As Petitioner correctly recognizes, at least four federal circuit courts of appeals and four other state high courts share the SJC's view. Pet. 9-10. They recognize that defense counsel's failure to raise a "structural" error does not

warrant presuming prejudice. *See United States v. Gomez*, 705 F.3d 68, 80 (2d Cir. 2013); *Palmer v. Hendricks*, 592 F.3d 386, 397-98 (3d Cir. 2010); *Purvis v. Crosby*, 451 F.3d 734, 738 (11th Cir. 2006); *Virgil v. Dretke*, 446 F.3d 598, 612 (5th Cir. 2006); *Reid v. State*, 286 Ga. 484, 487-89, 690 S.E.2d 177, 180-81 (2010); *People v. Vaughn*, 491 Mich. 642, 654-58, 821 N.W.2d 288, 297-99 (2012); *State v. Pinno*, 356 Wis.2d 106, 151-53, 850 N.W.2d 207, 230-31 (2014); *State v. Butterfield*, 784 P.2d 153, 157 (Utah 1989).

Petitioner identifies five decisions as standing for a contrary view. Of these, two actually reflect no disagreement with the prevailing view at all, and one is nearly two decades old and has already begun to be corrected by the circuit. The two remaining decisions can likewise be left to the lower courts to correct, given that this Court has already made clear that courts should not conflate forgoing harmlessness analysis upon proof of a structural defect with presuming the prejudice that is an essential element of establishing a denial of effective assistance of counsel.

1. This Court has been clear about the need to keep these two concepts separate. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-51 (2006). The reasons make sense: "the requirement of showing prejudice in ineffectiveness claims stems from the very definition of the right at issue; it is not a matter of showing that the violation was harmless, but of showing that a violation of the right to effective representation *occurred*." *Id.* at 150 & n.5 (distinguishing "[a] choice-of-counsel violation," which

"occurs *whenever* the defendant's choice is wrongfully denied"); *see also id.* at 147 ("The requirement . . . arises from the very nature of the specific element of the right to counsel at issue there – *effective* (not mistake-free) representation. Counsel cannot be 'ineffective' unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have). Thus, a violation of the Sixth Amendment right to *effective* representation is not 'complete' until the defendant is prejudiced."); *cf. Premo v. Moore*, 562 U.S. 115, 128-30 (2011) (stating, within discussion of performance prong of ineffectiveness test, that the "prejudice" or "harmless-error standard" applied on direct appeal in *Arizona v. Fulminante*, 499 U.S. 279 (1991), "presumes a constitutional violation, whereas *Strickland* seeks to define one," and "*Fulminante* says nothing about prejudice for *Strickland* purposes"); *Lockhart v. Fretwell*, 506 U.S. 364, 370 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.").[3]

[3] To be sure, certain of this Court's structural-error cases have used the term "prejudice." *See, e.g.*, *Waller v. Georgia*, 467 U.S. 39, 49-50 & n.9 (1984); *Tumey v. Ohio*, 273 U.S. 510, 524, 530 (1927). But there is no doubt that they were discussing what is now more commonly referred to as a "harmlessness" inquiry – that is, whether to excuse a demonstrated constitutional violation on the ground that its impact was limited.

Indeed, this Court requires a greater degree of prejudice for a defendant to establish ineffectiveness than to overcome harmlessness. *See Kyles v. Whitley*, 514 U.S. 419, 436 & n.9 (1995) (explaining that more is required to establish prejudice under *Strickland* than harm under standard of *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), applied in habeas corpus actions); *United States v. Dominguez Benitez*, 542 U.S. 74, 81 n.7 (2004) (explaining that more is required to show harm under *Brecht* than harm under standard of *Chapman v. California*, 386 U.S. 18, 24 (1967), applied on direct review); *id.* at 86 (Scalia, J., concurring) (observing that *Strickland* prejudice standard is "less defendant-friendly" than harmlessness standards of *Brecht* and *Chapman*); *cf. Premo*, 562 U.S. at 129-30 (explaining that the "prejudice" or "harmless-error standard" applied "on direct review following an acknowledged constitutional error" "cannot apply to determinations of whether inadequate assistance of counsel prejudiced a defendant who entered a plea agreement"). So, presuming that an error is harmful does not necessarily warrant treating counsel's failure to raise it as prejudicial for ineffectiveness purposes.

And in the limited circumstances in which this Court has held that prejudice may be presumed for ineffective-assistance claims, it has done so based on factors different from those found to warrant dispensing with a harmlessness inquiry. The Court has relied on a variety of rationales for forgoing the harmlessness inquiry for structural errors, including "the

difficulty of assessing the effect of the error," "fundamental unfairness," "the irrelevance of harmlessness," and the extent to which the error bears on the framework of the trial. *Gonzalez-Lopez*, 548 U.S. at 148-50 & n.4. By contrast, this Court has presumed prejudice in the ineffective-assistance context only where the nature of the error creates a high likelihood of prejudice. *Cronic*, 466 U.S. at 658-66 (explaining that a showing of prejudice has been found unnecessary where there were "circumstances that [we]re so likely to prejudice the accused that the cost of litigating their effect in a particular case [was] unjustified"); *accord Strickland*, 466 U.S. at 692-93 (adding that "such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent").[4] Thus, unlike its approach to structural error and harmlessness, this Court has not instructed the lower courts to forgo entirely considering the

[4] In addition, there are differences among structural errors and the manner in which they are to be remedied. For example, in *Waller*, the Court agreed that "the defendant should not be required to prove specific prejudice in order to obtain relief," but concluded that "the remedy should be appropriate to the violation" and a new suppression hearing would be sufficient, at least initially. 467 U.S. at 49-50 & n.9 (adding that "[a] new trial need be held only if a new, public suppression hearing results in the suppression of material evidence not suppressed at the first trial, or in some other material change in the positions of the parties"). This provides a further reason why the various presumptions of prejudice in the harmlessness context cannot be mechanistically carried over to the *Strickland* context.

damage wrought by allegedly ineffective counsel; rather, it has simply held that, in certain circumstances, such damage is so likely that it may be presumed.[5]

2. Although the Eighth Circuit a number of years ago conflated these two distinct concepts in *McGurk v. Stenberg*, 163 F.3d 470 (8th Cir. 1998), it has begun to rectify its own error. In *McGurk*, the Eighth Circuit viewed this Court's precedent as "dictat[ing] the conclusion that the Nebraska Court of Appeals erred in requiring a showing of actual prejudice [from counsel's failure to inform his client that he was entitled to a trial by jury]." 163 F.3d at 475 & n.5 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993)). But *Sullivan* announced only that "harmless-error analysis does not apply" to a "'structural defect'" involving "[d]enial of the right to a jury verdict

[5] Contrary to Petitioner's contentions, it is not impossible that a defendant could prove prejudice from a failure to object to a courtroom closure. As was done here, he can submit affidavits from his counsel and himself. Pet. App. 2a-3a. He can also offer sworn statements from venire members, to the extent permitted. *See, e.g.*, *Commonwealth v. Rice*, 427 Mass. 203, 207-08, 692 N.E.2d 28, 31-32 (1998); 75B Am. Jur. 2d Trial § 1640: *Bias, Prejudice, or Disqualification Not Disclosed on Voir Dire*. A defendant can further provide an analysis of the questions asked during jury selection and their relationship to the issues in the case. But here, the trial judge found that Petitioner's "affidavits and motion [did] not indicate that he suffered any prejudice as a result of his family's removal from the court room," or "identify any unfairness that would have been prevented had his family been present during the voir dire." Pet. App. 34a-35a; *accord* Pet. App. 23a.

of guilt beyond a reasonable doubt." 508 U.S. at 282-82 (quoting *Fulminante*, 499 U.S. at 309). *Sullivan* did not concern prejudice for ineffectiveness. *Id.*

The Eighth Circuit has since narrowly confined *McGurk*. In fact, the court declined to apply its holding to a habeas claim alleging that trial counsel was ineffective for consenting to a courtroom closure. *Addai v. Schmalenberger*, 776 F.3d 528, 535-36 (8th Cir. 2015) (concluding that "requiring [the petitioner] to demonstrate prejudice would not have been contrary to or an unreasonable application of clearly established federal law"). The court reasoned in part that "*McGurk* involved the right to a jury trial – not the temporary closure of the courtroom – and [the opinion] expressly noted 'the extremely limited circumstances in which it is appropriate to presume prejudice,'" and observed that both prior and subsequent Eighth Circuit decisions were in tension with *McGurk*. *See also United States v. Kehoe*, 712 F.3d 1251, 1254-55 (8th Cir. 2013) (rejecting argument that "defense counsel's decision to select the jury in a racially discriminatory manner should result in a presumption of prejudice," "[n]otwithstanding . . . *McGurk*"); *Charboneau v. United States*, 702 F.3d 1132, 1138 (8th Cir. 2013) (finding *McGurk* inapplicable to habeas claim alleging ineffectiveness of appellate counsel for failure to raise a public-trial issue).

Like the *McGurk* court, the First Circuit in *Owens v. United States*, 483 F.3d 48, 63-64 (1st Cir. 2009), maintained that "[i]f . . . it is impossible to determine whether a structural error is prejudicial,

Sullivan, 508 U.S. at 281, we must then conclude that a defendant who is seeking to excuse a procedurally defaulted claim of structural error need not establish actual prejudice." *Id.* at 64-65 & n.13 (citation omitted) (explaining that the court "believe[d] that [the] showings of prejudice [for ineffective assistance and excusing procedural default] overlap, and [the court would] resolve them simultaneously"). And in *Littlejohn v. United States*, 73 A.3d 1034, 1043-44 (D.C. 2013), the District of Columbia's Court of Appeals held that "[r]equiring Littlejohn to prove actual prejudice as a result of trial counsel's waiver of his public trial right would be inconsistent with the Supreme Court's holdings that prejudice is presumed when the constitutional error is a structural defect. . . ." But this Court need not step in to correct these errors; as the Eighth Circuit's example suggests, these two courts can correct themselves, based on this Court's precedents.

3. Neither of Petitioner's two remaining cases – *Johnson v. Sherry*, 586 F.3d 439 (6th Cir. 2009), and *State v. Lamere*, 327 Mont. 115, 112 P.3d 1005 (2005) – reflects a clear disagreement with the prevailing view of federal law.

The Sixth Circuit did not hold in *Johnson* that prejudice for ineffective-assistance purposes should be presumed where an attorney fails to object to a violation of the right to a public trial. 586 F.3d 439. Rather, the court concluded that "if evidence reveals that counsel's failure to object fell below an objective standard of reasonableness, there is a *strong*

likelihood that counsel's deficient performance would be deemed prejudicial." *Id.* (emphasis added). The court confirmed that it was not mandating a presumption of prejudice for ineffectiveness purposes by remanding the case "for an evidentiary proceeding to determine whether the trial closure was justifiable, whether trial counsel was constitutionally ineffective for failing to object, and *whether the cause and prejudice components of Johnson's public trial claim can be satisfied*." *Id.* at 447-48 (emphasis added).[6] And the Sixth Circuit has since confirmed *Johnson*'s limited reach. *See Ambrose v. Booker*, 684 F.3d 638, 651 (6th Cir. 2012) (describing *Johnson* as "suggest[ing] a 'strong likelihood' that if the performance was deficient, it would be deemed prejudicial, reasoning in part that the right to a public trial is a structural guarantee" and noting the "tentative and conditional nature of this language").

And in *Lamere*, the Montana Supreme Court offered no indication that its holding was based on its view of federal law. 327 Mont. at 124-26, 112 P.3d at 1013-14. The court cited only a state-court opinion concerning the presumption of prejudice or harm that arises when a structural error has been shown, and it extended the concept to the ineffective-assistance

[6] The court was not suggesting that prejudice must be assessed only as part of the cause-and-prejudice analysis for procedural default and not for ineffective assistance. As it explained, it saw the two prejudice inquiries as "'overlap[ping].'" 586 F.3d at 447-48 & n.7 (quoting *Owens*, 483 F.3d at 64 n.13).

context. *Id.* (holding that "prejudice is adequately established because a structural error existed, and such errors are presumptively prejudicial," followed by citation to *State v. Good*, 309 Mont. 113, 127-28 ¶ 59, 43 P.3d 948, 959-60 ¶ 59 (2002), where court held that "structural error is presumptively prejudicial and is not subject to harmless error review jurisprudentially or under [the state's] harmless error statute found at § 46-20-701(1), MCA").

A few tribunals' misunderstanding of a distinction recognized by this Court can be pointed out by litigants and commentators, and corrected through the refinement of decisions in the lower courts – a process that is already under way. Such isolated mistakes do not warrant this Court's intervention.

II. This case represents a poor vehicle for addressing the question presented.

1. This case is also a poor vehicle for addressing the question presented. It comes here without any lower-court finding that the courtroom was impermissibly closed or that defense counsel performed deficiently at Petitioner's trial. Pet. App. 3a-4a ("In denying the defendant's motion, the judge assumed both that a closure during jury empanelment had occurred and that trial counsel's performance in failing to object to the closure fell below that of an ordinary fallible lawyer."); 23a-25a & n.2, 28a n.2; 33a-35a.

That is, there has been no determination as to predicate matters that would normally be assessed by Massachusetts courts. First, the credibility of averments by Petitioner, his counsel, and his relatives has not been evaluated. *See, e.g.*, *Commonwealth v. Buckman*, 461 Mass. 24, 27-29, 957 N.E.2d 1089, 1094-96 (2011) (discussing assessment of credibility regarding allegations of courtroom closure in motion for new trial). It thus remains undetermined whether the courtroom was closed to spectators during the entirety of jury selection, for only part of the process, or not at all.

Second, to the extent there was a closure, there has been no assessment of whether it was trivial or de minimis, and thus not constitutionally offensive. *See, e.g.*, *Commonwealth v. Jackson*, 471 Mass. 262, 268, 28 N.E.3d 437, 442 (2015) ("[I]t is possible that some closures are so limited in scope or duration that they are deemed de minimis, and thus do not implicate the Sixth Amendment." (citing *Peterson v. Williams*, 85 F.3d 39, 44 (2d Cir. 1996))).[7]

Third, even if there was a closure that was impermissible to some degree, it might not have risen to the level of structural error. This Court has implied that, even if a "*complete denial* of [a right] amounts to

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[7] *Accord, e.g.*, *United States v. Gupta*, 699 F.3d 682, 688-90 (2d Cir. 2012); *United States v. Rivera*, 682 F.3d 1223, 1229 (9th Cir. 2012); *United States v. Perry*, 479 F.3d 885, 890 (D.C. Cir. 2007); *Braun v. Powell*, 227 F.3d 908, 918-20 (7th Cir. 2000).

structural error," it cannot be assumed that a "*restriction* of [that right] also amounts to structural error." *Glebe v. Frost*, 135 S. Ct. 429, 431 (2014). "That is all the more true because our structural-error cases 'ha[ve] not been characterized by [an] 'in for a penny, in for a pound' approach,'" the Court explained. *Id.* (quoting *Neder v. United States*, 527 U.S. 1, 17 n.2 (1999)).

Fourth and finally, it has also not been determined whether the failure to object to any closure may have been tactical. *See, e.g.*, *Commonwealth v. Morganti*, 467 Mass. 96, 99-105, 4 N.E.3d 241, 244-48 (2014) (finding no ineffective assistance where attorney had not considered that public trial right extends to jury selection but acquiesced in closure to provide for orderly empanelment); *see also*, *e.g.*, *Strickland*, 466 U.S. at 689-91, 699 (reflecting respect for "the wide latitude counsel must have in making tactical decisions").

This Court's ability to address the question presented is constrained by the undeveloped factual record before it. And its limited resources should not be devoted to debating issues of prejudice associated with an error that may not have occurred at all.

2. For the same reasons, a decision for Petitioner here might have no impact on his conviction. The most Petitioner could hope for is a remand to the state system, which could not grant relief without first resolving the open issues discussed above. *See, e.g.*, Pet. App. 6a; *Morganti*, 467 Mass. at 103-05,

4 N.E.3d at 247-48. This fact further weighs against granting certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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