No. 14-

IN THE

Supreme Court of the United States

JOSHUA CINTRON,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant asserting a structural error in connection with the denial of his Sixth Amendment right to a public trial—where the defendant and his counsel were concededly unaware that the courtroom had been closed during the entirety of jury selection—must show that he was prejudiced by the courtroom closure on a collateral challenge to his conviction, or, whether prejudice is presumed because the harm from the structural error is "necessarily unquantifiable and indeterminate." *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993)?

LIST OF PARTIES

The parties below are listed in the caption.

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Statutes and Other Authorities

Joshua Cintron respectfully petitions for a writ of certiorari to review the judgment of the Supreme Judicial Court of Massachusetts in this case.

OPINIONS BELOW

The decision of a Single Justice of the Massachusetts Supreme Judicial Court affirming the denial by the trial judge of the motion for a new trial appears at Appendix A to the petition. This decision is unpublished. The decision of the trial judge denying Petitioner's motion for new trial appears at Appendix B. The decision is unpublished. The decision of the Massachusetts Supreme Judicial Court affirming the Petitioner's conviction on direct appeal appears at Appendix C and is published, *Commonwealth v. Marrero (and seven companion cases)*, 436 Mass. 488, 766 N.E.2d 461 (2002).

STATEMENT OF JURISDICTION

The date of the opinion and judgment of the Supreme Judicial Court of Massachusetts for which review is sought is March 30, 2015. This petition is filed within ninety days of that date. The Supreme Judicial Court is the highest Massachusetts court. The decision of the Single Justice of the Supreme Judicial Court is final and unreviewable pursuant to Massachusetts General Law Chapter 272 Section 33E, *i.e.*, there is no further appellate review to the full bench of the Supreme Judicial Court. *Commonwealth v. Scott*, 437 Mass. 1008, 770 N.E.2d 474 (2002). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *** and to have the Assistance of Counsel for his defense.

STATEMENT OF CASE

A. Joshua Cintron Is Tried For Murder And His Conviction Is Affirmed On Appeal.

Joshua Cintron and a co-defendant, Miguel Marrero, were tried and convicted of felony-murder in the first degree on January 25, 1999, and were also convicted of armed robbery, armed home invasion, and unlawful possession of a firearm, in the Massachusetts Superior Court, in connection with the shooting death of Santiago Mena in his apartment. Convicted by a jury of first-degree murder, Mr. Cintron was thereafter sentenced to life in prison. On appeal, the Massachusetts Supreme Judicial Court affirmed Mr. Cintron's conviction on April 9, 2002. *Commonwealth v. Marrero (and seven companion cases),* 436 Mass. 488, 766 N.E.2d 461 (2002). (Appendix C).

B. Mr. Cintron Moves For A New Trial After Learning That His Right To A Public Trial Was Violated. The Trial Court Denies The Motion.

Following his conviction, Mr. Cintron filed a motion for a new trial, asserting, *inter alia*, that he was denied his Sixth Amendment right to a public trial in that court

officers closed the courtroom to his family and the public during jury selection, citing *Waller* v. *Georgia*, 467 U.S. 39, 104 S.Ct. 2210 (1984). He alternatively asserted, citing *Strickland* v. *Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984), that if objection to the closure was required, he was denied the effective assistance of counsel when his counsel failed to object to the closure.

The state trial court denied the motion for new trial, by Decision dated March 31, 2014 (Appendix "B"). The state trial court found both that there was a courtroom closure and that there was no intelligent waiver of the public trial right by Mr. Cintron who, along with his counsel, were both concededly unaware that court officers had excluded members of the public, including Cintron's family, from the courtroom. Because counsel was unaware that the closure had even occurred, the trial court found that Mr. Cintron was not deprived of the effective assistance of counsel. (Appendix "B" p. 5). Nevertheless, rather than reverse the conviction and order a new trial because denial of the public trial right is a structural error from which prejudice is presumed, the court denied the motion, holding that Mr. Cintron's claim was procedurally defaulted and Cintron could not demonstrate prejudice from the courtroom closure. (Appendix "B" p. 5).

C. The Single Justice Denies Leave to Appeal The Trial Court's Denial Of The Motion For New Trial.

Mr. Cintron timely filed a petition for leave to appeal the denial of his motion for new trial. On March 30, 2015, a Single Justice of the Supreme Judicial Court, Hon. Ralph D. Gants, C.J., *denied* the petition. (Appendix "A"). Relying upon *Commonwealth v. LaChance*, 469 Mass.

854, 17 N.E.3d 1101 (2014), the Single Justice held that Mr. Cintron's claim was procedurally waived because of the failure of trial counsel to object to the closure—even though counsel was unaware that a closure was even occurring (Appendix A, pp. 3-4). The Single Justice treated the claim as one of ineffective assistance of counsel, and denied the petition because, as in *LaChance*, Cintron relied upon the presumption of prejudice arising for a structural error, but made no separate showing of prejudice. (Appendix, p. 4).

D. The *LaChance* Decision.

In *LaChance*, a divided Massachusetts Supreme Judicial Court affirmed LaChance's conviction. The majority held that the defendant could not avail himself of "the presumption of prejudice that would otherwise apply to a preserved claim of structural error," because he had procedurally waived . . . his claim by not raising it at trial." *Id.* at 856-858. It further stated that the United States Supreme Court has recognized a presumption of prejudice only in limited circumstances," of which a courtroom closure is not one, and that courtroom closure, while a structural error, "will rarely have an effect on the judgment or undermine our reliance on the outcome of the proceeding." *Id.* at 859.

Justices Duffy and Lenk dissented. *Id.* at 860-868. In their view, the majority's decision "effectively forecloses vindication of [a] constitutional right on collateral review, even in cases where trial counsel has rendered constitutionally deficient performance . . . and neither the defendant nor his counsel knowingly waived his right to a public trial." *Id.* "[T]he very nature of a right to which

presumptive prejudice attaches—such as the right to an open court—is that a showing of prejudice is not possible." *Id.* at 862-863. Requiring proof of prejudice will therefore effectively preclude vindication of the right in virtually every case. *Id.*

Importantly, a petition for writ of certiorari in *LaChance* is currently pending with this Court, and with a direction from the Court that respondent in that case file a response to the petition on or before July 27, 2015.

REASONS FOR GRANTING THE PETITION

There is a deeply-divided conflict among the lower courts regarding the standard for determining prejudice on collateral review where the defendant's claim has been procedurally defaulted due to the failure of the defendant and/or his counsel to contemporaneously lodge an objection, based on a claim of ineffective assistance of counsel and trial counsel's failure to raise the violation of the defendant's structural rights. Some courts, relying on this Court's holdings that prejudice will be presumed on direct review because of the indeterminate effect of violations of structural rights, have concluded that prejudice is presumed if the defendant establishes deficient performance. Other courts hold that actual prejudice must be established notwithstanding the unquantifiable impact of violations of structural rights. This Court should grant review to resolve the conflict on this important, frequently recurring legal issue.

A. There is a deeply-divided and acknowledged conflict among the lower courts regarding the question presented.

1. Six courts hold that prejudice must be presumed in cases like this one.

In the Second Circuit, if the defendant and trial counsel are both unaware that the closure of the courtroom is even occurring—like the case on review here—then prejudice is presumed from the structural error on collateral review, just as it is on direct review, *without* resort to a forfeiture

analysis and a showing of actual prejudice. *United States v. Gupta*, 699 F.3d 682, 689-90 (2012) ("'Defense counsel cannot fairly be penalized for failure to raise at trial an issue of which he was, without his own fault, ignorant.' We therefore reject the Government's argument that Gupta has forfeited his Sixth Amendment claim'") (citation omitted).

Relatedly, three other courts of appeal and two state high courts have held, contrary to the ruling below, that when a defendant claims ineffective assistance of counsel arising from counsel's failure to object to structural error, the reviewing court must apply the same presumption of prejudice that governs the structural error analysis on direct review. *See Owens v. United States*, 483 F.3d 48, 65 (1st Cir. 2007) (citing this Court's determinations that it is impossible to identify prejudice from structural errors, and stating it would "not ask defendants to do what the Supreme Court has said is impossible"); *Johnson v. Sherry*, 586 F.3d 439, 447 (6th Cir. 2009) (presuming prejudice if the courtroom closure was unjustified); *McGurk v. Stenberg*, 163 F.3d 470, 475 and 475 n. 5 (8th Cir. 1998) ("failure on the part of counsel to ensure that mechanisms fundamental to our system of adversarial proceedings are in place cannot, under the reasoning of *Sullivan*, constitute harmless error"); *see also Littlejohn v. United States*, 73 A.3d 1034 (D.C. 2013) (prejudice must be presumed for *Strickland* purposes once a violation of the public trial right has been established); *Montana v. Lamere*, 112 P.3d 1005 (Mont. 2005) (same).

2. Seven courts hold that prejudice is not presumed in cases like this one.

Seven other lower appellate courts have reached the same conclusion that the Massachusetts Supreme Judicial Court did in this case, holding that a criminal defendant must affirmatively demonstrate prejudice when a structural-error claim is raised as part of a claim of ineffective assistance of counsel. *Palmer v. Hendricks*, 592 F.3d 386, 397-398 (3d Cir. 2013); *Virgil v. Dretke*, 446 F.3d 598, 612 (5th Cir. 2006); *Purvis v. Crosby*, 451 F.3d 734, 738 (11th Cir.), *cert. denied sub nom. Purvis v. McDonough*, 549 U.S. 1035 (2006); *Reid v. State*, 690 S.E.2d 177, 180-181 (Ga. 2010); *People v. Vaughn*, 821 N.W.2d 288, 297-299 (Mich. 2012); *State v. Pinno*, 850 N.W.2d 207, 230-231 (Wis. 2014); *State v. Butterfield*, 784 P.2d 153, 157 (Utah 1989).

Thus, the courts of appeal and the state high courts are deeply divided on the question presented. In *Johnson*, Judge Kethledge, in his dissent, recognized that the Sixth Circuit's "decision today directly conflicts with [the Eleventh Circuit's decision in *Purvis*]." 586 F.3d at 449. The Michigan Supreme Court likewise acknowledged a division among "the United States Courts of Appeals for the First and Eighth Circuits" which "have ruled that a structural error automatically satisfies the *Strickland* prejudice prong," and "the United States Court of Appeals for the Eleventh Circuit and the Georgia and Utah Supreme Courts," which "have held that an ineffective assistance of counsel claim premised on a structural public trial right violation still require a defendant to demonstrate actual prejudice." *Vaughn*, 821 N.W.2d at 307-308. And, in *LaChance*, the Massachusetts Supreme Judicial Court also acknowledged the conflict, rejected the

First Circuit's analysis in *Owens* that prejudice should be presumed, and stated that it was "more aligned" with the reasoning of the Eleventh Circuit in *Purvis*.

Thus, the conflict of authority at issue is especially poignant here since the Massachusetts Supreme Judicial Court's decision in this case conflicts specifically with the First Circuit's decision in *Owens*. Remarkably, in Massachusetts, identical constitutional claims are being treated differently in state and federal court.

B. *Strickland*'s Prejudice Requirement Is Presumptively Satisfied When Ineffective Assistance Results in Structural Error

Requiring a defendant to demonstrate prejudice flowing from the violation of the public trial right is directly at odds with this Court's precedents regarding the very nature of "structural" errors.

"Structural" errors defy harmless error analysis. *Arizona v. Fulminante*, 469 U.S. 279, 309 (1991). While trial errors may be "quantitatively assessed," structural rights are "markedly different," because they are "defects in the constitution of the trial mechanism" itself. *Id.* at 309. This Court has recognized that denials of structural trial rights are therefore "necessarily unquantifiable and indeterminate." *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993). Thus, if defendants were required to make a showing of prejudice in cases involving structural errors, relief would be practically impossible to obtain. *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984).

This is especially true in cases like this one involving the right to a public trial. The public trial serves a vital function in ensuring that "judge and prosecutor carry out their duties responsibly" and encourages "witnesses to some forward and discourages perjury." 467 U.S. at 46. While these functions are essential, they are also "frequently intangible" and thus "impossible . . . to quantify and prove. *Id.* at 49 & n.9. Accordingly, the Court held in *Waller* on direct review that prejudice must be presumed when there is a violation of the public trial right.

The Court's conclusion that structural errors are by definition errors that "defy" harmless error review applies equally to claims of ineffective assistance of counsel. Applying a harmless error analysis on collateral review would involve a "speculative inquiry into what might have occurred in an alternate universe"—just as it does on direct review. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006). Defendants would be obliged to carry a burden that this Court has recognized is "impossible to know" and "impossible . . . to quantify." *Ibid.* Absent a presumption of prejudice, a vast category of trial counsel errors would, practically speaking, be exempted from the Sixth Amendment's critical protection of effective assistance of counsel.

By contrast, no overriding concerns in the context of collateral review justify a different standard for "structural" errors. Although the finality of convictions is an important interest, *Strickland* itself identifies certain contexts in which prejudice is presumed—such as when defense counsel has "an actual conflict of interest." That is because, "it is difficult to measure the precise effect on the defense" of conflicted representation. *Ibid.* The

same conclusion applies with equal force to the Sixth Amendment right to a public trial whose benefit are significant, yet nonetheless, "frequently intangible, difficult to prove, or a matter of chance, [but] the Framers plainly thought them nonetheless real." *Waller,* 467 U.S. at 49 n. 9.

Finally, it is "rare" that an error is deemed "structural" in nature, *Washington v. Recuenco*, 548 U.S. 212, 218 (2006), and hence, any concern that the finality of verdicts will be broadly upended by applying a presumption of prejudice for ineffective assistance of counsel claims based on structural errors, is greatly diminished.

C. The Question Presented Is Important

Resolution of the question presented is important to resolve the deep division of authority in the lower courts, both state and federal, which is frequently recurring. Moreover, because any case in which the issue arises necessarily involves a structural error—in this case, the public trial right—every such case necessarily implicates principles of fundamental fairness that are essential to the administration of the criminal justice system.

As Justice Duffly so aptly observed in her dissent in *LaChance*, "[T]he very nature of a right to which presumptive prejudice attaches—such as the right to an open court—is that a showing of prejudice is not possible" 469 Mass. at 862-863. Requiring proof of prejudice will therefore effectively preclude vindication of the right in virtually every case. This Court should grant certiorari, invoking the principle that "every right, when withheld, must have a remedy." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 163 (1803).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — DECISION OF THE MASSACHUSETTS SUPREME JUDICIAL COURT DENYING LEAVE TO APPEAL THE DENIAL OF THE MOTION FOR NEW TRIAL

THE COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

RE: No. SJ-2012-0277

COMMONWEALTH

vs.

JOSHUA CINTRON

Plymouth Superior Court
No. PLCR99504-99507

NOTICE OF DOCKET ENTRY

You are hereby notified that on March 30, 2015, the following was entered on the docket of the above referenced case:

Second Memorandum Of Decision And Order On Defendant's Petition For Leave To Appeal Under G.L.c. 278, § 33E: . . . "I conclude that the issue raised in the defendant's motion for new trial is not substantial. For these reasons, leave to appeal the denial of his motion for new trial to the full court must be denied. Conclusion. It is ORDERED that the petition is DENIED." (Gants, C.J.)

Appendix A

/s/
Maura S. Doyle, Clerk

Appendix A

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY NO. SJ-2012-0277

COMMONWEALTH

vs.

JOSHUA CINTRON

SECOND MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S PETITION FOR LEAVE TO APPEAL UNDER G. L. c. 278, § 33E

The defendant, Joshua Cintron, was found guilty by a jury of felony-murder in the first degree on January 25, 1999.[1] On April 9, 2002, the Supreme Judicial Court affirmed the defendant's convictions. See *Commonwealth v. Marrero*, 436 Mass. 488 (2002). The defendant moved for a new trial, and his motion was denied by the trial judge. In July, 2012, the defendant petitioned the single justice under the gatekeeper provision of G. L. c. 278, § 33E, for leave to appeal the denial of his motion for a new trial. On July 31, 2013, I, as single justice, remanded the matter for additional factual findings regarding the defendant's claims that his right to a public trial was denied by the

1. The defendant was also convicted of armed robbery, armed home invasion, and unlawful possession of a firearm.

closure of the courtroom during jury selection, and that his trial counsel was ineffective for failing to object to the closure. I concluded that the defendant's remaining claims were not "new and substantial" under the gatekeeper provision of G. L. c. 278, § 33E.

On remand, the trial judge, after an evidentiary hearing, found that the defendant's mother and three of his sisters were told by a court officer during jury empanelment to wait outside the courtroom because there was standing-room-only in the courtroom arising from the large number of prospective jurors. The judge found that neither the defendant nor his attorney knew during empanelment that the family members had been asked to leave. The judge also found that, if the defendant or his attorney had informed the judge of the exclusion and objected to it, the judge would have ordered that the family members be allowed to remain in the courtroom, even if that meant that the number of prospective jurors in the courtroom had to be reduced. The judge concluded that the family members' exclusion during the empanelment "raises no serious doubt about whether the defendant is guilty of murder committed in the course of an armed home invasion," and "did not seriously affect the fairness or the integrity of the defendant's trial."

With respect to the defendant's claim that he was denied the effective assistance of counsel, the judge found that the absence of an objection was not caused by the lack of attention of defense counsel, or by incompetence or ineffectiveness. Rather, the judge found that defense counsel was paying all his attention to the selection of

jurors, and that, "[i]n these circumstances, the absence of an objection or request for relief by counsel regarding the unknown exclusion of family members was not objectively unreasonable." The judge concluded that defense counsel effectively represented the defendant at trial, that his conduct did not deprive the defendant of a substantial ground of defense, and that there was no substantial risk of a miscarriage of justice.

When the judge issued his memorandum of decision and order after remand on March 31, 2014, he did not have the benefit of the Supreme Judicial Court's opinion in *Commonwealth v. LaChance*, 469 Mass. 854, 856 (2014), which issued on October 21, 2014, where the Court held:

> "[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."

There is no dispute that the defendant did not object at trial to the closing of the courtroom to his family members. Therefore, the defendant's claim of error regarding the closing of the courtroom was procedurally waived. See *id.* at 857. Where an error is waived because of the failure of

trial counsel to object, we review the error after conviction, not as a claim of structural error arising from the denial of the right to a public trial, but as a claim of ineffective assistance of counsel. *Id.* at 858. To prevail on a claim of ineffective assistance of counsel, a defendant must show that trial counsel's failure to object to the closing of the courtroom "resulted in prejudice," that is, that there was a substantial risk that the failure to object to the closure of the courtroom affected the jury's verdict. *Id.* Here, the defendant makes no claim of prejudice; he rests solely on the claim that the closure of the courtroom is structural error that does not require a showing of prejudice. Where affirmance of the judge's denial of the defendant's new trial motion would be required by the full court's holding in *LaChance*, and where that holding, having issued less than one year ago, is unlikely to be undone, I conclude that the issue raised in the defendant's motion for new trial is not substantial.

For these reasons, leave to appeal the denial of his motion for a new trial to the full court must be denied.

Conclusion. It is ***ORDERED*** that the petition is ***DENIED.***

/s/ Ralph D. Gants
Ralph D. Gants
Chief Justice

Entered: March 30, 2015

APPENDIX B — FINDINGS AND RULINGS OF THE MASSACHUSETTS SUPERIOR COURT DENYING THE MOTION FOR NEW TRIAL

Commonwealth of Massachusetts
Superior Court

Ind. 1997: 99504-99507

COMMONWEALTH

v.

JOSHUA CINTRON

MEMORANDUM OF DECISION AND ORDER FOLLOWING AN EVIDENTIARY HEARING ON MOTION FOR A NEW TRIAL REGARDING THE RIGHT TO A PUBLIC TRIAL AND EFFECTIVE ASSISTANCE OF COUNSEL

A. Introduction

In 1999, the defendant and a codefendant were found guilty of murder in the first degree. The defendant's conviction was reviewed and affirmed by the Supreme Judicial Court. *Commonwealth v. Marrero,* 436 Mass. 488 (2002).

In 2011, the defendant submitted the present motion for a new trial raising several claims including a denial of the right to a public trial based on the exclusion of the

defendant's family members during the jury impanelment. The defendant also argues that he was deprived of the effective assistance of counsel by his trial attorney's failure to object to the exclusion. The motion for a new trial was denied by the trial judge in a Memorandum of Decision and Order dated June 4, 2012.

The defendant applied to a single justice of the Supreme Judicial Court for leave to appeal the denial of his motion for a new trial. The single justice remanded the case to the trial judge for additional fact findings on: (a) whether the alleged closure of the courtroom actually occurred during the jury selection; and (b) if so, whether defense counsel was ineffective for failing to object, including whether the absence of an objection was manifestly unreasonable tactical decision or, if the absence of an objection did not arise from a tactical decision, whether it was objectively unreasonable under the circumstances.

The Supreme Judicial Court single justice concluded that none of the other claims raised in the defendant's motion presented a "new and substantial question which ought to be determined by the full court." G.L. c. 278, § 33E.

The trial judge conducted an evidentiary hearing on January 17, 2014, on the public trial and assistance of counsel questions assigned by the single justice of the Supreme Judicial Court. The present Memorandum of Decision and Order contains revised fact findings and rulings on the public trial and assistance of counsel issues based on the trial transcript, the evidentiary hearing on

the motion for a new trial, and the judge's recollection of the trial as aided by the trial transcript and the hearing on the motion for a new trial. The trial transcript will be cited as "T." The post-trial hearing on the motion for a new trial will be cited as "P.H."

Due to courtroom overcrowding during the jury impanelment, four of the defendant's family members were instructed by a court officer to wait outside the courtroom until the jury selection was over. Neither the defendant nor his counsel made any objection or request for relief. The defendant and his attorney were not aware of this exclusion when it occurred. The absence of an objection or other request for relief was objectively reasonable. A new trial is not required or appropriate in the circumstances. The defendant was not deprived of the effective assistance of counsel on this or any other issue. The motion for a new trial is denied.

B. Facts

The joint trial of the defendant and his codefendant was conducted in the second criminal session courtroom in the Superior Court at Brockton. The jury impanelment occurred on the morning of on January 19, 1999. Extra jurors were summoned for this trial. T. I 17. A large number of prospective jurors were brought into the courtroom all at once.

The second session courtroom is on the second floor of the courthouse. The jury pool check-in and waiting area is in the basement. There is no available room on

the second floor for a staging area on the first or second floor for groups of prospective jurors who are waiting for impanelment in a particular courtroom. The other courtrooms are usually fully occupied with trials and hearings.

Based on my experience and the trial transcript, I estimate that seventy to eighty prospective jurors were brought into the courtroom for the impanelment of this two-defendant murder case. This courtroom has tight seating for about sixty members of the public. The public seating is on long benches that run along the rear and the right side of the courtroom.

In the early part of the impanelment there were not enough seats for the prospective jurors. Standing room is extremely limited in this courtroom because the spectator benches, the bar enclosure, counsel tables, and space for court staff take up almost all of the floor space. Some of the prospective jurors had to stand during a portion of the impanelment. T. I 17, 23. The standing jurors were standing very close to each other.

Based on the evidence, including the post-trial hearing, the court finds that court officers on their own initiative instructed four of the defendant's family members that they would have to wait on a bench outside the courtroom until the jury impanelment was over. The defendant's mother, Delia Pagan, and three of his sisters, Myra, Marlis and Elizabeth Cintron, were told by an officer to wait outside the courtroom. The officer did this because there was not enough room to safely and

properly conduct the impanelment while the large group of prospective jurors were in the courtroom in tight, standing-room-only conditions.[1]

The impanelment was conducted in the courtroom. The first sixteen jurors on the random list were called and seated in the jury box. The judge then asked a series of voir dire questions to the entire group or prospective jurors. He instructed the jurors to raise their hands if they had a "yes" answer to any of the judge's questions. The judge asked the jurors who were preliminarily called and any replacement jurors if they had any "yes" answers to the judge's questions. If a juror had a "yes" answer

1. Based on what I have learned after the trial, I find that court officers instructed the defendant's four family members to wait in the hallway during the impanelment to reduce the overcrowding in order to provide for a safe and orderly jury impanelment. If there had been any objection by the defendant, it is unlikely that these concerns would have warranted the exclusion of the family members. *Presley v. Georgia,* 558 U.S. 209, 215 (2010).

In the hearing on the motion for a new trial, the defendant offered as exhibits testimony from post-trial motion hearings regarding other Superior Court trials in Brockton in the same time period. I accept these exhibits as part of the evidence. Nevertheless, from my own experience I find that the court officers did not invariably exclude members of the public from all jury impanelments. I know now that exclusion during impanelment often occurred in the same time period if the courtroom was overcrowded. I find that the officers' responses varied from trial to trial and from courtroom to courtroom depending on the number of jurors that were being brought into the courtroom, the space available to hold the jurors, the number of defendants on trial and concern for safety and good order in the courtroom.

to the judge's questions, the judge spoke with the juror individually at the side of the bench in the presence of the attorneys but out of the hearing of other prospective jurors. There was individual voir dire at the bench only to this limited extent. The impanelment lasted an hour and seven minutes. It was completed at noon on the first day of the trial. When the impanelment was over, an officer informed the defendant's family members that they could come back into the courtroom. P.H. 27-28.

The trial judge did not instruct the court officers to exclude anyone from the courtroom during the jury impanelment. During the impanelment, I did not know that officers were excluding the defendant's family members from the courtroom. I was aware of the severe overcrowding, but I was not aware of whether any family members of either defendant had been told by an officer to wait outside the courtroom.

The defendant's attorney and the defendant were not aware during the impanelment that the defendant's four family members had been told by a court officer to remain outside the courtroom. The defendant's attorney and the defendant knew that when the large group of potential jurors was brought into the courtroom the courtroom became overcrowded. The defendant and his attorney knew that all the spectator benches became filled and that many jurors were left standing.

From the point when the large group of jurors entered the courtroom until the conclusion of the impanelment, the defendants, the attorneys and the judge concentrated on

the selection of jurors and not on whether members of the public (other than the large group of prospective jurors) were present or not present during the impanelment.

A copy the Confidential Juror Questionnaire for each of the seventy to eighty prospective jurors was given to each attorney. See G. L. c. 234A, § 22. The defendant's attorney showed the pertinent juror questionnaires to the defendant while jurors were being called and considered for impanelment. See T. 50. The defendant consulted freely with his attorney at counsel table on the use of peremptory challenges and challenges for cause. See T. I 50. Some jurors were excused for cause because they knew witnesses. The defendant and his attorney concentrated on using the juror questionnaires and their peremptory challenges to avoid jurors who might be favorable for the prosecution and to obtain jurors who might be preferable for the defendant. See T. I 50, 57, 62. For this reason and because of the overcrowded conditions, neither the defendant nor his attorney noticed whether or not the defendant's family members were in the courtroom during the impanelment.

In the defendant's 2014 post-trial hearing testimony, he testified that during the impanelment he was aware that his family members were not present in the courtroom. The defendant was asked if he mentioned this to his attorney at the time. The defendant replied: "I don't remember. I was pretty sure that I did." P.H. 66.

A bit later the defendant was asked about participating with his attorney in the selection of jurors. The defendant

testified: "I seen I was sitting at a table. What [it] was we talked about, I don't remember. I seen crowdedness behind me cause I had my back turned. That's about it." P.H. 69. Considering the trial and post-trial evidence as a whole, I find that the defendant did not notice during the impanelment that his family members were not present in the courtroom. I find that during the impanelment the defendant did not mention to his attorney that his family members were not present in the courtroom.

At the time of the trial, I was aware from prior experience and Massachusetts case law that an exclusion of a defendant's family members during a portion of a trial could amount to a violation of the defendant's right to a public trial. See *Commonwealth v. Marshall,* 356 Mass. 432, 433-435 (1969); *Commonwealth v. Bohmer,* 374 Mass. 368, 380-381 (1978). If the defendant or his counsel had informed me of the exclusion and objected, I would have ordered that the family members be permitted to be present even if this would result in reducing the number of potential jurors in the courtroom.[2]

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2. The witness list provided to the court by the attorneys included the defendant's sisters, Myra, Marlis and Elizabeth Cintron. T. I-30. On the second day of the trial a court officer told the judge that some family members or friends of the defendants wanted to observe the trial even though they were on the witness list and subject to a witness sequestration order. The judge asked the attorneys about this.

The judge informed counsel: "I wish to encourage friends and family members or any persons involved, the victim's family and defendants family, to attend if they wish. If someone is a crucial witness, they can be excluded. . . . And if someone requests an

C. The Right to a Public Trial and the Absence of Any Objection or Request for Relief

In *Commonwealth v. Morganti,* 467 Mass. 96, 97 (2014), and *Commonwealth v. Alebord,* 467 Mass. 106, 109, 113 (2014), the court concluded that the public trial issue had been waived by the lack of objection where experienced counsel were aware that the courtroom was closed to the public during jury impanelment. The court in *Morganti* and *Alebord* also concluded that defense counsel's failure to object was not ineffective assistance of counsel.

A violation of a defendant's right to a public trial is treated as a structural error that is "'not susceptible to harmless error analysis.'" *Morganti,* 467 Mass. at 101. The court noted in *Morganti* and *Alebord,* however, that "the right to a public trial may be procedurally waived by a failure to lodge a timely objection to the offending error." *Morganti,* 467 Mass. at 102; *Alebord,* 467 Mass. at 112.

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exception from the sequestration order because of a vital family interest in the deceased or a defendant, I would consider that as well." T. II 14-16.

Counsel for Mr. Cintron asked that his mother be permitted to be present in the courtroom at all times. Both defense counsel stated that they would not be calling Mr. Cintron's mother as a witness. T. II 14-16. Mr. Cintron's mother was not excluded from the courtroom after the impanelment. P.H. 27-28.

Appendix B

Several cases in other jurisdictions have found that a public trial issue occurring during jury impanelment was waived or forfeited. These cases have usually involved situations, like those in *Morganti* and *Alebord,* where the defendant's counsel was aware that members of the public were excluded but did not object. *United States v. Gomez,* 705 F.3d 68, 75 (2013); *State v. Vaughn,* 491 Mich. 642 (2012); *Robinson v. Maryland,* 410 Md. 91, 108 (2009) (reviewing similar cases from other jurisdictions).

In the present case, the defendant and his attorney were not aware that the defendant's family members or members of the public were being excluded from the courtroom during the impanelment. The court is not aware of any Supreme Court or Massachusetts appellate decision that directly confronts the question of a waiver or forfeiture of a public trial issue where the defendant and counsel did not know that an exclusion had occurred.

The term "waived" does not exactly fit where the defendant and his attorney were not aware that family members were being temporarily excluded. Courts have also used the terms "procedurally defaulted" and "forfeited." See *State v. Vaughn,* 491 Mich. at 654. The phrase "did not raise or preserve the issue" fairly describes what happened in this case.

One important reason for the rule requiring a timely objection or request for relief is that it alerts the trial judge to the problem and enables the judge to take appropriate corrective action. *United States v. Gomez,* 705 F.3d 68, 75, *cert. denied*, 134 S. Ct. 61 (2013) ("Had there

been a timely objection by Gomez to the exclusion of his family members, the trial court might well have adopted an alternative such as 'dividing the jury venire panel to reduce courtroom congestion ....'").

Some courts have applied a four-part test to determine whether a public trial issue should be reviewed in the absence of a timely objection. Under this test, a defendant is not entitled to relief unless the defendant can establish: "(1) that the error occurred, (2) that the error was 'plain,' (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *State v. Vaughn,* 491 Mich. at 654. A similar but not identical test was applied in *United States v. Gomez, supra,* 705 F.3d at 75, and *Barrows v. United States,* 15 A.3d 673, 677 (D.C. Court of Appeals 2011).[3]

In this case, the exclusion of the defendant's family members occurred. The error was "plain" in the sense that if there had been an objection and no corrective response there would have been a violation of the defendant's Sixth Amendment right to a public trial. *Commonwealth*

3. Compare the *pre-Gomez* case of *United States v. Gupta,* 699 F.3d 682, 689-690 (2d Cir. 2012), where a different panel of the Second Circuit did not apply the four-part test used in *United States v. Gomez, supra.* The court in *Gupta* set aside the defendant's conviction based on an unobjected-to exclusion of the defendant's brother and girlfriend during impanelment in a situation where the defense counsel and the defendant were not aware of the exclusion.

v. Marshall, 356 Mass. 432, 435 (1969); see *Presley v. Georgia,* 558 U.S. 209 (2010). The exclusion in the present case affected a substantial right of the defendant, although the defendant was not aware of this at the time.

The exclusion of the family members during the impanelment, however, raises no serious doubt about whether the defendant is guilty of murder committed in the course of an armed home invasion. See *Commonwealth v. Marrero* (and Cintron), 436 Mass. 488 (2002); *Commonwealth v. Cintron,* SJC single justice decision, 7/31/13, and trial judge decision, 6/4/12, regarding other postconviction issues. The exclusion during the impanelment due to overcrowding did not seriously affect the fairness or the integrity of the defendant's trial. It did not harm the public reputation of judicial proceedings in the Commonwealth.

In *Morganti,* the court noted the interest of finality in judicial decisions. 467 Mass. 102-103. There are values that are more important than finality. The interest of finality should not preclude review of an issue if there is serious doubt about the guilt of the defendant or the fundamental fairness of the trial. There is no such doubt in this case.

D. Assistance of Counsel

In *Morganti* and *Alebord,* there was testimony from the defendants' attorneys and other Brockton based defense attorneys. These attorneys were familiar with a court officer practice in the Superior Court in Brockton of asking members of the public to wait outside the

courtroom when the courtroom became overcrowded with prospective jurors during impanelment.

In the present case, the defendant's trial counsel was Thomas J. Ford. Mr. Ford was an experienced and capable criminal defense attorney. Attorney Ford's office was in Boston. The bulk of his practice was not in Brockton. Mr. Ford was not aware that court officers in the Superior Court in Brockton had a practice of excluding members of the public during impanelment when the courtroom was overcrowded with jurors.

The absence of an objection here was not caused by a lack of attention by the defendant or his counsel. It was not caused by incompetence or ineffectiveness by the attorney. *Commonwealth v. Saferian,* 366 Mass. 89, 96 (1974). On the contrary, the defendant and his counsel were paying all their attention to what mattered most to the defendant: the selection of potentially favorable jurors and the avoidance of unfavorable ones. See *Commonwealth v. Morganti,* 467 Mass. at 104. In these circumstances, the absence of an objection or request for relief by counsel regarding the unknown exclusion of family members was not objectively unreasonable. The attorney competently and effectively represented the defendant during the impanelment and throughout the trial. Counsel's conduct did not deprive the defendant of a substantial ground of defense. There was no substantial risk of a miscarriage of justice.

Appendix B

E. Order

The motion for a new trial is denied.

March 31, 2014

/s/
Charles J. Hely
Justice

APPENDIX C — DECISION OF THE MASSACHUSETTS SUPREME JUDICIAL COURT AFFIRMING PETITIONER'S CONVICTION ON HIS DIRECT APPEAL, COMMONWEALTH V. MARRERO (AND SEVEN COMPANION CASES), 436 MASS. 488, 766 N.E.2D 461 (2002)

SUPREME JUDICIAL COURT OF MASSACHUSETTS

436 Mass. 488

COMMONWEALTH

vs.

MIGUEL A. MARRERO
(and seven companion cases[1]).

February 7, 2002, Argued
April 9, 2002, Decided

Present: MARSHALL, C.J., GREANEY, COWIN, SOSMAN, & CORDY, JJ.

OPINION

GREANEY, J.

A jury convicted the defendants, Miguel A. Marrero and Joshua Cintron, of felony-murder in the first degree (finding both armed robbery and armed home invasion as predicate felonies). The defendants were also convicted

1. Four against the codefendant, Joshua Cintron, and three against Miguel A. Marrero.

of armed robbery, armed home invasion, and unlawful possession of a firearm. Represented by new counsel on appeal, each defendant asserts claims of error pertinent to himself, and both defendants make certain common claims of error. We discern no error and no basis on which to exercise our authority under G. L. c. 278, § 33E, to reduce the murder convictions to a lesser degree of guilt or to order a new trial. We shall first set forth a brief summary of the facts that could have been found by the jury based on the Commonwealth's evidence. We shall next proceed to decide Marrero's separate claims of error, then Cintron's, and we shall conclude by deciding the claims of error asserted by both defendants.

Santiago Mena was shot and killed in his Brockton apartment in the early morning hours of January 20, 1997. Several weeks prior to his murder, Mena and several others had begun selling drugs out of a second-floor apartment at 134 Green Street in Brockton. Their drug sales cut into the drug business of the defendants, who at that time were selling drugs out of a third-floor apartment at 234 Green Street. Cintron, according to trial testimony, believed that Mena was selling "better dope" than the defendants. Cintron was upset as well because he believed that Mena had stolen $ 500 from a friend and because Mena had refused to post bail for Cintron's cousin, Henry Nunez, who worked for the same drug organization as Mena. The Commonwealth argued that these personal problems, along with a desire to eliminate a rival drug dealer from the area, motivated Mena's killing.

Appendix C

On January 19, 1997, while visiting Cintron's apartment, Mary Hoard overheard a conversation, primarily in Spanish, between Cintron and a woman she believed may have been Inga Washington. Hoard heard Cintron say "they were going to go down the street and take care of the problem that had been there but they had to wait till after dark to do it." Hoard also heard Cintron say: "It would be easy. They had to wait till later, go at night when it was dark. It would be easy . . . ." The woman then warned Cintron to be quiet because Hoard might understand them.

At about 7 P.M. that evening, Inga Washington visited her boy friend, Alex Pagan, at 234 Green Street. Also present in the apartment at that time were the defendants Cintron and Marrero, and Hector Maldonado ("Nunie"). Washington observed Cintron and Marrero handling a black nine millimeter pistol and overheard a conversation about Mena's undercutting their drug sales. She also heard both defendants say that they were "going to take care of this and do what [they had] to do" and "they were just going to get their money from the guy down the street." Cintron said that he and Marrero would kick in the back door and let Washington in the front door. All four (Cintron, Marrero, Washington, and Nunie) then left the apartment. They were dressed in black and wearing black hats or "hoodies."

Marrero drove the group down the street in his automobile and parked a few blocks from 134 Green Street. A few minutes before 2:30 A.M., on January 20, 1997, Marrero and Cintron went to the rear entrance

of Mena's apartment, which was locked and barricaded with a refrigerator. Cintron wore a mask and carried a gun while Marrero was unmasked and wielded a knife. The defendants forced down the door. When Mena came to the door to see what was happening, Cintron shot him at close range in the chest.

Kristyn Genereux, who also lived at 134 Green Street, heard a crash and ran to the kitchen. On seeing the masked intruders with guns[2] and a knife, she retreated to the bedroom. Two of the men followed her and, as a masked man held a gun to her head, demanded money and drugs. Genereux gave them $ 150 from her pants pocket and packets of heroin and cocaine that were in the bedroom closet. She then heard someone yell, "Let's get out of here. Let's go."

Meanwhile, Washington and Nunie waited outside the front door of the apartment building. After about three minutes, they heard a gun shot and a woman, presumably Genereux, scream, "He's got a gun, he's got a gun." Washington and Nunie decided to enter the building. On their way inside, they were passed by a person known as "Tommy" (or "Chabey"), who also resided at 134 Green Street, fleeing the scene barefoot and without a coat. Cintron and Marrero then ran from the front door of Mena's apartment and told Washington and Nunie to "go,

2. Genereux testified that another intruder entered the apartment through the front door wearing a white ski mask and holding a silver gun. She also testified that she saw three men in the kitchen, two whose faces were completely covered by black masks.

go, go."[3] Cintron was behind Marrero and was holding a gun. The three men got into Marrero's automobile and left the scene, while Washington walked back to 234 Green Street. When the police arrived at 134 Green Street, they found Mena lying unconscious on the floor in a pool of blood, next to an overturned refrigerator. Mena was taken to a hospital and pronounced dead a short time later.

It was approximately 3:30 A.M. when Cintron, Marrero, and Nunie returned to 234 Green Street. Marrero said that he had gotten some money from Mena's apartment, and asked Cintron, "Why did you have to shoot him?" To that, Cintron replied, "Fuck him." Cintron acknowledged that he had shot Mena in the chest, and added, "I hope the guy's not dead." He also said that he had to "get out of here."

1. ***Issues Raised by Marrero.***

(a) Within twelve hours of the shooting, police arrived at the apartment of Cintron's sister, Marlis Cintron, where they found both defendants. The defendants agreed to accompany the officers to the police station, where they were questioned separately and allowed to leave. During his questioning, Cintron told the police that he had been with Marrero and Nunie at 234 Green Street on the previous day, leaving to play pool around 10 P.M., and returning one hour later. During the same interview, Cintron stated that he knew Mena and had, a few days

3. Genereux testified that four individuals had been in the apartment at the time of the shooting.

earlier, confronted him about obtaining bail money for his cousin, Henry Nunez, but Mena refused to help. He also said that a friend of his believed Mena had recently stolen money from her. He told the police that he knew about the murder because he had received a telephone call that day from a drug dealer who worked with Mena who said, "We know you killed [Mena]. You better watch out."

The above statements were introduced in evidence through the testimony of the State trooper who spoke with Cintron on January 20, and repeated, in substantially the same language, during testimony of another State trooper who had spoken with Cintron in early February. Prior to the first trooper's testimony, Marrero's trial counsel requested that the judge instruct the jury that any statement of Cintron could not be used as evidence against Marrero. The judge indicated that he would defer his decision on the request until hearing the rest of the evidence.[4]

Marrero contends that the admission of Cintron's statements violated his constitutional right to confrontation as set forth by the United States Supreme Court in *Bruton v. United States*, 391 U.S. 123, 126, 20 L. Ed. 2d 476, 88 S. Ct. 1620 (1968). In support of this contention, Marrero asserts that, while the statements standing alone may not implicate him, they are inculpatory when considered

4. He gave a limiting instruction, however, regarding statements made by Cintron on his arrest in Springfield on May 10, 1997, both after the direct examination of the State trooper who testified regarding the Springfield statements and in his final charge.

with other evidence because they place him with Cintron at the time the crimes were committed. The likely effect of the statements on the jury, contends Marrero, was to associate him with Cintron's statements of motive (his anger at Mena's refusal to help furnish bail for Nunez and Mena's suspected theft of the money), and with certain highly inculpatory statements that Cintron made to police when he was arrested in Springfield (which the jury were instructed could not be used against Marrera, see note 4, *supra*). Because Cintron did not testify at trial, Marrero argues, his constitutional right to cross-examine the witnesses against him was denied. See *id.* at 126.

The statements were admissible as statements made in furtherance of a joint venture. The *Bruton* decision, therefore, does not apply.[5] See *Commonwealth v. Bongarzone*, 390 Mass. 326, 339-340, 455 N.E.2d 1183 (1983). "Under the joint venture exception to the hearsay rule, 'out-of-court statements by joint criminal venturers

5. Even if there were a *Bruton* problem in this case, we discern no possible prejudice to Marrero from the jury's consideration of Cintron's statements. *Bruton v. United States*, 391 U.S. 123, 126, 20 L. Ed. 2d 476, 88 S. Ct. 1620 (1968). There was testimony that Marrero himself told the police, on January 20, that he and Cintron had spent the previous evening together. Moreover, the jury heard evidence that Marrero had told the manager of a drug and alcohol rehabilitation center that he had been present where a murder took place. See *Commonwealth v. Adams*, 416 Mass. 55, 58, 617 N.E.2d 594 (1993), quoting *Commonwealth v. Sinnott*, 399 Mass. 863, 872, 507 N.E.2d 699 (1987) (test whether *Bruton* error is harmless is whether any "'spillover' resulting from imperfect interlock [of the statements] was without effect on the jury and did not contribute to the verdict").

are admissible against the others if the statements are made during the pendency of the criminal enterprise and in furtherance of it.'" *Commonwealth v. Hardy*, 431 Mass. 387, 393, 727 N.E.2d 836 (2000), quoting *Commonwealth v. Clarke*, 418 Mass. 207, 218, 635 N.E.2d 1197, (1994). The judge's thorough instructions to the jury included a proper instruction on the joint venture exception to the hearsay rule. Marrero's claim that any joint venture between himself and Cintron had ended at the time the statements were made, see *Commonwealth v. Colon-Cruz*, 408 Mass. 533, 543, 562 N.E.2d 797 (1990), has no merit in light of undisputed evidence that the challenged statements were made only a few hours after the crimes, and police had found both defendants together in the apartment of Cintron's sister.

(b) On the day of the murder, at the police station, Genereux was shown a series of photographic arrays. She first selected a photograph of Marrero (in which Marrero had a moustache and beard), but stated she believed the photograph was of a cousin or relative of the unmasked intruder. Later that day, Genereux spoke to "Tommy" on the telephone. She told him that she had recognized the unmasked intruder, the one with the knife, as someone who had been at the 134 Green Street apartment on the previous Friday, picking up a cable box. Tommy told Genereux that the name of the person who had picked up the cable box was "Miguel" (the defendant Marrero). After that conversation, Genereux returned to the police station at her own request and was shown another photographic array. This time, she was able to identify Marrero as the unmasked intruder from a photograph of Marrero taken

that day. She explained to the police that facial hair in the first photograph had confused her, as the unmasked intruder had been clean shaven during the attack.

The judge properly admitted the evidence of Genereux's identification of Marrero's photograph. Contrary to Marrero's assertions, the identification was not based on what "Tommy" (who was a missing witness at trial) told Genereux, but on Genereux's recollection that she had seen the same person at the apartment a few days earlier. Tommy supplied a name to Genereux, but it was Genereux who, on her return to the police station, selected the photograph of Marrero from the array. The jury heard evidence of Genereux's telephone call to Tommy and subsequent identification of Marrero's photograph and she was subject to extensive cross-examination at trial. The jury thus were in a position to assess whether the circumstances surrounding the identification detracted from its credibility. There is no hint in the record of suggestive tactics on the part of the police that would implicate Marrero's due process rights. See *Commonwealth v. Odware*, 429 Mass. 231, 235-236, 707 N.E.2d 347 (1999).

(c) On the night of January 21, 1997, Marrero checked himself into a Christian rehabilitation center for drug addicts and alcoholics. The next day he told the manager of the facility, Wilfredo Montanez, that he had been present at a place where a murder occurred. The judge, after a voir dire, rejected Marrero's claim that his statement to Montanez should have been excluded because it was privileged under G. L. c. 233, § 20A, the statute which

protects, as confidential, statements made to a clergyman. The statute encompasses "[a] priest, rabbi or ordained or licensed minister of any church or an accredited Christian Science practitioner . . . ."

The judge ruled correctly. Montanez's testimony at the voir dire made it clear that he was not ordained or licensed as any form of clergyman, and therefore not a clergyman as defined in the statute. We decline to expand the statute to include Montanez. Marrero's contention that the facility was operated by an ordained minister and Marrero was seeking "religious or spiritual advice or comfort" does not suffice to make his conversation with Montanez privileged. This is not an appropriate case to consider the possible adoption of Proposed Mass. R. Evid. 505, which expands the definition of a clergyman beyond the definition contained in the statute.

2. ***Issues Raised by Cintron.***

(a) Cintron filed a pretrial motion to suppress statements he made to the police. The judge conducted an evidentiary hearing on the motion and denied it in a written memorandum of decision. Cintron now argues that the judge erred in concluding that Cintron voluntarily waived his Miranda rights and voluntarily made statements. He also contends that his response to two questions asked by State Trooper James White were involuntarily made and were ambiguous. The testimony in question was given by State Trooper Paul L'Italien at the motion hearing in the following manner:

> The witness: "[Cintron] stated that he didn't do it, and Trooper White asked him, 'If you didn't do it, who did it?'"
>
> The prosecutor: "How did the defendant respond to that?"
>
> The witness: "He gave no reply at all. Trooper White then stated to [Cintron], 'You didn't mean to kill him, did you?' At that point [Cintron] shook his head back and forth in a negative manner. Trooper White then asked, '[Cintron], you wish you could have that night back, don't you?' In response to this question, [Cintron] shook his head up and down in an affirmative manner."

The judge's conclusions that Cintron's statements to the police were made after he had received, understood, and waived his Miranda rights, and were voluntary in all respects, were supported by the evidence that the judge found credible. There is no basis in the evidence or in the judge's decision to support Cintron's present argument that his responses were involuntary.

We reject as well Cintron's arguments that the responses set forth above should have been suppressed because they were tantamount to silence and ambiguous. The judge properly found that Cintron's actions constituted "generally recognized negative and affirmative gestures that came in direct response to [Trooper White's] questions." There was nothing equivocal, evasive,

or nonresponsive in Cintron's action. His conduct — nodding his head "yes" and shaking it "no" in response to questioning — was communicative in nature and constituted admissions by deliberate nonverbal expression.

(b) On Friday, January 15, 1999, four days before the trial began, the Commonwealth disclosed for the first time its intention to call Mary Hoard as a witness. Cintron thereafter filed a motion seeking either a sixty-day continuance or the exclusion of Hoard's testimony, pursuant to Mass. R. Crim. P. 14 (c), 378 Mass. 874 (1979). The judge denied the requested relief at that time, based on his finding that the late disclosure was due to a good faith mistake (a fact that Cintron's trial counsel did not contest). The judge offered, however, to require Hoard to submit to a voir dire hearing or to an interview by Cintron's trial counsel or investigator, or both, as a remedy for the delayed disclosure. Cintron's trial counsel agreed to a voir dire hearing and requested a court interpreter to interview Hoard regarding her ability to speak Spanish.

At the voir dire hearing, Cintron's trial attorney questioned Hoard extensively regarding her limited ability to understand and speak Spanish. Hoard's testimony indicated that, although she never formally learned Spanish and presently understood virtually no Spanish at all, she had been able to understand (but not speak) Spanish two years earlier, on January 19, 1997, when she overheard Cintron discussing plans to "take care of it," because at that time she had lived around Spanish-speaking people. At the hearing's conclusion, Cintron moved to exclude Hoard's testimony as being unreliable. The judge denied the motion.

Cintron now claims that the judge abused his discretion in failing to exclude Hoard's testimony or to allow a sixty-day continuance. Although the late disclosure forever denied him the opportunity to test, on a firsthand basis, Hoard's ability to understand his words, Cintron contends that a continuance would, at least, have provided time to locate witnesses with knowledge of Hoard's ability to speak or understand Spanish in 1997. According to Cintron, the voir dire hearing failed to remedy the prejudice that resulted from his inability to investigate and, thus, to challenge effectively the extent of Hoard's familiarity with Spanish in 1997. His claim of prejudice is undercut, however, by his failure, after the voir dire hearing, to renew his motion for a continuance. See *Commonwealth v. Hamilton*, 426 Mass. 67, 71, 686 N.E.2d 975 (1997). The judge had considerable discretion under rule 14 (c), and adequately handled the problem created by the prosecution's inadvertent late disclosure of the witness. See *id.* at 70; *Commonwealth v. Donovan*, 395 Mass. 20, 24, 478 N.E.2d 727 (1985).

3. ***Issues Raised by Both Defendants.***

(a) Inga Washington testified at trial pursuant to a written agreement that required her to provide complete, accurate, and truthful information and give her full cooperation to the police, in return for the Commonwealth's promise to accept her pleas of guilty to drug charges pending against her and to recommend, in connection with those charges, a sentence of probation with drug counselling and abstinence from drugs. The Commonwealth also agreed not to initiate criminal

proceedings against Washington based on her activities on January 20, 1997. According to the terms of the agreement, if Washington did not cooperate truthfully, she would thereafter be subject to prosecution for any criminal violation known to the Commonwealth, including perjury. Pursuant to this agreement, Washington gave extensive testimony which, if believed by the jury, squarely implicated both defendants in the murder and other crimes committed at 134 Green Street in the early morning of January 20, 1997. Her credibility was, therefore, a key issue at trial.

Evidence of the agreement was presented to the jury in the following manner. On direct examination, the prosecutor elicited that Washington was testifying pursuant to an agreement and elicited as well that her understanding of the agreement was "to make sure I tell the truth."[6] Washington further testified that her understanding of her portion of the agreement was to "stay out of trouble [and] tell the truth." When asked whether she understood that she could be prosecuted for perjury if she failed to testify truthfully, Washington responded, "Yes."

During cross-examination, both defendants vigorously challenged the credibility of Washington's testimony based

6. Marrero's trial counsel moved to strike this particular portion of Washington's testimony. The judge stated that he would take the motion under advisement, but allowed the prosecutor to continue questioning Washington on the substance of the agreement.

on the agreement.[7] On redirect, the prosecutor reviewed with Washington her understanding of each of the terms of the agreement. The judge then admitted the complete agreement, which was in the form of a letter addressed to Washington's attorney, on the letterhead of the office of the district attorney, and signed by the assistant district attorney, Washington, and Washington's attorney, as an exhibit for the jury's consideration. No objection was made at trial to the prosecutor's manner of questioning on redirect or to the admission of the unredacted agreement in evidence.

During recross-examination and again during closing arguments, the defendants pursued efforts to impeach Washington's testimony.[8] The prosecutor responded

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7. At one point, after eliciting from Washington the extent of the promises made to her in exchange for her testimony, Marrero's trial counsel asked rhetorically, "So you got a sweetheart deal, correct?"

8. On his recross-examination of Washington, Marrero's trial counsel elicited Washington's agreement that, in order not to lose custody of her child, she "told [the police] what they wanted to hear." During his closing arguments, Marrero's trial counsel forcefully argued to the jury that Washington should not be believed because she "got a deal. . . . What does she do in return for her deal? She has to come in here and testify. Well, fine. She comes in here and testifies. Don't be swayed by this truthful business because the truth is what the police think the truth is. [Washington] has to testify a certain way or she will be, her deal on drugs will go out the window. She'll be facing close to three years and she'll be facing perjury charges."

during his closing argument, stating that Washington "tells the truth, at least that's as far as I could follow it," and "I suggest to you [Washington] told the grand jury exactly what happened and she told you exactly what happened." The prosecutor then urged the jury to read the agreement for themselves: "Here it is. Black and white. Look at it. Read it. It's very clear. It's very simple. Ask yourselves what possible motivation does this deal give [her] to lie. It's very clear. It's for her truthful and complete testimony." Neither defense counsel objected to the above comments.

The defendants now contend that the prosecution's use of the agreement in connection with Washington's testimony was improper. Specifically, they claim that vouching prohibited under the guidelines set forth in *Commonwealth v. Ciampa*, 406 Mass. 257, 264-266, 547 N.E.2d 314 (1989), occurred by reason of (1) Washington's testimony elicited on direct examination regarding her understanding of her obligation under the agreement to testify truthfully; (2) Washington's repetitive testimony elicited on redirect examination regarding her contractual obligation to testify truthfully; (3) prosecutorial remarks made during closing arguments; and (4) the admission of

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Cintron's trial counsel, during his closing arguments, returned to the matter of the agreement: "But I'll tell you where the heart of that deal is, where the best part of that deal is for Inga Washington. It's the murder case. And when [the police] told her you could go to jail for the rest of [her] life, she knew what she had to do and she did it. She was pretty street smart. That's when she knew she was cooperating with the government fully and completely and saying what they wanted to hear."

the unredacted agreement in evidence. In making their argument, the defendants also reference other decisions of this court and the Appeals Court, concerning the proper use of plea or immunity agreements. See, e.g., *Commonwealth v. Rivera*, 430 Mass. 91, 95-99, 712 N.E.2d 1127 (1999); *Commonwealth v. Meuse*, 423 Mass. 831, 832, 673 N.E.2d 546 (1996); *Commonwealth v. Sullivan*, 410 Mass. 521, 524-525, 574 N.E.2d 966 (1991); *Commonwealth v. Irving*, 51 Mass. App. Ct. 285, 294-295, 744 N.E.2d 1140 (2001); *Commonwealth v. Lindsey*, 48 Mass. App. Ct. 641, 644-645, 724 N.E.2d 327 (2000); *Commonwealth v. Robinson*, 48 Mass. App. Ct. 329, 338, 720 N.E.2d 480 (1999).

Testimony offered by a witness in exchange for the government's promise of a plea bargain or immunity should be treated with caution, lest the jury believe that the government has special knowledge of the veracity of the witness's testimony. See *Commonwealth v. Ciampa*, *supra* at 260-261. The danger increases when the jury are informed that the validity of the agreement depends on the truthful nature of the testimony. See *id.* at 263. If properly handled, however, such an agreement does not constitute improper prosecutorial vouching for the witness. See *id.* at 260. In the *Ciampa* decision, this court set forth guidelines to be used when a witness testifies pursuant to a plea or immunity agreement that explicitly incorporates a witness's promise to testify truthfully, to minimize the possibility that the jury will believe the witness because the Commonwealth, in effect, has guaranteed the truth of the witness's testimony. See *id.* at 264-266. These guidelines were generally followed in this case.

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The prosecutor's questions on direct examination properly elicited the fact that Washington had entered into a plea and immunity agreement and that she understood her obligations under it. See *id.* at 264. Because the defendants then undertook to impeach Washington's credibility based on the agreement, the prosecutor was allowed to bolster her testimony on redirect. See *id.* With the exception of Marrero's motion to strike a portion of Washington's direct testimony, see note 7, *supra*, no objection was lodged by either defendant regarding Washington's testimony. The judge pointedly instructed the jury on the issue of testimony pursuant to a plea bargain or immunity agreement, as required by *Commonwealth v. Ciampa*, *supra* at 266, both immediately after Washington's testimony and in his final charge. The judge told the jury that "the testimony of a witness under such an agreement must be considered with particular caution and care," and that the prosecutor did not have "any special knowledge of the truthfulness of her testimony." The jury's attention was clearly focussed on the incentives that could have influenced Washington's testimony and they were warned that the prosecutor did not know whether Washington was telling the truth. There was no objection to the judge's instructions. The charge was complete and comprehensive, and we set it forth (with some revisions) in the Appendix of this opinion for possible use by other judges in future cases.

We agree that the manner in which the agreement was presented to the jury was not perfect in all respects. It would have been preferable for the judge to have redacted the signatures of the assistant district attorney (who

prosecuted this case) and Washington's attorney, before admitting the agreement for the jury's consideration. It is possible that the signatures could have signaled to the jury that the prosecutor and Washington's attorney were attesting to Washington's credibility. Repeated references in the agreement to Washington's obligation to tell the truth also should have been deleted. See *id.* at 262-263. In the absence of an objection, however, such redaction was not required. See *Commonwealth v. Sullivan*, *supra* at 524-525.

In addition, at least one challenged remark made by the prosecutor in his summation approached perilously close to the limits of permissible argument. Although a prosecutor is allowed to remind the jury of the government's agreement with the witness, and argue reasonable inferences from its requirement of truthful testimony, he "may not explicitly or implicitly vouch to the jury that he . . . knows that the witness's testimony is true." *Commonwealth v. Ciampa*, *supra* at 265. Thus, although the prosecutor was free to encourage the jury to read the agreement (especially in light of the defendants' closing arguments to the jury that Washington was a "pretty street smart" witness and one who "got her deal" under which she "had to testify a certain way"),[9] he should not have stated that Washington "tells the truth, at least that's as far as [he] could follow it." No objections were made, however, and the prejudicial effect of this remark was neutralized by a rhetorical question posed

9. The prosecutor was also free to point out to the jury, as he did, that the existence of the agreement gave Washington no incentive to lie. See *Commonwealth v. Ciampa*, 406 Mass. 257, 265, 547 N.E.2d 314 (1989).

by the prosecutor just minutes before, "Am I standing here telling you that Inga Washington is the paramount of credibility?"

We conclude that there is no substantial likelihood that the jury could have understood that the prosecutor had a means of verifying Washington's testimony or that Washington's testimony should be accorded high value because of rewards promised in the agreement for "truthful" testimony. As discussed above, the judge's charge was clear and forceful. The judge specifically told the jury that the "district attorney is not in a position to have any specialized knowledge or opinion about whether [Washington's] testimony is truthful or not" and that they "must disregard any implication that the government or district attorney believes or doesn't believe any part of her testimony." The effect of the charge was to dispel any implication inherent in the agreement that the prosecutor warranted that Washington was telling the truth. Cf. *Commonwealth v. Meuse*, *supra* at 832 (jury instructions did not neutralize improper prosecutorial vouching in absence of specific instruction that government does not know whether witness is truthful).[10]

10. We reject Cintron's claim that his trial counsel's failure to object to Washington's testimony surrounding the agreement and the admission of the agreement into evidence constituted ineffective assistance of counsel. Because the defendant has been convicted of murder, we examine this claim to determine whether there exists a substantial likelihood of a miscarriage of justice, as required under G. L. c. 278, § 33E, which is more favorable to a defendant than is the general constitutional standard for determining ineffective assistance of counsel. See *Commonwealth v. Coonan*, 428 Mass. 823, 826-827, 705 N.E.2d 599 (1999).

(b) We reject the argument that the judge erred by not charging on felony murder in the second degree. No such instruction was requested, and, in any event, the evidence would not have supported such an instruction. The judge properly instructed on murder in the second degree in its usual formulation. This is all that was required. See *Commonwealth v. Christian*, 430 Mass. 552, 557-559, 722 N.E.2d 416 (2000); *Commonwealth v. Cruz*, 430 Mass. 182, 184-185, 714 N.E.2d 813 (1999).[11]

Cintron's trial counsel cross-examined Washington extensively regarding the agreement and argued to the jury that Washington was "pretty street smart" to have made such deal. He may well have thought that evidence of the agreement would work to Cintron's advantage. In any case, in view of our determination that any imperfections in the handling of the agreement at trial could not have caused the jury to misunderstand the agreement as a guarantee of Washington's truthfulness, any failure on the part of Cintron's trial counsel to object to evidence of the agreement was not likely to have influenced the jury's conclusion. See *Commonwealth v. Wright*, 411 Mass. 678, 682, 584 N.E.2d 621 (1992).

11. After oral argument, Marrero's appellate counsel submitted a letter pursuant to Mass. R. A. P. 16, as amended, 428 Mass. 1603 (1999), in which he appears to assert that Marrero was denied the benefit of any instruction on murder in the second degree. He contends that the judge's instruction on second degree murder was tailored to murder in the first degree by deliberate premeditation, a theory on which Cintron alone was being tried, and so the instruction would have been perceived by the jury not to apply to Marrero. We reject this assertion. We have examined the judge's instructions and conclude that the jury were fully informed that they could find Marrero guilty of felony-murder in the first degree or murder in the second degree.

(c) After consideration of the defendants' arguments asking that we grant relief pursuant to G. L. c. 278, § 33E, we agree with the Commonwealth that there is no basis to grant such relief.

(d) The jury returned a general verdict finding that both armed home invasion and armed robbery were predicate felonies for the convictions of felony-murder in the first degree of both defendants. The defendants are not entitled to have both the armed robbery and the armed home invasion convictions vacated on the ground that they are duplicative of the felony-murder convictions. We agree with the Commonwealth that only one of the two felonies as to each defendant is duplicative and that, because it is entitled to verdicts on the highest crimes charged, the armed robbery convictions are the convictions to be vacated. See *Commonwealth v. Doucette*, 430 Mass. 461, 471, 720 N.E.2d 806 (1999). See also *Commonwealth v. O'Brien*, 432 Mass. 578, 591, 736 N.E.2d 841 (2000). Cf. *Commonwealth v. Jackson*, 428 Mass. 455, 467, 702 N.E.2d 1158 (1998).

4. The convictions and sentences of the defendants on the indictments charging them with armed robbery are vacated, the verdicts are set aside, and the indictments dismissed. The defendants' convictions of felony-murder in the first degree, armed home invasion, and the unlawful possession of a firearm are affirmed.

So ordered.

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APPENDIX.

"You have heard testimony that Inga Washington testified and had an agreement with the district attorney's office and is testifying under the terms of that agreement. One part of the agreement, as you have heard the evidence, is that she has been promised probation on a drug charge that might otherwise result in a mandatory minimum prison sentence.

"Another part of the agreement is that the district attorney's office has agreed with her, and the district attorney brought this out, there's no dispute about this. The district attorney has agreed with her not to prosecute her for any involvement or any conduct by her regarding the events of January 20, 1997, at 134 Green Street.

"So, in effect, on the basis of the district attorney's agreement, she has immunity from being prosecuted for any of those events on January 20, 1997, at Green Street.

"When a witness is testifying under an agreement with the prosecutor for immunity for certain events, the jury must consider that as a possible incentive and whether that agreement or that immunity might affect her credibility and your assessment of her credibility.

"It is a factor you should consider when, after hearing all the evidence at the trial, you will be sizing up the credibility of all the witnesses, and whether a witness has testified under a grant of immunity is a factor to be considered.

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"When a witness testifies under a grant of immunity, the jury should be reminded that they must scrutinize her testimony with great care, that such a grant of immunity may influence a witness, and you can consider whether it influenced the witness and whether it affects your assessment of her truthfulness.

"Also, you have heard reference in the testimony, in the questioning by the attorneys, that she had an agreement to give truthful testimony. Whether or not her testimony is truthful will be a question solely for the jury to decide after hearing all of the evidence in the case.

"The district attorney is not in a position to have any specialized knowledge or opinion about whether her testimony is truthful or not. You may not consider anyone else's opinion, whether it's a government official or anyone else. You may not consider someone else's opinion about whether her testimony is truthful or not.

"The jury is not permitted in a criminal case to consider people's opinions about whether someone is telling the truth. You must disregard any implication that the government or district attorney believes or doesn't believe any part of her testimony.

"Whether her testimony is truthful or not, and credible, is solely for the jury to determine. You will be sizing up the credibility of all the witnesses in the case. That's my instruction on the concept of what the rules are with respect to a grant of immunity and how the jury should consider it.

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"The judge's comments, now or at any time during the trial, are not any suggestion one way or the other about the credibility of any witness. Decisions about the credibility of any witnesses, this witness or any other witness, are solely for the jury to determine based on your assessment of all the evidence in the case."