No. 16-240

In the Supreme Court of the United States

KENTEL MYRONE WEAVER, PETITIONER

v.

COMMONWEALTH OF MASSACHUSETTS

ON WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

BRIEF FOR MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Massachusetts Association of Criminal Defense Lawyers (MACDL), as amicus curiae, submits this brief in support of petitioner Kentel Myrone Weaver. MACDL is an incorporated association representing more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL's mission is to preserve the

[1] Both parties have consented to the filing of this amicus curiae brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amicus curiae or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

adversary system of justice, to maintain and foster independent and able criminal defense lawyers, and to ensure justice and due process for persons accused of crimes.

MACDL is dedicated to protecting the rights of the citizens of the Commonwealth guaranteed by the Massachusetts Declaration of Rights and the United States Constitution. MACDL seeks to improve the criminal justice system by supporting policies and procedures to ensure fairness and justice in criminal matters. MACDL devotes much of its energy to identifying, and attempting to avoid or correct, problems in the criminal justice system. It files amicus curiae briefs in cases raising questions of importance to the administration of justice.

SUMMARY OF THE ARGUMENT

When the Commonwealth opposed Mr. Weaver's appeal in the Massachusetts courts, the Commonwealth highlighted the trial courts' historic practice of excluding the public from courtrooms for jury selection in criminal trials. Commonwealth's SJC Br. 56. The Commonwealth's point, of course, was to raise the specter of a flood of similar petitions while the courts were considering Mr. Weaver's case.[2] While the history is certainly correct, it is also remote. Nearly a decade has passed since Massachusetts trial courts stopped the

[2] Although the Commonwealth invoked this historic practice as part of its argument that trial counsel's performance was not constitutionally deficient, it cited to, among others, cases that highlight the Supreme Judicial Court's finality concerns. These include, for example, *Commonwealth* v. *Morganti*, 4 N.E.3d 241, 247 (Mass. 2014).

practice. Both as a practical matter and as a matter of federal law, prisoners convicted in Massachusetts prior to the change in court practice have largely already exhausted their available appeals.

Mr. Weaver is correct that it will be a rare case in Massachusetts where a new trial must be granted because an attorney's constitutionally deficient performance resulted in unpreserved structural error. Mr. Weaver's case is, however, one such case.

ARGUMENT

DESPITE THE CONCERNS THE COMMONWEALTH SUGGESTED IN THE MASSACHUSETTS SUPREME JUDICIAL COURT, GRANTING MR. WEAVER'S PETITION WILL NOT INVITE A FLOOD OF NEW CHALLENGES

Mr. Weaver states that "the cases in which a presumption of prejudice will result in new trials are doubly unusual, involving both constitutionally deficient performance and a resulting structural error. Cases like that will be few and far between, and granting relief in such limited circumstances will do little, if anything, to imperil 'the public interest in the finality of verdicts.'" Pet. Br. 34 (quoting *Commonwealth* v. *LaChance*, 17 N.E.3d 1101, 1106 (Mass. 2014)). Massachusetts is no exception. While Mr. Weaver's 2006 trial took place at a time when Massachusetts trial courts regularly closed the court for jury selection, court practice changed shortly after Mr. Weaver was convicted. Given the practical and statutory limits on direct and habeas appeals, few Massachusetts prisoners today will have an unbarred claim. As a result, the specter that the Commonwealth implicitly invoked should not be used to deny Mr. Weaver relief. See *Schriro* v. *Landri-*

gan, 550 U.S. 465, 500 (2007) (Stevens, J., dissenting) ("[D]oing justice does not always cause the heavens to fall."). Mr. Weaver's petition poses no threat to finality in the Commonwealth other than to the finality of his own unconstitutionally obtained conviction.

a. Massachusetts trial courts used to have a "longstanding practice * * * of closing the court room during jury empanelment." *Commonwealth* v. *Alebord*, 4 N.E.3d 248, 252 (Mass. 2014). In these courts, the "practice, custom and procedure on a routine basis was that when jurors were brought into the court room, due to the size and configuration of the court room, anyone that was not directly connected with the case, * * * [was] told to leave and stand in the hallway during the jury selection process." *Commonwealth* v. *Morganti*, 4 N.E.3d 241, 244 (Mass. 2014) (quoting testimony of defense counsel regarding practice in Brockton Superior Court); see also *Commonwealth* v. *Cohen*, 921 N.E.2d 906, 915 (Mass. 2010) (noting that it was the practice in Norfolk Superior Court to exclude the public from jury selection if there was no room for spectators); *Commonwealth* v. *Lopes*, 51 N.E.3d 496, 497 (Mass. App. Ct.) (noting that "court rooms around this Commonwealth routinely were closed during jury empanelment"), rev. denied, 65 N.E.3d 661 (2016). In fact, courtroom closure during jury selection, to which defense attorneys failed to object, was a "culture," of which "defense attorneys were a part." *Morganti*, 4 N.E.3d at 244 (quoting testimony of lead attorney at county office of the state's Committee for Public Counsel Services); see also *Lopes*, 51 N.E.3d at 497 ("In many such cases, because of the longstanding culture of

these court houses, no contemporaneous objection was made to these closures.").

b. In 2007, the First Circuit affirmed that a defendant's Sixth Amendment right to a public trial applied to jury selection. *Owens* v. *United States*, 483 F.3d 48 (1st Cir. 2007). In *Owens*, the appeals court held that the closure of the courtroom for the entire day of jury selection was a denial of the defendant's public trial right, and rejected the argument that the over-crowding of the courtroom provided a blanket justification for such courtroom closure. *Id.* at 62-63. In short, *Owens* rejected the common practice in Massachusetts criminal trial courts. In 2010, both the Supreme Judicial Court and this Court affirmed as well that the right to a public trial applied to jury selection. See *Presley* v. *Georgia*, 558 U.S. 209, 213 (2010); *Cohen*, 921 N.E.2d at 918. *Cohen* stated further that the violation of the right to a public trial at jury selection would constitute a structural error, and thus a defendant would not have to show prejudice to obtain relief. 921 N.E.2d at 926-927.

c. It has been ten years since the *Owens* decision raised awareness in Massachusetts that the public must be admitted to jury selection unless the court follows the procedures outlined by this Court in *Waller* v. *Georgia*, 467 U.S. 39 (1984). Given that a decade has passed, defendants tried before *Owens* have completed their direct appeals. Since *Owens* in 2007, or at least since *Cohen* in 2010, it was well known in Massachusetts that the public trial right applied to jury selection and the denial of that right constituted a structural error. Accordingly, as the undersigned amicus has experienced while litigating scores of criminal trials and appeals during the past decade, effectively all Massachu-

setts defendants who desired to raise a public trial claim in a new trial motion on collateral review—hoping to benefit from the presumption of prejudice—had already done so by 2014, the year in which the Supreme Judicial Court in *LaChance* foreclosed the ability to raise a public trial claim on collateral review without showing prejudice. 17 N.E.3d at 1106 (holding that prejudice must be shown in a claim for ineffective assistance of counsel even where such ineffectiveness causes a structural error).

Because most defendants who were denied a public jury selection before *Owens* and *Presley* have by now exhausted their direct appeals and other state post-conviction options, the avenue left for the majority of them is a federal habeas petition. However, even those defendants are in turn limited by the one year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act (AEDPA). Under AEDPA, a state prisoner "ordinarily has one year to file a federal petition for habeas corpus, starting from 'the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *McQuiggin* v. *Perkins*, 133 S. Ct. 1924, 1929 (2013) (quoting 28 U.S.C. 2244(d)(1)(A)). The "time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending" is "not counted" towards that period of limitations. 28 U.S.C. 2244(d)(2). These defendants would have to have kept the direct review of their cases open for nearly a decade (not including any state post-conviction or collateral review) to satisfy AEDPA's statute of limitations.

d. Furthermore, it is unlikely that there were a significant number of cases tried in Massachusetts state courts after *Owens* in which the public was excluded from jury selection. Shortly after the First Circuit stated explicitly in *Owens* that the public could not be excluded wholesale from jury selection, the Massachusetts Administrative Office of the Trial Court held training for Massachusetts state court judges, in which the Administrative Office made clear that jury selection must be open to the public. This triggered a widespread change in trial court practice, all but eliminating the possibility of widespread public trial claims in cases tried after that point. See, *e.g.*, *Commonwealth* v. *Perez*, No. 05-947 (Mass. Super. Ct. Dec. 2, 2010), slip op. 4-5 ("At some point, a few years ago, as a result of court-wide training * * * [this court] became aware that the exclusion of spectators was disfavored at any time. From that point on, to the extent that he was aware that spectators were being excluded during [e]mpanelment, [the court] did not permit such exclusion."). Indeed, the data bears this out. The undersigned amicus reviewed all of the habeas petitions—both those pending and those resolved—filed in the District of Massachusetts since the *Owens* decision in 2007, and found that only about 3.5% (22 out of 651 available for review) of those habeas petitions, whether pending or not, raised the issue of trial counsel's ineffectiveness for failing to object to the closure of the courtroom at jury selection.

CONCLUSION

This Court should reverse the judgment of the Supreme Judicial Court of Massachusetts.

Respectfully submitted,

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