No. 16-240

In the Supreme Court of the United States

KENTEL MYRONE WEAVER,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Writ of Certiorari to the Supreme Judicial Court of Massachusetts

REPLY FOR PETITIONER

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REPLY FOR PETITIONER

Imagine a criminal defendant is being held in a windowless chamber, awaiting trial. Into the chamber marches a judge, a prosecutor, twelve jurors, and a defense lawyer who knows no better than to accept the situation. Over the next few days, the defendant is tried in the windowless room, behind closed doors, as witnesses are brought in to testify against him. All who think a trial might be taking place—members of the press and his family alike—are turned away. The defendant is thus secretly tried and secretly convicted; and although his lawyer knows enough to put on an otherwise adequate defense, he is ignorant of his client's public-trial right and does not object to the closure of the proceedings.

The Commonwealth's position is that, when the defendant later seeks post-conviction relief on the grounds that his public-trial right was violated and his lawyer was incompetent for failing to object, the reviewing court may not order a new trial unless it first finds that the presence of the public would have changed the outcome of the proceedings. Otherwise, the Commonwealth insists, there is no basis to believe that the trial—though held entirely in secret—was fundamentally unfair.

That position cannot be squared with this Court's cases, which make clear that fairness, in both appearance and actuality, inheres not only in the accuracy of verdicts, but in the constitutionally guaranteed procedures that produce them. Any other conclusion would deprive the Sixth Amendment of meaning.

Strickland accordingly does not require the unjust result that the Commonwealth defends. The Court was clear in *Strickland* that the focus of the ineffective-

assistance inquiry is the fundamental fairness of the trial whose result is being challenged. One way (the "general" way) to establish that an attorney's error rendered the trial unfair is to demonstrate that the error undermined confidence in the verdict, overcoming the ordinary presumption that the trial was reliable. But another way to establish that defense counsel's incompetence resulted in unfairness is to show that it perpetuated a structural error. Because the hallmark of structural error is fundamental unfairness, proof of a structural error alone will demonstrate that the verdict is legally tainted and cannot stand, regardless of any additional effect the error may have had on the actual outcome. Requiring defendants to establish a second time that the trial was infected with unfairness, with proof of actual prejudice, would be redundant. The Commonwealth declines to address this fundamental point.

That alone is enough to reverse. But we also showed in the opening brief (at 26-29) that the Commonwealth's rule is inconsistent with settled precedent providing that, because structural errors affect the entire framework within which the trial proceeds, their practical effects cannot be ascertained. In this case, for example, there would be no way to unwind the clock to show how the participants in the proceedings would have behaved differently—or, indeed, who the participants would have been to begin with—had the courtroom doors been kept open. By requiring defendants to demonstrate what this Court has said cannot be demonstrated, the Commonwealth's proposed rule would thus foreclose relief under *Strickland* in all cases where defense counsel's incompetence perpetuates structural error, the gravest of constitutional trespasses. That would turn *Strickland*'s core purpose—to guarantee fair trials—on its head.

These points, laid out fully in the opening brief, go largely unanswered by the Commonwealth. And as we demonstrate more fully below, what little the Commonwealth does say is unpersuasive. The judgment below accordingly should be reversed.

A. When deficient performance results in structural error, the trial is rendered fundamentally unfair without any additional showing of prejudice

1. As we explained in the opening brief (at 20-22), "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *United States* v. *Cronic*, 466 U.S. 648, 658 (1984). *Strickland*'s prejudice prong thus plays a specific role in the ineffective-assistance inquiry: Because "the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged," and because trials are presumed fair and reliable (*Strickland*, 466 U.S. at 696), it follows that, to demonstrate that an attorney error rendered the trial unfair in cases not involving structural error, a defendant will have to show that the error actually "undermined the reliability of the finding of guilt" (*Cronic*, 466 U.S. at 659 n.26).

The Commonwealth agrees that the purpose of the prejudice inquiry is to determine whether, despite the presumption of reliability applicable in most cases, "the trial was [un]fair"; it thus cites *Strickland* and *Gonzalez-Lopez* for the proposition that "the prejudice requirement stems from * * * 'the purpose of ensuring a fair trial.'" Resp. Br. 17. Accord U.S. Br. 11.

But the Commonwealth ignores the necessary upshot: The actual-prejudice requirement is superfluous

when there is an independent and alternative basis for concluding that defense counsel's error rendered the trial fundamentally unfair. That is the case where—as here—trial counsel incompetently fails to object to a structural error, which (thus allowed to stand) infects the trial with unfairness. Because "[t]he touchstone of structural error is fundamental unfairness and unreliability" (*United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 159 (2006) (Alito, J., dissenting)), there would be no point in requiring a defendant who shows that his lawyer's error resulted in structural error to establish unfairness a *second* time with proof of actual prejudice. Regardless of such additional proof, the trial "cannot reliably [have] serve[d] its function as a vehicle for determination of guilt or innocence." *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991).

Both the Commonwealth and the United States thus misunderstand our argument when they say that it is "difficult to see how the exclusion of spectators from jury selection could be treated as presumptively altering the verdict" (Resp. Br. 51) and "structural errors do not inevitably create circumstances where a different trial outcome is so likely that litigating prejudice in every case is unjustified" (U.S. Br. 19). Our position is not that proof of a structural error necessarily satisfies the actual-prejudice requirement; it is that structural error renders the trial fundamentally unfair and unreliable all on its own, "regardless of [its] actual impact on [the] trial." *United States* v. *Marcus*, 560 U.S. 258, 263 (2010) (discussing plain error).

2. Although the Commonwealth never directly responds to these arguments, it makes two points that might be understood as rejoinders.

a. The Commonwealth observes that "[a] violation of the right to counsel is not complete without preju-

dice." Resp. Br. 14. "That is, 'any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.'" *Id.* at 16 (quoting *Strickland*, 466 U.S. at 692). Accord U.S. Br. 24.

But again, "the ultimate focus of [the ineffective-assistance] inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696. Thus, the better and fuller understanding of the language cited by the Commonwealth is that a violation of the Sixth Amendment's effective-assistance guarantee is not established *absent a showing of fundamental unfairness*. Although the "general standard[]" for showing fundamental unfairness in a *Strickland* case is a reasonable probability actual prejudice (466 U.S. at 698), this Court has never held that that is the exclusive way of doing so; while all inaccuracies may result in unfairness, it does not follow that every unfairness must be the result of an inaccuracy.

That conclusion finds strong support in *Strickland* itself. The Court there explained that, given the focus on fairness above all else, actual prejudice is only "a *general* requirement that the defendant affirmatively prove prejudice" to establish the unfairness of the proceedings (466 U.S. at 693 (emphasis added)); it thus admonished that "the principles we have stated do not establish mechanical rules" (*id.* at 696). The Commonwealth's inflexible adherence to the actual prejudice requirement as the only possible means of establishing unfairness is not compatible with that statement. We made this exact point in the opening brief (at 26), but the Commonwealth declines to respond.

b. The Commonwealth says that our position "disregards established Sixth Amendment principles."

Resp. Br. 2. But the only "established Sixth Amendment principle" that the Commonwealth ever cites is *Strickland*'s prejudice requirement, which it insists (without elaboration) is applicable in all ineffective-assistance cases, including this one. See, *e.g.*, Resp. Br. 11 (a defendant pressing an ineffective-assistance claim "must prove a reasonable probability that counsel's deficiencies affected the verdict, in order to obtain a new trial"); Resp. Br. 17, 20 (similar).

The Commonwealth's repeated, unadorned citation to *Strickland*'s actual prejudice requirement sheds no light on the question presented in the petition.

3. We further explained that a violation of the public-trial right not only deprives the defendant of a fair trial per force, but also (and as such) undermines the reputation and integrity of the criminal justice system. Petr. Br. 30-32. "[T]he means used to achieve justice must have the support derived from public acceptance of both the process and its results," but "it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 571-572 (1980). The public-trial right is critical to "promot[ing] confidence in the fair administration of justice" (*id.* at 572) and "the appearance of fairness so essential to public confidence in the system" (*Press-Enter. Co.* v. *Superior Court*, 464 U.S. 501, 508 (1984)). Thus, declining to correct violations of the public-trial right because the defendant suffers the added insult of representation by incompetent (often court-appointed) counsel diminishes the integrity of the criminal justice system, in both appearance and actuality.

As the Reporter's Committee explains in its amicus brief (at 5-11), moreover, the Commonwealth's rule would unfairly burden the public, whose First Amend-

ment rights are violated by courtroom closures. "The right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness." *Press-Enter. Co.* v. *Superior Court*, 478 U.S. 1, 7 (1986).

The Commonwealth does not deny any of this. The United States, for its part, brushes the point aside with the question-begging assertion that "[t]hose important underpinnings of the public-trial right have no bearing on a *Strickland* prejudice analysis." Br. 21. We do not disagree; indeed, it is precisely our point that a rote application of the ordinary *Strickland* prejudice analysis to cases involving structural errors is inadequate to account for the very serious injury inflicted by unaddressed structural errors upon the criminal justice system as a whole. And the risk to the integrity of the system is compounded by the rationale upon which the United States would allow such grave constitutional violations to stand: the deficient performance of court-appointed defense counsel.

B. The acknowledged violation of petitioner's public-trial right was a structural error not susceptible to an actual-prejudice analysis

1. There is a another reason to reject the Commonwealth's rule: As we showed in the opening brief (at 26-29), this Court has held that structural errors, including the denial of the public-trial right, "defy analysis by harmless-error standards by affecting the entire adjudicatory framework." *Puckett* v. *United States*, 556 U.S. 129, 141 (2009) (quoting *Fulminante*, 499 U.S. at 309). "Errors of this type" are "intrinsically harmful" (*Neder* v. *United States*, 527 U.S. 1, 7 (1999)) and "not amenable to harmless-error review." *Vasquez* v. *Hillery*, 474 U.S. 254, 264 (1986).

We explained in the opening brief (at 19, 27) why this is so: To ask what would have happened absent a courtroom closure is to ask how the trial might have proceeded in an alternate universe. There is no way to meaningfully assess how the judge, lawyers, witnesses, courtroom officers, and venirepersons or jurors would have behaved differently in the presence of the public. And it would add a second layer of guesswork to attempt to determine how any of those differences might have affected the outcome of the trial.

The required speculation is not diminished in this case because the closure took place during jury empanelment rather than the presentation of the evidence. As the First Circuit has explained:

> It is possible that jurors might have been more forthcoming about biases and past experiences if they had faced the public. It is also possible that [the parties] might have picked a more impartial jury or asked different questions with local citizenry watching.

United States v. *Negron-Sostre*, 790 F.3d 295, 306 (1st Cir. 2015) (quoting *Owens* v. *United States*, 483 F.3d 48, 65 (1st Cir. 2015)). Maybe a venireperson would have answered a question slightly differently, so that she was struck rather than seated. Maybe not. Maybe the lawyers would have been more sensitive to this Court's *Batson* line of cases and exercised their strikes in different ways. Maybe not. There is no way to know—no way to unscramble the egg—without engaging in pure speculation.

In response, the Commonwealth offers mere *ipse dixits*: The burden of establishing actual prejudice "is substantial but not insurmountable" (Resp. Br. 11), "hardly insurmountable" (*id*. at 20), and "not * * * im-

possible" (*id.* at 44). But the only support the Commonwealth offers is to say that "there may occasionally be unusual or egregious circumstances that present a sound basis for believing that prejudice arose from a courtroom closure during jury selection." Resp. Br. 53.

That is plainly wrong. Even supposing that a "particular trial participant's behavior" was especially aberrant or that a specific "excluded spectator" had some "connection" with the proceedings (Resp. Br. 53), attempting to determine what would have happened if the courtroom doors had been opened—and then attempting to determine whether the difference would have resulted in a different jury, and in turn whether a different jury would have resulted in a different verdict—would manifestly remain "a speculative inquiry into what might have occurred in an alternate universe." *Gonzalez-Lopez*, 548 U.S. at 150. Proving that there conceivably could have been a difference is not the same thing as proving what the difference would have been (the same jury or a different one?) or how it would have affected the outcome.

2. For its part, the United States acknowledges that *Strickland*'s prejudice framework requires evaluating what the finder of fact would have decided "absent counsel's error." U.S. Br. 11. But the test that the United States proposes for addressing structural error (*id.* at 18-19) is inconsistent with that framework; the government proposes to ask whether the evidence was sufficient for a conviction *despite*—not *absent*—the error.

This Court has rejected such an approach several times before. By the government's rationale, for example, a defendant whose counsel failed to file a notice of appeal would have to show not just that he would have appealed, but also that he would have obtained a

reversal or vacatur. That position was rejected by *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), which held that a defendant need show only that "he would have timely appealed." *Id*. at 484. Similarly, a defendant whose counsel gave deficient advice in the plea process would have to show not just that he would have gone to trial, but also that he would have been acquitted. That position similarly was rejected by *Hill* v. *Lockhart*, 474 U.S. 52 (1985), which held that a defendant must show only that "he would have elected to plead not guilty and proceed to trial." *Missouri* v. *Frye*, 566 U.S. 133, 141 (2012) (citing *Hill*, 474 U.S. at 60).

Faithfully extending the reasoning of *Roe* and *Hill* to the context of a courtroom closure means that a defendant need show only that absent the unlawful closure, he would have enjoyed a public trial. That, of course, is always and automatically the case.

3. We observed in the opening brief (at 28) that the *Chapman* harmless-error analysis and *Strickland* prejudice analysis involve an inquiry of the same basic character, and that the impossibility of undertaking one thus implies the impossibility of undertaking the other. The Commonwealth resists this conclusion, observing that, because the *Chapman* and *Strickland* standards "implicate different burdens of proof and different probabilities of prejudice, * * * the fact that an error is deemed harmful in the *Chapman* sense does not mean that it was prejudicial in the *Strickland* sense." Resp. Br. 40.

That is true but irrelevant. The impossibility of a prejudice analysis arises from the nature of the *error*, not from the specific procedural context in which the analysis is undertaken. When the error affects the entire framework of the trial, it is impossible to determine what the participants in the proceedings would

have done differently absent the error—indeed, in the context of a courtroom closure, it is impossible to know even who the participants would have been.

Thus, our point is not that the harmlessness and prejudice inquiries are equivalent, so that an absence of harmlessness necessarily entails the presence of prejudice. The point, instead, is that the two inquiries take account of the same basic considerations, and if the effects of an error are "unmeasurable," "unquantifiable," and "indeterminate" in the *Chapman* sense (*Sullivan* v. *Louisiana*, 508 U.S. 275, 281-282 (1993)), they are likewise so in the *Strickland* sense.

At bottom, neither the Commonwealth nor its amici engage this critical point; none provides any explanation for why the government cannot prove "harmlessness" with respect to a structural error, but a defendant like petitioner supposedly *can* prove "prejudice" with respect to the same error. See U.S. Br. 23 ("The government cannot satisfy [its *Chapman*] burden in the case of a structural error because 'the effect of the violation cannot be ascertained.'") (quoting *Vasquez*, 474 U.S. at 263)).[1]

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[1] Neither *Premo* nor *Walker* (Resp. Br. 40), helps the Commonwealth on this point. *Premo* addressed the question of when a *Strickland* claim is clearly established by this Court's precedents under the Antiterrorism and Effective Death Penalty Act; the Court held simply that *Fulminante* did not "clearly establish" federal ineffective-assistance law because it was not an ineffective-assistance case. *Premo* v. *Moore*, 562 U.S. 115, 131 (2011). And *Walker* cited *Premo* for the proposition that cases addressing substantive constitutional rights "simply did not confront ineffective assistance of counsel claims" involving those rights for purposes of habeas claims under AEDPA. *Walker* v. *Martel*, 709 F.3d 925, 940 (9th Cir. 2013).

It is no answer to say (as the United States does, Br. 25) that the government bears the burden under *Chapman*, whereas "the tables are turned" under *Strickland*. First, that argument accepts as given the troubling conclusion that the second constitutional injury makes the first constitutional injury unreviewable, and vice-versa. Second, this Court has shown little tolerance for so unfair a rule. As it explained in *Mickens* v. *Taylor*, 535 U.S. 162 (2002), for example, "an automatic reversal rule" in favor of the *defendant* is "justified" under *Strickland* when defense counsel engages in "joint representation of conflicting interests" in large part because "it [is] difficult to measure the precise harm arising from counsel's errors." *Id*. at 168 (citing *Holloway* v. *Arkansas*, 435 U.S. 475, 489-490 (1978)). *Mickens* thus reflects the common-sense conclusion that the Sixth Amendment—designed as it is to protect the accused—does not impose impossible burdens on defendants.

This Court has also expressed openness to presuming prejudice under the plain error standard (where the burden likewise is on the defendant) because "structural errors are a very limited class of errors that affect the framework within which the trial proceeds, such that it is often difficult to assess the effect of the error." *Marcus*, 560 U.S. at 263 (citations and quotation and alteration marks omitted). Accord *United States* v. *Dominguez Benitez*, 542 U.S. 74, 81 (2004) (assuming structural errors necessarily affect substantial rights under Rule 52). No less can be said in the *Strickland* context.

4. The Commonwealth makes the stunning assertion that "[t]his Court has never held that the characteristics of a public-trial violation are such that prejudice is presumed and its impact may never be assessed." Resp. Br. 45. In fact, the Court held exactly

that in *Waller*, where it expressly "agree[d]" with the "consistent view of the lower federal courts that the defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee." *Waller* v. *Georgia*, 467 U.S. 39, 49 (1984). The Court went on to explain that the "benefits of a public trial are frequently intangible, [and] difficult to prove" and thus quoted approvingly from *State* v. *Sheppard*, 438 A.2d 125, 128 (Conn. 1980): "Because demonstration of prejudice in this kind of case is a practical impossibility, prejudice must necessarily be implied." 467 U.S. at 50 n.9.

What is more, this Court repeatedly has ranked violations of the public trial right as structural errors. It recently explained:

> We have characterized as "structural" "a very limited class of errors" that trigger automatic reversal because they undermine the fairness of a criminal proceeding as a whole. Errors of this kind include denial of counsel of choice, denial of self-representation, *denial of a public trial*, and failure to convey to a jury that guilt must be proved beyond a reasonable doubt.

United States v. *Davila*, 133 S. Ct. 2139, 2149 (2013) (emphasis added). This was no outlier statement; the Court routinely identifies violation of the public-trial right as a structural error. See, *e.g.*, *Marcus*, 560 U.S. at 263; *Gonzalez-Lopez*, 548 U.S. at 148-149; *Neder*, 527 U.S. at 37; *Johnson* v. *United States*, 520 U.S. 461, 468-469 (1997); *Fulminante*, 499 U.S. at 294. And it is precisely the point of a structural error that it "str[ikes] at fundamental values of our society and 'undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review.'" *Fulminante*, 499 U.S. at 294.

5. The Commonwealth takes the equally astonishing position that courtroom closures during jury empanelment are not violations of the public trial right at all because, in such cases, the "courtroom [is] filled with members of the general public in the form of prospective jurors." Resp. Br. 50. Thus, as the Commonwealth sees it, "[d]uring jury selection at [petitioner's] trial, the courtroom was not free from the watchful eye of the public; rather, a large group of prospective jurors was there to observe." *Id.* at 54.

That assertion is flatly contradicted by this Court's decision in *Presley*, which involved identical circumstances: The gallery was closed because it was overcrowded with members of the jury venire. The Court there summarily dispensed with the State's argument that no closure had taken place within the meaning of the Sixth Amendment: "exclusion of the public at juror *voir dire*" is a clear violation of the Sixth Amendment public trial guarantee. *Presley* v. *Georgia*, 558 U.S. 209, 214 (2010). The Commonwealth cannot avoid that clear holding with wordplay, characterizing the venire panel as "the public."[2]

6. Resisting our assertion that a new trial would necessarily be required in this case and others, the Commonwealth observes that "structural errors have been remedied in different ways," pointing in particular to *Waller*. Resp. Br. 37.

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[2] Notwithstanding *Presley*, the Commonwealth complains of a "lack of clarity" surrounding the definition of structural errors. Resp. Br. 34-35. Even supposing this concern had merit (it does not), it would not be unique to the ineffective-assistance context. The Commonwealth cites no evidence that the purported lack of clarity has been unmanageable in other contexts where the structural nature of an error is relevant, such as direct appellate review, where reversals for structural errors are automatic.

True enough, the Court in *Waller* did not remand for an automatic new trial. Because the courtroom was closed in that case only for a suppression hearing, the Court sensibly remanded for an automatic new suppression hearing. It makes sense in that context that the Court would permit the lower courts to determine in the first instance what additional relief may have been warranted based on the outcome of the new hearing. Despite the Commonwealth's contrary suggestion (Resp. Br. 45), the Court's approach in *Waller* was not akin to a prejudice requirement—the Court ordered a new suppression hearing without regard for actual prejudice.

The analogy in this case would be a remand for a new jury empanelment; of course, a new jury necessarily would require a new trial. That was the ultimate outcome in *Presley*: "Because the trial court erred in excluding spectators from voir dire without considering alternatives to closure, Presley is entitled to a new trial." *Presley* v. *State*, 706 S.E.2d 103, 104 (Ga. Ct. App. 2011).

C. Interest in finality is not a sufficient basis for denying relief when an attorney's deficiency results in structural error

Like the Supreme Judicial Court below, the Commonwealth and its amici assert that a decision in petitioner's favor would undermine the States' interest in the finality of criminal judgments. None of its contentions is persuasive.

1. The Commonwealth asserts that inflexible application of *Strickland*'s prejudice requirement is necessary to discourage "sandbagging" trial courts with later claims of ineffective assistance. Resp. Br. 29-30. The amici States similarly postulate that "defense

counsel will have strong incentive *not* to object contemporaneously if that failure to object is deemed *per se* prejudicial." Amici States' Br. 10.

That makes no sense. The nub of petitioner's claim is that his lawyer was ignorant of his public-trial right and thus provided deficient performance by failing to object. It should go without saying that a lawyer who is ignorant of a constitutional right cannot deliberately sandbag a court by *knowingly* declining to raise it at trial. The Commonwealth's concern for sandbagging thus rests on the startling assumption that defense lawyers will lie to establish their own feigned incompetence, claiming that they were ignorant of a right of which they were actually aware. The Commonwealth's concern is exceedingly unlikely to come to pass; few lawyers would be willing to make material misrepresentations of that sort under any circumstance, much less for the purpose of establishing their own made-up deficiencies. An imaginary concern, supported by neither evidence nor common sense, is no basis for denying relief for a violation of the Constitution.

As for those circumstances where defense counsel waive or forfeit the public-trial right for tactical reasons, *Strickland*'s first prong would almost always bar relief. That is, courts' respect for the "wide latitude counsel must have in making tactical decisions" (466 U.S. at 689) will effectively filter out cases where strategic decisions were made. See BIO 25-26 (collecting cases). That is especially so in federal collateral attacks on state-court convictions, where the federal courts must be "doubly deferential," taking "a 'highly deferential' look at counsel's performance through the 'deferential lens of § 2254(d).'" *Cullen* v. *Pinholster*, 563 U.S. 170, 190 (2011).

2. The Commonwealth and its amici speculate that adoption of the rule that we advocate would mean a substantial curtailment of the finality interests protected by procedural default rules and "other claim-processing rules that call for prejudice to be shown." Resp. Br. 26-28. Accord Amici States' Br. 30-32. These concerns are overblown.

We acknowledge that "[a]n ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial." *Harrington* v. *Richter*, 562 U.S. 86, 105 (2011). But *Strickland*'s central premise is that finality interests must yield when an attorney error "threaten[s] the integrity of the very adversary process the right to counsel is meant to serve." *Ibid*. And in no circumstance is the integrity of a criminal trial more starkly undermined than when an attorney's deficiency results in a structural error, the "touchstone" of which is "fundamental unfairness and unreliability." *Gonzalez-Lopez*, 548 U.S. at 159 (Alito, J., dissenting).

We explained, moreover, that cases in which relief is granted under the rule we advocate would be rare (Opening Br. 33-34), for two reasons. First, the lower courts can be trusted to apply *Strickland*'s first prong with care, and "the standard for judging counsel's representation is a most deferential one." *Harrington*, 562 U.S. at 105. Thus defendants will not often pass *Strickland*'s first prong—an observation with which the Commonwealth does not disagree.

The United States' concern (Br. 30) that defendants seeking habeas relief may evade the cause-and-prejudice requirements under Sections 2254 and 2255 "by merely dressing th[e] claim in ineffective assistance garb and asserting that prejudice must be presumed" is therefore misplaced. Raising an ineffective-assistance

claim is no mere pleading trick. As the United States admits (*ibid.*), "a *Strickland* claim requires a showing of deficient performance, which is a high hurdle." That high hurdle will prevent defendants from simplistically "funneling" their claims through *Strickland*.[3]

Second, structural errors are themselves highly unusual; very few rights are structural in nature, and given their conspicuous impact on the framework of the trial, those rights are rarely violated. That is especially so with respect to public-trial violations like the one at issue here. As the Massachusetts Association of Criminal Defense Lawyers confirms (Amicus Br. 7), courts are now well aware that courtroom closures during jury selection violate the Sixth Amendment. And the practice of closing courtrooms ended long enough ago that few, if any, criminal defendants will be waiting in the wings with new collateral challenges; nearly all such challenges will by now be barred by statutes of limitations and rules against second or successive collateral challenges. See *id.* at 5-6.

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[3] We do not concede that the cause-and-prejudice requirement for federal habeas relief is not satisfied by a showing of structural error. *Francis* v. *Henderson*, 425 U.S. 536 (1976), predates both *Fulminante* and *Strickland*. More recently, in *Murray* v. *Carrier*, 477 U.S. 478 (1986), the Court explained that the hallmark of cause-and-prejudice is "a showing that the prisoner was denied 'fundamental fairness' at trial," thus "infecting [the] entire trial with error of constitutional dimensions." *Id.* at 494. That is a perfect description of structural error. Thus, at least two courts of appeals have presumed prejudice for purposes of the cause-and-prejudice requirement. See *United States* v. *Withers*, 638 F.3d 1055, 1066 (9th Cir. 2011) (in a courtroom closure case, citing *Murray* and holding that "[a] structural error would likely satisfy the prejudice showing"); *Owens* v. *United States*, 483 F.3d 48, 64 & n.13 (1st Cir. 2007) (presuming prejudice "to excuse [the defendant's] procedural default on the public trial claim").

In this respect, it bears emphasis that the rule we advocate would have no effect on the majority of procedural rules applicable to *Strickland* claims raised on collateral review. State courts will retain leeway to deny new trials when defendants bring second or successive collateral attacks, when they file petitions for collateral review out of time, and when they otherwise fail diligently to protect their rights as required by state procedural rules. Here, just as in *Waller*, the state courts will thus remain free "[to] determine on remand whether [petitioner is] procedurally barred from seeking relief as a matter of state law." Resp. Br. 27 (quoting *Waller*). What the state courts may *not* do, we submit, is deny relief under the Sixth Amendment for the *substantive* reason that a defendant has failed to prove actual prejudice resulting from a structural error.

3. Invoking the contemporaneous-objection rule, the Commonwealth asserts that finality concerns are especially acute in this case because "the trial judge was never made aware of the spectators' exclusion" from the courtroom and "thus was unable to address the potential error at a point when it could have been remedied without causing disruption or substantially burdening any party." Resp. Br. 1. It thus repeatedly cites the contemporaneous-objection rule as a basis for affirming the lower court. *E.g.*, *id.* at 11, 25, 28-29. This resort to the contemporaneous-objection rule is deeply misplaced.

First, the record is clear that the trial judge *was* aware of the exclusion of the public—the prosecutor brought to the court's attention the presence of the excluded members of the public outside the courtroom. Pet. App. 45a. And every indication is that the judge himself ordered the closure; after all, it was a court

officer who closed and guarded the courtroom doors. JA27-28. It is also fair to say that the court itself is "responsible for creating a situation which resulted in the impairment of [the] right[]" because "the manner in which the parties accepted the [error] indicates that they thought they were acceding to the wishes of the court." *Glasser* v. *United States*, 315 U.S. 60, 71-72 (1942) (appointment of conflicted counsel). See Pet. App. 45a-46a.[4]

More fundamentally, the right to a public trial is protected in the first instance by judges' independent responsibility to manage their courtrooms consistent with constitutional mandates. *E.g.*, *Negron-Sostre*, 790 F.3d at 306 ("[T]he ultimate responsibility of avoiding 'even the appearance that our nation's courtrooms are closed or inaccessible to the public' lies with the judge."). Thus, "[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials," regardless of whether or not the parties object or propose any particular alternatives to closure. *Presley*, 558 U.S. at 214-215. Because closed trials are wholly within the power and responsibility of the court to prevent, the values protected by the contemporaneous-objection rule are attenuated at best in this case.[5]

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[4] Moreover, petitioner was "unaware of his right to a public trial, [and] did not intentionally waive this right" at the trial. Pet. App. 62a. Petitioner raised his ineffective-assistance claim at the earliest possible opportunity, on direct appeal before the Supreme Judicial Court of Massachusetts.

[5] This conclusion is not limited to public-trial violations. At the most basic level, "the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused" rests foremost "[u]pon the trial judge." *Glasser*, 315 U.S. at 71. Thus, "the primary responsibility for protecting the right to *trial by jury* rests on trial judges and prosecutors." *United States* v. *Garrett*,

5. While the Commonwealth does not deny that courtroom closures erode the public's confidence in the judiciary, or that the public confidence is especially undermined where the rationale for allowing a closure to stand is the incompetence of the defendant's court-appointed lawyer, it asserts that "[r]eversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." Resp. Br. 17-18 (quoting *Johnson*, 520 U.S. at 470). But as we already have shown, concern for finality is limited as a practical matter because of the rarity of attorney incompetence and structural errors, and in any event diminished by the presence of fundamental unfairness. *Johnson*, which did not involve a structural error or an ineffective-assistance claim, does not suggest otherwise.

* * * * *

As we explained in the opening brief, the question presented in the petition calls to mind the elementary-school adage that two wrongs do not make a right. Petitioner here suffered two wrongs: a courtroom closure and a court-appointed defense lawyer too ignorant to know to object. Under the rule proposed by the Commonwealth, putting the two wrongs together means that petitioner gets no relief, in contravention of one of the oldest and most basic Anglo-American legal norm. See *Ashby* v. *White*, 92 Eng. Rep. 126, 135 (Q.B. 1703) (a party with a right "must of necessity have a means to vindicate and maintain it").

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727 F.2d 1003, 1013 (11th Cir. 1984) (emphasis added). And judges bear a personal obligation to assure their own impartiality. See, *e.g.*, *Williams* v. *Pennsylvania*, 136 S. Ct. 1899, 1908 (2016) (detailing rules of professional conduct requiring judges to recuse when "the judge's impartiality might reasonably be questioned").

This Court should not countenance such a result. The lower court's lose-lose logic is inconsistent with core constitutional values, offends *Strickland*'s instruction to focus on fundamental fairness, and undermines the integrity and reputation of the criminal justice system. It should be rejected.

CONCLUSION

The judgment below should be reversed, and the case should be remanded with instructions to grant petitioner a new trial.

Respectfully submitted.

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