No. 16-240

IN THE

Supreme Court of the United States

KENTEL MYRONE WEAVER,
Petitioner,
vs.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

On Writ of Certiorari to the Supreme Judicial Court of Massachusetts

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a defendant who claims that his counsel was ineffective for failing to object to a structural error must, in addition to demonstrating deficient performance, show that he was prejudiced by counsel's deficiency in order to obtain a new trial under *Strickland* v. *Washington*, 466 U. S. 668 (1984).

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, defendant seeks to have his murder conviction reversed for a technical error which his

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

attorney did not bring to the attention of the court and which did not affect the fairness of the trial. Reversing judgments on technicalities in this manner is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On August 10, 2003, 15-year-old Germaine Rucker was attacked by a group of men and boys and shot twice, in the head and in the back. One of the younger members of the group was seen running from the area. He pulled a pistol from his pants leg and lost his baseball cap. The cap was later found by the police and matched by DNA to the defendant, Kentel Weaver. The victim was dead when paramedics arrived. See *Commonwealth* v. *Weaver*, 474 Mass. 787, 788-790, 54 N. E. 3d 495, 501-503 (2016).

Defendant was pressed by his mother to tell the truth, and he confessed to her and later to detectives. See *id*., at 797-798, 54 N. E. 3d, at 508-509.

During jury selection, the large venire made the courtroom very crowded, with standing room only, and "a court officer informed the defendant's mother and those accompanying her that the court room was 'closed for jury selection.' They were also denied entry the second day of empanelment for the same reason. Trial counsel lodged no objection." *Id*., at 813, 54 N. E. 3d, at 519-520.

The defendant was convicted of murder in the first degree in 2006. Five years later, he made a motion for a new trial, claiming ineffective assistance of counsel in two respects: inadequate investigation of a claim that his statements were coerced and failure to object to closure of the courtroom during jury empanelment. Two different judges heard and rejected the two claims,

and denial of the motion was consolidated with the pending appeal. *Id*., at 788, 54 N. E. 3d, at 501-502.

The Supreme Judicial Court of Massachusetts directed a modification regarding eligibility for parole because the defendant was a juvenile but otherwise affirmed. See *id*., at 815, 54 N. E. 3d, at 521. Claims regarding the defendant's statements were the primary issues in the appeal, see *id*., 799-813, 54 N. E. 3d, at 509-519, but the defendant did not seek certiorari in this Court on these issues. See Pet. for Cert. i.

The motion judge determined and the Supreme Judicial Court agreed that counsel's failure to object to the closure was deficient performance but not prejudicial. See *id*., at 814, 54 N. E. 3d, at 520. The state high court declined to revise its precedent that a showing of prejudice is required in this area, and it noted that "the defendant has not advanced any argument or demonstrated any facts that would support a finding that the closure subjected him to a substantial likelihood of a miscarriage of justice" under the applicable plain error rule. See *id*., at 815, 54 N. E. 3d, at 520-521.

The defendant filed a petition for writ of certiorari on the latter point, which this Court granted on January 13, 2017.

SUMMARY OF ARGUMENT

Every criminal defendant has a constitutional right to the effective assistance of counsel. *Strickland* v. *Washington* established a performance-and-prejudice test for evaluating all claims that allege ineffective assistance. Under this test, the defendant has the burden to prove both elements of the claim. Every criminal defendant also has a constitutional right to a public trial. If the right to a public trial is erroneously

abridged, *Arizona* v. *Fulminante* holds that such denial constitutes a structural error and is never subject to harmless error review because prejudice to the defendant is presumed.

When counsel inadvertently fails to object to a structural error at trial, it does not automatically relieve a defendant from proving prejudice as demanded by *Strickland*. *Fulminante*'s structural error analysis eliminates the government's ability to prove a lack of prejudice in that context, but it does not eliminate a defendant's burden to prove prejudice in an ineffective assistance of counsel context. Prejudice is an element of the defendant's claim.

There is no need to bring procedurally defaulted structural errors in through the back door of ineffective assistance claims. Procedurally defaulted claims of error are reviewable under a "plain error" analysis, and under that standard, courts are permitted to remedy the error if not doing so would result in a miscarriage of justice. Defendant advanced no argument at trial or on appeal that closure of the courtroom during *voir dire* only was prejudicial or that it caused a "miscarriage of justice." Trial counsel's failure to object to the closure did not affect the fairness or reliability of the proceeding as a whole and overturning defendant's conviction based on such a trivial error would undermine the public's trust in the criminal justice system.

ARGUMENT

I. Requiring a defendant to make an affirmative showing of prejudice due to an attorney's deficient performance at trial is a vital element of an ineffective assistance of counsel claim.

The Sixth Amendment guarantees a panoply of constitutional rights to criminal defendants.[2] The rights at issue in this case involve the right to a public trial and the right to the assistance of counsel. Both rights are personal to the accused and both are violated upon erroneous deprivation.[3] *Presley* v. *Georgia*, 558 U. S. 209, 212 (2010) (*per curiam*) (public trial); *Gannett Co.* v. *DePasquale*, 443 U. S. 368, 379-380 (1979) (same); *United States* v. *Gonzalez-Lopez*, 548 U. S. 140, 146 (2006) (right to counsel); *Gideon* v. *Wainwright*, 372 U. S. 335, 344 (1963) (same).

The Sixth Amendment right to counsel exists to protect the right to a fair trial as guaranteed by the Due Process Clauses. *Strickland* v. *Washington*, 466 U. S.

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2. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U. S. Const., Amend. VI.

3. The separate right of the public to attend a trial extends beyond that of the accused. *Press-Enterprise Co.* v. *Superior Court of Cal., Riverside Cty.*, 464 U. S. 501, 508 (1984). The press and the public have a First Amendment right to attend the *voir dire* examination of potential jurors in addition to the proceedings themselves. *Id.*, at 510.

668, 684-685 (1984). Counsel's assistance is necessary to the adversarial process. *Id*., at 685. "[A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." *Ibid*.

The Sixth Amendment right to a public trial helps to ensure that a defendant is dealt with fairly, to import a sense of responsibility among the attorneys and judge, to encourage the presence of witnesses and to discourage perjury. *Waller* v. *Georgia*, 467 U. S. 39, 46 (1984). The right to a public trial extends to pre-trial suppression hearings and to *voir dire*. *Id*., at 48; *Presley*, 558 U. S., at 213.

A. Strickland.

In *Strickland*, this Court was asked for the first time to "directly and fully" address the standard for analyzing a claim of "actual ineffectiveness" of counsel's performance. 466 U. S., at 683. Because the lower federal courts and state courts were applying different standards "[w]ith respect to the prejudice that a defendant must show from deficient attorney performance," this Court granted certiorari "to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel." *Id*., at 684.

" '[T]he right to counsel is the right to the effective assistance of counsel.' " *Id*., at 686 (quoting *McMann* v. *Richardson*, 397 U. S. 759, 771, n. 14 (1970)). Partisan advocacy on behalf of the prosecution and defense is the most effective method of eliciting truth and to " 'promote the ultimate objective that the guilty be convicted and the innocent go free.' " *United States* v. *Cronic*, 466 U. S. 648, 655 (1984) (quoting *Herring* v. *New York*, 422 U. S. 853, 862 (1975)). Truth and

fairness are the overriding reasons for demanding that an attorney's assistance be "effective." *Ibid*.; *Gonzalez-Lopez*, 548 U. S., at 147. Thus, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U. S., at 686; see also *Nix* v. *Whiteside*, 475 U. S. 157, 175 (1986) (refusal to cooperate in defendant's perjury is not "prejudice," even if it would have changed the outcome).

With these considerations in mind, this Court developed a two-part test for evaluating ineffective assistance claims. *Strickland*, 466 U. S., at 687. To prove that counsel's performance was "so defective as to require reversal of a conviction," a convicted defendant must prove that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Ibid*.; *Cronic*, 466 U. S., at 658 ("the burden rests on the accused to demonstrate a constitutional violation"). The defendant, as the moving party, has the burden to show both deficient performance *and* prejudice. *Knowles* v. *Mirzayance*, 556 U. S. 111, 122 (2009). No particular order of decision is required. *Strickland*,, *supra*, at 697.

Pursuant to the deficient performance element, a defendant must demonstrate that "counsel's representation fell below an objective standard of reasonableness" in light of all of the surrounding circumstances. *Id*., at 687-688.[4] Judicial scrutiny is highly deferential and there is a "'strong presumption' that counsel's representation was within the 'wide range' of reason-

4. Because the Supreme Judicial Court of Massachusetts found that defense counsel's performance was deficient, this brief focuses solely on the prejudice element.

able professional assistance." *Harrington* v. *Richter*, 562 U. S. 86, 104 (2011) (quoting *Strickland*, 466 U. S., at 689).

With regard to the prejudice element, "any deficiencies in counsel's performance *must* be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Strickland*, 466 U. S., at 692 (emphasis added). Thus, a defendant must prove that but for counsel's unprofessional errors there is a reasonable probability that the outcome of the trial could have come to a different result. *Id*., at 694; *Richter*, 562 U. S., at 104. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, *supra*, at 694. The standard is high, and in those few cases in which an attorney's errors are so significant, reversal is required because the "errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman* v. *Morrison*, 477 U. S. 365, 374 (1986).

> "The requirement that a defendant show prejudice in effective representation cases arises from the very nature of the specific element of the right to counsel at issue there—*effective* (not mistake-free) representation. Counsel cannot be 'ineffective' unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have). Thus, a violation of the Sixth Amendment right to *effective* representation is not 'complete' until the defendant is prejudiced." *Gonzalez-Lopez*, 548 U. S., at 147.

In addressing the prejudice requirement, this Court stated that in certain Sixth Amendment contexts, prejudice is presumed and a "case by case inquiry into prejudice is not worth the cost." *Strickland*, 466 U. S., at 692. The actual or constructive denial of counsel is presumed to be prejudicial, as is the state's interference

with counsel's assistance. *Ibid*.; see also *Cronic*, 466 U. S., at 659.[5] In these limited circumstances, "impairments of the Sixth Amendment right . . . are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent." *Strickland*, *supra*, at 692.

Further, the Sixth Amendment right to effective assistance mandates that the accused receive " 'counsel acting in the role of an advocate.' " *Cronic*, 466 U. S., at 656 (quoting *Anders* v. *California*, 386 U. S. 738, 743 (1967)). If defense counsel "entirely fails" to subject the state's case to "meaningful adversarial testing," such as by cross-examination, "the process loses it character as a confrontation between adversaries" is presumptively unreliable, and prejudice is presupposed without further inquiry. *Cronic*, *supra*, at 656-657, 659. "Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." *Id*., at 659, n. 26.

In the 33 years since *Strickland* and *Cronic* were decided, this Court has not expanded the narrow class of presumptively prejudicial errors and continues to require a showing of prejudice in cases alleging inefficient assistance of counsel. This is because "[t]he government is not responsible for, and hence not able

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5. A limited presumption of prejudice will also be applied when an attorney is burdened by an actual conflict of interest. *Strickland*, 466 U. S., at 692; see also *Cuyler* v. *Sullivan*, 446 U. S. 335, 345-350 (1980); *Holloway* v. *Arkansas*, 435 U. S. 475, 489 (1978). Prejudice will only be presumed if a defendant shows that counsel " 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance." *Strickland*, 466 U. S., at 692 (quoting *Cuyler*, *supra*, at 350, 348).

to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. . . . Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant *must show that they actually had an adverse effect on the defense*." *Strickland*, 466 U. S., at 693 (emphasis added).

With regard to the right to counsel itself, this Court has said that the right of a criminal defendant to hire and be assisted by counsel of choice is "regarded as the root meaning of the constitutional guarantee." *Gonzalez-Lopez*, 548 U. S., at 147-148; see also *Cronic*, 466 U. S., at 653 ("[l]awyers in criminal cases 'are necessities not luxuries' "). In addition, the failure to appoint counsel to an indigent defendant at all is an obvious and unique constitutional defect hitting directly at the heart of the Sixth Amendment itself, and it is easy for the government to prevent. *Custis* v. *United States*, 511 U. S. 485, 496 (1994); *Strickland*, 466 U. S., at 692.

Thus, if a defendant is denied counsel of choice or counsel at all, the "[d]eprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, *regardless* of the quality of the representation he received." *Gonzalez-Lopez*, 548 U. S., at 148 (emphasis added). The constitutional error is self-evident and instantly violated. Proving prejudice would be futile because " 'no amount of showing of want of prejudice would cure it.' " *Cronic*, 466 U. S., at 659 (quoting *Davis* v. *Alaska*, 415 U. S. 308, 318 (1974)).

Cases interpreting the right to *effective* assistance of counsel, on the other hand, "impose[] a baseline requirement of competence on whatever lawyer is chosen

or appointed." *Gonzalez-Lopez*, 548 U. S., at 148. Thus, denial of the right to counsel requires a different inquiry from whether that counsel provided effective assistance. The former mandates that a violation of the right occurs, and is thus complete, upon erroneous deprivation, whereas the latter violation occurs only if counsel's mistake(s) caused harm to the defense. *Id*., at 147. *Strickland* set a high bar and this Court has stated several times that hurdling that bar is not an easy task. *Padilla* v. *Kentucky*, 559 U. S. 356, 371 (2010); see also *Premo* v. *Moore*, 562 U. S. 115, 122 (2011).

As both *Strickland* and *Gonzalez-Lopez* identified, there is the right to counsel and within that right, there is the right to the effective assistance of that counsel. The Sixth Amendment guarantees the right and due process defines the contours of the right. *Gonzalez-Lopez*, 548 U. S., at 147.

B. Fulminante.

In *Arizona* v. *Fulminante*, 499 U. S. 279 (1991), this Court addressed whether the erroneous admission of a coerced confession in violation of the Fifth Amendment was subject to harmless error review. When analyzing the appropriate standard of review, this Court noted that most constitutional errors are subject to such review and do not automatically require reversal of a conviction. *Id*., at 306; *Chapman* v. *California*, 386 U. S. 18, 24 (1967) (establishing the harmless error standard).

Cases involving "trial errors," like an involuntary confession, occur during the presentation of the case and can be assessed in the context of other evidence to determine whether its admission "was harmless beyond a reasonable doubt." *Fulminante*, 499 U. S., at 307-308. Certain enumerated "structural defects" or

"structural errors," however, are not amenable to harmless error analysis because these affect "the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id*., at 310; *Neder* v. *United States*, 527 U. S. 1, 8 (1999).

These structural errors include the total denial of counsel, a biased trial court judge, unlawful exclusion of members of defendant's race from a grand jury, denial of the right to self-representation, denial of a public trial, and the denial of the right to trial by jury due to a defective reasonable doubt instruction. *Fulminante*, 499 U. S., at 309-310; *Gonzalez-Lopez*, 548 U. S., at 149 (cases cited). " 'Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.' " *Fulminante*, *supra*, at 310 (quoting *Rose* v. *Clark*, 478 U. S. 570, 577-578 (1986)).

The public trial right has deep historical roots and operates as "an effective restraint on possible abuse of judicial power" and "as a safeguard against any attempt to employ our courts as instruments of persecution." *In re Oliver*, 333 U. S. 257, 270 (1948). However, the right to a public trial is not absolute and excluding the public is not always erroneous. *Waller*, 467 U. S., at 45; *Presley*, 558 U. S., at 215. "[T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Waller*, *supra*, at 45. *Voir dire* may also be closed to the public upon a court's finding that safety concerns or the threat of improper communications with jurors justify the closure. *Presley*, *supra*, at 215. Thus, because the erroneous deprivation of a defendant's right to a public trial is an enumerated structural error, reversal is required without harmless

error review if the objection was preserved. *Waller*, *supra*, at 49.

C. Strickland v. Fulminante.

Petitioner in this case is arguing that because his attorney did not object to his mother's exclusion from the courtroom during jury selection, his right to a public trial was violated and he need not show he was prejudiced because the underlying error was structural. In other words, his attorney was ineffective because of his inadvertent failure to preserve a structural error.

The flaw in Petitioner's argument, however, is that *Fulminante* concerns the standard of review that courts apply to a select few preserved structural errors and not to ineffective assistance of counsel claims. "The *Fulminante* prejudice inquiry presumes a constitutional violation, whereas *Strickland* seeks to define one." *Premo*, 562 U.S., at 128; see also *Lockhart* v. *Fretwell*, 506 U. S. 364, 369, n. 2 (1993). *Gonzales-Lopez* sheds light on this distinction. In that case, the issue was whether the trial court's erroneous deprivation of a criminal defendant's paid counsel of his choosing amounted to a structural error entitling the defendant to a reversal of his conviction. 548 U. S., at 142. The Government conceded that the defendant was erroneously deprived of counsel of his choice, but argued that the Sixth Amendment was not violated and thus not "complete" unless the defendant could show that his substitute counsel was ineffective within the meaning of *Strickland*. *Id*., at 144. This Court rejected the Government's argument, concluding that there is a difference between the right to counsel of choice and the right to effective counsel. *Id*., at 148. Requiring a defendant to prove that his substitute counsel was ineffective in order to establish a violation of his right

to counsel of choice confuses the two distinct rights. *Ibid*.

The right to counsel of choice guarantees "the right to a particular lawyer regardless of comparative effectiveness" and the right to effective counsel "imposes a baseline requirement of competence in whatever lawyer is chosen or appointed." *Ibid*. After concluding that the erroneous denial of counsel of choice was structural, this Court delved further into the differences between analyzing the right to counsel versus the right to effective counsel. *Id*., at 150.

> "[T]he requirement of showing prejudice in ineffectiveness claims stems from the very definition of the right at issue; it is not a matter of showing that the violation was harmless, but of showing that a violation of the right to effective representation *occurred*. A choice-of counsel violation occurs *whenever* the defendant's choice is wrongfully denied." *Ibid*.

When a glaring structural error occurs, the framework of the entire trial court proceeding is affected. The vehicle by which guilt or innocence was determined was hijacked by constitutional error and renders the trial fundamentally unfair. *Neder*, 527 U. S., at 8. "The entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial." *Fulminante*, 499 U. S., at 309-310.

> "It is one thing to recognize that structural errors and defects obviate any requirement that prejudice be shown on direct appeal and rule out an application of the harmless error rule in that context. It is another matter entirely to say that they vitiate the prejudice requirement for an ineffective assistance

claim." *Purvis* v. *Crosby*, 451 F. 3d 734, 740 (CA11 2006).

Strickland seeks to define a constitutional error and in doing so demands the defendant, as the moving party, to prove both deficient performance and prejudice. Prejudice is an element of the defendant's claim.

II. Defaulted claims of structural error should be addressed in "plain error" review, not brought in the back door through ineffective assistance claims.

For the class of claims in which prejudice cannot be realistically assessed, assignment of the burden of showing prejudice effectively determines the ineffective assistance claim once deficient performance has been shown. If the defendant has the burden of showing prejudice and the showing is impossible, no such claims will succeed. If the government has the burden of showing lack of prejudice (harmlessness) and the showing is impossible, all such claims will succeed.

If all such claims succeed, then convictions of clearly guilty criminals will be overturned on grounds that will strike the general public as trivial. The present case is a prime example. The error committed in this case does not remotely call into question the reliability of the trial, *i.e.*, its capacity to produce a just result. See *Strickland* v. *Washington*, 466 U. S. 668, 696 (1984). Reversal in such cases undermines the public's trust in the criminal justice system.

On the other side of the scale, if such underlying errors are not correctable through ineffective assistance claims, they remain correctable through "plain error" rules when justice so requires. The specific requirements for plain error review vary by jurisdiction, but

these rules typically contain enough "play in the joints" to permit courts to avoid miscarriages of justice.

In federal criminal cases, if a defendant makes a timely objection to an error at trial, Federal Rule of Criminal Procedure 52(a) authorizes federal appellate courts to engage in a harmless error inquiry to determine whether the error was prejudicial. *United States* v. *Olano*, 507 U. S. 725, 734 (1993); see also *Lockhart* v. *Fretwell*, 506 U. S. 364, 369, n. 2 (1993) ("Harmless error analysis is triggered only *after* the reviewing court discovers that an error has been committed"). Rule 52(b), on the other hand, gives appellate courts limited authority to correct errors that were not timely raised at trial. *Olano*, *supra*, at 731. Rule 52(b) is discretionary, not mandatory. *Id*., at 735.

To overcome procedural default in federal courts, Rule 52(b) "allows plain errors affecting substantial rights to be noticed," *Johnson* v. *United States*, 520 U. S. 461, 466 (1997), despite the lack of preservation if (1) there was an error that was not affirmatively waived by the defendant; (2) the legal error is clear or obvious; (3) the error affected the appellant's "substantial rights" in that it affected the outcome of the proceeding; and (4) "the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Puckett* v. *United States*, 556 U. S. 129, 135 (2009) (internal quotation marks omitted). If the first three elements are satisfied, an appellate court has the discretion to remedy the forfeited error after considering the fourth. *Ibid*. In Massachusetts, "unpreserved claims of error [are] reviewed to determine if a substantial risk of a miscarriage of justice occurred." *Commonwealth* v. *LaChance*, 469 Mass. 854, 857, 17 N. E. 3d 1101, 1104 (2014).

Both Rule 52(a) and (b) require a showing of prejudice

> "with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice [under Rule 52(b)]. In most cases, a court of appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial. . . . This burden shifting is dictated by a subtle but important difference in language between the two parts of Rule 52: While Rule 52(a) precludes error correction only if the error 'does *not* affect substantial rights' . . . , Rule 52(b) authorizes no remedy unless the error *does* 'affec[t] substantial rights.' " *Olano*, 507 U. S., at 734-735 (citations omitted; emphasis in original).

Stated another way—under Rule 52(a), if a properly preserved error is not prejudicial to the defendant, it is subject to harmless error review with the burden on the Government to prove harmlessness. While under Rule 52(b), if an unpreserved error *is* prejudicial to the defendant, it is subject to "plain error" review with the burden on the defendant.

Fulminante holds that certain structural errors are not subject to harmless error review. However, "[w]hether an error can be found harmless is simply a different question from whether it can be subjected to plain-error review." *Puckett*, 556 U. S., at 139.

Because the right to a public trial is not absolute, upon objection, a trial court must evaluate the four *Waller* factors to determine whether the closure is necessary.[6] If an appellate court determines that the

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6. A four-part test applies: the party seeking closure must advance an overriding interest that is likely to be prejudiced; the closure must be no broader than necessary to protect the interest; the trial court must consider reasonable alternatives to the closure; and the trial court must make findings adequate to support the closure. *Waller*, 467 U. S., at 48.

closure was erroneous, the error is considered structural and is not subject to harmless error review. See *United States* v. *Marcus*, 560 U. S. 258, 263 (2010). "Where a defendant raises a properly preserved claim of structural error, this court will presume prejudice and reversal is automatic." *LaChance*, 469 Mass., at 857, 17 N. E. 3d, at 1104.

If the courtroom closure is not objected to, and thus unpreserved, and a defendant raises the issue for the first time on appeal, determining whether the closure was erroneous shifts the burden to the defendant because the claimed error has been procedurally defaulted. In the federal courts, "a right ' "may be forfeited in criminal as well as civil cases by the failure to make a timely assertion of the right before a tribunal having jurisdiction to determine it." ' " *Johnson*, 520 U. S., at 465 (quoting *Olano*, 507 U. S., at 731 (quoting *Yakus* v. *United States*, 321 U. S. 414, 444 (1944))). "[A]ppellate courts exist solely to determine whether trial courts committed reversible error in proceedings below. An appeal is not a do-over of the original proceeding." Cunningham, Appellate Review of Unpreserved Questions in Criminal Cases: An Attempt to Define the Interest of Justice, 11 J. App. Prac. & Process 285, 288 (2010) (footnotes omitted). Cf. *Wainwright* v. *Sykes*, 433 U. S. 72, 90 (1977).

Alerting the trial judge to the alleged error gives the trial court the opportunity to evaluate the alleged error at the time it occurred. *Puckett*, 556 U. S., at 134. "Without a preservation rule, a trial attorney might intentionally keep quiet about an error with the hope of using it, in the event of a loss at trial, as a basis for reversal on appeal." Cunningham, *supra*, at 292; *Puckett*, *supra*, at 134. This is not a hypothetical possibility. Defense counsel actually tried this gambit

in *United States* v. *Turrietta*, 696 F. 3d 972, 975-976 (CA10 2012).

The third prong of the plain error rule is similar to the prejudice prong of *Strickland*, and this Court has not yet found it necessary to decide if this prong should be presumed for structural-error claims reviewed for plain error. See *Puckett*, 556 U. S., at 140-141. The Court has found that the errors coming before it in this posture did not satisfy the fairness-integrity-reputation prong. See *Johnson*, 520 U. S., at 469-470 (failure to submit to jury an element not genuinely disputed); *United States* v. *Cotton*, 535 U. S. 625, 632-633 (2002) (omission of drug quantity from indictment when "essentially uncontroverted").

> "Although a showing (or presumption) of prejudice is necessary to meet this prong, it is not sufficient because not every prejudicial error threatens the fairness and integrity of the proceedings. [Citation.] Rather, the fourth prong is an independent inquiry, more appropriately compared with a miscarriage of justice standard under which a claimed error should not be corrected, unless allowing it to stand would be 'particularly egregious.' " *Turrietta*, 696 F. 3d, at 984.

In the present case, the Supreme Judicial Court of Massachusetts found no plain error because "the defendant has not advanced any argument or demonstrated any facts that would support a finding that the closure subjected him to a substantial likelihood of a miscarriage of justice." 474 Mass., at 815, 54 N. E. 3d, at 521. This holding is consistent with *Johnson*, *Cotton*, and *Turrietta*.

The courtroom closure for jury selection did not affect the fairness of the judicial proceedings as a whole. The defendant was tried and convicted for a murder he

clearly did commit. There is no reason to bend the rules to allow him to raise a minor error to which he did not object and which could have been corrected on the spot if he had objected.

CONCLUSION

The decision of the Supreme Judicial Court of Massachusetts should be affirmed.

April, 2017

Respectfully submitted,

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