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

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF MASSACHUSETTS, IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than one million members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Massachusetts is one of its statewide affiliates. *Amici* respectfully submit this brief to assist the Court in resolving whether prejudice should be presumed in addressing ineffective assistance of counsel claims in which counsel's ineffective representation results not in mere trial error but in structural error. Given its longstanding interest in the protections contained in the Constitution, including the Sixth and Fourteenth Amendment rights to due process, a fair trial, and constitutionally adequate defense, the questions before the Court are of substantial importance to the ACLU, its Massachusetts affiliate, and their members.

STATEMENT OF THE CASE

A Massachusetts jury convicted Kentel Weaver of possession of an unlicensed firearm and murder. For the entirety of jury selection, the trial court fully closed the courtroom to Weaver's family and the public. App. 6-8. Weaver's lawyer, however, failed to object to the closure. Weaver himself was unaware that the closure violated his constitutional rights. In Weaver's motion for a new trial, filed by new counsel,

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court. No party has authored this brief in whole or in part, and no one has made a monetary contribution to the preparation or submission of this brief other than *amici*, its members, and its counsel.

he raised the error in his trial counsel's failure to object immediately to the courtroom closure. App. 88. At an evidentiary hearing, the trial court found that the closure did not meet the criteria for a permissible closure under *Waller v. Georgia*, 467 U.S. 39, 48 (1984), and that trial counsel's failure to object had not been a reasonable trial strategy but "was the product of 'serious incompetency, inefficiency, or inattention to the defendant's Sixth Amendment right to a public trial, and was not objectively reasonable," Pet. App. 40a. The court nonetheless denied relief because it concluded that Weaver had failed to demonstrate how the closure had prejudiced him.

Weaver conceded that he had not shown prejudice, *id.* at 40a – a showing that was in fact impossible to make – but argued that where, as here, defense counsel ineffectively fails to object to a structural error in the trial proceedings, prejudice should be presumed under the second prong of *Strickland v. Washington*, 466 U.S. 668, 687-89 (1984). Pet. App. 39a-40a. The trial court rejected Weaver's argument, and the Massachusetts Supreme Judicial Court affirmed. *Id.* at 40-41.

SUMMARY OF ARGUMENT

Structural errors, by definition, rob defendants of a fair trial. A trial infected with one of the limited errors this Court has deemed "structural" cannot "reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair." *Rose v. Clark*, 478 U.S. 570, 577–78 (1986). At the same time, the "precise effects"

of structural errors are "indeterminate" and "unmeasurable[,]" making it impossible to point to specific evidence of prejudice. *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993). A defendant denied a public trial cannot identify precisely how the closed trial prejudiced him, but that does not diminish the fundamental deprivation suffered. An appellant who establishes structural error therefore is entitled to relief without undergoing the "harmless error" analysis that would apply to mere trial errors. *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991).

Whether structural error follows in the wake of defense counsel's unsuccessful objection to the trial court, or follows counsel's ineffective failure to object, the result is the same. The defendant has been convicted in a trial lacking fundamental fairness and the prejudice flowing from the error is impossible to prove. Thus, where counsel, through deficient performance, fail to object to structural errors, prejudice should be presumed for purposes of establishing ineffective assistance of counsel as well.

The court below found that petitioner's counsel failed to object to the unconstitutional closure of jury selection out of ignorance of the law, but held that petitioner had not proven prejudice and that prejudice would not be presumed. Under this approach, ineffective assistance with respect to the most serious errors, those that infect the entire trial and are deemed "structural," is for all practical purposes immune from review. As one circuit court held in denying a claim of ineffectiveness under *Strickland*, for lack of proof that counsel's failure to object to a courtroom closure caused prejudice, "[w]e do not know, and when we do not know the party

with the burden loses, and here that party is" the defendant. *Purvis v. Cosby*, 451 F.3d 734, 741 (11th Cir. 2006). Because prejudice cannot be demonstrated with respect to structural errors, requiring that defendants prove prejudice is a fatal obstacle to any relief. As a result, only those defendants with effective counsel who object are guaranteed the protection of this Court's structural-error jurisprudence.

If prejudice is presumed with respect to deficient failure to object to structural errors, the Court's familiar *Strickland* jurisprudence is more than adequate to ferret out insubstantial or contrived claims of structural error. The lower court's prior precedent raises the specter of unethical trial lawyers withholding objections to structural error at trial to preserve an appellate parachute. But under proper application of *Strickland,* such claims would fail. *Strickland*, 466 U.S. at 690. Reviewing courts "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. Strategic failures to object do not meet this test.

Petitioner highlights the vital importance of the public-trial right, Pet. Br. 15-20, and the injustice of requiring a defendant to prove quantifiable prejudice given this Court's decisions holding that structural errors defy harmless-error analysis. *Id.* at 26-29. The same analysis applies to other structural errors, as amici illustrate through examples of other types of structural error where prejudice could not be proved, and where the errors, if uncorrected, would have undermined fundamental justice. This Court has overturned convictions in such cases without

undertaking harmless error analysis precisely because prejudice is unmeasurable and impossible to prove.

These examples illustrate the importance of the structural error doctrine to ensuring justice, and also demonstrate the arbitrariness that would result if the approach to ineffective assistance claims below is upheld. The harm would fall only on those unlucky few who not only endure trials infected with structural error, but are represented by counsel who, through ignorance or incompetence, fail to recognize and object to such error. Moreover, the victims of those double constitutional errors would be almost exclusively the indigent.

ARGUMENT

I. PRESUMING THAT PREJUDICE FLOWS FROM COUNSEL'S DEFICIENT FAILURE TO OBJECT TO STRUCTURAL ERROR IS NECESSARY TO UPHOLD CRITICAL CONSTITUTIONAL RIGHTS.

The rule proposed here – that prejudice should be presumed, where counsel, through constitutionally deficient performance, fails to object to a "structural error" – is necessary to vindicate essential rights bearing on the fundamental fairness of the trial itself.

A. Presuming Prejudice Would Uphold Vital Structural Rights.

By definition, structural errors "render a trial fundamentally unfair." *Rose*, 478 U.S. at 577–78. The accused forced to trial before a biased judge, *Tumey v. Ohio*, 273 U.S. 510 (1927), or without counsel,

Gideon v. Wainright, 372 U.S. 335 (1963), or without a jury, *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968), is denied the trial our Constitution guarantees. *See* U.S. Const. amends. VI, XIV. A trial without these safeguards "cannot reliably serve its function as a vehicle for determination of guilt or innocence . . .1and no criminal punishment may be regarded as fundamentally fair." *Rose*, 478 U.S. at 577-78.

Other basic protections of our Constitution similarly define the "framework within which the trial proceeds[.]"*Fulminante*, 499 U.S. at 310; *United States v. Marcus*, 560 U.S. 258, 263 (2010) (quoting *Fulminante* and noting the class of structural errors is "limited"); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (same). These include the right to a grand jury selected without racial discrimination, *Vasquez v. Hillery*, 474 U.S. 254 (1986); the right to self-representation at trial, *McKaskle v. Wiggins*, 465 U.S. 168, 177–178 (1984); and the right to a public trial, *Waller v. Georgia*, 467 U.S. 39, 49, n. 9 (1984). *Fulminante*, 499 U.S. at 310 (internal parallel citations omitted).

When these protections are disregarded, the accused is denied a criminal trial that is reliable, fundamentally fair, *id*., and consistent with "the American scheme of justice," *Duncan*, 391 U.S. at 149. To obtain relief on appeal, the defendant therefore need only show that structural error has occurred, and the "harmless error" analysis that governs mere trial errors is inapplicable. *Id.*

Harmless error analysis is not necessary because structural errors, by their very nature, defy case-specific proof of prejudice typical of mere trial

error. A court reviewing whether trial error caused prejudice evaluates the evidence remaining after evidence improperly admitted is set aside. *Fulminante*, 499 U.S. at 310. That's not possible with structural error. As the Court has explained:

> [Structural errors] defy analysis by 'harmless-error' standards. 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.

Id. at 309-10. *See also Sullivan*, 508 U.S. at 281 (noting the "precise effects" of structural errors are "indeterminate" and "unmeasurable").

What is true on review of a structural error on direct review is also true on review of a claim that counsel, through ignorance or incompetence, provided ineffective assistance by failing to object to a structural error. In both circumstances, the error simultaneously infects the whole trial and defies a specific demonstration of prejudice.

The position of the court below would therefore render appellate error correction unavailable for those with the misfortune of representation by counsel who unprofessionally, incompetently, and without reasonable strategic motive, failed to object to "structural errors." *See Strickland*, 466 U.S. at 687-89 (setting forth first prong of ineffectiveness standard). Unable to show prejudice flowing from an error that by definition defies such a showing, *Fulminante*, 499 U.S. at 309-10, the claim of

ineffective assistance would fail under *Strickland*'s second prong.

Denying appellate relief for those unlucky enough both to have been convicted in a trial tainted by structural error and by counsel who, through constitutionally deficient performance, failed to object, would make a mockery of our tradition of requiring fair trials.

Two additional considerations support this conclusion. First, "[t]he Sixth Amendment mandates that the State bear the risk of constitutionally deficient assistance of counsel." *Kimmelman v. Morrison*, 477 U.S. 365, 379 (1986) (citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (holding that where a "procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State"); *Cuyler v. Sullivan*, 446 U.S. 330, 344 (1980) ("The right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance."); *see also Evitts v. Lucey*, 469 U.S. 387, 396 (1985) ("The constitutional mandate is addressed to the action of the State.").

The State that permits a structural error in a criminal trial should not obtain a windfall by also failing to ensure that the accused has adequate representation. *Cf. Chapman v. California*, 386 U.S. 18, 24 (1967) ("requiring the [State as] beneficiary of a constitutional error to prove beyond a reasonable doubt that [constitutional trial] error complained of did not contribute to the verdict"). When the accused is denied adequate representation and the result is

the failure to object to structural error, her conviction is fundamentally unfair and unreliable.

Second, presuming prejudice from counsel's ineffective failure to object to structural error is essential to safeguard structural rights. Even when appellate counsel raise unpreserved error on direct appeal, defendants are far from guaranteed relief under the wide range of state practices with respect to procedural default. Most but not all state appellate courts permit some variety of "plain error" review of unpreserved error. *See generally* Tory A. Weigand, *Raise or Lose: Appellate Discretion and Principled Decision-Making*, 17 Suffolk J. Trial & App. Advoc. 179, 222 (2012) (collecting state "plain error" review standards). The burden an appellant must carry to win relief under these standards, however, varies widely. *Id.* at 222-242 (describing the various standards).

Some state courts withhold relief on appeal when trial counsel have failed to object to structural errors. *See*, *e.g.*, *Stackhouse v. People*, 386 P.3d 440, 446 (Colo. 2015) (finding defendant "affirmatively waive[d] . . . right to public trial by not objecting to known closures"); *Barrows v. United States*, 15 A.3d 673, 681 (D.C. 2011) (concluding that although wrongful courtroom closure is structural error, defendant failed to prove sufficient prejudice for relief); *People v. Vaughn*, 821 N.W.2d 288, 305 (Mich. 2012) (same); *State v. Butterfield*, 784 P.2d 153, 156 (Utah 1989) (concluding that right to open courtroom may be waived by failure to object to closure). *Compare with Lane v. State,* 80 So. 3d 280, 302-03 (Ala. Crim. App. 2010) (reversing based on structural error to which counsel had not objected as plain

error); *Savoy v. State,* 22 A.3d 845, 859 (Md. 2011) (similar).

Thus, absent a ruling requiring prejudice to be presumed when counsel, through constitutionally deficient performance, fails to object to structural errors, a defendant's entitlement to appellate relief for structural constitutional errors will not be guaranteed. It will depend entirely on geography. "That result is contrary to the Supremacy Clause and the Framers' decision to vest in 'one supreme Court' the responsibility and authority to ensure the uniformity of federal law." *Danforth v. Minnesota*, 552 U.S. 264, 292 (2008) (Roberts, C.J., dissenting).

Presuming prejudice flows from counsel's ineffective failure to object to such errors is therefore essential to ensure the uniform application of vital constitutional protections.

B. Presuming Prejudice Would Uphold The Right To Effective Counsel.

Presuming prejudice in these circumstances would also vindicate the right to effective assistance of counsel itself. To do so does not risk affording relief to unworthy or "sandbagged" appellate claims; nor does it encourage counsel to "'harbor error as an appellate parachute'" by declining to object at trial to structural error. *Commonwealth v. LaChance*, 17 N.E.3d 1101, 1112 (Mass. 2014) (a decision relied on by the lower court) (quoting *People v. Vaughn*, 821 N.W.2d 288, 308 (Mich. 2012)), *cert. denied*, 136 S. Ct. 317 (2015).

The Court has instructed reviewing courts to presume counsel has "rendered adequate assistance and made all significant decisions in the exercise of

reasonable professional judgment[.]" *Strickland*, 466 U.S. at 690. Reviewing courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. The defendant seeking relief must, under prong one of *Strickland*, "show that counsel's performance was deficient." *Id.* at 687. When the defendant fails to do so, he will not be entitled to relief. *See*, *e.g.*, *Burt v. Titlow*, __ U.S. __, 134 S. Ct. 10, 17 (2013).

In jurisdictions where courts already presume counsel's ineffective failure to object to structural error is prejudicial,[2] insubstantial claims of ineffectiveness have been rejected as not constituting deficient performance. *See Johnson v. Sherry*, 465 Fed. Appx. 477, 481 (6th Cir. 2012) (unpublished decision) ("Johnson's lawyer apparently weighed the minimal benefits against the significant costs of objecting to the closure, and then decided against it. The Constitution permitted him that choice."); *Addai v. Schmalenberger*, 776 F.3d 528, 536 (8th Cir. 2015) (noting "that almost all of the testimony during the time the courtroom was closed was elicited by . . . trial counsel, which was part of trial counsel's strategy for which he so aggressively fought to permit the witness to even testify at all"); *State v. Racz*, 168 P.3d 685, 690 (Mont. 2007) (dismissing claim that counsel ineffectively failed to maintain cause challenge of allegedly biased jurors because the appellate record did not foreclose the possibility of an unspoken strategic reason). *Cf. Eberhardt v. Wenerowitz*, No. 13-1700, 2016 WL 5390567, at *1

[2] *See* Pet. for Cert. at 11-15 (collecting cases from Montana, the Sixth Circuit, and the Eighth Circuit).

n.3 (E.D. Pa. Sept. 26 2016) (denying a certificate of appealability for the open question whether defendants must show prejudice for structural errors raised under ineffectiveness claims because the defendant's ineffectiveness claim was properly denied on the deficiency prong).

Absent countervailing strategic considerations, defense lawyers are professionally obligated to object to structural constitutional errors. *See* American Bar Association ("ABA"), *Standards for Criminal Justice: Prosecution and Defense Function*, Standard 4-3.6 (3d ed. 1993) ("Many important rights of the accused can be protected and preserved only by prompt legal action. Defense counsel should inform the accused of his or her rights at the earliest opportunity and take all necessary action to vindicate such rights."); *see also* ABA, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* 10.8 (A) (rev. ed. 2003) (requiring counsel to consider all legal claims potentially available, investigate whether they should be asserted, with attention to the importance of preserving legal error should an appeal later become needed).[3]

Ordinarily, counsel's objection will prompt the trial court to "consider and resolve" the issue

[3] Further, "[t]he basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation." *Standards for Criminal Justice: Prosecution and Defense Function*, Standard 4-1.2 (3d ed. 1993). The gamesmanship assumed in the notion that counsel would knowingly preserve an appellate parachute is also inconsistent with professional norms.

appropriately. *Puckett v. United States*, 556 U.S. 129, 134 (2009). Whether convicted or acquitted, the defendants in those trials will have had their structural rights honored. In a smaller set of cases, the trial court will overrule a valid objection to structural error, the defendant will be convicted, and an appellate court will reverse the conviction. *See*, *e.g.*, *Vasquez*, 474 U.S. at 264 (affirming grant of habeas relief due to racial discrimination in selection of grand jurors).

The only structural errors left unremedied are those where defendants are convicted in trials infected both by structural error and by counsel's constitutionally deficient failure to object. There is no reason to deny relief from such doubly tainted trials.

II. OTHER "STRUCTURAL ERROR" CASES ILLUSTRATE THE NEED TO PRESUME PREJUDICE WHERE ERROR DEFIES A SPECIFIC DEMONSTRATION OF PREJUDICE.

Petitioner has demonstrated the critical importance of the public-trial right, Pet. Br. 15-20, and the unfairness of requiring prejudice to be shown where it is impossible to prove. *Id.* at 26-29. The case examples below highlight other critical applications of structural error and show why a prejudice requirement would be an insurmountable hurdle for those claims as well.

A. Denial Of An Impartial Judge.

Victor Berger was a journalist and former Congressman who had represented a district in Milwaukee, Wisconsin after World War I. Sally M. Miller, *Victor Berger and the Promise of Constructive*

Socialism, 33, 39 (1973). He was also a Social Democratic Party activist, *id.* at 26, and an immigrant born in what was then Austria-Hungary. *Id.* at 17. While running as the Social Democratic candidate in a special election to fill one of Wisconsin's U.S. Senate seats, Berger was indicted under the Espionage Act of 1917, based on his newspaper editorials calling for the preservation of civil liberties and criticizing the military draft. Joseph A. Ranney, *Aliens and "Real Americans": Law and Ethnic Assimilation in Wisconsin 1846-1920*, 67 Wis. Law. 28, 58 (Dec. 1994).

District Court Judge Kenesaw Landis was assigned Berger's case. *See Berger v. United States*, 255 U.S. 22, 28 (1921). Berger moved to recuse the judge, citing his public comments evincing his deep animus against German Americans. *Id.* at 28-29. To the recusal motion, counsel attached an affidavit documenting several prejudicial statements made in public by Judge Landis, including:

- "If anybody has said anything worse about the Germans than I have I would like to know it so I can use it . . . . "
- "[The German-Americans'] hearts are reeking with disloyalty."

Id. at 28-29. The motion to recuse Judge Landis "was denied and upon the trial defendants were convicted and each sentenced to 20 years' imprisonment." *Id.* at 27.

On review, this Court found Judge Landis to be impermissibly biased, *id.* at 36, and remanded to the lower court. *Id.* That court in turn reversed the convictions of Berger and his codefendants. *Berger v.*

United States, 275 F. 1021, 1021 (7th Cir. 1921). Neither court paused to determine whether Judge Landis's participation in the trial court had caused prejudice, or was "harmless error." *Id.* As the Court has explained, such evaluation is impractical if not impossible: "When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm." *Vasquez*, 474 U.S. at 263. The government took no further action. Ranney, *supra*, at 58.

The people of Berger's Wisconsin district then elected him to three successive terms (1922, 1924, 1926) in the U.S. Congress. Library of Congress, *Victor Berger: America's First Socialist Congressman*, https://www.loc.gov/rr/news/topics/berger.html (last visited March 3, 2017).

B. The Denial Of A Jury Trial Right.

Denying someone the right to a jury trial has also been treated as structural error. Gary Duncan was an African American 19-year-old when he encountered several white boys in Louisiana, and either "slapped" one on the elbow or "merely touched" him. *Duncan*, 391 U.S. at 148. He was tried before a judge, not a jury, who found Duncan guilty of simple battery, and sentenced him to a fine and 60 days' imprisonment. *Id.* at 147. Duncan had requested a trial by a jury of his peers. *Id.* at 146-47. But because the Louisiana Constitution guaranteed a jury trial only for capital punishment or imprisonment at hard labor, the trial judge denied his request. On review, this Court held that the Sixth Amendment entitled

Duncan to a jury trial for the "serious crime" with which he was charged. *Id.* at 156, 161.

The Court reversed the judgment below, with no evaluation of prejudice or "harmless error." *Id.* at 161. As the Court later explained of *Duncan*, an analysis of prejudice is impossible: "[T]he State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty." *Rose*, 478 U.S. at 578.

Following the Court's ruling, the State of Louisiana appeared determined to retry Duncan, again without a jury. Alvin J. Bronstein, *Representing the Powerless: Lawyers Can Make a Difference*, 49 Me. L. Rev. 1, 12 (1997). The legislature amended the battery statute "to max the punishment at six months rather than two years, and then they wanted to prosecute Duncan again without a jury trial. They arrested him again," and his lawyers went to "federal court to enjoin this prosecution." *Id.* Duncan's lawyers argued that any touching that occurred was an everyday occurrence, not a crime, and that the prosecution was in bad faith. *Id.* The federal judge held that the Louisiana officials were acting in bad faith, a decision upheld by the court of appeals. *Id.* at 12, 13 n. 18 (citing *Duncan v. Perez*, 445 F.2d 557 (5th Cir. 1971) (applying *Younger v. Harris*, 401 U.S. 37 (1971)).

Thus, because showing how a trial by a hypothetical jury would have differed from a trial by a judge is impossible, the presumption of prejudice is necessary to provide relief for those "rare" instances in which the defendant is denied a jury trial without objection by trial counsel. *McGurk* v. *Stenberg*, 163

F.3d 470, 475 n.5 (8th Cir. 1998) (reversing where defense counsel deficiently failed to object or advise his client of the jury trial right, and noting that such instances of presumed prejudice for structural errors will rarely arise).

C. Denial Of Right To Counsel.

Charles Clarence Hamilton was convicted of breaking and entering a dwelling at night and sentenced to death. *Hamilton v. Alabama*, 368 U.S. 52, 53 (1961). Hamilton had counsel at trial, but not at arraignment, where "[a]vailable defense[s] may be . . . irretrievably lost, if not then and there asserted, as they are when accused represented by counsel waives a right for strategic purposes." *Id.* at 54. Hamilton's trial counsel, however, failed to object that his client had not been represented at arraignment.[4] The Alabama Supreme Court ultimately denied relief on the grounds that counsel's absence did not prejudice Hamilton. *Ex parte Hamilton*, 122 So. 2d 602, 604 (Ala. 1960). This Court, however, presumed prejudice and rejected Alabama's argument that the error was harmless, explaining that "the degree of prejudice can never be known. Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently." *Hamilton*, 368 U.S. at 55.

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[4] This is apparent because the original trial record incorrectly stated that Hamilton did in fact have counsel at the arraignment, *Hamilton v. State*, 116 So. 2d 906, 909 (Ala. 1960), a finding that Hamilton's appellate counsel had to challenge via a separate writ before the Alabama Supreme Court would reach the merits of his claim. *Ex parte Hamilton*, 122 So. 2d 602, 604 (Ala. 1960).

D. Race Discrimination In Jury Selection.

Race discrimination in petit and grand juries are another type of structural error where a prejudice requirement would prove an insurmountable obstacle to ineffective assistance claims. *See, e.g., Winston v. Boatwright*, 649 F.3d 618, 632 (7th Cir. 2011) (presuming prejudice and granting relief where defense counsel intentionally removed all men from the jury); *Drain v. Woods*, 902 F. Supp. 2d 1006 (E.D. Mich. 2012) (granting relief where counsel "failed to object to the obvious pattern of strikes against minority jurors" without requiring a prejudice showing). Such claims have on occasion succeeded, albeit rarely. In the jurisdictions that required prejudice, the defendant's claim necessarily failed. *See*, *e.g.*, *Jackson v. Herring*, 42 F.3d 1350, 1362 (11th Cir. 1995) (finding counsel deficient for failing to object to prosecution's removal of all Black jurors, stating that it "would have more confidence in the verdict had it been delivered by a constitutionally composed jury," but denying claim because the defendant could not show a reasonable likelihood of a different verdict); *Young v. Bowerox*, 161 F.3d 1159, 1160 (8th Cir. 1998) (rejecting *Batson* claim where attorney failed to object because the defendant could not show "how the outcome of the trial would have been different in the absence of a structural defect").

Consider Grady Bankhead, a white man, sentenced to death in an Alabama state trial where the prosecutor "peremptorily challenged 8 of the 10 blacks on the jury panel." *Ex parte Bankhead*, 585 So. 2d 112, 117 (Ala. 1991). Although Bankhead did not object, the Alabama courts reviewed his *Batson*

claim on appeal as plain error, and remanded for a hearing where the State could offer race-neutral reasons for its strikes. *Ex parte Bankhead*, 585 So. 2d at 117.

On remand, the prosecutor explained that one African American prospective juror did not fit the "best juror profile" because he was an "older black male[,]" that two black women did not fit the "best juror profile" because they were women, and that one black man caused the prosecutor a bad gut reaction, while another purportedly "rubbed his face in disgust" at the mention of sequestration. *Ex parte Bankhead*, 625 So.2d 1146, 1147 (Ala. 1993). The court also noted that the prosecutor had "been found to have systematically excluded black veniremembers in violation of *Swain v. Alabama*, 380 U.S. 202 (1965) . . . and the State had failed to conduct any meaningful voir dire of the excluded black veniremembers." *Ex parte Bankhead*, 625 So. 2d at 1147 (parallel internal citations omitted).

The Alabama Supreme Court found that Bankhead had established a prima facie showing of racial discrimination, that the prosecutor had failed to offer a race-neutral reason with respect to the older black male prospective juror, and that the race-neutral reasons the prosecutor had offered were suspect. *Ex parte Bankhead*, 625 So. 2d at 1148. The court thus reversed Bankhead's conviction and death sentence. *See also Drain v. Woods*, 902 F. Supp. 2d 1006 (E.D. Mich. 2012) (following similar approach to

counsel's ineffective failure to object to *Batson* violation, and presuming prejudice).[5]

The court did not pause to evaluate whether Bankhead had shown prejudice in the outcome of his trial, or whether the error was harmless, presumably because it "simply cannot [be] know[n]" whether a "properly constituted" jury would have convicted. *Vasquez*, 474 U.S. at 264 (similar findings with respect to effect of discrimination in grand jury selection). *See also, Winston v. Boatwright*, 649 F.3d 618, 632 (7th Cir. 2011) ("Prejudice, in other words, is automatically present when the selection of a petit jury has been infected with a violation of *Batson* or *J.E.B."*). *Compare with Batiste v. State*, 888 S.W.2d 9, 15 (Tex. Crim. App.1994) (rejecting claim of ineffective assistance of counsel where counsel, through deficient performance, failed to lodge *Batson* objection, for failure to establish prejudice).

In each of these cases, structural errors deprived defendants of fundamentally fair trials. In each instance, the nature of the error defied "harmless error" or "prejudice" analysis, because the precise effect of the errors could not be demonstrated. Such errors should be remedied whether a defendant's lawyer objected unsuccessfully or failed, through deficient performance, to object. Under the lower court's approach here, only *some* defendants in jurisdictions with more forgiving plain-error standards will be eligible for relief. *See*, *e.g.*, *Diggs v.*

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[5] In 1994, Bankhead was resentenced to life imprisonment without release. *See* http://www.doc.state.al.us/InmateHistory.aspx (search last name Bankhead).

State, 973 A.2d 796, 815–16 (Md. 2009) (excusing counsel's failure to object to judge's "repeated and egregious behavior of partiality," presuming prejudice, and granting relief). Others whose trials were similarly marred by structural constitutional error will get no relief. *Batiste*, 888 S.W.2d at 15. *See also* p.10, *supra* (collecting cases of unpreserved structural error with different outcomes in different jurisdictions). The only way to ensure relief for all defendants doubly harmed by structural error and constitutionally deficient assistance of counsel is to presume prejudice.

III. THE COST OF NOT PRESUMING PREJUDICE WILL FALL MOST HEAVILY ON THE POOR.

Structural errors are rare. *See* Brief for Petitioner at 34. Instances when counsel fail to object to structural error, for a demonstrably non-strategic purpose, will be rarer still. *Id.*; s*ee also*, Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense reform*, 97 Minn. L. Rev. 1197, 1214-1215 (2013) ("[T]he vast majority of ineffective assistance of counsel claims are unsuccessful."); John Blume and Stacey Neumann, *"It's Like Déjà vu All Over Again": Williams v. Taylor, Wiggins v. Smith, Rompilla v. Beard and A (Partial) Return to the Guidelines Approach To The Effective Assistance of Counsel*, 34 Am. J. Crim. L. 127, 142 (2007) ("Almost all representation was found to be within *Strickland*'s 'wide range of professionally competent assistance.'"). But where this double-problem arises, its burdens will virtually always fall on indigent or low income defendants.

Abysmal representation for poor people undermines every aspect of the criminal justice system, but has long been a particularly egregious problem in death-penalty cases, where the stakes are the highest. *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 1835 (1994); Stephen B. Bright, *Death by Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. Va. L. Rev. 679, 683 (1990). As Justice Ginsburg acknowledged some years ago, "I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well-represented by counsel." Associated Press, *Oklahoma Governor Commutes Death Case, Texas Bill Boosts Defense for Poor,* Chicago Tribune, Apr. 11, 2001, at 8.

A prime example is *Knese v. State*, 85 S.W.3d 628 (Mo. 2002). In this capital case, defense counsel failed to read the jury questionnaires of two seated jurors whose statements strongly suggested they would automatically impose the death penalty. Due to that failure, counsel did not voir dire the jurors about their statements or move for cause. The Missouri Supreme Court found ineffective assistance and reversed the death sentence.[6] In fact, the defense

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[6] In this context, the court reversed after finding that the jurors' predisposition to impose death established a "reasonable probability" to undermine confidence in the verdict. *Knese*, 85 S.W.3d at 633. This is the exceptional variety of structural error that might be open to a showing of prejudice. But it is the exception that proves the rule; as this Court has acknowledged, structural errors generally defy analysis of prejudice. *See Vasquez*, 474 U.S. at 263; *cf. White,* 290 S.W. 3d at 165.

attorney had not handled a death penalty case in over 15 years, and had been disbarred for nine and a half years before representing Knese. *Id.* at 631-32.[7]

Similar problems infect non-capital trials of the indigent. Sonny White, an indigent Missouri defendant, was represented by appointed counsel. His lawyer failed to object to a juror who responded on three occasions during voir dire that he could not be fair to the defendant. *White v. State,* 290 S.W.3d 162, 166 (Mo. Ct. App. 2009). The appellate court concluded that no reasonably competent attorney would have permitted the juror to serve, and reversed. *Id.* at 167. His defense attorney surrendered his law license the year after White won a new trial, and the lawyer was later sentenced to five years' probation for criminal violations, including fraud and public urination. *In re: Alan S. Cohen*, MBE 39896, No. SC90622 (Mo. 2010); Doyle Murphy, *Disbarred St. Louis Lawyer Charged with Fraud, Public Urination*, Riverfront Times (Nov. 6, 2015).

Failing to provide a meaningful remedy for structural errors where deficient counsel do not object will impose an insurmountable obstacle to relief on those who least deserve it: poor people who

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[7] The attorney was reprimanded in 1976 for failing to return client funds. *In re Wendt*, 544 S.W.2d 3 (Mo. banc 1976). He surrendered his law license in 1981 following additional misconduct, and reacquired it in 1989. Informant's Brief, *In re: Robert H. Wendt*, No. SC86642 2005 WL 2213903, *4-*6 (Mo. June 10, 2005). During his disbarment, he was convicted and sentenced to prison for a federal conspiracy charge. *Id.* at *6. After reinstatement, he was admonished in 1994, three years before Knese's trial, for breaking the rule against contact with represented parties. He was admonished yet again in 1999 for a breach of diligence.

are unlucky enough to be represented by inadequate, over-burdened, or incompetent counsel.

CONCLUSION

The judgment of the Supreme Judicial Court of Massachusetts should be reversed.

Respectfully Submitted,

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