14-1153

No.

In the Supreme Court of the United States

EDMUND LACHANCE,

Petitioner,

v.

MASSACHUSETTS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant asserting ineffective assistance under *Strickland* v. *Washington*, 466 U.S. 668 (1984), based upon counsel's failure to raise a structural error must—in addition to demonstrating deficient performance—show that he was prejudiced by counsel's ineffectiveness, or whether prejudice is presumed because the harm from structural errors is "necessarily unquantifiable and indeterminate." *Sullivan* v. *Louisiana*, 508 U.S. 275, 282 (1993).

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

OPINIONS BELOW

The opinion of the Massachusetts Supreme Judicial Court (app., *infra*, 1a-21a) is reported at 17 N.E.3d 1101. The Superior Court's memorandum order denying petitioner's motion for reconsideration (app., *infra*, 22a-26a) and memorandum order denying petitioner's motion for a new trial (app., *infra*, 27a-35a) are both unreported.

JURISDICTION

The judgment of the Supreme Judicial Court of Massachusetts was entered on October 21, 2014. On January 9, 2015, Justice Breyer granted an extension of time in which to file a petition for a writ of certiorari to and including March 20, 2015. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution provides, in relevant part:

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

U.S. CONST. amend. VI.

STATEMENT

"[T]his Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Strickland* v. *Washington*, 466 U.S. 668, 684 (1984).

The familiar two-pronged *Strickland* standard for establishing ineffective assistance of counsel requires the defendant to show both that counsel's performance was deficient and "that the deficient performance prejudiced the defense." *Id.* at 687.

The question presented in this case is whether the prejudice prong of a *Strickland* claim is presumptively satisfied when the deficient performance consisted of counsel's failure to object to a *structural* error at trial. By holding that prejudice may *not* be presumed in such circumstances, the Massachusetts Supreme Judicial Court (1) exacerbated the deep division among the lower courts, and (2) adopted a standard that erects a practically insuperable barrier to an ineffective assistance of counsel claim based on trial counsel's failure to raise a violation of a defendant's structural constitutional right.

A. Trial and courtroom closure

In October 1999, petitioner met "Lisa Hill" (a pseudonym) at her workplace and struck up a conversation with her. Appellee Br. 5, *Massachusetts* v. *LaChance*, 2002 WL 32757907 (Oct. 30, 2002). Later that month, Hill encountered petitioner on her way to a subway station; he offered her a ride to Chinatown, and she accepted after some hesitation. *Id.* at 7. At that point, prosecutors later alleged, petitioner drove with Hill to a trailer truck terminal, threatened her with a knife, and raped her. *Id.* at 8-9.

Petitioner later convicted on several counts in connection with the alleged rape and kidnapping. App., *infra*, 1a. Affidavits submitted by petitioner, his mother, his uncle, and two of his previous attorneys, demonstrate that a courtroom closure occurred on April 10, 2001, during the jury-empanelment

phase of the trial. App, *infra*, 2a. That morning, petitioner's family members were in the courtroom, waiting for voir dire to begin, when a court officer ordered them to leave the room. The family members waited outside in the lobby for several hours; they attempted to reenter the courtroom in the afternoon, but once again a court officer refused to allow them to observe the proceedings. *Ibid.*

Petitioner's trial counsel stated that he failed to object to the courtroom closure because it was then customary in the Middlesex County Superior Court to clear the courtroom during jury empanelment. App, *infra*, 3a. He also stated that he had not discussed the matter with his client at any time, as he was wholly unaware that the courtroom closure presented a Sixth Amendment issue. *Ibid.*

Petitioner's appellate counsel also failed to raise the courtroom closure issue on the direct appeal of his conviction. The Appeals Court affirmed, and both the Massachusetts Supreme Judicial Court and this Court denied review. *Commonwealth* v. *LaChance*, No. 02-P-443, 2003 WL 21800943 (Mass. App. Ct. Aug. 5, 2003), rev. denied, 440 Mass. 1104 (2003), cert. denied, 540 U.S. 1202 (2004).

Petitioner's former appellate counsel stated that he failed to raise the issue with his client or the appellate courts because "it did not occur to him that closure was an issue in the case." App., *infra*, 3a.[1]

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[1] Petitioner filed two other motions for a new trial—in 2003 and in 2004—alleging different constitutional violations in the conduct of his trial. App., *infra*, 1a-2a. These motions were denied simultaneously by the trial judge on April 15, 2004 (app., *infra*, 2a) and are not at issue here.

B. Opinions below

The superior court denied petitioner's 2011 motion for a new trial. App., *infra*, 27a-35a. In the underlying motion, petitioner asserted ineffective assistance of counsel based on his counsels' failure to object to the public-trial right violations that occurred during voir dire. App., *infra*, 2a. The trial court decided that an evidentiary hearing was unnecessary because petitioner had raised "no substantial issue" and denied the motion. App., *infra*, 27a n.1.

Petitioner sought reconsideration of the superior court's ruling based upon two intervening decisions of the Massachusetts Supreme Judicial Court: *Commonwealth* v. *Lavoie*, 981 N.E.2d 192 (Mass. 2013), and *Commonwealth* v. *Hardy*, 984 N.E.2d 727 (Mass. 2012). The superior court denied the motion (app., *infra*, 22a-26a), holding that prejudice could not be presumed despite the "structural nature of the underlying public trial right." App., *infra*, 4a.

A divided Massachusetts Supreme Judicial Court affirmed. App., *infra*, 1a-21a. The majority held that petitioner could not avail himself of "the presumption of prejudice that would otherwise apply to a preserved claim of structural error," because he had "procedurally waived his * * * claim by not raising it at trial." App., *infra*, 4a. It further stated that "the United States Supreme Court has recognized a presumption of prejudice only in limited circumstances," of which a courtroom closure is not one, and that courtroom closure, while a structural error, "will rarely have an effect on the judgment or undermine our reliance on the outcome of the proceeding." App., *infra*, 7a (quoting *Strickland*, 466 U.S. at 691-92).

Justices Duffy and Lenk dissented. App, *infra*, 9a-21a. In their view, the majority's decision "effectively forecloses vindication of [a] constitutional right on collateral review, even in cases where trial counsel has rendered constitutionally deficient performance * * * and neither the defendant nor his counsel knowingly waived his right to a public trial." App., *infra*, 10a. In their view, "the very nature of a right to which presumptive prejudice attaches—such as the right to an open court—is that a showing of prejudice is not possible" as a practical matter. App., *infra*, 12a-13a. Requiring proof of prejudice will therefore effectively preclude vindication of the right in virtually every case. App., *infra*, 13a.

REASONS FOR GRANTING THE PETITION

There is an entrenched and expressly-recognized conflict among the lower courts regarding the standard for determining prejudice when an ineffective assistance of counsel claim is based on trial counsel's failure to raise a violation of the defendant's structural constitutional rights. Some courts, relying on this Court's holdings that prejudice will be presumed on direct review because of the indeterminate effect of violations of structural rights, have concluded that prejudice is presumed if the defendant establishes deficient performance. Other courts hold that actual prejudice must be established notwithstanding the unquantifiable impact of violations of structural rights. This Court should grant review to resolve the conflict on this important, frequently-recurring legal issue.

A. There is a broad, acknowledged conflict among the lower courts regarding the question presented

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

Three courts of appeals and one state high court have held, contrary to the ruling below, that when a defendant claims ineffective assistance of counsel arising from counsel's failure to object to structural error, the reviewing court must apply the same presumption of prejudice that governs the structural error analysis on direct review.

In the First Circuit, "a defendant who is seeking to exercise a procedurally defaulted claim of structural error need not establish actual prejudice." *Owens* v. *United States*, 483 F.3d 48, 64 (1st Cir. 2007). Citing this Court's determinations that it is impossible to identify prejudice resulting from structural errors, including violations of a defendant's right to a public trial, the First Circuit concluded that it would "not ask defendants to do what the Supreme Court has said is impossible," by requiring that they show prejudice where an ineffective assistance of counsel claim is predicated on defense counsel's failure to object to a structural error. *Id.* at 65. Rather, prejudice "must be presumed" in such a case. *Id.* at 66.

The Sixth Circuit reached the same conclusion in *Johnson* v. *Sherry*, 586 F.3d 439 (6th Cir. 2009), with respect to a state habeas petitioner's claim that his counsel had been constitutionally ineffective in failing to object to a courtroom closure during testimony at trial. *Id.* at 445. The court ordered an evidentiary hearing and observed that, under *Strickland*, a ha-

beas petitioner who "establish[ed] that counsel's performance was deficient * * * [would] also be required to demonstrate that he was prejudiced by the error." *Id.* at 446-447. The court held, however, that if the trial court found that the courtroom closure was unjustified—in other words, if the closure in fact amounted to a denial of the petitioner's right to a public trial—then, because public trial violations constitute structural errors that defy harmlessness review, "prejudice would be presumed" for purposes of the *Strickland* analysis. *Id.* at 447.[2]

The Eighth Circuit has adopted the identical rule: "when counsel's deficient performance causes a structural error, we will presume prejudice under *Strickland*." *McGurk* v. *Stenberg*, 163 F.3d 470, 475 (8th Cir. 1998). Defense counsel in *McGurk* failed to recognize that his client was entitled to a trial by jury, thereby depriving him of his jury trial right. The Eighth Circuit broadly addressed "structural error"—including the right to a public trial— holding that "failure on the part of counsel to ensure that mechanisms fundamental to our system of adversar-

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[2] *Johnson* involved a state habeas petitioner seeking the grant of the writ despite having procedurally defaulted his ineffective assistance claim in state court. The Sixth Circuit noted (586 F.3d at 447 n.7) that this would require that the petitioner make "two showings of prejudice"—one called for by *Strickland* and the other required by *Coleman* v. *Thompson*, 501 U.S. 722 (1991), under which a state habeas petitioner must show cause and prejudice to overcome the procedural default of a claim in state court. The Sixth Circuit agreed with the First Circuit's conclusion in *Owens* that the *Strickland* and *Coleman* prejudice requirements "overlap," and would have extended its presumption of prejudice to excuse the habeas petitioner's procedural default as well. See *Johnson*, 586 F.3d at 447 n.7.

ial proceedings are in place cannot, under the reasoning of *Sullivan*, constitute harmless error." *Id.* at 475 & 475 n.5.

Two state courts have reached the same conclusion as the First, Sixth, and Eighth Circuits. In *Littlejohn* v. *United States*, 73 A.3d 1034 (D.C. 2013), the District of Columbia Court of Appeals similarly held that prejudice must be presumed for *Strickland* purposes once a violation of the public trial right has been established. The court reasoned in particular that, because prejudice is "impossible to identify" when the error is structural, requiring the defendant to prove prejudice "as a result of trial counsel's waiver of his public trial right would be inconsistent with the Supreme Court's holdings that prejudice is presumed when the constitutional error is a structural defect." *Id.* at 1043.

The Montana Supreme Court reached the same conclusion in *Montana* v. *Lamere*, 112 P.3d 1005 (Mont. 2005). There, the court concluded that "defense counsel's performance was deficient" because he permitted a biased juror to be seated and thereby failed to "secure an impartial jury." *Id.* at 1013. Because the upshot of "counsel's deficient performance" was the introduction of a structural error, the court reasoned, "the integrity of the entire trial" was "undermined," and "prejudice is therefore presumed" for purposes of "the second prong of the *Strickland* test." *Id.* at 1013-1014. The court thus concluded that the petitioner in that case "satisfied both prongs of the *Strickland* test[:] Counsel's failure to ensure that the jury was impartial constitutes deficient performance. This failure produced a structural error, and thus prejudice is presumed." *Id.* at 1014.

Against this backdrop, there is no doubt that petitioner here would have obtained relief if his petition for collateral review had been filed in the First, Sixth, or Eighth Circuits or the courts of the District of Columbia or Montana.[3]

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

Eight other lower appellate courts have reached the same conclusion as the Massachusetts Supreme Judicial Court did in this case, holding that a criminal defendant must affirmatively demonstrate prejudice when a structural-error claim is raised as part of a claim of ineffective assistance of counsel.

The Eleventh Circuit, for example, rejected an ineffective assistance claim based on defense counsel's failure to object at trial to a partial courtroom closure, holding that the defendant "has not established that he was prejudiced by his trial counsel's failure to object to the closure of the courtroom." *Purvis* v. *Crosby*, 451 F.3d 734, 738 (11th Cir.), cert. denied *sub nom. Purvis* v. *McDonough*, 549 U.S. 1035 (2006). "If counsel had objected in a timely fash-

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[3] In *United States* v. *Withers*, 638 F.3d 1055 (9th Cir. 2010), the Ninth Circuit acknowledged that the First, Sixth, and Eighth Circuits had "concluded that prejudice can be presumed where counsel's deficient performance results in a structural error." *Id.* at 1067. The court declined to decide the question in *Withers* because the "procedural posture of the case limit[ed] [the] inquiry to whether such a claim of presumptive prejudice [was] frivolous" and the court found that "[i]t plainly is not." *Ibid.* The court there noted, however, that Ninth Circuit precedent "strongly suggested" that such a claim would succeed in that court. *Id.* at 1068 (citing *Styers* v. *Schriro*, 547 F.3d 1026, 1030 n.5 (9th Cir. 2008)).

ion" to the courtroom closure, the court reasoned, "there is no reason to believe that would have changed the victim's testimony." *Id.* at 738-739. The court thus rejected the argument that prejudice should be presumed because of the structural nature of the error at trial:

> 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.

Id. at 740.

The Second, Third, and Fifth Circuits have reached the same conclusion (*United States* v. *Gomez*, 705 F.3d 68, 80 (2d Cir. 2013); *Palmer* v. *Hendricks*, 592 F.3d 386, 397-398 (3d Cir. 2010); *Virgil* v. *Dretke*, 446 F.3d 598, 612 (5th Cir. 2006)), as have four other state high courts (*Reid* v. *State*, 690 S.E.2d 177, 180-181 (Ga. 2010); *People* v. *Vaughn*, 821 N.W.2d 288, 297-299 (Mich. 2012); *State* v. *Pinno*, 850 N.W.2d 207, 230-231 (Wis. 2014); *State* v. *Butterfield*, 784 P.2d 153, 157 (Utah 1989)).

The courts of appeals and the state high courts are thus deeply divided on the question presented. Indeed, several lower courts have explicitly acknowledged the division of authority. In *Johnson*, for example, Judge Kethledge, in his dissent, recognized that the Sixth Circuit's "decision today directly conflicts with [the Eleventh Circuit's decision in *Purvis*]." 586 F.3d at 449. The Michigan Supreme Court likewise acknowledged a division among "the

United States Courts of Appeals for the First and Eighth Circuits," which "have ruled that a structural error automatically satisfies the *Strickland* prejudice prong," and " the United States Court of Appeals for the Eleventh Circuit and the Georgia and Utah Supreme Courts," which "have held that an ineffective assistance of counsel claim premised on a structural public trial right violation still requires a defendant to demonstrate actual prejudice." *Vaughn*, 821 N.W.2d at 307-308.

The conflict of authority at issue is especially untoward because the Supreme Judicial Court's decision in this case conflicts specifically with the First Circuit's decision in *Owens*. Thus, in Massachusetts, identical constitutional claims are being treated one way in the state courthouse and another way in the federal courthouse just down the street. Only this Court can resolve that perverse result; it accordingly should take this opportunity to clarify whether prejudice may be presumed in the *Strickland* context for structural trial errors.

B. *Strickland*'s prejudice requirement is presumptively satisfied when ineffective assistance results in a structural error

Requiring a defendant to demonstrate prejudice flowing from the violation of his public trial right is starkly inconsistent with this Court's precedents regarding the unique nature of "structural" errors.

"Structural" errors, unlike "trial" errors, "defy analysis by 'harmless-error' standards." *Arizona* v. *Fulminante*, 499 U.S. 279, 309 (1991). Trial errors may "be qualitatively assessed in the context of other evidence * * * in order to determine" whether it was clear beyond a reasonable doubt that the error had

no effect on the outcome. *Id.* at 308. Structural rights are "markedly different," because they are "defects in the constitution of the trial mechanism" itself. *Id.* at 309. This Court has recognized that the consequences of denials of structural trial rights are therefore "necessarily unquantifiable and indeterminate." *Sullivan* v. *Louisiana*, 508 U.S. 275, 282 (1993). If defendants were required to make a showing of prejudice in cases involving structural errors, relief would be practically impossible to obtain. Cf. *Waller* v. *Georgia*, 467 U.S. 39, 49 n.9 (1984) (quoting *United States ex rel. Bennett* v. *Rundle*, 419 F.2d 599, 608 (3d Cir. 1969)).

That is particularly true in cases involving a denial of the right to a public trial. The public trial right serves a vital function in ensuring that "judge and prosecutor carry out their duties responsibly" and "encourag[ing] witnesses to come forward and discourag[ing] perjury." *Waller* v. *Georgia*, 467 U.S. 39, 46 (1984). While these functions are essential, they are also "frequently intangible," often a "matter of chance," and thus impossible to quantify and prove. *Id.* at 49 & n.9. Recognizing this, the Court held in *Waller* that on direct review prejudice must be presumed when there is a violation of the public trial right. *Ibid.*

The Court's conclusion that structural errors are by definition errors that "defy" harmless error review applies equally in the ineffective assistance context. Such an analysis would involve a "speculative inquiry into what might have occurred in an alternate universe"—just as it does on direct review. *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 150 (2006). Defendants would be obliged to carry a burden that this Court has recognized is "impossible to know"

and "impossible * * * to quantify." *Ibid.* Absent a presumption of prejudice, therefore, a significant category of trial counsel errors would, as a practical matter, be exempted entirely from the Sixth Amendment's critical protection of effective assistance of counsel.

No overriding concerns in the context of collateral review justify a different standard for "structural" errors. The Massachusetts Supreme Judicial Court invoked the importance of finality in arguing against a presumption of prejudice. App., *infra*, 6a, 9a. Finality is an important interest, but *Strickland* itself identifies certain contexts in which prejudice is presumed—such as when defense counsel "is burdened by an actual conflict of interest." 466 U.S. at 692. That is because, "it is difficult to measure the precise effect on the defense" of conflicted representation. *Ibid.* Precisely the same conclusion applies with respect to the Sixth Amendment right to a public trial.

Even apart from that, it would be no answer to say that a presumption of prejudice for ineffective assistance claims based on structural errors will upend finality of verdicts in habeas cases. As this Court has recognized, it is "rare" that an error is deemed structural. *Washington* v. *Recuenco*, 548 U.S. 212, 218 (2006). And structural error, rare as it is, would not be enough—a petitioner would have to establish that his counsel gave a constitutionally deficient performance, which was the cause of the error.

The court below also expressed concern that defense counsel could "'harbor error as an appellate parachute'" by failing to object and then invoking an unpreserved "structural" error to obtain a new trial. App., *infra*, 9a (quoting *Vaughn*, 821 N.W.2d at 308).

But a court applying the deficient performance prong of *Strickland* can and must consider whether the failure to object was a tactical decision, and therefore not constitutionally defective representation, in determining whether counsel's "identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690.

C. The question presented is important

Not only is there a deep division of authority over the question presented, but its proper resolution is tremendously important. To begin with, the issue arises with considerable frequency. A simple (and likely underinclusive) Westlaw search shows that it has arisen in scores of cases over the past several years.[4]

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[4] See *United States* v. *Aguilar*, No. 12-1553, 2015 WL 582083, at *12 n.18 (D.D.C. Feb. 12, 2015); *Brown* v. *Price*, No. 1:12-cv-00789, 2015 WL 403173, at *8 (N.D. Ala. Jan. 30, 2015); *Harrison* v. *Woods*, No. 2:12-CV-11634, 2014 WL 6986172, at *8 (E.D. Mich. Dec. 10, 2014); *Porter* v. *Tribley*, No. 14-CV-10171, 2014 WL 6632123, at *8 (E.D. Mich. Nov. 21, 2014); *Christian* v. *Hoffner*, No. 13-CV-11491, 2014 WL 5847600, at *11 (E.D. Mich. Nov. 12, 2014); *United States* v. *Lighty*, No. 12-3065, 2014 WL 5509205, at *6 (D. Md. Oct. 30, 2014); *Alvarez* v. *United States*, No. 6:10-cr-01092, 2014 WL 29383, at *4-5 (D.S.C. Jan. 3, 2014); *Brown* v. *Thaler*, No. 3:12-CV-1262, 2013 WL 3455713, at *3 & n.3 (N.D. Tex. July 9, 2013); *Hestle* v. *United States*, No. 05-40245, 2013 WL 1147712, at *6 (E.D. Mich. Mar. 19, 2013); *Drain* v. *Woods*, 902 F. Supp. 2d 1006, 1026 (E.D. Mich. 2012); *Reid* v. *United States*, 871 F. Supp. 2d 324, 341 (D. Del. 2012); *United States* v. *Charboneau*, No. 2:11-cv-61, 2011 WL 5040717, at *4 (D.N.D. Oct. 24, 2011); *Espada* v. *Sec'y, DOC*, No. 2:08-cv-504, 2011 WL 4459169, at *13-15 (M.D. Fla. Sept. 26, 2011); *United States* v. *Kaufman*, No. 04-40141-01, 2011 WL 3299937, at *7 (D. Kan. Aug. 1, 2011); *Strong* v. *Roper*, No. 4:08CV1917, 2011 WL 2600241, at *14 (D. Mo. June 29, 2011); *Price* v. *Sec'y*,

Beyond its frequent recurrence, the question presented is independently important in every case in which it arises. Because *any* case in which the issue arises necessarily involves a structural error, *every* such case implicates principles of fundamental fairness that are essential to the just and proper functioning of the criminal justice system. Remarkably, the Supreme Judicial Court in this case (like the other courts that are in agreement with it) openly acknowledged that the basic rules of fairness guaranteed by the Constitution have been violated, and yet it refused to grant relief all the same.

Dep't of Corr., No. 6:09-cv-1061, 2011 WL 2561246, at *8 (M.D. Fla. June 28, 2011); *Zimmerman* v. *Davis*, No. 5:03-CV-60173, 2011 WL 1233311, at *14 (E.D. Mich. Feb. 17, 2011); *Stevens* v. *Beard*, No. CIV.A.09-3930, 2010 WL 8266292, at *6 n.3 (E.D. Pa. Nov. 30, 2010); *Torres* v. *McNeil*, No. 3:08-CV-396, 2010 WL 5849880, at *19-21 (N.D. Fla. Nov. 3, 2010); *Charleston* v. *McDonough*, No. 407CV260, 2010 WL 780200, at *8 (N.D. Fla. Feb. 26, 2010); *Berryman* v. *Wong*, No. 1:95-CV-05309, 2010 WL 289181, at *5-6 (E.D. Cal. Jan. 15, 2010); *Matthews* v. *Purkett*, No. 4:06-CV-925, 2009 WL 2982912, at *7 (E.D. Mo. Sept. 14, 2009); *Johnson* v. *Yates*, No. CIVS06-554, 2009 WL 2705877, at *11 (E.D. Cal. Aug. 25, 2009); *Rector* v. *Wolfe*, No. 5:07CV1229, 2009 WL 1788569, at *13 (N.D. Ohio June 23, 2009); *McQueen* v. *Bobby*, No. 1:06-CV-1003, 2009 WL 803583, at *7 (N.D. Ohio Mar. 24, 2009); *Gipson* v. *Hubbard*, No. C-06-5463, 2009 WL 426215, at *9 (N.D. Cal. Feb. 20, 2009); *Solomon* v. *United States*, No. 1:05-CR-207, 2008 WL 5331860, at *20 (S.D. Ohio Dec. 19, 2008); *Torres* v. *Small*, No. CV 00-10388, 2008 WL 1817243, at *23 (C.D. Cal. Apr. 21, 2008); *Hunt* v. *Houston*, No. 4:98CV2354, 2008 WL 822401, at *36 (D. Neb. Mar. 26, 2008); *Owens* v. *United States*, 517 F. Supp. 2d 570, 577 (D. Mass. 2007); *Koon* v. *Rushton*, No. CIV.A.8:05-2523RBHB, 2007 WL 2903945, at *17 (D.S.C. Aug. 7, 2007); *Corjasso* v. *Ayers*, No. CIV S-97-0018, 2007 WL 1526762, at *14 (E.D. Cal. May 24, 2007).

The Seventh Circuit's decision in *Winston* is a model of the same outcome. In that case, the court of appeals readily acknowledged that the error resulting from defense counsel's ineffective assistance fundamentally "undermine[d] the structural integrity of the criminal tribunal itself." *Winston*, 649 F.3d at 632. Yet the court held that it could not provide relief on collateral review—not because justice did not require it, or because the petition had not done all he could to vindicate his rights, but because the petitioner could not prove what this Court has said is *unprovable*. If that perverse rule is to be the law of the land, it should be this Court that says so.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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[5] The representation of petitioner by a clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.