No. 14-1153

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

REPLY BRIEF FOR PETITIONER

ALBA DOTO
316 Central Street
Saugus, MA 01906
(781) 233-0909

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
MICHAEL B. KIMBERLY
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000
apincus@
mayerbrown.com

Counsel for Petitioner

TABLE OF CONTENTS

Table of Authorities ii
Reply Brief for Petitioner 1
A. There Is A Clear, Well-Developed, And Persistent Conflict On The Issue Presented. 2
1. There is no basis for concluding that the Eighth Circuit might revisit its holding in *McGurk*. 2
2. *Johnson* and *Lamere* clearly conflict with the decision of the Supreme Judicial Court. 6
B. The Issue Is Important, Recurring, And Squarely Presented In This Case 9
Conclusion 1

TABLE OF AUTHORITIES

Cases

Addai v. *Schmalenberger*,
776 F.3d 528 (8th Cir. 2015) 3, 5

Ambrose v. *Booker*,
684 F.3d 638 (6th Cir. 2012) 9

Arizona v. *Fulminante*,
499 U.S. 279 (1991) 7, 10, 11

Charboneau v. *United States*,
702 F.3d 1132 (8th Cir. 2013) 4, 5

Ford v. *Norris*,
67 F.3d 162 (8th Cir. 1995) 4

Georgia v. *McCollum*,
505 U.S. 42 (1992) 3, 4

Johnson v. *Sherry*,
465 F. App'x 477 (6th Cir. 2012) 8, 9

Johnson v. *Sherry*,
586 F.3d 439 (6th Cir. 2009) 7, 8, 9

Littlejohn v. *United States*,
73 A.3d 1034 (D.C. 2013) 5, 6

Mader v. *United States*,
654 F.3d 794 (8th Cir. 2011) 2

Neder v. *United States*,
527 U.S. 1 (1999) 4

Owens v. *United States*,
483 F.3d 48 (1st Cir. 2009) 5, 6, 7, 11

Rose v. *Clark*,
478 U.S. 570 (1986) 1

State v. *Good*,
43 P.3d 948 (Mont. 2002) 6, 7

State v. *Lamere*,
112 P.3d 1005 (Mont. 2005) 6, 7

State v. *Van Kirk*,
32 P.3d 735 (Mont. 2001) 7

Strickland v. *Washington*,
466 U.S. 668 (1984) ..... *passim*

Sullivan v. *Louisiana*,
508 U.S. 275 (1993) 4

United States v. *Kehoe*,
712 F.3d 1251 (8th Cir. 2013) 3, 4

United States v. *Lee*,
715 F.3d 215 (8th Cir. 2013) 4

Waller v. *Georgia*,
467 U.S. 39 (1984) 4, 9

Zivotofsky ex rel. Zivotofsky v. *Clinton*,
132 S. Ct. 1421 (2012) 10

STATUTES

28 U.S.C. § 2254(d)(1) 3, 11

REPLY BRIEF FOR PETITIONER

If a criminal trial does not comply with what this Court has categorized as "basic protections," it "cannot reliably serve 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, 578 (1986) (citations omitted). That is why the violation of these protections constitutes "structural error" requiring that a conviction challenged on direct review be vacated without a showing of prejudice.

The question in this case is whether a defendant who has been denied one of these protections because of his counsel's deficient performance is entitled to relief only if he also separately demonstrates the prejudice generally required under *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984). The lower courts are widely and deeply divided on this issue—and they have recognized the disagreement. Pet. 6-11.

Indeed, respondent candidly acknowledges the conflict, but contends it is less developed than the petition asserts. Respondent's view rests on a misreading of the relevant decisions. And respondent does not dispute that the question is important and recurs frequently. See Pet. 14-16. Because the issue is cleanly and clearly presented in this case, the Court should grant review to resolve the conflict among the lower courts.[1]

[1] Respondent devotes a considerable portion of its submission to arguing the merits of the question presented. See Opp. 9-13. The critical question at this stage of the case is not the underlying merits, but whether there is a conflict among the lower

A. There Is A Clear, Well-Developed, And Persistent Conflict On The Issue Presented.

We explained in the petition that the holding below conflicts with decisions of the First, Sixth, and Eighth Circuits, as well as decisions of the Montana and the District of Columbia high courts. Respondent strives mightily to make this clear circuit split appear less serious than it is. But even if those arguments were persuasive, respondent concedes that the Massachusetts Supreme Judicial Court's decision exacerbated a division among the lower courts. In reality, moreover, respondent's assertions about the cases cited in the petition do not withstand scrutiny—confirming the case for this Court's intervention.

1. *There is no basis for concluding that the Eighth Circuit might revisit its holding in* McGurk.

Respondent begins by asserting that the Eighth Circuit "has begun to rectify" the supposed "error" in *McGurk*. Opp. 13. Respondent cites three cases for this proposition. None supports it.[2]

---

courts on an important question of federal law. Moreover, the lower court decisions holding that prejudice must be presumed demonstrate that there is significant support for that rule in this Court's precedents. See also Pet. 11-14.

[2] Because subsequent panels have no authority to overrule prior panel decisions, *McGurk* would remain the law of that circuit even if respondent were correct that subsequent panel opinions had departed from its holding. See *Mader* v. *United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc) ("We definitively rule today, in accordance with the almost universal practice in other circuits, that when faced with conflicting panel opinions, the earliest opinion must be followed as it should have controlled

Respondent first cites *Addai* v. *Schmalenberger*, 776 F.3d 528 (8th Cir. 2015), but that decision involved a claim for collateral relief under 28 U.S.C. § 2254(d)(1), which permits the writ to be granted only if the underlying state decision is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined *by the Supreme Court of the United States*," not as determined by the Eighth Circuit. 28 U.S.C. § 2254(d)(1) (emphasis added). The court of appeals reasoned only that "requiring Addai to demonstrate prejudice would not have been contrary to or an unreasonable application of clearly established federal law." *Addai*, 776 F.3d at 536.

Significantly, the *Addai* court repeated *McGurk*'s holding that "[g]enerally, * * * when counsel's deficient performance causes a structural error, we will presume prejudice under *Strickland*," *id.* at 535 (internal quotation marks omitted), and acknowledged the division among federal courts of appeals on the issue, *ibid.* But it recognized that *McGurk* did not apply to a Section 2254 case because only this Court's decisions are relevant in that context. It was the absence of a legal principle "clearly established" by this Court's decisions, not any erosion of *McGurk*'s precedential status, that dictated the outcome in *Addai*.

Respondent next cites *United States* v. *Kehoe*, 712 F.3d 1251 (8th Cir. 2013), which, as respondent explains, "reject[ed]" the argument that a defense counsel's decision to strike jurors on a racially discriminatory basis in violation of *Georgia* v.

---

the subsequent panels that created the conflict.") (internal citations and quotation marks omitted).

McCollum, 505 U.S. 42 (1992), entitled the defendant to a presumption of *Strickland* prejudice. Opp. 14; *see also Kehoe*, 712 F.3d at 1253. Again, the ruling is inapposite: *McGurk* held that *Strickland*'s prejudice requirement is presumptively satisfied when counsel's ineffectiveness resulted in a structural error, but—at least as far as the Eighth Circuit is concerned—a *McCollum* violation is not a structural error. See *United States* v. *Lee*, 715 F.3d 215, 222 (8th Cir. 2013) (noting, in the course of rejecting an identical claim advanced by Kehoe's codefendant, that *Kehoe* "concluded that * * * a *McCollum* violation is not a structural error and that a showing of prejudice is thus required to make out an ineffective assistance claim"); see also *Neder* v. *United States*, 527 U.S. 1, 8 (1999) (collecting examples of structural error and omitting *McCollum* and *Batson* violations).[3] The denial of a defendant's right to trial by jury—the right at issue in *McGurk—is* indisputably a structural error. *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993). And so is the denial of a defendant's right to a public trial, the right at issue in this case. *Waller* v. *Georgia*, 467 U.S. 39 (1984).

Finally, respondent cites *Charboneau* v. *United States*, 702 F.3d 1132 (8th Cir. 2013), noting that *Charboneau* found *McGurk* inapplicable to a Section 2255 habeas claim "alleging ineffectiveness of appellate counsel for failure to raise a public-trial issue." Opp. 14. Once again, there is no tension with

---

[3] A *Batson* violation, on the other hand, *is* structural error in the Eighth Circuit. *Ford* v. *Norris*, 67 F.3d 162 (8th Cir. 1995). Since *McCollum* violations occur at the behest of defense counsel, rather than the prosecution, they are categorized as "trial error" in that circuit.

McGurk. The *Charboneau* court itself explained that *McGurk* did not apply.

The court effectively disposed of Charboneau's *Strickland* claim based on failure to satisfy the "deficient performance" prong: because appellate counsel knew that the defendant's public trial claim would only be reviewable for plain error on appeal, and that weighty reasons for the closure appeared in the trial record, his failure to raise that claim was not constitutionally deficient. *Charboneau*, 702 F.3d at 1138. As for prejudice, *McGurk* did not apply, the court explained, because Charboneau's claim was ineffective assistance of *appellate* counsel. The public trial claim had been raised by trial counsel and rejected; Charboneau claimed that his appellate counsel should have sought review of that determination. Appellate counsel's "performance did not result in structural trial error, he simply failed to assert a public trial claim on appeal. Thus, the normal *Strickland* prejudice rule applie[d] * * * ." *Ibid.*

In sum, there is no evidence that the Eighth Circuit has in any way retreated from its decision in *McGurk*. Rather, it has simply declined to apply that ruling in different legal contexts to which it plainly did not extend. And in one of those decisions—*Addai*—it made clear that it adhered to *McGurk*'s determination.

Further, respondent does not attempt to argue that the First Circuit and the D.C. Court of Appeals no longer adhere to their holdings that proof of prejudice is not required—in *Owens* v. *United States*, 483 F.3d 48 (1st Cir. 2009), and *Littlejohn* v. *United States*, 73 A.3d 1034 (D.C. 2013). Instead, respondent expresses its hope that "as the Eighth Circuit's example suggests, these two courts can correct them-

selves." Opp. 15. The Eighth Circuit, of course, has done nothing of the kind.

Moreover, there is no basis for any belief that the First Circuit and the D.C. Court of Appeals might reconsider their conclusion that ineffective assistance of counsel resulting in structural error creates a presumption of *Strickland* prejudice. Those courts are well aware that they, along with the Eighth Circuit, have departed from the holdings of several of their sister circuits and state supreme courts. See *Owens*, 483 F.3d at 64 n.14; *Littlejohn*, 73 A.3d at 1047 (Pryor, J., dissenting). This Court's intervention is required to resolve the conflict.

2. Johnson *and* Lamere *clearly conflict with the decision of the Supreme Judicial Court.*

Next, respondent argues that two other decisions cited in the petition do not actually "reflect[] a clear disagreement with the prevailing view of federal law." Opp. 15. Here, too, respondent's interpretations of these rulings are wrong.

State v. *Lamere*, 112 P.3d 1005 (Mont. 2005), squarely presumed prejudice from trial counsel's failure to object to a structural error. See Pet. 8. Respondent says that "the Montana Supreme Court offered no indication that its holding was based on its view of federal law." Opp. 16.

In fact, the Montana court stated that its analysis of the ineffective-assistance claim in that case was guided by the Sixth Amendment and by "the two-prong test enunciated in [*Strickland*]." *Lamere*, 112 P.3d at 1009 (citations omitted). The court did cite one of its own decisions, *State* v. *Good*, 43 P.3d 948, 959-60 (Mont. 2002), for the proposition that

structural errors "are presumptively prejudicial." But the cited portion of *Good* relies on another Montana case, *Van Kirk*, which in turn relies on this Court's discussion in *Fulminante* of prejudice arising from structural error. See *State* v. *Van Kirk*, 32 P.3d 735, 744 (Mont. 2001) (quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991)). The Montana Supreme Court thus squarely rested its holding on the federal Constitution, as interpreted by this Court. Respondent's contention that *Lamere* and *Good* are grounded only in Montana law is wholly without merit.

Respondent's reading of *Johnson* v. *Sherry*, 586 F.3d 439 (6th Cir. 2009), also misses the mark. Respondent focuses on a passage in the opinion stating that, "if evidence reveals [on remand] that counsel's failure to object [to a public-trial violation] fell below an objective standard of reasonableness, there is a *strong likelihood* that counsel's deficient performance would be deemed prejudicial." Opp. 15-16 (quoting *Johnson*, 586 F.3d at 447 (emphasis added)).

But respondent fails to mention the immediately preceding sentence in *Johnson*, which states that, "[b]ecause the right to a public trial is a structural guarantee, if the closure were unjustified or broader than necessary, prejudice would be presumed." *Id.* at 447. And respondent also ignores the footnote immediately following the passage it quotes, in which the court approvingly cited *Owens* and explained that the two required showings of prejudice, in the procedural-default and ineffective-assistance contexts, "overlap" and deserve to be addressed "simultaneously." *Johnson*, 586 F.3d at 447 n.7 (citing *Owens*, 483 F.3d at 64 n.13. See also Pet. 6-9 & n.2 (discussing *Johnson*).

In context, therefore, it is clear that the "strong likelihood" language in *Johnson* refers to whether defense counsel's performance would be deemed deficient when assessed on remand—in which case, as a consequence, prejudice would be presumed—not to the possible outcome of an independent prejudice inquiry (particularly because such an inquiry would make no sense given the court's statement that prejudice would be presumed).

Respondent also highlights the Sixth Circuit's decision to remand in *Johnson* for an evidentiary hearing. See Opp. 16. However, the court's decision to remand was not a "confirm[ation] that it was not mandating a presumption of prejudice," as respondent contends. Rather, the remand was necessary "to determine if trial counsel's failure to object to the closure constitutes *deficient performance*"—that is, to evaluate the *first* prong of the *Strickland* analysis. *Johnson*, 586 F.3d at 446 (emphasis added). The purpose of the evidentiary hearing, in other words, was to determine whether counsel's failure to object to the courtroom closure had been both deliberate and reasonable. *Ibid.* ("To be sure, counsel's decision would be owed deference if it could be viewed as strategic, and counsel may have been privy to information of which we are unaware. * * * However, if counsel had additional relevant information, it is not [yet] evident from the record.").[4]

---

[4] After holding the prescribed evidentiary hearing, the District Court denied Johnson's habeas petition again, and the Sixth Circuit affirmed. See *Johnson* v. *Sherry*, 465 F. App'x 477 (6th Cir. 2012). As a result of the evidentiary hearing, it became clear that Johnson's trial—unlike LaChance's trial—had involved a set of circumstances that made a courtroom closure reasonable:

Respondent's final attack on *Johnson* is a claim that *Ambrose* v. *Booker*, 684 F.3d 638 (6th Cir. 2012), repudiated *Johnson*, or at least "confirmed *Johnson*'s limited reach." Opp. 16. But the *Ambrose* court itself recognized that *Johnson* did not apply: the *Ambrose* petitioners raised no *Strickland* argument in the court of appeals, see *Ambrose*, 684 F.3d at 651-52, and the trial error related to jury composition rather than courtroom closure, see *id.* at 640-43. The *Ambrose* court merely refused to extend *Johnson* to a wholly dissimilar factual and legal context.

The conflict among the lower courts is thus clear, persistent, and well developed. This Court's intervention is needed to resolve the disagreement.

B. The Issue Is Important, Recurring, And Squarely Presented In This Case.

Respondent argues that this case is a "poor vehicle for addressing the question presented" because the lower court assumed, but did not decide, that counsel was constitutionally deficient; that a *Waller* violation occurred; that any courtroom closure did not fall into a hypothetical de minimis exception to *Waller*; and that the particular *Waller* violation did,

---

> "When the prosecutor told the judge that witnesses had been killed under suspicious circumstances and requested that the judge close the trial, Johnson's lawyer had a decision to make: He could challenge the suggestion or he could acquiesce. Had he challenged it, the judge might have inquired further into the suspicious circumstances, which (to understate matters) might not have presented Johnson in the best light. * * * 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."

Id. at 481.

in fact, "rise[] to the level of structural error." Opp. 18-19.

But the reason that none of these questions was answered is that the court below thought that it could resolve this case by addressing a pure question of law: whether a defendant claiming ineffective assistance of counsel resulting in a structural error may rely on a presumption of prejudice or must instead make an independent showing of prejudice. That was perfectly ordinary and appropriate judicial practice.

Indeed, a court is likely to follow the same approach whenever it holds that a separate prejudice showing is required. As this Court recognized in *Fulminante*, a defendant is not likely to be able to prove prejudice from structural error, and a court requiring such proof is likely to be able to reject claims on this basis without ever addressing the questions of deficient performance or underlying structural error. Respondent's argument is therefore a recipe for precluding review whenever a court adopts respondent's preferred rule requiring a showing of prejudice.

It is irrelevant that, if this Court rules in petitioner's favor, there may be more work for the Massachusetts courts to do on remand. It is this Court's usual practice, in such circumstances, to correct the lower court's legal error and then "remand for resolution of any [issues] the lower courts' error prevented them from addressing." *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012).

The question in this case is clear: whether a defendant who would be excused from the *Chapman* standard must nevertheless satisfy the *Strickland* standard. Or, put another way, it is whether a de-

fendant victimized by "structural defects in the trial mechanism [that] thus defy analysis by harmless-error standards," *Arizona* v. *Fulminante*, 499 U.S. 279, 280 (1991), must nevertheless show that, but for his counsel's performance, "the result" of that structurally defective "proceeding would have been different." *Strickland*, 466 U.S. at 694.

Either the court below was correct in applying that rule, or the First Circuit and other courts are correct in holding that the two prejudice analyses overlap and that the same presumption should apply to both. *Owens* v. *United States*, 483 F.3d at 64 n.13.

Importantly, because this case comes to this Court from state court, after state collateral proceedings, questions of plain error review, cause and prejudice, and deference to state court proceedings on federal collateral attack are not at issue. This Court has an opportunity to resolve an important, recurring question of federal law unimpeded by 28 U.S.C. § 2254(d)(1)'s "clearly established Federal law" bar. This Court should grant review to resolve the issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ALBA DOTO
316 Central Street
Saugus, MA 01906
(781) 233-0909

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic[*]
127 Wall Street
New Haven, CT 06511
(203) 432-4992

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
MICHAEL B. KIMBERLY
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3127
apincus@
mayerbrown.com

Counsel for Petitioner

AUGUST 2015

[*] 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.