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APPELLANT'S BRIEF

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

MIDDLESEX, SS Sitting, 2013

NO. 2012-P-0766

COMMONWEALTH OF MASSACHUSETTS
Plaintiff-Appellee

v.

EDMUND D. LACHANCE, JR.
Defendant-Appellant

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT DEPARTMENT, MIDDLESEX DIVISION

BRIEF OF EDMUND D. LACHANCE, JR.
DEFENDANT-APPELLANT

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June 17, 2013

TABLE OF CONTENTS

QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT IMPROPERLY REQUIRED A DEMONSTRATION OF PREJUDICE AS TO DEFENDANT'S STRUCTURAL ERROR CLAIM UPON DETERMINING THAT TRIAL COUNSEL WAS INEFFECTIVE

II. WHETHER THE TRIAL COURT ERRED IN DETERMINING THAT DEFENDANT DID NOT SUFFER PREJUDICE BY THE CLOSURE OF THE COURTROOM TO THE PUBLIC DURING HIS JURY SELECTION RESULTING IN A SUBSTANTIAL RISK OF MISCARRIAGE OF JUSTICE.

STATEMENT OF THE CASE

On December 16, 1999, a Middlesex County grand jury returned indictments charging Edmund D. LaChance, Jr. ("Defendant" or "LaChance") with aggravated rape, second offense (Mass. Gen. Laws, ch. 265§22), kidnapping (Mass. Gen. Laws, ch. 265§26), indecent assault and battery of a person over 14 years of age (Mass. Gen. Laws, ch. 265§13H) and assault with a dangerous weapon (Mass. Gen. Laws, ch. 265§15B(b) (A 1).1 Defendant was arraigned on August 27, 2008 (A 3).

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1 References to the trial transcript shall appear as "Tr.," followed by a volume and page number, e.g. "I:1", those to the Appendix are referred to as "A." followed by a page number located at the top right corner of each page.

A jury trial was held from April 9, 2001 through April 20 2001 before Brassard, J., presiding (A 8). The jury returned verdicts of guilty as to all counts (A 9). Defendant was sentenced to 17 to 25 years imprisonment on the aggravated rape; 25 years probation on the kidnapping; and 10 years probation on each charge of indecent assault and battery and assault and battery with a dangerous weapon all to run concurrently. The second offense portion of the aggravated rape charge was nolle prosequi (A 9).

Defendant appealed (A. 9). The Appeals Court affirmed the convictions and the Application for Further Appellate Review was denied (A. 11-12). On February 23, 2004, the United States Supreme Court denied Defendant's Certiorari Petition.

On October 27, 2003, Defendant filed a motion for new trial which was later denied (A 11,13). Defendant appealed, the denial was affirmed and the Application for Further Appellate Review was denied (A 12,13).

On December 6, 2003 Defendant filed a Motion for a Frank's hearing which the court denied on December 19, 2003 (A. 14). Defendant appealed, the denial was affirmed and the Supreme Judicial Court denied further appellate review (A. 16).

On March 12, 2004 Defendant filed a Motion to be Released from Unlawful Restraint which was denied without a hearing on April 15, 2004 (A. 15). Defendant appealed, the denial was affirmed by the Appeal Court and the Supreme Judicial Court denied further appellate review (A 16).

On September 9, 2011, Defendant filed a motion for a new trial and a request for an evidentiary hearing (A 15,17,53). On December 12, 2011, Defendant filed a Supplemental Memorandum of Law in support of those motions (A 15,54). On January 6, 2012, the Commonwealth filed an opposition (A 15,62). On February 3, 2012 Defendant filed a response to the Commonwealth's Opposition (A 15,105). On March 28, 2012 both motions were denied (A 15,115). Defendant filed a

timely Notice of Appeal on April 27, 2012 (A 15,111). The case was docketed in the Appeals Court on May 8, 2012 (A 113).

On May 18, 2012, Defendant requested the appeal be stayed (A 115). On May 22, 2012 the stay was allowed until July 20, 2012 (A 118). On May 29, 2012 Defendant filed a Motion for Reconsideration with the trial court (A 16,123). On July 19, 2012 Defendant requested the stay continue which the court allowed until December 3, 2012 (A 119-122).

On March 8, 2013, Defendant requested the stay continue despite the failure to file a status report as required in the previous order (A 175). The stay was continued until April 12, 2013 (A 178).

On April 4, 2013 Defendant filed a renewed motion for reconsideration (A 16, 179). On April 8, 2013 Defendant requested the stay continue which was allowed until May 10, 2013 (A 204-206).

On May 3, 2013 the Commonwealth filed an opposition to the renewed motion for reconsideration (A 16,207). The motion was denied by the trial court on May 22, 2013 (A 16,231).

On June 5, 2013 Defendant requested the say be continued in order to allow the filing of an application for direct appellate review with the Supreme Judicial Court despite the failure to filing a status report as required by the previous order (A 235). The request was denied, the stay removed and the brief ordered to filed by June 17, 2013 (A 238).

On June 12, 2013, Defendant filed an Application for Direct Appellate Review with the Supreme Judicial Court, a copy of which was filed with the Appeals Court.

STATEMENT OF THE FACTS

In early October, 1999 a thirty-six (36) year old woman ("Complainant"), was working as an accountant at Boston Windows in Malden, Massachusetts (Tr. II/55-57, 72-73).

Complainant spoke limited English as her native language was Mandarin Chinese (Tr. II/55-59). Complainant's co-worker ("Co-Worker") spoke both languages (Tr. II/55-59). Edmund LaChance, Jr. ("Defendant") went into the store with promotion coupons from his employer Winner's Advertisement (Tr. II/53–59, 72–73, III/171; IV/127–128).

Defendant and Complainant began a discussion, while Co-Worker translated (Tr. II/28–79). Each offered to teach the other his native language (Tr. II/72). Defendant soon left the store, but returned twice more that day, leaving his pager number to Complainant (Tr. II/79). Later in the month, he returned and again offered to teach Complainant English (Tr. II/80). A few weeks later on Saturday morning, October 30, 1999, Complainant was riding her bike to Chinatown and saw Defendant parked in his car (Tr. II/81–82). Complainant was carrying a purse containing cash and customer checks for bank

deposits (Tr. II/84–85). Defendant offered to drive Complainant to Chinatown and she agreed (Tr. II/114–116).

They did not drive to Chinatown, instead the car was stopped in an empty area, where a knife was held to her throat, her clothes were removed and non-consensual intercourse occurred (Tr. II/123-125, 129–130, 134–140). Complainant was then told to put on her clothing and leave the car and she complied (Tr. II/140–141). Complainant realized she had forgotten her purse but the car had already been driven away (Tr. II/142-144). Complainant called police from a pay phone (Tr. II/147-149, 152–153). Police arrived and transported her to a hospital (Tr. II/164, 169–172 III/61-62). Defendant was later arrested and charged.

STATEMENT OF FACTS RELATIVE TO THE MOTION FOR NEW TRIAL AND COURTROOM CLOSURE

Jury selection for Defendant's trial began shortly after 9:00am on April 10, 2001 and concluded at approximately 4:30pm that afternoon

MISSING

PAGE

51). At no time throughout the jury selection process had any court officer or judicial official go to the lobby to inform Defendant's family that they would be allowed to return to the courtroom as seating had become available (A 48-50). Defense counsel provided affidavits stating that he was aware that the policy in Middlesex Superior Courthouse was to close the jury selection process to the public but had no tactical reason for not objecting and that he was unaware as to the pertinent law as to courtroom closures at the time of Defendant's trial (A 199-202).

Defendant filed a motion for new trial arguing that his right to a public trial had been violated (A 17). In denying Defendant's motion for new trial, the trial court first determined the courtroom to be closed for the purpose of the motion and then ruled that Defendant had waived his public trial right when he failed to object upon witnessing his family's removal from the

courtroom and consequently reviewed the claim under the substantial risk of miscarriage of justice standard requiring Defendant to demonstrate prejudice (A 115-110).

Defendant filed a motion for reconsideration arguing that his waiver had to be knowing, intelligent and voluntary which was denied without opinion (A 123-131).

Defendant had requested a stay of his appeal pending the resolution of the motion for new trial and pending this Court's decision in *Commonwealth v. Lavoie*, 464 Mass. 83 (2013) (A 115). Once the decision was released, Defendant filed a renewed motion for new trial arguing that the onus was not on a defendant to object to the closure when a defendant had been represented by counsel and that counsel was ineffective for failing to object due to his lack of knowledge of the law as to courtroom closure at the time of trial and that prejudice must be presumed due o the structural character of the public trial

right (A 179). The trial court agreed, in part, ruling that Defendant's trial "counsel's actions fell below that which might be expected from an ordinary fallible lawyer" but denied the motion finding that because Defendant failed to show any prejudice as a result of counsel's ineffective assistance the claim failed (A 231-234).

SUMMARY OF THE ARGUMENT

The trial court abused its discretion in denying Defendant's motion for new trial (B 19). The court improperly applied the ineffective assistance of counsel standard within the public trial context (B 20-21). The trial court's requirement that Defendant show prejudice for a structural error forced Defendant to do something that is impossible thereby violating Defendant's constitutionally protected right to a fair, impartial and public trial (B 25-28).

Notwithstanding the trial court's improper application of the standard, the trial court also erred in determining that Defendant did not

suffer prejudice at the hands of ineffective counsel (B 31-33). The closing of the courtroom without objection of trial counsel created a substantial risk of miscarriage of justice in violation of Defendant's constitutionally protected rights (B 36-38).

ARGUMENT

I. THE TRIAL COURT IMPROPERLY REQUIRED A DEMONSTRATION OF PREJUDICE AS TO DEFENDANT'S STRUCTURAL ERROR CLAIM UPON DETERMINING THAT TRIAL COUNSEL WAS INEFFECTIVE

The Sixth Amendment to the United States Constitution specifically guarantees every criminal defendant a right to a public trial, which includes the jury selection process. U.S.Const.Amend. VI; *Presley v. Georgia*, 558 U.S. 209 (2010); *Commonwealth v. Lavoie*, 464 Mass. 83, 84 (2013); *Commonwealth v. Cohen*, 456 Mass. 94, 105-106 (2010). Even if the benefits of a public trial sometimes seem "intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real." *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984); See, *Arizona*

v. Fulminante, 499 U.S. 279, 310 (1991); *Cohen*, at 105. "When a defendant attributes the failure to preserve a claim to the ineffective assistance of counsel..." the standard of review is a two part test. *Commonwealth v. Hardy*, 464 Mass. 660, 662 (2013); *Commonwealth v. Saferian*, 366 Mass. 89, 96 (1974); *Lavoie*, 91. In determining whether counsel was ineffective, a reviewing court looks to whether counsel's conduct fell "below that which might be expected from an ordinary fallible lawyer [performance prong] and prejudices the defendant [prejudice prong]." *Lavoie*, at 91, quoting *Saferian*, at 96. "[C]ounsel may waive...the right to a public trial during jury selection where the waiver is a tactical decision." *Lavoie*, 88-89. Conversely, when counsel's failure to object is not based on a reasoned tactical decision, counsel's performance is deemed to fall below that which might be expected from an ordinary fallible lawyer. *Id.* Counsel's failure to object as a result of a lack

of the "requisite knowledge of the law" is not tactical and satisfies the performance prong of ineffectiveness test. *Hardy*, at 666, citing *Saferian*, at 96.

Here, the trial court determined that Defendant's trial counsel had "no tactical reason...not to object" to the closure of the courtroom during to the public during jury selection and that "counsel's actions fell below that which might be expected from an ordinary fallible lawyer" (A 231-234)2. However, the trial court concluded that "even assuming a deficient performance by counsel, LaChance has failed to show that he suffered any prejudice due to counsel's actions" (A 231-234). Trial court committed fundamental constitutional error in requiring Defendant demonstrate prejudice.

The Commonwealth has not yet reached a determination on the issue of prejudice. *Lavoie*,

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2 Trial counsel provided affidavits stating he was unaware of the state of the law as to public trials at the time of LaChance's trial in 2001 and that he had not tactical reason for failing to object (A 46,199).

at 88-89; *Hardy*, at 666 n.9. In both cases the court failed to reach the prejudice prong as in both instances the defendants failed to satisfy the performance prong. *Id.*3 However, that court's examination of the prejudice prong suggested that prejudice must be presumed in instances where the performance prong is satisfied. *Lavoie*, at 88-90; citing *Owens v. United States*, 483 F.3d 48 (1st Cir. 2007)("*Owens-I*"); *Saferian,* at 96. The court in one case reasoned that the defendant's attempt to attach a presumption of prejudice to his substantive ineffective claim in reliance on

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3 Although the prejudice prong for ineffective assistance of counsel claims arising out of counsel's failure to object has not yet been determined, other jurisdictions have considered the prejudice prong for ineffective claims arising out of a structural error. *Carrera v. Ayers*, 670 F. 3d 938, 943 n.8 (9th Cir. 2010) (where ineffective results in structural error, prejudice presumed); *Johnson v. Sherry*, 586. F.3d 439, 447 (6th Cir. 2009) (if failure to object ineffective, there is a strong likelihood it will be deemed prejudicial); *Walton v. Briley*, 361 F.3d 431, 433-34 (7th Cir. 2004); *Becht v. United States*, 403 F.3d 541, 549 (8th dir. 2005) (suggesting, but not deciding, that counsel's failure to raise structural error would constitute per se prejudice); *McGurk v. Stenberg*, 163 F.3d 470, 475 (8th Cir. 1998) (if counsel's deficient performance causes structural error, prejudice presumed); *United States v. Canady*, 126F.3d 352, 359-360 (2nd Cir. 1999); *United Gov't of Virgin Island v. Force*, 865 F.2d 59, 63-64 (3rd dr. 1989).

Owens-I, was misplaced because the presumption of prejudice in there was to overcome a procedural default so as to permit a defendant an evidentiary hearing as to his substantive ineffective claim resulting in a remand back to the district court for an evidentiary hearing on the ineffective assistance claim. *Lavoie*, at 90 citing *Owens-I*, at 64. Because that defendant had already had an evidentiary hearing in which his attorney was not deemed ineffective, because his failure to object was, in fact, a reasoned tactical decision, that he failed to satisfy the performance prong of the test, thus they did not need to reach the prejudice prong. *Lavoie*, at 91 quoting *Saferian*, at 96.

The court distinguished the two types of prejudice and concluded that the presumption of prejudice required to overcome a procedural default ("forfeited" prejudice) was not the same prejudice attached to ineffectiveness claim ("substantive" prejudice) and that the

defendant's attempt to attach the forfeited prejudice to his substantive ineffective assistance claim could not pass muster. *Id.*, at 91; *Owens v. United States,* 517 F.Supp.2d 570, 577 (D. Mass. 2007) (*Owens-II*). However, the *Owens-II* court on remand attached the appropriate substantive prejudice to the ineffective assistance claim once the performance prong was satisfied. *Owens v. United States,* 517 F.Supp.2d 570, 577 (D. Mass. 2007) (*Owens-II*) citing *Strickland v. Washington*, 466 U.S. 668 (1984).

> Ordinarily, this court would now address whether [Owens] could demonstrate that he was prejudiced by the violation of his rights. However, the First Circuit determined that closure of the courtroom is a 'structural error' [internal citation omitted]. It also concluded that since 'it is impossible to determine whether a structural error is prejudicial ...we must...conclude that a defendant who is seeking to excuse a procedurally defaulted claim of structural error need not establish actual prejudice.'"

Id. 517 at 577.[4] Thus, prejudice must be presumed because to do otherwise, that is, to require a defendant to demonstrate prejudice, would require him to do what the United States Supreme Court and the First Circuit Court of Appeals has said is impossible. *United States v. Gonzales-Lopez*, 548 U.S. 140 150-151 (2006); *Owens-I*, at 64-65.

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4 Owens sought relief claiming that the court closed the court room to the public during the jury selection. The lower court denied relief after finding that the claim was procedurally defaulted and that Owens had failed to show cause to excuse said default. On appeal, the First Circuit held that closure of the courtroom during jury selection absent meeting established criteria would violate a defendant's right to a public trial; counsel's failure to object to such closure may constitute ineffective assistance of counsel; and that improper closure of the court room to the public would constitute a structural defect and therefore prejudice would be presumed. The First Circuit remanded the case to the district court to hold an evidentiary hearing in order to determine the nature and extent of the trial closure and what relief was appropriate. *Owens-I*, at 61-65. On remand, after holding an evidentiary hearing, the district court (Gertrier,D.J.,) found that spectators had, in fact, been barred from the court room during the seating of the jury and therefore, the defendant's Sixth Amendment right to a public trial was violated. The court then found that the failure of counsel to object to the closing constituted ineffective assistance of counsel, which constituted cause for purposes of excusing the procedural default. Because the error was structural, the court found that prejudice was presumed and the conviction was vacated. *Owens-II* at 575-577.

The procedural posture in the present case is indistinguishable. Here, Defendant was denied a hearing in the trial court on his substantive ineffective assistance claim. Defendant's trial counsel's performance fell measurably below that which might be expected from an ordinary fallible lawyer because counsel did not have requisite knowledge of the law pertaining to courtroom closures at the time of trial. Defendant sought to excuse a procedural default from counsel's deficient performance in failing to object for non-tactical purposes. Therefore Defendant must be given the presumption of prejudice for counsel's deficient performance in failing to preserve his structural error claim. Prejudice must be presumed because to do otherwise, would require Defendant to do what the United States Supreme Court and the First Circuit Court of Appeals has said is impossible to do. *Gonzales-Lopez*, at 150-151; *Owens-I*, at 64-65.

The presumption of prejudice is applied by a consensus of courts that consider a violation of the right to a public trial to be "structural error not susceptible to harmless error analysis." *Cohen*, at 106, quoting *Commonwealth v. Baran*, 74 Mass.App.Ct. 256, 296 (2009); See also, *Commonwealth v. Rogers*, 459 Mass. 249, 263 (2011); *Commonwealth v. Alebord*, 80 Mass.App.Ct. 432, 438 (2011); *Gonzales-Lopez*, at 149; *Waller*, at 49 n.9.5; *Johnson v. United States*, 520 U.S. 461, 468-469 (1997) (observing violation of the public trial right is one of the "very limited class of cases" that constitute structural error); *Owens-I*, quoting *Judd v. Haley*, 250 F.3d 1308, 1315 (11th Cir. 2001) (once right to public trial violation found defendant is entitled to relief).

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5 The court in *Waller* not only gave new guidance to trial judges considering courtroom closure, it unequivocally instructed appellate courts that they could not review any failure to follow the four part test using harmless error analysis. "The defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public trial guarantee." *Waller*, at 49.

A distinction exists between trial errors and structural errors. Courts must "eschew[] the harmless error test entirely" when reviewing structural errors because structural errors, such as a failure to hold a public trial "defy harmless error review" and "infect the entire trial process." *Neder v. United States*, 527 U.S. 1, 8 (1999) quoting *Fulminante*, at 310. Unlike trial rights, structural rights are "basic protection[s] whose precise effects are immeasurable, but without which a criminal trial cannot reliably serve its function." *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993). Structural errors thus have "consequences that are necessarily unquantifiable and indeterminate." *Id.* "[I]f, as a categorical matter, a court is capable of finding that error caused prejudice upon reviewing the record, then that class of error is not structural." *Owens-I*, at 64, quoting *United States v. Gonzales-Huerto*, 403 F.3d 727, 734 (10th Cir. 2005). This is particularly true

in the public trial context. See, *Gonzales-Lopez*, at 149 n.14 citing *Waller*, at 49 n.9. See, *Washington v. Recuenco*, 548 U.S. 212, 218 (2006) (structural defects require automatic reversal regardless of whether specific prejudice can be identified).

> If the failure to a public trial is structural error, *Neder*, 527 U.S. at 8, and it is impossible to determine whether structural error is prejudicial, *Sullivan*, 508 U.S. at 281, we must then conclude that a defendant who is seeking to excuse a procedurally defaulted claim of structural error need not establish prejudice. See *Sustache-Rivera v. United States*, 221 F.3d 8, 17 (1st Cir. 2000) ("If [an error] did constitute structural error, there would be per se prejudice, and harmless error analysis, in whatever form, would not apply."); [internal citations omitted]...We will not ask defendants to do what the Supreme Court has said is impossible.

Owens-II, at 64-65. In fact, the only instance in which a defendant would be permitted to demonstrate prejudice as to structural error would "be a speculative inquiry into what might have occurred in an alternate universe... [because]...we would have to speculate upon

what...would have been handled differently-or indeed, would have [been] handled the same...[a]nd then we would have to speculate upon what effect those different choices or different intangibles might have had." *Gonzales-Lopez*, at 15051. "[T[he Supreme Court's pronouncement that prejudice is presumed in cases of structural error [is] not because the risk of prejudice is high, but because it is impossible to determine the extent of the prejudice." *Owens-I*, at 65 n.14. It is simply illogical "to square the notion that the denial of public voir dire defies harmless error standards and is thus subject to automatic reversal when preserved because the resulting harm is 'necessarily unquantifiable and indeterminate,' [internal citations omitted], but the same error is nevertheless subject to plain-error analysis when unpreserved." *People v. Vaughn*, 821 N.W.2d. 288, 311 (2012) (Cavanagh, J., concurring), quoting *Sullivan*, at 282.

Similarly, Defendant here is entitled to the presumption of prejudice on his procedural default as a result of counsel's failure to object due to a lack of knowledge of the law pertaining to courtroom closures and also the presumption of prejudice as to his substantive ineffective claim as a result of his already having satisfied the performance prong of his substantive ineffective claim.

II. THE TRIAL COURT ERRED IN DETERMINING THAT DEFENDANT DID NOT SUFFER PREJUDICE BY THE CLOSURE OF THE COURTROOM TO THE PUBLIC DURING HIS JURY SELECTION RESULTING IN A SUBSTANTIAL RISK OF MISCARRIAGE OF JUSTICE.

In order to preserve a constitutional objection, "a defendant must raise a claim of error at the first available opportunity." *Commonwealth v. Randolph*, 438 Mass. 290, 294 (2002). Failure to properly object at trial or raise the issue on direct appeal results in a waiver of the claim. *Id.*, at 293. The existence of a waiver does not mean that a claim of error is not subject to review; rather it means that a

different standard of review is employed. *Id.*, at 293-294. There are exceptions to the waiver doctrine based upon the seriousness of the error and the attendant risk of a miscarriage of justice, the circumstances of the defendant's failure to object, or the nature of the crime charged. *Id.*, at 293-297.

Two of the exceptions are potentially applicable in this case: (1) an error which may have created a substantial risk of miscarriage of justice and (2) an allegation of ineffective assistance of counsel. Both of the exceptions, upon review, result in relief for Defendant.

Review under the substantial risk of miscarriage of justice standard requires a court to inquire "if [it has] a serious doubt whether the result of the trial might have been different had the error not been made." *Commonwealth v. Lefave*, 430 Mass. 169, 174 (2002). In making this determination, a four part test which requires the following determinations be made:

> (1) Was there error? (2) Was the defendant prejudiced by the error? (3) Considering the error in the context of the entire trial, would it be reasonable to conclude that the error materially influenced the verdict? (4) May [the court] infer from the record that counsel's failure to object or raise a claim of error at an earlier date not a reasonable tactical decision? Only if the answer to all four questions is 'yes' may [the court] grant relief."

Randolph, at 298 (internal citations omitted).

1. Error Was Committed During Defendant's Trial?

"[T]he guarantees of open public proceedings in criminal trial cover proceedings for the voir dire examination of potential jurors concerning their qualifications to serve." *Commonwealth v. Gordon*, 422 Mass. 816, 823 (1996). Consistent with federal jurisprudence, Massachusetts recognizes that a violation of the public trial right constitutes structural error. *Waller,* at 49; *Cohen*, at 105.

In the case at bar, notwithstanding that the trial court deemed the courtroom to be closed, the public was explicitly denied access to the courtroom during the entirety of the jury

selection process, i.e., during both the general and the individual voir dire. The closure resulted not from a specific court order, but rather as part of an apparently accepted practice employed by courtroom security personnel to accommodate a jury venire in a criminal case that, by its numbers, occupies the entirety of the public seating area of the courtroom. The jury selection spanned an entire day while occupying an entire courtroom with ample seating available, thus violating the Sixth Amendment. Moreover, Defendant did not waive his Sixth Amendment rights at trial, there was no explicit waiver by Defendant or his attorney and the trial court deemed trial counsel's performance in not objecting to fall measurably below that of a normal fallible attorney.

2 & 3 Defendant Was Prejudiced By The Error And The Error Materially Influence The Verdict

Notwithstanding the doctrine that the presumption of prejudice attaches to ineffectiveness claims arising out of counsel's

failure to object to structural error for non-tactical purposes, the closure of the courtroom during Defendant's jury selection to his family, and the public, prejudiced his right to a public and fair trial. The closure of the courtroom to the public had a cascading effect on the unfair jury selection and the remainder of his trial.6

Although Massachusetts has not yet determined prejudice to be met in the courtroom closure context, when reviewing such under the substantial risk test, other jurisdictions have

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6 The Supreme Court has never wavered from holding that violation of the public trial right is among the small class of constitutional errors that remain automatically reversible and can never be subject to harmless error (substantial risk) analysis. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). Such "structural errors" affect the framework of the trial itself and thus infect the fairness and integrity of the entire proceeding. *Id.* The fact that the Court has explicitly reaffirmed this position while it has steadily weakened post-trial protection for other serious constitutional errors further strengthens the position for consistent enforcement of the public trial right. *Chapman v. California*, 386 U.S. 18, 22 (1967); See *Presley v. Georgia*, 558 U.S. 209 (2010). For example, the Court has expanded harmless error analysis to apply to violations of the Confrontation Clause, admissions of coerced confessions and a host of other constitutional violations. See Harry T. Edwards, *To Err is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167, n.5, at 1177 n.33 (1996). The law is clear that violation of the public trial right can never be assessed under the rubric of harmless error.

permitted prejudice in structural error/public trial context when reviewing under the "plain error" standard.7

A four part test is utilized to determine whether an unpreserved error constitutes "plain error" federally. *United States v. Olano*, 507 U.S. 5, 732-737 (1993); See also, *Johnson*, at 466-467. A defendant who has forfeited his claim of error must prove that there was error, that the error was "plain", that the error affected substantial rights and that the error the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings..." Id. at 734-736, quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936).8 The third prong, also known as the prejudice prong requires a

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7 The "substantial likelihood of a miscarriage of justice [standard]...is a limited standard of review akin to the federal plain error standard." *Bucci v. United States*, 662 F.3d 18, 28 (1st Cir. 2011).

8 "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right."' *Olano*, at 733-34, quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

showing that the error "affected substantial rights" and "affect[s] the fairness, integrity or public reputation of judicial proceedings." *Olano*, at 734-736.

Here, because Defendant's courtroom was closed, prejudice is automatically presumed as the error is deemed structural, not harmless, and therefore, a violation of a substantial right has occurred.

Although the Supreme Court has not squarely decided whether the plain error rule applies to a violation when a defendant fails to object, the plain error rule applies to the "very limited class of cases" where there is structural error, thus implicating substantial rights. *Johnson*, at 468-469 (noting the existence of a limited class of cases where errors involved do affect substantial rights); *United States v. Dominguez Benitez*, 542 U.S. 74, 74 (2004) ("Except for certain structural errors...relief for [plain] error is tied to prejudicial effect..."); *Waller*,

at 49 n.9, quoting *United States ex rel. Bennett v. Randle*, 419 F.2d 599, 608 (3rd Cir. 1969) (denial of the right to a public trial is an error that must be presumed prejudicial because "a requirement that prejudice be shown 'would in most cases deprive [the defendant] of the [public trial] for it would be difficult to envisage a case in which he would have evidence available of specific injury"); *United States v. Agosto-Vega*, 617 F.3d 541, 554 (1st Cir. 2010)(granting relief on other grounds but noting under plain error, defendant would be relieve of his forfeiture by lack of a trial objection...as to public trial claim); *United States v. Recio*, 371 F.3d 1093, 1103 n.7 (9th Cir. 2004)("[I]t is difficult to imagine a case where structural error will not satisfy [the] fourth requirement [of the plain error analysis]."); *United States v. Rodriguez*, 406 F.3d 1261, 1266 (11th Cir. 2005)(structural errors renders punishment fundamentally unfair making conclusion that an error infect the

fairness, integrity or public reputation of trials unjustifiable); *United States v. Floresca*, 38 F.3d 706, 712 (4th Cir. 1994) (concluding the error structural but reluctantly applying plain error review where open question remained as to whether absence of objection required further analysis when error at heart of judicial process); *Barrows v. United States*, 15 A.3d 673, 679680 (D.C. 2011) (any structural error likely to affect fairness, integrity or public reputation of trial); Deborah S. Nall, Comment, *United States v. Booker: The Presumption of Prejudice in Plain Error Review*, 81 Chi-Kent L.Rev. 621, 623 n.86 (2006) (identifying violations of *Waller* as structural error that therefore meet the third prong of four part test of the plain error rule). Dicta aside, a bona fide structural error harms substantial rights and automatically passes the plain error test.

A fundamental tenet of Anglo-American jurisprudence recognizes that "[n]o right ranks

higher than the right of the accused to a fair trial." *Press Enterprise Co. v. Superior Court California*, 464 U.S. 501, 508 (1984); *Spencer v. Texas*, 385 U.S. 554 (1967). "A public trial is a necessary component of a criminal defendant's right to a fair trial because a fair trial" is the "objective" and "public trial is an institutional safeguard for attaining it." *Estes v. Texas*, 381 U.S. 532, 583 (1965). Significance of the Court's lineage emphasizing the right to a fair trial and the necessity of the public trial guarantee so as to secure that right cannot be ignored.[9] "Open trials play a, fundamental role

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9 See *In re Oliver*, 333 U.S. 257, 270 n.25 (1948)(public trial right for the protection of all accused to insure fair treatment); *Estes*, at 560 (open courtroom fundamental concept of fair trials); *Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979) (open courtroom improves quality of testimony, may induce unknown witnesses to come forward); *Presley*, at 209; *Waller* (public trial guarantee created for benefit of the defendant and to assure fairness); *Rivera v. Illinois*, 556 U.S. 148 (2009); *Commonwealth v. Bresnahan*, 462 Mass. 761, 771 (2012) (recognizing constitutional right to a fair trial); *In re Enforcement of a Subpoena*, 463 Mass. 177 n.8 (2012); *Commonwealth v. Washington*, 462 Mass. 204, 215-16 (2012).

in furthering the efforts of our judicial system to assure the criminal defendant a fair and accurate adjudication of guilt or innocence." *Richmond Newspaper, Inc. v. Virginia*, 448 U.S. 555, 593 (1980). The central aim of a criminal proceeding must be to try the accused fairly. *Waller*, at 46, quoting *Gannett Co.*, at 380. Absent the Sixth Amendment public trial protection, the Sixth and Fourteenth Amendment fair trial guarantees cannot be adequately served because a defendant's right to a public trial "keep[s] his triers keenly alive to a sense of their responsibility", "encourages witnesses...to come forward and discourages perjury." *Waller*, at 46, quoting *In re Oliver*, at 270. "[T]he sure knowledge that anyone is free to attend gives assurance...that established procedures are being followed and that deviations will become known." *Press Enterprise, Co.*, at 508, citing *Richmond Newspapers, Inc.*, at 569-71. "Openness thus enhances the basic fairness of the criminal

trial." *Id.* "[J]udges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings." *Estes*, at 588. Openness "safeguards the integrity of the fact finding process", discourages participant misconduct, discourages "decisions based on secret bias or partiality", enhances all individuals' performances, protects the court "from imputations of dishonesty" and "improves the quality of testimony." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982); *Richmond Newspapers, Inc.*, at 569; *Estes*, at 583. Moreover, all checks and balances, including recordation, appeal and even the substantial risk of miscarriage of justice standard, serve only as cloaks in secrecy as opposed to checks and balances in our system of justice when closure occurs. *Richmond Newspapers, Inc.*, at 569.

Here, the mere fact that LaChance's trial was closed to the public during the jury

selection prevented LaChance from having a fair trial as a public trial was a necessary component of his right to a fair trial. Because LaChance did not receive a fair trial as a result of the lack of a public trial during the jury selection then it cannot be said that LaChance did not suffer prejudice as a result of the closure because the prejudice he suffered was the lack of fair trial. As a result of the closure, LaChance's triers, the judges, lawyers, witnesses and jurors, may not have been as cognizant of their sense of responsibility, witnesses may not have been encouraged to come forward, perjury wasn't necessarily discouraged. The closure of the courtroom did not enhance the basic fairness of the trial process and did not safeguard the integrity of the trial. Had the proceedings been open to the public, jurors would likely have been more forthcoming about biases and past experiences had they been made to face the public. Because LaChance's supporters were

excluded from the courtroom during the jury selection, jurors were led to believe that LaChance did not have any supporters. This false impression may have led potential jurors to believe that if LaChance had no supporters then his family and friends must have believed LaChance was guilty. This false impression may have permitted jurors to draw an erroneous inference of guilt. Had the selection been public, LaChance and the government could have selected a more impartial jury and could have asked different questions in response to different responses had the local citizenry been watching.

Furthermore, had LaChance's family been present, they would have been able to observe and hear the prospective jurors as they orally responded to questions during the selection process. The presence of the public in the courtroom would have impacted the voir dire process since it would have provided the type of

meaningful observations intended to ensure that the proceedings were fair. All of these factors demonstrate the fundamental unfairness of LaChance's jury selection, and therefore, his entire trial. *Owens-I*, at 65.

"The value of openness" that a public trial guarantees "lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurances that established procedures are being followed and that deviations will become known." P*ress Enterprise Co.*, at 508. While a public presence will more likely bring to light errors that do not occur, it is the openness of the proceeding itself, regardless of what transpires, that imparts "the appearance of fairness so essential to public confidence in the system" as a whole. *Id.*

In one case although a defendant demonstrated actual prejudice, he was not so

required where his attorney's failure to raise his public trial claim presumed prejudice. *United States v. Withers*, 618 F.3d 1008, 1017-1018 (2011). There, the defendant made a credible, non-frivolous claim of prejudice the second requirement for overcoming procedural default. *Id.* The defendant established the prejudice necessary to overcome procedural default because the error "infect[ed] his entire trial with error of constitutional dimension." *Murray v. Carrier*, 477 U.S. 478, 494 (1986). Implicit in the recognition that the trial closures are structural errors is the recognition that such errors "affect the framework in which the trial proceeds." *Fulminante*, at 310; See also *Campbell v. Rice*, 408 F.3d 1166, 1171-1177 (9th Cir.2005).

Here, because the courtroom closure during jury selection was indeed structural error, it constituted a "defect affecting the framework" of the entire trial proceedings, rather than simply an error in the trial process. *Gonzales-Lopez*, at

149, quoting *Fulimante*, at 310. The courtroom closure during jury selection here, "infect[ed] the entire trial process," and rendered Defendant's trial fundamentally unfair. *Neder*, at 8. The closure deprived Defendant "of 'basic protections' without which [his] criminal trial [could] not reliably serve its function as a vehicle for determination of guilt or innocence...and no criminal punishment" imposed upon Defendant could be considered fundamentally fair. *Id.*, at 8 quoting *Rose v. Clark*, 478 U.S. 570, 577-578 (1986). Therefore, because the closure of LaChance's jury selection to the public "affect[ed] the framework in which the trial proceed[ed] the closure [infected [his] entire trial with error of constitutional dimension." *Murray*, at 494.

4. It Is Clear That Failure To Object Was Not Tactical?

Affidavits from both, defense and appellate counsel explicitely indicate, that the failure to

object, and subsequently raise on appeal, were not tactical decisions.

Accordingly, the court abused its discretion in denying the Motion for New Trial violating Defendant's federal and state constitutionally protected rights. U.S. Const. Amends. 5, 6, 14; Mass. Decl. R. Part 1, Arts. 11, 12.

CONCLUSION

For the foregoing reasons the lower court decision should be reversed and case remanded for a new trial.

Respectfully Submitted,
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By his attorney,

Dated: 06/17/13

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CERTIFICATION

I, Alba Doto Baccari, counsel for Defendant Edmund D. LaChance, Jr., herein certifies that the within brief complies with the rules of court pertaining to the filing of briefs including but not limited to Mass. R. A. P. 16(a)(6), 16(e), 16(f), 16(h), 18, 20.

Dated: 06/17/13

Alba Doto Baccari