

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

MIDDLESEX COUNTY

2013 SITTING

2013-SJC-11494

EDMUND D. LaCHANCE
Appellee,

v.

COMMONWEALTH OF MASSACHUSETTS
Appellant.

ON DIRECT APPEAL FROM JUDGEMENT OF THE SUERIOR COURT
DENYING THE DEFENDANT'S MOTION FOR A NEW TRIAL

BRIEF OF AMICUS CURIAE
FOR APPELLEE EDMUND D. LaCHANCE,
BY: RICHARD C. FELTON

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MARCH 31, 2014

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VESTED INTEREST OF APPLICANT

The applicant, Richard C. Felton, ("Felton" or "Applicant"), has a legitimate vested interest in the resolution of Commonwealth v. LaChance, SJC-11494, because this Court will be determining whether prejudice must be presumed for the second prong of the Saferian test as described in Commonwealth v. Saferian, 366 Mass. 89 (1974), in a case where trial counsel was found to be ineffective for failing to object to an improper courtroom closure.

Felton is currently defending the allowance of a motion for new trial, against the Commonwealth's appeal in the Appeals Court. See Commonwealth v. Richard Felton, 2012-P-0792. In the Commonwealth's appeal, the Commonwealth puts forth the claim that a defendant must demonstrate prejudice on a procedurally defaulted structural error. Since procedural default is part of the Commonwealth's argument, this, therefore, makes this Court's decision in Commonwealth v. LaChance, supra, a vested interest of the Applicant.

II

ARGUMENT

B. THE UNITED STATES SUPREME COURT HAS ALREADY HELD THAT PREJUDICE IS INHERENT IN STRUCTURAL ERROR AND FAILURE TO EXTEND THIS WELL ESTABLISHED PRINCIPLE TO THE NEW CONTEXT OF AN UNPRESERVED STRUCTURAL ERROR, AMOUNTS TO AN ERROR IN-AND-OF-ITSELF

The Commonwealth advances the position that when a criminal defendant, convicted of a non-capital offense, fails to preserve a courtroom closure claim at trial, such a failure should require the defendant to demonstrate prejudice to overcome procedural default. The Commonwealth's argument should fail for several reasons.

First, the Applicant respectfully notes that this Court stated in Commonwealth v. Hardy, 464 Mass. 660, 666 n.10 (2013), in agreement with the premise of a holding on the issue of prejudice made in Bucci v. United States, 662 F.3d 18, 30-31 (1st Cir. 2011), **"that a complete closure generally will harm the defendant."** Hardy, supra. (emphasis added). This Court's statement in Hardy demonstrates that this Court recognized the type of prejudice that inherently accompanies a structural error. Failure to object does not remove this inherent prejudicial nature, and

somehow make it possible to pinpoint prejudice on a structural error - the error is still structural regardless of the circumstance.

Indeed, the Supreme Court for the State of Washington rebuffed the suggestion of a dissenting Justice, when that Justice tried to imply that a failure to object to a structural error would then make the demonstration of prejudice a requirement on that unpreserved structural error. See Washington v. Wise, No. 82802-4 (2012) ("The dissent contends that the public trial right violation in this case is not a structural error simply because no contemporaneous objection was made . . . **[h]owever, the dissent fails to explain how an objection magically transforms an ordinary error into a structural one.**") (emphasis added).

Moreover, the Maryland Supreme Court, ruling on a procedurally defaulted structural error - in the realm of a flawed reasonable doubt instruction - and citing Sullivan v. Louisiana, 508 U.S. at 280 (1993), held that the defendant's unpreserved claim of structural error was to be presumed prejudicial, and ordered a new trial. See Savoy v. Maryland, No. 120 (2009).

Secondly, never in the history of United States legal jurisprudence, has a defendant ever successfully demonstrated prejudice flowing from a structural error - procedurally defaulted or otherwise. If a defendant actually could demonstrate prejudice, then the Supreme Court would not presume prejudice. Indeed, the United States Supreme Court has held that, "[they] rest [their] conclusion of structural error upon the **difficulty** of assessing the effect of the error." United States v. Gonzalez-Lopez 547 U.S. ___ (2006), citing Waller v. Georgia, 467 U.S. 39, 49, n. 9 (1984) (violation of the public-trial guarantee is not subject to harmless review because "the benefits of a public trial are frequently intangible, **difficult to prove**, or a matter of chance") (emphasis added).

Thirdly, the Applicant respectfully submits that any requirement to demonstrate prejudice on an error classified by the Supreme Court as a structural error, regardless of whether it's procedurally defaulted or not, is "objectively unreasonable." See Williams v. Taylor, 529 U.S. 362 (2000) (holding that a state court decision warrants habeas relief if the state court "unreasonably refuses to extend [a well-

established] principle to a new context where it should apply.”). The Applicant respectfully suggests that the presumption of prejudice should also extend to the context of an unpreserved structural error. This because, unpreserved or not, it’s still structural error. See Wise, supra.

Indeed, the Applicant is not alone in this assertion. The Supreme Court in United States v. Olano, 507 U.S. 725 (1993) stated that, “[t]here may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome.” . . . stating also that “[the Supreme Court need not] address those errors **that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice.**” Id. at 735. (emphasis added).

With regard to the Applicant’s assertion that a requirement to demonstrate prejudice on a structural error would be objectively unreasonable, the Applicant submits that this rationale is sound - prejudice is impossible to demonstrate. See United States v. Gonzalez-Lopez, 547 U.S. ___ (2006), citing Waller v. Georgia, 467 U. S. 39, 49, n. 9 (1984).

Moreover, it is extremely notable that our own Court of Appeals for the First Circuit, in United

States v. Owens, 483 F. 3d. 48 (1st Cir. 2007), held that “[they would] not ask defendants to do what the Supreme Court has said is impossible.” Id. at 65. (emphasis added).

Any requirement to demonstrate prejudice on a procedurally defaulted structural error removes the structural nature of the right, and in essence disregards the Supreme Court’s holding that a public trial violation is a structural error. This, in turn, amounts to a ruling “contrary to clearly established federal law as determined by the Supreme Court of the United States,” because such a ruling would implicitly mean that the right is no longer structural because defendants’ can prove prejudice. The Applicant submits that any holding that finds that the right to a public trial is not structural, would be “contrary” to Supreme Court precedent.

Williams, supra; See Presley v. Georgia, 558 U.S. 209 (2010); Waller, supra. “[I]f, as a categorical matter, a court is capable of finding that the error caused prejudice upon reviewing the record, then that class of errors is not structural.” United States v. González-Huerta, 403 F.3d 727, 734 (10th Cir.2005). See also Arizona v. Fulminante, 499 U. S.

279, 310 (1991) (distinguishing the differences between a "trial error" and a "structural error").

The failure to object does not make it possible for a defendant to demonstrate prejudice flowing from a procedurally defaulted public trial claim - the error is still structural, and the failure to object does not "magically" transform a structural error into an ordinary trial error susceptible to harmless error analysis. See Wise, supra; Arizona v. Fulminante, 499 U. S. 279, 310 (1991) (constitutional error may not be found harmless if error deprives defendant of the "basic protections [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair") , quoting Rose v. Clark, 478 U. S. 570, 577-578 (1986).

Imposing a requirement on a defendant to demonstrate prejudice on a procedurally defaulted structural error, simply because there was no contemporaneous objection, creates an objectively unreasonable requirement that can honestly never be met in order to be able to enforce structural rights - and ignores all of the other intentions that such

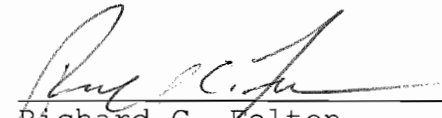
rights are meant to protect. See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975) (holding that publicity "serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice").

III

CONCLUSION

For the foregoing reasons, the Applicant respectfully requests that this Court establish that when a defendant fails to preserve a structural error, prejudice is to be presumed.

Respectfully Submitted,


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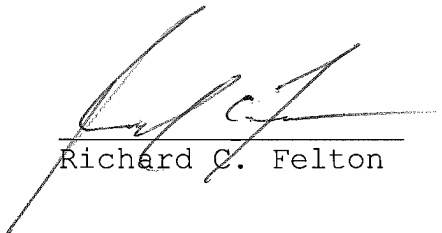
Date: 3/31/14

CERTIFICATE OF SERVICE

I, Richard C. Felton, amicus curiae, hereby certify that I did serve upon the counsel of record two true and accurate copies of the "Brief of Amicus Curiae for the Appellee, Edmund D. LaChance, By: Richard C. Felton" via first class pre paid postage to:

Michael Albert Kaneb & James W. Sahakian
Assistant District Attorney
Office of the District Attorney/Middlesex
15 Commonwealth Avenue
Woburn, MA 01801

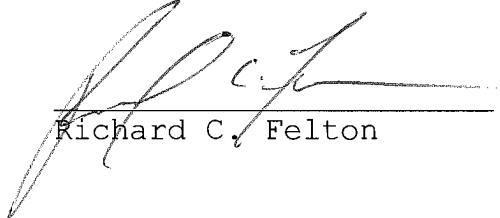
On this 31st day of March 2014.


Richard C. Felton

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure, I, Richard C. Felton, hereby certify that this brief conforms with the rules of court that pertains to the filing of briefs.

Signed on this 31st day of March 2014.


Richard C. Felton