Supreme Court, U.S.
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19-5610

No. _____

IN THE

Supreme Court of the United States

Richard Felton,
Petitioner-Appellant

v.

Kristie Ladouceur, Superintendent
Respondent-Appellee

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

ORIGINAL

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June 17th, 2019

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QUESTIONS PRESENTED

I. Whether the United States Court of Appeals for the First Circuit contravened this Court's holding in Terrell v. Morris, 493 U.S. 1 (1989) (per curiam), when it affirmed a Federal District Court decision that was not the District Court's actual decision?

II. The state court concluded that petitioner's Sixth Amendment right to public trial was violated when the courtroom (for an entire phase of trial) was ordered closed to the public without the trial court considering any of the factors illuminated in Waller v. Georgia, 468 U.S. 39 (1984). In light of that state court determination, and this Court's holding in Presley v. Georgia, 558 U.S. 209 (2010), did the United States Court of Appeals for the First Circuit error by concluding that petitioner failed to demonstrate the violation of a constitutional right, as its sole basis for denying certificate of appealability from denial of both the petitioner's §2254 habeas petition, and his Rule 60(b)(6) motion to vacate?

III. Defense counsel testified that she would have objected to the courtroom closure that took place for all of jury selection during petitioner's trial had she been notified. In view of that testimony, did the court officer's surreptitious order to close the courtroom during petitioner's trial constitute a Sixth Amendment denial of counsel resulting from state interference "preventing [counsel] from assisting the accused during a critical stage of the proceeding," United States v. Cronic, 466 U.S. 648, 659 n.25 (1984)? If so,

did the United States Court of Appeals for the First Circuit error by concluding that petitioner failed to demonstrate the violation of a constitutional right, in its order denying a certificate of appealability from denial of both the petitioner's §2254 habeas petition, and his Rule 60(b)(6) motion to vacate?

LIST OF PARTIES

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PETITION FOR WRIT OF CERTIORARI

Richard Felton respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The March 25, 2019 opinion of the Court of Appeals denying panel rehearing is unreported and attached as Appendix A. The February 14, 2019 panel opinion of the Court of Appeals denying Mr. Felton a COA with respect to the denial of both his §2254 petition and his Rule 60(b) motion to vacate that judgment is unreported and attached as Appendix B. The February 12, 2018, Order of the United States District Court for Massachusetts denying Mr. Felton's request for COA with respect to denial of his Rule 60(b) motion to vacate is unreported and attached as Appendix C. The February 20, 2018, Order of the United States District Court for Massachusetts denying Mr. Felton's request for COA with respect to the denial of his §2254 petition is unreported and attached as Appendix D. The March 20, 2018, Order of the United States District Court denying Mr. Felton's request for Rule 60(b) relief is unreported and attached as Appendix E. The February 12, 2018, Order of the United States District Court for Massachusetts adopting the Magistrate Judge's report and recommendation, and denying Mr. Felton's §2254 petition is available at 2018 U.S. Dist. LEXIS 33922 (D. Mass. 2018), and attached as Appendix F. The September 27, 2017, Order, Report and Recommendation of the Magistrate Judge of the United States District Court for the District of Massachusetts is available at 2017 U.S. Dist. LEXIS 218707 (D. Mass. 2017), and attached as Appendix G.

JURISDICTION

The Court of Appeals entered its judgment on February 14, 2019. Petitioner filed his request for rehearing on February 28, 2019. The Court of Appeals entered its judgment of denial with respect to the rehearing on March 25, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a state criminal defendant's constitutional rights under the Sixth and Fourteenth Amendments.

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . public trial, . . . and to have the assistance of counsel for his defense.

The Fourteenth Amendment provides in relevant part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law.

This case also involves the application of 28 U.S.C. § 2253(c), which states:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from

—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;

. . .

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

A. Introduction

Multiple instances of flagrant judicial disobedience threatens to not only undermine the integrity of these §2254 habeas proceedings, but also the sacrosanct trust that exists in the law as an institution. First, the District Court declared a state procedural rule to be an 'adequate' bar to federal review of petitioner's Sixth Amendment public trial claim, despite its simultaneous conclusion that said rule was fraught with "split[s] in authorities" and "uncertainty in [Massachusetts] law" at the time of petitioner's purported procedural defaults (Appendix G, at 14). In response, petitioner entreated before both the District Court and the Court of Appeals for the First Circuit, asserting that the District Court's findings of splits and authority and uncertainty in the State's procedural law, mandated a finding of inadequacy (Appendix M, at Docket Entry 08/31/2018; Appendix N, at, Docket Nos. 53, 54, 55, 57 & 58). It is well-settled that "[s]tate rules count as 'adequate' [only] if they are 'firmly established and regularly' followed." *Johnson v. Lee*, 195 L.Ed. 2d 92, 95 (2016) (quoting *Walker v. Martin*, 562 U.S. 307, 316 (2011)). Yet, and still, while there can be nothing firmly established and regularly followed about a state rule that is fraught with "split[s] in authorities" and "uncertainty in the law" (Appendix G, at 14), neither lower federal court took any corrective action to align the District Court's findings with this Court's explicit mandate.

The District Court's determination of 'adequacy' was left uncorrected by the First Circuit, because First Circuit's adjudication of petitioner's request for a certificate of

appealability (COA), introduced yet another layer of judicial disobedience far beyond anything that the District Court had done. Indeed, the First Circuit concluded that a complete courtroom closure for an entire phase of trial without considering a single factor illuminated in *Waller v. Georgia*, 468 U.S. 39, 48 (1984), did not demonstrate a constitutional violation sufficient to warrant the issuance of a COA. (Appendix B). This ruling was shocking; and was rendered in direct contravention of this Court's holding in *Presley v. Georgia*, 558 U.S. 209 (2010). In addition, it ignored both the District Court's finding that petitioner had presented "a colorable claim that his constitutional rights were violated when the courtroom was closed to the public during jury empanelment" (Appendix D, at 4), and the state court's finding that petitioner indeed suffered a violation of his right to public trial. (See *infra* at 9-10). Yet, despite all of that contravention, petitioner's efforts to gain the First Circuit's adherence to this Court's precedent case law, by way of a petition for rehearing (Appendix A), was summarily dismissed by the First Circuit.

The flagrancy in these judicial anomalies, produces a real danger to our system of justice. They threaten to "injure[ ] not just the defendant, but the law as an institution." *Rose v. Mitchell*, 443 U.S. 545, 556 (1979). Indeed, over thirty-five years ago, this Court made clear that "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts." *Hutto v. Davis*, 454 U.S. 370, 375 (1982). Given the fact that, here, petitioner made numerous attempts to compel the lower courts compliance with this Court's precedent case law, the lower federal court determinations at issue must "be viewed as having ignored, consciously

. ., the hierarchy of the federal court system created by the Constitution and Congress." *Davis*, 454 U.S. at 374-375.

Finally, in this case, an illicit courtroom closure was ordered and orchestrated by a state court officer behind the backs of the trial judge, the prosecutor and defense counsel for all of jury empanelment. (Appendix K, at 4-6). These facts give rise to the final question presented by this petition. Namely, what, if any, resulting error occurs when state agents orchestrate constitutional violations behind the back of defense counsel -- effectively impeding counsel's efforts to act on behalf of their client during the throes of trial? Petitioner firmly submits that, in this case, state interference affected trial counsel's ability to protect his constitutional right to public trial, abridging his Sixth Amendment guarantee to the uninterrupted guiding hand of counsel. See *United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984) ("The Court has uniformly found constitutional error without any showing of prejudice when counsel was **either** totally absent, or **prevented from assisting** the accused during a critical stage of the proceeding.") (citations omitted) (emphasis added).

B. State Trial Proceedings

Petitioner's jury trial started on March 5, 2008 in the Superior Court of Massachusetts ("Superior Court" or "state court"), for the charges of rape and kidnapping. (Appendix K, at 3). The first day of trial consisted primarily of jury selection. (Appendix K, at 4-6). On that day, petitioner's mother, father, girlfriend and church pastor were all present in the courtroom seated in the viewing gallery. (Appendix K, at 4-6) ("petitioner's supporters"). The first phase of the jury selection was

a general voir dire, with all the jurors being ushered into the courtroom, seated in the viewing gallery, and asked a series of general questions to which they were to answer in the affirmative or the negative by raising their hands (Appendix L, at 9). Prior to that however, petitioner's supporters were ordered to leave the courtroom by a state court officer who told them that they were not allowed to be in the courtroom during jury selection. (Appendix L, at 9). Neither the trial judge, the prosecutor or defense counsel were alerted to the order given by the court officer to close the courtroom -- hence, there was no objection by defense counsel nor was there any consideration of Waller factors prior to the closure (Appendix K, at 5-6).

The second phase of the jury selection was an individual voir dire. For this, jurors were ushered out of the courtroom and into a waiting room where they would be called back into the courtroom one-by-one, and questioned on the witness stand. Petitioner's supporters were not allowed to reenter the courtroom during this phase of the jury selection either. (Appendix L, at 9). Ultimately, day one of trial concluded with fourteen jurors being selected, and petitioner's supporters were never allowed back into the courtroom that day. (Appendix K, at 10). On March 10, 2008, petitioner was convicted, and on March 11, 2008, was sentenced to serve six-to-eleven years in state prison, with five years of probation to serve from and after that sentence. (Appendix O, at 6).

C. State Post-Conviction Proceedings

1. Mr. Felton's First Motion For New Trial

Petitioner's first motion for new trial was filed on September 22, 2009 by appellate counsel retained by his family. (Appendix O, at 7). In that motion he asserted that trial

counsel's failure to confront the complainant with substantial inconsistences in her rape allegation, as well as contradictions in her medical records, provided ineffective assistance of counsel. Petitioner did not raise a Sixth Amendment public trial violation in this first motion for new trial. On January 22, 2010, that motion was denied without a hearing. (Appendix O, at 7).

2. Mr. Felton's Direct Appeal

In March of 2010, petitioner filed, with counsel, his direct appeal in the MAC. That direct appeal was consolidated with the appeal from the denial of his first motion for new trial. See *Commonwealth v. Felton*, Massachusetts Appeals Court No. 2009-P-1137. Petitioner did not raise a Sixth Amendment public trial violation in this direct appeal. On January 4, 2011, petitioner's direct appeal was denied, and petitioner did not seek further appellate review to the Supreme Judicial Court of Massachusetts (SJC). See *Commonwealth v. Felton*, 78 Mass. App. Ct. 1118, 939 N.E.2d 135 (2011).

3. Mr. Felton's Second Motion For New Trial

On March 23, 2011, petitioner, acting pro se, filed in the state court his second motion for new trial asserting, for the first time, that his Sixth Amendment right to public trial was violated when courtroom doors were ordered closed to the public for the entirety of jury selection. (Appendix O, at 7). In support of the motion, petitioner filed affidavits from the state court officer that gave the order to close the courtroom, his mother, father, girlfriend, church pastor, former trial counsel, former appellate counsel, as well as from himself. (Appendix L). The state court ordered an evidentiary hearing. (Appendix O, at 8).

During the hearing, the state court officer testified that he remembered petitioner's trial, and remembered giving the order to petitioner's supporters to leave the courtroom during jury empanelment. (Appendix L, at 9). The court officer testified that this had been his customary practice throughout his career, and that when he gave the order to clear the public from the courtroom, he would not permit anyone to reenter the courtroom until jury selection was over. (Appendix L, at 11-12). Petitioner's supporters testified consistent with the court officer's account of his order to exclude the public from the courtroom during empanelment. (Appendix L, at 40-78). Petitioner himself testified that while he witnessed his family leaving the courtroom at the start of jury selection, he did not know what was going on. (Appendix L, at 79). He explained that it was not until later that night, after jury selection had ended and he was at home with his family that they told him they had been ordered to leave the courtroom by the court officer. (Appendix L, at 80). Petitioner then explained that even though he was then made aware of what happened, he just thought it was normal courthouse procedure to close the courtroom because trial counsel had never explained the public trial right to him. (Appendix L, at 80).

Former trial counsel confirmed that she never informed petitioner of his right to public trial. (Appendix L, at 19). Trial counsel also testified that she was unaware that an order to close the courtroom had been given, (Appendix L, at 20-21), but explained that she was aware of petitioner's Sixth Amendment right to public trial, and would have objected had the court officer alerted her to his order to close the courtroom. (Appendix L, at 27-28). Former appellate counsel testified that he was completely

unaware that a courtroom closure had taken place at petitioner's trial because the trial record was completely devoid of any evidence that a closure had taken place. (Appendix L, at 34). Hence, in petitioner's first post-conviction motion for new trial the public trial issue was not raised. However, counsel went on to explain how in 2010, the SJC released its decision in the public trial case of *Commonwealth v. Cohen* (No. 1), 456 Mass. 94, 921 N.E.2d 906 (2010), and how the release of that decision made petitioner aware of his right to public trial for the first time. (Appendix L, at 34). Former appellate counsel explained that it was at this point that petitioner began to come to him complaining of the courtroom closure that occurred at his trial. (Appendix L, at 34). Appellate counsel stated that petitioner brought the issue to his attention three or four times while his appeal was pending (Appendix L, at 34), but acknowledged that he neither investigated the issue nor sought to raise the issue because there was no objection lodged at trial. (Appendix L, at 35-36).

Ultimately, the state court determined that the courtroom was indeed ordered closed by a state court officer for all of petitioner's jury selection, and that petitioner's mother, father and girlfriend were all excluded as a result of the closure. (Appendix K, at 4-6). The state court also found that the closure was done without the knowledge of the trial judge, prosecutor or defense counsel, and that no Waller factors were considered prior to closure. (Appendix K, at 5-6). The state court also found that the petitioner was ignorant of his public trial right because his trial counsel never informed him of the right. (Appendix K, at 20). Finally, the state court also found former appellate counsel provided ineffective assistance in failing to investigate and raise the Sixth Amendment

public trial issue in petitioner's direct appeal. (Appendix K, at 24-26). In the end, the state court reversed petitioner's convictions and released him on bail pending the prosecution's appeal. (Appendix O, at 10).

a. The state prosecutor's appeal to the MAC

Following the reversal of petitioner's convictions by the Superior Court, the prosecution appealed the order of reversal to the MAC. In that appeal, the prosecution's sole objective was to get the MAC to retroactively apply the procedural waiver doctrine against petitioner's public trial claim. Specifically, this was the prosecution's argument:

> Recent Decisions By The Supreme Judicial Court Consistent With The Arguments Made In The Commonwealth's Initial Brief Require Determinations That [ ] The Courtroom Closure Claim Was Procedurally Waived Because It Was Not Raised At Trial, In The First Motion For New Trial Or On Direct Appeal . . . .

(Appendix Q, at i). This argument by the prosecution was made despite the fact that it was asking the MAC to retroactively invoke a doctrine of law to a past period of time when the MAC was uniformly not applying and refusing to apply that doctrine of law in cases alleging public trial violation. See *Commonwealth v. Alebord*, 80 Mass. App. Ct. 432, 953 N.E.2d 744 (2011) (refusing to apply procedural waiver in the public trial context). Nonetheless, as the prosecution's aforementioned argument suggests, while its appeal from reversal of petitioner's convictions was pending in the MAC, the procedural law as it applied in public trial cases changed in Massachusetts. Specifically, in 2014, the SJC released decisions in two public trial cases holding that the procedural waiver doctrine was now applicable in the public trial context. See *Commonwealth v. Wall*, 469 Mass. 652, 15 N.E.3d 708 (2014), and *Commonwealth v. LaChance*, 469 Mass.

854, 17 N.E.3d 1101 (2014).

In response, petitioner's bail was revoked, and the state court judge cited -- as referenced within the prosecution's state appellate brief -- the following reason for revoking petitioner's bail:

> Based on significant changes in the doctrinal framework on the issues of waiver and prejudice that needs to be shown relative to . . . the context of a public trial, it appears to the [c]ourt that the defendant's likelihood of success on appeal is now remote.

(Appendix Q, at 2). In reply to the prosecution's state appellate brief petitioner argued that he had not procedurally waived the public trial claim considering the surreptitious nature of the closure (Appendix R, at 8), and also asserted that he was denied counsel's assistance when his trial counsel was impeded from preventing the public trial violation that occurred during all of jury empanelment. (Appendix R, at 15).

Ultimately, in 2015, the MAC reversed the 2012 new trial order petitioner had achieved in the Superior Court, by invoking, retroactively, the procedural waiver doctrine, just as the prosecution had requested. See *Commonwealth v. Felton*, 87 Mass. App. Ct. 1134, 33 N.E.3d 1267 (Unpub. Decision) (2015) ("The Commonwealth claims that by failing to object to a court room closure during jury empanelment, and by failing to raise the issue in his first motion for new trial, the defendant waived his right to a public trial. We agree.). Notably, in making that decision, the MAC stated that petitioner's "case is controlled in all material respects by *Commonwealth v. Wall*, 469 Mass. 652, 15 N.E.3d 708 (2014), and *Commonwealth v. LaChance*, 469 Mass. 854, 17 N.E.3d 1101 (2014)." *Felton, supra.* Both of these cases, however, **were decided years**

after petitioner supposedly defaulted his public trial claim. (emphasis added). Moreover, the MAC also expressed this view with respect to petitioner's assertion that his defense counsel was not aware of the closure at no fault of her own: "The fact that [defense] counsel was not aware of the closing of the court room is immaterial to determining whether the right has been procedurally waived." *Felton, supra* at n.2 (citations omitted).

The reason the MAC relied so heavily on the *Wall* and *LaChance* decisions in reversing petitioner's order for new trial, was because "[b]efore *LaChance* and *Wall*, it was not clear [in Massachusetts law whether] the defendant had waived his right to a public trial by failing to object when his family members were asked to leave the courtroom during jury empanelment." *Felton, supra.* Indeed, the MAC noted that the motion "judge reluctantly allowed the [petitioner's] motion for new trial based on the state of [Massachusetts] law in 2012." *Id.* "The judge [ ] felt constrained to allow the [petitioner's] motion even though the claim was made for the first time in his second motion for new trial." *Id.* The MAC explained however, that "*LaChance* and *Wall* have since [settled this] issue[ ]." *Id.* Specifically, in *LaChance* the SJC determined that "[w]here counsel fails to lodge a timely objection to the closure of the court room, the defendant's claim of error is deemed to be procedurally waived." *LaChance*, 469 Mass. at 857. In *Wall,* the SJC determined that "[a] procedural waiver may occur where . . . defense counsel did not object to any alleged court room closure at trial, and the defendant failed to raise the claim in his first motion for new trial." *Wall*, 469 Mass. at 673. Notwithstanding the SJC's pronouncements in its *Wall* and *LaChance* decisions,

the reality is this: *LaChance* and *Wall* stand in stark contrast to the procedural law in place (and in practice) in Massachusetts at the time of petitioner's purported defaults.

Indeed, from the 2000 to 2014, the MAC both did not and would not apply procedural waiver in the public trial context. Starting in 2000, the MAC reversed a defendant's convictions for the violation of his public trial right without considering procedural waiver despite trial counsel in that case purposely choosing not to object. See *Commonwealth v. Patry*, 48 Mass. App. Ct. 470, 475-476, 722 N.E.2d 979 (2000). *Patry* was decided eight years before petitioner's 2008 trial. Then, just a year after petitioner's trial, and 20 days prior to him filing his first motion for new trial, the MAC in *Commonwealth v. Edward*, 74 Mass. App. Ct. 162, 912 N.E.2d 515 (2009), explicitly refused to apply the procedural waiver doctrine to *Edward*'s unobjected-to public trial claim. *Id.* at 163, 173. See also *Commonwealth v. Baran*, 74 Mass. App. Ct. 256, 294-297, 905 N.E.2d 1122 (2009) (same). Then, again, in 2011, after petitioner's direct appeal had already been decided, the MAC refused to apply the procedural waiver doctrine, referring to, and quoting, its earlier decision in *Edward, supra*:

> "We held in Edward – a case involving a new trial motion brought fifteen years after trial and more than thirteen years after the defendant's conviction was affirmed on direct appeal – that a conclusion that the defendant's right to public trial was violated does not lead us to the substantial risk of a miscarriage of justice analysis that would be involved in assessing other errors that, like this one, were not timely raised."

Commonwealth v. Alebord, 80 Mass. App. Ct. 432, 438, 953 N.E.2d 744 (2011) (quoting *Edward*, 75 Mass. App. Ct. at 173)) (internal brackets and quotation marks omitted).

With respect to petitioner's state interference denial of counsel claim, and his

ineffectiveness claim against his appellate counsel, this was the MAC's disposition: "[trial] counsel was not prevented from assisting the defendant during empanelmet because, as the motion judge (who was also the trial judge) found, the defendant did not inform his counsel or the judge when he saw his family being escorted from the courtroom. The defendant's additional claim that his appellate counsel was ineffective is without merit." *Felton, supra* at *2. Petitioner then appealed to the SJC in an application for further appellate review, and on December 22, 2015, that application was denied. (Appendix I).

D. Mr. Felton's §2254 Habeas Petition[1]

1. The Federal District Court

Pursuant to 28 U.S.C. §2254 in the Federal District Court, petitioner timely filed his petition for writ of habeas corpus.[2] In that original petition he asserted three grounds for relief, (see Appendix N at Docket #1), but petitioner later moved to amend his petition to state the following four grounds:

GROUND ONE: The trial court committed automatic reversible error, when it secretly closed the courtroom during empanelment without considering Waller factors.

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[1] Petitioner notes that he did previously seek writ of certiorari in this Court on direct review from the Massachusetts state court of last resort. Both that petition, and his petition for rehearing were denied. See *Felton v. Massachusetts,* 137 S. Ct. 212, 196 L.Ed 2d 164 (2016), rehearing denied, 197 L.Ed, 2d 238 (2017). Petitioner did not raise the issues presented by questions one and two of the instant petition.

[2] Following the December 22, 2015 denial of petitioner's application for further appellate review by the SJC, petitioner filed a third motion for new trial on January 26, 2016 in the state court -- and the appeal from the denial of that motion was still pending at the time petitioner filed the instant petition seeking certiorari in this Court. The filing of his third motion for new trial in the state court on January 26, 2019 effectively tolled the time for filing his §2254 habeas petition in the Federal District Court, but the petitioner nonetheless filed his §2254 petition anyway.

GROUND TWO: The structural defect public trial violation accomplished behind defense counsel's back rendered the entire trial fundamentally unfair, and constructively denied the petitioner counsel altogether because it became impossible for defense counsel to ensure a fair trial for the petitioner, which the Supreme Court has said is the entire purpose of counsel under the effective assistance guarantee of the Sixth Amendment.

GROUND THREE: State interference prevented counsel from assisting this petitioner for an entire phase of his trial.

GROUND FOUR: The state court's procedural rule that first faults a defendant for failing to object to a public trial violation that was hidden from defense counsel, and then requires a prejudice demonstration requirement in order to obtain relief, is an inadequate state procedural ground, because it lacks any fair or substantial support in prior state law and was applied freakishly.

(Appendix N at Docket # 9). The Federal District Court later allowed petitioner's motion to amend his habeas petition with the additional Ground Four inadequacy claim (herein referred to as "first motion to amend Ground Four"). (Appendix N at Docket # 49 & 50).

On December 12, 2016, petitioner filed a motion for summary judgement with respect to Ground Three of his petition. (Appendix N at Docket # 13). On January 23, 2017, the respondent, Massachusetts, replied to petitioner's habeas petition and his motion for summary judgement, by filing a cross-motion for summary judgement. (Appendix N at Docket # 21 & 22). This is where petitioner's Ground Three and Ground Four claims first began to be misconstrued as public trial claims -- i.e., the respondent

started a legal conundrum that rippled over into the District Court's assessment of the claims. Specifically, the respondent, on page one of its opposition, wrote: "The opposition is based on the petitioner's procedural default of the public trial claims raised in the petition (Grounds One, Three, and Four) . . . ." (Appendix N at Docket # 21 at pg 1). It is obvious just by viewing the aforementioned four grounds raised by petitioner's habeas pleading, that Grounds Three and Four are not public trial claims.

In reply to the respondent's opposition and cross-motion for summary judgement, petitioner sought to add an additional Ground Four claim by way of a motion to amend (herein referred to as "second motion to amend Ground Four"). In that motion, and subsequent motions filed on the issue, petitioner claimed that the state procedural rule invoked as a bar to federal review of his Ground One public trial claim, was novel and unforeseeable. (Appendix N at Docket # 32, 33, 38, 41 & 43). Specifically, petitioner asserted that the procedural rule invoked by the state as a bar to federal review, was not in place at the time of petitioner's purported defaults, but rather, was a new state court practice. (Appendix N at Docket # 32, 33, 38, 41 & 43). In the end, Magistrate Judge David Hennessey issued a negative report and recommendation ("R&R"). (Appendix G).

In that R&R, the Magistrate Judge, in relevant part, determined that petitioner's second motion to amend his Ground Four claim, was "futile." (Appendix G, at 8). The Magistrate Judge reasoned that:

> "Petitioner's argument that he would not been found to have waived his public trial claim had he raised it on direct appeal in 2009 . . . – rather than having it heard in 2015 on appeal from his second motion for new trial, after *LaChance* and *Wall* were

> decided – is [ ] speculative. This is precisely because, as the [Massachusetts] Appeals Court determined in [this case], the law was 'not clear' on this issue. *Commonwealth v. Felton, [supra]* at *1. Put another way, the 'procedural barriers' Petitioner identifies in *LaChance* and *Wall* were already part of the legal landscape before 2009. What the SJC did in *LaChance* and *Wall* was not erect new procedural barriers, but rather resolve a split in authorities. Hence, given the uncertainty in the law, a court could have supportably found waiver of petitioner's public trial claim . . . Accordingly, I find that the Appeals Court correctly concluded that Petitioner defaulted on his public trial claim."

(Appendix G, at 14) (emphasis added). The Magistrate Judge also determined that petitioner's Ground Three and Ground four claims were procedurally defaulted public trial claims. (Appendix G, at 15) ("Petitioner has defaulted on his public trial claim . . . [a]ccordingly, I conclude that Ground One, Three, and Four of the petition fail as a matter of law, and I recommend that the District Court grant Respondent's motion for summary judgment as to these grounds.").

In his objections to the Magistrate Judge's R&R, petitioner asserted that the Magistrate Judge had misconstrued Ground Three and Four as a public trial clam, and thus, had not properly adjudicated Grounds Three and Four of the petition. (Appendix N, at Docket # 53 at pgs. 2-11). Furthermore, following the issuance of the R&R, petitioner immediately moved to amend his Ground Four inadequacy claims with one final claim (herein referred to as "third motion to amend Ground Four"). In that motion, petitioner noted that in light of the Magistrate Judge's findings of "split[s] in authorities" and "uncertainty in [Massachusetts's procedural] law" (Appendix G at 14), the state procedural rule invoked as a bar to federal review of his Ground One public trial claim, was not firmly established and regularly followed. (Appendix N, at Docket

55). Petitioner also moved to supplement his objections to the Magistrate Judge's R&R with the assertion that the Magistrate Judge failed to liberally construe his second motion to amend Ground Four. (Appendix N, at Docket # 57).

On February 12, 2018, Federal District Court Judge Timothy Hillman adopted the Magistrate Judge's R&R (Appendix F), and denied petitioner's motions to amend and to supplement. (Appendix N, at Docket # 60). The reason cited for the denial of petitioner's third motion to amend Ground Four, as well the denial of petitioner's motion to supplement his objections, was this: "The [c]ourt having adopted the R&R the motions are denied." (Appendix N, at Docket # 60). Petitioner then moved pursuant to Federal Rules of Civil Procedure 60(b)(6) to vacate the District Court's order adopting the R&R and dismissing the petition, asserting multiple grounds to vacate, but those grounds most pertinent to this petition are: (1) the District Court failed to liberally construe petitioner's second motion to amend Ground Four, (2) the District Court denied petitioner's third motion to amend Ground Four without any justification stated or appearing conspicuously in the record, and (3) the District Court grossly mischaracterized and adjudicated Grounds Three and Four as public trial claims, when in fact Ground Three is a state interference denial of counsel claim, and Ground Four asserts the inadequacy of a state procedural rule to act as a legitimate bar. (Appendix N, at Docket # 63 & 64).

On March 30, 2018, the Federal District Court denied petitioner's motion to vacate (Appendix E), and petitioner filed a timely notice of appeal from both that Rule 60(b)(6) denial, as well as the denial of his §2254 petition. Petitioner also filed a petition for

Writ of Mandamus in the Court of Appeals for the First Circuit, praying that the First Circuit would issue a mandate to the District Court to apply its findings of "split[s] in authorities" and "uncertainty in [Massachusetts procedural] law" (Appendix G at 14), to this Court's precedents outlining that state rules not firmly established and regularly followed are inadequate as a matter of law. (Appendix N at Docket #). The First Circuit, however, denied the petition without a hearing, stating that "Petitioner Richard Felton has filed an 'emergency petition for a writ of mandamus,' essentially inviting this court to decide now whether the district court erred in recently denying 28 U.S.C. § 2254 relief. Having reviewed the petition and relevant portions of the record, we conclude that the extraordinary remedy of mandamus relief is not in order." (Appendix H).

In turn, petitioner then proceeded to seek from the District Court the issuance of COA's from both the denial of his §2254 petition and the denial of his Rule 60(b)(6) motion to vacate. (Appendix N at Docket #73, 86). The District Court denied petitioner's request for COA with respect to his §2254 petition, holding, in relevant part, that:

> "Assuming that the facts are as asserted by Felton, he has a colorable claim that his constitutional rights were violated when the courtroom was closed to the public during jury empanelment. However, the MAC found that Petitioner had procedurally defaulted this claim. Accordingly, there is an independent and adequate state ground which bars federal habeas relief. Reasonable jurists could not debate that Petitioner procedurally defaulted with respect to the underlying constitutional claim on which Grounds One, Three and Four are based. Moreover, while there is a possibility that it could be debated whether he was prejudiced by the closure of the courtroom during jury empanelment, reasonable jurists could not debate that he has not established cause for the default."

(Appendix D, at 4). The District Court also denied petitioner's request for issuance of a COA with respect to petitioner's Rule 60(b)(6) motion, with this disposition: "Petitioner's motion to vacate failed to assert any sound leg basis for vacating the denial of his habeas petition. No reasonable jurist could conclude otherwise. Accordingly, to the extent it is necessary, his motion for a certificate of appealability is denied." (Appendix C).

2. The Court of Appeals for the First Circuit

The First Circuit consolidated both petitioner's appeal from denial of his §2254 petition and appeal from denial of his Rule 60 (b)(6) motion. (Appendix M at 2). His request for COA's as to both was thus consolidated into one brief before the First Circuit. (Appendix M at 3). Referring only to the portions of petitioner's COA request that are pertinent to the instant petition for certiorari, petitioner asserted that: (1) the District Court erred in dismissing petitioner's Ground One public trial claim on procedural grounds, (2) the District Court failed to liberally construe petitioner's second motion to amend Ground Four, (3) the District Court denied petitioner's third motion to amend Ground Four without any justification stated or appearing conspicuously in the record, and (4) the District Court grossly mischaracterized and adjudicated Grounds Three and Four as public trial claims, when in fact Ground Three is a state interference denial of counsel claim, and Ground Four asserts the inadequacy of a state procedural rule to act as a legitimate bar. (Appendix M at Docket Entry 8/31/2018).

Then, the First Circuit, in a move that was completely unexpected, and

incomprehensible as a matter of law, denied petitioner's request for COA with respect to both the denial of his §2254 petition and his Rule 60(b)(6) motion to vacate, on the sole premise that petitioner "has not made a substantial showing of the denial of a constitutional right." (Appendix B). This determination not only sidestepped this Court's precedents in both Waller and Presley, but consciously disregarded the District Court's conclusion to the contrary that petitioner had indeed presented a constitutional claim that was "colorable" (Appendix D, at 4), and the state court's determination that petitioner's Sixth Amendment right to public trial was in fact violated. (Appendix K, at 4-6).

REASONS FOR GRANTING THE WRIT

Granting the writ is necessary because this Court's precedents must be followed; and here, they were not. They were not followed despite petitioner's most honest attempts to encourage the lower court's adherence to this Court's precedent, time and time again. The multiple levels of judicial disobedience present in this case, is troubling. Knowingly choosing not to adhere to the explicit mandates of this Court, is an attack on the hierarchy of the judicial system. It represents the epitome of judicial anarchy -- a total disregard for the orders that fall from the bench of this most Honorable Court. Moreover, the First Circuit's refusal to issue a COA in this case on the sole premise that petitioner demonstrated no violation of a constitutional right, conflicts directly with the state court's determination that petitioner's Sixth Amendment right to public trial was indeed violated. This split between these two intimately related state and federal courts on such an important question of federal law, begs for this Court's intervention. It is for all of these reasons, that the Court should grant the writ.

I. THE COURT OF APPEALS CONTRAVENED THIS COURT'S PRECEDENT CASE LAW WHEN IT AFFIRMED A DECISION THAT THE FEDERAL DISTRICT COURT NEVER EVEN MADE IN DENYING PETITIONER A CERTIFICATE OF APPEALABILITY

In denying petitioner a COA from denial of his §2254 petition, as explained above, the District Court determined that petitioner presented "a colorable claim that his constitutional rights were violated when the courtroom was closed to

the public during jury empanelment." (Appendix D at 4). The only reason the District Court denied petitioner a COA, was because "the MAC found that Petitioner ha[d] procedurally defaulted this claim," and the District Court thus determined that "while there is a **possibility** that it could be debated whether [petitioner] was prejudiced by the closure of the courtroom during jury empanelment, reasonable jurists could not debate that he has not established cause for the default . . . ." (Appendix D at 4) (emphasis in original). When the petitioner challenged the District Court's decision denying issuance of a COA before the First Circuit, he asserted multiple grounds for relief (Appendix M at Docket entry 8/31/18), but the First Circuit addressed none of those grounds. In fact, it not only failed address any of those grounds, it addressed no aspect of the District Court's rulings dismissing petitioner's §2254 habeas petition or his Rule 60(b)(6) motion to vacate. Instead, it made a brand new ruling. It declared that petitioner had not suffered the violation of a constitutional right (Appendix B), even though the state court squarely found facts that led it to declare that petitioner's right to public trial was violated, (Appendix K at 4-6), and the District Court found that petitioner's public trial claim was "a colorable" one. (Appendix D at 4). In essence, the First Circuit duplicated the same type of error that caused reversal in *Terrell v. Morris*, 493 U.S. 1 (1989) (per curiam), but worse.

In *Terrell*, "[t]he Sixth Circuit [Court of Appeals] . . . affirmed a decision that the District Court never made, and so [it was clear that the Sixth Circuit]

never reviewed that [District] [C]ourt's actual decision." *Id.* at 3. In the end, this Court determined that "[r]eview of the . . . issues should be undertaken based on a correct formulation of the ruling in the District Court," *id.* at 3, even though, as the dissent in *Terrell* pointed out, "[t]he Court summarily vacate[d] [the] opinion of the Court of Appeals for the Sixth Circuit without indicating that the Sixth Circuit committed legal error . . . ." *Id.* at 3 (Chief Justice Rehnquist, with whom Justice White, Justice O'Connor, and Justice Scalia join, dissenting).

At bar, however, the First Circuit's conclusion that petitioner suffered no constitutional violation (Appendix B), is not only at odds with the District Court's finding that petitioner presented "a colorable claim that his constitutional rights were violated when the courtroom was closed to the public during jury empanelment," (Appendix D at 4), but the First Circuit's determination is unquestionably legal error that runs contrary to this Court's precedent in both *Waller* and *Presley*.

This Court has squarely determined that ordering courtroom doors closed for all of jury empanelment, effectively excluding all members of the public for the entirety of jury selection, without considering a single factor illuminated in *Waller*, is a Sixth Amendment violation. In *Presley v. Georgia, supra*, this Court reversed the defendant's convictions because the trial judge improperly ordered a courtroom closure that lasted all of jury empanelment. *Id.* Specifically, the trial court excluded "a lone courtroom observer" who turned out to be the defendant's "uncle," *id.* at 210, and did so without "consider[ing] all reasonable

alternatives to closure." *Id.* at 216.

The Court explained in *Presley* that "*Waller* provided standards for courts to apply before excluding the public from any stage of a criminal trial." *Id.* at 213-214 (quoting *Waller*, 467 U.S. at 48) ("[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure."). The Court in *Presley* further explained that "[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials." *Id.* at 215. At bar, however, not a single Waller factor was considered prior to the complete courtroom closure that took place during petitioner's jury selection (Appendix K at 4-6), constituting an unquestionable, irrefutable, constitution violation.

It is obvious then that the First Circuit is acting in total contravention of this Court's clear precedent case law. Moreover, the First Circuit has not addressed the true substance of the District Court's denials. That failure to address the issues creates a whole separate level of complexity. There are numerous reasons as to why it is so vitally important for the First Circuit to pass upon the District Court's acutal reasons for denial in this case, before any challenges to those denials reaches the docket of this Court. First, as the Court acknowledged in *Terrell,* when "the answer to the question requires a familiarity with [a particular State's] law, it should not be addressed in this Court before

[this Court] ha[s] the benefit of the Court of Appeals' views." *Terrell*, 493 U.S. at 3 n.1. Here, several of the challenged District Court rulings deal directly with whether or not the procedural ground invoked by Massachusetts as a bar to federal review of petitioner's public trial claim, are even adequate enough to act as a legitimate bar. (Appendix M at Docket entry 8/31/18). Answering that question inherently calls upon the First Circuit's familiarity with Massachusetts's procedural laws. Secondly, this Court has made it clear "that [it is] 'a court of last review, not of first review' and, for that reason, ha[s] refused to decide issues not addressed below." *McCoy v. Louisiana*, 200 L.Ed 2d 821, 840 (2018) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 (2005)). Hence, the need for grant of certiorari is clear. Respectfully, the Court should reverse with instruction that the First Circuit review the actual issues and District Court conclusions, and make a COA determination "based on a correct formulation of the ruling in the District Court." *Terrell*, 493 U.S. at 3.

II. THE STATE COURT'S DETERMINATION THAT THE COURTROOM CLOSURE AT ISSUE CREATED A CONSTITUTIONAL VIOLATION, IS LEGALLY SOUND, AND THE FIRST CIRCUIT'S CONCLUSION TO THE CONTRARY, PURPOSELY CONTRAVENES THIS COURT'S WELL-SETTLED PRECEDENT

This Court grants certiorari in cases where "a United States court of appeal has . . . decided an important federal question in a way that conflicts with a decision by a state court of last resort," Sup. Ct. R. 10(a), as well as when "a United States court of appeals has decided an important question . . . in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Both of

these grant-worthy scenarios arise in the instant case.

A. State Court vs. First Circuit

One can only toss a guess at why the First Circuit decided to take the state court's legally sound determination that petitioner's Sixth Amendment right to public trial was violated by the complete closure of the courtroom without any consideration of Waller factors (Appendix K at 4-6), and turn that clear constitutional violation on its head by determining that petitioner suffered no constitutional violation at all. (Appendix B). Nonetheless, the First Circuit's action in doing so contravened not only the state court's determination, but the well-established precedent of this Court in both *Waller* and *Presley*.

B. Contravening this Court's precedent case law

There is simply no other way to put it. The First Circuit made a conscious choice in this case to ignore well-settled law clearly stated within the precedents of this Court. Indeed, its actions are unmistakable. When the First Circuit determined that petitioner had not demonstrated he suffered a constitutional violation, (Appendix B), petitioner immediately moved for panel rehearing arguing that the First Circuit had squarely contravened this Court's clear precedents in both Presley and Waller. (Appendix M at Docket entry 2/28/19). But that made no difference. In single line decision, the First Circuit summarily denied petitioner's request for a rehearing (Appendix A), leaving him to turn to this Court to enforce its own mandate. In turn, ripple effect of the First Circuit's contravention in this case is significant. It allowed the First Circuit to avoid

addressing many critical issues in this case -- some of which are discussed below.

Unaddressed Issues

i. **The District Court Committed Reversible Error In Failing To Liberally Construe Petitioner's Request To Amend His Ground Four Inadequacy Claim**

Part of petitioner's reply to the respondent's opposition to his §2254 petition, included a motion for leave to amend his Ground Four inadequacy claim. (Appendix N at Docket # 32 & 33). Specifically, petitioner sought to add the assertion that the state procedural rule invoked as a bar to review of his Ground One public trial claim, was novel and unforeseeable, and thus inadequate as a matter of law. (Appendix N at Docket # 33). The District Court disagreed. It determined the state procedural rule was adequate because it was not novel and unforeseeable as petitioner alleged, but rather, just fraught with "split[s] in authorities" and "uncertainty in the [State's] law." (Appendix G at 14). That disposition, however, is nothing more than "a formal distinction and implies no difference in substance." *Mullen v. United States*, 224 U.S. 448, 456 (1912). Indeed, while it is true that the District Court rejected petitioner's assertion that the state procedural rule was inadequate on the premise that it was novel and unforeseeable, the District Court's findings simultaneously made clear that the rule at issue was one not firmly established and regularly followed by Massachusetts courts. (Appendix G at 14). Said differently, the fact that the District Court rejected petitioner's novel and unforeseeable argument, is irrelevant, because no matter what, "[s]tate rules count as adequate [only] if

they are firmly established and regularly followed." *Johnson v. Lee*, 195 L.Ed. 2d 92, 95 (2016) (citations and quotation marks omitted). Thus, the District Court's finding that the state procedural rule was fraught with "split[s] in authorities" and "uncertainty in the [State's] law," (Appendix G at 14), still required a declaration that the State's procedural rule is inadequate. See *The Nereide, Bennett, Master*, 3 L.Ed 769, 9 Cranch 388, 410 (1815) ("A distinction founded upon no difference of principle cannot alter the case."). What this boils down to, is a failure by the District Court to liberally construe.

ii. The District Court Denied Petitioner's Request For Leave To Amend His Ground Four Inadequacy Claim, Without Any Justifiable Rhyme Or Reason

Without any imaginable justification, the District Court denied petitioner leave to amend his Ground Four inadequacy claim with the assertion that the state procedural rule at issue was not firmly established and regularly followed. Immediately following the issuance of the Magistrate Judge's "R&R" (Appendix G), petitioner requested to amend his Ground Four inadequacy claim (Appendix N at Docket # 55, 57 & 58), citing the Magistrate Judge's R&R findings of "split[s] in authorities" and "uncertainty in the [State's procedural] law," (Appendix G at 14), as support for his request to amend. (Appendix N at Docket # 55, 57 & 58). The District Court, having already refused to liberally construe petitioner's inadequacy claim (Appendix N at Docket # 57), now refused to allow petitioner's request for leave to amend offering this one line disposition as reason for the denial: "The [c]ourt having adopted the R&R the motion[ ] [is]

denied." (Appendix N at Docket # 60).

However, the only inadequacy claim addressed in the Magistrate Judge's R&R was petitioner's assertion that the state's procedural rule was novel and unforeseeable (Appendix G). Hence, simply citing its adoption of the Magistrate Judge's R&R as reason for denying petitioner leave to amend with his more recent firmly established and regularly followed assertion, is therefore tantamount to offering no reason at all. This is especially true given that the Magistrate Judge's R&R findings of "split[s] in authorities" and "uncertainty in the [State's procedural] law" (Appendix G at 14), support the proposed amendment; Leaving no justifiable reason for denying petitioner leave to amend.

The law in this area is clear. Any "outright refusal to grant leave [to amend] without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of discretion and inconsistent with the spirit of Federal Rules." *Foman v. Davis,* 371 U.S. 178, 182 (1962). Indeed, this Court has said that "[i]f the underlying facts and circumstances relied upon by a [petitioner] may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Id.* at 182. The underlying facts and circumstances present here, are that not only do the findings made in the District Court support the proposed amendment (Appendix G at 14), but also the reasons asserted in petitioner's motion to amend.

iii. The District Court Committed Error In Not Granting Petitioner Rule 60(b)(6) Relief

Petitioner's Rule 60(b)(6) motion challenged all of the District Court's procedural findings (Appendix N at Docket # 63 & 64). It also challenged the District Court's characterization of petitioner's Ground Three and Ground Four claims. Specifically, petitioner noted how the District Court disposed of both claims as if they were the procedurally defaulted public trial claims. (Appendix N at Docket # 64). However, as noted above, Ground Three is actually a state interference denial of counsel claim, that was clearly adjudicated by the MAC on its merits. (Appendix J). Ground Four, on the other hand, is made up of an assortment of inadequacy claims that the state procedural rule invoked as a bar to review of petitioner's Ground One public trial claim. Against those actualities, it is clear that the District Court disposed of petitioner's Ground Three and Four claims in a way that was blatantly wrong and extraordinary, warranting Rule 60(b)(6) relief.

C. This Court's precedents must be followed

"In the exercise of its proper function this Court has declared the law of the land concerning" what constitutes a violation of the Sixth Amendment public trial right, as well as what constitutes an adequate state procedural rule. *St. Louis & O'Fallon R. Co. v. United States*, 279 U.S. 461, 487 (1929). To that point, it should be understood that "once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994). That did not happen here; and for that reason alone, this Court should grant certiorari and summarily reverse.

III. THE FIRST CIRCUIT ERRED IN DENYING COA WITH RESPECT TO THE DISTRICT COURT'S DENIAL OF BOTH PETITIONER'S GROUND THREE HABEAS PLEADING, AND HIS RULE 60(b)(6) MOTION TO VACATE

This Court has held that various kinds of "state interference with counsel's assistance" are "legally presumed to result in prejudice." *Strickland v. Washington*, 466 U.S. 688, 692 (1984). The state interference presented by the instant petition, represents a variation of that kind of case. Here, a structural defect public trial violation took place during petitioner's trial at the surreptitious order of a state court officer. That surreptitious action prevented petitioner's trial counsel from objecting to and preventing the Sixth Amendment public trial violation, and because the quantum of harm flowing from a public trial violation is "unquantifiable and indeterminate," *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993), there is no way to measure the prejudice caused by the state interference which prevented trial counsel from objecting. Hence, this is a case where "state interference with counsel's assistance" must be "legally presumed to result in prejudice." *Strickland*, 466 U.S. at 692.

Defense counsel is appointed to "protect the rights of the person charged." *Martinez v. Ryan*, 566 U.S. 1, 12 (2011). However, executing that duty becomes practically impossible when state officials are orchestrating constitutional deprivations behind defense counsel's back. There can be no doubt that state officials surreptitiously acting in such a way squarely abridges the Sixth Amendment right to counsel's assistance. *Cf. Michigan v. Harvey*, 494 U.S. 344,

361 (1990) ("After the right to counsel has been implemented, the State may not short-circuit the adversarial system by [doing things that affect the defendant] behind counsel's back."). Against this axiom, however, when state officials in this case surreptitiously ordered court room doors closed behind defense counsel's back during jury selection, the blame was placed on the petitioner.

Indeed, when petitioner asserted that the surreptitious order to close the courtroom during trial amounted to state interference that "prevented [counsel] from assisting the [petitioner] during a critical stage of the proceeding," *United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984), (Appendix R at 15-36), the MAC rejected that assertion by concluding that, "counsel was not prevented from assisting the [petitioner] during empanelment because, . . . the [petitioner] did not inform his counsel or the judge when he saw his family being escorted from the courtroom." (Appendix J). This cannot be the constitutionally acceptable practice -- that even if state officials secretly close court room doors behind counsel's back, the onus then falls upon the defendant himself to act and protect his rights. This is especially true, where, as here, the state court squarely determined that petitioner was ignorant of his right to public trial (Appendix K at 20).

This Court has said that "the guaranty [of counsel's assistance] would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution." *Johnson v. Zerbst*, 304 U.S. 458, 465

(1938). In fact, in *Zerbst*, very much like the instant case, the defendant "contend[ed] that he was ignorant of his right[s] . . . and incapable of preserving his legal and constitutional rights during trial." *Id.* at 467. The Federal District Court on habeas review in turn held that, "'It [was] unfortunate [that] *[Zerbst]* lost [his] right to a new trial through ignorance or negligence, but such misfortune cannot give th[e] [c]ourt jurisdiction in a habeas corpus case to review and correct the errors complained of.'" *Id.* at 465. This Court quickly rejected this District Court determination in *Zerbst*. The Court made clear that the whole objective of "the constitutional guaranty of a right to Counsel is to protect an accused from . . . his own ignorance of his legal and constitutional rights," id. at 465, precisely because the "Sixth Amendment embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself." *Id.* at 463. Hence, in this case, the MAC's conclusion that petitioner's counsel was not prevented from assisting him, simply because he did not, himself, take action to protect or preserve his constitutional right to public trial as it was being stripped away from him behind his trial counsel's back, should be rejected as unconstitutional.

Indeed, that is the operative fact. That here, a state court officer gave an undisclosed order to close the courtroom during all of the petitioner's jury selection, (Appendix K at 4-6), and his trial counsel testified in the state court that had she been notified of the order to close the courtroom, she "would have objected." (Appendix L at 27-28). The lack of notice provided to counsel made it

so that she was not "able to invoke the procedural and substantive safeguards" that she was appointed to protect under the Sixth Amendment. *Cuyler v. Sullivan*, 466 U.S. 335, 343 (1980); making this state interference denial of counsel claim, a meritorious one.

These are fundamental points of concern raised by petitioner's Ground Three habeas claim, but were points never even addressed by the District Court. They were never addressed because the District Court denied petitioner's Ground Three denial of counsel claim on the premise that it is somehow a public trial claim. (Appendix G at 15). Petitioner responded by filing a Rule 60 (b)(6) motion to vacate, citing the District Court's failure to address the true merits of his Ground Three claim after misconstruing the issue asserted. (Appendix N at Docket # 63 & 64). Petitioner also cited the District Court's failure to acknowledge the MAC's merit-based adjudication of the state interference claim, as well as the District Court's failure to execute its obligation to undertake the statutorily prescribed §2254 (d)(1) review of the MAC's merit-based adjudication of the claim. (Appendix N at Docket # 64). The District Court summarily denied Rule 60 (b)(6) relief, (Appendix E), and then denied petitioner a COA from that denial. (Appendix C).

This Court has held that "the COA question [when addressing Rule 60(b) denials] is [ ] whether a reasonable jurist could conclude that the District Court abused its discretion in declining to reopen the judgment." *Buck v. Davis*, 197 L.Ed. 2d 1, 21 (2017); *Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018) (same); *Cf.*

Kellogg v. Attack, 269 F.3d 100, 103-04 (2nd Cir. 2001) (per curiam), cert. denied, 535 U.S. 932 (2002) (holding that the COA analysis for a Rule 60(6) denial is whether "(1) jurists of reason would find it debatable whether the district court abused its discretion in denying the Rule 60(b) motion, and (2) jurists of reason would find it debatable whether the underlying habeas petition, in light of the grounds alleged to support the Rule 60(b) motion, states a claim of a denial of a constitutional right.").

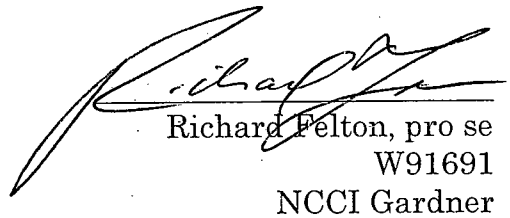
Here, the District Court's adjudication is highly debatable. First, petitioner's state interference denial of counsel claim is not a public trial claim. Second, because the state court adjudicated the claim on its merits, the District Court was required to undertake the statutorily prescribed §2254 (d)(1) standard of review, but did not. Petitioner had a right to have his Ground Three claim that counsel was prevented from assisting him, addressed by the District Court as the claim that it is, and not as something totally different. The District Court's determination that Ground Three is a procedurally defaulted public trial claim is clearly contrary to the record that was before the District Court, which is the same record that is before this Court. Moreover, the petitioner's constitutional claim of denial of counsel by way of state interference, is a meritorious one in which "counsel was [indeed] prevented from assisting the [petitioner] during a critical stage of the [trial]," *Cronic*, 466 U.S. at 659 n.25, because counsel testified that she "would have objected" to the closure if she had been provided notice. (Appendix L at 27-28). With that, petitioner respectfully

submits that the First Circuit erred in not issuing a COA with respect to the District Court's denial of his Ground Three §2254 habeas corpus petition itself, as well as with respect to the denial of his Rule 60(b)(6) motion to vacate, on the sole premise that petitioner "ha[d] not made a substantial showing of the denial of a constitutional right." (Appendix B).

CONCLUSION

The law of the land, once declared by this Court, should be followed. That never happened here. Time and again the law as explained by this Court's precedents was easily avoided, circumvented and ignored by the lower courts. It is for these reasons that petitioner prays this Honorable Court will grant the writ.

Respectfully Submitted,
Richard Felton, pro se,



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