

24-5677

IN THE SUPREME COURT OF
THE UNITED STATES

No.

ORIGINAL

KELLY BASS, PETITIONER

v.

CHADWICK DOTSON, RESPONDENT

Supreme Court, U.S.
FILED

SEP 23 2024

OFFICE OF THE CLERK

PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE 4TH CIRCUIT

KELLY BASS#1809789

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QUESTIONS PRESENTED

1. Whether criminal defendants are required to prove prejudice for an ineffective assistance of counsel claim where counsel is absent and the defendant is unable to assert his constitutional right to a speedy trial at the hearing to set a trial date.
2. Whether it is fundamentally unfair to close the courtroom during the complaining witness's CCTV testimony and for the remainder of the trial where counsel was absent from the courtroom during the CCTV testimony and never advised the defendant of the public trial right or if counsels ineffective assistance should be presumed prejudicial.

(i)

PARTIES

The petitioner is Kelly Bass, a prisoner at Buckingham correctional center in Dillwyn, VA. The respondent is Chadwick Dotson the director of Virginia Department of Corrections.

RELATED CASES

Bass v. Commonwealth, 70 Va. App. 522, Virginia court of appeals decided on July 9, 2019.

Bass v. Commonwealth, No. 191033 petition for appeal decided on Aug 5, 2020 and petition for rehearing decided on Oct 9, 2022.

Bass v. Clarke, No. 210518, Virginia Supreme Court. Decided on March 23, 2022.

Bass v. Clarke, No. 7:22cv00259, U.S. District court for the Western District of VA, Roanoke division. Decided on July 28, 2023.

Bass v. Dotson, No. 23-6847, United States Court of Appeals for the 4th Circuit. Decided on July 9, 2024.

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DECISIONS BELOW

The decision of the Virginia Supreme Court is attached as appendix A. The decision and order of the U.S. District court for the Western District of Virginia are attached as appendix B and C respectively to this petition.

JURISDICTION

The judgement of the United States Court of Appeals for the 4th Circuit was entered on June 3, 2024. An order denying the petition for rehearing was entered on July 9, 2024 and a copy of that order is attached as appendix D to this petition. Jurisdiction is conferred by 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendments V, VI, and XIV to the United States constitution which provide:

Amendment V: No person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

Amendment VI: In all criminal prosecutions, the accused shall

enjoy the right to a speedy and public trial, by impartial jury of the state and district wherein the crime shall have been committed,

which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation ; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV: section 1. All persons born or naturalized in the United states, and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside . No state shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

This case also involves Virginia statute § 18.2-67.9: VA code § 18.2-67.9: Testimony by child victims using two-way closed-circuit television.

A. The provisions of this section shall apply to an alleged victim who was 14 years of age or younger at the time of the alleged offense and who is 16 years of age or younger at the time of the trial and to a witness who is 14 years of age or younger at the time of the trial. In any criminal proceeding, including preliminary hearings, involving an alleged offense of a child, rel-

ating to a violation of laws pertaining to kidnapping pursuant to article 3 (§ 18.2-43, et seq) of chapter 4, criminal sexual assault pursuant to article 7 (§ 18.2-61, et seq) of chapter 4, commercial prostitution or sex trafficking offenses pursuant to article 3 (§ 18.2-346, et seq) of chapter 8, or family offenses pursuant to article 4 (§ 18.2-362, et seq) of chapter 8, or involving an alleged murder of a person of any age, the attorney for the commonwealth or the defendant may apply for an order from the court that the testimony of the alleged victim or child witness be taken in a room outside the courtroom and be televised by two-way closed-circuit television. The party seeking such an order shall apply for the order at least seven days before the trial date or at least seven days before such other preliminary proceeding for which the order is to apply.

B. The court may order that the testimony of the child be taken by closed-circuit television as provided by subsection A if it finds that the child is unavailable to testify in open court in the presence of the defendant, jury, the judge and the public, for any of the following reasons:

1. The child's persistent refusal to testify despite judicial requests to do so;
2. The child's substantial inability to communicate the offense; or
3. The substantial likelihood, based upon expert opinion testimony, that the child will suffer severe emotional trauma from so testifying. Any ruling on the child's unavailability under this subsection shall be supported by the court with findings on the record or with written findings in a court not of record.

C. In any proceeding in which closed-circuit television is used to reciev testimony, the attorney for the commonwealth and the defendants attorney shall be present in the room with the child, and the child shall be subject to direct and cross-examination. The only other persons allowed to be present in the room with the child during the testimony ahall be those neccessary to operate the closed-circuit equipment and any other person determined by the court to be neccessary to the qwelfare and well-being of the child.

D. The child's testimony shall be transmitted by closed-circui television into the courtroom for the defendant, jury, judge and public to view. the defendant shall be provided with a means of private, contemporaneoud communication with his attorney during the testimony.

STATEMENT OF THE CASE

Petitioner was indicted on five charges on sept 27,2016. That same day the prosecutor, as well as the defendant appeared before the court, without defense counsel present, to set a trial date. Trial was then set for Dec 12, 2016. The court then ordered petitioner to sign a continuance order setting the date. On Dec 12, 2016 trial was suspended due to petitioner being housed at Central State Hospital.

Petitioner returned to court on March 21, 2017 where the parties came to set a new trial date. A trial date of July 11, 2017 was then selected and was objected to by the petitioner through counsel.

On July 11, 2017 petitioner appeared for trial and was convicted of four charge, while one charge was dismissed for insufficient evidence. He was sentenced on Oct 24, 2017, to life plus 70 years with 35 suspended. He maintained his innocence in his trial testimony and his allocution.

Petitioner filed a direct appeal which was denied on July 9, 2019.

Petitioner filed an appeal to the Supreme Court of Virginia, which was denied on Aug 5, 2020. Petitioner then filed a petition for rehearing which was denied on Oct 9, 2020.

Petitioner filed a petition for writ of habeas corpus in the Supreme Court of Virginia on May 25, 2021. The court dismissed the petition on March 23, 2022, ruling petitioners ineffective assistance of counsel claims had no merit.

Petitioner filed a petition for writ of habeas corpus in the federal court for the western district of Virginia which was denied and dismissed on July 28, 2023. The court ruled petitioner showed neither deficient performance nor prejudice for his ineffective counsel; absence of counsel on Sept 27, 2016 claim and ruled the claim was not substantial to overcome default. The court also ruled petitioner failed to establish prejudice in his ineffective counsel; Denial of public trial claim.

Petitioner file for a Certificate of appealability in the 4th Circuit Court of Appeals, which was denied and dismissed on June 3, 2024.

Petitioner filed a petition for rehearing and rehearing En banc on June 13, 2024, which was denied on July 9, 2024.

STATEMENT OF PERTINANT FACTS

1. Ineffective assistance of counsel; absence at hearing to set trial date.

Petitioner's right to counsel was violated when his attorney was absent on the Sept 27, 2016 hearing date to set a trial date and the court required petitioner to sign a continuance order setting the date without counsel present to assist and advise him of his statutory and federal constitutional rights to a speedy trial and petitioner was therefore unable to assert his desire for a speedy trial.

The district court denied the claim, ruling counsels performance was not deficient or prejudicial.

2. Ineffective assistance of counsel: Public trial denied

On July 11, 2017 petitioner appeared for trial. The complainant witness D.B. testified of CCTV pursuant to Va code 18.2-67.9. Before D.B.'s testimony began defense counsel alerted the court that the officer in charge of the equipment reported a malfunction in the telephone system that was to be used for private contemporaneous communication between defense counsel and petitioner during D.B.'s testimony.

The officer suggested petitioner raise his hand to get the court's attention in order to speak to counsel. The court accepted the officer's proposal and instructed petitioner to keep those disruptions to a minimum. The court asked petitioner to take notes fully and completely during the testimony and defense counsel left the courtroom to go to the CCTV room during D.B.'s testimony.

Petitioner did not raise his hand during D.B.'s active testi-

mony and only spoke to counsel during court breaks in that testimony and was unable to take notes and listen to D.B.'s testimony at the same time. After a lunch break following the prosecutor's direct examination of D.B., the prosecutor and defense counsel returned to the CCTV room to continue D.B.'s testimony, where the prosecutor then requested the court close the courtroom, during D.B.'s testimony or where her identity might be stated, to members of the public. Petitioner's counsel did NOT leave the CCTV room to go to the courtroom and advise petitioner of his right to a public trial, so petitioner was unable to object to the closure and counsel failed to object to the closure. The court then ordered the officer to keep people from another case out of the courtroom and the officer left to follow that order. The public was excluded. The public was excluded from the trial beginning with the defense's cross-examination of D.B. and from the rest of the trial where D.B.'s identity might be stated. The public was deprived of viewing petitioner alone without counsel by his side to guide him during D.B.'s entire testimony beginning with cross-examination. As the closure included any instance where D.B.'s identity might be stated this included the remainder of the trial including during the testimony of both the prosecution's and defense's witness's testimony, so the closure was not temporary.

No members of the public entered the courtroom during trial, before or after the court's order to keep people out. It is unknown if the officer prevented any other individuals or parties from entering the courtroom, other than the group from the afternoon case, because his actions were done outside the presence of the

the court.

The District Court denied the claim ruling petitioner failed to establish prejudice.

BASIS OF FEDERAL JURISDICTION

This case raises questions of interpretation of the Due process clause of the 5th and 14th amendment, as well as the 6th amendment's right to assistance of counsel and to a public trial. Jurisdiction is conferred by 28 U.S.C. 1254(1).

REASONS FOR GRANTING THE WRIT

A. Conflicts with decisions of other courts.

1. The holding of the courts below that petitioner's claim was not a substantial Ineffective Counsel claim and was required to prove prejudice in Strickland v. Washington, 466 U.S. 668 (1984) claim is in direct conflict with the holdings in five other circuit courts. See Montilla v. INS, 926 f.2d 162,169 (2nd cir.1991); Burdine v. Johnson, 262 F.3d 336,341 (5th cir. 2001); Childress v. Johnson, 103 f.3d 1221, 1228-29(5th cir. 1997); Van v. Jones, 475 f.3d 292,311-12(6th cir. 2007); Lewis v. Zatecky, 993 f.3d 994(7th cir. 2021), and with this courts holding in Strickland; U.S v. Cronic, 466 U.S. 668 (1984); Mickens v. Taylor, 535 U.S. 162, 166(2002); Bell v. Cone, 535 U.S. 685,695-96 (2002); Perry v. Leeke, 488 U.S. 272, 280 (1989).

2. The holding of the courts below that petitioner is required to prove Strickland prejudice in an ineffective counsel claim involving a violation of public trial and that sex crimes are an exception to closing the court to the public is in direct conflict.

ct with the holdings of two other federal courts, with regards to alleged minor victims of sex crimes testifying in front of the public, see U.S. v. Thunder, 438 f.3d 866, 868(8th cir. 2006); Davis v. Reynolds, 890 f.2d 1105, 1110-12(10 cir. 1989). With regard to Ineffective counsel claims, the holding of the courts below is in conflict with this court's decision in U.S. v. Cronic, 466 U.S. 648(1984); Strickland v. Washington, 466 U.S. 668(1984); and Weaver v. Massachusetts, 137 S.CT 1899, 1913(2017) where this court ruled that a presumption of prejudice might be warranted if "defense counsel errs in failing to object when the government's main witness testifies in secret".

B. Importance of questions presented

1. This case presents a fundamental question of the interpretation of this court's decision in Strickland v. Washington, 466 U.S 648 (1984) and U.S. v. Cronic, 466 U.S. 648(1984). The question presented is of great public importance because it affects the public's perception of the fairness and integrity of judicial proceedings and their faith that the justice system respects, protects, and preserves the constitutional rights of the citizens of the U.S. and provides remedies when those rights are violated. The question is also of great importance to criminal defendants because it affects their rights to assistance of counsel, their ability to assert their other constitutional rights and to receive fair, trustworthy proceedings.

The issue's importance is enhanced by the fact that the lower courts have seriously misinterpreted Strickland. This court held in Strickland that in instances of "actual or constructive de-

nials" of counsel prejudice need not be shown, *Strickland v. Washington*, 466 U.S. 668,692(1984). This court also ruled previously that "the deprivation of the right to counsel at a single discreet stage may "contaminate" the rest of the proceeding, *Satterwhite v. Teaxas*, 486 U.S. 249,257 (1988), and only those "Sixth amendment violations that pervade the entire proceeding" can "never be considered harmless." *Satterwhite* at 256. This court has made it clear that exceptions to the prejudice prong include "where assistance of counsel has been denied entirely or during a critical stage of the proceeding. When that has occurred, the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary", *Mickens v. Taylor*, 535 U.S. 162, 166 (2002), and "the presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his proceeding", *U.S. v. Crone*, 466 U.S. 648, 659 (1984).

Thus counsel's absence at the hearing to set a trial date should have been presumed prejudicial because, "constitutional error" existed without any showing of prejudice when counsel was either totally absent or prevented from assisting the accused during a critical stage in the proceeding.", *Bell v. Cone*, 535 U.S. 685, 695-96(2002).

The lower courts reasoning that counsel isn't deficient when the prevailing professional norm of prosecutors and defense attorneys agreeing to trial dates outside of court, is unconvincing and absurd. This practice completely denies the defendant his ability and right to participate in setting the trial date and in bringing up any concerns regarding time conflicts with his wife.

tnesses or any other concerns he may have and interferes with his ability to assert his sixth amendment constitutional right to a speedy trial through the assistance of counsel. This means when counsel is absent the deficient performance prong of Strickland is easily met.

The lower courts reasoning that the petitioner could only show prejudice if his statutory right to a speedy trial was infringed upon by counsel's absence is also absurd and unconvincing. First this court has previously ruled that when counsel is absent at a "critical stage" of the proceedings or when there is an "actual or constructive denial of assistance of counsel"(see Cronic Strickland, Taylor, Satterwhite, and Bell.) Then prejudice need not be proven and must instead be presumed. Further the lower court only considered prejudice under the statutory speedy trial right and improperly presumed the trial date would be the same and failed to take into account the effect of petitioner asserting the right that there was a reasonable probability of a different outcome by a different trial date being selected which could have impacted any number of factors such as witness availability. As a matter of a defendant alleging a sixth amendment violation must demonstrate " a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different", Mickens v. Taylor, 535 U.S. 162,166 (2002) quoting Cronic at 694. This means counsels absence at this critical stage automatically meets the prejudice prong because prejudice must be presumed.

Thus the lower courts seriously misinterpreted Strickland by requiring petitioner prove prejudice for absent counsel. This co-

urt should correct that misinterpretation and make it clear that when counsel is absent at the hearing to set the trial date his performance is both deficient and prejudicial because his absence deprives a defendant of the fundamental fairness of participating in selecting a trial date and asserting his constitutional speedy trial right, and that the proper application for such an ineffective counsel claim is not simply the Strickland prejudice prong but the standard decided in cronic where prejudice must be presumed due to counsel's absence at a critical stage of the trial.

2. This case presents a fundamental interpretation of this courts decision in Weaver v. Massachusetts, 137 S.CT 1899(2017), Strickland, and Cronic. The question presented is of great public importance because it affects their right to attend judicial proceedings that are conferred on them by the U.S. constitution. Guidance on the question is also of great importance to criminal defendants because it affects their right to have the public present at the trial as well as fundamental fairness in proceedings.

The issues importance is enhanced by the fact that the lower courts have seriously misinterpreted and unreasonably applied Weaver (limiting the holding to "the context of trial counsels failure to object to the closure of the courtroom during jury selection") Weaver at 1907, and "the violation of the public trial right is a structural error" Weaver at 1908. This court made it clear that it's ruling requiring a showing of prejudice was being "narrowly applied" in that case to the issue of court closure during jury selection brought under ineffective counsel and was NOT meant to be applied mechanically to every claim of a public trial

violation due to ineffective counsel. The court also made it clear that there must be a consideration of the facts surrounding the closure and it's impact on fundamental fairness. Counsel's deficient performance is prejudicial if "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable", Strickland v. Washington, 466 U.S. 668, 687(1984), and that a proceeding can be rendered unreliable and unfair even if the errors of counsel can't be shown by a preponderance of evidence to have determined the outcome, Strickland at 694. Further, " the ultimate inquiry must concentrate on the 'fundamental fairness' of the proceeding, even if there is no showing of a reasonable probability of a different outcome, relief must still be granted if the convicted person shows that the attorney errors rendered the trial fundamentally unfair", Weaver at 1911. The lower courts ignored this key part of the opinion and ruled petitioner was required to show prejudice and failed to consider the unique circumstances surrounding the closure when ruling petitioner failed to show how the trial was fundamentally unfair.

It is clear that petitioner's case is substantially different from the one in Weaver. First, the closure occurred unnecessarily during the CCTV testimony of the complaining witness, while counsel was absent from the courtroom and petitioner had no private, contemporaneous communication with him during the testimony and counsel never left the CCtv testimony room to advise petitioner of his right to a public trial. Second, the closure was not temporary and was closed for the remainder of the trial beginning with D.B.'s cross-examination by the defense and was done while

D.B. testified and where her identity might be stated.

The lower courts noted there are exceptions to the public trial guarantee and excused the violation by ruling petitioner's case is an exception to the structural error rule because it involves an alleged minor victim of sex assault. The lower courts applied the decades old case of *Bell v. Jarvis*, 236 F.3d 149,167-68 (4th cir. 2000) that involved an alleged victim of sex assault where the public was denied access temporarily during regular court testimony, after the court ruled on the delicate nature of the testimony and agreed to the temporary closure in order to protect the individual's emotional and mental well-being from testifying in person in the physical presence of the public. Other federal circuits have ruled it unconstitutional to close the court during the testimony of alleged minor victims of sex assault and relief must be granted, *U.S. v. Thunder*, 438 F.3d 866,868 (8th cir. 2006); *Davis v. Reynolds*, 890 F.2d 1105, 1110-12(10th cir. 1989).

The lower courts reasoning that sex assault testimony is an exception to the right to a public trial is entirely unconvincing. It relied on *Bell* that contained that holding. However, the facts in *Bell* were significantly different from petitioner's case in that it was decided before implementation of Virginia statute § 18.2-67.9 codifying the CCTV process, which was enacted to preserve the public's right to attend the trial of alleged minor victims of sex assault, as well as the defendant's right to a public trial while protecting alleged victims physical and psychological well-being while still testifying in front of the public, jury and defendant.

In petitioner's case no such finding of the witness's condition was made, "the 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." *Waller v. Georgia*, 467 U.S. 39, 48(1984). Further D.B. was physically absent from the courtroom and testified over CCTV in a completely separate room. Weaver at 1913 (explaining some circumstances might warrant a presumption of prejudice such as if "if defense counsel errs in failing to object when the government's main witness testifies in secret".)

The lower courts unreasonably determined there was no prejudice by the closure and failed to consider the totality of the circumstances in ruling the trial was not fundamentally unfair.

First, the commonwealth waited until defense cross-examination to request the closure thereby depriving petitioner the right and same opportunity the commonwealth had for the public to attend the complaining witness's testimony, and denying the public it's right to attend for the remainder of the trial because D.B.'s identity could be and was stated multiple times throughout the rest of the trial, leading to a breakdown in the adversarial process and causing the witness to testify in secret.

Finally petitioner could not object to the closure because co-counsel was absent from the courtroom and didn't come out of the CCTV room to inform and advise him of his public trial right, constitutional error "existed" without any showing of prejudice when counsel was either totally absent or prevented from assisting

the accused during a critical stage in the proceeding." Bell at 695-96. There are three situations implicating the right to counsel that involves circumstances " so likely to prejudice the accused that the cost of litigating their effectin a particular case is unjustified" and the first and "most obvious" is " the complete denial of counsel" or where the accused is denied the presence of counsel at a " critical stage". Bell at 695 quoting cronic at 658-59. "The presumption that counsels assistance is essential :: requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Cronic at 659.

This closure occurred during the complaining witness's CCTV t-
estimony without private contemporaneous communication between d-
efendant and defense counsel and where the presence of the public
may have influenced the court's decision to continue the CCTV te-
stimony without private contemporaneous communication between co-
unsel and defendant. This court has said that in addition to ens-
uring that the judge and prosecutor carry out their duties repon-
sibly, a public trial encourages witnesses to come forward and d-
iscourages perjury, In re Oliver, 333 U.S. 257,270(1948).

Criminal defendants and the nation at large require this court to make a clear ruling that prejudice must be presumed and that a trial is rendered fundamentally unfair in a public trial violation under an ineffective assistance of counsel claim when the court is closed to the public, beginning with CCTV crossexamination testimony of the complaining witness without private contemporaneous communication between defense counsel and defendant, and which closure pervaded throught the entire remainder of the trial.

CONCLUSION

For the foregoing reasons, certiorari should be granted in this case.

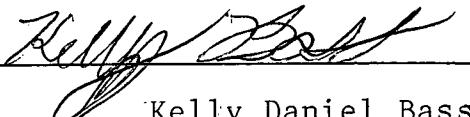
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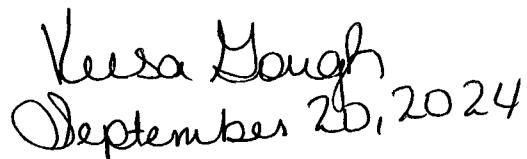
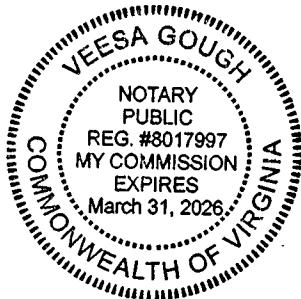
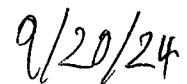
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Respectfully submitted



Kelly Daniel Bass



Veesa Gough
September 26, 2024