

1 haven't met your burden. I mean, what we've said is
2 that the whole burden analysis kind of goes out the
3 window because this is so hard to prove because it's so
4 speculative.

5 So it's really not a question of who has the
6 burden. It's just never been the way we've addressed
7 the structural error category.

8 MS. O'CONNELL: I -- I think in -- in
9 Strickland, it's clear that the -- the -- proving each
10 prong of Strickland deficient performance and prejudice
11 is on the defendant. And so, I guess, it is our
12 position that even though it's difficult to prove -- I
13 mean, the test is not meant to be easy. We're looking
14 to identify cases where the error, the attorney's
15 error --

16 JUSTICE KAGAN: Well, it's not meant to be
17 easy, but it's meant to be possible. And what we've
18 said in our structural error cases is that it's not
19 possible in a very, very large proportion of them.

20 MS. O'CONNELL: Well, I guess I'd like to
21 push back on that a little bit, though, and -- I mean, I
22 could give an example in the public-trial context in
23 specific where, you know, a lot of times when this
24 particular right is at issue or is violated, it's with
25 respect to the courtroom closure for one witness, say an

1 undercover police officer, a rape victim, a child, or
2 something like that.

3 And if -- you know, if the courtroom is
4 closed for that witness's testimony and there's no
5 objection, and on appeal, the -- the court of appeals
6 says, oh, well, that was a -- that courtroom closure was
7 unjustified under the Waller factors. And if that
8 witness didn't testify or wouldn't have testified to
9 those things but for the courtroom closure, you could
10 absolutely evaluate that and see if there was a
11 reasonable likelihood the trial would have come out
12 differently had that witness not testified.

13 So I -- I don't think it's the case that --
14 it may be a general rule across the board that
15 structural errors are difficult to prove, but I don't
16 think it's true in every case.

17 CHIEF JUSTICE ROBERTS: Is the difficulty in
18 any particular case something that can be weighed in
19 determining whether the defendant has carried his burden
20 of showing prejudice?

21 I mean, in some of these, you say -- I guess
22 we haven't required in some Batson cases, I think it
23 would be -- that's where I do think it would be almost
24 impossible to put the burden on showing prejudice. On
25 the other hand, denial of counsel of choice, I would

1 think that would be pretty easy to show whether there's
2 prejudice or -- or not, right?

3 Is that something a judge, reviewing whether
4 there's been an adequate showing of prejudice, can take
5 into account, or is it all or nothing?

6 MS. O'CONNELL: I -- no, I think so.

7 In Strickland, I think it's page 459 of
8 Strickland, the Court describes the test for how to do a
9 case-by-case prejudice inquiry under Strickland. And
10 the Court looks to, was the evidence against this
11 defendant overwhelming. Was the error that occurred
12 pervasive, in that it affected everything that happened
13 in the trial, or was it just limited to one particular
14 witness or one particular thing.

15 So I think, you know, under Strickland, the
16 test is flexible enough that courts could take into
17 consideration what type of an error it was.

18 I think Justice Gorsuch --

19 JUSTICE KENNEDY: How -- how about here?
20 And we get into the whole problem with speedy trial,
21 they close it -- pardon me -- lack of public trial.
22 They close it for an hour, they close for half a day,
23 they close it for a day, they close it for two days,
24 they close it for the voir dire.

25 How -- how do we go about looking at that?

1 Is -- is that presented in this case?

2 MS. O'CONNELL: Well, I think this case has
3 been litigated on the assumption that there was a Sixth
4 Amendment violation here. If this was our own case,
5 there is a triviality exception to the Sixth Amendment
6 public-trial right that's recognized in the Federal
7 courts. We've actually taken the position in -- in
8 various cases that a courtroom closure during voir dire
9 is not a Sixth Amendment violation because it doesn't
10 undermine the -- the purposes of the public-trial right.
11 But I think this Court comes -- this case comes to the
12 Court on the assumption there was a Sixth Amendment
13 violation. But -- but I think the Court can take into
14 account that it was closed for only a limited amount of
15 time in determining prejudice under Strickland.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 Ms. O'Connell.

18 Mr. Kimberly.

19 REBUTTAL ARGUMENT OF MICHAEL B. KIMBERLY

20 ON BEHALF OF THE PETITIONER

21 MR. KIMBERLY: Thank you, Your Honor. Just
22 a few brief points.

23 First, Justice Kennedy, to address what you
24 just -- the hypothetical and -- and line of questions
25 that you just raised.

1 The question there, I think, is whether a
2 public-trial violation happened at all. And although
3 there may be difficult cases where it's unclear whether
4 a closure of a particular length, or the exclusion of
5 some and not all actually amounts to a public-trial
6 violation. After *Presley v. Georgia*, there's no
7 question --

8 JUSTICE GORSUCH: What about -- what about
9 counsel's argument we just heard a moment ago, that
10 there's a triviality exception. Might this case qualify
11 for that?

12 MR. KIMBERLY: So, one, we don't disagree
13 that there is a triviality exception. It certainly
14 would not qualify after *Presley v. Georgia*. The
15 triviality question comes in at the threshold issue of
16 whether there has been a violation of the public-trial
17 right at all.

18 There's no question, under this Court's
19 precedence, and certainly the way that the lower courts
20 uniformly have treated public-trial errors after *Waller*,
21 that when it is determined that the Sixth Amendment
22 right to a public trial has been violated, it is
23 structural. And so triviality comes into whether there
24 was, in fact, a violation, not whether, assuming there
25 is one, it's structural. If it happened --

1 JUSTICE GORSUCH: I understand. But why
2 should we assume there was one here? Why wasn't --

3 MR. KIMBERLY: Well, I don't think the Court
4 needs to look any further than *Presley v. Georgia*.
5 *Presley v. Georgia* involved precisely the same
6 circumstances here. The courtroom was overcrowded, the
7 judge closed the courtroom to the public, and this Court
8 said, in a 7-2 decision, that it was a violation of the
9 public-trial right.

10 If I may, Justice --

11 JUSTICE GINSBURG: It didn't -- didn't get
12 involved with the structural. It was -- that was a per
13 curiam opinion. And it was -- and just the question
14 was, does it -- does it violate the public-trial right?
15 Yes. But *Presley* doesn't go on to say what the remedy
16 should be when that's not brought up by counsel, and
17 your own --

18 MR. KIMBERLY: That's correct, Your Honor.
19 That question is answered by *Waller* itself, which said
20 that it's the proceeding itself that's closed that has
21 to be redone. And so the upshot of a courtroom closure
22 during an entire jury empanelment is that the jury
23 empanelment has to happen again. The idea is that a
24 jury empaneled behind closed doors is not a fair jury.
25 And so it's the same sort of analysis that might arise

1 in a Batson case. The jury, not being fairly
2 constituted, the trial has to take --

3 JUSTICE BREYER: What about using it -- if
4 we're going to distinguish among substantial -- among
5 structural errors, taking the standard out of Allano and
6 saying those that seriously affect the fairness,
7 integrity, or public reputation of judicial proceedings,
8 if the -- if the procedural -- if the structural error
9 rises to meet that standard, then -- then you don't have
10 to show prejudice. But if it doesn't, then you'd
11 better. Now, that would harmonize the plain error and
12 this proceeding which can come up in the -- in a
13 collateral proceeding.

14 MR. KIMBERLY: Yes. So -- so I wanted to
15 say a couple things that --

16 JUSTICE BREYER: What do you think about
17 that?

18 MR. KIMBERLY: I don't think that there's a
19 basis in this Court's structural error precedence --

20 JUSTICE BREYER: No, that's true.

21 MR. KIMBERLY: -- for drawing --

22 JUSTICE BREYER: But you're asking us --
23 you say, no, none. Just take structural error as your
24 category, and -- and period, and that's it.

25 MR. KIMBERLY: Right.

1 JUSTICE BREYER: Okay. Now, but they --
2 they want -- and they want to go to the other extreme,
3 basically. But if we're cutting this child in two, what
4 about that as a standard?

5 MR. KIMBERLY: I -- I guess it's, at least
6 as we understand what this Court has said about
7 structural errors, which is that they undermine -- and I
8 should say, in particular, the public-trial right, which
9 goes to the very perception of the judiciary by the
10 public and -- and undermines, in our view, certainly,
11 and this Court said in *Richmond Newspapers* and
12 *Press-Enterprises*, that courtroom closures -- and those
13 cases, by the way, were --

14 JUSTICE GORSUCH: But that's the third
15 prong. You're not answering Justice Breyer's question,
16 with respect. That gets you past the third prong, but
17 it doesn't get you home in an unpreserved error case.
18 You still have to meet the fourth prong.

19 MR. KIMBERLY: That's true. To be clear,
20 though, I mean, I think that would be true in a trial
21 error context as well. That's just to say that the --

22 JUSTICE GORSUCH: Right.

23 MR. KIMBERLY: -- the two tests don't
24 overlap. And so, yes, it is true that sometimes relief
25 will be available on collateral review under *Strickland*,

1 even where it is not available on direct review under a
2 plain error standard. But I -- I think that's --

3 JUSTICE GORSUCH: Doesn't that seem highly
4 unlikely? I mean, a structural error, we think is
5 important, but it isn't automatically a winner every
6 single time if you don't preserve it.

7 MR. KIMBERLY: May I answer?

8 CHIEF JUSTICE ROBERTS: Please.

9 MR. KIMBERLY: That's right, Your Honor. I
10 don't think there's anything particularly unseemly about
11 that, because, again, that is exactly how the Court
12 approaches the exact same question in the context of
13 trial errors. It may be that a forfeited trial error
14 affects substantial rights and yet, it gets filtered out
15 at prong 4 of the Allano test --

16 JUSTICE GORSUCH: Thank you.

17 MR. KIMBERLY: -- and -- and so that could
18 be raised on a Strickland basis, and counsel could
19 obtain -- the defendant could obtain relief in that
20 context.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 The case is submitted.

23 (Whereupon, at 12:11 p.m., the case in the
24 above-entitled matter was submitted.)

25

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