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IN THE SUPREME COURT OF THE UNITED STATES

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KENTEL MYRONE WEAVER, :

Petitioner : No. 16-240

v. :

MASSACHUSETTS, :

Respondent. :

- - - - - x

Washington, D.C.
Wednesday, April 19, 2017

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:11 a.m.

APPEARANCES:

MICHAEL B. KIMBERLY, ESQ., Washington, D.C.; on behalf of the Petitioner.

RANDALL E. RAVITZ, ESQ., Assistant Attorney General, Boston, Mass.; on behalf of the Respondent.

ANN O'CONNELL, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting the Respondent.

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P R O C E E D I N G S

(11:11 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 16-240, Weaver v. Massachusetts.

Mr. Kimberly.

ORAL ARGUMENT OF MICHAEL B. KIMBERLY

ON BEHALF OF THE PETITIONER

MR. KIMBERLY: Thank you, Mr. Chief Justice, and may it please the Court:

The upshot in practice of the Commonwealth's proposed rule in this case is that when a criminal defendant like Petitioner demonstrates that his trial counsel failed to preserve the fundamental fairness of the criminal proceeding by failing to object and, therefore, allowing to stand a structural error, the gravest kind of constitutional error there can be in the course of a criminal trial. It would be impossible for the defendant to obtain relief under Strickland against Washington for ineffective assistance of counsel. And that's because the Commonwealth says that such -- all such defendants must prove actual prejudice resulting from their attorney's deficiency.

But the problem is that when an attorney deficiency results in a structural error, it will be practically impossible to demonstrate what the practical

1 affects of --

2 JUSTICE GINSBURG: The problem is the
3 structural errors -- I think one brings -- put it this
4 way -- come in all sizes and shapes. So here we have
5 not -- not an exclusion of public from the trial itself.
6 It's only the from the jury selection.

7 But I take it your view is it doesn't
8 matter. If it had been the first day of the jury
9 selection, everything else is open, or if the entire
10 proceedings were closed. Structural error -- you go
11 from structural error directly to new trial.

12 Do you make any distinctions between kinds
13 of errors that we have called structural?

14 MR. KIMBERLY: The short answer, Your Honor,
15 is no. There are distinctions to be made in -- in the
16 context of the public-trial right, for example. Those
17 distinctions play out as -- at the threshold question
18 whether the public-trial right, in fact, has been
19 violated.

20 But certainly what this Court suggested in
21 Waller where the courtroom closure was for a -- a
22 suppression hearing at the outset of the trial and not
23 the entire trial, that when the public-trial right is
24 deemed to have been violated, it is itself structural.

25 That doesn't mean, as -- as -- as Justice

1 Stevens recognized in footnote 23 of his concurrence in
2 Reporters Committee, that doesn't mean that the
3 public -- that every single closure of the courtroom
4 necessarily implicates the public-trial right as the
5 framers of the Sixth Amendment would have understood it.
6 For instance, sidebars and in some -- in some instances
7 chambers conferences and certainly any circumstance in
8 which the State is -- is able to pass the -- a strict
9 scrutiny test established by Waller, those sorts of
10 closures, although closures in the technical sense,
11 would not be closures in the constitutional sense.

12 CHIEF JUSTICE ROBERTS: I -- I -- this may
13 not be directly pertinent, but why was the courtroom
14 considered closed? I mean, it was filled with members
15 of the public. Now, they were there as part of the jury
16 pool, but, of course, they weren't all chosen.

17 I mean, what was the -- did the judge have
18 to set aside how many seats for people who weren't
19 actually being called for jury duty before you would
20 conclude that the courtroom was not closed?

21 MR. KIMBERLY: Well, I -- I would have
22 thought that the courtroom -- so the --

23 CHIEF JUSTICE ROBERTS: Not -- I mean, it's
24 a limited space. There's only so many --

25 MR. KIMBERLY: Sure.

1 CHIEF JUSTICE ROBERTS: -- spaces and
2 it's -- you know, he's got to get the jury pool in there
3 and, you know, they took up all the space. So you
4 must -- your position must be on the error itself that
5 the judge should have kept aside certain seats for
6 people who weren't being called for jury duty. I'm just
7 curious how many that is.

8 MR. KIMBERLY: So I -- there are two
9 elements to that question. I'll take them each in turn.

10 The first is we know that the courtroom was
11 closed because members of the public and -- indeed,
12 every member of the public who expressed an interest in
13 attending the proceeding who was not a member of the
14 jury venire was turned away, actively turned away.

15 CHIEF JUSTICE ROBERTS: Well, but -- but
16 you -- presumably, I guess the argument is, well, they
17 were turned away because there was no -- no room. And
18 there was no room because the courtroom was full of
19 members of the public who were called for jury duty.

20 MR. KIMBERLY: So -- and that leads to the
21 second answer. And -- and -- and that is, as this Court
22 held in Presley, first of all, courtroom crowding is not
23 a sufficient answer for turning away -- a sufficient
24 justification for turning away other members of the
25 interested public.

1 CHIEF JUSTICE ROBERTS: I'll have to go back
2 and look at Presley, but courtroom overcrowding is not a
3 justification for turning away other people, what are
4 they supposed to do?

5 MR. KIMBERLY: Well, but to be very clear,
6 that is precisely what happened in Presley. Presley,
7 the -- the --

8 CHIEF JUSTICE ROBERTS: What did they say in
9 Presley that you were supposed to do? In other words,
10 there's no room in the courtroom, and you say, well,
11 that's not a justification for keeping people out.

12 MR. KIMBERLY: So the answer is very simply
13 bringing in the jury venire in groups of, say, 40 rather
14 than allowing all 90 in at once. There are a range of,
15 I think, very practical solutions to this particular
16 problem that would have allowed the judge to keep the
17 gallery open to members of the public.

18 JUSTICE SOTOMAYOR: Presumably, lawyers are
19 members of the public. The judge is a member of the
20 public. The bailiff is a member of the public. I'm
21 presuming that once those jury members -- if they were
22 given a choice, would not be there.

23 (Laughter.)

24 JUSTICE SOTOMAYOR: And so I think they have
25 stopped being a member of the public as might be

1 understood with respect to access. I think one thinks
2 of members of the public as anyone who might be
3 interested, but not compelled to be in attendance.

4 MR. KIMBERLY: Right.

5 JUSTICE SOTOMAYOR: All right. So I think
6 what Presley said, if I'm not mistaken, is that you
7 can't keep out interested people just because of
8 overcrowding.

9 MR. KIMBERLY: That's exactly right. And I
10 think underlying that holding is a recognition that not
11 all members of the public are the same. So in this
12 instance, for instance, the members of the public who
13 were excluded from the proceeding were the defendant's
14 own mother, his mother's boyfriend, sister, and pastor.

15 And -- and so bearing in mind that the jury
16 empanelment is the point at which the defendant is
17 introduced to the judge and jury for the first time,
18 it's the first opportunity for the defendant to make an
19 impression on the people who decide his or her guilt or
20 innocence, it makes a real difference both in terms of
21 how the defendant behaves, that members of the
22 interested public, not just any member of the public,
23 but his support system, his friends and family, are
24 present.

25 It has an effect on his demeanor and the

1 confidence with which he presents himself, but it also
2 has an effect on how the jury perceives him. Because
3 what does it say that at the first time that the
4 members, again, of the jury who are going to decide this
5 young man's guilt or innocence, he is presented to them
6 without the support even of his mother.

7 JUSTICE ALITO: So what -- what you're
8 saying, and I -- I think this is true -- is that there
9 are circumstances in which closing the courtroom can
10 have an effect on the outcome of the -- of the trial.

11 But, conversely, is it your position that
12 it's never possible for there to be a violation of the
13 right without there being an effect on the trial; that
14 it's never possible to show that this could not have had
15 any effect on the outcome?

16 MR. KIMBERLY: I think that's right. It's
17 to say that -- and -- and this is reflected in this
18 Court's precedence --

19 JUSTICE ALITO: As a practical matter --

20 MR. KIMBERLY: -- in -- in Waller.

21 JUSTICE ALITO: As a practical matter, it's
22 never possible to show that it -- there -- it would --
23 there would be no outcome -- no effect on the outcome?

24 MR. KIMBERLY: I -- I think this is
25 precisely the sort of situation that the Court

1 recognized in Gonzalez-Lopez about the right to counsel
2 of choice. That is a --

3 JUSTICE ALITO: So in this --

4 MR. KIMBERLY: -- speculative inquiry.

5 JUSTICE ALITO: In -- in this case, what's
6 your best theory about how this could have affected the
7 trial? What happened here?

8 MR. KIMBERLY: Well, as I was just
9 describing, there's no way to tell what effect the
10 presence of the defendant's mother would have had on the
11 impression made to the jurors, who, again, were first
12 introduced to him and -- and formed their first
13 impression of him sitting alone without the support of
14 anybody. There's no way to know what effect it had on
15 his own demeanor. There's no way to know what the
16 effect of his -- his mother's and -- and pastor's
17 presence would have had on the demeanor of the attorneys
18 and the judge.

19 These are all completely -- and -- and as --
20 as we say, it may be that the attorneys may have
21 exercised preemptory challenges in different ways. It
22 may be that prospective jurors moved by the differences
23 of the presence of the public would have answered
24 questions in somewhat different ways and would have
25 formed different inquit attitudes about the defendant.

1 These are completely unknowable and
2 indeterminate effects, though. And that's exactly what
3 this Court said in Waller, and it's why since Waller,
4 the lower courts have universally treated the question
5 of a courtroom closure as a structural error as to which
6 harmless error on direct appellate review simply cannot
7 be demonstrated. And -- and we think certainly that
8 exact same analysis applies with respect to Strickland,
9 actual prejudice.

10 JUSTICE ALITO: Well, suppose the two people
11 who couldn't get in were members of the public, but not
12 the defendant's mother and her pastor.

13 MR. KIMBERLY: Well, again, I think it would
14 depend on -- on who they are. I think the difficulty
15 here also is there's no way to tell what sort of the
16 downstream effects of the closure are outside the
17 courtroom. It may be that those who were excluded the
18 first day let be known to others that the courtroom is
19 closed, and others then don't plan to show up and -- and
20 don't even bother to come in.

21 JUSTICE SOTOMAYOR: Could -- could I ask
22 you, though, there is a big difference between the
23 absence of an attorney at trial or a conflict of
24 interest. In both those situations, there's not a
25 possibility of waiver or forfeiture -- the -- knowing

1 waiver or forfeiture because a conflicted counsel has
2 failed to tell someone a truth that they're conflicted
3 and gotten themselves off the case. Absence of counsel
4 is the very essence of the violation.

5 MR. KIMBERLY: Sure.

6 JUSTICE SOTOMAYOR: The defendant doesn't
7 know enough to object. But here there are serious
8 questions about waiver and forfeiture. It's -- why
9 wouldn't it be in the best interest of every attorney to
10 say, I didn't know that a closure was a constitutional
11 violation, the way this gentleman did? Isn't that --

12 MR. KIMBERLY: In -- in -- in circumstances
13 where that isn't actually the truth?

14 JUSTICE SOTOMAYOR: No. In every
15 circumstance.

16 MR. KIMBERLY: So --

17 JUSTICE SOTOMAYOR: In -- in virtually every
18 circumstance, the lawyer knows there's been a closure.
19 There's been plain error in his failure -- his or her
20 failure to object. So how does the judge determine
21 whether that waiver or forfeiture should or should not
22 be held against the defendant?

23 MR. KIMBERLY: Well, I think the same way
24 that the judge would do so in any case implicating a
25 Strickland claim based on a failure to object. The --

1 the threshold question is whether the attorney rendered
2 deficient performance. And in this case, for example,
3 at pages 7 and 8 of the Joint Appendix, there's no
4 question that the defense attorney here acknowledged
5 that the sole reason he declined to object to the
6 courtroom closure was he did not know that it was a
7 violation of his client's public trial right, and if he
8 had known, he would have raised an objection. That's
9 a -- I think a straightforward case of deficient
10 performance.

11 Now, it -- it's true the Commonwealth and
12 the United States have raised the possibility of
13 sandbagging in a circumstance where a defense counsel
14 who in fact does know about the violation of the right
15 and nevertheless declines to raise it to preserve the
16 possibility of bringing a Strickland claim later, but
17 that turns on the presumption that the defense attorney
18 would make a material represent -- misrepresentation to
19 the Court in later collateral proceedings, address it --
20 addressed at that -- at the question of the first prong,
21 whether he rendered deficient performance.

22 JUSTICE GORSUCH: Well, why doesn't that
23 follow, though? Because it seems to me that if it's
24 unpreserved error at trial and we get to appeal, you --
25 you have a choice. In most cases, I see claims are

1 dealt with collaterally. You could either bring it as a
2 plain error of question on direct appeal, but you have
3 to face prong 4 --

4 MR. KIMBERLY: Correct.

5 JUSTICE GORSUCH: -- and show it affects the
6 integrity of the proceedings, or you have a choice. You
7 could bring it in collateral proceedings where you
8 wouldn't have to meet prong 4, and it would actually be
9 easier to win a Sixth Amendment collateral claim than it
10 would be a plain error claim. And it -- it just seems
11 very unusual to me that we create a structure that would
12 incentivize, through honest and good advocacy, defines
13 the -- the normality of the final judgments. So that's
14 question one.

15 And question two is related. Would we then
16 create actually a really perverse incentive for the
17 State to secure IEC waivers from individuals so that
18 they don't confront these kinds of problems, and
19 therefore, kind of a Professor Stunt sort of problem, by
20 perfecting procedure, we actually result in its denial
21 at all.

22 Can you help me with those two problems?

23 MR. KIMBERLY: So the -- the question about
24 plain error, first, I think it depends on the
25 jurisdiction that you're in. In this jurisdiction, for

1 example, Massachusetts --

2 JUSTICE GORSUCH: Well, work with me with
3 the typical jurisdiction. I know Massachusetts is a
4 little different.

5 MR. KIMBERLY: Well, so there -- there are
6 groups of two. Massachusetts falls into one bucket;
7 most of the Federal courts fall into another budget.

8 JUSTICE GORSUCH: Work with -- work with
9 the usual, the Federal jurisdiction, which is
10 predominant in most States, which is that IECs are done
11 collaterally.

12 MR. KIMBERLY: And -- and, actually, I
13 appreciate it. I -- I wouldn't -- I wouldn't deny that
14 this is a collateral proceeding here, and I'm not --

15 JUSTICE GORSUCH: I -- I understand that,
16 but, please, just -- just stick with me.

17 MR. KIMBERLY: So under Rule 54(b) in the
18 Federal proceeding -- in -- in the Federal context, this
19 would be Olano four-pronged plain error context, we --
20 we think it's true that, for the most part in the way
21 that the lower Federal courts have dealt with it, is
22 that the third prong -- effect on substantial rights, is
23 presumed when there is a structural error. And so, I
24 think, as a practical matter --

25 JUSTICE GORSUCH: It's still a prong 4,

1 though, right?

2 MR. KIMBERLY: It's still a prong 4. And I
3 think that's why, for instance, there's an opportunity
4 for the Court to avoid sandbagging, if there's any
5 concern that the -- that the defense counsel knew about
6 it and kept the objection.

7 JUSTICE GORSUCH: Defense counsel just
8 doesn't bring it -- doesn't bring it on direct appeal.
9 Good defence counsel wouldn't bring it, and would leave
10 it for collateral review in most jurisdictions.

11 MR. KIMBERLY: Sure. I mean, I think in
12 that circumstance, very frequently, plain error review
13 would be available. I'm sorry to push back --

14 JUSTICE SOTOMAYOR: It's available. The
15 question is, wouldn't the judge be doing exactly what's
16 happening here? Wouldn't the judge, under the fourth
17 prong, look at what actually happens, whether the
18 closure was complete, part of the trial, was there a
19 transcript of the voir dire --

20 MR. KIMBERLY: Uh-huh.

21 JUSTICE SOTOMAYOR: -- so that they could
22 measure the possible effects or not, and end up saying
23 that the substantial integrity of the proceedings
24 haven't been violated?

25 Do you think that, as a matter of law, we

1 could overrule a finding of that nature, if it was in
2 direct review under plain error?

3 MR. KIMBERLY: I think in most circumstances
4 in -- in -- where there's a structural error that passes
5 the third, it will almost always pass the fourth. I --

6 JUSTICE SOTOMAYOR: Oh, that's not the --
7 the lessons of our case law.

8 MR. KIMBERLY: Well, there's -- I -- I --

9 JUSTICE SOTOMAYOR: I think reverse is true
10 of our case law.

11 MR. KIMBERLY: I -- I don't mean to deny
12 that the fourth prong has -- has -- does real work.
13 It -- it certainly does, and there are case-specific
14 circumstances in which maybe then the appellate court
15 would decline to grant relief on collateral review,
16 and the defendant would, in that circumstance, be able
17 to bring a collateral challenge under Strickland.

18 The -- the one -- I just want to push back a
19 little bit on the hypothetical, because, in fact, there
20 are a number of State jurisdictions in which plain error
21 review of this sort isn't available at all because they
22 decline to presume prejudice on whatever the equivalent
23 of Olano prong 3 is, and Massachusetts is such a State.

24 And so in our case, in -- in any State court
25 jurisdiction where State courts have leeway to undertake

1 whatever plain error -- procedural plain error rules
2 they like, they aren't bound by this Court's or the
3 Federal courts' precedence on Rule 54(b). They can, and
4 very frequently do, say that you have to show actual
5 prejudice -- actual prejudice in the sort of Strickland
6 sense for relief under plain error.

7 And in that circumstance, Strickland is a
8 critical, we think, relief valve. It's the only way
9 of -- of getting later review in the circumstance where
10 the structural error perpetuated by the attorney's
11 deficient failure to object renders the trial
12 fundamentally unfair. And I -- I think it bears -- it
13 bears emphasis to recall that the Commonwealth does not
14 deny that if there were an objection in this case, the
15 defendants in this case, and in other cases like it,
16 would be entitled to a new trial automatically on direct
17 appeal.

18 The Commonwealth does suggest putting that
19 error -- and -- and remember, structural errors go to
20 the fundamental fairness of the proceeding. They
21 are the -- the gravest sort of constitutional errors
22 possible in the course of a criminal proceeding.
23 Putting that error together with the additional injury
24 of having been appointed counsel by the court, who's too
25 ignorant to know to object to the structural violation,

1 that the defendant should be completely out of luck.

2 CHIEF JUSTICE ROBERTS: The -- the
3 structural errors are not the most grievous errors
4 possible in the criminal process. They are a particular
5 type of error, which the assumption is there's no way to
6 tell whether they're prejudicial or not. But, I mean,
7 this -- this may be a good case. That doesn't mean
8 they're the most shocking miscarriages of justice you
9 can imagine.

10 MR. KIMBERLY: Well, I -- I don't think that
11 they're necessarily shocking, but I would say that this
12 Court's structural error precedents make clear that
13 although one feature of a structural error is that it's
14 impossible to -- to determine the practical
15 consequences, it is an independent feature of structural
16 errors that they render the trials fundamentally unfair.

17 The idea is that the rights that are
18 protected by the structural error doctrine are just
19 essential elements to a fair trial. And so take, for
20 example, the -- the right to trial by jury. Under the
21 Commonwealth --

22 CHIEF JUSTICE ROBERTS: Yeah. You're
23 picking good ones, but, I mean, I -- I can come up with
24 a long list of things that I think are more serious
25 violations than the exclusion of the public from voir

1 dire when you have the other jury members there. I
2 understand that that is an error, and I -- the argument,
3 of course, that it is a structural error; but I'm just
4 quarreling with the idea that these are the most
5 grievous miscarriages of -- of justice you can imagine.

6 There are particular characteristics of them
7 that put them in a different category. The -- the --

8 MR. KIMBERLY: And --

9 CHIEF JUSTICE ROBERTS: A list of errors
10 that could occur in criminal procedure, I think you'd
11 agree, there's some that you would put ahead of
12 excluding members of the public from voir dire when the
13 courtroom is otherwise full.

14 MR. KIMBERLY: I -- I -- and I didn't mean
15 to suggest or -- or overstate the grievousness of the
16 error. What I meant to suggest is that these are a
17 category of errors where the Court recognizes that their
18 denial -- that the denial of the rights protected by
19 this doctrine render the proceeding automatically
20 suspect and -- and inherently unfair.

21 JUSTICE KAGAN: But, in a way, Mr. Kimberly,
22 I mean, you don't have to convince us of that, do you?

23 MR. KIMBERLY: I -- I hope not.

24 JUSTICE KAGAN: Yeah. No. I'm saying you
25 don't have to convince us, because -- because one of the

1 things that we've said over and over about structural
2 error is that it's -- it's impossible to show how they
3 affected the trial.

4 MR. KIMBERLY: That's correct.

5 JUSTICE KAGAN: And -- and that's really
6 what's at issue here, is whether we should put the
7 defendant to the burden of showing how it affected the
8 trial, when, in fact, we've said over and over that you
9 can't do that.

10 MR. KIMBERLY: I think --

11 JUSTICE KAGAN: So whether they're
12 important, whether they're not important, whether
13 they're critical to fundamental fairness or not, you
14 know, is, in some ways, beside the point.

15 MR. KIMBERLY: Well, I -- so I think there
16 are two independent ways of thinking about it, and that
17 certainly is -- is one very important way of thinking
18 about it. It's something that we stress in our
19 briefing, and I -- I think that's absolutely right.
20 This is the point about putting two wrongs together and
21 just saying --

22 JUSTICE ALITO: Well, it's not a question of
23 putting two wrongs together. I mean, the Commonwealth's
24 argument and the argument of the United States is that
25 there is no violation of the Sixth Amendment right to

1 counsel unless the -- the counsel's performance deprived
2 the defendant of a -- a fair trial. It's -- this is not
3 a Sixth Amendment speedy trial -- I'm sorry --
4 public-trial act issue. It's a right-to-counsel issue.
5 And prejudice is built into the Sixth Amendment
6 Strickland standard because the defendant had an
7 attorney.

8 So on what theory was the defendant deprived
9 of an attorney? Well, the theory is, although there was
10 somebody sitting next to that defendant and asking
11 questions and pretending to be an attorney, that
12 attorney was so bad that he might as well not have had
13 an attorney. So it's built right in. And so,
14 ultimately, there has to be the determination for there
15 to be a Sixth Amendment right-to-trial violation that
16 there was prejudice.

17 Now, you can make the argument that it's
18 impossible to tell whether there was prejudice, but it's
19 built right into the speedy -- into the -- a right to
20 counsel.

21 MR. KIMBERLY: I -- I think that's exactly
22 right. I wouldn't disagree with anything you said.

23 But that leads me to the second point that I
24 was going to make, and that's that Strickland instructs
25 that the fundamental focus of the ineffective assistance

1 inquiry has to be on the fundamental fairness of the
2 trial. If, therefore, the -- the two -- as we
3 understand the two steps, it's whether there was
4 deficient performance, objectively unreasonable
5 performance, and whether that objectively unreasonable
6 error, in turn, rendered the trial unfair.

7 Now, in the mine run of cases, we do not
8 disagree. In the mine run of cases involving trial
9 errors, the way to prove that the error rendered the
10 trial fundamentally unfair is to show that it was
11 sufficiently serious that it undermined our confidence
12 in the result.

13 JUSTICE ALITO: And -- and you have to say
14 that that's always true, or it's -- it's true in such a
15 high percentage of the cases that there's no point in
16 even making that an issue, no matter how steep the
17 burden that the prosecution might have to satisfy.

18 MR. KIMBERLY: That -- that is -- that is
19 the reasoning underlying Cronic. I think it's somewhat
20 different from what we're suggesting here. What we're
21 suggesting here is that the rights protected by
22 structural errors are fundamental to the American system
23 of criminal justice, and that their denial renders the
24 trial fundamentally and inherently suspect, and
25 therefore, unfair.

1 And so it is simply another way to prove
2 that a defense attorney's objectively unreasonable error
3 rendered the trial unfair to show that it resulted in a
4 structural error. It is the -- it is the hallmark of a
5 structural error that it does exactly that, that it
6 renders the trial unfair.

7 JUSTICE ALITO: Let's put this label aside
8 for a minute. You really think that it's impossible,
9 that there can never be a case where a violation like
10 the one that took place here had no effect on the
11 outcome of the trial?

12 MR. KIMBERLY: Again, I --

13 JUSTICE ALITO: It's impossible to ever --
14 for there ever to be such a case --

15 MR. KIMBERLY: It's -- it's impossible to
16 tell. And what I would say about this is -- I point the
17 Court, for example, to the Eighth Circuit's decision in
18 Stenberg -- excuse me -- Glickman v. -- not Glickman --
19 McGurk v. Stenberg. The issue there was Nebraska had
20 enacted a statute that deprived criminal defendants in
21 DWI cases of a right to trial by jury. The judge had to
22 decide guilt in that case. The -- the defendant was
23 found guilty. He appealed throughout the State system.
24 His appeals were denied.

25 On Federal habeas review, it was not until

1 the Eighth Circuit looked at the case, and the
2 government in that case making the exact same arguments
3 that the Commonwealth and United States here make, the
4 court there said it is no answer to the denial of a jury
5 right to say that the evidence against the defendant was
6 strong. The point is, it was the wrong entity who
7 decided guilt or innocence. It is fundamental to the
8 American system of criminal justice and to our promise
9 of fair trials that criminal defendants be tried by
10 juries.

11 JUSTICE ALITO: Well, that's a different --
12 I mean, that's a different situation. Suppose the only
13 people who wanted to go -- the only members of the
14 public who wanted to be in this -- in the courtroom were
15 the family and the friends of the victims of a crime.
16 So it would be a hostile audience.

17 MR. KIMBERLY: I -- I think -- I think that
18 would implicate many of the same problems that we have
19 here. There's no way to tell the ways in which
20 individuals would have been affected by their presence.

21 It -- it very well may be that that would
22 have cast a defendant in worse light, but there's no way
23 to know. Maybe some members of -- of the jury venire
24 would be off-put by what they viewed as -- as especially
25 egregious behavior in that circumstance.

1 The point is, it -- it remains a speculative
2 inquiry. And -- and I think, as -- as we've suggested,
3 the -- I think the -- the Court's cases on this point
4 really leave very little doubt that, as far as -- as
5 denial of the public trial right goes, there's no way to
6 tell what the difference is.

7 And if, in order to obtain relief, we
8 require defendants to prove what the difference is,
9 it -- it means that, just as a practical matter, there
10 will never be relief for violations of the public trial
11 right that happen to be coupled with the additional
12 injury of defense counsel who don't know to object.

13 I'd like to reserve the balance of my time.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 Mr. Ravitz.

16 ORAL ARGUMENT OF RANDALL E. RAVITZ

17 ON BEHALF OF THE RESPONDENT

18 MR. RAVITZ: Mr. Chief Justice, and may it
19 please the Court:

20 The claim before the Court is one of
21 ineffective assistance of counsel, and requiring
22 individualized prejudice to be proven for claims like
23 that, claims like the Petitioner's, ensures that a
24 criminal judgment is not vacated unless a violation of
25 the right to effective counsel is complete.

1 It tells us whether the defendant's own
2 conviction resulted from a breakdown in the adversarial
3 process, or was likely the -- the right outcome. And it
4 keeps us from upsetting judgments based on attorney
5 errors that had no impact on the verdict.

6 JUSTICE GINSBURG: Supposing this objection
7 had been made at the first opportunity and it's denied
8 by the trial judge. And then it goes up on appeal. So
9 there was a timely objection. Wouldn't it follow, then,
10 that the case has to be -- the judgment has to be
11 vacated and there has to be a retrial?

12 MR. RAVITZ: Assuming the judge's decision
13 was improper, yes, that -- that's what would happen in
14 Massachusetts. But that -- that wasn't the case here.
15 And -- and it's important to recognize the distinction
16 between those two situations, because there are both
17 doctrinal and practical considerations there.

18 The doctrinal ones are that now we are
19 looking at a different type of claim. We're not looking
20 at a public trial claim. We're looking at an
21 ineffectiveness claim. And there must be prejudice in
22 order for that violation to be complete, Gonzalez-Lopez
23 tells us. Not only that, the focus of the prejudice
24 inquiry is different than the focus that it would be if
25 we were looking at a violation of the right to a public

1 trial.

2 Strickland tells us --

3 JUSTICE ALITO: Unless it's a -- unless the
4 fact that it's a structural error is fatal, then in the
5 situation -- in -- in the hypothetical Justice Ginsburg
6 provided, wouldn't it be open to you to prove that it
7 was harmless error beyond a reasonable doubt?

8 MR. RAVITZ: That's -- that's correct if --
9 if it was not a structural error. But if it's -- if
10 it's a structural error, then -- then the government
11 would be precluded from making that -- that showing.

12 JUSTICE KENNEDY: And what's -- and what --
13 is there a structural error in this case, in your view,
14 under the hypothetical?

15 MR. RAVITZ: Where -- where there was an
16 improper closure of the trial, we -- we respect the fact
17 that -- or I should say of jury selection -- we respect
18 the fact that the Court has said that public trial
19 errors are structural, and that the Court has said that
20 the closure of jury selection is a public trial error.

21 However, not all structural errors should be
22 treated the same, and not all public trial errors should
23 be treated the same. They're -- they're very different
24 from one another. There could be a closure for --

25 JUSTICE KENNEDY: And under Justice

1 Ginsburg's hypothetical, there's an objection, the
2 objection is overruled, it's wrongly overruled. And
3 then you say, well, in Massachusetts, we would -- there
4 would be a reversal.

5 What about under the law of the
6 Constitution? Must there be a reversal on the facts of
7 that hypothetical?

8 MR. RAVITZ: The -- this Court in Presley
9 did not address remedies. So if -- if one takes Presley
10 combined with statements about a public trial error
11 being a structural error, takes them together, then --
12 then yes. But the fact is the Court has never expressly
13 said that. It has never said that a Presley error is a
14 structural error.

15 And -- and even if it were to be a
16 structural error, that doesn't mean that it should be
17 treated like every other structural error, or even like
18 every other public trial error.

19 As I said, the courtroom closure could be
20 for a few minutes during --

21 JUSTICE BREYER: Yes, but what -- what's
22 your line?

23 MR. RAVITZ: Excuse me?

24 JUSTICE BREYER: I mean, do you -- suppose
25 that the structural error were excluding

1 African-Americans from the jury, or women from the jury.
2 Okay? That's the error. They select a different jury.
3 All white men. Now, we have no way of knowing whether
4 that made a real difference in that case. We don't
5 know. So it's a structural error.

6 Now, are you saying in such a circumstance,
7 where the lawyer failed to object, et cetera, therefore
8 Strickland, therefore inadequate assistance of counsel,
9 that that isn't the end of it? That there was an all
10 white male jury? Isn't that the end of it, even though
11 we don't know if there was prejudice in the sense that
12 the jury would have decided differently? Is that your
13 position?

14 MR. RAVITZ: It is our position that
15 prejudice would need to be proven.

16 JUSTICE BREYER: You can't. All right? You
17 can't. You can't prove that the jury would have come
18 out differently.

19 So I'd say, at least in my mind, if your
20 point is that even -- suppose they had a -- a trial by
21 inquisition. I mean, you know, I can imagine even the
22 most fantastic examples where you don't know whether,
23 really, the result would have been every -- different if
24 you had the most perfect jury. All right?

25 Now, you're saying either there -- the --

1 somebody has to prove that it really made a difference?
2 That's what a structural error is really about, that
3 kind of case, where you can't prove it because it was a
4 basically unfair proceeding.

5 MR. RAVITZ: Well, the Court hasn't said
6 that --

7 JUSTICE BREYER: I -- I don't care what the
8 Court said.

9 MR. RAVITZ: Okay.

10 JUSTICE BREYER: I'm asking my question.
11 And my question, I thought, until I'm getting this
12 answer, that, of course, in some instances, you say it
13 was such an unfair trial, and you show inadequate
14 assistance of counsel and that's the end of it. You
15 presume the prejudice. And I was going to ask you how
16 you draw the line.

17 MR. RAVITZ: Right. It may be an unfair
18 trial with respect to the right that's claimed at issue,
19 but where the right that's claimed is one of ineffective
20 assistance, Strickland tells us that that -- that deals
21 with --

22 JUSTICE BREYER: I'm not interested in
23 Strickland at the moment. I want to know how you think,
24 in this case, we should draw the line between those
25 structural errors, which are absolutely egregious, and

1 it is plain that the defendant did not get a fair trial,
2 although we cannot prove one way or the other that it
3 would have made a difference to the outcome.

4 MR. RAVITZ: The --

5 JUSTICE BREYER: I -- I would have thought
6 that you would have said, of course, in such a case,
7 inadequate assistance of counsel for not raising that
8 error leads to a new trial. We presume prejudice. And
9 if you're not going to say that, then I will withdraw
10 all my questions and keep quiet.

11 (Laughter.)

12 MR. RAVITZ: I will say that the -- the
13 Court's approach in Cronin made sense, that there what
14 the Court said was prejudice would be presumed where
15 it's highly likely that there was, in fact, prejudice,
16 and not just any type of prejudice, but prejudice in the
17 sense of a breakdown in the adversary process; in other
18 words, prejudice to the right at issue because of
19 circumstances on the order of a -- of a complete denial
20 of counsel.

21 And I say that makes sense because by
22 focusing on the likelihood, the high likelihood, we are
23 not saying that something actually existed merely
24 because we don't know whether it existed. We are saying
25 that it existed when we can be very confident that it

1 did. And by focusing on the right at issue, we are
2 zeroing in on what is before --

3 JUSTICE SOTOMAYOR: All right.

4 MR. RAVITZ: -- the Court.

5 JUSTICE SOTOMAYOR: So the rule that you're
6 asking us to adopt today, Cronic said an absolute
7 absence of counsel, you presume prejudice. We have
8 further said that a conflict of interest, actual
9 conflict of interest, you can presume prejudice.

10 Would an absolute closure, improper closure
11 of a courtroom for no reason, could we presume prejudice
12 there, or would you require the proof of actual
13 prejudice the way you're advocating here?

14 MR. RAVITZ: Yes. We would say that actual
15 prejudice needs to be shown, that a presumption is
16 inappropriate. That a presumption is appropriate in
17 those situations where, again, it -- it can be said with
18 confidence -- and this isn't just the approach taken
19 in -- in Cronic. Cronic cited cases dealing with a
20 variety of errors. Because it's one thing to say that
21 because something is difficult to show, we are going to,
22 for example, relieve the government --

23 JUSTICE SOTOMAYOR: What's wrong -- wouldn't
24 it be logical to say that there are -- that structural
25 errors on the reliability of a trial are affected by the

1 quality of the violation? A partial closure, improper
2 as it may be, is not the same as a total closure. And
3 in a total situation, the reliability of the trial is
4 put into question in a such a fundamental way that
5 prejudice can be presumed.

6 Otherwise, we're never going to make any
7 meaning of structural error.

8 MR. RAVITZ: Well, but -- but the
9 reliability that Strickland and Cronin talked about is
10 where the result of the trial is rendered unreliable
11 because of a breakdown in -- in the -- the adversary
12 process, so it focuses in on the heart of the right at
13 issue.

14 The Petitioner here could have pursued a
15 standalone public-trial claim, and then we would be
16 talking about the rights underlying that. So Kimmelman
17 v. Morrison says it's important to look at the values
18 underlying the right that has been asserted.

19 But the -- but the Petitioner didn't do
20 that. He didn't do it in the SJC and he didn't do it
21 here. So instead the focus should be on the values
22 underlying the -- the right to the assistance of counsel
23 and whether there's been a breakdown in the adversary
24 process. That's the specific aspect of fairness, of a
25 fair trial, that Strickland says the Counsel Clause is

1 about.

2 Had the Petitioner pursued a standalone
3 claim for the rights -- for violation of the
4 public-trial right, even though it was forfeited in
5 Massachusetts, it would have gotten a review because all
6 claims are reviewed in Massachusetts, just under a
7 different standard.

8 And, in fact, if -- looking at the way that
9 Massachusetts has treated those standalone claims versus
10 ineffectiveness claims, it's clear that Massachusetts
11 understands what this Court said in -- in Kimmelman.
12 Because in one case, in a case called Celester, the
13 Commonwealth, via the SJC, was applying its substantial
14 likelihood of a miscarriage of justice standard to an
15 ineffectiveness claim based on this kind of a closure.
16 And it -- and it cited -- it quoted Strickland.

17 But in another case where it was focusing on
18 the underlying right, it talked about public-trial
19 theory, even as it applied the same standard of review.

20 JUSTICE KAGAN: Mr. -- Mr. Ravitz, I don't
21 know, maybe this is a simple-minded way to look at
22 things, but I've always thought Strickland, it's about
23 the fairness and the reliability of the trial process.
24 And that's a pretty important thing to be concerned
25 about. And we have said as part of Strickland that you

1 have to show prejudice, because we're not really
2 concerned about lawyers, however bad they may be, who do
3 things that just don't affect the reliability of the
4 trial.

5 But here, with respect to these structural
6 errors, what we've said again and again and again is we
7 actually just don't know. So the -- in any particular
8 case, whether the commission of this error affected the
9 outcome.

10 So what you are suggesting to us is that the
11 defendant has to come in and prove as part of
12 Strickland -- which, as I said, is integral to ensuring
13 the fairness and reliability of the process -- has to
14 come in and prove as part of that something that we have
15 said, time and again, is unprovable. And that just
16 seems like that's not something that a legal system
17 should do. You have to prove something that we've
18 admitted is unprovable.

19 MR. RAVITZ: Well, when the Court said that
20 it was difficult to prove prejudice from this kind of
21 error, it wasn't talking about the reasonable
22 probability standard of Strickland. That's one of the
23 benefits to the standard. It was specifically designed
24 to account for and does account for situations where
25 there might be a breakdown in the process. There might

1 be an unreliable result, and yet it's too hard to prove.
2 It can't be proven by a preponderance of the evidence.

3 And so the standard was -- was a
4 middle-of-the-road standard deliberately and it's
5 flexible. And it -- and Strickland says, take into
6 account all the circumstances. Take into account the
7 totality of the evidence.

8 JUSTICE KAGAN: Well, but then what you're
9 asking us to do is you're asking us to apply Strickland
10 in such a way that we're saying this terrible attorney
11 error took place because we're assuming that. And we
12 think it might -- it could have affected the outcome of
13 the trial, but because of the kind of error it is, as
14 we've said a hundred times, we just are not able to --
15 to say that with any certainty, so we'll give the
16 benefit of the doubt to the government.

17 MR. RAVITZ: No. That -- that sounds like
18 what it's saying is exactly the kind of idea that relief
19 would be awarded where prejudice is merely conceivable
20 that Strickland rejected. And it makes sense, because
21 to say that something -- because something is difficult
22 to show, it must have existed, one doesn't follow from
23 the other. And it would -- and it would allow for
24 relief to be granted in a wide range of situations
25 where, in fact, in reality there was no prejudice.

1 JUSTICE KAGAN: I -- I just -- I'm sorry to
2 keep, like, bugging you about this, but it just seems so
3 Kafkaesque to me. It's like you have to prove
4 something, but we know you can't prove it.

5 MR. RAVITZ: Well, I wouldn't even say
6 that -- that it can't be proven, because looking --

7 JUSTICE KAGAN: But we've said it. We've
8 said it a hundred times.

9 (Laughter.)

10 MR. RAVITZ: The -- the Court hasn't said it
11 about a reasonable probability standard. It hasn't said
12 that it -- it -- a reasonable probability can't be
13 shown.

14 And -- and as far as proving it, there are
15 analogous situations where what we see is that the party
16 shows a connection between the error. So let's say
17 here, the closure, the spectators that are excluded, and
18 the events that occurred during that time taking into
19 account what's said in the trial transcripts, and a
20 connection between those things and the issues at trial,
21 giving particular attention to anything that went wrong
22 and also giving attention to -- as I say, to likelihood,
23 to probability.

24 And so the -- for example, the Solicitor
25 General cites the McKernan Third Circuit case that was

1 handed down this year, which involved a biased judge.
2 And that's -- that's the approach that the Court took
3 there. It was very simple. It was to look at what
4 happened, what went wrong, and what the connection was
5 between that and the error and then the -- the
6 probability that it had an effect on the judgment.

7 And sometimes -- sometimes that's the best
8 that we can do, but it's because we are inherently
9 considering what would have happened in a different
10 situation. That's the case in every Strickland
11 situation. We're always considering what would have
12 happened.

13 CHIEF JUSTICE ROBERTS: Well, let's say, I
14 mean, the argument on the other side is that one of the
15 most important things about the trial is to have the
16 mother with the young offender. Did that cause
17 prejudice or not, that the mother wasn't there? They
18 just looked and there was a guy alone who was accused of
19 killing a 15-year-old, as opposed to a troubled youth
20 with his mother holding his hand. I mean, you know, all
21 these things are important.

22 So are they right that that prejudiced the
23 trial or not?

24 MR. RAVITZ: They are right that that was
25 unfortunate and it shouldn't have happened.

1 As to whether it had an effect on the
2 judgment --

3 CHIEF JUSTICE ROBERTS: Yeah.

4 MR. RAVITZ: -- that's something different.

5 CHIEF JUSTICE ROBERTS: Well, how do you
6 prove it?

7 MR. RAVITZ: Well, again, the -- the -- a
8 defendant can aim to show a connection between the
9 spectators and what happened at the trial. So, for
10 example, let's say the judge made certain comments that
11 were offensive about a particular group, and members of
12 that group were excluded from jury selection.

13 CHIEF JUSTICE ROBERTS: Yeah, that's a
14 different case. I'm asking -- I'm asking about this
15 case.

16 MR. RAVITZ: The defendant probably would
17 have had a great difficulty showing it because it was so
18 likely to have occurred, but that doesn't mean that
19 there was a breakdown in the system. That means that
20 the prejudice that Strickland and Cronin called for was
21 just highly unlikely to have been present.

22 And why do I say that? Because the
23 courtroom was filled with as many as 90 members of the
24 public in the form of prospective jurors who were able
25 to observe the proceedings, and because there was no

1 evidence taken and there was no argumentation on the
2 merits and because once the courtroom -- once the jury
3 selection process was finished, the courtroom was opened
4 up. And there was no issue raised about the rest of
5 the -- of the jury selection proceeding or the jury that
6 was chosen. It was only the courtroom closure. And
7 then when it was opened up, the jurors heard evidence of
8 a confession. And they heard other evidence of -- of
9 biological evidence and ballistics evidence. So yes,
10 here, it was just highly unlikely that there was, in
11 fact, prejudice.

12 Just on a final note, it's -- it's been said
13 that structural errors are the gravest type of errors.
14 And this Court in Gonzalez Lopez redirected things and
15 clarified that structural errors are, in fact,
16 different, and they've been rendered structural, given
17 that classification for different reasons. And it's
18 important to focus on those differences just as
19 Strickland says it's important to focus on the different
20 circumstances in a given case.

21 And if there are no further questions from
22 the Court.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 MR. RAVITZ: Thank you very much.

25 CHIEF JUSTICE ROBERTS: Ms. O'Connell.

1 ORAL ARGUMENT OF ANN O'CONNELL
2 FOR UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING THE RESPONDENT

4 MS. O'CONNELL: Mr. Chief Justice, and may
5 it please the Court:

6 I'd like to begin where my co-counsel just
7 left off here with the idea that any time a structural
8 error occurs, it leads to fundamental unfairness and
9 unreliability in the outcome of the trial. Structural
10 errors implicate fairness in a way that's broader than
11 the interest that's protected by the Sixth Amendment
12 right to the effective assistance of counsel.

13 Under Strickland, we're focused on whether
14 counsel's error undermines confidence in the -- in the
15 verdict. You're asking whether there was such a
16 breakdown in the adversarial process that we can no
17 longer rely on what the jury did. And the Court in
18 Gonzalez-Lopez pushed back on the idea that all
19 structural errors are necessarily the type of error that
20 undermine confidence in the reliability of the trial.

21 And I can give three examples of scenarios
22 where structural errors occur, where other courts have
23 concluded that those errors do not undermine the
24 reliability of the trial outcomes: Batson errors, right
25 to counsel of choice, and bias trial judge.

1 In the context of Batson errors, which you
2 were talking a little bit about before, we have cited
3 some cases in page 18 and 19 of our brief where courts
4 of appeals have looked at cases where Batson errors
5 occurred and said, okay. There was a Batson error. We
6 consider that a structural error, but it didn't
7 undermine our -- our confidence in the outcome of this
8 trial. There was overwhelming evidence of guilt.
9 There's no reason to believe that any juror that was
10 actually sitting on the jury had any kind of a bias.

11 And those decisions are consistent with this
12 Court's opinion in *Allen v. Hardy*, which is the case
13 that holds that Batson is not retroactive. And that
14 case --

15 JUSTICE BREYER: That would be an awful lot
16 of -- that -- that's exactly what's worrying me. Batson
17 errors, you know, we can think of a host. Sir Walter
18 Raleigh is in the Star Chamber. You know, I mean,
19 you -- now, the government's position is what? The
20 government's position is that even though there is a
21 serious structural error, really serious, the all-white
22 jury, the Star Chamber, et cetera, even then -- and the
23 lawyer didn't object -- even then, the person doesn't
24 automatically get a new trial.

25 The truth of the matter is, we don't know

1 what would have happened in the jury room. We can't
2 say. And if what we're supposed to do is weigh the
3 evidence, I guess then you're having trial by appellate
4 judge. And -- and so do -- do we get into that? Is
5 that what you want, that in each case, no matter how
6 egregious sort of the structural error, which may or may
7 not affect the jury -- we don't know -- that there's no
8 new trial? The appellate judges are supposed to say
9 whether or not there really would have been or likely
10 would have been an impact on this case?

11 That strikes me as a little -- I mean, I
12 would like to hear your answer, because it strikes me
13 as -- as not -- not -- yeah.

14 MS. O'CONNELL: Right. So it's -- it's our
15 position, Justice Breyer, that in the case of structural
16 errors, you still have to show prejudice. It doesn't
17 matter what the structural error is. The Strickland
18 test says that we're looking under the second prong to
19 see if this error had an effect on the outcome of the
20 trial. Maybe there's a reasonable probability that it
21 did, in which case the standard is satisfied; and if
22 there's not, then the standard is not satisfied. We
23 don't run the -- rerun the trial just because we don't
24 know.

25 JUSTICE ALITO: Is there a distinction

1 between the -- the examples that you gave where -- where
2 it would appear that the issue would be a question of
3 harmless error, and the situation here, where the
4 question is whether there's a constitutional error at
5 all?

6 MS. O'CONNELL: Well -- so I think that this
7 case has been litigated on the assumption that there has
8 been a constitutional error, a -- a Sixth Amendment
9 violation of the public power.

10 JUSTICE ALITO: No. But that's not the
11 error that's -- that is before us. The error -- the
12 alleged error that's before us is a violation --

13 MS. O'CONNELL: Oh, right.

14 JUSTICE ALITO: -- of the right to trial --
15 the right to counsel.

16 MS. O'CONNELL: I must have misunderstood
17 the question. Yes.

18 JUSTICE ALITO: Okay. It was probably not
19 very clear.

20 The error -- what we are being asked to
21 address is the right to counsel; am I right?

22 MS. O'CONNELL: That's correct.

23 JUSTICE ALITO: And there is no violation of
24 the right to counsel based purely on deficient
25 performance; isn't that right?

1 MS. O'CONNELL: Correct.

2 JUSTICE ALITO: So there has to be -- the
3 prejudice prong has to be satisfied.

4 MS. O'CONNELL: Yes.

5 JUSTICE KAGAN: But I thought your
6 understanding of Batson was that you were saying when an
7 attorney is deficient, as respects to a Batson claim,
8 there, too, you would say that -- sort of too bad.

9 MS. O'CONNELL: Yes. But you -- you still
10 must satisfy the prejudice prong in order to rerun the
11 trial.

12 JUSTICE ALITO: So your -- your examples
13 were ineffective assistance of counsel cases, not just
14 Batson cases.

15 MS. O'CONNELL: No. Well, Batson cases
16 would be if -- you know, if the attorney didn't object,
17 it's -- it's being done under --

18 JUSTICE KAGAN: But that's the underlying
19 violation of the ineffective assistance claim.

20 MS. O'CONNELL: Correct. Correct.

21 JUSTICE KAGAN: And you would say the same
22 rule would go, and you have to prove prejudice.

23 MS. O'CONNELL: Correct.

24 JUSTICE KAGAN: Even though we've said over
25 and over that you can't prove prejudice.

1 MS. O'CONNELL: Well, I think on that point,
2 Justice Kagan, the idea that you can't prove prejudice,
3 the Court said it's difficult to do. That may be true
4 as a general matter; it's not true across the board.
5 We've cited cases in our brief with respect to the bias
6 trial judge structural error, for example, where courts
7 have done a case-by-case inquiry and said, okay. In
8 this case, the bias of the trial judge, there is a
9 reasonable probability it would have affected the trial
10 outcome. In this case, there is no reasonable
11 probability that it would have.

12 And it's not -- the -- the burden of proof
13 in the Strickland context is on the defendant --

14 JUSTICE KAGAN: You know, I'm not saying
15 that there aren't cases where you can have a sort of gut
16 intuition as to whether it did or not. But one of the
17 things that have made us put these particular rights in
18 this box called "structural" is that we say, you know,
19 notwithstanding that you can pick out a case here and
20 there and say, okay. I kind of know.

21 In general, these are -- it is so
22 speculative as to whether this fundamental defect in the
23 trial process caused error that we're going to -- to --
24 to presume it.

25 MS. O'CONNELL: And -- and so that, Justice

1 Kagan, is the rationale for -- for not letting the
2 government prove harmless error if the objection is
3 preserved. And I think a big part of that is that these
4 interests -- a lot of these interests are ones that
5 would not adequately be protected if that rule was not
6 dispensed with in the harmless-error context for
7 preserved objections.

8 I think the most stark example is a
9 McCaskill error, the right to represent yourself, where
10 if we didn't exempt that type of an error from
11 harmless-error analysis, it would always be harmless,
12 because the judge could just deny the motion and then
13 say, well, there was no prejudice because you would
14 have -- you would have been worse off representing
15 yourself.

16 In the Strickland prejudice, the -- the
17 tables are turned and the defendant has the burden to
18 prove that there was some sort -- there was a reasonable
19 probability of a different outcome at trial had this
20 error been objected to and been fixed. And there's --
21 there's just no reasonable probability of that in this
22 particular case.

23 JUSTICE KAGAN: I don't think we've ever
24 really talked about burdens when we label things
25 structural errors. You know, we don't say, oh, you

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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