



CRIMINAL LAW REPORTER



VOL. 79, NO. 11

JUNE 14, 2006

Right to Counsel

Failure to Object to Structural Error Isn't Ineffectiveness Without Proof of Prejudice

A criminal defendant whose attorney failed to make an objection at trial to an error that would have required reversal without a showing of prejudice on direct review must show prejudice from the misstep to succeed on collateral review with a Sixth Amendment claim of ineffective assistance of counsel, the U.S. Court of Appeals for the Eleventh Circuit held June 6. Although a structural error has been described by the U.S. Supreme Court as one that defies analysis for prejudice, an attorney's failure to object to such a defect in the trial process is something that must be evaluated for its effect on the outcome of the trial, the circuit court decided. (*Purvis v. Crosby*, 11th Cir., No. 04-14913, 6/6/06)

Ordinarily, the test for Sixth Amendment ineffectiveness claims that was established in *Strickland v. Washington*, 466 U.S. 668 (1984), requires a defendant to show both that counsel's performance fell below professional norms and that the deficient performance was likely to have affected the outcome of the trial. The habeas corpus petitioner before the Eleventh Circuit argued that he did not have to satisfy the prejudice requirement in light of another line of U.S. Supreme Court caselaw that recognizes that some errors in the trial process—such as a complete deprivation of the right to counsel, or an erroneous reasonable doubt instruction—qualify as “structural errors” that require reversal regardless of their effect on the outcome of the proceedings.

The petitioner was convicted in state court of capital sexual battery of a child. He subsequently filed a 28 U.S.C. § 2254 petition claiming that he was deprived of his right to effective assistance of counsel when his trial attorney failed to object to the trial court's decision to clear the courtroom of most spectators in anticipation of the victim's taking the stand.

A complete closure in violation of a defendant's right to a public trial has been recognized as a structural error, and the Eleventh Circuit was willing to assume that a structural error occurred at trial. The court was also willing to assume that trial counsel's failure to object to the closure constituted deficient performance under the *Strickland* test. However, the court could not accept the idea that *Strickland's* prejudice requirement is inappli-

cable to trial attorneys' failure to preserve structural errors.

In an opinion by Judge Ed Carnes, the court said, “It is one thing to recognize that structural errors and defects obviate any requirement that prejudice be shown on direct appeal and rule out an application of the harmless error rule in that context. It is another matter entirely to say that they vitiate the prejudice requirement for an ineffective assistance claim.”

“It is one thing to recognize that structural errors and defects obviate any requirement that prejudice be shown on direct appeal and rule out an application of the harmless error rule in that context. It is another matter entirely to say that they vitiate the prejudice requirement for an ineffective assistance claim.”

JUDGE ED CARNES

Caselaw Requires Prejudice. The Eleventh Circuit stressed that the high court has identified only three circumstances in which the prejudice prong of the counsel ineffectiveness test does not apply: actual or constructive denial of counsel altogether, certain types of state interference with counsel's assistance, and conflicts of interest. “We cannot hold,” the Eleventh Circuit said, “that attorney error in failing to object to the closing of the courtroom is so likely to result in prejudice that we will presume it, unless we are willing to defy the Supreme Court's specific admonition [in *Strickland*] that when it comes to deciding ineffective assistance claims: ‘[Attorney errors] cannot be classified according to likelihood of causing prejudice.’”

The Eleventh Circuit supported its conclusion with cases in which the Supreme Court has applied the prejudice component of other tests to claims that involved structural error. The Eleventh Circuit pointed out that in *Davis v. United States*, 411 U.S. 245 (1973), and *Francis v. Henderson*, 425 U.S. 536 (1976), the Supreme Court held that defendants whose attorneys

failed to object to prosecutors' systematic exclusion of blacks from juries or grand juries must still satisfy the prejudice prong of the "cause and prejudice" test for overcoming the procedural default. The Eleventh Circuit noted that the *Francis* court, citing *Davis*, said, "The presumption of prejudice which supports the existence of the right is not inconsistent with a holding that actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner."

"For the same reasons that prejudice cannot be presumed in order to satisfy the prejudice requirement when an objection to structural error was not made at trial, it cannot be presumed to satisfy the prejudice component of an ineffective assistance claim arising from the same failure to preserve the structural error," the Eleventh Circuit declared. It explained that, otherwise, "[a]ny defendant who could not make the prejudice showing necessary to have a defaulted claim of structural error considered could bypass that requirement by merely dressing that claim in ineffective assistance garb and asserting that prejudice must be presumed."

No Prejudice Here. The petitioner could not show prejudice from trial counsel's failure to object to the closure, the court decided, because he did not offer any reason to believe that the jury would have found the vic-

tim less credible had her testimony been given in front of spectators.

The petitioner maintained that, had trial counsel objected to the closure, the objection would have preserved the closure error, and the petitioner would have been able to obtain automatic reversal of his conviction on direct appeal. The court, however, pointed out that this argument for finding prejudice from trial counsel's failure to object focuses incorrectly on the outcome of the appeal instead of on the outcome of the trial. Moreover, trial counsel's objection might have prompted the judge to correct the error, the court added.

"[I]t is important to remember," the court continued, "that virtually all ineffective assistance claims are litigated at the collateral attack stage, after the conviction and sentence have been upheld on direct review." It said, "To hold that the presumption of prejudice applies not only when properly preserved structural errors are raised on appeal but also when related ineffective assistance claims are raised in a collateral proceeding would diminish the difference between direct and collateral review" by "undermin[ing] the important finality and comity interests that are entitled to respect in a § 2254 proceeding, like this one."

William Mallory Kent, Jacksonville, Fla., argued for the petitioner. Kellie A. Nielan, of the Florida Attorney General's Office, Daytona Beach, Fla., argued for the state.

Full text at <http://pub.bna.com/cl/0414913.pdf>