

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES BURTON, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether mailing a verdict to a criminal defendant through his counsel in violation of the Fifth Amendment, Sixth Amendment and Federal Criminal Rule of Procedure 43(a) constitutes structural error, and if so, whether harmless error review is the proper appellate standard.

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APPENDIX C - Sixth Circuit Opinion in *United States v. David Crozier (and Charles Burton)*, 259 F.3d 503 (6th Cir. 2001), cert denied 534 U.S. 1149 (2002).

APPENDIX D - The Judgment of the United States District Court, Eastern District of Tennessee, in *United States v. Charles William Burton*, No. 97-CR-00154-001, entered November 08, 1999.

APPENDIX E - Sixth Circuit Court of Appeals Order in *In Re: Charles W. Burton*, Case No 16-5745, rendered January 25, 2017.

APPENDIX F – *Pro se* Motion for Relief from Order Pursuant to Federal Rule of Civil Procedure 60(b)(4), filed May 12, 2017.

APPENDIX G – Memorandum and Order of the United States District Court, Eastern District of Tennessee, Case No. 97-CR-00154, rendered May 24, 2017.

APPENDIX H – *Pro se* Motion for Resentencing/Sentencing Brief filed August 17, 2017, in Case No. 97-CR-00154.

APPENDIX I – Motion and Memorandum to File *Pro se* Supplemental Motion for Resentencing/Sentencing Brief, filed January 31, 2018, in Case No. 97-CR-00154.

APPENDIX J – Order of District Court denying *Pro se* Motion for Leave to file Supplemental Motion, rendered February 01, 2018, in Case No. 97-CR-00154.

APPENDIX K – Supplemental Argument filed by defense counsel again addressing Rule 43(a), Fifth Amendment and Sixth Amendment violations, filed June 21, 2018, in Case No. 97-CR-00154.

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APPENDIX N – *Pro se* Motion and Memorandum to Be Heard Pursuant to Rule 83.4(c), filed in Case No. 97-CR-00154 on August 23, 1999.

(Note: This document is filed stamped and initialed by a deputy clerk of the district court for the Eastern District of Tennessee but cannot be found in the original paper record of the 1999 proceedings. It was provided to the undersigned by the Petitioner herein.)

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PETITION FOR A WRIT OF CERTIORARI

Charles Burton, the Petitioner, respectfully asks this Court to grant a Writ of Certiorari to review his conviction and sentence and the Judgment of the Sixth Circuit Court of Appeals (entered February 04, 2020), affirming the judgment of the district court. The Sixth Circuit finds a violation of Federal Rule of Criminal Procedure 43(a) does not constitute structural error and that Mr. Burton does not satisfy the plain error standard of review, giving the Court no basis to overturn the district court's decision. The Sixth Circuit's decision that a Rule 43(a) violation is not structural error is in direct conflict with the decisions of other circuit courts of appeals. The resulting application of the plain error standard of review by the Sixth Circuit, requiring a showing of prejudice by the defendant, is therefore also misapplied, ignoring this Court's rationale for the structural error doctrine.

OPINIONS BELOW

The Opinion of the Sixth Circuit Court of Appeals in *United States v. Charles Burton*, No. 18-5737, affirming, is rendered on February 4, 2020, and is unpublished but can be found in the Appendix hereto. (Appx. 1a).

The Judgment of the United States District Court, Eastern District of Tennessee, in *United States v. Charles W. Burton*, No. 97-CR-00154-RLJ(1), entered on July 12, 2018, is attached in the Appendix hereto. (Appx. 27a).

Sixth Circuit Opinion in *United States v. David Crozier and Charles Burton*, 259 F.3d 503 (6th Cir. 2001), cert denied 534 U.S. 1149 (2002), is attached in the Appendix hereto. (Appx. 35a).

The Judgment of the United States District Court, Eastern District of Tennessee, in *United States v. Charles William Burton*, No. 97-CR-00154-001, entered November 08, 1999, is attached in the Appendix. (Appx. 51a).

Sixth Circuit Court of Appeals Order in *In Re: Charles W. Burton*, Case No 16-5745, rendered January 25, 2017, attached hereto in the Appendix. (Appx. 59a).

The Memorandum Opinion and Order of the United States District Court, Eastern District of Tennessee, in *Charles W. Burton v. United States of America*, No. 97-CR-154 and 17-CV-00025, denying *pro se* motion for relief, decided May 24, 2017, DLB-CJS, found in the Appendix hereto. (Appx. 80a).

District Court Order denying *pro se* motion in Case No. 97-CR-154, rendered February 01, 2018, attached hereto in the Appendix. (Appx. 115a).

JURISDICTION

This Petition seeks review of the Opinion of the Sixth Circuit Court of Appeals, entered on February 4, 2020, affirming the Petitioner's conviction and resentence pursuant to the district court's judgment in a criminal case entered on July 09, 2018. (Appx. 1a).

Jurisdiction is generally conferred upon the Court of Appeals pursuant to 28 U.S.C. § 1291. The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and United States Supreme Court Rule 10.

This petition is timely filed pursuant to Supreme Court Rule 13.1 and 13.3.

Appropriate service is made pursuant to Supreme Court Rule 29.4(a) upon the Solicitor General of the United States and upon Hon. Luke A. McLaurin, Assistant United States Attorney, who argued this case on behalf of the United States before the Sixth Circuit Court of Appeals

CONSTITUTIONAL AND RULES PROVISIONS INVOLVED IN CASE

Due Process Clause, Fifth Amendment, United States Constitution

No person shall be ... deprived of life, liberty, or property, without due process of law....

Right to Public Trial, Sixth Amendment, United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a ... public trial....

Federal Rule of Criminal Procedure Rule 43(a)

Unless this rule, Rule 5, or Rule 10, provides otherwise, the defendant must be present at (1) the initial appearance, the initial arraignment and the plea; (2) every trial stage, including jury empanelment and the return of the verdict; and (3) sentencing.

Federal Rule of Criminal Procedure 51(b)

A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party.

STATEMENT OF THE CASE

A. Introduction

Charles W. Burton is charged with various federal drug and firearm offenses. A bench trial is conducted in 1999, and the verdict is delivered to Mr. Burton's counsel by mail in violation of Federal Rule of Criminal Procedure 43(a). He is sentenced to 562 months imprisonment. In 2017, the Sixth Circuit grants his request to file a successive 28 U.S.C. § 2255 petition challenging his Armed Career Criminal Act enhanced sentence. (Appx. 59a). Mr. Burton challenges the district court's authority to proceed with the § 2255 hearing, asserting that an error occurred in his original underlying case. The specific error complained of is the original district court's delivery of its verdict by mail and outside Mr. Burton's presence in violation of the Fifth and Sixth Amendments to the United States Constitution and Federal Rule of Criminal Procedure 43(a). The Sixth Circuit Opinion that the Rule 43 violation does not rise to the level of structural error is in direct conflict with opinions of other circuit courts of appeals. By finding no structural error, the Sixth Circuit holds Mr. Burton to a plain error standard of review and denies his request for relief because it concludes he is unable to show prejudice to his substantial rights. (Appx. 12a-16a).

Delivery of a criminal verdict is part of the basic framework of a public trial. The defendant's presence at the delivery of the verdict is a fundamental structural right guaranteed to every criminal defendant. When the verdict is mailed, a defendant is deprived of that fundamental structural right. It is error *per se*.

The Opinion of the Sixth Circuit that there is no structural error is erroneous and presents a question with national implications.

B. The underlying case

The following background will aid the Court in understanding the important issues presented.

1. Relevant Court Proceedings, 1998-2002

Charles Burton is charged in a second superseding indictment returned by the grand jury in the Eastern District of Tennessee in 1998. He is charged with multiple federal offenses that occurred in 1995, including conspiracy to distribute and to possess controlled substances with intent to distribute; possession with intent to distribute Schedule II, III and IV controlled substances; robbery of a pharmacy; use of a firearm during the commission of a drug conspiracy and robbery; and being a felon in possession of a firearm. After a three-day bench trial, the district court finds Mr. Burton guilty on all counts. The district judge makes only General Findings and it is not disputed that the verdict is mailed to defense counsel. This act violates Criminal Rule of Procedure 43(a), the Fifth Amendment due process rights, and the Sixth Amendment right to a public trial.

Mr. Burton is initially sentenced to 562 months imprisonment. He timely appeals the conviction and sentence, and the government cross-appeals the award of jail credit. The conviction is affirmed. See *United States v. David Crozier and Charles Burton*, 259 F.3d 503 (6th Cir. 2001). (Appx. 35a).

2. Successive Motion Pursuant to 28 U.S.C. §2255 in 2017

On May 31, 2016, Mr. Burton seeks an order authorizing the district court to consider a successive application for relief under 28 U.S.C. §§ 2254 or 2255. He seeks resentencing pursuant to *Johnson v. United States*, 135 S.Ct. 2551 (2015). His request is granted on January 25, 2017, and Mr. Burton is authorized to file his request for relief. The matter is transferred to the district court for further proceedings, but without instructions. (Appx. 59a-61a).

3. Relevant Proceedings in District Court and Sentencing, 2017-2018

The case is received by the district court on January 25, 2017. On May 12, Mr. Burton files a *pro se* motion for relief pursuant to Federal Rule of Civil Procedure 60(b)(4). (Appx. 63a). He asserts the new sentencing court must determine if it has jurisdiction of his case before it can conduct any hearing to correct his sentence or resentence him. He questions the court's authority to proceed because of the initial court's evident violation of Federal Rule of Criminal Procedure 43(a) when it failed to deliver its verdict in Mr. Burton's presence. (Appx. 63a-74a). The district court considers this motion as a request by Mr. Burton to amend his § 2255 petition and denies it "because of futility." (Appx. 85a).

Mr. Burton next files a *pro se* motion on August 17. He seeks a full sentencing hearing. He reiterates that there are issues remaining to be decided that are consequential to the relief already granted pursuant to his § 2255 petition. (Appx. 88a).

Mr. Burton moves for leave to file a *pro se* supplemental motion for resentencing and supporting memorandum on January 31, 2018. (Appx. 105a). He seeks a full resentencing hearing, argues that the originally imposed sentencing package must be revisited, and again asserts that the Rule 43(a) issue be revisited to determine the court's authority to resentence him. (Appx. 106a). The district court refuses to consider the *pro se* filing because Mr. Burton is represented by counsel. (Appx. 115a).

Defense counsel files a supplemental argument on June 21, 2018. Counsel asserts, in part, that the currently presiding district court lacks authority to resentence Mr. Burton because of the initial Rule 43(a) violation. (Appx. 116a). The district court construes this supplemental argument as a renewed motion to amend the § 2255 petition and denies it. (Appx. 121a).

A resentencing hearing is held on July 09, 2018, arguments are heard, and Mr. Burton delivers his allocution to the Court. (Appx. 122a). Mr. Burton presents his Rule 43(a) arguments and other issues. (Appx. 133a-134a). The district court then declines to address them. (Appx. 144a).

After hearing arguments, the district court imposes a 360-month sentence.

C. The Appeal

On appeal to the Sixth Circuit Court of Appeals, Petitioner challenges the district court's denial of his May 12, 2017 *pro se* motion, and the denial of defense counsel's June 21, 2018 supplemental argument, both of which question the 2018 district court's authority to conduct any resentencing hearing without first

determining critical Rule 43(a) threshold issues. He argues on appeal that the Rule 43(a) violation is a structural error and not subject to harmless error review.

The opinion of the Sixth Circuit holds that Mr. Burton's notice of appeal was sufficient to challenge the denial of his Rule 43 based motions. The Sixth Circuit also, *sua sponte*, grants Mr. Burton's Certificate of Appealability of the § 2255 judgment and certifies the Rule 43 issue for appeal. (Appx. 5a-11a).

Finding no structural error, and relying on Federal Rule of Criminal Procedure 52(b) and *United States v. Ford*, 761 F.3d 655 (6th Cir. 2014), the panel engages in plain error review and reasons that:

Burton's Rule 43 claim that the district court's guilt determination was improperly delivered by mail rather than in open court fails clearly for lack of prejudice. Burton's claim is reviewed for plain error, as he never raised it during the district court's sentencing proceedings. (Appx. 12a).

The Court then concludes "Because Burton has not established that he was prejudiced by the asserted Rule 43 violation, he may not obtain relief under plain error review." (Appx. 14a).

The Sixth Circuit states:

Burton seeks to avoid the issue of prejudice altogether by inviting the court to hold – as the Second Circuit in *United States v. Canady* did – that the Rule 43 violation amounts to "structural error." See 126 F.3d 352, 364 (2d Cir. 1997). The asserted Rule 43 violation in this case, however, did not rise to the level of a structural error. The error was confined to the delivery of the verdict and did not undermine the outcome of the trial. Nor did it affect the quality or reliability of the evidence presented. (Appx. 14a).

As a result of this Opinion, this Petition follows.

REASONS FOR GRANTING THE PETITION

I. The Question Presented In This Case Is One Of Great Constitutional Importance.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to a public trial. Moreover, Federal Rule of Criminal Procedure Rule 43(a) provides “... the defendant must be present at ...(2) every stage, including...the return of the verdict...” This Court, in *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979), has recognized that the public trial guarantee is created for the defendant’s benefit. Furthermore, this Court, more than one hundred years ago, recognized that defendants charged with a felony have a right to be present at all stages of a trial, “especially at the rendition of the verdict.” *Diaz v. United States*, 223 U.S. 442, 456 (1912). That case goes on to hold that the right to be present is “scarcely less important to the accused than the right of trial itself.” *Id.*, at page 455. Criminal defendants are denied Fifth Amendment due process and Sixth Amendment rights, when without any process, they are denied the opportunity to be face-to-face with the court to address the verdict rendered 48 days after conclusion of the bench trial, to lodge objections, or to preserve issues for direct appeal. As will be discussed below, the effect of such a violation, contrary to the Sixth Circuit holding, creates structural error and harmless error analysis does not apply.

The right to the public proceeding also serves the interests of the public. It has long been recognized that trials, whether before a jury or a court, are public events. *Times-Picayune Pub. Corp. v. Schulingkamp*, 419 U.S. 1301, 1307 (1974).

The public's interest in a criminal proceeding is not protected by the delivery of a verdict without any court proceeding taking place. Mailing the verdict denies the public its right to observe the workings of the court and impugns the process as a whole. In the absence of a public proceeding, the public is denied its right to witness justice in action and to participate in the process.

A clear direction from this Court is needed. Is a public trial guaranteed, absent removal of a defendant for cause or a waiver of presence? Does Rule 43(a) mandate the defendant's presence at delivery of the verdict? Isn't the Rule more than a suggestion? Rendering the verdict by mail to defense counsel outside of the defendant's or public's presence, without any explicit or implicit waiver by the defendant or other order of court, does not advance the interests of justice. A process resulting in a judgment depriving an individual of his or her liberty, whether it be for one day or decades, is worthy of review. Instructions from this Court are necessary to prevent reoccurrence of Rule 43(a) violations, as well as any practice of issuing criminal verdicts by any court at any level across the United States in violation of the right to have the defendant present as required.

The affirmance by the Sixth Circuit undercuts the legitimacy of the criminal justice process everywhere, and certainly presents a question of national importance. This Court should grant review of these important issues presented by this case.

II. The Sixth Circuit misapplies federal law when it determines that there is no structural error when the district court mails a criminal verdict to defendant's counsel outside defendant's presence in

First, an error has been deemed structural in some instances if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest. This is true of the defendant's right to conduct his own defense.... That right is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty. See *Faretta v. California*, 422 U.S. 806, 834, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Because harm is irrelevant to the basis underlying the right, the Court has deemed a violation of that right structural error. See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149, n. 4, (2006).

Second, an error has been deemed structural if the effects of the error are simply too hard to measure. For example, when a defendant is denied the right to select his or her own attorney, the precise "effect of the violation cannot be ascertained." *Ibid.* (quoting *Vasquez v. Hillery*, 474 U.S. 254, 263, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986)). Because the government will, as a result, find it almost impossible to show that the error was "harmless beyond a reasonable doubt," *Chapman, supra*, at 24, 87 S.Ct. 824, the efficiency costs of letting the government try to make the showing are unjustified.

Third, an error has been deemed structural if the error always results in fundamental unfairness....It therefore would be futile for the government to try to show harmlessness.

Weaver, 137 S.Ct. at 1908. More than one of these rationales can be used to find a structural error exists in Mr. Burton's case. The Sixth Circuit ignores them all.

In its opinion the Sixth Circuit fails to recognize that the categories are not rigid. Rather, it holds that the "...mailing of the verdict in this case does not fit within the narrow category of structural errors outlined by the Supreme Court." (Appx. 1a; Opinion, Page 14a). The Sixth Circuit's reasoning is too narrow, and not contemplative of this Court's explanation of the rationale behind the doctrine. For example, the delivery of a verdict is a critical stage of the proceedings, an important part of the trial process itself and one mandated by the public trial language in the

Sixth Amendment, the due process rights guaranteed by the Fifth Amendment, and the mandatory language in Rule 43(a). Each of those rights protects not only the defendant, but the public as well. The first rationale set forth in *Weaver, supra*, is a worthy consideration ignored by the Sixth Circuit. The requirements serve much more than a defendant's benefit. They also serve the public's interest.

Secondly, the Sixth Circuit's holds that the presence of Mr. Burton or his counsel at the delivery of the verdict would not have had "any impact on the judge's rendition of the verdict aside from their presence." (Appx. 1a; Opinion, page 15a). This, too, is erroneous. If presence of a criminal defendant has no impact and delivery of a verdict can be by mail outside the defendant's presence or the presence of the public, then why is a public trial guaranteed by the Sixth Amendment and mandated by the language of Rule 43(a)? Is it possible to measure the effects of the error? The Second Circuit, as explained below, says not. The second rationale for finding a structural error, that the effect of the error cannot be ascertained, is also worthy of consideration.

Thirdly, absence of a criminal defendant and his counsel is fundamentally unfair on its face. Our courts do not operate in secret, but that is what happened in this case. On this point, it should be considered that "an error can count as structural even if the error does not lead to fundamental unfairness in every case." *Gonzalez-Lopez*, 548 U.S. at 149, n.4.

2. The decision of the Sixth Circuit is in direct conflict with several circuit courts of appeals that hold a Rule 43(a) violation is structural.

The decision of the Sixth Circuit conflicts with decisions of the Second, Fourth, Fifth, Seventh, and Tenth Circuit Courts of Appeals. The precedent established in these circuits provides that a Rule 43(a) violation is a structural defect in the proceedings.

United States v. Canady, 126 F.3d 352 (2nd Cir, 1997), is particularly on point. In facts similar to those found in Mr. Burton's case, the Second Circuit, recognizes that "the moment the district court announces its decision is a 'stage' of the trial, perhaps the most critical one from the defendant's perspective. *Id.*, at page 361. The Second Circuit explains:

The announcement of the decision to convict or acquit is neither "of little significance" nor "trivial;" it is the focal point of the entire criminal trial. To exclude the public, the defendant, the prosecution, and defense counsel from such a proceeding-indeed not to have a proceeding at all-affects the integrity and legitimacy of the entire judicial process....In view of our long history of public open trials, we hold that the failure to publicly announce in open court the decision following a criminal bench trial is an error of constitutional dimension that affects the framework of the trial itself....

Next in time is the decision of the Fifth Circuit in *United States v. Navarro*, 169 F.3d 228, 235-239 (5th Cir.1999). The case interprets the meaning of "presence," and holds that the language of Rule 43(a) must be given its ordinary meaning. The Fifth Circuit finds that presence means physical presence and that a defendant must be present at all stages of a trial as mandated by the Rule. Delivery of the verdict is a critical stage and falls within the framework of every trial, whether by jury or judge. Without regard to prejudice, the Fifth Circuit reverses and remands the case.

The Fourth Circuit holds that “Rule 43’s presence requirement applies to proceedings explicitly recognized by the plain language of the rule.” *United States v. Gonzales-Lopez*, 701 F.3d 112, 118 (4th Cir. 2012), relying upon *United States v. Lawrence*, 248 F.3d 300, 303-304 (4th Cir. 2001). The Rule requires the defendant’s presence at verdict. The Sixth Circuit should also give effect to the mandatory language of the Rule.

United States v. Torres-Palma, 290 F.3d 1244, 1248 (10th Cir.2002), explicitly holds that “... Rule 43 vindicates a central principle of the criminal justice system, violation of which is *per se* prejudicial. In that light, presence or absence of prejudice is not a factor in judging the violation.” The opinion of the Sixth Circuit directly conflicts with this holding of the Tenth Circuit.

As recently as 2018, in *United States v. Bethea*, 888 F.3d 864, 867 (7th Cir. 2018), the Seventh Circuit agrees with the Fourth Circuit, Fifth Circuit, and Tenth Circuit, and holds that a Rule 43(a) violation constitutes *per se* error.

This Petition should be granted to resolve the conflict between the circuits to establish uniformity in the application of Rule 43(a) and to protect the Fifth and Sixth Amendment guarantees.

3. The Sixth Circuit’s decision contradicts its prior holdings.

In *United States v. Williams*, 641 F.3d 758 (6th Cir. 2011), the Sixth Circuit held that a district court erred by conducting a sentencing hearing by video conference instead of in the physical presence of the defendant. It did so even though Mr. Williams appeared via video conference and his elbow counsel was

present in the courtroom. The Court relied on the plain language of Rule 43(a)(3) that requires the defendant's presence at sentencing, vacated Mr. Williams sentence and remanded for resentencing. *Id.*, at page 765.

In Mr. Burton's case, recall that the court's verdict was mailed. Neither he nor his counsel were in the courtroom. There was no court proceeding at all when the verdict was announced, and there is no court record to review. Mr. Burton did not personally receive the verdict from the court, but instead received it days later from his counsel. Rule 43(a)(2) requires a defendant's presence at verdict, and the application is the same here as in the *Williams* case. Presence at delivery of the verdict is required by the Rule.

The *Williams* court explains that "being physically present in the same room with another has certain intangible and difficult to articulate effects that are wholly absent when communicating by video conference." *Id.*, at page 764-65. If the effects cannot be determined when the defendant is present by video, certainly they cannot be determined when the defendant is not present at all. The Sixth Circuit recognizes intangibles that presence includes and the difficulty in articulating the effects of non-presence. However, it ignores such factors in Mr. Burton's case.

The opinion of the Sixth Circuit in this case directly conflicts with its own prior precedent and reasoning.

4. The Sixth Circuit is incorrect when it holds that a criminal defendant who suffers a deprivation of his right to be present at a critical stage of the proceedings must show prejudice.

a. No prejudice must be shown when there is a structural error.

When there is a structural error, the presence or absence of prejudice is not a factor in judging the violation. The Sixth Circuit's opinion applying a plain error analysis is erroneous and also in conflict with the cases noted above.

Fulminante clearly states that a structural error "defies analysis by harmless error standards." 499 U.S. at 309. Harm is irrelevant to the basis underlying the right when a structural error exists. *Gonzalez-Lopez*, 548 U.S. at 149.

Despite the reasoning employed by the Sixth Circuit that a harmless error analysis disposes of the need for a technical formality of returning the case to the district court for pronouncement of the verdict, the language of Rule 43(a) mandating presence does not overlook the significance of the criminal defendant facing the judge at the verdict's delivery. The district court did not have discretion to deliver the verdict outside the defendant's presence, because such a practice ignores the intangibles present at a face-to-face encounter in a public courtroom where both the actions of the court and defendant interplay. The rule's language is clear, serves the interests of justice, and protects the public perception of the court.

The Sixth Circuit's opinion that pronouncement of the verdict is a technical formality offends the rule and constitutional protections afforded all criminal defendants. Prejudice is not a requirement and imposes a difficult burden upon any criminal defendant to articulate the effects of the encounter. Prejudice *per se* exists when the district court commits an obvious structural error in violation of the criminal rules of procedure and fundamental constitutional rights.

b. The dictates of Rule 51(b) are important in the proper analysis and show why prejudice need not be shown.

Harmless-error analysis in the context of structural error is speculative at best, and that is why it does not apply when there is structural error. Plain error, as employed by the Sixth Circuit, is also an incorrect standard of review. What might have happened if Mr. Burton and his counsel had been present when the verdict was rendered? What if Mr. Burton was found not guilty?

The Sixth Circuit further ignores the language of Federal Rule of Criminal Procedure 51(b), that provides:

A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party.

A criminal defendant thus has the opportunity when the verdict is delivered to make objections to it and to renew objections previously made. Such is necessary to preserve the record for appellate review. This becomes a critical component when the defendant has been actively involved in the defense of the charges against him. Mr. Burton is denied the opportunity.

For example, the Sixth Circuit's opinion concludes that Burton had failed to make objections at trial and was limited to plain error review. But the record is replete with Mr. Burton's multiple attempts to address the Rule 43(a) violation.

Recall that this matter was before the Sixth Circuit on direct review of the sentence imposed in 2018. The 2018 district court had granted a full resentencing hearing to Mr. Burton. Both Mr. Burton and his counsel directly challenged the

authority of that court to proceed against him because of the Rule 43(a) errors committed by the 1999 district court. The challenges include the following:

- 1). Mr. Burton's May 12, 2017 *pro se* motion challenging the authority of the district court to resentence him because of the Rule 43(a) violation which is denied because of futility; (Appx. 63a);
- 2). Mr. Burton's August 17, 2017 *pro se* motion seeking a full resentencing hearing, wherein he argues a violation of his Sixth Amendment right to have a public trial; (Appx. 87a);
- 3). Mr. Burton's January 31, 2018, *pro se* supplemental motion, again asserting that the Rule 43(a) must be revisited to determine the court's authority to resentence him; (Appx. 105a);
- 4). Defense counsel's supplemental argument, filed June 21, 2018, challenging the district court's authority because of the initial 43(a) violation; (Appx. 116a); and
- 5). Mr. Burton's allocution at the July 09, 2018, resentencing hearing, wherein he attempted to present his Rule 43(a) argument, but was denied the opportunity to do so, (Appx. 113a-134a);

In addition, Mr. Burton had also attempted to pursue error after rendition of the verdict in 1999. Of particular note is his attempt to appear before the district court and have jurisdictional issues addressed regarding violations of constitutional rights. He filed *pro se* motions on August 23, 1999, after verdict but before sentencing, because his then counsel would not raise certain issues Mr. Burton requested. (Appx. 159a). Because these requests were not heard, Mr. Burton was held to plain error review during his first appeal. (Appx. 35a).

Thus, Mr. Burton, on the face of the record, attempted to make his objections known, was denied by the district court, and now the Sixth Circuit again holds him to a plain error standard of review. What was Mr. Burton to do? Not only is this

fundamentally unfair, but it also makes apparent that the rationale behind this Court's prior determinations that harmless error review has no place where structural error has occurred was ignored by the Sixth Circuit. The difficulty of assessing the effect of the error supports the conclusion that the error is structural. *Gonzales-Lopez*, 548 U.S. at 149, n. 4.

III. This case is a good vehicle to resolve the important issues presented.

Mr. Burton's case presents an appropriate vehicle to resolve the circuit split regarding structural error and the harmless error analysis. Does the denial of a public proceeding at a critical stage in the case constitute structural error? Does harmless error review apply, or is such a deprivation of rights and violation of the mandatory language of Rule 43(a) a *per se* violation where harmless error has no place? The issue is clearly set out before the district court and the court of appeals, and the arguments are clear. The relevant facts are not in dispute, and even the Sixth Circuit opinion acknowledges "...the defendant's absence at the announcement of a verdict is not of 'little significance.'" (Appx. 1a; Opinion, page 15, citing *Canady*, 126 F.3d at 364).

The rationale of the Sixth Circuit is flawed, but clearly stated in its Opinion and thus is subject to review by this Court without having to speculate on what the Sixth Circuit ruled and why it did so. It ignored this Court's rationale when examining if structural error exists, too narrowly limited the categories into which structural error may fall, and then incorrectly conducted plain error review while ignoring significant parts of the record.

Finally, the case presents an excellent framework of why circuit splits must be resolved, because courts across the country are now approaching the review of structural error from vastly different paradigms. This is the case to bring more clarity about structural error issues to district courts, all criminal defendants, and the public at large.

CONCLUSION

This case presents important issues involving fundamental rights under the Fifth Amendment, Sixth Amendment, and the federal court's own rules of procedure. By accepting review of this case, this Court can resolve the questions presented, and bring uniformity to the federal criminal justice system. Because of that, this Petition for Writ of Certiorari, should be granted.

Respectfully Submitted,



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Submitted: April 28, 2020

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES BURTON, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT*

**APPENDIX TO THE
PETITION FOR A WRIT OF CERTIORARI**

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Note: (This document is filed stamped and initialed by a deputy clerk of the district court for the eastern District of Tennessee but cannot be found in the original paper record of the 1999 proceedings. It was provided to the undersigned by the Petitioner herein.)