No. 20-1523

IN THE SUPREME COURT OF THE UNITED STATES

ROLANDO CRUZ, JR.,
MARC HERNANDEZ,
and ROSCOE VILLEGA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF RESPONDENT, TYREE EATMAN, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ANDREW J. SHUBIN
333 South Allen Street
State College, PA 16801
(814) 867-3115
shubin@shubinlaw.com
Counsel of Record for Tyree Eatmon

May 28, 2021

QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to resolve whether a trial court's obvious structural error, in this case *sua sponte* closing the courtroom during the entire voir dire process and without trial counsel objection, requires reversal of a divided circuit panel's holding that judicial system integrity and reputation interests did not require a retrial where the potential costs outweighed the public's interest in enforcement of fundamental rights?

2. In fashioning the respondent's twenty-year conspiracy prison sentence, the court relied on the sum of the amounts involved in all distributions that it determined were foreseeable and within the scope of the agreement, even though no single agreed-upon transaction exceeded the threshold quantity required for such a sentence. The question, on which the Circuits are divided, is:

> How is the quantity of controlled substance involved in drug distribution determined for purposes of sentencing for conspiracy under 21 U.S.C. § 846, when the offense of distribution is the object of the conspiracy?

LIST OF ALL PARTIES

Petitioners herein are Rolando Cruz, Jr., Marc Hernandez and Roscoe Villega. Respondent, Tyree Eatmon, files this brief in support of the certiorari petition pursuant to Supreme Court Rule 12.6. as he was one of the consolidated Third Circuit co-appellants. Respondent had multiple trial co-defendants. In the court below, the Third Circuit consolidated Eatmon's appeal with those of co-defendants Rolando Cruz, Jr., Marc Hernandez, Roscoe Villega, Jabree Williams, Eugene Rice, Douglas Kelly, Angel Schueg, Maurice Atkinson, and Anthony Sistrunk. Co-Defendant Douglas Kelly filed his own Petition docketed before the Supreme Court at No. 20-7868, raising separate, but similar, issues to the Petitioner's questions. Additionally, co-defendant Anthony Sistrunk filed his own Petition docketed before the Supreme Court at No. 20-7889 raising a separate but similar issue to Petitioner's first question.

By filing this Respondent's Brief, Tyree Eatmon seeks to join the issues raised by Rolando Cruz, Jr., Marc Hernandez and Roscoe Villega in their Joint Petition for Writ of Certiorari.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION, STATUTES and RULES

RESPONDENT TYREE EATMON'S BRIEF IN SUPPORT OF THE PETITIONS OF ROLANDO CRUZ, JR., MARC HERNANDEZ, AND ROSCOE VILLEGA FOR A WRIT OF CERTIORARI

Respondent Tyree Eatmon files this brief in support of the joint petition filed by Rolando Cruz, Jr., Marc Hernandez and Roscoe Villega seeking a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit upholding their convictions and sentences.

I. OPINIONS BELOW

The Third Circuit's September 10, 2020, precedential opinion (authored by Judge Fisher and joined by Judge Roth; Restrepo, J., dissenting), is published at 974 F.3d 320. Appx. A[1]. The United States District Court for the Middle District of Pennsylvania (Kane, J.) did not write a pertinent opinion.

II. JURISDICTION

On September 10, 2020, the United States Court of Appeals for the Third Circuit filed its opinion affirming respondent's convictions and the trial court's sentence. On that same day, and in a joint opinion, the Circuit affirmed the relevant portions of co-defendants and writ petitioners Hernandez's, Cruz's and Villega's convictions and sentences. On November 16, 2020, the Third Circuit denied respondent's timely rehearing petition. Appx. B. Writ petitioners/co-appellants Hernandez, Cruz and Villega timely filed their joint petition for a writ of

[1] All references to Appendix citations, unless otherwise indicated, are references to Petitioner's Joint Petition for Writ of Certiorari.

certiorari docketed at No. 21-1523 and pursuant to this Court's rule 26.1, Tyree Eatmon's response is due no later than June 1, 2021. Accordingly, this response is timely filed. Respondent invokes this Court's 28 U.S.C. § 1254(1) jurisdiction.

III. RESPONDENT'S STANDING

The legal questions raised by the Third Circuit's affirmance and presented for this Court's review by co-defendants and writ petitioners Cruz, Hernandez, and Villega, are identically consequential and relevant to respondent Tyree Eatmon. Because these defendants were tried together and sentenced by the same judge, Tyree Eatmon's constitutional right to a public trial and the manner in which the trial court determined his sentence were identical to writ petitioners.

IV. STATEMENT OF THE CASE

a. The Southside

Tyree Eatmon, like the petitioners, grew up on the "South Side" of York, Pennsylvania, a high-crime, drug infested, impoverished neighborhood with a history of itinerant and often brazen violence. Appx. 2a. This case arose from a multi-year Federal and local law enforcement investigation into drug trafficking and violence in response to a perceived pattern of escalating violence between residents of that neighborhood and residents of the Parkway neighborhood of York. Appx. 3a. In its Indictment, the government posited that the defendant South Side residents were, in fact a gang, the "Southside Gang", that engaged in drug trafficking and attendant acts of violence. According to the government, individuals

associated with a national street gang developed the South Side's existing drug trafficking into a more organized operation. Id. The government prosecuted respondent, the petitioners and others as members of a criminal enterprise named the "South Side gang." Id.

In September 2014, a grand jury returned a second superseding indictment against 21 South Side neighborhood men including the respondent and the petitioners. Both respondent and petitioners were charged in: Count I with conspiracy to violate 18 U.S.C. § 1962(c) of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(d); Count II conspiracy to distribute a controlled substance, 21 U.S.C. § 846, and; Count III with distribution of a controlled substance, 21 U.S.C. § 841(a). Counts II and III specified drug quantities of 5 kilograms or more of powder cocaine, and 280 grams or more of crack cocaine. The government charged respondent and petitioners, among others, with racketeering conspiracy, drug trafficking conspiracy, drug trafficking, and firearm offenses. Appx. 1a, 4a. The indictment alleged that from 2002 to 2014, the "Southside Gang" constituted an extensive drug trafficking RICO enterprise conducted across a defined territory and which was animated by episodic and occasionally deadly violence. Appx. 1a–2a.

The indictment charged 5 kilograms or more of cocaine, and 280 grams or more of crack cocaine, heroin and marijuana, drug quantities and described drug trafficking as the enterprise's object offense specifying racketeering activities, which if proven, would increase the statutory penalties. Appx. 4a. Although several

defendants pleaded guilty and cooperated with the government, none agreed with the indictment's allegation of the existence of a "Southside Gang" or the government's characterization of that alleged organization.

Respondent Eatmon's and writ petitioners' 33-day jury trial, began with voir dire on September 21, 2015. The District Court sua sponte ordered the public excluded from the courtroom during voir dire and filed a written order closing the courtroom to the public for the entirety of voir dire. The Court closed the courtroom to the public without determining whether it was necessary or considering any alternatives. None of the defendants objected to the order and voir dire then took place for two days.

As petitioners alleged in their cert petition:

> During the eight-week trial, the government's witnesses predominately testified that there was no Southside gang. Rather, as the defense countered, despite the illegal activity that undoubtedly occurred, expressions of a South Side identity reflected at most a kind of autochthonous pride, a loyalty borne of a common home, and did not amount to the existence of a South Side gang or criminal organization. Appx. 5a–6a. Witnesses described numerous, smaller drug sales that occurred in the South Side. Some individuals sold drugs on their own, or alongside neighborhood friends, and some had different supply sources for their sales. There was no leader or structure, and profits were earned separately. The violent incidents relied on by the government were the product of personal beefs." Appx. 2a, 6a, 49a.
>
> The government also presented witnesses who testified about drug quantities they allegedly received from one or more of the petitioners, but the government provided no evidence of any drug transaction that equaled or exceeded the charged amounts. Appx. 53a. Instead, the government argued, and the trial court's jury instructions authorized, that drug quantities from sales during the indictment period should be aggregated to meet the statutory threshold for enhanced penalties.

Petitioner's Joint Petition for Writ of Certiorari, at pg. 6.

On November 16, 2015, a jury returned guilty verdicts as to all defendants, and respondent and petitioners were commonly convicted as to drug trafficking Counts I, II and III. The trial court sentenced Eatmon to 260 months incarceration, followed by 3 years of supervised release.

b. Third Circuit's 2-1 Decision

Respondent, petitioners, and several co-defendants appealed their convictions and sentences on various grounds. In a 2-1 precedential decision, a Third Circuit panel (Fisher, Restrepo & Roth, JJ.), largely affirmed. Appx. A, sub nom. *United States v. Williams*, 974 F.3d 320. Relevant to this petition, the panel affirmed the appellants RICO conspiracy and drug conspiracy convictions against their insufficiency arguments, applying the generous legal definitions of those offenses. Appx. 47a, 51a. The court also rejected arguments that the trial record established only a far different (and smaller) scope of agreement than that charged. Appx. 45a–53a.

Petitioners also argued, based upon a subsequent Third Circuit decision that comported with every other circuit which decided the same issue, that the record was insufficient to support the § 841(b)(1) severity level of their drug distribution convictions, and that the jury was wrongly charged on a quantity-aggregation theory. See *United States v. Rowe*, 919 F.3d 752, 759 (3d Cir. 2019) (holding that the penalties assigned by § 841(b)(1)(A) (larger quantities) and (b)(1)(B) (mid-level quantities) attach to each discrete act of distribution or possession, not to a course

of drug dealing).

Although the government conceded the error as to the substantive counts, it opposed reversal on those grounds. Appx. 35a. Petitioners also argued that *Rowe* applied to the drug conspiracy convictions, because the terms of that statute (§ 846) expressly tie the penalty for conspiracy to that which applies to —the offense, the commission of which is the object of the conspiracy.

Reviewing for plain error, the panel focused on the *Olano* substantial-rights inquiry and whether the various appellants' total sentences would have been the same absent the error. Appx. 37a–38a. Although the panel agreed that the jury instructions were erroneous on both the substantive and conspiracy counts (for different reasons), they declined to require resentencing on the substantive counts because of their concurrency with the conspiracy sentences. On the § 846 conspiracy count, the panel held – recognizing that different circuits have taken divergent approaches – that aggregation was appropriate but only within the parameters defined by this Court (for an entirely different purpose) in *Pinkerton v. United States*, 328 U.S. 640 (1946), and (again for a different purpose) in the —relevant conduct provision of the United States Sentencing Guidelines. Appx. 41a–45a. The court's analysis did not start with, or seek to justify its holding under (or even refer to) the governing language of 21 U.S.C. § 846.

The panel concluded that it was unnecessary to correct the error finding the trial evidence more than sufficient under the test it had just articulated to support (b)(1)(A) (the highest level) sentences. Citing the conspiracy aggregates, the court

held that vacating the distribution verdicts would not reduce the sentence, Appx. 45a–53a, and the conspiracy count error (as defined by the panel) did not affect appellants' substantial rights. Appx. 39a–45a.1

As to appellants' public trial argument, the panel recognized that the trial court's courtroom closure violated the defendants' Sixth Amendment right to a public trial and that this violation amounted to a "structural" error that even the majority conceded, would have resulted in automatic reversal had trial counsel objected. Appx. 8a–9a.

The panel majority found that respondent and petitioners failed to satisfy prong 4 of the *United States v. Olano*, 507 U.S. 725, 732 (1993) four-part plain-error review inquiry: whether "the error seriously affects the fairness, integrity or public reputation of judicial proceedings" requiring correction. Notwithstanding their holding, the majority recognized that the District Court's closure "undoubtedly violated the Defendants' Sixth Amendment right to public trial and under Supreme Court precedent that sort of violation is a structural error." *United States v. Williams*, 974 F.3d 340. The majority also acknowledged that the closure "compromised the values underlying the public-trial right . . .to some degree . . ." because it "had the potential to call into question the fairness, integrity, and public reputation of judicial proceedings because it stamped the violation of the Defendants' Sixth Amendment right with the imprimatur of the federal judiciary itself, thereby undermining public confidence in its impartiality." *Id.* at 346.

The majority's admission is far from a complete accounting of the "structural

defect in the constitution of the trial mechanism" prejudice which, as explained by this Court, "def[ies] analysis by 'harmless-error' standards". *Sullivan v. Louisiana*, 508 U.S. 275, 276, 113 S. Ct. 2078, 2080, 124 L.Ed.2d 182, 187 (1993)(internal citations omitted). As noted in the dissent, the District Court's voir dire courtroom closure "is the prototypical constitutional error that is impossible to measure."

Against this "unquantifiable" and "indeterminate" structural error prejudice, the dissenting judge noted that "the Majority conduct[ed] a cost-benefit analysis to justify leaving the public trial violation uncorrected. Majority Op. at 347 (declining remedial action because "the remedy is to be assessed relative to the costs of the error")". *Williams* at 385. The majority's central inquiry focused on "balancing" the quantifiable and considerable costs and inconvenience attendant to retrying multiple defendants against the structural error prejudice. The majority's deployment of a test positing concrete and tangible costs and inconvenience against "unquantifiable and indeterminate" structural prejudice preordained an outcome that prioritized judicial efficiency over correction of a "grave" constitutional error. *Id* at 386.

The court of appeals denied petitioners' and respondent's requests for rehearing, either by the panel or en banc. See Order Denying Respondent, Tyree Eatmon's Petition for Rehearing attached as Exhibit A.

V. REASONS FOR GRANTING THE WRIT PETITION

1. Respondent, like trial co-defendants and Certiorari Writ Petitioners Rolando Cruz, Jr., Marc Hernandez, Roscoe Villega, believes that this case addresses a fundamental but not yet settled question: whether a structural error by its nature "affects substantial rights" for purposes of plain error review – as well as the related, important question whether the potential retrial costs and similar practical considerations, can outweigh the harm to the integrity and reputation of the courts that results from ignoring blatant violations of well-established constitutional rights.

This petition's exceptional importance lies in the urgent need to address the effects of a precedential opinion that conditions the fundamental right to a public trial on a defense attorney's timely objection to a courtroom closure.[2] Absent such an objection, the panel majority announced a new set of metrics requiring an appellate court that identifies a wrong to conduct a costs and inconvenience accounting -- an inherently speculative exercise – and balance that against the unquantifiable and indeterminate effects of stamping the Federal judiciary's imprimatur on a constitutional violation. The Circuit's opinion offends settled, common sense, precedent which recognizes that the effects of a courtroom closure are immeasurable, incalculable, foundational, and inarticulable, and cannot and must not be posited against the speculative costs and burdens of correcting this constitutional wrong. Respondent supports and adopts the arguments made by petitioners which apply equally to him.

[2] Indeed, this case can act as a vehicle for this Court to determine whether the right to a public trial is so foundational that it must be affirmatively waived by a defendant or, in the very least, the product of counsel's intentional decision rather than a product of her failure to object.

2. Respondent supports the position of trial co-defendants and Certiorari Writ Petitioners Rolando Cruz, Jr., Marc Hernandez, Roscoe Villega that this Court should resolve a division among the circuits on how a jury should determine the quantity of drugs necessary to trigger a mandatory minimum or increase a statutory maximum under 21 U.S.C. § 841(b)(1) in a conspiracy case under § 846. The decision of the court below defies this Court's cases by failing even to consider, much less to implement, the statutory language that answers this important question.

Respondent supports and adopts the arguments made by petitioners which apply equally to him.

VI. CONCLUSION

For the foregoing reasons, Respondent Tyree Eatmon respectfully requests that the petition for writ of certiorari filed by Rolando Cruz, Jr., Marc Hernandez and Roscoe Villega be granted.

Respectfully submitted,

ANDREW J. SHUBIN
333 South Allen Street
State College, PA 16801
(814) 867-3115
shubin@shubinlaw.com
Counsel of Record for Tyree Eatmon

May 28, 2021