NO. 20-7796

IN THE SUPREME COURT OF THE UNITED STATES

MAURICE ATKINSON,
Petitioner

vs

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 DOUGLAS KELLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Petitioner Maurice Atkinson, as well as Respondent Douglas Kelly, were denied their Sixth Amendment right to a public trial when the courtroom was completely closed to the public pursuant to the District Court's *sua sponte* written Order?

IV. Whether a two level enhancement for body armor was improperly applied when there was insufficient evidence that Maurice Atkinson and/or Douglas Kelly used body armor during drug sales?

LIST OF ALL PARTIES

Petitioner herein is Maurice Atkinson. This brief is filed on behalf of Respondent, Douglas Kelly, who is designated as a Respondent under this Court's Rule 12.6, because: Maurice Atkinson and Douglas Kelly were consolidated Co-Appellants before the Third Circuit Court of Appeals below; were also Co-Defendants during trial in the Middle District of Pennsylvania; and, Douglas Kelly did not join Maurice Atkinson in this Court as a Petitioner. Instead, Respondent, Douglas Kelly, filed his own Petition docketed before the Supreme Court at No. 20-7868, raising a separate, but similar issue, to Petitioner's first question. By filing this Respondent's Brief, Douglas Kelly seeks to join Maurice Atkinson's first and fourth issues, in addition to the issues Kelly raised separately.

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BRIEF OF RESPONDENT, DOUGLAS KELLY, IN SUPPORT OF MAURICE ATKINSON'S PETITION FOR A WRIT OF CERTIORARI

Respondent, Douglas Kelly, suggests that this Court grant the Petition For Writ Of Certiorari seeking to review the judgment and order of the United States Court of Appeals for the Third Circuit as filed by Petitioner, Maurice Atkinson.

STATEMENT OF THE CASE

By Second Superseding Indictment, Petitioner, Maurice Atkinson, Respondent, Douglas Kelly, and 19 others were charged with racketeering conspiracy, drug trafficking conspiracy and drug trafficking. The indictment alleged a conspiracy involving numerous individuals over a 12 year period, between 2002 and 2014, who were accused of engaging in drug trafficking and violence in a region of York, Pennsylvania called the "Southside". Atkinson and Kelly and ten of their Co-Defendants proceeded to a consolidated trial. (United States v Williams, 974 F.3d 320,335 (2020))

On the eve of trial, the District Court issued an order closing the courtroom during jury selection. The Order stated:

> AND NOW, on this 18th day of September, 2015, IT IS HEREBY ORDERED THAT due to courtroom capacity limitations, only (1) court personnel, (2) defendants, (3) trial counsel and support staff, and (4) prospective jurors shall be allowed into the courtroom during

> jury selection. No other individuals will be present except by express authorization of the Court. (Id. , at 337.)

Neither the Government nor any defense counsel requested this order, nor did the District Court request their input. The District Court closed the courtroom to the public for jury selection without determining whether it was necessary, or if there were alternatives. None of the defendants objected to the Order. Voir dire then took place for two (2) days. (Id., at 337-338).

At the conclusion of trial, Atkinson, Kelly and their co-defendants were convicted. Atkinson and Kelly were convicted of: Count 1, Racketeering Conspiracy, in violation of 18 U.S.C. 1962; Count 2, Conspiracy To Distribute Controlled Substances, in violation of 21 U.S.C. 846; and Count 3, Distribution of Controlled Substances, in violation of 21 U.S.C.841(a)(1). Atkinson and Kelly were sentenced to life imprisonment. (Id., at 339)

On appeal, Atkinson, Kelly and their co-appellants challenged the courtroom closure, among other issues. However, the Third Circuit denied their appeals. (Id., at 380) By a 2-1 Decision, the Third Circuit concluded that the District Court's error in closing the courtroom for jury selection did not warrant reversal of Atkinson's and Kelly's convictions and the granting of a new trial. (Id., at 345-348) The Third Circuit ruled that the District Court's closure of the

courtroom was a structural error, in violation of Atkinson's and Kelly's Sixth Amendment right to a public trial. They acknowledged that a structural error is among a limited class of fundamental constitutional errors that by their very nature affect substantial rights and cannot be disregarded. The Third Circuit opinion stated: "As a result, in determining the availability of a remedy, no further inquiry may be necessary beyond the fact of the violation itself: the injured parties are entitled to 'automatic reversal.' (Id., at 340)

Because no defendant had objected, the Third Circuit reviewed for plain error. They applied the four-part inquiry established in United States v Olano, 507 U.S. 725,732 (1993). There must: (1) be an error; (2) that is plain; (3) affects substantial rights; and (4) seriously affects the fairness, integrity or public reputation of judicial proceedings. Id. The Government conceded that the District Court committed error, and that the error was plain. (United States v Williams, supra., at 340-341)

The majority Third Circuit opinion declined to address Olano's third prong, whether the very fact of a structural error affects substantial rights. (United States v Williams, supra., at 341) In considering the fourth prong of Olano, the majority ruled that, even when there is structural error, a new trial is not automatic, but the error is to be evaluated in the context of the unique facts of the case as a

whole to see if the error warrants remedial action, considering the costs to the fairness, integrity and public reputation of the judicial proceedings that would result from allowing the error to stand. (United States v Williams, supra., at 341-345) Ultimately, the majority opinion concluded the District Court's error did not warrant reversal of appellants' convictions and remand for a new trial. (Id., at 345-348)

The dissenting opinion pointed out it is illogical to classify an error as structural because it affects substantial rights, but then conclude it did not affect these appellants' substantial rights. The dissent suggested that prejudice should be presumed, and stated that the substantial rights prong had been satisfied. The dissenting opinion condemned the majority balancing test, or cost benefit analysis, as improper and unjust because the public trial right is a fundamental right. (Id., at 384-386)

Seven appellants, including Atkinson and Kelly, filed Petitions For Rehearing By Panel Or *En Banc* to the Third Circuit. All were denied, including Atkinson's and Kelly's, with the final denial being the Petition For Rehearing of Eugene Rice, on November 24, 2020. The matter is now before this Honorable Court for disposition.

REASONS FOR GRANTING THE PETITION

I. Whether Maurice Atkinson and Douglas Kelly were denied their Sixth Amendment right to a public trial when the courtroom was completely closed to the public pursuant to the District Court's *sua sponte* written Order ?

A. Important Questions Of Federal Law Not Settled By This Court

The Sixth Amendment right to a public trial was extended to *voir dire* of prospective jurors in Presley v Georgia, 558 U.S. 209, 213 (2010). This Court has classified courtroom closure as a structural error that generally entitles the defendant to automatic reversal. Weaver v Massachusetts, 137 S.Ct. 1899,1905 (2017) (plurality opinion); Waller v Georgia, 467 U.S. 39 (1984).

A structural error is a limited class of fundamental constitutional errors that are so intrinsically harmful as to require automatic reversal without regard to their effect on a trial's outcome. Such errors infect the entire trial process and necessarily render a trial fundamentally unfair. Neder v United States, 527 U.S. 1, 8-9 (1999) An open courtroom during jury selection is fundamental to protecting defendants' rights to a jury free from prejudice and ensuring public confidence in the administration of justice. See Gomez v United States, 490 U.S. 858,873 (1989)

An instance where this Court has ruled that a structural error involving erroneous courtroom closure did not automatically lead to reversal was in

Weaver v Massachusetts, supra. However, in Weaver, the issue was not raised until collateral review, which required a different standard of review. Applying the standard for ineffective assistance of counsel set by Strickland v Washington, 466 U.S. 668,687 (1984), a plurality of this Court concluded that the petitioner did not demonstrate prejudice as required for a new trial. Weaver v Massachusetts, supra., at 137 S.Ct. 1910-1913. However, this Court has never addressed the issue in the instant case, whether a structural error requires the remedy of a new trial when the error is raised for the first time on direct appeal.

Because Petitioner Atkinson and Respondent Kelly, as well as their Co-Defendants did not object at trial to the closure of the courtroom for *voir dire*, but raised the issue on direct appeal, the standard of review is plain error. United States v Olano, 507 U.S. 725,736 (1993) requires that four prongs be satisfied in order for a new trial to be granted under plain error review. A petitioner must show that: (1) there was an error, (2) it was clear or obvious, (3) it impacted substantial rights, and (4) seriously affected the fairness, integrity or public reputation of judicial proceedings. Id., at 736.

Olano's third, substantial rights, prong typically requires a showing of prejudice. The opinion in Olano acknowledged that there may be a special category of forfeited errors that can be corrected regardless of their effect on the

outcome. Id., 507 U.S. at 735. A structural constitutional error, such as the denial of a public trial during *voir dire* proceedings, should be corrected regardless of prejudice on plain error review. See Neder v United States, supra. However, this Court has not yet resolved the issue of whether structural errors automatically satisfy the third prong of Olano. See: United States v Marcus, 560 U.S. 258,263 (2010); Puckett v United States, 556 U.S. 129,140 (2009)

In summary, Certiorari should be granted to finally resolve the important questions of: (1) Whether a structural error requires the remedy of a new trial when the error is raised for the first time on appeal, and (2) do structural errors automatically impact substantial rights, thereby satisfying the third prong of Olano?

B. Conflict With Relevant Decisions Of This Court

This Court has consistently ruled that structural errors generally result in the reversal of a conviction because they are so intrinsically harmful as to require automatic reversal without regard to their effect on the outcome. Neder v United States, supra., 527 U.S., at 7. Defendants have not been required to make a specific showing of prejudice when claiming a structural error on direct review because they would be forced to engage in a "speculative inquiry into what might

have occurred in an alternative universe." United States v Gonzalez-Lopez, 548 U.S. 140,148-150 (2006)

In the instant case, the Third Circuit ruled that Atkinson, Kelly, and their co-appellants were not entitled to a new trial because they did not meet Olano's fourth prong, that the error seriously affected the fairness, integrity or public reputation of judicial proceedings. (United States v Williams, supra., at 342,344-348) In doing so, the Third Circuit Majority erred by engaging in a cost-benefit analysis to justify not correcting the public trial structural error violation. (Id., at 345-348) The Majority analysis mistakenly relied on cases that consider errors reviewed for harmlessness. (Id., at 344-345)

Past decisions of this Court have ruled that harmless error review is not appropriate for structural violations. United States v Gonzalez-Lopez, supra., at 150-152; Neder v United States, supra., at p 7-9; Arizona v Fulminante, 499 U.S. 279, 310 (1991). Structural errors defy analysis by harmless error standards because they affect the framework within which the trial proceeds, and are not simply an error in the trial process itself. United States v Gonzalez-Lopez, supra., at 148. Such trials "cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." Arizona v Fulminante, supra. As a result, this Court has

ruled that structural errors are so intrinsically harmful as to require automatic reversal. Neder v United States, supra., at 7-8.

As this Court stated in Rosales-Mireles v United States, 138 S.Ct. 1897,1908 (2018): "...the public legitimacy of our justice system relies on procedures that are 'neutral, accurate, consistent, trustworthy, and fair,' and that 'provide opportunities for error correction''...(W)hat reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise..."

Because the reported Third Circuit decision in the instant case is in conflict with the aforesaid past precedents of this Court, Certiorari should be granted to resolve their erroneous reasoning.

C. Conflict With Decisions of Other United States Court Of Appeals And Third Circuit Precedent On The Same Issue

The decision of the Third Circuit in the instant case, refusing to grant Atkinson and Kelly a new trial despite structural error involving denial of a public trial during *voir dire*, is in error because it is contrary to decisions of the First Circuit Court of Appeals and the Second Circuit Court of Appeals addressing the same issue. United States v Negron-Sostre, 790 F.3d 295 (1st Cir. 2015); United States v Gupta, 699 F.3d 682 (2nd Cir. 2011)

1. First Circuit Court of Appeals

In Negron-Sostre, family members of the defendants were excluded from the courtroom during jury selection. No defense counsel objected during trial. The issue was first raised on direct appeal. United States v Negron-Sostre, supra., at 299-300,302-304. Applying the Olano plain error analysis, the First Circuit panel found that the courtroom was closed, and that the closure was clear and obvious error, satisfying the first two prongs of plain error analysis. Id., at 305.

The First Circuit in Negron-Sostre also ruled that the third prong of Olano had been met. They stated that exclusion of the public during the entirety of *voir dire* without meeting the test set forth in Waller v Georgia, supra., was a structural error. The Opinion in Negron-Sostre said that structural errors, as distinguished from trial errors, infect the entire trial process. As a result, unlike trial rights, structural rights are basic protections whose precise effects are unmeasurable. Id., at 305-306. The Court stated: "Our precedent is unequivocal: structural error in the form of a denial of the public trial right prejudices a defendant notwithstanding that the prejudice may be difficult to detect." Id., at 305.

The First Circuit determined that the error had affected the fairness, integrity and public reputation of the proceedings as a whole. They ruled that improper courtroom closure calls into question the fundamental fairness of the

trial. The Negron-Sostre decision reasoned that structural error transcends the criminal process by depriving a defendant of those basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair. Id., at 306.

2. Second Circuit Court of Appeals

In United States v Gupta, 699 F.3d 682 (2nd Cir. 2011) the Second Circuit considered whether intentional closure of the courtroom during *voir dire* violated the defendant's right to a public trial. As in the instant case, no party raised a contemporary objection. While the direct appeal was pending, Presley v Georgia, 130 S.Ct. 721,724 (2010) was decided, and the issue was added. United States v Gupta, supra., at 685-687. The Second Circuit in Gupta ruled that the trial court's intentional, unjustified closure of the courtroom for the entirety of voir dire violated the defendant's Sixth Amendment right to a public trial and granted a new trial, despite no objection at trial. Id., at 690.

The Second Circuit in Gupta pointed out that the knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power. Publicity serves to guarantee the fairness of trials and to bring the beneficial effects of public scrutiny

upon the administration of justice. Id., at 687. The Second Circuit considered applying a "triviality standard", but rejected it, stating:

> "...the value of openness' that a public trial guarantees 'lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known" Id., at 689, quoting Press-Enter. Co. v Super. Ct. of Cal., 464 U.S. 501,510 (1984)

It is the openness of the proceeding, not what actually transpires, that establishes the appearance of fairness so essential to public confidence in the entire judicial system. The Second Circuit in Gupta stated that given the exceptional importance of the right to a public trial, excluding the public from all of *voir dire* without justification grounded in the record would eviscerate the right to a public trial entirely. Id.

3. Third Circuit Court of Appeals

In the case at bar, the majority Third Circuit opinion acknowledged that their failure to grant a new trial was even contrary to past Third Circuit law as set forth in United States v Syme, 276 F.3d 131,155 n.10 (3d Cir. 2002). (United States v Williams, supra., at 342) In Syme, the Third Circuit stated that structural error would constitute reversible error even under plain error review. Id.

In summary, the conflict between this decision and precedent from the United States Court of Appeals for the First and Second Circuits, together with the failure to follow past holdings of the Third Circuit, makes this a case for which the Petition For A Writ Of Certiorari should be granted to decide and finally resolve the conflicts between the Circuits.

D. Conflict With Other State Courts Of Last Resort

The decision by the Third Circuit in the instant case is in error and conflicts with decisions of the Supreme Court of North Dakota, as well as the Supreme Court for the State of Washington. State Of North Dakota v Martinez, 2021 ND 42(ND 2021) (Appendix E); State v Brightman 122 P.3d 150 (Wash. 2005).

1. North Dakota

North Dakota v Martinez, 2021 ND 42 (ND 2021) (Appendix E) involved the consolidated appeals of Juan Martinez and Everest Moore. In Moore's case, the courtroom was closed by the Judge during jury selection. In the case involving Martinez, the Judge closed the courtroom during testimony of the victim and her counselor. Defense counsel did not object in either case. The trial court made no detailed findings regarding the reasons for courtroom closure. Id.

The North Dakota Supreme Court found the violations to the right to public trial to be structural error, quoting Weaver v Massachusetts, supra., at 137 S.Ct.

1907. North Dakota v Martinez, supra., found that the structural error doctrine ensures certain basic constitutional guarantees that should define the framework of any criminal trial. As a result, Martinez ruled that errors that affect the entire adjudicatory framework defy analysis by harmless error standards. They ruled that because structural errors are immune to harmless error analysis, structural errors necessarily affect substantial rights. Id.

Ultimately, the North Dakota Supreme Court in Martinez, held that the exclusion of the public, without a knowing, intelligent, and voluntary waiver or Waller findings articulated on the record before the closures, negatively affected the fairness, integrity, and public reputation of their criminal justice system. As a result, they granted a new trial. Id. Martinez also applied the standard for waiver of other Sixth Amendment rights and concluded that the right to a public trial can never be waived by a defendant without a knowing, intelligent, and voluntary waiver, the same as the standard for waiver of counsel. Id.

2. Washington

In State of Washington v Brightman, supra., the trial judge closed the courtroom for jury selection because of space and security concerns. Neither party objected. Id., at 510-511. Brightman was convicted and on direct appeal argued the trial court violated his right to a public trial by closing the courtroom during

jury selection. Id., at 512. The Washington Supreme Court recognized that the public trial right serves to ensure a fair trial, remind the officers of the court of the importance of their functions, encourage witnesses to come forward, and to discourage perjury. Id., at 514, citing Waller v Georgia, supra., at 467 U.S. 46-47. The Court noted that a closed jury selection process harms the defendant by preventing their family from contributing their knowledge or insight to jury selection and by preventing the prospective jurors from seeing the interested family members. Id. , at 515.

The Washington Supreme Court in Brightman, ruled that failure to lodge a contemporaneous objection at trial did not effect a waiver of the public trial right. Because the record did not indicate that the trial court considered Brightman's public trial right as required, they remanded for a new trial. Id., at 518; See also: State v Schierman, 438 P.3d 1063, 1079,1081 (Wash.2015)

In sum, the decision in this case is in error and contrary to established precedent in at least the states of North Dakota and Washington. As a result, Atkinson's Petition For A Writ of Certiorari should be granted to resolve this conflict and establish uniformity among the states.

IV. Whether a two level enhancement for body armor was improperly applied when there was insufficient evidence that Maurice Atkinson and/or Douglas Kelly used body armor during drug sales?

On December 11, 2017, the day before sentencing, a Second Revised Presentence Report was submitted, which calculated a Base Offense Level of 38. Like Atkinson, Kelly was assessed 2 points for using body armor in connection with a drug trafficking crime, pursuant to USSG 3B1.5(1) and (2)(A). His Total Offense level was calculated at 43 and a Criminal History Category of 6 was determined, based upon a finding Kelly was a career offender. The guideline imprisonment term was calculated to be life. (Doc 1361).

A sentencing hearing was held on December 12, 2017. No witness testimony was presented. Despite Kelly's objection, a 4 level enhancement was imposed for use of a body armor. (A505-507) The same thing happened when Atkinson was sentenced. Kelly and Atkinson were sentenced to life imprisonment. (A513-A518,A522-A523,A528-A529)

A three step framework is required for sentencing. First, a District Court must calculate a defendant's Sentencing Guidelines. Second, the Court must formally rule on the motions of both parties, and third, the Court is required to exercise its discretion by considering the relevant factors set forth in 18 U.S.C. 3553(a). United States v Gunter, 462 F.3d 237,247 (3d Cir. 2006)

Kelly's original Presentence Report assessed a 4-level increase in the Base Offense Level pursuant to USSG 3B1.5(1) and (2)(B) because Kelly was convicted of a drug trafficking crime and a Co-Defendant used body armor. (Doc 1007, p 289) Kelly objected and the revised PSR stated:

> The probation officer agrees with the defendant that the four-level enhancement is not applicable to him, as the enhancement at §3B1.5(2)(B) is limited to the defendant's own conduct. There is no evidence that Kelly used body armor during the offense. However, the racketeering offense involved the use of body armor and therefore, a two-level enhancement is applicable under USSG §3B1.5(2)(A) in this case... (Doc 1136, p 9)

USSG 3B1.5(2)(A) provides for a 2-level increase in the Base Offense Level if the defendant was convicted of a drug trafficking crime or a crime of violence and the offense involved the use of body armor. "Use" means active employment in a manner to protect the person from gunfire." USSG 3B1.5, App Note 1. In addition, USSG 3B1.5, App Note 2 states:

> . . .the term 'defendant', for purposes of subdivision (2)(B), limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

As a result, in order for USSG 3B1.5(2) to apply, there must be some form of direct or active participation by Kelly and/or Atkinson. A 3B1.5(2) enhancement based solely upon entry into a conspiracy is inadequate because it does not meet the burden of proof required that Kelly and/or Atkinson aided,

abetted, counseled, commanded, induced, procured, or willfully caused the use of the body armor upon which the enhance-ment is predicated. See: United States v Cespedes, 663 F.3d 685,689-690 (3d Cir. 2011); United States v Pojilenko, 416 F.3d 243,247-249 (3d Cir. 2005)

The Revised Presentence Report and Addendum assigned Kelly 2 Offense Level points under USSG Section 3B1.5(1)(2)(A). (Doc 1350: p 63) However, at sentencing the Court imposed a 4 level enhancement. (A506-A507)

During an almost 2 month trial, which featured a multitude of witnesses, physical evidence and documents, the only evidence presented that Douglas Kelly wore body armor was the testimony of Cordaress Rogers, who briefly discussed the issue. His testimony was as follows:

> Q. Did you ever see any people in the south side with bulletproof vests?
> A. The guys from New York.
> Q. And can you be more specific?
> A. Douglas and Marky D.
> Q. And where did you see them with bulletproof vests?
> A. On Maple and Duke Street.
> Q. What were they doing with the bulletproof vests?
> A. Wearing them.
> Q. I beg your pardon?
> A. Wearing them.
> Q. Wearing them. So you saw both Douglas and Mr.–and when I say "Douglas,", Mr. Kelly and Mr. Hernandez wearing bulletproof vests?
> A. Yes.
> Q. Did you see that on more than one occasion?
> A. Yes. (A339)

Rogers' testimony does not have sufficient indicia of reliability to support its probable accuracy. Rogers provided no facts or details as to the circumstances when the body armor was worn. This made the opportunity for cross-examination impossible. United States v Freeman, F.3d 322 (3d Cir. 2014); United States v Miele, 989 F.2d 659 (3d Cir. 1993)

Even if deemed credible, Rogers' testimony does not establish Kelly used body armor while committing a drug trafficking crime. Rogers did not expound on what Kelly was doing while wearing the bulletproof vest, nor why he was wearing it. He never stated, expressly or implied, that Kelly was wearing body armor while selling drugs.

Because there is no reliable evidence that Kelly, or Atkinson, wore body armor in connection with a drug trafficking crime, their Base Offense Level should not have been enhanced under USSG Section 3B1.5(2)(A) See: United States v Cespedes, supra.; United States v Pojilenko, supra.

CONCLUSION

WHEREFORE, for all of the reasons set forth above, Maurice Atkinson's Petition For A Writ Of Certiorari should be granted.

Respectfully submitted,
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