

NO.

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IN THE SUPREME COURT OF THE UNITED STATES

DOUGLAS KELLY, PETITIONER

vs

UNITED STATES OF AMERICA, RESPONDENT

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

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PETITION FOR A WRIT OF CERTIORARI

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## **QUESTIONS PRESENTED**

I. In the context of a structural error involving a public trial violation during jury selection, where no trial objection was made but the error was raised on direct appeal, must the Petitioner demonstrate prejudice to secure a new trial, or are they entitled to automatic reversal?

II. Does the aggregation of drug sales to enhance the maximum sentence for drug Conspiracy and RICO Conspiracy conflict with this Court's decision in Alleyne v United States?

## **LIST OF PARTIES**

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this Petition is as follows:

## **RELATED CASES**

1. United States District Court (Middle District of Pennsylvania): United States v Hernandez, et al., No. 1: 14-CR-0070:

A. United States v Marc Hernandez, No. 1: 14-CR-00070-001 (October 25, 2017);

B. United States v Douglas Kelly, No. 1: 14-CR-00070-002 (December 12, 2017);

C. United States v Roscoe Villega, No. 1: 14-CR-00070-003 (November 15, 2017);

D. United States v Rolando Cruz, Jr., No. 1: 14-CR-00070-004 (October 4, 2017);

E. United States v Tyree Eatmon, No. 1: 14-CR-00070-006 (December 20, 2018)

F. United States v Maurice Atkinson, No. 1: 14-CR-00070-008 (February 12, 2018);

G. United States v Anthony Sistrunk, No. 1: 14-CR-00070-009 (June 28, 2018); and

H. United States v Eugene Rice, No. 1: 14-CR-00070-011 (December 7, 2017);

I. United States v Angel Schueg, No. 1: 14-CR-00070-012 (December 21, 2017);

J. United States v Jabree Williams, No. 1: 14-CR-00070-017 (May 05, 2017);

2. United States Court of Appeals (3<sup>rd</sup> Circuit): United States v Williams, 974 F.3d 320 (2020):

    A. United States v Jabree Williams, No. 17-2111 (judgment on appeal on September 10, 2020);

    B. United States v Rolando Cruz, Jr., No. 17-3191 (judgment on appeal on September 10, 2020; order denying rehearing on November 10, 2020);

    C. United States v Marc Hernandez, No. 17-3373 (judgment on appeal on September 10, 2020; order denying rehearing on November 10, 2020);

    D. United States v Roscoe Villega, No. 17-3586 (judgment on appeal on September 10, 2020; order denying rehearing on November 10, 2020);

    E. United States v Eugene Rice, No. 17-3711 (judgment on appeal on September 10, 2020; order denying rehearing on November 24, 2020);

    F. United States v Douglas Kelly, No. 17-3777 (judgment on appeal on September 10, 2020; order denying rehearing on November 10, 2020);

    G. United States v Angel Schueg, No. 18-1012 (judgment on appeal on September 10, 2020);

    H. United States v Maurice Atkinson, No. 18-1324 (judgment on appeal on September 10, 2020; order denying rehearing on November 10, 2020)

    I. United States v Anthony Sistrunk, No. 18-2468 (judgment on appeal on September 10, 2020; order denying rehearing on November 10, 2020)

    J. United States v Tyree Eatmon, No. 19-1037 (judgment on appeal on September 10, 2020; order denying rehearing on November 16, 2020)

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**IN THE**  
**SUPREME COURT OF THE UNITED STATES**  
**PETITION FOR A WRIT OF CERTIORARI**

Petitioner, Douglas Kelly, respectfully prays that a Writ Of Certiorari issue to review the judgment below.

**OPINIONS BELOW**

The Opinion of the United States Court Of Appeals For The Third Circuit appears at Appendix B to the Petition and is reported at 974 F.3d 320 (3<sup>rd</sup> Cir. 2020).

The Judgment of the United States District Court For The Middle District Of Pennsylvania appears at Appendix A to the Petition and is unpublished.

**JURISDICTION**

The United States Court Of Appeals For The Third Circuit entered judgment on September 10, 2020.

A timely Petition For Rehearing And Rehearing En Banc was thereafter denied on November 10, 2020; and, a copy of the Order denying rehearing appears herein at Appendix C.

A timely Petition For Rehearing And Rehearing En Banc by Co-Defendant/Co-Appellant Eugene Rice was denied on November 24, 2020, and a copy of the Order denying rehearing appears herein at Appendix D. Pursuant to this Court's Order dated March 19, 2020 extending the deadline for filing a Petition For A Writ Of Certiorari to 150 days from the date of the lower court order denying a timely petition for rehearing, this Petition For A Writ Of Certiorari is timely.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

Constitution of the United States, Amendment VI., Right of Accused in Criminal Prosecutions:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Federal Rule Of Criminal Procedure 52: Harmless and Plain Error:

- (a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
- (b) Plain Error. A plain error that effects substantial rights may be considered even though it was not brought to the court's attention.

18 U.S.C. 1962;  
18 U.S.C. 1963;  
21 U.S.C. 841(b)(1)(A);  
21 U.S.C. 841(b)(1)(B);  
21 U.S.C. 846:

See Appendix F attached.

## STATEMENT OF THE CASE

By Second Superseding Indictment, Petitioner, Douglas Kelly, and 20 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.” Kelly and eleven of his 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 18<sup>th</sup> 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).

Cooperating co-defendant Cordaress Rogers testified that, in the early years just after 2002, he received an aggregate of one (1) kilogram of crack from each of Hernandez, Kelly and Cruz. There was trial testimony that in early 2002, co-defendants Cruz, Hernandez and Kelly supplied crack to co-defendants Atkinson and Eatmon. A few years later co-defendant Sistrunk began selling drugs. By that time, Cruz, Hernandez and Kelly had been incarcerated, but Atkinson, Eatmon, Sistrunk, and others began collectively to traffic in large quantities of crack. Their profits were all earned separately, but the men sometimes bought or fronted drugs among each other. By 2012, Cruz and Hernandez were still supplying substantial amounts of crack, and Kelly was present for some of these transactions. In early 2014, Villega's floormate at a halfway house worked with him to sell heroin. When police later searched the house, they found approximately 13.5 grams of heroin and 61 grams of crack. (Id., at 370-371, 373) However, “[i]t is undeniable that the drug dealers operating on the South Side during the indictment period did not constitute a gang on the order of the Bloods or Crips. Nor was this a trafficking operation to rival the ‘Ndrangheta.” (Id., at 370)

At the conclusion of trial, Kelly and his co-defendants were convicted. Kelly was 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). The jury rendered its verdicts by considering only the amount of drugs involved in the conspiracy as a whole. (United States v Williams, supra., at 367) Kelly and eight Co-Defendants had drug quantities of five (5) kilograms or more of powder cocaine and 280 grams or more of crack cocaine attributed to them, thus raising their mandatory minimum term of imprisonment to 10 years and the maximum term to life. See 21 U.S.C. 841(b)(1)(A); (United States v Williams, supra., at 360) Kelly was sentenced to life imprisonment. (Id., at 339)

On appeal, Kelly and his co-appellants challenged the courtroom closure and the wrongful aggregation of drug amounts, 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 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 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)

In regard to the arguments involving improperly aggregating drug amounts from individual sales, the Third Circuit acknowledged that the jury was improperly charged on an aggregation theory. The Third Circuit conceded that the evidence was insufficient to support Count II (Conspiracy in violation of 21 U.S.C. 846) and Count III (Distribution of Controlled substances in violation of 21 U.S.C. 841(a)(1). (United States v Williams, supra., at 360) However, the Third Circuit found no affect on the appellants' substantial rights because their statutory maximum terms would have been life even if the aggregation errors had not occurred. (Id., at 374).

Seven appellants, including Kelly, filed Petitions For Rehearing By Panel Or *En Banc* to the Third Circuit. All were denied, including Kelly's on November 10, 2020, 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. In the context of a structural error involving a public trial violation during jury selection, where no trial objection was made but the error was raised on direct appeal, must the Petitioner demonstrate prejudice to secure a new trial, or are they entitled to automatic reversal?**

### **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 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. 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 Kelly and his 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 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 (1<sup>st</sup> Cir. 2015); United States v Gupta, 699 F.3d 682 (2<sup>nd</sup> 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 (2<sup>nd</sup> 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 have 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, Kelly's Petition For A Writ of Certiorari should be granted to resolve this conflict and establish uniformity among the states.

**II. Does the aggregation of drug sales to enhance the maximum sentence for drug conspiracy and RICO Conspiracy conflict with this Court's decision in Alleyne v United States?**

Almost three and one-half (3½) years after trial, and after all defendants had been sentenced, the Third Circuit decided United States v Rowe, 919 F.3d 752 (3d Cir. 2019). Rowe held that Alleyne v United States, 570 U.S. 99, 133 S.Ct. 2151 (2013) requires that the provisions of 21 U.S.C. 841(b)(1)(A) and (b)(1)(B) attach to each discrete act of distribution or possession because they specify facts that increase the statutory penalty, and so, under Alleyne, constitute an element of a distinct and aggravated crime that must be submitted to the jury. As a result, pursuant to Alleyne, a jury may not combine the amounts distributed or possessed at discrete instances to find the drug quantities specified in 21 U.S.C. 841(b)(1)(A) and (b)(1)(B). United States v Alleyne, supra., at 570 U.S at 116, 133 S.Ct. 2151; United States v Rowe, supra., at 761.

Kelly was sentenced to concurrent terms of life imprisonment on Count 1 (RICO Conspiracy in violation of 18 U.S.C. 1962(d) and Count 2 (drug

Conspiracy in violation of 21 U.S.C. 846 ). ( United States v Williams, supra., at 339) The maximum penalty for violation of RICO conspiracy is 20 years, unless the conviction is based on a racketeering activity for which the maximum penalty is life. Then the maximum penalty for a RICO conspiracy conviction becomes life imprisonment. 18 U.S.C. 1962(d); 18 U.S.C. 1963(a). In order for the maximum sentence for violation of drug Conspiracy to be life, the defendant must be responsible for distribution of greater than five (5) kilograms of cocaine or 280 grams of cocaine base. (21 U.S.C. 841(b)(1)(A)

In the case at bar, the jury was charged on an aggregation theory of 21 U.S.C. 841(a)(1). The Third Circuit conceded that the aggregation error occurred on Counts 2 and 3. ( United States v Williams, supra., at 360) The Third Circuit did not find as a matter of fact that any evidence was offered at trial of any distribution or agreement to distribute more than five (5) kilograms of cocaine nor more than 280 grams of crack cocaine in any single discrete transaction. As a result, Petitioner Kelly's life sentence is illegal since his sentence at Count 1 is dependent on the same mistake about drug quantity as Counts 2 and 3. By failing to grant Kelly relief, the Third Circuit in this case failed to follow the holdings of United States v Alleyne, supra., together with their own precedent in United States v Rowe, supra.

In summary, Certiorari should be granted in this case because the Third Circuit has decided an important federal question on aggregation of drug quantities for conspiracy and RICO conspiracy in a way that conflicts with the decision of this Court in United States v Alleyne, supra.

### **III. Incorporation by Reference**

Petitioner believes and therefore avers, that some or all of his co-defendants/co-appellants: Rolando Cruz, Jr., Roscoe Villega, Eugene Rice, Marc Hernandez, Maurice Atkinson, Anthony Sistrunk, and/or Tyree Eatmon, will also separately file Petitions For A Writ Of Certiorari. Petitioner respectfully joins and adopts the arguments and issues raised by any Co-Petitioner in their Petitions For A Writ Of Certiorari as fully as though herein set forth at length.

### **CONCLUSION**

**WHEREFORE**, for all of the reasons set forth above, Petitioner, Douglas Kelly, respectfully requests that Your Honorable Court grant his Petition For A Writ Of Certiorari.

Respectfully submitted,

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