

No. 20-7868

**In the
Supreme Court of the United States**

Douglas Kelly,
Petitioner,

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 ANTHONY SISTRUNK IN
SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

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QUESTIONS PRESENTED:

1. 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 Petitioner demonstrate prejudice to secure a new trial, or is Petitioner entitled to automatic reversal?
2. Does the aggregation of drug sales to enhance the minimum sentence for drug conspiracy and RICO conspiracy conflict with this Court's decision in *Alleyne v. United States*?

LIST OF ALL PARTIES:

Petitioner herein is Douglas Kelly. This brief is filed on behalf of Respondent, Anthony Sistrunk, who is deemed a “Respondent” (in addition to the United States) under this Court’s Rule 12.6, because Kelly and Sistrunk were consolidated co-appellants in the Third Circuit court below (also co-defendants at trial in the Middle District of Pennsylvania) and also because Sistrunk did not join Kelly in this Court as petitioners. Instead, respondent, Sistrunk, filed his own petition docketed in the Supreme Court at No. 20-7889, raising a separate but similar issue to Petitioner’s first question. By filing a Respondent’s Brief, Sistrunk seeks to join in both of Kelly’s issues.

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**BRIEF OF RESPONDENT, ANTHONY SISTRUNK,
IN SUPPORT OF WRIT OF CERTIORARI:**

Respondent, Anthony Sistrunk, 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, Douglas Kelly.

STATEMENT OF THE CASE:

At trial, the district court issued a *sua sponte* order closing the courtroom during the entire *voir dire* phase of trial. Compounding the severity of its error, the district court failed to make specific findings in support of its order. The district court also failed to consider alternatives to closure of the courtroom.

Neither the government, nor the defendants raised a timely objection to the district court's order at trial. However, Kelly, Sistrunk, and several of their consolidated co-appellants in the court below raised this objection on direct appeal.

The instant petition asks if in the context of a structural error involving a violation of the defendants' Sixth Amendment right to a public trial, must Petitioner demonstrate prejudice to secure a new trial, or is Petitioner entitled to an automatic reversal? Kelly responds in the affirmative. As a consolidated co-appellant below, Sistrunk is similarly affected, and in like manner, also responds in the affirmative.

Petitioner's second issue also directly affects Sistrunk. In the court below, Kelly, Sistrunk, and several of their consolidated co-appellants challenged the wrongful aggregation of drug quantities to impose the greater statutory minimum and maximum sentences applicable to drug trafficking offenses under 21 U.S.C. §§841 and 846. The court below conceded that the evidence was legally insufficient

to support the defendants' convictions at Count 2 (conspiracy in violation of 21 U.S.C. §846) and Count 3 (drug trafficking in violation of 21 U.S.C. §841) *United States v. Williams*, 974 F.3d 320, 360 (3rd Cir. 2020). Nevertheless, the circuit court ruled that there was no effect upon substantial rights because the statutory maximum term for Kelly and Sistrunk (and several of their consolidated appellants below) was life imprisonment despite the aggregation errors. *Id.*, at 374.

The instant petition asserts that the lower court's decision is in conflict with this Court's decision in *United States v. Alleyne* 570 U.S. 99 (2013), as well as the lower court's decision in *United States v. Rowe* 919 F.3d 752 (3rd Cir. 2019). Sistrunk agrees, joining Kelly to request this Court to grant the petition for writ of certiorari.

REASONS FOR GRANTING THE PETITION:

1. The district court committed structural error by closing the courtroom during the entire *voir dire* phase of trial. When Petitioner (and Respondent Sistrunk) failed to make timely objections at trial, but raised the error on direct appeal, Petitioner (and similarly situated defendants) is entitled to automatic reversal without demonstrating prejudice.

The right of a defendant to a speedy and public trial is indisputably established in the Sixth Amendment. ("the accused shall enjoy the right to a speedy and public trial."). U.S. Const. Amend. VI. The Sixth Amendment right to a public trial extends to all phases of trial, including *voir dire*. *Pressley v. Georgia*, 558 U.S. 209, 213 (2010) (*per curium*), *see also*, *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508-510 (1984) (extending a similar right to a public trial under the First Amendment.) The district court's closure of the courtroom during *voir dire* is a structural error that generally entitles the defendant to automatic reversal. *Weaver v. Massachusetts*, ____

U.S. ___, 137 S. Ct. 1899, 1905 (2017) (plurality opinion); *Waller v. Georgia*, 467 U.S. 39 (1984).

In those rare instances where the trial court finds it necessary and appropriate to exclude the public during a portion of the trial, the trial court must specifically identify the overriding interest to be preserved by exclusion so that a reviewing court can determine if closure was appropriate. The trial court is also required to consider reasonable alternatives to closure no broader than necessary to protect that interest. *Pressley v. Georgia*, 558 U.S. 209, 215 (2010).

When, on direct appeal, there is an objection to exclusion of the public at trial, the defendant on appeal is entitled to “automatic reversal” regardless of the error’s actual “effect on the outcome” and without any inquiry into prejudice. *Neder v. United States*, 527 U.S. 1, 7-9 (1999), *see, Weaver*, 137 S. Ct. at 1910. However, the same result (automatic reversal for structural error) does not necessarily occur when the matter arises on collateral review. *Weaver*, ___ U.S. at ___, 137 S. Ct. at 1912-14.

The instant petition lies somewhere between those two extremes. Kelly, Sistrunk and their consolidated co-appellants below failed to raise a timely objection to the district court’s order at trial. Nevertheless, they did raise their Sixth Amendment objection to closure of the courtroom on direct appeal. This court has not addressed the question, as in the instant case, whether a structural error raised for the first time on direct appeal, merits automatic reversal. In support of Kelly’s petition, Sistrunk suggests that it does.

This Court should take up this important question, as the decision of the court below is in direct conflict with decisions of its sister courts of appeal in other circuits on the same question. *United States v. Negron-Sostre*, 790 F.3d 295, 303 (1st Cir. 2015) (Closure of the courtroom during the entirety of *voir dire* is a plain and obvious error. Because the error is structural, and because it affected the defendant's substantial rights, the error affected substantial rights seriously impairing the fairness, integrity or public reputation of the proceedings.); *United States v. Gupta*, 699 F.3d 682 (2nd Cir. 2012) (The district court's intentional closure of the courtroom during *voir dire* violated the defendant's Sixth Amendment right to a public trial when the trial court failed to consider the *Waller* factors prior to closing the courtroom.);¹ *United States v. Simmons*, 797 F.3d 409 (6th Cir. 2015) (The trial court's failure to apply the four-step *Waller* test prior to excluding the co-defendants was a structural error requiring automatic reversal without proof of the effect of the error on the trial's outcome.)

The decision of the court below also conflicts with decisions of the Supreme Courts of several states on the same important federal matter. *State v. Brightman*, 155 Wash. 2d 506, 518, 122 P.3d 150, ___ (Wash. 2005) (Brightman's failure to lodge a contemporaneous objection at trial did not affect a waiver of his public trial right. Since Brightman's trial judge failed to consider Brightman's public trial rights and

¹ A subsequent decision of the Second Circuit reaching the opposite result in *United States v. Gomez*, 705 F.3d 68 (2nd Cir. 2013), can be distinguished as Gomez invited the exclusion of family members from the courtroom during *voir dire*, but Petitioner and his consolidated co-appellants below did not.

also failed to articulate reasons for closing the courtroom, the Washington Supreme Court could not determine if closure was warranted and remanded for a new trial.); *State v. Martinez*, 2021 N.D. 42 (N.D. March 24, 2021) (In consolidated appeals, the North Dakota Supreme Court recognized that the trial courts' failure to carefully consider reasons for closure, viable alternatives, and failure to articulate its reasons for closing the courtroom on the record before excluding the public in accordance with the requirements of *Waller* required reversal.)

Sistrunk respectfully requests that the Supreme Court grant *certiorari* in the instant case to correct the conflict created by the court below with that of its sister courts of appeal in the First, Second and Sixth Circuits. Sistrunk further suggests that this Court grant *certiorari* to resolve the decision of the court below with those decisions of several state courts of last resort on this important federal question.

2. The decision of the court below to aggregate drug quantities to enhance the minimum sentence for drug conspiracy and RICO conspiracy conflicts with this court's decision in *Alleyne v. United States* and the lower court's decision in *United States v. Rowe*.

The decision of the court below is in conflict with its own precedent in *United States v. Rowe*, 919 F.3d 752 (3rd Cir. 2019) as well as this Court's decision in *Alleyne v. United States*, 570 U.S. 99 (2013). *Rowe* holds that separate acts of distribution of controlled substances are distinct offenses under Section 841(a), as opposed to a continuing crime. As a result, the government cannot combine separate acts to meet (or exceed) the increased statutory minimum and maximum penalties of Section 841(b)(1)(A) and (b)(1)(B) under *Alleyne* unless submitted to and decided by a jury. *Rowe*, at 759-760.

Here, the trial court charged the jury on the aggregation theory of 21 U.S.C. §841(a)(1). Finding that no evidence was offered at trial in support of distribution or attempt to distribute quantities triggering the increased penalties of Section 841(b), the court below conceded that an aggregation error occurred as to Counts 2 and 3. *United States v. Williams*, 974 F.3d 320, 360 (3rd Cir. 2020). Nevertheless, the court below found that the error had no effect upon the appellants' rights because their statutory maximum terms remained life despite the aggregation errors. *Id.*, at 374.

Petitioner Kelly asserts that the lower court's error results in an illegal sentence as the statutory penalty at Count 1 is entirely dependent upon the same aggregation mistake that the trial court made at Counts 2 and 3. Respondent Sistrunk agrees. Simply put, under *Alleyne* and *Rowe*, an aggregation error occurred on the drug-distribution charge at Count 3. Regardless of whether the jury found the defendants guilty of drug-trafficking triggering a statutory penalty of 5-40 years under Section 841(b)(1)(B), or a 20-year statutory maximum under Section 841(b)(1)(C), without improper aggregation, Kelly and Sistrunk cannot be convicted of a drug-trafficking offense resulting in a sentence of life imprisonment under Section 841(b)(1)(A). The same result occurs for the drug conspiracy charge at Count 2. In either case, without improper aggregation, (increasing the statutory maximum for the underlying offenses at Counts 2 and 3 to life under Section 841(b)(1)(A)) the statutory maximum penalty for the RICO conspiracy at Count 1 remains 20 years. 18 U.S.C. §1963(a). Any suggestion to the contrary by the court below is simply incorrect. This case offers an excellent vehicle for clarifying that drug quantities

cannot be improperly aggregated. Sistrunk respectfully requests that this Court grant certiorari to correct that error.

CONCLUSION AND PRAYER FOR RELIEF:

The petition for writ of certiorari should be granted.

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