

**NO. 20-7889**

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**IN THE SUPREME COURT OF THE UNITED STATES**

**ANTHONY SISTRUNK,  
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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**BRIEF OF RESPONDENT DOUGLAS KELLY IN  
SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

I. In the context of direct appeal, when the District Court *sua sponte* closes the courtroom for the entirety of *voir dire* and fails to make findings specifically identifying the “higher values” that must be preserved by closure pursuant to Waller v Georgia, does the violation of the public trial provisions of the Sixth Amendment rise to a structural error of such magnitude that it constitutes a *per se* reversible error under the “plain error” standard of review?

## **LIST OF ALL PARTIES**

Petitioner herein is Anthony Sistrunk. This brief is filed by Respondent, Douglas Kelly, who is designated as a Respondent under this Court's Rule 12.6, because: Anthony Sistrunk 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 Anthony Sistrunk 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 question. By filing this Respondent's Brief, Douglas Kelly seeks to join Anthony Sistrunk's issue, in addition to the issues Kelly raised separately.

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**BRIEF OF RESPONDENT, DOUGLAS KELLY,  
IN SUPPORT OF ANTHONY SISTRUNK'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, Anthony Sistrunk.

**STATEMENT OF THE CASE**

By Second Superseding Indictment, Petitioner, Anthony Sistrunk, 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.” Sistrunk 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 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).

At the conclusion of trial, Sistrunk, Kelly and their 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). Kelly was sentenced to life imprisonment. (Id., at 339)

On appeal, Sistrunk, 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 Sistrunk'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 Sistrunk'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 Sistrunk and Kelly, filed Petitions For Rehearing By Panel Or *En Banc* to the Third Circuit. All were denied, including Sistrunk'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. In the context of direct appeal, when the District Court *sua sponte* closes the courtroom for the entirety of *voir dire* and fails to make findings specifically identifying the “higher values” that must be preserved by closure pursuant to Waller v Georgia, does the violation of the public trial provisions of the Sixth Amendment rise to a structural error of such magnitude that it constitutes a *per se* reversible error under the “plain error” standard of review?**

### **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 Sistrunk 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 Sistrunk, 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 Sistrunk 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 (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 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, Sistrunk's Petition For A Writ of Certiorari should be granted to resolve this conflict and establish uniformity among the states.

### **CONCLUSION**

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

Respectfully submitted,

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