No. 08-2558

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

OVERTIS SYKES,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Case No. 07 CR 857 - 1

Hon. John F. Grady, Presiding Judge

REPLY BRIEF OF DEFENDANT-APPELLANT OVERTIS SYKES

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I. The district court abused its discretion in dismissing the indictment without prejudice for this egregious violation of the Speedy Trial Act.

The district court erred in dismissing the indictment without prejudice because it employed a presumption favoring dismissal *without* prejudice, erroneously concluded that Sykes contributed to the illegal delay, and failed to recognize that the delay prejudiced Sykes. The Speedy Trial Act clock ran for 224 days—154 more than allowed by the Act and far more than in any case in which this Court has found dismissal without prejudice to be appropriate.[1] The government's *post hoc* speculation about why the district court excluded time at various points does not change the fact that a major violation of the Speedy Trial Act occurred. Moreover, the government's attempts to downplay the prejudice to Sykes are unsupported by the record and ignore the government's own neglect of the Act.

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[1] Appellant has lowered his original figure by nine days to account for the time between August 3 and August 7, 2006, (excluded for preparation of pretrial motions) and for a motion filed on November 9, 2007, and denied five days later, during which periods time was properly excluded. (R. 06-CR-453 at 19, 73, 77.) The latter motion does not appear in the docket sheet and was inadvertently overlooked in the initial calculation. This slight revision does not alter Appellant's conclusion that the delay was an egregious violation of the Speedy Trial Act, particularly since 224 days is a conservative estimate of the non-excludable time in this case. A number of delays that rested on a proper basis were much longer than reasonably necessary. For example, it took *five months* to find Sykes psychologically competent, and only a portion of this period was excludable for consideration of pretrial motions. (R. 06-CR-453 at 23; Status Hr'g Tr. 3:2-3, Jan. 10, 2007.)

A. The record reveals a serious violation of the Speedy Trial Act's seventy-day time requirement.

The district court never made specific findings that would support the lengthy exclusions of time in this case, and the government cannot now manufacture justifications for the district court's decisions, particularly when such justifications find no support in the record. The government devotes six pages in its brief to whittling this calculation down below the Act's seventy-day threshold. (*See* Gov't Br. 9-14.) But each of the government's arguments falls short, and its final contention—that "it is reasonable that at least 44 of these days were needed for trial preparations"—is indicative of its strained efforts. (Gov't Br. 14.) Of course, the number "44" is simply pulled out of thin air in order to make the government's preferred arithmetic work.

The district court improperly excluded the period from July 25, 2007, to November 9, 2007, for "trial preparations" (R. 06-CR-453 at 68) because there was no suggestion made by the government or defense, let alone the necessary findings by the district court, that lengthy trial preparations were needed.[2] The Speedy

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[2] The government contends that the eight days from July 25 to August 2, 2007 were properly excluded to allow time to arraign Barkalow on the superseding indictment. The government is incorrect. The basis for the court's exclusion was section 3161(h)(6), which allows extra time when a defendant's case is joined with another defendant; contrary to the government's contention, the section has nothing to do with arraignment on a superseding indictment. The rule in this circuit is that a "superseding indictment does not affect the running of the time on the . . . charges that were in the original indictment as well as the superseding indictment." *United States v. Thomas*, 788 F.2d 1250, 1258 (7th Cir. 1986). The case cited by the government is inapposite because it deals with the effect of an entirely new indictment after an outright dismissal of the original indictment. *United States v. Menzer*, 29 F.3d 1223, 1227-1228 (7th Cir. 1994). The indictment was not dismissed here; it was merely superseded.

Trial Act "requires the government to do all of the things ordinarily necessary to get a case to trial within the 70 days." *United States v. Thomas*, 788 F.2d 1250, 1256 (7th Cir. 1986). Thus, as the government acknowledges, excluding time for "trial preparations" under the "ends of justice" provision of the Speedy Trial Act requires the district court to make a finding that extra time for trial preparation is necessary. 18 U.S.C. § 3161(h)(8)(A) (2006). The government claims the court made the required findings in a single question where the court asked the government about the preparation time needed for the defendants to address the superseding indictment. (Gov't Br. 14; Status Hr'g Tr. 5:14-16, May 9, 2007.) But a *question* can hardly be construed as a *finding* that extra trial preparation was needed, particularly when the government responded that the defendants needed only "a couple of weeks." (Status Hr'g Tr. 5:17-19, May 9, 2007.) Despite the complete lack of any foundation in the record, the government wonders whether "the Court might have been concerned that Defendant needed more time to prepare for trial." (Gov't Br. 13.) Indeed, the government concludes that the court might have had at least 44 days worth of concern. (Gov't Br. 14.) This is utter speculation, and it cannot overcome the reality that the Speedy Trial Act was violated in this case.

The government's argument that the period from January 25, 2007 to May 8, 2007 was properly excluded for plea negotiations of Sykes's co-defendant rests on a similarly flawed reading of the record. (*See* Gov't Br. 10-12.) Although ongoing plea negotiations can be a legitimate basis for excluding time under the Speedy Trial Act, *see United States v. Montoya*, 827 F.2d 143, 150 (7th Cir. 1987), nothing in the

record indicates that plea negotiations actually occurred during this period. The record suggests, at most, that the government hoped plea negotiations would eventually take place.[3] At the January 25, 2007 hearing, the prosecutor stated that "[standby counsel for Barkalow] and I are exploring exactly how to proceed with some *potential* plea negotiations . . . to the extent there is *going to be* some plea discussions[.]" (Status Hr'g Tr. 5:22-25, 6:1-5, Jan. 25, 2007) (emphasis added).) The government argues that Barkalow did not definitively rule out eventual plea negotiations at that time (Gov't Br. 11), but it ignores the preceding question where the district court asked Barkalow, "[D]o you desire to go to trial?" and she responded "Yes." (Status Hr'g Tr. 5:10-12, Jan. 25, 2007); (*See also* Status Hr'g Tr. 3:24-25, 4:1, May 2, 2007 (Barkalow's standby counsel stating that "at this point [Barkalow] plans on going to trial"); Status Hr'g Tr. 11:5-17, Dec. 12, 2007 (Sykes's standby counsel stating, without rebuttal by government, that he had not "heard any proffers made from [the government] or Ms. Barkalow's counsel that there actually were plea negotiations [between January and May]").) Thus, the district court erred in excluding time for plea negotiations from January 25 to May 8 of 2007 because the record confirms there were no ongoing plea negotiations during this period.

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[3] Speculative plea negotiations cannot be a proper basis for excluding time under the Speedy Trial Act, else the government could toll the clock indefinitely in every case merely by wishing that negotiations would occur in the future. *Cf. Montoya*, 827 F.2d at 150 (noting that "if plea negotiations [are] not concluded to the mutual satisfaction of the parties, the government still would [be] required to try [the defendant] within seventy days").

In sum, the record shows that there was a major violation of the Act's 70-day time limit: the clock ran for at least 224 days, 154 more than allowed by the Act. And the Speedy Trial Act's requirements cannot be fulfilled, or this major violation erased, by the government supplying *post hoc* justifications that have no support in the record.

B. The appropriate remedy for such an egregious violation of the Speedy Trial Act is dismissal of the indictment with prejudice.

The district court abused its discretion in dismissing the indictment without prejudice. Its analysis of the appropriate remedy for the violation of the Speedy Trial Act in this case was faulty in three respects. First, it incorrectly treated dismissal without prejudice as the default remedy under the Act. Second, it unfairly blamed Sykes for the delay by suggesting that he was largely responsible for and complicit in the delay merely because he did not raise the Speedy Trial Act claim earlier. Finally, it failed to recognize the prejudice to Sykes inherent in such a substantial delay. The government adopts the district court's approach by focusing its attention on Sykes himself rather than on its own neglect in allowing an extended violation of the Speedy Trial Act.

First, the district court incorrectly presumed that the dismissal of the indictment would be without prejudice. The government quibbles that the court never used the word "presumption" (Gov't Br. 21), but this is mere semantics. The district court stated on the record, before hearing argument from either side on the remedy issue, that "it would take a very strong argument by the defendant[] to persuade [the court] that the dismissal should be with prejudice." (Status Hr'g Tr.

16:2-4, Dec. 12, 2007.) The district court's predisposition toward dismissal without prejudice is further highlighted by the fact that neither the court nor the government took the time to calculate the precise magnitude of the Speedy Trial Act violation, and thus could not adequately judge the extent of the prejudice to Sykes. Indeed, the government has continued this approach on appeal, declining to pinpoint the magnitude of the violation, yet asserting that any violation must have been so small as not to prejudice Sykes. (*See* Gov't Br. 19.) However, the 154-day violation here was far longer than in any other case in which this Court has found dismissal without prejudice to be appropriate, *see, e.g.*, *United States v. Arango*, 879 F.2d 1501, 1508 (7th Cir. 1989) (ninety-three day violation of the Speedy Trial Act), a fact that clearly goes to the prejudice Sykes suffered.

Furthermore, the district court unfairly blamed Sykes for the delay in two ways. First, it found that Sykes's "lassitude" with regard to the Speedy Trial Act cut in favor of dismissal without prejudice. (Status Hr'g Tr. 19:5-9, Dec. 20, 2007.) The government attempts to support the district court's reasoning on this point by noting that Sykes never objected to any exclusion of time. (Gov't Br. 18 n.6.) But the government overlooks the fact that Sykes was not even present on January 25, 2007 or August 1, 2007, the days that initiated the two longest periods of impermissible delay—103 and 108 days, respectively. (Status Hr'g Tr. Jan. 25, 2007; Aug. 1, 2007.) Moreover, the government cannot excuse itself from a major violation of the Speedy Trial Act by characterizing the delay as a failure by the defendant to assert his Speedy Trial rights because the responsibility for ensuring

speedy trials lies with the prosecution, not the defendant. *See, e.g.*, *Thomas*, 788 F.2d at 1256 (noting that the Speedy Trial Act requires the *government* to bring a case to trial within seventy days).

Second, the district court suggested that Sykes himself—in particular his various pretrial motions—had been largely responsible for the delay. (*See* Status Hr'g Tr. 20:19-24, Dec. 20, 2007.) The government cites this finding approvingly (Gov't Br. 16-17), but the premise underlying such a finding is clearly mistaken. If the delay had been entirely a product of Sykes's motions, there would have been no violation because time attributable to consideration of motions is excludable under the Act. *See* 18 U.S.C. § 3161(h)(1)(D) (2006). The 224-day delay calculated by the Appellant does not include any time when Sykes's motions were pending before the district court; therefore, there is no basis to claim that such motions contributed to the delay.

Finally, the district court's weighing of the section 3162 factors was unfairly biased in favor of the government because it failed to recognize that the illegal delay substantially prejudiced Sykes. The government dismisses Appellant's argument that the superseding indictment resulted in prejudice to Sykes by noting that it could have brought the fourth bank robbery charge at any time before the statute of limitations ran. (Gov't Br. 19.) Although true, the effect of the superseding indictment (and even the government's announcement that it intended to bring the additional charge) was to delay the trial still further—and *after* the Speedy Trial clock had already run out. (*See* Appellant's Br. 24.)

The government likewise shrugs off the obvious conclusion that the egregiously long pretrial incarceration prejudiced Sykes, claiming that his conviction cured any prejudice because his pretrial incarceration ultimately counted toward his sentence. (Gov't Br. 20.) But this after-the-fact justification does not factor into the district court's determination of the appropriate remedy. The question is whether the district court abused its discretion in dismissing the indictment without prejudice, and a conviction that occurred *after* the dismissal has no bearing whatsoever on that analysis. The government cites *United States v. Killingsworth*, 507 F.3d 1087 (7th Cir. 2007), to bolster its claim that Sykes's lengthy pretrial detention should not factor into a prejudice analysis. (Gov't Br. 20.) But *Killingsworth* stands only for the proposition that a defendant's pretrial detention is not a *dispositive* factor in the prejudice analysis. 507 F.3d at 1091. The fact that Sykes was incarcerated is not in itself notable, but the fact that he was incarcerated for 224 days of non-excludable time—more than *three times* the statutory limit—is surely notable and was surely prejudicial. Therefore, Sykes's indictment should be dismissed with prejudice.

II. Sykes's Fifth Amendment right to meaningful access to the courts was violated when he was detained for five weeks before his trial without access to his standby counsel or a law library.

In the five weeks before his trial, Sykes was held in the Kankakee County Detention Center with no access to a law library or his standby counsel—a clear violation of his Fifth Amendment right to meaningful access to the courts. The government attempts to sidestep this Fifth Amendment violation by pointing to

irrelevant Sixth Amendment cases dealing with the right to representation. (*See* Gov't Br. 24-30.) When the appropriate Fifth Amendment caselaw is applied to the facts in the record, however, it is clear that Sykes lacked meaningful access to the courts while he was in Kankakee. *See infra* Section II.B. Moreover, because this particular violation of a pretrial detainee's rights is an important and fundamental error, it should be deemed structural, and Sykes's conviction should be reversed.

A. The government impermissibly conflates the Sixth Amendment right to representation with the Fifth Amendment right to meaningful access to the courts.

The Fifth Amendment right to meaningful access to the courts and the Sixth Amendment right to representation are discrete constitutional protections that cannot be conflated. The Fifth Amendment provides breadth of protection by offering both prisoners and criminal defendants a variety of avenues to meaningfully access the courts, including a law library, attorney representation, standby counsel, a lawyer providing part-time consultation, a paralegal, law students, or others with legal training. *See Bounds v. Smith*, 430 U.S. 817, 831 (1977). The Sixth Amendment, on the other hand, guarantees a depth of protection to criminal defendants only; that is, a right to zealous representation by a licensed attorney in a criminal prosecution. *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963). Indeed, this Court would not have explicitly extended the rights enumerated in *Bounds* to pretrial detainees had those rights already been provided by the Sixth Amendment. *See, e.g.*, *Casteel v. Pieschek*, 3 F.3d 1050, 1053 (7th Cir. 1993) (recognizing that pretrial detainees have a right to meaningful access to the courts).

Although the Fifth and Sixth Amendments protect different rights in different ways, the government erroneously shoehorns Appellant's Fifth Amendment claim into Sixth Amendment jurisprudence. The cases on which the government relies lay bare its attempts to analyze a Fifth Amendment meaningful-access claim through the lens of the Sixth Amendment. *Kane v. Espitia*, 546 U.S. 9, 9-10 (2005) (per curium) (declining to resolve whether *Faretta* implied a law library access right for *pro se* defendants and instead finding that *Faretta* did not "clearly establish" such a right as required for reversal on habeas review); *United States v. Byrd*, 208 F.3d 592, 593-94 (7th Cir. 2000) (holding that there was no Sixth Amendment violation where a *pro se* criminal defendant with standby counsel was denied access to a law library); *United States v. Lane*, 718 F.2d 226, 227 (7th Cir. 1983) (same).[4] And, significantly, the only Fifth Amendment case cited by the government, *United States v. Moya-Gomez*, is completely in line with the *Bounds* approach, which requires only one form of meaningful access, such as the availability of legal assistance *or* law library. *Bounds,* 430 U.S. at 830-31 (approving of a variety of different avenues to create meaningful access to the courts); *United States v. Moya-Gomez*, 860 F.2d 706, 743 (7th Cir. 1998) (holding that a *pro se* criminal defendant does not have "an unqualified right of access to a

[4] The relevance of two other cases relied on by the Government is even more attenuated because they involve Sixth Amendment ineffective assistance of standby counsel claims by *pro se* criminal defendants. *Simpson v. Battaglia*, 458 F.3d 585, 597 (7th Cir. 2006); *United States v. Chapman*, 954 F.2d 1352, 1362 (7th Cir. 1992). Appellant does not allege error on the part of his standby counsel, but failure of the government to provide him with meaningful access to the courts.

law library" under the Fifth Amendment where other avenues of access, such as the open offer to appoint counsel, satisfy the Fifth Amendment).[5] Indeed, because the district court in *Moya-Gomez* offered *accessible* legal assistance to the defendant, it is readily distinguishable from Sykes's case where he tried, but was unable, to access his standby counsel. As a result, the government cannot legitimately claim as a matter of Fifth Amendment law that Sykes "was entitled to nothing more" than court-appointed standby counsel (Gov't Br. 26), when, as discussed below, *see infra* Section II.B, the record demonstrates that Sykes was unable to reach his standby counsel in the critical weeks leading up to trial. The Fifth Amendment obligates the government to do more than simply appoint representation for criminal defendants; it must assure that the methods chosen actually afford pretrial detainees meaningful access to the courts.

B. Sykes was deprived of his Fifth Amendment right to meaningful access to the courts when he was simultaneously unable to access legal assistance or a law library.

The provision of standby counsel in this case did not provide Sykes with meaningful access to the courts. Although the appointment of standby counsel may sometimes satisfy the requirement of meaningful access to the courts, *see Howland v. Kilquist*, 833 F.2d 639, 643 (7th Cir. 1987), standby counsel can only do so if the

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[5] The government continues to improperly graft Sixth Amendment jurisprudence onto the Fifth Amendment in its attempt to distinguish *Johnson-El v. Schoemehl*, 878 F.2d 1043 (8th Cir. 1989), a case relied upon by Appellant. (Gov't Br. 26-27.) Although the distinction between counsel and standby counsel is important under the Sixth Amendment, *see Simpson*, 458 F.3d at 597, it is completely immaterial under the Fifth, *see Bounds*, 430 U.S. at 831 (noting the numerous ways to provide meaningful access to the courts beyond traditional attorney representation).

defendant is able to contact him. That is, once the government chooses the avenue by which it will afford the defendant access to the courts, it must also ensure that that mode is meaningful. *Bounds* 430 U.S. at 823 (stating that "meaningful access" is the "touchstone" of the inquiry) (internal quotations omitted). In Sykes's case, the district court appointed Bob Korenkiewicz as his standby counsel[6] when he chose to proceed *pro se*.[7] (R. 06-CR-453 at 3.) But the record shows that Sykes was unable to contact Korenkiewicz during the five weeks immediately preceding his trial, and because he was housed in a state facility with no law library, Sykes could not prepare his own defense.

First, it is undisputed that the Kankakee County Jail does not have a law library. The government claims that Sykes had "access to legal authorities" (Gov't Br. 28), but this is not equivalent to law library access. The record does not indicate where Sykes obtained these authorities, but perhaps he relied on the resources of other inmates, as he did to obtain stamps and phone calls. (*See* Status Hr'g Tr. 5:9-

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[6] The government's argument that there is no constitutional right to standby counsel (Gov't Br. 25) is yet another attempt to inappropriately conflate the Fifth and Sixth Amendments. *See supra*, note 5 (noting that the distinction between counsel and standby counsel is immaterial under the Fifth Amendment).

[7] Although Sykes initially felt strongly about defending himself (*see, e.g.*, Status Hr'g Tr. 3:4-5, Jan. 10, 2008), the record indicates that he increasingly relied on Korenkiewicz as his trial date approached. On January 30, 2008, the district court suggested that Sykes take advantage of Korenkiewicz's expertise. (Status Hr'g Tr. 31:14-21, Jan. 30, 2008.) Moments later, Sykes agreed to allow Korenkiewicz to prepare and file an appearance for him. (Status Hr'g Tr. 32:3-5, Jan. 30, 2008.) At a status hearing the following day, Sykes gained the attention of the district court and then turned the floor over to Korenkiewicz. (Status Hr'g Tr. 5:20-22, Jan. 31, 2008) ("Mr. Korenkiewicz said he wanted to speak.") Finally, Sykes stated on March 6, 2008, just days before his trial, that he had unsuccessfully tried to contact Korenkiewicz from Kankakee. (Status Hr'g Tr. 7:10-13, Mar. 6, 2008.) These interactions suggest that Sykes did indeed attempt to rely on Korenkiewicz.

11, Mar. 9, 2008 ("[T]his motion that I sent to the Court was sent on the account of another inmate."); Status Hr'g Tr. 8:6-7, Mar. 9, 2008 ("I have other people [] try to call.").) Sykes's reliance on legal authorities obtained from inmates or other unreliable sources is not equivalent to meaningful access to a law library under the Fifth Amendment.

Therefore, the relevant question is whether Sykes had meaningful access to his standby counsel. Sykes was unable to contact Korenkiewicz from the day after his January 31, 2008, status hearing until his status hearing on March 6, 2008. (Status Hr'g Tr. 7:7-13, Mar. 6, 2008.) Korenkiewicz, as an officer of the court, likewise affirmed that he had "no contact whatsoever" with Sykes during this period. (Status Hr'g Tr. 15:4-5, Mar. 6, 2008.) Given that Sykes attempted, but was unable, to contact his standby counsel during the critical five weeks before his trial, he did not have meaningful access to the courts.[8]

The government argues that Sykes had meaningful access to his standby counsel because they spoke with each other during status hearings and because Sykes had access to the mail and a telephone. (Gov't Br. 28.) These assertions are misleading. First, Sykes did not have a status hearing between January 31 and March 6, 2008, so he did not have the opportunity the government suggests to meet with Korenkiewicz during this critical time before his trial. Second, although Sykes

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[8] Although Sykes declined the district court's offer of a continuance on March 6, 2008, he did so at the end of a long colloquy where he voiced justifiable frustration with the prejudice he had already suffered as a result of his extended detention, *see supra* Section I, and his inability to contact Korenkiewicz and thus prepare for trial. (Status Hr'g Tr. 26:17-20, Mar. 6, 2008 ("The damage has already happened.").)

filed some motions and made some phone calls during his time in Kankakee, he explicitly told the court that he had no money to buy stamps and that he accessed the mail and the phones via other inmates' accounts.[9] (Status Hr'g Tr. 5:9-11, 7:10-13, 8:6-7, Mar. 6, 2008.) This haphazard access was not *meaningful* because it was neither reliable nor government-provided. The government cannot rely on the charity of other inmates to fulfill its obligation to assure Sykes's access to the courts. Therefore, because Sykes's constitutional rights were violated, he should be granted a new trial.

C. The denial of meaningful access to the courts for pretrial detainees should be deemed a structural error.

When a pretrial detainee is denied meaningful access to the courts—especially during the critical weeks leading up to the trial—the fundamental fairness of that trial is compromised.[10] A "limited class" of constitutional errors is structural because they similarly affect the fairness and reliability of a criminal trial. *See Neder v. United States*, 527 U.S. 1, 8-9 (1999); (Appellant's Br. 30-31). In analyzing this issue of first impression, Appellant cited ample authority and discussed at length the similarities between denial of meaningful access to the

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[9] Furthermore, one of the motions the government implies Sykes mailed from Kankakee (Gov't Br. 27) was hand-delivered to the district court by Sykes on March 6, 2008 (*see* Status Hr'g Tr. 27:25–28:1-2, Mar. 6, 2008).

[10] Although Fifth Amendment due process claims are generally reviewed *de novo*, *United States v. Kirschenbaum*, 156 F.3d 784, 792 (7th Cir. 1998), the government asserts—without citation or discussion—that Appellant's Fifth Amendment claim is a mixed question of law and fact (Gov't Br. 22). But the factual finding on which the government relies to support this standard of review—the question of when Sykes received discovery—is irrelevant to whether Sykes's Fifth Amendment meaningful-access rights were violated. Therefore, this Court should apply a *de novo* standard of review.

courts and existing structural errors. (*See* Appellant's Br. 29-32.) The deprivation of this right fits squarely within the categories of structural errors because it permeates the entire framework of the ensuing trial and so affects the trial process that it is not amenable to harmless-error review. *Arizona v. Fulminante*, 499 U.S. 279, 307 (1991) (noting that harmless-error review requires the reviewing court to "quantitatively" assess the effect of the error in the context of the other evidence presented at trial); (*see also* Appellant's Br. 30-33). Rather than address the legal merits of the question, however, the government devotes a single footnote to an argument that erroneously focuses on the facts of Sykes's case, which are wholly irrelevant to the question of whether a category of errors is structural. (Gov't Br. 29, n.9); *see, e.g.*, *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (analyzing whether a constitutionally deficient reasonable-doubt instruction is a structural error without addressing the facts of the case); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (determining first whether there was an error and then deciding the separate issue of structural error).

Even if this Court finds that a denial of meaningful access to the courts for pretrial detainees is subject to harmless-error review, Sykes's conviction should still be reversed. An error is harmless only when it "did not influence the jury or only had [a] very slight effect." *United States v. Jung*, 473 F.3d 837, 842-43 (7th Cir. 2007). It is impossible to know the exact extent of the harm caused by the denial of Sykes's ability to contact his standby counsel during the critical period leading up to his trial. Sykes probably would have filed standard pretrial motions to exclude

evidence and prepared to cross-examine the government's witnesses. And given that the jurors were troubled by the fingerprint evidence, *see infra* Section III.B., the case against Sykes was certainly not "overwhelming," as the government claims (Gov't Br. 29). Therefore, the exclusion of any evidence through pretrial motions or an effective cross-examination—which could have been possible had Sykes had meaningful access to the courts—could have had more than a "slight effect" on an already skeptical jury. In short, Sykes was harmed by the denial of his right to meaningfully access the courts, and his conviction should be reversed.

III. The district court erred by allowing the jurors to question witnesses during trial.

The district court plainly erred in permitting jurors to question witnesses at Sykes's trial because neither he nor his standby counsel was present to clarify the juror questions or to ensure his right to a fair trial. The government downplays the district court's error with a strained interpretation of juror-question jurisprudence and speculation about the district court's motivation. But neither of these tactics alters the fact that: (1) the district court engaged in none of the required cost-benefit balancing; (2) even if the district court engaged in off-the-record balancing, it reached the wrong conclusion; and (3) the district court employed no safeguards to reduce the resulting prejudice. This approach prejudiced Sykes because juror questions elicited testimony from witnesses and the district court that helped the prosecution meet its burden. Moreover, Sykes's absence heightened the prejudice because he was not there to assert his rights in the face of these juror questions.

Therefore, the district court plainly erred and Sykes's conviction should be overturned.

A. The district court plainly erred by inviting jurors to ask questions of witnesses without properly weighing the prejudice or instituting any precautions.

The district court erred by allowing jurors to ask questions for two reasons. First, the district court failed to properly weigh the benefits to the jury against the potential prejudice to Sykes, a *pro se* criminal defendant who was not even present at trial to defend himself. Second, the district court forced Sykes to shoulder the full weight of the prejudice by failing to use procedural safeguards. The government acknowledges that the defendant's absence was a cause for concern due to the "apparent lopsidedness of the proceedings" (Gov't Br. 33-34), but it ignores the fact that juror questions only exacerbated the inequity of the trial.

This Court has explicitly held that balancing is *required* before a court may permit juror questions, *United States v. Feinberg*, 89 F.3d 333, 337 (7th Cir. 1996) (holding that "implicit in [the district court's] exercise of discretion is an *obligation* to weigh the potential benefit to the jurors against the potential harm to the parties, *especially* when one of those parties is a criminal defendant") (emphasis added), and thus the failure to engage in balancing is error. Accordingly, the government's reliance on *Feinberg* for the proposition that balancing is merely a "suggested" practice is just plain wrong. (Gov't Br. 32.)

Moreover, implicit in this principle is that the record must clearly and unequivocally demonstrate that the requisite balancing occurred. But no such

findings occurred here. The government speculates that the district court "concluded that the potential risks of permitting juror questions were outweighed by the need to address the apparent lopsidedness of the proceedings." (Gov't Br. 33.) In the same breath, however, the government concedes that "the court did not expound upon its reasoning" and proposes that such balancing can be "inferred" from the district court's statement that "[b]ecause Mr. Sykes is not present, I'm going to permit the jury to ask any questions you like of the witnesses as they appear." (Gov't Br. 33, citing Trial Tr. 38:13-17.) Noticeably absent from the district court's statements is any discussion of the benefits to the jurors, the potential harms to Sykes, or how juror questions would impact the "lopsidedness of the proceedings." Thus, the district court erred in failing to engage in balancing on the record.

Even if this Court finds that the district court engaged in some sort of balancing, the district court erred in concluding that the benefits of juror questioning outweighed the risks. The government contends, without support, that the "court believed allowing juror questions would, in some respects, help to level the playing field." (Gov't Br. 33.) As discussed below, *see infra* Section III.B, far from leveling the playing field, juror questions actually gave the prosecution an unfair advantage and *increased* the prejudice to Sykes.[11] (*See* Appellant's Br. 38-39.)

[11] Moreover, the government's assertion that "no authority stat[es] that the district court's weighing of the costs / benefits in this particular situation was per se improper" is meaningless. (Gov't Br. 34.) There is no "per se" prohibition for "this particular situation"

Furthermore, the district court failed to use even the most straightforward precautions to reduce prejudice to Sykes. The government points out that such prophylactic measures are only recommended. (Gov't Br. 34.) But where a court fails to use any precautions at all, there is nothing to ameliorate the prejudice inflicted upon the defendant. *See, e.g.*, *Feinburg*, 89 F.3d at 337 (holding that because the district court failed to take prophylactic measures, it left itself vulnerable to the argument that juror questions were prejudicial); *United States v. Sutton*, 970 F.2d 1001, 1006 (1st Cir. 1992) (finding no abuse of discretion where the "panoply of prophylactic measures" greatly reduced any prejudice). In this case, the district court failed to use even the most basic safeguards, instead allowing jurors to blurt out questions to the witnesses and repeatedly inviting jurors to ask questions. Since the district court failed to weigh the appropriate factors and Sykes endured the full amount of prejudice from the juror questions at trial, the district court erred by allowing juror questioning.

B. Juror questions affected Sykes's substantial rights by compromising his right to a fair trial.

The prejudice to Sykes from the juror questions affected his substantial rights under the third prong of the plain-error test and likely impacted the outcome

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because no appellate court has ever been faced with a criminal prosecution where the district court allowed juror questions despite the fact that the defendant had no legal representation, *pro se* or otherwise, at trial. Indeed, a sister circuit has reversed a conviction in a less egregious situation than this one—that is, for a simple criminal prosecution where defense counsel and the defendant were present. *See United States v. Ajmal*, 67 F.3d 12, 14-15 (2d Cir. 1995) (finding an abuse of discretion in trial court's decision to invite juror questioning where "not necessitated by the factual intricacies of the banal drug conspiracy").

of the trial. The jurors' questions prompted comments from the district court that cast Sykes in a poor light. The questions further helped the government meet its burden of proof by eliciting additional expert testimony that bolstered the prosecution's case and by alerting the government to gaps in its case. The government unfairly characterizes the additional expert testimony as innocuous clarification of the facts and misstates the nature of the district court's comments. In each of these instances, the prejudice was further enhanced by the fact that only one side—the prosecution—was present to respond and react to juror questions. Thus, there is more than a reasonable probability that at least one juror would have harbored a reasonable doubt as to Sykes's guilt had the juror questions not tainted his right to a fair trial.

1. The juror questions about fingerprints affected Sykes's right to a fair trial by eliciting additional expert testimony about a critical piece of evidence.

The questions posed by the jurors elicited additional expert testimony that filled gaps in the prosecution's case. The questions also suggested that the jurors had serious concerns about the fingerprint evidence, especially since Sykes did not attend trial and the jurors could not compare the man in the surveillance photos to a live defendant sitting in the courtroom. Far from serving as mere clarification, as the government contends (Gov't Br. 34-35), the jurors' questions permitted one-sided, uncontested bolstering of the prosecution's fingerprint evidence. The government had the opportunity to shape the expert testimony and curry favor with the jury by asking additional questions to follow up on juror questions, a luxury

that the defense never had. (*See, e.g.*, Trial Tr. 155:3-8.) Although the government is correct that it is not "inherently improper" to allow a party to conduct follow-up questioning to clear up potential confusion (Gov't Br. 35), the authority the government relies on envisions *both* sides having an opportunity to clarify and re-question the witness. *United States v. Rawlings*, 522 F.3d 403, 408 (D.C. Cir. 2008) (noting that questions should be in writing, so the court can "review them with *counsel*") (emphasis added); *see also United States v. Richardson*, 233 F.3d 1285, 1290 (11th Cir. 2000) ("Care should be taken that the procedure utilized is fair, and permits *all the parties* to exercise their rights.") (emphasis added); *Sutton*, 970 F.2d at 1005 ("Juror-inspired questions may serve to advance the search for truth by . . . alerting the *attorneys* to points that bear further elaboration.") (emphasis added); *Feinburg*, 89 F.3d at 337. Allowing the jurors to elicit additional expert testimony and then having only the prosecution re-question the witnesses about the new evidence unduly prejudiced Sykes.

2. Juror questions substantially affected Sykes's right to a fair trial by prompting a comment from the court that suggested Sykes had no meritorious defense.

The district court offered testimony, in response to a juror question, about events he observed prior to trial. The judge testified that Sykes "demanded the right to represent himself," "instructed his standby counsel not to appear . . . during this trial," and "takes the position, for reasons that I won't go into, that this Court has no jurisdiction over him, and this certainly is one reason he's decided to waive his presence." (Trial Tr. 40:21-25, 41:1-13.) Through this interjection, the judge

introduced evidence that the prosecution could not otherwise present about Sykes's absence from trial, defense strategy, and pretrial events. And by implying that Sykes had been difficult and had no meritorious defense, the comment altered the jury's opinion of Sykes and influenced the outcome of the trial.

The government attempts to sidestep the district court's prejudicial statement by arguing that according to Federal Rule of Evidence 614(b), "there is nothing inherently improper about the judge . . . following up after a juror has asked a question." (Gov't Br. 35.) But Rule 614(b) only pertains to judicial *questions*, not judicial *testimony*. Fed. R. Evid. 614(b). In this case, the district court told the jury about events he witnessed during pretrial motions. The applicable federal rule, Federal Rule of Evidence 605, mandates that "[t]he judge presiding at the trial may not testify in that trial as a witness." Fed. R. Evid. 605; *see also United States v. Blanchard*, 542 F.3d 1133, 1149 (7th Cir. 2008) (holding that a court's comments based upon his own personal observations of the defendant prior to trial were impermissible judicial testimony where they added new evidence which the prosecution was otherwise unable to establish).

Finally, the government contends that Sykes would have been convicted even absent any prejudice from juror questions. But the juror questions themselves demonstrate the reasonable doubt that they harbored with respect to the critical forensic evidence in the case. Thus, there is more than a reasonable probability that at least one juror would have doubted Sykes's guilt had the juror questions not

tainted his right to a fair trial.[12] For these reasons, Sykes's conviction should be reversed and his case should be remanded for a trial that comports with the constitutional guarantees of fairness and impartiality.

[12] The government has failed to address the plain error test in any systematic way and, in fact, wholly ignores the fourth prong. As discussed in Appellant's opening brief (*see* Appellant's Br. 46-47), the juror questions not only were a plain error that affected Sykes's substantial rights, but they also impacted the integrity of the judicial proceedings. *See United States v. Johnson*, 892 F.2d 707, 715 (8th Cir. 1989) (Lay, C.J., concurring) ("Jury interrogation of defendants not only impairs the attainment of just results; it demeans the very appearance of justice. . . . Because juror questions give the impression that the defendant faces a tribunal biased against him, the moral authority of the court and trial suffers."); *see also Offutt v. United States*, 348 U.S. 11, 14 (1954) ("These are subtle matters, for they concern the ingredients of what constitutes justice. Therefore, justice must satisfy the appearance of justice.").

CONCLUSION

For the foregoing reasons, the appellant, Overtis Sykes, respectfully requests that this Court vacate his conviction and dismiss the indictment against him with prejudice or, in the alternative, reverse his conviction and remand his case to the district court for a new trial.

Respectfully Submitted,

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No. 08-2558

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FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. OVERTIS SYKES, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division Case No. 07 CR 857 - 1 Hon. John F. Grady Presiding Judge

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 31(e)

I, the undersigned, counsel for the Defendant-Appellant, Overtis Sykes, hereby certify that I have filed electronically, pursuant to Circuit Rule 31(e), a version of this reply brief in non-scanned PDF format.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

I, the undersigned, counsel for the Defendant-Appellant, Overtis Sykes, hereby certify that this brief conforms to the rules contained in Fed. R. App. 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 6742 words.

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CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Defendant-Appellant, Overtis Sykes, hereby certify that I served two copies of this reply brief and one digital copy of the brief by placing them in an envelope with sufficient postage affixed and directed to the person named below at the address indicated, and depositing that envelope in the United States mail box located at 357 East Chicago Ave., Chicago, Illinois on February 19, 2009.

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