

**IN THE SUPREME COURT  
OF THE STATE OF NORTH DAKOTA**

<b>State of North Dakota,</b>	)	
	)	<b>Supreme Court No. 20170279</b>
<b>Plaintiff-Appellee,</b>	)	
	)	<b>Criminal No. 51-2015-CR-01459</b>
	)	
<b>vs.</b>	)	
	)	
	)	
<b>Alexander Justin Pittenger,</b>	)	
	)	
<b>Defendant-Appellant.</b>	)	

---

**BRIEF OF PLAINTIFF-APPELLEE**

---

**Appeal from the Criminal Judgment Entered on July 13, 2017 and  
Appeal from the Order Denying Motion to Dismiss on June 12, 2018  
In District Court, Ward County, State of North Dakota  
The Honorable Stacy J. Louser, Presiding**

---

Marie A. Miller (#06617)  
Ward County Assistant State's Attorney  
315 3<sup>rd</sup> St. SE  
PO Box 5005  
Minot, ND 58702-5005  
701-857-6480-5682  
marie.miller@wardnd.com

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....¶1

STATEMENT OF THE ISSUES.....¶2

STATEMENT OF THE CASE.....¶6

STATEMENT OF THE FACTS .....¶26

LAW AND ARGUMENT .....¶42

CONCLUSION.....¶78

**[¶1] TABLE OF AUTHORITIES**

<b>Cases</b>	<b>Paragraph</b>
<u>Arizona v. Fulminante</u> , 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) .....	¶47,48,74
<u>Neder v. United States</u> , 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)...	¶48,74,76
<u>Carson v. Fischer</u> , 421 F.3d 83, 94 (2d Cir. 2005) .....	¶57
<u>Chapman v. California</u> , 386 U.S. 18, 23, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)...	¶47,74
<u>City of Fargo v. Hector</u> , 534 N.W.2d 821 (N.D. 1995).....	¶63
<u>Huso v. Bismarck Pub. Sch. Bd.</u> , 219 N.W.2d 100 (N.D. 1974).....	¶73
<u>Minnkota Power Coop. v. Lake Shure Properties</u> , 295 N.W.2d 122 (N.D. 1980) .....	¶71
<u>Peterson v. Williams</u> , 85 F.3d 39 (2d Cir. 1996) .....	¶57
<u>Press-Enterprise Co. v. Super. Ct. of Cal.</u> , 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).....	¶49,74
<u>State v. Aguero</u> , 2010 ND 210, 791 N.W.2d 1 .....	¶45
<u>State v. Decker</u> , 2018 ND 43, 907 N.W.2d 378.....	¶45,47,48,49,50,51,57,58,74,76
<u>State v. Garcia</u> , 1997 ND 60, 561 N.W.2d 599 .....	¶49
<u>State v. Kelly</u> , 2001 ND 135, 631 N.W.2d 167 .....	¶62,63
<u>State v. Klem</u> , 438 N.W.2d 798 (N.D. 1989).....	¶50,74
<u>State v. Louser</u> , 2017 ND 10, 890 N.W.2d 1 .....	¶17,32
<u>State v. Pena Garcia</u> , 2012 ND 11, 812 N.W.2d 328.....	¶45
<u>State v. Watkins</u> , 2017 ND 165, 898 N.W.2d 442.....	¶48,76
<u>United States v. Aguiar</u> , 82 F. Supp. 3d 70, 84 (D.D.C. 2015) .....	¶57
<u>Waller v. Georgia</u> , 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) .....	¶50,51,53,54,56,57,74

<b><u>Statutes</u></b>	<b><u>Paragraph</u></b>
<u>N.D.C.C. § 12.1-35-05.2</u> .....	¶52,53,54,56
<u>N.D.C.C. § 29-16-01(3)</u> .....	¶62
<u>N.D.C.C. § 29-16-02</u> .....	¶62
<u>N.D.C.C. § 29-26-12</u> .....	¶73,75
<b><u>Rules</u></b>	<b><u>Paragraph</u></b>
<u>N.D.R.Civ.Pro 60</u> .....	¶75
<u>N.D.R.Crim.P. 33</u> .....	¶73,75
<u>N.D.R.App.P. 35</u> .....	¶70
<u>N.D.R.Crim.P. 48</u> .....	¶73,75
<u>N.D.R.Crim.P 31(e)(2)</u> .....	¶63
<b><u>United States Constitution</u></b>	<b><u>Paragraph</u></b>
<u>U.S. Const. Amend VI</u> .....	¶57

**[¶2] I. STATEMENT OF THE ISSUES**

- [¶3] 1. Whether the District Court created a structural error by closing the courtroom at trial.
- [¶4] 2. Whether the District Court erred by determining as a matter of law jeopardy no longer attached after the jury was empaneled and sworn.
- [¶5] 3. Whether the District Court erred by denying the State's Motion to Dismiss.

**[¶6] II. STATEMENT OF THE CASE**

[¶7] On June 29, 2015, the State charged Alexander Justin Pittenger (hereinafter "Pittenger") with Gross Sexual Imposition, a Class A Felony; and Corruption Minors, a Class A Misdemeanor. See Appellant's App. pp. 1-2, 10-11.

[¶8] Pittenger made his Initial Appearance on all charges on July 6, 2015. Id. at p. 2.

[¶9] On August 13, 2015, a Preliminary Hearing was held. Id. at p. 3. The District Court found probable cause existed. See Transcript of Preliminary Hearing at pp. 16-17.

[¶10] A Pretrial Conference was held on October 21, 2015. See Appellant's App. p. 3. The District Court issued a Notice of Trial on October 22, 2015, ordering that trial would commence February 29, 2016. See Appellant's App. p. 3, Doc ID# 30. On November 6, 2015, the District Court ordered the trial be continued. See Appellant's App. pp. 3, Doc ID# 45. The District Court issued an Amended Notice of Trial on November 19, 2015, ordering that trial would commence on May 9, 2016. See Appellant's App. p. 3, Doc ID# 49. On February 29, 2016, the Court ordered the trial be continued. See Appellant's App. p. 4.

[¶11] On April 25, 2016, Pittenger filed Defendant's Motion in Limine No. 1, Defendant's Motion in Limine No. 2, and Defendant's Motion in Limine No. 3. See

Appellant's App. p. 4, Doc ID#'s 73, 76, and 79. A hearing on the motions was held May 3, 2016. Id.

[¶12] On May 9, 2016, the District Court ordered that trial be continued and rescheduled for July 18, 2016. See Appellant's App. p. 5, Doc ID# 88.

[¶13] The District Court entered an order granting Pittenger's "Defendant's Motion in Limine No. 3" on July 18, 2016. Id., Doc ID# 108; See also Appellant's App. pp. 14-17.

[¶14] Jury trial commenced July 18, 2016. See Jury Trial Transcript. On July 22, 2016, the District Court entered an Order for Mistrial. See Appellant's App. pp. 6 Doc ID# 136, 18-21.

[¶15] The District Court issued an Order for Trial on July 22, 2016, ordering that trial would commence January 9, 2017. Id. at 6 Doc ID# 137.

[¶16] The State moved to dismiss Count 1 Gross Sexual Imposition, on December 29, 2016. Id. Doc ID# 146. The District Court granted the State's motion to dismiss on January 3, 2017. Id. Doc ID# 148.

[¶17] Trial commenced on January 9, 2017. See Transcript of Trial. On January 10, 2017, the State requested a stay of proceedings and petitioned the North Dakota Supreme Court for a Supervisory Writ. See Transcript of Jury Trial, Day 2, pp.3-9. The District Court issued an Order Excluding Testimony Due to Non Compliance with Rule 16 Discovery Request on January 11, 2017. See Appellant's App. p. 7 Doc ID# 157; See also Appellee's App. pp. 1-12. Petition for Supervisory Writ and Brief of Petitioner was filed January 12, 2017. See Appellee's App. pp. 13-32. Pittenger filed the Brief of the Respondent on January 24, 2017. Id. at pp. 33-47. On January 27, 2017, the North Dakota Supreme Court granted supervision and ordered the District Court to vacate its prior order. State v. Louser, 2017 ND 10, 890 N.W.2d 1.

[¶18] The District Court issued an Order Vacating Order Excluding Testimony on January 30, 2017. See Appellant's App. p. 7; See also, Appellee's App. pp. 48-49. On February 2, 2017, the District Court issued an Order on Witness Special Agent Pat Helfrich and Resumption of Trial. See Appellant's App. p. 7; See also, Appellee's App. pp. 50-64.

[¶19] Jury Trial re-commenced on February 6, 2017. See Appellant's App. p. 7. The jury returned a guilty verdict on February 6, 2017. Id. On the same date, the District Court issued an Order for PSI Risk Assessment. Id.

[¶20] Pittenger was sentenced on July 10, 2017. See Appellant's App. p. 8; See also Sentencing Transcript. The District Court sentenced Pittenger to 360 days incarceration, first serve 300 hundred days, with the balance suspended for two (2) years of supervised probation. See Sentencing Transcript pp 26-34; See also Appellant's App. pp. 22-29. Pittenger was also ordered to enroll and complete sex offender treatment and to register as a sex offender. Id.

[¶21] Pittenger filed a timely Notice of Appeal from the Amended Criminal Judgment on July 25, 2017. See Appellant's App. pp. 8, 38.

[¶22] An Amended Criminal Judgment was issued by the District Court on September 12, 2017. Id. at pp. 30-37.

[¶23] On April 16, 2018, Pittenger and the State filed a Stipulation for Remand with the North Dakota Supreme Court. See Appellee's App. pp. 65-66. On the same date, the North Dakota Supreme Court issued an Order of Remand. See Appellant's Supp. App. pp. 12 Doc ID# 225, and 25.

[¶24] The State filed a Motion to Dismiss on May 9, 2018. See Appellant's Supp. App. pp. 12 Doc ID# 227, and 13. A Status Conference on the State's Motion to Dismiss was held on June 7, 2018. See Appellant's Supp. App. pp. 12. The District Court issued an

Order Denying Motion to Dismiss Charge on June 12, 2017. See Appellant's Supp. App. pp. 12 Doc ID# 231, and 14-24.

[¶25] Pittenger filed a timely Notice of Appeal from the Order Denying Motion to Dismiss Charge on June 19, 2018. Id. at 26.

### [¶26] III. STATEMENT OF THE FACTS

[¶27] On June 29, 2015, the State charged Alexander Justin Pittenger (hereinafter "Pittenger") with Gross Sexual Imposition, a Class A Felony; and Corruption Minors, a Class A Misdemeanor. See Appellant's App. pp. 1-2, 10-11

[¶28] Jury trial commenced July 18, 2016. See Jury Trial Transcript. On July 22, 2016, the District Court entered an Order for Mistrial. See Appellant's App. pp. 6 Doc ID# 136, 18-21.

[¶29] The District Court issued an Order for Trial on July 22, 2016, ordering that trial would commence January 9, 2017. Id. at 6 Doc ID# 137.

[¶30] The State moved to dismiss Count 1 Gross Sexual Imposition, on December 29, 2016. Id. Doc ID# 146. The District Court granted the State's motion to dismiss on January 3, 2017. Id. Doc ID# 148.

[¶31] Trial commenced on January 9, 2017. See Transcript of Trial. On January 9, 2017, prior to the commencement of voir dire, the District Court inquired if the intention was for the courtroom to remain closed during the testimony of Jane Doe. See Transcript of Trial pp. 16-17. The State asked for the courtroom to be closed and for the Court to follow the statutes pertaining to closure of a courtroom for child victim testimony. Id. at 17. Pittenger objected to the closure of the courtroom. Id.

[¶32] On January 10, 2017, the State requested a stay of proceedings and petitioned the North Dakota Supreme Court for a Supervisory Writ. See Transcript of Jury Trial, Day 2,



pp.3-9. The District Court issued an Order Excluding Testimony Due to Non Compliance with Rule 16 Discovery Request on January 11, 2017. See Appellant's App. p. 7 Doc ID# 157; See also Appellee's App. pp. 1-12. Petition for Supervisory Writ and Brief of Petitioner was filed January 12, 2017. See Appellee's App. pp. 13-32. Pittenger filed the Brief of the Respondent on January 24, 2017. Id. at pp. 33-47. On January 27, 2017, the North Dakota Supreme Court granted supervision and ordered the District Court to vacate its prior order. State v. Louser, 2017 ND 10, 890 N.W.2d 1.

[¶33] Jury Trial re-commenced on February 6, 2017. See Appellant's App. p. 7. The State called Jane Doe to testify and requested that the courtroom be closed to the public. See Jury Trial Transcript, Day 3, p. 37. Pittenger objected to the closure of the courtroom. Id. The District Court excused all individuals that were not part of the proceedings during Jane Doe's testimony. Id.

[¶34] Prior to trial commencing, Pittenger requested a jury instruction for Double Jeopardy. The State filed an Objection to Double Jeopardy Jury Instruction on January 6, 2017. See Appellant's App. p. 6 Doc ID# 153. Pittenger filed a brief in response to the State's objection on the same date. Id. at Doc ID# 155. On January 9, 2017, prior to voir dire, the District Court requested that Pittenger make an offer of proof prior to the District Court ruling on Pittenger's request for a Double Jeopardy jury instruction. See Jury Trial Transcript, Day 1, Volume 1 of 3, pp. 7-16. No offer of proof was made at that time, and no offer of proof was made at any other point during trial. See Jury Trial Transcripts for January 9, January 10, and February 6, 2017. At the close of trial on February 6, 2017, Pittenger moved to withdraw his request for a Double Jeopardy jury instruction. See Jury Trial Transcript, Day 3, Volume 3, pp. 129-130.

[¶35] The jury returned a guilty verdict on February 6, 2017. See Appellant's App. p. 7. On the same date, the District Court issued an Order for PSI Risk Assessment. Id.

[¶36] Pittenger was sentenced on July 10, 2017. See Appellant's App. p. 8; See also Sentencing Transcript. The District Court sentenced Pittenger to 360 days incarceration, first serve 300 hundred days, with the balance suspended for two (2) years of supervised probation. See Sentencing Transcript pp 26-34; See also Appellant's App. pp. 22-29. Pittenger was also ordered to enroll and complete sex offender treatment and to register as a sex offender. Id.

[¶37] Pittenger filed a timely Notice of Appeal from the Amended Criminal Judgment on July 25, 2017. See Appellant's App. pp. 8, 38.

[¶38] An Amended Criminal Judgment was issued by the District Court on September 12, 2017. Id. at pp. 30-37.

[¶39] On April 16, 2018, Pittenger and the State filed a Stipulation for Remand with the North Dakota Supreme Court. See Appellee's App. pp. 65-66. On the same date, the North Dakota Supreme Court issued an Order of Remand. See Appellant's Supp. App. pp. 12 Doc ID# 225, and 25.

[¶40] The State filed a Motion to Dismiss on May 9, 2018. See Appellant's Supp. App. pp. 12 Doc ID# 227, and 13. A Status Conference on the State's Motion to Dismiss was held on June 7, 2018. See Appellant's Supp. App. pp. 12. The District Court issued an Order Denying Motion to Dismiss Charge on June 12, 2017. See Appellant's Supp. App. pp. 12 Doc ID# 231, and 14-24.

[¶41] Pittenger filed a timely Notice of Appeal from the Order Denying Motion to Dismiss Charge on June 19, 2018. Id. at 26.

[¶42] IV. LAW AND ARGUMENT

[¶43] A. **Whether the District Court created a structural error by closing the courtroom at trial.**

[¶44] 1. Standard of Review.

[¶45] The North Dakota Supreme Court applies “a de novo standard of review to a claim of a constitutional violation.” State v. Decker, 2018 ND 43, ¶ 6, 907 N.W.2d 378 (*quoting State v. Agüero*, 2010 ND 210, ¶ 16, 791 N.W.2d 1) *see State v. Pena Garcia*, 2012 ND 11, ¶ 6, 812 N.W.2d 328 (“A de novo standard of review applies to whether facts rise to the level of a constitutional violation...”)).

[¶46] 2. The District Court created a structural error by closing the courtroom at trial.

[¶47] “Structural errors are violations of the framework of the trial rather than mere procedural errors. State v. Decker, 2018 ND 43, ¶ 7, 907 N.W.2d 37 (*citing Arizona v. Fulminante*, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)). “Some constitutional rights are so basic to a fair trial that their infraction can never be treated as harmless error...” State v. Decker, 2018 ND 43, ¶ 7, 907 N.W.2d 378 (*quoting Chapman v. California*, 386 U.S. 18, 23, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)).

[¶48] “Structural errors include deprivation of right to counsel, lack of judicial impartiality, racial exclusion from a grand jury, violation of the right to self-represent, and denial of the right to a public trial. State v. Decker, 2018 ND 43, ¶ 8, 907 N.W.2d 37 (*citing Arizona v. Fulminante*, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)). “Structural errors ... are constitutional errors ‘so intrinsically harmful as to require automatic reversal’ regardless of whether they have been forfeited or waived.” State v. Decker, 2018 ND 43, ¶ 8, 907 N.W.2d 378 (*quoting State v. Watkins*, 2017 ND

165, ¶ 12, 898 N.W.2d 442 (*quoting Neder v. United States*, 527 U.S. 1, 7, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

[¶49] “The rights implicated in structural errors are not absolute. *State v. Decker*, 2018 ND 43, ¶ 9, 907 N.W.2d 378 (*citing State v. Garcia*, 1997 ND 60, ¶ 20, 561 N.W.2d 599 (ruling right to a public trial is not absolute and must give way in rare instances to other interests essential to the fair administration of justice.)). “The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.” *State v. Decker*, 2018 ND 43, ¶ 9, 907 N.W.2d 378 (*quoting Press-Enterprise Co. v. Super. Ct. of Cal.*, 464 U.S. 501, 510, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)).

[¶50] “Four factors must be present to avoid structural error in closing a courtroom: ‘(1) the claiming party must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure.’” *State v. Decker*, 2018 ND 43, ¶ 9, 907 N.W.2d 378 (*quoting Waller v. Georgia*, 467 U.S. 39, 48, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). “An appellate court may not provide a post hoc rationale for why the trial court would have closed the trial had it held a hearing and made findings.” *State v. Klem*, 438 N.W.2d 798, 802 (N.D. 1989).

[¶51] “[B]efore ordering a courtroom closed to the public at any stage of a trial, a judge must make sufficient findings under the four *Waller* factors.” *State v. Decker*, 2018 ND

43, ¶ 11, 907 N.W.2d 378. “If a party objects to the closure and the judge has not made the required findings, on appeal the party generally receives a reversal.” Id.

[¶52] “In any criminal proceeding in which the defendant is charged with a violation of chapter 12.1-20 involving a child, the court, upon the motion of the prosecuting attorney, shall conduct a hearing to determine whether the testimony of and relating to a child may be closed to the public in order to protect the child’s reputation. In making the determination to close the proceedings, the court shall consider: (1) The nature and seriousness of the offense; (2) The age of the child; (3) The extent to which the size of the community would preclude the anonymity of the victim; (4) The likelihood of public opprobrium due to the status of the victim; (5) Whether the prosecution has demonstrated a substantial probability the identity of the witness would otherwise be disclosed to the public during the proceeding and that the disclosure would cause serious harm to the witness; (6) Whether the witness has disclosed information concerning the case to the public through press conferences, public meetings, or other means; and (7) Any other factor the court may find necessary to protect the interests of justice.” N.D.C.C. § 12.1-35-05.2.

[¶53] On January 9, 2017, prior to the commencement of voir dire, Pittenger informed the District Court that he would oppose the closing of the courtroom during Jane Doe’s testimony. See Jury Trial Transcript, Day 1, Volume 1, p. 17. The State requested the closure of the courtroom during Jane Doe’s testimony and asked the District court to follow those statutes that permitted courtroom closure during the testimony of a juvenile victim. Id. The District Court stated, “At this point, I am inclined to have the courtroom locked during Jane Doe’s testimony. I understand the concern, but we do also have a minor victim here.” Id. at 17-18. The District Court did not make findings under the four Waller factors,

nor did the District Court engage in the required analysis pursuant to N.D.C.C. § 12.1-35-05.2.

[¶54] The State called Jane Doe to testify on February 6, 2017. See Jury Trial Transcript, Day 3, Volume 3, p. 37. The State again asked the District Court to order all individuals who were not a party to the proceedings removed from the courtroom. Id. Pittenger objected to the State’s request. Id. The District Court stated, “And Jane Doe is a minor. [...] And I am going to ask anybody that is in the courtroom that is not part of these proceedings to go ahead and be excused at this time.” Id. Again, the District Court did not make findings under the four Waller factors, nor did the District Court engage in the required analysis pursuant to N.D.C.C. § 12.1-35-05.2.

[¶55] After the testimony of Jane Doe concluded, and the jury was excused from the courtroom, the District Court set out, “There was an objection to whether or not additional individuals could be seated in the gallery during Jane Doe’s testimony. The objection, in particular, was that Mr. Pittenger has the right to confront his witnesses. [...] That is true, he does. He, as the defendant, has the right. That right is not extended to family members. And Jane Doe is a minor child. The Court does have obligations to minimize the exposure and/or the stressors that could be imposed. And so for that reason, the gallery was cleared during her testimony. Obviously, I didn’t want to address that in front of the jury but that was the basis for the decision.” See Jury Trial Transcript, Day 3, Volume 3, p. 78-79.

[¶56] The District Court failed to address the four Waller factors: (1) the claiming party must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure. The sole finding the District Court made was that Jane Doe was a

minor child and the court was obligated to minimize the exposure and/or stressors that could be imposed. Not only did the District Court fail to address the four Waller factors, but the District Court also failed to comply with N.D.C.C. § 12.1-35-05.2.

[¶57] Sixth Amendment concerns may be allayed if closing the courtroom had a trivial impact on Pittenger’s case, as some errors are not significant enough to rise to the level of a constitutional violation under the triviality standard. State v. Decker, 2018 ND 43, ¶ 13, 907 N.W.2d 378 (*citing Carson v. Fischer*, 421 F.3d 83, 94 (2d Cir. 2005)). “The Sixth Amendment right to a public trial advances four essential values: ‘(1) to ensure a fair trial; (2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions; (3) to encourage witnesses to come forward; and (4) to discourage perjury.’” State v. Decker, 2018 ND 43, ¶ 14, 907 N.W.2d 378 (*quoting Peterson v. Williams*, 85 F.3d 39, 42 (2d Cir. 1996)). “Whether a courtroom closure made without proper Waller findings met the triviality standard, and hence was not a Sixth Amendment violation, depends on whether the closure implicated these four values. State v. Decker, 2018 ND 43, ¶ 14, 907 N.W.2d 378 (*citing United States v. Aguiar*, 82 F. Supp. 3d 70, 84 (D.D.C. 2015)).

[¶58] Here, unlike in Decker, all members of the public were excluded from the courtroom. The State cannot assert that such an exclusion was trivial.

[¶59] Appellee concurs with Pittenger and would request the matter be reversed, the Criminal Judgment be vacated, and remanded.

**[¶60] B. Whether the District Court erred by determining as a matter of law jeopardy no longer attached after the jury was empaneled and sworn.**

[¶ 61] Appellee concurs with Pittenger that this matter should be reversed and remanded under the first issue, which negates a need to address the second issue. In the event that

this Court does not find the structural error warrants reversal, argument on the second issue follows.

[¶62] “Under N.D.C.C. § 29-16-01(3), an issue of fact arises upon a plea of once in jeopardy.” State v. Kelly, 2001 ND 135, ¶ 7, 631 N.W.2d 167. “Issues of fact must be tried by a jury.” Id. (citing N.D.C.C. § 29-16-02).

[¶63] “Under Rule 31(e)(2), N.D.R.Crim.P., ‘When a defendant interposes the defense of having been formerly convicted or acquitted for the same offense or an offense necessarily included therein, or of having been once in jeopardy, and evidence thereof is given at trial, the jury, if it so finds, shall declare that fact in its verdict.’” State v. Kelly, 2001 ND 135, ¶ 7, 631 N.W.2d 167. “The rule allows evidence of double jeopardy to be presented to the trial court and, if an issue of fact is presented, then to the jury for its determination. The rule requires the trial court to submit a special verdict form to the jury, but only if the double jeopardy issue includes a question of fact.” Id. at ¶ 7 (citing City of Fargo v. Hector, 534 N.W.2d 821, 823 (N.D. 1995)).

[¶64] Prior to trial commencing, Pittenger requested a jury instruction for Double Jeopardy. The State filed an Objection to Double Jeopardy Jury Instruction on January 6, 2017. See Appellant’s App. p. 6 Doc ID# 153. Pittenger filed a brief in response to the State’s objection on the same date. Id. at Doc ID# 155. On January 9, 2017, prior to voir dire, the District Court requested that Pittenger make an offer of proof prior to the District Court ruling on Pittenger’s request for a Double Jeopardy jury instruction. See Jury Trial Transcript, Day 1, Volume 1, pp. 7-16. No offer of proof was made at that time, and no offer of proof was made at any other point during trial. See Jury Trial Transcripts for January 9, January 10, and February 6, 2017. At the close of trial on February 6, 2017,



Pittenger moved to withdraw his request for a Double Jeopardy jury instruction. See Jury Trial Transcript, Day 3, Volume 3, pp. 129-130.

[¶65] Pittenger now asserts that he should have been allowed to present evidence of a defense of double jeopardy to the tribunal. See Appellant's Brief p. 12. The District Court asked Pittenger to put forward an offer of proof in order to make a determination if an issue of fact existed. Pittenger failed to do so. Not only did Pittenger fail to do so, but he ultimately chose to withdraw his request for a Double Jeopardy jury instruction.

[¶66] The District Court did not err, as Pittenger failed to produce evidence to the District Court which demonstrated an issue of fact existed.

**[¶67] C. Whether the District Court erred by denying the State's motion to dismiss.**

[¶68] On April 16, 2018, the State and Pittenger filed a Stipulation for Remand with the North Dakota Supreme Court. See Appellee's App. pp. 65-66. Pittenger and the State set out, "Defendant/Appellant asserts that the District Court created a structural error in closing the courtroom during part of the State's case-in-chief. Upon review, the State/Appellee concurs in the analysis of that assertion; WHEREFORE the parties stipulate that this matter be remanded to the District Court for appropriate disposition." Id.

[¶69] The North Dakota Supreme Court issued an Order of Remand on April 16, 2018. See Appellee's App. p. 67. The North Dakota Supreme Court set out, "[A] Stipulation for Remand was filed requesting the district court to consider a motion regarding the agreement by the parties that a 'structural error in closing the courtroom during part of the State's case-in-chief.' The Chief Justice considered the matter, and ORDERED, that this case be temporarily remanded to the trial court for the limited purpose of consideration of

appropriate motion to be expeditiously filed by the parties concerning the issue identified above.” Id.

[¶70] “Upon an appeal from a verdict, judgment, or order, the court may reverse, affirm, or modify the verdict, judgment, or order, and may do any of the following: (A) set aside, affirm, or modify any or all of the proceedings subsequent to or dependent upon the verdict, judgment, or order; (B) order a new trial; (C) remand the case, with proper instructions and its opinion, to the district court.” N.D.R.App.P. 35.

[¶71] Upon remand from the North Dakota Supreme Court, the trial court has a duty to examine the opinion of the Supreme Court and to determine what further proceedings may be had consistent with the Supreme Court’s opinion. Minnkota Power Coop. v. Lake Shure Properties, 295 N.W.2d 122 (N.D. 1980).

[¶72] On May 9, 2018, the State filed a Motion to Dismiss, moving the District Court to dismiss the charge of Corruption of a Minor on the grounds that a structural error committed in the course of trial would result in a reversal of the conviction and require the victim to endure the stress of a third trial. See Appellant’s Supp. App. p. 13.

[¶73] The District Court scheduled a Status Conference for June 7, 2018, to address the State’s Motion to Dismiss. Id. at p. 12, Doc ID# 230. At the Status Conference, the District Court inquired to what process was attempting to be utilized in dismissing Crim. No. 51-2015-CR-01459. See Transcript of Hearing, dated June 7, 2018, p. 3. The State informed the District Court that it believed that N.D.R.Crim.P. 48 was appropriate, as the State and Pittenger agreed that if the appeal were to proceed, the matter would be reversed and remanded to the District Court. Id. at pp. 3-4. The State also informed the District Court that, pursuant to Huso v. Bismarck Pub. Sch. Bd., 219 N.W.2d 100 (N.D. 1974), it believed that the District Court had the inherent authority to control its Criminal Judgment in the

matter. Id. at p. 4. The State also indicated that if the District Court was not inclined to exercise its inherent authority or to grant the State's motion to dismiss, that a motion from Pittenger either pursuant to N.D.R.Crim.P. 33 or N.D.C.C. § 29-26-12 should be considered, at which time the State believed the District Court should order judgment be deferred, determine that a new trial is necessary, and then proceed to rule upon the State's Motion to Dismiss. Id. at pp. 5-6.

[¶74] On June 12, 2018, the District Court issued an Order Denying Motion to Dismiss Charge. See Appellant's Supp. App. pp. 14-11. The District Court, post hoc, engaged in an analysis as to why the District Court ruled the courtroom should be closed during Jane Doe's testimony. Id. at pp. 18-21. The District Court stated, "If in fact, the Court erred in closing the courtroom during Jane Doe's testimony and in so doing, created a structural error, it is this Court's belief that the proper authority to make such a determination is the Supreme Court, not the State and Pittenger." Id. at p. 21. The North Dakota Supreme Court, as well as the United States Supreme Court, in their existing precedent, have determined that the District Court committed structural error when it closed the courtroom during Jane Doe's testimony. See State v. Decker, 2018 ND 43, ¶ 7, 907 N.W.2d 37; Arizona v. Fulminante, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); Chapman v. California, 386 U.S. 18, 23, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); State v. Watkins, 2017 ND 165, ¶ 12, 898 N.W.2d 442; Neder v. United States, 527 U.S. 1, 7, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); Press-Enterprise Co. v. Super. Ct. of Cal., 464 U.S. 501, 510, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984); Waller v. Georgia, 467 U.S. 39, 48, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984); State v. Klem, 438 N.W.2d 798, 802 (N.D. 1989).

[¶75] The District Court stated in its order that "the State offered N.D.R.Civ.Pro 60 and Rule 48 N.D.R.Crim.P. The State and Pittenger further suggested Rule 33 N.D.R.Crim.P.

may also be applicable.” See Appellant’s App. p. 8. The District Court fails to acknowledge nor consider the arguments of the State and Pittenger asserting that N.D.C.C. § 29-26-12 would provide a means to defer and/or arrest judgment and to order a new trial.

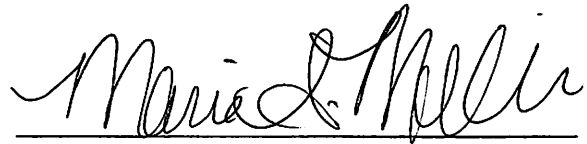
[¶76] The structural error committed by the District Court was a constitutional error so intrinsically harmful as to require automatic reversal. State v. Decker, 2018 ND 43, ¶ 8, 907 N.W.2d 378 (*quoting* State v. Watkins, 2017 ND 165, ¶ 12, 898 N.W.2d 442 (*quoting* Neder v. United States, 527 U.S. 1, 7, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999))). In this, there is no disagreement between Pittenger and the State. In an effort to expedite a remedy of the harmful constitutional error, the State and Pittenger stipulated to remand in order to rectify the wrong. The District Court has made it clear that acknowledgement of structural error by the State and Pittenger is not sufficient, and only a finding by the North Dakota Supreme Court will suffice.

[¶77] Appellee requests this Court find that the District Court committed structural error when it closed the courtroom for Jane Doe’s testimony, the matter be reversed, that the verdict be set aside, the Criminal Judgment be vacated, and the matter be remanded with instructions for the District Court to order dismissal.

V. **[¶78] CONCLUSION**

[¶79] The District Court erred in closing the courtroom for Jane Doe's testimony and committed structural error. The District Court did not err by determining as a matter of law jeopardy no longer attached after the jury was empaneled and sworn. The matter should be reversed, the verdict set aside, the Criminal Judgment vacated, and remanded with instructions for the District Court to order dismissal

Dated this 11<sup>th</sup> day of October, 2018.



---

Marie A. Miller (ND Bar ID #06617)  
Ward County State's Attorney's Office  
315 3<sup>rd</sup> Street SE  
Minot, ND 58701  
701-857-6480  
[51wardsa@wardnd.com](mailto:51wardsa@wardnd.com)

IN THE SUPREME COURT  
OF THE STATE OF NORTH DAKOTA

State of North Dakota, )  
 ) Supreme Court No. 20170279  
 Plaintiff-Appellee, )  
 ) District Court No. 51-2015-CR-01459  
 )  
 vs. )  
 )  
 )  
 Alexander Justin Pittenger, )  
 )  
 )  
 Defendant-Appellant. )

**AFFIDAVIT OF SERVICE**

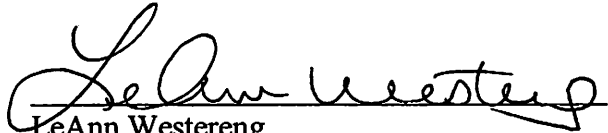
LeAnn Westereng, being first duly sworn, deposes and says:

That she is a citizen of the United States of America, over the age of twenty-one years, and is not a party to nor interested in the above entitled action; that on the 11<sup>th</sup> day of October, 2018, this Affiant provided a true and correct copy of the following documents in the above entitled action:

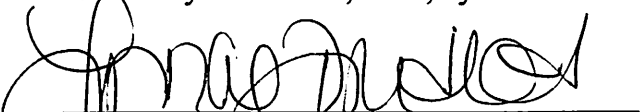
**BRIEF OF PLAINTIFF-APPELLEE AND  
APPENDIX OF PLAINTIFF-APPELLEE**

By ELECTRONIC SERVICE to the following:

**KIARA COSTA KRAUS-PARR**  
[kiara@kpmwlaw.com](mailto:kiara@kpmwlaw.com)

  
LeAnn Westereng

Subscribed and sworn to before me this 11<sup>th</sup> day of October, 2018, by LeAnn Westereng

  
Notary Public

LYNNAE RUDLAND  
Notary Public  
State of North Dakota  
My Commission Expires April 26, 2022