No. 20-1523

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In the Supreme Court of the United States

Rolando Cruz, Jr.

Marc Hernandez,

and Roscoe Villega,

Petitioners,

v.

United States of America,

Respondent

On Petition for a Writ of Certiorari

to the United States Court of Appeals

For the Third Circuit

BRIEF OF RESPONDENT EUGENE RICE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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G. Scott Gardner, Esquire,

Attorney for Respondent Eugene Rice

1000 Commerce Park Drive, Suite 310-B

Williamsport, PA 17701

Phone: (570) 971-0090

Email: gsgmakeswine@gmail.com

QUESTIONS PRESENTED

1. (a) Does structural error (the closing of the courtroom for voir dire), by its very nature, affect substantial rights for purposes of plain error review?
   (b) Should the potential costs of a retrial outweigh the harm to the integrity and reputation of the courts in assessing whether a structural error requires reversal on plain error review?
2. How is the quantity of controlled substances "involved" in drug distribution determined for purposes of sentencing for conspiracy under 21 U.S.C. §846, when the offense of distribution is the object of the conspiracy?

LIST OF ALL PARTIES

Petitioners herein are Rolando Cruz, Jr., Marc Hernandez and Roscoe Villega. This brief is filed on behalf of Eugene Rice, who is deemed a "Respondent" under this Court's Rule 12.6. Rice was one of the consolidated co-appellants in the court below but did not join Cruz, Hernandez and Villega in this Court as petitioners. Mr. Rice has not filed his own petition. By filing the within Respondent's brief in support, Rice seeks to join in the arguments in support of the issues set forth in the instant Petition.

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BRIEF OF RESPONDENT, EUGENE RICE, IN SUPPORT OF WRIT OF CERTIORARI

Respondent, Eugene Rice, requests that this Court grant the petition for writ of certiorari that seeks review of the judgment and order of the United States Court of Appeals for the Third Circuit as filed by Petitioners Cruz, Hernandez and Villega.

STATEMENT OF THE CASE

Respondent Rice began selling small quantities of crack cocaine on the streets of York, PA as a 16 year-old in 2004. He, along with several other teenagers, sold drugs, partied, drank and smoked marijuana. Although the group "hung out" together, there were no rules regarding territories and the group did not report to anyone and kept all the money they made selling drugs.

Rice was arrested on three occasions. The first involved a sale of one ounce of crack cocaine on December 22, 2004. Rice was 16 years old, was charged as a juvenile and pled guilty. The second arrest occurred on April 28, 2006 and involved the sale of .1 gram of crack cocaine for $20.00. Again, Rice was charged as a juvenile and pled guilty. The third occurred on March 19, 2009 and involved $50.00 worth of crack cocaine.

Rice was incarcerated following each of the aforesaid arrests and spent a total of 6 ½ years in state prisons between October 10, 2003 and June 13, 2013.

In September of 2014, Respondent Rice was indicted for the aforementioned

activity and, on November 16, 2015, was convicted by a jury of Count 2: conspiracy to distribute and Possess with the intent to distribute 5 kilograms or more of cocaine, 280 grams or more of crack cocaine, heroin and marijuana and Count 3: possession with the intent to distribute 5 kilograms or more of cocaine, 280 grams or more of crack cocaine, heroin and marijuana. Rice was acquitted of Count 1: Conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (RICO Conspiracy). Rice was sentenced to a term of 200 months imprisonment on each of Counts 2 and 3 to be served concurrently.

At trial, Rice, like the other defendants, made no objection to the Court's decision to close the courtroom to the public during voir dire. However, this issue was raised on direct appeal by other appellants and was timely joined by Rice. The lower court applied "plain error" review and concluded that the closing of the courtroom during voir dire did not require reversal . Because this issue obviously affects Rice's substantial rights, he agrees with the arguments set forth in the Petition and joins in same. Rice also agrees with Petitioners that the potential costs of a retrial should not outweigh the public interest in enforcement of fundamental rights.

Petitioners' second issue also directly affects Rice. At trial, Government witnesses testified that Rice, and others, sold small quantities of drugs (crack cocaine in Rice's case) at various times during the period of the indictment. However, none of the transactions met or exceeded the quantities necessary to trigger the increased penalties under 21 U.S.C. §§ 841(b)(1)(A) or (b)(1)(B). Despite this, the trial court instructed the jury to aggregate the drug quantities

which resulted in the jury attributing to each Defendant, including Rice, the quantity of drugs involved in the conspiracy as a whole.

Petitioners argue that the evidence was insufficient to support the increased statutory penalties and that therefore the jury was wrongly charged on what the lower court refers to as the "aggregation theory". **United States v, Rowe**, 919 F. 3d 752, 759 (3rd Cir. 2019). Rice agrees.

REASONS FOR GRANTING THE PETITION

The 6th Amendment Issue

Because this issue was raised for the first time on direct appeal, the standard of review is plain error. In order for a new trial to be granted, Petitioners must show that: (1) there was an error; (2) it was clear or obvious; (3) it impacted substantial rights; and (4) it seriously affected the fairness, integrity or public reputation of judicial proceedings. **United States v. Olano**, 507 U.S. 725, 736 (1993).

The issue is whether structural error, by its very nature, affects substantial rights under plain error review. The court below unanimously agreed that by closing the courtroom to the public during voir dire, the district court committed "structural error" thereby satisfying the first 2 prongs of **Olano**. However, after pretermitting the 3rd prong, the court divided on the application of the 4th prong of **Olano** and declined to reverse. In doing so, its decision is in conflict with its

sister circuits on this very issue. See **United States v. Negron-Sostre**, 790 F. 3d 295, 306 (1st Cir. 2015), **United States v. Gupta**, 699 F.3d 682, 687 (2nd Cir. 2012) and **United States v. Simmons**, 797 F. 3d 409, 415 (6th Cir. 2015). This Court should grant the petition in order to resolve this conflict.

The aggregation theory issue

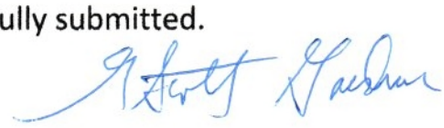
As to Count 2 (the drug conspiracy count), the trial court instructed the jury to find the amount involved in the conspiracy as a whole. The jury did so and found that amount to be 5 kilograms or more of cocaine, 280 grams or more of crack cocaine, heroin and marijuana on both Counts 2 and 3 despite the fact that none of the transactions proved met or exceeded the threshold of a §841(b)(1)(A) offense. The lower court agreed that this instruction was in error but refused to grant a new trial.

Because the Petitioners, and Rice, were sentenced based upon the "aggregate" quantities of drugs, the sentences on counts 2 and 3 are illegal. **United States v. Rowe**, 919 F. 3d 752 (3rd Cir. 2019) and **United States v. Lartey**, 716 F. 2d 955, 967-68 (2nd Cir. 1983). This petition should be granted to review and decide this important question of statutory construction and to correct this injustice.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, for the reasons set forth above, Respondent Eugene Rice respectfully requests that the petition for writ of certiorari filed by Cruz, Hernandez and Villega be granted.

Respectfully submitted.



G. Scott Gardner, Esquire
1000 Commerce Park Drive, Suite 310-B
Williamsport, PA 17701
Phone: (570) 971-0090
Email: gsgmakeswine@gmail.com
Attorney for Eugene Rice

May 26, 2021

No. 20-1523

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Respondent

On Petition for a Writ of Certiorari

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For the Third Circuit

CERTIFICATE OF COMPLIANCE

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As required by this Court's Rule 33.2(b), I certify that Respondent Rice's brief contains less than 15 pages and is in compliance with the word count requirement as well as other requirements of the Rule.

G. Scott Gardner, Esquire,
Attorney for Respondent Eugene Rice
1000 Commerce Park Drive, Suite 310-B
Williamsport, PA 17701
Phone: (570) 971-0090
Email: gsgmakeswine@gmail.com

May 24, 2021

No. 20-1523

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On Petition for a Writ of Certiorari

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CERTIFICATE OF SERVICE WITH FILING BY MAIL

Pursuant to this Court's Rules 29.2 and 29.5(b), I hereby certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit, having been appointed by that Court to represent Respondent Eugene Rice, and:

1. On May 27, 2021 and within the time permitted by the rules of this Court, I mailed a copy of the enclosed Brief of Respondent, Eugene Rice, in Support of Petition for Writ of Certiorari for filing, and related documents printed on 8 ½" by 11" paper and formatted under this Court's Rule 33.2, by U.S.P.S., Priority Mail, postage prepaid and properly addressed to the

Clerk of this Court.

2. I emailed the same documents to supremectbriefs@usdoj.gov. on that same date.

3. I further certify that on that same date, I served the same documents upon the following persons in the manner set forth below:

   (a) Peter Goldberger, Esquire, Counsel of Record for Petitioners, 50 Rittenhouse Place, Ardmore, PA 19003, (610) 649-8200 by email addressed to peter.goldberger@verizon.net.

   (b) Tieffa Harper, Esquire, Attorney for Petitioners, via email addressed to tieffa_harper@fd.org. (302) 573-6010.

   (c) Elizabeth D. Prelogar, Esquire, Acting Solicitor General, Attorney for Respondent, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530. (202) 514-2201.

G. Scott Gardner, Esquire,
Attorney for Respondent Eugene Rice
1000 Commerce Park Drive, Suite 310-B
Williamsport, PA 17701
Phone: (570) 971-0090
Email: gsgmakeswine@gmail.com

May 27, 2021