No. 20-7868

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IN THE SUPREME COURT OF THE UNITED STATES

DOUGLAS KELLY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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On Petition for Writ of Certiorari
To the United States Court of Appeals for the Third Circuit

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BRIEF OF RESPONDENTS ROLANDO CRUZ, JR., MARC HERNANDEZ, and ROSCOE VILLEGA IN SUPPORT OF PETITION

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May 2021

QUESTIONS PRESENTED

1. The district court excluded the public, including family members, from the courtroom for the entirety of jury selection. Defense counsel failed to object. Applying Fed.R.Crim.P. 52(b), a divided panel pretermitted the question whether this structural error "affect[ed petitioner's] substantial rights," and held that the integrity and reputation of the courts did not call for reversal. The question is:

> In assessing whether a constitutional error that is both structural and obvious warrants reversal on plain error review, can the potential but unlikely costs of retrial outweigh the public interest in enforcement of fundamental rights?

2. Section 846 of title 21 provides that the available penalties for a controlled substances conspiracy violation are "the same … as those prescribed for the offense, the commission of which was the object of the … conspiracy." Under *id.* § 841(b)(1), the penalties for "the offense" of drug distribution – which was the object of the conspiracy – vary according to whether a given substantive "violation" is one "involving" at least a certain amount of drugs. The court below disregarded the statutory language entirely and held that the jury should set the outer limits of a sentence for drug conspiracy by applying concepts borrowed from general conspiracy law and the "relevant conduct" provision of the Sentencing Guidelines. The question, on which the Circuits are divided, is:

> 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 and the penalties for distribution are transaction-specific, not aggregated?

LIST OF ALL PARTIES

Rolando Cruz, Jr., Marc Hernandez and Roscoe Villega stood trial as co-defendants with petitioner Kelly. Their appeals were all consolidated and were decided in a single, common opinion by the court of appeals. Accordingly, Cruz, Hernandez and Villega are respondents under this Court's Rule 12.6, and file the instant brief in that capacity. Their own joint petition is pending at No. 20-1523.

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BRIEF IN SUPPORT OF PETITION

Rolando Cruz, Jr., Marc Hernandez and Roscoe Villega, as respondents under Rule 12.6, respectfully urge this Court to grant the petition of their co-defendant and co-appellant Maurice Atkinson for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

STATEMENT OF THE CASE

The South Side neighborhood of York, Pennsylvania, is a community bound by lifelong friendships, local pride, and loyalty. It is a place where people grow up, start and raise families, and associate as neighbors. But life in the South Side, like other high-crime areas, is "punctuated by moments of significant and sometimes reckless violence," widespread drug dealing, and personal feuds. Appx. 2a.

Federal and local law enforcement conducted a multi-year investigation into drug trafficking and violence in the South Side because of a perceived pattern of escalating violence attributed to a rivalry between residents of that neighborhood and others who lived in the Parkway neighborhood of York. Appx. 3a. The government associated this violence with drug trafficking, and the drug trafficking with the so-called "Southside Gang," an alleged criminal enterprise named (in the indictment) after the South Side neighborhood. *Id.* According to the government, individuals associated with a national street gang "developed the South Side's existing drug trafficking into a more organized operation." *Id.*

In September 2014, a grand jury returned a second superseding indictment against 21 men from the South Side neighborhood. Petitioner Douglas Kelly, along with respondents Rolando Cruz, Jr., Marc Hernandez and Roscoe Villega, among others, were charged with racketeering conspiracy, drug trafficking conspiracy, drug

trafficking, and firearm offenses. Appx. 1a, 4a. The indictment alleged that from 2002 to 2014 the "Southside Gang" constituted a RICO enterprise, and that this "enterprise" was an extensive drug trafficking operation "conducted across a defined territory and nurtured in part through sporadic episodes of occasionally deadly violence …." Appx. 1a–2a. The indictment specified drug quantities of 5 kilograms or more of cocaine, and 280 grams or more of crack cocaine, heroin and marijuana, as being "involv[ed]" in the charged drug distribution, in the drug conspiracy's object offense, and as specified racketeering activities, which if proven would increase the statutory penalties for all of those counts. Appx. 4a. Several defendants pleaded guilty and cooperated with the government. Appx. 2a. None of the cooperators agreed with the indictment's allegation of the existence of a "Southside Gang" or the government's characterization of that alleged organization.

a. Jury Selection

Twelve defendants, including the petitioner and the three respondents, proceeded to a consolidated trial, with jury selection set to start on September 21, 2015. Appx. 4a. On the Friday before the start of trial, the district court issued orders related to *voir dire*. One order stated:

> AND NOW, on this 18th 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 in the courtroom during jury selection. No other individuals will be present except by the express authorization of the Court.

Appx. 5a. Jury selection lasted two days. The court did not explain the rationale for the order, and no party objected to it. *Id.*

b. The Trial, Verdict, and Sentencing

During the eight-week trial, the government's witnesses predominately testified that there was no "Southside gang." Rather, as the defense countered, "despite the illegal activity that undoubtedly occurred, expressions of a South Side identity reflected at most a kind of autochthonous pride, a loyalty borne of a common home, and did not amount to the existence of a South Side gang or criminal organization." Appx. 5a–6a.

Witnesses described numerous, smaller drug sales that occurred in the South Side. Some individuals sold drugs on their own, or alongside neighborhood friends, and some had different supply sources for their sales. There was no leader or structure, and profits were earned separately. The violent incidents relied on by the government "were the product of personal 'beefs.'" Appx. 2a, 6a, 49a.

The government also presented witnesses who testified about drug quantities they allegedly received from one or more of the defendants, but the government provided no evidence of any drug transaction that equaled or exceeded the charged amounts. Appx. 53a. Instead, the government argued, and the trial court's jury instructions authorized, that drug quantities from sales during the indictment period should be aggregated to meet the statutory threshold for enhanced penalties.

All twelve defendants were found guilty on one or more counts. Respondents Hernandez and Cruz received concurrent terms of life imprisonment; respondent Villega received concurrent terms of 300 months. Hernandez and Cruz were also convicted of firearms offenses and on that account each received a 20-year concurrent sentence and a five-year consecutive sentence.

c. The Decision Below

Petitioner, respondents and several co-defendants appealed their convictions and sentences on various grounds, two of which are relevant to this petition. Petitioner, respondents and their co-appellants first argued that the district court's closure of the courtroom to the public during jury selection violated their Sixth Amendment right to a public trial, and that this constitutional violation amounted to a plain and reversible error. Appx. 2a. A Third Circuit panel (Fisher, Restrepo & Roth, JJ.), in a lengthy, precedential opinion, largely affirmed. Appx. A, sub nom. *United States v. Williams*, 974 F.3d 320. The panel first affirmed the appellants' RICO conspiracy and drug conspiracy convictions against their insufficiency arguments, applying the generous legal definitions of those offenses, Appx. 47a, 51a. The court also rejected arguments that the trial record established only a far different (and smaller) scope of agreement than that charged. Appx. 45a–53a. Citing this Court's precedent, however, the panel recognized that the trial court's "closure of the courtroom undoubtedly violated the Defendants' Sixth Amendment right to public trial." The court of appeals also acknowledged that this Sixth Amendment violation amounted to a "'structural' error" that would have resulted in automatic reversal had trial counsel unsuccessfully objected. Appx. 8a–9a.

But the panel, over Judge Restrepo's dissent, ruled that the constitutional violation did not amount to "plain error." Applying the four-part inquiry set forth in *United States v. Olano*, 507 U.S. 725 (1994), the majority pretermitted the third prong, effect on substantial rights. The panel held that the fourth prong – the error's effect on the fairness, integrity or reputation of the courts – was not satisfied, which was enough to require affirmance. In doing so, the majority gave considerable weight to the "practical costs of correcting the District Court's error" along with the "mitigated

costs of inaction." The court therefore declined to exercise its remedial discretion to reverse. Appx. 18a. The majority acknowledged that its decision appeared to conflict with that of the First Circuit in a similar case. Appx. 15a-16a n.12.

Judge Restrepo's dissent emphasized that courtroom closure during *voir dire* is the "prototypical constitutional error that is impossible to measure," and that it would be "illogical to classify an error as structural because it affects substantial rights but then conclude that it did not affect defendants' substantial rights for purposes of *Olano's* third prong." Appx. 67a–68a. The dissent also concluded that *Olano's* fourth, discretionary prong was satisfied, warranting reversal. Judge Restrepo concluded that it "is perverse to weigh the costs of judicial efficiency against [the defendants'] constitutional rights when the District Court undeniably committed structural error." Appx. 70a.

Petitioners also argued, based on a Third Circuit decision decided subsequent to their convictions (agreeing with every other circuit to have addressed the same question), that the evidence was insufficient to support the § 841(b)(1) severity level of their drug distribution convictions, and that the jury was wrongly charged on a quantity-aggregation theory. *See United States v. Rowe*, 919 F.3d 752, 759 (3d Cir. 2019) (holding that the penalties assigned by § 841(b)(1)(A) (larger quantities) and (b)(1)(B) (mid-level quantities) attach to each discrete act of distribution or possession, not to a course of drug dealing). The government conceded the error as to the substantive counts, although the government did not concede a reversal. Appx. 35a. Respondent Hernandez also argued that *Rowe* applied to the drug *conspiracy* convictions, because the terms of that statute (§ 846) expressly tie the penalty for conspiracy to

that which applies to "the offense, the commission of which is the object of the conspiracy."

The panel reviewed for plain error, focusing on the substantial-rights inquiry under *Olano* and whether the various appellants' total sentences would have been the same absent the error. Appx. 37a–38a. The panel agreed that the jury instructions were erroneous on both the substantive and conspiracy counts (for different reasons), but declined to require resentencing on the substantive counts because of their concurrency with the conspiracy sentences. On the § 846 conspiracy count, the panel held – recognizing that different circuits have taken divergent approaches – that aggregation was appropriate, but only within the parameters defined by this Court (for an entirely different purpose) in *Pinkerton v. United States*, 328 U.S. 640 (1946), and (again for a different purpose) in the "relevant conduct" provision of the United States Sentencing Guidelines. Appx. 41a–45a. The court's analysis did not start with, or seek to justify its holding under (or even refer to) the governing language of 21 U.S.C. § 846. Finding the trial evidence more than sufficient under the test it had just articulated to support (b)(1)(A) (the highest level) sentences, the panel concluded that it was unnecessary to correct the error. Vacating the distribution verdicts would not result in reduced sentences, the court held. Appx. 45a–53a. And the error on the conspiracy count (as the panel defined that error) did not affect any of the appellants' substantial rights. Appx. 39a–45a.[1]

The court of appeals denied petitioner's and respondents' requests for rehearing, either by the panel or *en banc*. Appx. B, Appx. C.

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[1] Respondent Hernandez's judgment of sentence was nevertheless vacated and remanded for resentencing, because he had not been afforded his right of allocution. No resentencing has yet been scheduled.

REASONS FOR GRANTING THE WRIT

1. This case presents a fundamental question that this Court has repeatedly noted but declined to decide – whether a structural error by its nature "affects substantial rights" for purposes of plain error review – as well as the related, important question whether the potential costs of retrial and similar practical considerations can outweigh the harm to the integrity and reputation of the courts that results from ignoring blatant violations of well-established constitutional rights.

Petitioner's and respondents' case presents troubling issues in the interpretation and application of Fed.R.Crim.P. 52(b), the "plain error" rule, which this Court has often undertaken to elaborate and enforce. In particular, important and related questions are presented about application of the third and fourth prongs of the four-part test articulated by this Court in *United States v. Olano*, 507 U.S. 725 (1993). This Court has several times reserved the question whether a structural error inherently "affects substantial rights" under Rule 52(b) and *Olano*'s third prong. That question – although pretermitted by the court below – should be decided in this case, as would be necessary for the Court to give full consideration to the decision of the court below on the fourth, discretionary prong. That ruling gives dominant weight to the potential (but by no means certain) costs of a possible retrial, relative to the systemic costs of disregarding obvious and fundamental error.

By written order filed the Friday before the Monday when jury selection began, the district court *sua sponte* closed the courtroom to the press and public during *voir dire*, except upon application to and order of the trial judge. The court below unanimously agreed that in doing so the trial judge committed constitutional error that was not only obvious but also so serious that it is classified as "structural." As a result, the error would have resulted in automatic reversal on direct appeal if objected to unsuccessfully. This conclusion was certainly correct. The issue thus

clearly satisfied the first two criteria for a plain error reversal under Fed.R. Crim.P. 52(b) – an error was committed, and the error was obvious. Yet, after pretermitting the third ("substantial rights") prong, the panel divided on application of the fourth, discretionary prong, with the majority declining to reverse. Judge Restrepo dissented.

Respondents advanced specific arguments below (specifically, in the brief for Hernandez, joined by all) on the four prongs of the plain error test, as articulated in *Olano*. The government responded in only a single conclusory sentence (CA3 U.S. Br. 87) on the Rule's fourth prong, urging the court of appeals to exercise its discretion to disregard the fundamental error. The failure of a party to present reasoned argument, supported by authority, ordinarily results in the waiver of an issue on appeal. Yet ironically – in a case where the outcome turned on the consequences of *defense* counsel's failure to preserve an issue – the majority below developed a lengthy, detailed and entirely original analysis under the fourth prong of the *Olano* test, advancing arguments never proposed by the government to justify affirmance. Appx. 10a–18a.

For the reasons articulated by Judge Restrepo (*see* Appx. 63a–70a) and for other reasons, the majority's analysis deserves further review by this Court. The Founders enshrined the right to public trial in the Bill of Rights because of their awareness of how public access to criminal courtrooms helps ensure the fairness of the entire process and the accuracy of trial results. By shining the light of press and public scrutiny on the trial, including the jury selection process, an open courtroom helps ensure that witnesses testify truthfully, because they must do so publicly, and that prosecutors and judge alike adhere to the expected standards. Appx. 64a–65a. For this reason, although a direct effect on the verdict can almost never be

demonstrated, a Sixth Amendment public trial violation is among the very few types of errors this Court has classified as "structural." See *Weaver v. Massachusetts*, 582 U.S. —, 137 S.Ct. 1899, 1905 (2017); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148–50 (2006); *Neder v. United States*, 527 U.S. 1, 7–9 (1999); *Johnson v. United States*, 520 U.S. 461, 468–69 (1997), citing *Waller v. Georgia*, 467 U.S. 39, 48 (1984).

This Court has declared (as the court below recognized) that when structural error occurs, "the 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.'" Appx. 11a, quoting *Arizona v. Fulminante,* 499 U.S. 279, 310 (1991). This Court held in *Johnson* that structural errors are not outside the reach of Rule 52(b), but rather are governed by it. 520 U.S. at 466. The court below relied for its decision against reversal on cases discussing how the plain error rule applies when the defendant has been denied the benefit of a jury verdict on one of the elements of the offense. Appx. 14a. In those cases, affirmance is permissible on plain error review if (but only if) the evidence on the omitted element was "overwhelming *and* essentially uncontroverted." *United States v. Cotton*, 535 U.S. 625, 633 (2002) (emphasis added) (failure to submit drug quantity to the jury, where quantity was never contested). Here, not only was the error of an entirely different character, but the evidence was also extensively controverted, not "uncontroverted," on the fundamental question at trial of whether a unified agreement or enterprise of the kind charged in the indictment even existed. Thus, even if the same standard would apply to the sort of error implicated here, the *Cotton* test is not satisfied.

There is obviously no common unit of measurement that could allow an objective comparison between the weight of differing legitimate interests. But the intangible "costs" to the reputation of the courts from minimizing the values

protected by the Public Trial Clause and turning a blind eye to violations of fundamental rights may well be greater than the "costs" in time and money to which the majority below, in the end, gave controlling weight. *See* Appx. 18a. It is true that the costs of a retrial are ordinarily greater than those of a resentencing (see *Rosales-Mireles v. United States*, 585 U.S. —, 138 S.Ct. 1897, 1908 (2018), quoting *United States v. Molina-Martinez*, 578 U.S. 189, 136 S.Ct. 1338, 1348–49 (2016)). But this is not always or necessarily so, and a retrial is by no means inevitable. The cost of retrial is speculative, after all, not a given. Experience teaches that on remand after a reversal a plea bargain or other negotiated resolution is far more likely in most cases than a retrial. This is particularly so after defendants have been made fully aware of the nature and extent of the evidence against them, have seen a jury credit the adverse witnesses, and also know how severe the sentences may be for those convicted on all charges after trial.

As the court below emphasized, the systemic costs of correcting unpreserved error "may be overcome, but not disregarded." Appx. 13a. But the same is true of the undeniably substantial process-legitimacy costs. These are to be viewed from the perspective of an informed, "reasonable citizen" who cares about fairness and constitutional values. See *Rosales-Mireles*, 138 S.Ct. at 1908. An open courtroom fosters the invaluable systemic asset of "public confidence in the proceedings." Appx. 16a (majority), 68a n.3 (dissent).[2] The production of a transcript many months later (copies of which are sold, not made readily available to the public), which the court

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[2] The majority's comment that "there has been no suggestion of misbehavior by the prosecutor" as a further factor counseling against reversal, Appx. 16a (quoting *Weaver*), is incorrect. There was a *Batson* objection in this case, *see* Appx. 20a–21a, which – although eventually overruled – is exactly the sort of occurrence that awareness by the prosecutor of press and public scrutiny might prevent.

below repeatedly referenced, is in no way comparable. *Cf.* Appx. 15a, 17a. Under all the circumstances, this Court should review whether those potential costs were overcome here.

Also relevant to this factor is the egregiousness of the error in question. First, it was patently unfair that the majority would give weight to the lack of record evidence that anyone who wished to observe was excluded. Appx. 16a ("nor is there any evidence of an individual … being turned away after attempting to attend the proceedings"). After all, the entire point is that defense counsel failed to bring the problem of closure to the trial court's attention. How could such "evidence" exist, then? But undersigned counsel are informed and assured that family members of both Mr. Cruz and Mr. Hernandez, at least, *did* come to court on that Monday when trial began, wishing to observe the proceedings and to show support for the defendants. They sought entry, but were told the judge had ordered the courtroom closed and so were turned away, counsel are now advised. The family, therefore, precisely because they were locked out, themselves had no opportunity to bring this matter to the court's attention. The petitioner and his co-defendants should not have been penalized by the court below because their appellate counsel adhered to professional norms and to Fed.R.App.P. 28(a)(8)(A) by not attempting to rely in their briefs on facts not of record.

As this Court noted in *United States v. Frady*, 456 U.S. 152, 163 n.13 (1982), the original 1944 Advisory Committee Note to Rule 52(b) states that the Rule was intended as "a restatement of existing law." Based on "existing law" as established by this Court before 1944, it would be reasonable to view the need for a "serious [e]ffect [on] the fairness, integrity or public reputation of judicial proceedings." as an *alternative*, not a necessary *addition*, to a finding that the asserted plain error was

or should have been "obvious" to the trial court. See *United States v. Atkinson*, 297 U.S. 157, 160 (1936) ("if the errors are obvious, *or if* they otherwise seriously affect …") (emphasis added), quoted with approval in *Frady*, 456 U.S. at 163 n.13[3]; *Brasfield v. United States*, 272 U.S. 448 (1926) (clear and obvious error in the court's inquiring as to the numerical division of a deliberating jury, without proof of prejudice, requires plain error reversal without more). That is, as of the time of adoption of Rule 52(b), an error being fundamental and obvious was sufficient, in and of itself, to support reversal on the basis of plain error.

The 1944 Advisory Committee Note is an authoritative guide to how the Rule was originally understood. *United States v. Vonn*, 535 U.S. 55, 64 n.6 (2002). Rule 52(b) should therefore be read to incorporate and continue the standard of *Brasfield* and *Atkinson*. As this Court has stated with respect to a different Rule of Procedure, "[W]e are bound to follow Rule 23 as we understood it upon its adoption, and … we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 861 (1999). *Olano*'s conjunctive assertion to the contrary (requiring a sufficient effect on the integrity and reputation of the courts as well as the error being egregious) was dictum, and under *Vonn* was arguably mistaken. See Berger, *Moving Toward Law: Refocusing the Federal Courts' Plain Error Doctrine in Criminal Cases*, 67 U. Miami L.Rev. 521, 544–46 (2013). Indeed, the *Olano* decision expressly endorses *Atkinson*, 507 U.S. at 736, and suggests no intent to overturn it. Lowry, *Plain Error Rule—Clarifying Plain Error Analysis Under Rule 52(b) of the Federal Rules of Criminal Procedure*,

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[3] This Court also reiterated the *Atkinson* plain-error formulation – and applied it – in the pre-Rule case of *Socony-Vacuum Oil Co. v. United States*, 310 U.S. 150, 239 (1940).

84 J. Crim. L. & Crimin. 1065, 1079–80 (1994).[4] The need to clarify this questionable aspect of *Olano* is itself a reason to grant the writ in this case.

The characteristics of the constitutional violation here were in fact extreme. This case involves an affirmative, written order – issued in advance (not a spur-of-the-moment response to emergent conditions) – that was clearly violative of the long-established and recently reiterated *Waller* requirements (*see* 467 U.S. at 48, quoted in *Presley v. Georgia*, 558 U.S. 209, 213-14 (2010) (per curiam) (applying *Waller* to jury selection) such as consideration of alternatives. The trial courtroom was closed to *all* members of the press and public for the *entirety* of the *voir dire* process, which lasted for two full days. The court below cited the duration of the violation as if it were short and therefore a factor against granting relief. Appx. 16a ("only two days"), 17a (same). But voir dire in a federal criminal trial rarely consumes an entire day, much less two full days. The closure was thus extended in duration, not brief.[5]

The court below acknowledged that its decision was in conflict with a published precedent of the First Circuit, *United States v. Negrón-Sostre*, 790 F.3d 295, 306 (1st Cir. 2015). The panel sought to downplay that conflict by noting that *Negrón-Sostre* predates *Weaver*. Appx. 15a–16a n.12. But that distinction is fallacious, as *Weaver* concerned the prejudice element of an ineffective assistance claim raised on collateral attack. This Court has emphasized that post-conviction collateral review is and must necessarily be different from and more stringent than plain error review on direct appeal. See *Frady*, 456 U.S. at 164–66. See also *United States v.*

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[4] Indeed, it would be entirely appropriate, in light of the history of Rule 52(b), to define errors in the narrow category involved here as reversible *per se* on plain error review.

[5] The failure of defense counsel to object was perhaps understandable, if not excusable, in light of the timing of the district court's order relative to the demands of final preparation for a highly complex trial. As the court below conceded, App. 18a–19a n.14, there is no suggestion or indication here of deliberate "sandbagging" by the defense.

Gupta, 699 F.3d 682 (2d Cir. 2012) (on rehearing) (unjustified closure of the court-room during *voir dire* violated Sixth Amendment right to public trial and required automatic reversal, when trial court failed to first consider the *Waller* factors; issue not forfeited by defense counsel's failure to object, where record suggests counsel were unaware of exclusion of public).

For these reasons, along with those stated in the petition, this Court should grant certiorari both to resolve the split in the Circuits and to instruct the courts of appeals on how to weigh the intangible costs of leaving unremedied this kind of severe constitutional violation, which fundamentally impugns the fairness and integrity of the judicial system. The majority below gravely erred when it suggested, alluding to *Weaver*, that the "principal question," Appx. 13a, in this case was how the rules that govern habeas corpus litigation should inform the disposition of the instant direct appeal. To the contrary, the only issues are the effect on "substantial rights" and how cases discussing the discretionary prong of a Rule 52(b) analysis apply to the circumstances of cases like the present one.

The Court's consideration and decision with respect to the discretionary aspect of Rule 52(b) in this case are inherently interrelated with and should therefore be taken up along with the matter of how "structural error" affects "substantial rights" under that Rule. After all, Rule 52(b) uses the same terminology – "affect substantial rights" – as Rule 52(a). See *Neder v. United States*, 527 U.S. 1, 7–9 (1999) (equating structural error, when preserved, with a *per se*, or at least presumed, "effect on substantial rights," even absent any showing of conventional prejudice); see also *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004) (suggesting that *Olano*'s third prong should be treated as "[ ]tethered to a prejudice

requirement" in cases of "nonstructural error").[6] If a preserved objection to a structural error in a federal criminal case will occasion reversal without proof of prejudice – which it will – that must be because such errors inherently "affect substantial rights" within the meaning of Fed.R.Crim.P. 52(a). *See also* 28 U.S.C. § 2111 (same). Those same words, when appearing in Rule 52(b), then, almost certainly should be given the same meaning as in 52(a). See *Law v. Siegel*, 571 U.S. 415, 422 (2014) ("words repeated in different parts of the same statute generally have the same meaning"). Structural errors are not exempt from Rule 52; they are encompassed by it. *Johnson*, *supra*. It follows that structural errors by their nature "affect substantial rights" when considered as plain error, just as they do when the error is preserved.

The question of how Rule 52(b) treats "substantial rights" in cases of structural error has merited this Court's attention several times, yet has eluded resolution. See *Puckett v. United States*, 556 U.S. 129, 140 (2009) (noting that Court has "several times declined to resolve whether 'structural' errors … automatically satisfy the third prong of the plain-error test. … Once again we need not answer that question …."), cited in *United States v. Marcus*, 560 U.S. 258, 263 (2010); see also *United States v. Cotton*, 535 U.S. 625, 632–33 (2002); *Johnson v. United States*, 520 U.S. 461, 469 (1997), The time has come to resolve that question, and this case is a suitable vehicle for doing so.

Rosales-Mireles, *Molina-Martinez, Marcus*, and *Puckett* are among the many cases in which this Court has granted certiorari in recent years to clarify discrete

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[6] Where the public trial violation is first raised on collateral attack, however, and ineffective assistance of counsel is invoked to overcome procedural default resulting from the failure to object, the ordinary requirement of showing prejudice from counsel's dereliction does apply. See *Weaver v. Massachusetts*, 582 U.S. —, 137 S.Ct. 1899 (2017).

aspects of the plain error rule. See also *Henderson v. United States*, 568 U.S. 266 (2013). Petitioner's and respondents' case should be another.

2. The circuits are divided on how a jury should determine the quantity of drugs necessary to trigger a mandatory minimum or increase a statutory maximum under 21 U.S.C. § 841(b)(1) in a conspiracy case under § 846. The decision of the court below defies this Court's cases by failing even to consider, much less to implement, the statutory language that answers this important question.

The court below articulated a complex and novel form of quantity aggregation for determining the mandatory minimum penalties, different from another formula for determining the maximum, for a drug conspiracy in violation of 21 U.S.C. § 846. Appx. 43a–45a. In doing so, it deepened a circuit split and entirely disregarded this Court's cases that emphasize that only text-based statutory construction can answer such questions of federal criminal law, including substantive sentencing law. The split requires resolution and the Third Circuit's fundamental error requires correction. Petitioner Kelly argues that the decision of the court below conflicts with this Court's decision in *Alleyne v. United States*, 570 U.S. 99 (2013). Respondents Cruz, Hernandez and Villega suggest that a proper application of the governing statute resolves the question presented, without reaching the constitutional issue.

The error is this: in determining the meaning of a governing statute (*i.e.*, § 846), the court below did not begin with (or even discuss) the legislative language but instead went immediately to past case law and general principles of conspiracy law.[7] Applying a text-first analysis, on the other hand, produces a different (and more favorable) result for the petitioner and respondents, three of whom received

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[7] The statutory interpretation advanced in this part of the petition was advanced in the court below in respondent Hernandez's supplemental briefing, as well as that for respondent Villega, and adopted by respondent Cruz, but it went unmentioned in the opinion.

unauthorized life sentences and the other a term of 25 years, all based on an inapplicable sentencing statute. Accordingly, this Court should grant the writ.

The trial court understood that because drug quantity affects the maximum punishment and may trigger a mandatory minimum, the jury must decide that question. See *Alleyne, ante*. But on the controlled substances conspiracy count, it instructed that the question for the jury to decide was the amount "involved" (undefined) in the conspiracy as a whole. Based on the verdict that the jury then returned, the trial court imposed conspiracy sentences within the highest, § 841(b)(1)(A) range, including maximum, life sentences for Kelly, Cruz and Hernandez. The court below agreed with petitioner and respondents that this instruction was wrong. The mandatory minimum applicable to each defendant must be individually determined, the panel held, based on and limited to what that person agreed to in entering and participating in the conspiracy. Appx. 40a–41a, 45a. But the formula it said was to be used was based on an amalgam of non-statutory conspiracy law and Guidelines sentencing principles. *See* Appx. 40a–45a. Neither doctrine is incorporated into, or even alluded to, in any of the words of § 846. That holding conflicts with this Court's cases explicating proper statutory construction, and is inconsistent with decisions in other circuits (none of which applies the correct rule).

Whenever there is a statute that addresses the question before the court, the starting point for decision must be the statutory language, a principle as true of criminal laws addressing elements or punishment as it is of any other. *Holloway v. United States*, 526 U.S. 1, 6 (1999); *United States v. Turkette*, 452 U.S. 576, 580 (1981). And where the statute's language is plain, "the sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enterprises, Inc.*, 489

U.S. 235, 241 (1989), quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917). Here, the parameters of the penalties for a violation of § 846 are established in that statute, which states, "Any person who ... conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the ... conspiracy." Thus, unless one or more of the terms at issue had a traditional, common law meaning (as understood at the time of enactment) when used in a criminal statute, see *United States v. Shabani*, 513 U.S. 10, 13–14 (1994) (whether use of "conspires" in § 846 implies an overt act), the job of the court is only to interpret these words consistent with their "ordinary meaning ... at the time Congress enacted the statute."[8] *Wisconsin Central Ltd. v. United States*, 585 U.S. —, 138 S.Ct. 2067, 2070 (2018), quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979). The opinion of the court below overlooked this fundamental precept. By starting from a mistaken spot, it arrived at an erroneous conclusion.

The questions to be answered – which nowhere appear in the court of appeals' opinion – are simply these: What is "the offense, the commission of which was the object of the ... conspiracy"? And what are "the same penalties" that are "prescribed for [that] offense"? The answer to the first question, in the present case, is simple: "the offense" is a violation, or a series of violations of 21 U.S.C. § 841(b), the law that criminalizes violations of § 841(a).[9] And what are "the penalties ... prescribed for

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[8] The Controlled Substances Act including the present section 846, was enacted in 1970 and last amended in 1988. *Shabani*, 513 U.S. at 13. There is no suggestion that the common meaning of the words at issue here has changed in the last 33 years.

[9] Section 841(a) defines "unlawful" conduct, which is regulated and controlled in a variety of ways under Title 21, but the *criminal offense* is created by § 841(b) and its subsections, not § 841(a) itself, because the former both fully incorporates the latter and articulates the penalties. See *United States v. Vazquez*, 271 F.3d 93, 107–15 (3d Cir. 2001) (en banc) (Becker, J., with Ambro, J., concurring in result). Absent a legislatively prescribed punish-

[that] offense"? According to every circuit to have addressed the latter question, including the Third in *United States v. Rowe*, 919 F.3d 752 (3d Cir. 2019), the penalties for the substantive offense which was the object of this conspiracy are the penalties set forth in § 841(b)(1) for any one discrete instance of possession or distribution. See *United States v. Lartey*, 716 F.2d 955, 967–68 (2d Cir. 1983) (noting that courts "have uniformly held that separate unlawful transfers of controlled substances are separate crimes under § 841, even when these transfers are part of a continuous course of conduct," citing, *inter alia*, *United States v. Noel*, 490 F.2d 89 (6th Cir. 1974) (per curiam).[10]

The landmark case on distinguishing single from multiple offenses, *Blockburger v. United States*, 284 U.S. 299, 301–03 (1932), construed a predecessor federal drug statute – indistinguishable from § 841 in the respect under consideration here – to require a separate count for each single act of distribution or continuous course of possession. As this Court stated in *Blockburger*, and as remains true today, "The Narcotic Act does not create the offense of engaging in the business of selling the forbidden drugs, but [rather] penalizes any sale ...." 284 U.S. at 302. There is no reason to suppose, and no case holds, that Congress intended to overthrow that ruling when it enacted the Controlled Substances Act. Neither section 841 nor section 846 creates a federal crime of "being in the business of selling heroin." There

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ment, a prohibition of conduct is simply not a criminal law. *United States v. Evans*, 333 U.S. 483 (1948). *Cf. United States v. Oakland Cannabis Buyers' Club*, 532 U.S. 483 (2001) (discussing injunction against § 841(a) violations, brought under 21 U.S.C. § 882(a)).

[10] See also *United States v. Elliott*, 849 F.2d 886, 888–90 (4th Cir. 1988); *United States v. Palafox*, 764 F.2d 558 (9th Cir. 1985) (en banc); *United States v. Mancuso*, 718 F.3d 780, 793 (9th Cir. 2013); *United States v. Smith*, 757 F.2d 1161 (11th Cir. 1985); *United States v. Weatherd*, 699 F.2d 959 (8th Cir. 1983); *United States v. McDonald*, 692 F.2d 376 (5th Cir. 1982).

are other such statutes, *see* 18 U.S.C. § 1962(c) (RICO); 21 U.S.C. § 848 (Continuing Criminal Enterprise), but section 846 is not one of them.

But what if the agreement constituting the conspiracy is not to commit one discrete violation but rather, as applies here and in many cases, to commit a series of such violations (or to commit several offenses carrying varying penalties)? Does "the offense, the commission of which" refer to the penalty for the type, level and category of offense (or perhaps, the most serious category of offense) that the conspirators agreed to commit? (This is what petitioners argued.) Or does it perhaps mean the sum of the penalties for all the separate instances of the offense that the conspirators agreed to commit? (No one suggests that that is the right answer; it is not consistent with the statutory language.) Or does it refer to the penalties that *would be* prescribed for an "offense" consisting of all the intended instances of the object offense *were they to be committed at one time*, which never happened nor was agreed to, rather than separately, as was in fact the case? The last of these was the answer of the court below, which it calls "aggregation."

The Third Circuit cobbled together its non-textual theory of punishment for § 846 violations from other bodies of law, rather than from the statute at hand. Thus, aggregation of drug quantities is a rule for determining "relevant conduct" under the U.S. Sentencing Guidelines, *see* USSG § 1B1.3, which in turn is used to select the correct "offense level" and thus ultimately what suggested sentence the Court must consider (within statutory bounds) under 18 U.S.C. § 3553(a)(4). Appx. 42a–44a, discussing *United States v. Collado*, 975 F.2d 985 (3d Cir. 1992). The court below also referenced the venerable principle of evidence law under which a member of a conspiracy is responsible for acts and statements of co-conspirators. Appx. 41a, citing *Bannon v. United States*, 156 U.S. 464, 469 (1895). Similarly, the vicarious

liability of co-conspirators for substantive offenses committed in furtherance of the agreement, *see* Appx. 41a–42a, is a common law rule announced by this Court in *Pinkerton v. United States*, 328 U.S. 640 (1946), but having nothing to do with sentencing law. Certainly, Congress might have incorporated any or all of those principles into a sentencing statute for drug conspiracies, but there is nothing that references any of them, explicitly or implicitly, in § 846.

The interpretation announced in the decision below, in addition to being atextual, is virtually unadministrable at a real jury trial. Under that rule, the maximum applicable penalty is determined by one (non-statutory) test, while the mandatory minimum is determined by another (equally non-statutory) rule. Appx. 42a–44a, discussing *United States v. Phillips*, 349 F.3d 138, 143 (3d Cir. 2003), and related out-of-circuit case law.[11] Presumably the jury is to receive two sets of instructions, one for each purpose. Worse, there is no clause of § 841(b)(1) that allows a minimum from subparagraph (B), for example, to be coupled with a maximum from subparagraph (A). The decision of the court below is utterly uncoupled from the statute it purports to interpret and enforce. And the cases in the other circuits are not even consistent. As the decision below notes, the circuits are divided in announcing various tests for applying § 846, Appx. 42a–43a & n. 33 (canvassing the circuits

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[11] See *United States v. Collins*, 415 F.3d 304, 313–15 (4th Cir. 2005) (reaffirming *United States v. Irvin*, 2 F.3d 72, 75–78 (4th Cir. 1993)); *United States v. Colon-Solis*, 354 F.3d 101, 103 (1st Cir. 2004); *United States v. Swiney*, 203 F.3d 397, 405–06 (6th Cir. 2000); *United States v. Ruiz*, 43 F.3d 985, 992 (5th Cir. 1995); *United States v. Young*, 997 F.2d 1204, 1210 (7th Cir. 1993); *United States v. Bacerra*, 992 F.2d 960, 967 n.2 (9th Cir. 1993) (reaffirmed in *United States v. Banuelos*, 322 F.3d 700, 704–05 (9th Cir. 2003)); *United States v. Martinez*, 987 F.2d 920, 925 (2d Cir. 1993); *United States v. Jones*, 965 F.2d 1507 (8th Cir. 1992). This authority, going back more than 25 years, draws a sharp distinction between the facts that trigger an increased maximum (the full scope of the conspiracy) and what triggers a mandatory minimum (the extent of the defendant's own involvement). It is all created from whole cloth, with no basis in the governing statute.

and discussing *sui generis* Sixth Circuit rule). But none of them is correct, because none is founded in the simple words of the statute.

Just as a conspiracy under 18 U.S.C. § 371 (the general federal conspiracy offense) has the same five-year maximum sentence regardless of how many different offenses are agreed to be committed or how often or for how long, *Braverman v. United States*, 317 U.S. 49 (1942), a violation of § 846 is expressly punishable by reference to the *type of* "offense, the commission of which was the object of the ... conspiracy." See *Shular v. United States*, 589 U.S. —, 140 S.Ct. 779, 785 (2020) (contrasting sentencing statute that makes reference to another "offense" with another provision that references criminal conduct). It was for Congress, not the courts, to decide as a matter of penal policy whether to punish more severely conspiracies that involve an agreement to handle and distribute larger quantities of drugs at one time, as compared with agreements to handle smaller quantities, even repeatedly. "Only the people's elected representatives in the legislature are authorized to 'make an act a crime.'" *United States* v. *Davis*, 588 U.S. —, 139 S.Ct. 2319, 2325 (2019) (quoting *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)).[12] It is equally well-settled that a court cannot, without violating the separation of powers, determine the range of available punishment for proscribed behavior other than by fairly construing – not altering or amending – what Congress wrote. *United States v. Evans*, 333 U.S. 483, 486 (1948).

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[12] Even if there were any ambiguity in the statutory language that might support the creative rule devised by the courts of appeals, which there is not, respondents' suggestion is also consistent with the principle that where statutory language defining criminal punishment is legitimately ambiguous, the rule of lenity requires the Court to select the interpretation (consistent with that language) which is more favorable to the defendant. *Bifulco v. United States*, 447 U.S. 381, 387 (1980).

The trial and sentencing record of this case demonstrates that none of the transactions (that is, the particular "offenses") committed or agreed to as part of the charged conspiracy "involv[ed]" (*see* § 841(b)(1)[13]) amounts of drugs that exceeded the § 841(b)(1)(B) level. Hence, a properly instructed jury could not have found any of the petitioners liable for a sentence at the (b)(1)(A) level. See *United States v. Zavala-Martí*, 715 F.3d 44, 52–54 (1st Cir. 2013) (properly explaining impact of plain error analysis under *Cotton* in this context). Yet the petitioner and respondents were sentenced on Count Two, as well as Count One (the RICO conspiracy),[14] as if they were guilty of conspiracy to commit a (b)(1)(A) offense. In other words, unless the government proved – which here, it is undisputed that it did not and could not – that the petitioners had *agreed* to distribute at least 280 grams of crack on any of one or more *single occasions* (and/or at least 5 kilograms of cocaine), the penalties applicable to their conspiracy convictions should have come within 21 U.S.C. § 841(b)(1)(B) or (C) and not within (b)(1)(A). Accordingly, the sentences imposed (life

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[13] The issue in this case does not turn on any ambiguity in the statutory term "involving" in § 841(b)(1), but on § 846's unambiguous cross-reference to the punishment prescribed for "the offense" that was the object of the conspiracy.

[14] The maximum punishment for a RICO offense, including a RICO conspiracy, 18 U.S.C. § 1962(d), is 20 years unless the enterprise is engaged in a type of racketeering activity that may trigger a life sentence. In that event, the RICO maximum also becomes life. *Id.* § 1963(a). Here, the only agreed-upon racketeering activity that would potentially allow a sentence of more than 20 years on Count One would be the § 846 drug conspiracy, if that offense were subject to sentencing under 21 U.S.C. § 841(b)(1)(A). (No other level under § 841(b)(1) allows a life term, absent other aggravating factors.) Accordingly, the issue that petitioner and respondents present here implicates the legality of their sentences on Count One as well as on Count Two. Moreover, the court below declined to reverse on the substantive counts despite the equivalent error in sentencing on those convictions, in light of the verdicts and concurrent life sentences for conspiracy. Appx. 38a–39a. Accordingly, upon correcting the error in the decision below regarding the § 846 count the Court must remand these cases for resentencing on all drug-related counts at the lesser-included § 841(b)(1)(B) (or (b)(1)(C)) level, as well as on the Count One RICO conspiracy charge.

imprisonment in the case of petitioner Kelly and respondents Cruz and Hernandez) were illegal.

For these reasons, to decide the important and recurring question of statutory construction, and to resolve the split in the Circuits, the instant petition should be granted. After review, the case should be remanded for correction of petitioner's and respondents' convictions to the lesser-included level, with imposition of new sentences reflecting the pertinent statutory penalties.

CONCLUSION

For the foregoing reasons, Rolando Cruz, Jr., Marc Hernandez and Roscoe Villega, as respondents under Rule 12.6, urge this Court to grant the petition for a writ of certiorari of their co-defendant Kelly, along with their own petition (No. 20-1523).

Respectfully submitted,

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May 22, 2021.