No. 23-_____

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IN THE SUPREME COURT OF THE UNITED STATES

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MARC HERNANDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

==========

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

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PETITION FOR WRIT OF CERTIORARI

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January 2024

QUESTIONS PRESENTED

1. The district court excluded the public, including family members, from the courtroom for the entirety of jury selection. Petitioner's 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:

> Should this Court's decision in *United States v. Olano*, 507 U.S. 725 (1994), be overruled in part, insofar as it departs from the original meaning of Fed.R. Crim.P. 52(b) by requiring, to allow reversal as "plain error," that an obvious structural error have not only affected an appellant's "substantial rights" but *also* that it implicate the fairness, integrity or reputation of the courts?

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 for which petitioner was convicted – vary according to whether a given substantive "violation" is one "involving" at least a certain amount of drugs. Petitioner received a life sentence on the conspiracy count, based on the sum of the amounts involved in all distributions that were found to be within the scope of the conspiratorial agreement as a whole, even though no single agreed-upon transaction exceeded the threshold quantity required for such a sentence. The question, on which the Circuits are divided, is:

> On what basis is the quantity of controlled substances "involved" in the "violation" ascertained for purposes of determining the maximum sentence on a conviction for conspiracy under 21 U.S.C. § 846, when the "offense" of "distribution" is the object of the conspiracy?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties to this petition (petitioner Hernandez and respondent United States). Petitioner had multiple co-defendants at trial. In the court below, his initial appeal was consolidated with those of co-defendants Rolando Cruz, Jr., Roscoe Villega, Jabree Williams, Eugene Rice, Douglas Kelly, Angel Schueg, Maurice Atkinson, Anthony Sistrunk, and Tyree Eatmon. None is a party to this petition.

LIST OF RELATED PROCEEDINGS

In the district court, this case was No. 1:14-cr-00070-YK-001 (M.D.Pa.). The second superseding indictment (Doc. 78) named 21 defendants. Ten pleaded guilty and eleven stood trial.

In the Third Circuit, petitioner's initial appeal bore Dkt. No. 17-3373. It was consolidated for disposition with nine co-defendants' appeals: Jabree Williams (No. 17-2111), Rolando Cruz (No. 17-3191), Roscoe Villega (No. 17-3586), Eugene Rice (No. 17-3711), Douglas Kelly (No. 17-3777), Angel Schueg (No. 18-1012), Maurice Atkinson (No.18-1324), Anthony Sistrunk (No. 18-2468), and Tyree Eatmon (No. 19-1037). After he won a remand for resentencing, his second appeal was docketed at No. 21-3383. There were no related cases.

Petitioner's application for certiorari following the initial affirmance of his convictions, filed jointly with two co-appellants, was docketed in this Court *sub nom. Cruz v. United States*, at No. 20-1523, and denied on October 4, 2021; 142 S.Ct. 309, 211 L.Ed.2d 146 (mem.). Certain co-appellants' related petitions at Nos. 20-1523, 20-7868 and No. 20-7889 were also denied.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Marc Hernandez respectfully petitions this Court for a writ of certiorari to review the judgment and opinions of the United States Court of Appeals for the Third Circuit upholding his convictions and life sentence.

OPINIONS BELOW

The Third Circuit's September 10, 2020, precedential opinion affirming petitioner's convictions (authored by Judge Fisher and joined by Judge Roth; Restrepo, J., dissenting), is published at 974 F.3d 320, *sub nom. United States v. Williams*. A copy is Appendix B. The opinion of the Third Circuit affirming his life sentence, imposed on remand from the initial appeal, was filed on June 8, 2023 (per Hardiman, J. with Ambro and Fuentes, JJ.); it is not published but is available at 2023 WL 3884115. A copy is Appendix A. The United States District Court for the Middle District of Pennsylvania (Yvette Kane, J.) did not write any pertinent opinion.

JURISDICTION AND TIMELINESS

On September 10, 2020, the United States Court of Appeals for the Third Circuit filed its opinion affirming petitioner's convictions, but vacating the judgment of sentence and remanding for resentencing, on account of a denial of his right to allocution. Appx. B. The Third Circuit's opinion affirming re-imposition of petitioner's life sentence was filed on June 8, 2023. Appx. A. On July 7, 2023, the Third Circuit denied a timely petition for rehearing. Appx. C. On October 5, 2023, the Third Circuit granted petitioner's motion for appointment of new (undersigned) counsel for purposes of filing the instant petition, recalled its mandate, and re-entered the judgment of affirmance, Appx. D, so as to allow a timely filing in this Court. As a result, pursuant

to this Court's Rules 13.1 and 13.3, the instant petition for certiorari is timely filed within 90 days of October 5, 2023, that is, not later than January 3, 2024. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES and RULE INVOLVED

The Sixth Amendment to the Constitution of the United States provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial …."

Title 21, United States Code, provides, in pertinent part:

§ 841. Prohibited Acts – A

(a) **Unlawful acts**

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with the intent to manufacture, distribute, or dispense, a controlled substance;

* * * *

(b) **Penalties**

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

* * * *

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

* * * *

(iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

* * * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $10,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $20,000,000 if the defendant is an individual or $75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

* * * *

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

* * **

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

* * * *

(iii) 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

* * * *

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $5,000,000 if the defendant is an individual or $25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $8,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

21 U.S.C. § 841.

§ 846. Attempt and Conspiracy

Any person who attempts or conspires to commit an 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 attempt or conspiracy.

21 U.S.C. § 846.

The Federal Rules of Criminal Procedure provide, in pertinent part:

Rule 52. Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Fed.R.Crim.P. 52.

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. 11a.

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. 12a. 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 Marc Hernandez, among others, was charged with racketeering conspiracy, drug trafficking conspiracy, drug trafficking, and firearm offenses. Appx. 10a, 13a. The indictment alleged that the "Southside Gang" constituted a RICO enterprise from 2002 to 2014, and that the enterprise was an extensive drug trafficking operation "conducted across a defined territory and nurtured in part through sporadic episodes of occasionally deadly

violence ….” Appx. 10a–11a, *citing, inter alia,* 18 U.S.C. § 1962(d), 21 U.S.C. § 846. 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 conspiracy and as specified racketeering activities, which if proven would increase the statutory penalties for all of those counts. Appx. 13a. Several defendants pleaded guilty and cooperated with the government. Appx. 11a. But 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, proceeded to a consolidated trial, with jury selection set to start on September 21, 2015. Appx. 13a. 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. 14a. 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 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. 14a–15a.

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. 11a, 15a, 58a.

The government also presented witnesses who testified about drug quantities they allegedly received from of petitioner Hernandez, but the government provided no evidence of any drug transaction that equaled or exceeded the charged amounts. Appx. 62a. 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, including life imprisonment as a maximum punishment.

All twelve defendants were found guilty on one or more counts. Petitioner Hernandez, in particular, was convicted of the RICO conspiracy (18 U.S.C. § 1962(d)), drug conspiracy (21 U.S.C. § 846), and drug distribution (21 U.S.C. § 841(b)(1)(A)). Petitioner received concurrent terms of life imprisonment. He was also convicted of the firearms offenses and on that account received a 20-year concurrent sentence and a five-year consecutive sentence.

c. The First Appeal Decision

Petitioner and several co-defendants appealed his convictions and sentence on various grounds, two of which are relevant to this petition. First, petitioner argued that the district court's closure of the courtroom to the public during jury selection violated the defendants' Sixth Amendment right to a public trial. Appx. 11a. A Third Circuit panel (Fisher, Restrepo & Roth, JJ.), in a lengthy, precedential opinion, largely affirmed. Appx. B, *sub nom*. *United States v. Williams*, 974 F.3d 320. Citing this

Court's precedents, the panel recognized that the trial court's "closure of the court-room undoubtedly violated the Defendants' Sixth Amendment right to public trial," and that the violation is a "'structural' error" that would have resulted in automatic reversal had trial counsel unsuccessfully objected. Appx. 17a–18a.

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 panel majority pretermitted the third prong – effect on substantial rights – holding that the fourth and final prong – the error's effect on the fairness, integrity or reputation of the courts – was not satisfied. 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 of appeals therefore declined to exercise its remedial discretion to reverse. Appx. 27a. The majority acknowledged that its decision appeared to conflict with that of the First Circuit in a similar case. Appx. 24a-25a 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. 76a–77a. The dissent also concluded, in conflict with the majority, that *Olano's* fourth prong was satisfied, warranting reversal, and that it "is perverse to weigh the costs of judicial efficiency against [petitioners'] constitutional rights when the District Court undeniably committed structural error." Appx. 79a.

Petitioner's appeal further argued, based on a Third Circuit decision decided subsequent to their convictions (and 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 for purposes of determining the mandatory minimum. *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 it did not concede a reversal. Appx. 44a. But the government contested petitioner's argument that *Rowe* likewise applied to the drug *conspiracy* convictions. That argument is premised on the terms of the drug conspiracy statute (§ 846), which expressly tie the applicable penalties to those which apply to "the offense, the commission of which is the object of the conspiracy." *See* Statutes Involved, *ante*.

The panel reviewed the sentence for plain error, focusing on the substantial-rights inquiry under *Olano* and whether petitioner's total sentence would have been the same absent the error. Appx. 46a–47a. The panel agreed that the jury instructions with respect to determining drug quantity were erroneous on both the substantive and conspiracy counts (for different reasons). It 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 for setting a mandatory minimum, but only within parameters defined by this Court (75 years ago, 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. With respect to applicable statutory maximums, on the other hand, the panel held that it was bound by prior Circuit precedent

setting the statutory maximum for a drug conspiracy count on an aggregated basis, that is, based on the full scope of the conspiracy, without individualized limitation by either *Pinkerton* or "relevant conduct" principles. Appx. 51a-53a, citing *United States v. Phillips*, 349 F.3d 138, 143 (3d Cir. 2003)).[1]

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. 54a–62a. And the error on the conspiracy count (as the panel defined that error) did not affect petitioner's substantial rights, the court further concluded. Appx. 58a–59a.

Petitioner Hernandez did receive a remand for resentencing, however, as the court of appeals held that he had not been offered the right to speak on his own behalf prior to imposition of the sentence, that is, the right of allocution. Appx. 64a.

The court of appeals denied petitioner's requests for rehearing, either by the panel or *en banc*. This Court subsequently denied certiorari. 142 S.Ct. 309, 211 L.Ed.2d 146 (Oct. 4, 2021) (Dkt.No. 20-1523).

d. Remand and Second Appeal.

On remand, petitioner preserved a number of his sentencing arguments, some of which had been addressed in the first appeal and others which had not been

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[1] *Phillips* was vacated and remanded by this Court for resentencing in light of *Booker, sub nom. Barbour v. United States*, 543 U.S. 1102 (2006). Nevertheless, the vacated opinion is treated in the Third Circuit as binding precedent.

reached. Appx. 3a. The district court conducted a *de novo* resentencing, but ultimately reimposed a life sentence. Appx. 4a.

On appeal, in a non-precedential opinion, a different panel of the Third Circuit affirmed. Appx. A. The Court held that petitioner had not preserved his challenge to the calculation of any mandatory minimum at the resentencing, which in any event could not affect his substantial rights in light of the nature of the sentence ultimately imposed. Appx. 5a. As to question of statutory maximum, on the other hand, the panel held that petitioner had preserved this challenge but the panel deemed itself bound by the law of the case and by Circuit precedent to affirm. Appx. 5a–7a. The court of appeals then denied rehearing *en banc*. Appx. C.

Petitioner's court-appointed counsel was obligated by ethical considerations to withdraw from the appointment after accepting a new position as an Assistant U.S. Attorney. By the time the court of appeals had appointed new, replacement counsel (the undersigned), the statutory time to petition for certiorari had expired. Accordingly, in connection with the new appointment, the court below recalled its mandate, vacated the judgment it had formerly entered upon denial of rehearing, and then re-entered the judgment. Appx. D. Accordingly, the present petition is timely.

e. *Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii).* The United States District Court had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged federal offenses committed in the district. The court of appeals had jurisdiction under 28 U.S.C. § 1291) and 18 U.S.C. § 3742(a).

REASONS FOR GRANTING THE WRIT

1. This case presents an important and frequently recurring 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 question whether this Court's 1994 decision in *Olano* misstated the original meaning of Fed.R.Crim.P. 52(b) by requiring an impairment of the integrity and reputation of the courts in addition to a violation of substantial rights.

Petitioner's case presents key 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 for applying Rule 52(b) first articulated by this Court in *United States v. Olano*, 507 U.S. 725, 732–36 (1993).

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. This conclusion was certainly correct. The issue thus clearly satisfied the first two criteria for a plain error reversal under *Olano*'s Fed.R.Crim.P. 52(b) formulation – 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.

Petitioner advanced specific arguments in his first appeal on the four parts of the *Olano* test. The government responded in only a single conclusory sentence (CA3 No. 17-3373, U.S. Br. 87) on the Rule's fourth prong (as articulated in *Olano*), urging the court of appeals to exercise its discretion to disregard the fundamental error. A party's failure 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. 19a–27a.

For the reasons articulated by Judge Restrepo (*see* Appx. 72a–79a) and for other reasons, the majority's analysis deserves further review by this Court. The First Congress enshrined the right to public trial in the Bill of Rights because of the Founding Generation's 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. 73a–74a. 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. 286, 296 (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). At the same time, 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.

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. 20a, quoting *Arizona v. Fulminante,* 499 U.S. 279, 310 (1991). For its decision against reversal, the court below relied 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. 23a. 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 (a unitary "Southside Gang") ever existed. Thus, even if the same standard would apply, the *Cotton* test is not satisfied. Accordingly, the present case squarely presents the oft-pretermitted question of how the plain error rule should properly be applied to structural errors.

a. *Reconsideration of Olano's "fourth prong" in cases of structural error*. 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, a "serious [e]ffect [on] the fairness, integrity or public reputation of judicial proceedings" is an *alternative*, not a necessary *addition*, to a

finding that the asserted plain error was or should have been "obvious" to the trial court, at least in the case of errors that would be characterized today as "structural." 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[2]; *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 one of the Rules of Civil 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's being apparent and egregious) was dictum, and under *Vonn* was at least 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

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[2] This Court also reiterated the *Atkinson* plain-error formulation – and applied it to *reject* the defendant-appellant's claim – in the pre-Rule case of *Socony-Vacuum Oil Co. v. United States*, 310 U.S. 150, 239 (1940) (failure to object to prosecutor's improper statements in closing argument).

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*, 84 J. Crim. L. & Crimin. 1065, 1079–80 (1994).[3] The need to clarify or overrule this highly questionable aspect of *Olano*'s plain error formulation, requiring the appellant to demonstrate a sufficient effect on the integrity or reputation of the courts *in addition to* a clear violation of substantial rights, is itself a reason to grant the writ in this case.

b. *The need to clarify Rule 52(b) standards in cases of structural error.* 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 should be decided in this case, as would be necessary for the Court to give full consideration to the decision of the Court below (first appeal) 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.

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).[4] See *Neder*, 527 U.S. at 7–9 (equating structural error, when preserved, with a *per se*, or at least presumed, "effect on substantial rights," even absent any showing of conventional prejudice);

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[3] 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.

[4] *See* Constitutional Provision, Statutes and Rule Involved, *ante*.

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").[5] 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. at 632–33; *Johnson v. United States*, 520 U.S. at 469; *Olano*, 507 U.S. at 735. The time has come to resolve that question, and this case is a highly suitable vehicle for doing so.

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[5] 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. 286 (2017).

The characteristics of the constitutional violation here were 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. Petitioner's 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. 25a ("only two days"), 26a (same). But voir dire in a federal criminal trial rarely consumes an entire day, much less two full days. The closure in this case was thus extended in duration, not brief.[6]

The court below purported to weigh the effect on petitioner's rights against the systemic costs of retrial. Petitioner acknowledges that there is no common unit of measurement that could allow an objective comparison between the weight of differing legitimate interests. But the analysis of the court below is certainly questionable, as Judge Restrepo's dissent makes clear, and warrants review by this Court. 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. 27a. The costs of a retrial may also ordinarily be greater than those of a resentencing (see

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[6] 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. 27a–28a n.14, there is no suggestion or indication here of deliberate "sandbagging" by the defense.

Rosales-Mireles v. United States, 585 U.S. —, 138 S.Ct. 1897, 1908 (2018), quoting *United States v. Molina-Martinez*, 578 U.S. 189, 204 (2016)), for example, but this is not always or necessarily so. The cost of retrial is speculative, after all, not a given. Experience teaches that on remand after 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 acknowledged, the systemic costs of correcting unpreserved error "may be overcome, but not disregarded." Appx. 22a. 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. 25a (majority), 77a n.3 (dissent).[7] The production of a transcript many months later (copies of which are sold, not made readily available to the public), which the court below repeatedly referenced, is in no way comparable. *Cf.* Appx. 24a, 26a. 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

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[7] The majority's comment that "there has been no suggestion of misbehavior by the prosecutor" as a further factor counseling against reversal, Appx. 25a (quoting *Weaver*), is incorrect. There was a *Batson* objection in this case, *see* Appx. 29a–30a, which – although eventually overruled – is exactly the sort of occurrence that awareness by the prosecutor of press and public scrutiny might prevent.

evidence that anyone who wished to observe was excluded. Appx. 25a ("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 is informed and assured that family members of both Mr. Hernandez and at least one other defendant (Cruz), 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 has since been advised. The family, therefore, precisely because they were locked out, themselves had no opportunity to bring this matter to the court's attention. Petitioner should not have been penalized by the court below because his appellate counsel adhered to professional norms and to Fed.R.App.P. 28(a)(8)(A) by not attempting to rely in the appellate briefs on facts not of record.

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. 24a–25a 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.

Accordingly, this Court should grant certiorari for any or all of several reasons: to resolve whether *Olano* wrongly departed from the original meaning of Rule 52(b), to answer the long-pretermitted question whether prejudice must be

established to obtain reversal on plain error review of a structural error, to resolve the split in the Circuits, and/or to instruct the courts of appeals on how to weigh the intangible costs of leaving unremedied this kind of severe constitutional violation, which by its nature 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. 22a, 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 structural error cases like the present one.

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 aspects of the plain error rule. See also *Henderson v. United States*, 568 U.S. 266 (2013). The present case should be another.

2. The circuits are divided on how a jury should determine the quantity of drugs necessary to 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 followed highly questionable Third Circuit precedent to hold that the amount of drugs involved in the conspiracy as a whole determines the maximum penalty for a drug conspiracy in violation of 21 U.S.C. § 846. Appx. 5a–7a. 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 calls for a resolution and the Third Circuit's fundamental error requires correction.

The basic error is this: in determining the meaning of a governing sentencing 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. Applying a text-first analysis, on the other hand, produces a different (and more favorable) result for petitioner, who received an unlawful life sentence.[8] Accordingly, this Court should grant the writ.

The decision below (that is, the decades-old Circuit precedent it felt bound to follow – *United States v. Phillips*, 349 F.3d 138, 143 (3d Cir. 2003), and *United States v. Gori*, 324 F.3d 234, 237 (3d Cir. 2003); *see* Appx. 5a–7a), is egregiously wrong, because it is not premised on the words of the legislation that it purports to apply. 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) (Bankruptcy Code), quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (criminal appeal). 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

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[8] The statutory interpretation advocated here was advanced at petitioner Hernandez's resentencing and in his second appeal, as well as in supplemental briefing for this initial appeal. As the opinion of the court below recognized, it is therefore subject to plenary, not plain error review.

object of the ... conspiracy."[9] 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 task of the court is only to interpret these words consistent with their "ordinary meaning ... at the time Congress enacted the statute." *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).[10] The court below overlooked this fundamental precept.

Based on the language of section 846, the questions to be answered – which nowhere appear in the court of appeals' opinions (either the opinion below, or the precedent on which it relies) – 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 statute, by its terms, does not set a penalty based on the *conduct* that was undertaken or to be undertaken by the conspirators, but rather points to the *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*, to conclude that the former calls for reference to legal elements, not facts). The answer to the first question, in the present case, is thus simple: "the offense" is a felony under 21 U.S.C. § 841(b), the law that criminalizes violations of § 841(a).[11] And what are "the penalties ...

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[9] *See* Statutes Involved, *ante*.

[10] 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 35 years.

[11] 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,

prescribed for [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 – distribution of a controlled substance – 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).[12]

The error of the court below, and of most of the other circuits, is to focus on the conspirators' course of conduct or agreed course of conduct. After all, the court seems to have been thinking, the agreement underlying and constituting most drug conspiracies is not a plan 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). But do the words, "the offense, the commission of which," nevertheless 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

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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 punishment, a legislative prohibition of conduct, such as § 841(a), 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)).

[12] 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).

commit? (This is what petitioner argues.) 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; nor would that be 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 is effectively the answer of the court below, and of most other circuits, which is referred to as "aggregation." But that answer has no foundation in the statutory language, nor does the court below (or any other of which petitioner is aware) offer any such textual foundation in its opinion. Being "'unmoored from any statutory text," *Oklahoma v. Castro-Huerta*, 597 U.S. —, 142 S.Ct. 2486, 2496 (2022), the methodology for determining the applicable sentence adopted by the court below is necessarily wrong, as was its conclusion.

This Court's landmark case on distinguishing single from multiple offenses, *Blockburger v. United States*, 284 U.S. 299, 301–03 (1932), sheds light on the issue. *Blockburger* 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 or instance 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 are 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. According, "the offense" referenced in § 846 must be *an instance* of distribution of the kind agreed to be committed.

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 (if any) is determined by another (likewise non-statutory) rule. Compare *Williams*, 974 F.3d at 364–67; Appx. 49a–53s; with *id.* 365; Appx. 50a (decision on petitioner's first appeal). Presumably the jury is to receive two different sets of instructions, one for each purpose (mandatory minimum and statutory maximum). See *Alleyne v. United States*, 570 U.S. 99 (2013). But there is no clause of § 841(b)(1) that allows a minimum penalty from subparagraph (B), for example, to be coupled with a maximum from subparagraph (A). The decision of the court below is thus utterly uncoupled from the statute it purports to interpret and enforce.

Other circuits mostly follow the same, curious pattern,[13] although a few more recent cases have questioned it. See *United States v. Collazo*, 984 F.3d 1308 (9th Cir. 2021) (en banc) (6-5 split on related *mens rea* question); *United States v.*

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[13] 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). This entire body of sentencing law is created from whole cloth, with no basis in the governing statute.

Stoddard, 892 F.3d 1203, 1220 (D.C.Cir. 2018). As the court below noted in petitioner's first appeal decision, the circuits are divided in announcing various tests for applying § 846, 974 F.3d at 365 & n. 33, Appx. 51a–52a (canvassing the circuits and discussing *sui generis* Sixth Circuit rule). But none of them is correct, because none is founded in the simple words of the statute.

There is nothing implausible in petitioner's reading 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), so a violation of § 846 is expressly punishable by reference to the *type of* "offense, the commission of which was the object of the ... conspiracy." 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)).[14] 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. at 486.

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[14] Even if there were any ambiguity in the statutory language of § 846 that might support the creative rule(s) devised by the courts of appeals, which there is not, petitioner's suggestion is also consistent with the principle that where statutory language defining criminal punishment is genuinely ambiguous, the rule of lenity requires the court to select the interpretation (consistent with a fair reading of that language) which is more favorable to the defendant. *Hughey v. United States*, 495 U.S. 411, 422 (1990); *Bifulco v. United States*, 447 U.S. 381, 387 (1980).

The trial court understood that because drug quantity affects the maximum punishment and may trigger a mandatory minimum, the jury must decide that question. 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 returned, the trial court imposed a conspiracy sentence within the highest, § 841(b)(1)(A) range, that is, a life sentence, on Count Two, as well as Count One (the RICO conspiracy).[15]

The trial and sentencing record of this case demonstrates that none of the transactions (that is, any particular "offense") committed or agreed to as part of the charged conspiracy "involv[ed]" (*see* § 841(b)(1)[16]) amounts of drugs that exceeded the § 841(b)(1)(B) level. In other words, unless the government proved – which here, it is undisputed that it did not and could not – that petitioner 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 his conspiracy convictions should have come within 21 U.S.C. § 841(b)(1)(B) and not within

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[15] 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 sentenced 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 petitioners 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 them 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) level, as well as on the Count One RICO conspiracy charge.

[16] 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.

(b)(1)(A). Petitioner was thus gravely prejudiced, as the life sentence he received was illegal.[17]

For these reasons, to decide the important and recurring question of statutory construction, the petition should be granted.

CONCLUSION

The Court should grant the petition of Marc Hernandez for a writ of certiorari and reverse the judgments of the United States Court of Appeals for the Third Circuit affirming his convictions and sentence.

Respectfully submitted,

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[17] On petitioner's first appeal, his sentences on the substantive drug counts were found to be illegal, but the error was deemed harmless in light of the conspiracy sentence. Accordingly, if this petition is granted and he then prevails on the merits, petitioner will now be entitled to a remand for a full resentencing on all counts.