No. _____

IN THE

Supreme Court of the United States

MARK MAYO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Does a clear or obvious structural error always, or at least ordinarily, require relief under the plain-error standard of Federal Rule of Criminal Procedure 52(b)?

Related Proceedings

United States District Court (D. Guam):

United States v. Mayo, Case No. CR-19-00045-2 (June 22, 2021).

United States Court of Appeals (9th Cir.):

United States v. Mayo, Case 21-10181 (August 14, 2023).

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Petition for a Writ of Certiorari

Petitioner Mark Mayo respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The decision of the United States Court of Appeals for the Ninth Circuit (App. 1a-9a) is unpublished but is available at 2023 WL 5198767. The district court did not issue any relevant written decisions.

Jurisdiction

The court of appeals entered its judgment on August 14, 2023. App. 1a. It denied a petition for panel rehearing / rehearing en banc on November 15, 2023. App. 10a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

U.S. Const., Amend. VI provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]"

Fed. R. Crim. P. 52(b) provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

Introduction

The Court has provided some guidance about the plain-error standard of review's third prong (whether the error affects substantial rights) and fourth prong (whether the error seriously affects the fairness, integrity, or public reputation of judicial proceedings). For example, it has explained how both prongs apply to miscalculations under the Sentencing Guidelines. *See Rosales-Mireles v. United States*, 585 U.S. __, 138 S. Ct. 1897 (2018) (fourth prong); *Molina-Martinez v. United States*, 578 U.S. 189 (2016) (third prong). But it has not delved into the proper way for appellate courts to consider the third and fourth prongs when confronted with a clear or obvious *structural* error. Several times, it has noted the possibility that such errors might automatically satisfy the third prong, but it has not decided the issue. *See*, *e.g.*, *Puckett v. United States*, 556 U.S. 129, 140-41 (2009). And it has never addressed whether structural errors merit special consideration when applying the fourth prong. These questions are important because "the defining feature of a structural error is that it affects the framework within which the trial proceeds, rather than being simply an error in the trial process itself." *Weaver v. Massachusetts*, 582 U.S. 286, 295 (2017) (cleaned up). In other words, structural errors are categorically different from other kinds of errors. There has therefore been some confusion in the courts of appeals about whether the plain-error standard applies differently to such errors in general and to the

structural error at issue here—denial of the right to a public trial—in particular. Because the Court's guidance is needed on the matter, it should grant the petition.

Statement of the Case

1. Legal Background.

The Constitution guarantees the right to public trial. U.S. Const., Amend. VI. This right extends to jury selection. *Presley v. Georgia*, 558 U.S. 209, 212-13 (2010). And denial of the right is structural error. *Weaver*, 582 U.S. at 290, 296. This petition concerns how such structural errors should be considered under the plain-error standard of review.

"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(b). This standard has four requirements, or prongs. First, there must be an error. *United States v. Olano*, 507 U.S. 725, 732-34 (1993). Second, that error must be plain (in other words, clear or obvious). *Id.* at 734. Third, the error must affect substantial rights. *Id.* at 734-35. Finally, although the standard "is permissive, not mandatory," a "Court of Appeals should correct a plain forfeited error affecting substantial rights if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* at 735-37 (cleaned up).

2. Factual Background and Proceedings Below.

Mark Mayo had one of the first pandemic-affected trials held in the District of Guam, in January 2021. AOB 18; GAB 11.[1] The district court moved voir dire from the courthouse to a nearby military facility, which precluded public access. AOB 18, 23-25; GAB 11-12. The public could only access those proceedings via telephone by calling the clerk's office for dial-in instructions. AOB 18, 25; GAB 12; ARB 15. When the trial returned to the courthouse, Mayo's family and other members of the public attended in person and were also able to watch a video feed. AOB 25; GAB 14; ARB 16.

On appeal, Mayo argued (among other things) that restricting access to his trial during jury selection violated his constitutional right to a public trial—a structural error requiring reversal, even under the plain-error standard of review. AOB 23-35; ARB 1-17. The Ninth Circuit rejected that claim. App. 2a-5a. It acknowledged that the district court erred and that error was plain under precedent holding that, even under the circumstances presented by the pandemic, a district court violates a defendant's public-trial right by giving those excluded from the courtroom access to

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[1] The following abbreviations refer to documents filed in the Ninth Circuit: "AOB" refers to the appellant's opening brief (docket no. 28). "GAB" refers to the government's answering brief (docket no. 42). "ARB" refers to appellant's reply brief (docket no. 47). "PFR" refers to the appellant's petition for rehearing (docket no. 58).

the proceedings only via streaming audio. App. 2a-3a (citing *United States v. Allen*, 34 F.4th 789 (9th Cir. 2022)). The Ninth Circuit also found that the error affected Mayo's substantial rights because it was structural. App. 3a. But it denied relief under the fourth plain-error prong. App. 3a-5a.

Noting that not every public-trial violation results in a fundamentally-unfair trial, the Ninth Circuit wrote that the record did not "suggest that the district court's audio-only public-access limitation undermined the *actual* fairness or integrity of the jury selection process or the subsequent trial[.]" App. 4a (emphasis in original). It then concluded that neither the perception of fairness nor the public reputation of those proceedings warranted reversal because the district court's "overreaction" was the result of its "sincere efforts to accommodate the extraordinary practical concerns raised by the pandemic[.]" App. 4a-5a (cleaned up). Significantly, the Ninth Circuit's fourth-prong analysis did not treat the structural error at issue any differently than if it had been nonstructural. App. 3a-5a.

Although it did not cite the case, the Ninth Circuit's reasoning closely tracked its opinion two weeks earlier in *United States v. Hougen*, where public access to the courthouse was restricted in response to the pandemic during an April 2021 trial in the Northern District of California, a docket entry provided dial-in information for public access to the trial's audio feed, the defendant asserted a violation of his public-trial right on appeal, and the Ninth Circuit applied the plain-error standard.

76 F.4th 805, 808-14 (9th Cir. 2023). The first and third prongs were uncontested and the Court declined to address the second prong. *Id*. at 811. As here, relief was denied based entirely on the fourth prong, without any acknowledgement that structural errors deserved special consideration. *Id*. at 811-14.

Mayo filed a petition for rehearing asking for en banc review to address how the fourth prong of the plain-error standard applies to structural errors. PFR 1-21. The Ninth Circuit summarily denied it. App. 10a.

Reasons for Granting the Writ

When a criminal defendant fails to object to a clear or obvious error in the district court, Rule 52(b) allows the court of appeals to nevertheless grant relief if the error affects substantial rights and seriously affects the fairness, integrity, or public reputation of judicial proceedings—the third and fourth prongs of the well-established plain-error standard. *See Olano*, 507 U.S. at 731-37. The Court has never applied that standard to a structural error, but its precedent suggests that such errors must be treated differently. Granting review would allow the Court to directly address that issue for the first time and hold that a clear or obvious structural error always, or at least ordinarily, requires relief under the plain-error standard. Precedent concerning the particular structural error at issue here—denial of the right to a public trial—illustrates why that is appropriate. Finally, this case presents an excellent vehicle for the Court to address how Rule 52(b) applies to structural errors.

1. The Court has "characterized as 'structural' a very limited class of errors that trigger automatic reversal because they undermine the fairness of a criminal proceeding as a whole." *United States v. Davila*, 569 U.S. 597, 611 (2013) (cleaned up); *see also United States v. Dominguez Benitez*, 542 U.S. 74, 81 (2004) ("It is only for certain structural errors undermining the fairness of a criminal proceeding as a whole that even preserved error requires reversal without regard to the mistake's effect on the proceeding."). The Court takes a "categorical approach to structural errors"—"a constitutional error is either structural or it is not." *Neder v. United States*, 527 U.S. 1, 14 (1999). "Errors of this kind include denial of counsel of choice, denial of self-representation, denial of a public trial, and failure to convey to a jury that guilt must be proved beyond a reasonable doubt." *Davila*, 569 U.S. at 611. The Court has never considered how such errors should be reviewed when unpreserved. Therefore, "whether the structural-error doctrine modifies a defendant's burden to satisfy all four plain-error factors remains unsettled." *United States v. Nelson*, 884 F.3d 1103, 1108 (11th Cir. 2018) (cleaned up). Still, the Court's precedent suggests that unpreserved structural errors should not be treated the same as nonstructural errors.

A. The Court has "cautioned that any *unwarranted* extension of the authority granted by Rule 52(b) would disturb the careful balance it strikes between judicial efficiency and the redress of injustice, and that the creation of an *unjustified* exception to the Rule would be even less appropriate." *Puckett*, 556 U.S. at 135-36

(cleaned up) (emphasis added). The words "unwarranted" and "unjustified" reflect the possibility that extensions of, or exceptions to, the general plain-error rule might be appropriate in some circumstances. Consider, for example, *Greer v. United States*, where the Court rejected an argument that certain plea-proceeding errors "are 'structural' and require automatic vacatur in *every* case without regard to whether a defendant can otherwise satisfy the plain-error test." 593 U.S. 503, 512-13 (2021) (emphasis in original). It held that the errors at issue were "not structural" and therefore "a defendant [raising them] must satisfy the ordinary plain-error test." *Id*. at 513-14. That suggests that when structural errors are involved, defendants do *not* need to satisfy the ordinary plain-error test.

B. With regard to the third prong in particular, a defendant must "normally, although perhaps not in every case," establish prejudice. *Olano*, 507 U.S. at 734-35 (cleaned up). The Court has left open "whether the phrase 'affecting substantial rights' is always synonymous with 'prejudicial'" because "there may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome" or "errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice." *Id*. at 735. Specifically, the Court "has several times declined to resolve whether structural errors—those that affect the framework within which the trial proceeds—automatically satisfy the third prong of the plain-error test." *Puckett*, 556 U.S. at 140 (cleaned up) (citing cases). Those cases acknowledge "the possibility that certain errors, termed structural errors,

might affect substantial rights regardless of their actual impact on an appellant's trial." *United States v. Marcus*, 560 U.S. 258, 263 (2010) (cleaned up) (citing *Puckett*).

Holding so would be consistent with the structure of Rule 52, which contains two provisions, each hinging on whether an error affects substantial rights. Subsection (a) concerns "Harmless Error" and provides: "Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Subsection (b) concerns "Plain Error" and provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." This case concerns subsection (b), but what the Court said about substantial rights for purposes of subsection (a) in *Neder v. United States* is important:

> Although this Rule by its terms applies to *all* errors where a proper objection is made at trial, we have recognized a limited class of fundamental constitutional errors that defy analysis by harmless error standards. Errors of this type are so intrinsically harmful as to require automatic reversal (i.e., 'affect substantial rights') without regard to their effect on the outcome. For all other constitutional errors, reviewing courts must apply Rule 52(a)'s harmless-error analysis[.]

527 U.S. at 7 (cleaned up) (emphasis in original). Having already recognized a structural-error exception for subsection (a), it would make sense for the Court to also treat such errors differently under subsection (b)—which uses the same "affects

substantial rights" language—and hold that they categorically satisfy the third plain-error prong.

C. The Court's precedent supports doing the same for the fourth prong. In *Johnson v. United States*, it declined to reach whether failing to submit an element of a crime to the jury was structural because, even if the error affected substantial rights, it did not seriously affect the fairness, integrity, or public reputation of judicial proceedings given that the evidence supporting that element was overwhelming. 520 U.S. 461, 468-70 (1997); *see also United States v. Cotton*, 535 U.S. 625, 632-34 (2002) (doing similarly with indictment's failure to allege drug quantity). Two years later, in *Neder*, the Court held that omitting an element of the offense in jury instructions is *not* structural. 527 U.S. at 8-15. In doing so, it noted that *Johnson*'s fourth-prong "conclusion cuts against the argument that the omission of an element will *always* render a trial unfair." *Id*. at 9 (emphasis in original). Thus, *Neder* implied that relief cannot be denied under the fourth prong if the error is structural. *See United States v. Omer*, 429 F.3d 835, 841 (9th Cir. 2005) (Graber, joined by Kozinski, O'Scannlain, Bybee, Callahan, and Bea, CJJ, dissenting from denial of rehearing en banc) (citing *Neder* as "deciding that omission of an element from jury instructions is not structural error, in part,

because in [*Johnson*] the Court had decided that the same error did not satisfy the fourth element of the plain error analysis[.]").[2]

2. Despite this precedent suggesting that structural errors deserve special treatment under Rule 52(b), the Court's failure to directly address this important issue has resulted in some confusion among the courts of appeals with regard to how the third and fourth prongs of the plain-error standard apply to such errors. The Court's guidance on the matter is therefore required.

A. Like this Court, some courts of appeals have noted the possibility that structural errors may automatically satisfy the third prong without answering the question. *See*, *e.g.*, *United States v. Mendonca*, 88 F.4th 144, 154-55 (2d Cir. 2023); *United States v. Williams*, 974 F.3d 320, 341 (3d Cir. 2020); *United States v. Anderson*, 881 F.3d 568, 573 (7th Cir. 2018); *United States v. Padilla*, 415 F.3d 211, 220 n.1 (1st Cir. 2005) (en banc). But others have held that the third prong is necessarily satisfied when the error is structural. *See*, *e.g.*, *United States v. Becerra*, 939 F.3d 995, 1005-06 (9th Cir. 2019); *United States v. Ramirez-Castillo*, 748 F.3d 205, 215 (4th Cir. 2014); *United States v. Turrietta*, 696 F.3d 972, 983 (10th Cir.

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[2] In *Johnson*, the Court wrote that "the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure." 520 U.S. at 466. That does not mean the structural nature of the error is irrelevant to *how* Rule 52(b) applies. For example, as discussed above, the Court held in *Neder* that structural errors categorically affect substantial rights without regard to their effect on the outcome for purposes of Rule 52(a). 527 U.S. at 7.

2012). The Second Circuit, however, has suggested that "there is some reason to think" that such a categorical rule is not appropriate. *See Mendonca*, 88 F.4th at 154 n.6 (cleaned up); *but see id.* at 171 (Lohier, CJ, concurring in part and concurring in judgment) (suggesting otherwise); *see also* GAB 19-24 (government arguing that Ninth Circuit should "distinguish—or, if necessary, reconsider and overrule—its precedents treating unpreserved structural errors as presumptively prejudicial."). The Court should eliminate this confusion by holding that a structural error always "affects substantial rights" for purposes of Rule 52(b). Again, that conclusion is consistent with its precedent interpreting the same language in Rule 52(a). *See supra* Part 1.B.

B. The circuit law on how the fourth prong of the plain-error standard applies to structural errors is even more muddled. For example, the Ninth Circuit had repeatedly held that structural errors automatically satisfy that prong. *See*, *e.g.*, *United States v. Ramirez-Ramirez*, 45 F.4th 1103, 1109 (9th Cir. 2022); *Becerra*, 939 F.3d at 1006; *United States v. Chavez-Cuevas*, 862 F.3d 729, 734 (9th Cir. 2017); PFR 13-16. In this case, however, the Ninth Circuit improperly ignored that authority. App. 3a; PFR 17-19. And in *Hougen*, a published opinion issued around the same time, it claimed that reading those cases "to require the exercise of [its] discretion to afford relief under plain error review every time there has been a structural error, regardless of any and all case-specific facts relevant to the fairness, integrity, and reputation of the proceedings," would be "in irreconcilable tension

with" this Court's precedent. 76 F.4th at 813; PFR 19-20. As discussed above, that is not true. *See supra* Part 1.C.

In both this case and *Hougen*, the structural nature of the error was not treated as a significant factor in the fourth-prong analysis; in fact, the Ninth Circuit did not treat the structural errors any differently than if they had been nonstructural. App. 3a-5a; *Hougen*, 76 F.4th at 811-14; PFR 4-5, 20. Other courts of appeals have similarly not considered the structural nature of an error when applying the fourth prong. *See*, *e.g.*, *Mendonca*, 88 F.4th at 155-57; *Turrietta*, 696 F.3d at 984-86. In contrast, the Third Circuit has at least recognized that, "although a structural error is not to be given automatic effect in the Rule 52(b) context, the same considerations that in other contexts render its correction automatic may coincide with the appropriate exercise of judicial discretion to notice an unpreserved error." *Williams*, 974 F.3d at 342. "The very nature of the error may warrant a remedy in the ordinary case," even if automatic reversal is not the rule. *Id.* The Fourth Circuit has also recognized that the fourth prong requires careful consideration of the factors that render an error structural. *See Ramirez-Castillo*, 748 F.3d at 217 (structural error of not having jury make finding of guilt satisfied prong four regardless of substantial evidence against defendant presented at trial). The Court should resolve this circuit conflict.

C. Even if the Court were to decide that structural errors do not always satisfy the third and fourth prongs of the plain-error standard, it could (and should)

at least hold that they do so in the ordinary case. Consider how the Court has applied the plain-error standard to miscalculation of the Sentencing Guidelines advisory range, a nonstructural error. In *Molina-Martinez v. United States*, it held that such an error "can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error" such that the third prong will be satisfied "in most cases." 578 U.S. at 199-200, 204 (cleaned up). It reached a similar conclusion as to the fourth prong in *Rosales-Mireles v. United States*, where it held that appellate courts' fourth-prong discretion has "bounds." 138 S. Ct. at 1903. "Although Rule 52(b) is permissive, not mandatory, it is well established that courts 'should' correct a forfeited plain error that affects substantial rights if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id*. at 1906 (cleaned up). Even though applying the fourth prong to nonstructural errors "inherently requires a case-specific and fact intensive inquiry" (*id*. at 1909 (cleaned up)), the Court created a *general rule* for exercising that discretion as to Sentencing Guidelines mistakes: "*In the ordinary case*, as here, the failure to correct a plain Guidelines error that affects a defendant's substantial rights will seriously affect the fairness, integrity, and public reputation of judicial proceedings." *Id*. at 1911 (emphasis added); *see also id.* at 1909 n.4. A particular case's facts might make it an exception to this general rule. *Id*. at 1909. But the phrase "ordinary case" reflects the Court's expectation that such exceptions will be

rare. Likewise, even if clear or obvious structural errors do not always require plain-error relief, cases where such relief is denied should be very rare.

3. The importance of considering the structural nature of an error when applying the third and fourth prongs of the plain-error standard is demonstrated by the particular error at issue here—denial of the Sixth Amendment right to a public trial.

A. That right has deep historical roots. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564-69 (1980). It protects a defendant because "knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In re Oliver*, 333 U.S. 257, 270 (1948). Furthermore, "the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Id.* at 270 n.25 (cleaned up). In other words, a public trial may "cause all trial participants to perform their duties more conscientiously[.]" *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 383 (1979). The public-trial right also serves societal interests in two ways. First, it "generally give[s] the public an opportunity to observe the judicial system." *Id.* Second, it provides "assurance to those not attending trials that others were able to observe the proceedings" and thereby "enhance[s] public confidence." *Press-Enterprise Company v. Superior Court of California, Riverside County*, 464 U.S. 501, 507 (1984).

The public-trial right extends to jury selection. *Presley*, 558 U.S. at 212-13. And while it belongs to the accused, the "public has a right to be present whether or not any party has asserted the right." *Id.* at 212, 214. In fact, courts must consider alternatives to closure even when not requested by the parties because "the process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." *Id.* at 214 (cleaned up).

B. In *Weaver v. Massachusetts*, the Court recognized that violation of the public-trial right is structural error. 582 U.S. at 290, 296. "The defining feature of a structural error is that it affects the framework within which the trial proceeds, rather than being simply an error in the trial process itself. For the same reason, a structural error defies analysis by harmless error standards." *Id.* at 294-95 (cleaned up).

There are three broad rationales for finding an error to be structural: (1) "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest;" (2) "if the effects of the error are simply too hard to measure;" and (3) "if the error always results in fundamental unfairness." 582 U.S. at 295-96 (cleaned up). These are not "rigid" categories, so more than one may explain why an error is deemed structural. 582 U.S. at 296.

The Court observed that violation of the public-trial right might sometimes result in fundamental unfairness, but not in every case. 582 U.S. at 297-98. A "public-trial violation is structural for a different reason: because of the difficulty of

assessing the effect of the error." *Id.* at 298 (cleaned up). "The public-trial right also protects some interests that do not belong to the defendant." *Id.* at 298-99. In particular, "various constituencies of the public—the family of the accused, the family of the victim, members of the press, and other persons—all have their own interests in observing the selection of jurors." *Id.* at 297-98.

C. *Weaver* was not a plain-error case; it concerned whether a defendant could prove the *actual prejudice* required for an ineffective-assistance-of-counsel claim, so *fundamental* unfairness was the critical issue. 582 U.S. at 290, 299-305. When applying the plain-error standard's fourth prong, however, one question is whether the error even "seriously affects" fairness. *Olano*, 507 U.S. at 736 (cleaned up). Moreover, regardless of any unfairness, courts must separately consider whether the error "seriously affects" the "integrity" or "public reputation" of the proceedings. *Id.* The reasons for characterizing public-trial violations as structural indisputably encompass those interests. The Ninth Circuit nevertheless relied on *Weaver* to find that defendants could not satisfy the fourth prong for the denial of the public-trial right during jury selection absent a showing of actual prejudice. App. 3a-5a; *Hougen*, 76 F.4th at 811-13.

The Second Circuit similarly refused to find the fourth prong satisfied where a defendant's public-trial right was denied for large portions of jury selection, citing the circumstances presented by the pandemic but ignoring the reasons for deeming violations of the right to be structural error. *Mendonca*, 88 F.4th at 155-57. Judge

Lohier wrote separately to explain why, despite how the majority considered the fourth prong, the structural nature of the error is of the utmost importance:

> [S]hould we presume that structural errors also seriously affect the fairness, integrity, or public reputation of judicial proceedings—the fourth and final prong of plain error review? At least in the context of the public trial right, in my view, the answer is yes. If the searchlight of a public trial serves as a restraint against the abuse of judicial power, then extinguishing it through an improper closure surely threatens to erode the integrity and public reputation of the trial.

Id. at 171 (cleaned up). He concluded that a categorical rule that prong four always applies in that situation would go too far, but it is appropriate "to say that structural errors *typically* compel the reversal of a conviction whether or not harm is shown." *Id*. (emphasis in original). Denying plain-error relief for such errors is allowed only in "the *very* rare case[.]" *Id*. (emphasis in original).

The Third Circuit also denied plain-error relief based on the fourth prong (after skipping prong three) where a district court had closed the courtroom during jury selection. *Williams*, 974 F.3d at 341-48. Judge Restrepo dissented. *Id*. at 380-86. He correctly observed that although *Weaver* "cautioned courts not to assume that public trial violations always require reversal in a collateral proceeding, it did not address the appropriate remedy when the error is raised for the first time on direct review." *Id*. at 383. Because the plain-error standard applied and its first two

prongs were undisputedly satisfied, he considered the third and fourth prongs. *Id.* Relying on *Neder*, Judge Restrepo recognized 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 [the] third prong." *Id.* at 384 (cleaned up). "Given the difficulty of measuring prejudice arising from a public trial violation and the importance of jury selection in protecting criminal defendants," presuming an effect on substantial rights was appropriate. *Id.* Judge Restrepo then refuted the majority's reasoning as to the fourth prong. *Id.* at 384-86. He would have reversed the defendants' convictions because "a balancing test or a cost-benefit analysis is an improper and unjust method for determining whether to protect certain fundamental constitutional rights. The public trial right is one of these fundamental rights. It has deep roots in our Nation's history and is essential to the functioning of our criminal justice system." *Id.* at 386 (cleaned up).

Unlike these other courts of appeals, the First Circuit granted plain-error relief for a violation of the public-trial right during jury selection. *United States v. Negron-Sostre*, 790 F.3d 295, 301-06 (1st Cir. 2015). Because the error was structural, the third prong was satisfied. *Id.* at 305-06. So was the fourth prong: "Indeed, given the importance of the public trial right, it would be hard to see how the public reputation and integrity of the proceedings would not be compromised in this case." *Id.* at 306.

These cases reflect conflicts about how the plain-error standard applies to violations of the public-trial right. Therefore, that particular right provides a good context for considering the broader question of how the plain-error standard applies to structural errors in general.

4. This case presents good vehicle for addressing that issue. All agreed that the first two prongs of the plain-error standard are satisfied. App. 2a-3a; AOB 28-34; GAB 18-19; ARB 7. There was also no dispute that the public-trial error is structural. App. 3a; AOB 27, 34; GAB 8, 20; ARB 7. This case therefore squarely presents the questions of how the third and fourth plain-error prongs apply to structural errors in general and the right to a public trial in particular. And that issue is dispositive; if the plain-error standard is satisfied here, then the petitioner's convictions must be reversed.

Conclusion

For the foregoing reasons, the petitioner respectfully requests that this Court grant his petition for a writ of certiorari.

February 2, 2024

Respectfully submitted,

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