Nos. 20-1523, 20-7868, and 20-7889

In the Supreme Court of the United States

ROLANDO CRUZ, JR., MARC HERNANDEZ, AND ROSCOE VILLEGA, PETITIONERS

v.

UNITED STATES OF AMERICA

DOUGLAS KELLY, PETITIONER

v.

UNITED STATES OF AMERICA

ANTHONY SISTRUNK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners are entitled to automatic vacatur of their convictions because the district court entered a *sua sponte* order requiring members of the public to obtain judicial authorization to be present in the courtroom during jury selection, notwithstanding petitioners' failure to object to the district court's order, their inability to identify on appeal any case-specific prejudice, and the court of appeals' discretionary determination that plain-error relief was unwarranted in the circumstances of this case.

2. Whether any error in the jury's drug-quantity findings for petitioners' convictions for conspiracy to distribute controlled substances, in violation of 21 U.S.C. 846, warrants plain-error relief.

ADDITIONAL RELATED PROCEEDING

Supreme Court of the United States:

Atkinson v. *United States*, No. 20-7796 (Apr. 15, 2021) (co-defendant's petition for a writ of certiorari)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-70a) is reported at 974 F.3d 320.[1] The order of the district court in *United States* v. *Cruz*, No. 14-cr-70, is not published in the Federal Supplement but is available at 2015 WL 10786602. The order of the district court in *United States* v. *Hernandez*, No. 14-cr-70, is not published in the Federal Supplement but is available at 2015 WL 10786616. The order of the district court in *United States* v. *Villega*, No. 14-cr-70, is not published in the Federal Supplement but is available at 2015 WL 10786612. The opinion and order of the district court in *United States* v. *Kelly*, No. 14-cr-70, are not published in the Federal Supplement but are available at 2015 WL 5165482 and 2015 WL 10786605. The opinion and order of the district court in *United States* v. *Sistrunk*, No. 14-cr-70, are not published in the Federal Supplement but are available at 2015 WL 5124040 and 2015 WL 10786615.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 2020. Petitions for rehearing were denied on November 10, 2020, and November 24, 2020 (Pet. App. 71a-74a; 20-7868 Pet. App. A66-A67; 20-7889 Pet. App. 53a-54a). The petitions for writs of certiorari were filed on April 21, 2021 (No. 20-7889); April 23, 2021 (No. 20-1523); and April 26, 2021 (No. 20-7868). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] Unless otherwise specified, all citations to the "Pet. App." are to the appendix to the petition in No. 20-1523.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Pennsylvania, petitioners were convicted of conspiring under the Racketeer Influenced and Corrupt Organizations Act (RICO), in violation of 18 U.S.C. 1962(d); conspiring to distribute 280 grams or more of cocaine base and five kilograms or more of cocaine, in violation of 21 U.S.C. 846; and distributing 280 grams or more of cocaine base and five kilograms or more of cocaine, in violation of 21 U.S.C. 841(a). Pet. App. 1a, 4a, 7a, 34a. Petitioners Cruz and Hernandez were also convicted of using a firearm in relation to or in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c) (2012), and conspiring to do so, in violation of 18 U.S.C. 924(*o*). Pet. App. 4a, 7a. The court sentenced petitioners Cruz, Hernandez, and Kelly to life imprisonment, to be followed by five years of supervised release; sentenced petitioner Sistrunk to 360 months of imprisonment, to be followed by five years of supervised release; sentenced petitioner Villega to 300 months of imprisonment, to be followed by five years of supervised release; and ordered all petitioners to pay certain fines and costs. *Id.* at 6a-7a; 17-3191 C.A. App. 5-6; 17-3373 C.A. App. 4a; 17-3777 C.A. App. A4-A5; 20-7889 Pet. App. 58a-59a; 17-3586 C.A. App. 6907a-6908a. The court of appeals affirmed petitioners' judgments of conviction, vacated petitioners' sentences as to one fine, and vacated petitioner Hernandez's sentence in full. Pet. App. 1a-70a.

1. From 2002 to 2014, petitioners were members of the Bloods, a national street gang, and were associated with South Side, a criminal enterprise that operated out of York, Pennsylvania. Pet. App. 1a; Cruz Presentence Investigation Report (Cruz PSR) ¶¶ 22, 26-27. The

heart of the South Side enterprise was an extensive drug-trafficking operation, Pet. App. 1a, with crews of South Side drug dealers operating daily open-air drug markets on the streets of south York. Cruz PSR ¶¶ 9, 17, 21. All five petitioners distributed crack cocaine, and Kelly, Hernandez, Cruz, and Sistrunk supplied the drug to South Side associates who then sold it on the streets of York. See, *e.g.*, *id.* ¶¶ 14, 17, 26-27, 93, 105, 159. One of those associates sold almost 26 kilograms of crack cocaine during a one-year period in the mid-2000s. *Id.* ¶ 16. The group also shared and used firearms, sometimes supplied by Kelly and Hernandez. *Id.* ¶¶ 15, 19.

South Side engaged in "sporadic episodes of occasionally deadly violence involving rival gangs, gang affiliates, and, collaterally, members of the general public." Pet. App. 2a. For example, Kelly fatally shot a man in September 2003 and stabbed another man less than three months later. Cruz PSR ¶¶ 33, 35-36. In 2007, Sistrunk was involved in assaults that resulted in the death of a rival gang member, and during the same year, he also shot at a local drug dealer. *Id.* ¶¶ 67-69, 73. In 2012, Cruz, Hernandez, Kelly, Sistrunk, and others assaulted five people in a restaurant parking lot, shooting and killing one of them. *Id.* ¶¶ 142-144. And in 2013, a drug dealer who was closely associated with Cruz, Hernandez, and Villega was shot to death in front of his home, with the investigation into the murder indicating that Cruz was involved in the killing. *Id.* ¶¶ 167-178.

2. A federal grand jury in the Middle District of Pennsylvania returned a second superseding indictment charging petitioners with RICO conspiracy, in violation of 18 U.S.C. 1962(d); conspiring to distribute five

kilograms or more of powder cocaine, 280 grams or more of crack cocaine, heroin, and marijuana, in violation of 21 U.S.C. 846; and distributing five kilograms or more of powder cocaine, 280 grams or more of crack cocaine, heroin, and marijuana, in violation of 21 U.S.C. 841(a). Pet. App. 4a; see 17-3373 C.A. App. 44a-47a. The grand jury also charged petitioners Cruz and Hernandez with using a firearm in relation to or in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c) (2012), and with conspiring to do so, in violation of 18 U.S.C. 924(*o*). Pet. App. 4a.

Petitioners and seven co-defendants proceeded to trial in September 2015. Pet. App. 4a. On Friday, September 18, 2015, with jury selection set to begin the following Monday, the district court issued a *sua sponte* order directing 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." *Id.* at 4a-5a. The order further stated that "[n]o other individuals will be present except by express authorization of the Court." *Id.* at 5a. No party objected to the order, and the record contains no evidence that the press or any other member of the public sought "express authorization" to attend jury selection, as the district court's order contemplated, or was turned away after attempting to attend. *Ibid.* Jury selection lasted for two days, and all other trial proceedings were open to the public. *Ibid.*

Petitioners' consolidated trial lasted approximately two months and involved "well over one hundred witnesses." Pet. App. 18a. Following trial, the jury found petitioners guilty of RICO conspiracy, in violation of 18 U.S.C. 1962(d); conspiring to distribute 280 grams or

more of cocaine base and five kilograms or more of cocaine, in violation of 21 U.S.C. 846; and distributing 280 grams or more of cocaine base and five kilograms or more of cocaine, in violation of 21 U.S.C. 841(a). Pet. App. 4a, 7a, 34a. The jury also found Cruz and Hernandez guilty of using a firearm in relation to or in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c), and conspiring to do so, in violation of 18 U.S.C. 924(*o*). Pet. App. 4a, 7a. The district court sentenced petitioners Cruz, Hernandez, and Kelly to life imprisonment, to be followed by five years of supervised release; sentenced petitioner Sistrunk to 360 months of imprisonment, to be followed by five years of supervised release; sentenced petitioner Villega to 300 months of imprisonment, to be followed by five years of supervised release; and ordered all petitioners to pay certain fines and costs. *Id.* at 6a-7a; 17-3191 C.A. App. 5-6; 17-3373 C.A. App. 4a; 17-3777 C.A. App. A4-A5; 20-7889 Pet. App. 58a-59a; 17-3586 C.A. App. 6907a-6908a.

3. The court of appeals affirmed petitioners' judgments of conviction, vacated petitioners' sentences as to one fine, and vacated Hernandez's sentence in full on grounds not at issue here. Pet. App. 1a-70a.

a. On appeal, petitioners asserted for the first time that the district court's order closing the courtroom during jury selection violated their right to a public trial. The court of appeals determined that petitioners were not entitled to relief on that unpreserved claim. Pet. App. 8a-20a.

The government conceded, and the court of appeals agreed, that the district court's closure order constituted an error that was plain, thus satisfying the first two requirements of the plain-error standard. Pet. App. 8a-9a. The court of appeals determined, however, that

the courtroom closure "did not 'seriously affect the fairness, integrity or public reputation of judicial proceedings,'" as required to satisfy the fourth element of plain-error review. *Id.* at 10a (citation omitted).

The court of appeals recognized that erroneous courtroom closure is classified as structural error, and would warrant automatic relief if the district court had persisted in the error over a contemporaneous objection. Pet. App. 8a-9a. The court of appeals declined to decide whether such an error, when not brought to the district court's attention, could warrant plain-error relief without satisfying the third element of the plain-error standard, which requires a showing of case-specific prejudice. *Id.* at 9a-10a. It instead observed that regardless of how that issue—which this Court has left open—might be resolved, the plain-error standard's fourth element requires courts to evaluate an unpreserved claim of structural error, including a violation of the public-trial right, "in the context of the unique circumstances of the proceeding as a whole to determine whether the error warrants remedial action." *Id.* at 11a; see *id.* at 10a-13a. Applying that approach to petitioners' case, the court of appeals found that the courtroom closure during jury selection did not warrant reversal of petitioners' convictions in the circumstances here. *Id.* at 15a; see *id.* at 14a-20a.

The court of appeals acknowledged that the district court's closure order "had the potential to call into question the fairness, integrity, and public reputation of judicial proceedings." Pet. App. 17a. The court of appeals found, however, that "countervailing factors" had "sufficiently mitigate[d]" that danger: the closure of jury voir dire lasted only two days, and the public had access to all other phases of the seven-week trial; a transcript

of the proceedings was created and disclosed; "knowledge both of the media's attention to the trial and of the transcript's production * * * may have had a similar effect on the proceedings' participants as real-time public access would have had"; "'there were many members of the venire who did not become jurors but who did observe the proceedings'"; and the record contained "'no suggestion of misbehavior by the prosecutor, judge, or any other party'" and "'no suggestion that any of the participants failed to approach their duties with * * * neutrality and serious purpose.'" *Ibid.* (quoting *Weaver* v. *Massachusetts*, 137 S. Ct. 1899, 1913 (2017)).

Taking account of this Court's decision in *Weaver*, the court of appeals determined that, "in spite of the closure, the jury-selection proceedings possessed the publicity, neutrality, and professionalism that are essential components of upholding an accused's right to a fair and public trial." Pet. App. 18a; see *id.* at 12a-20a. The court found that "[a]llowing the error to stand would not leave in place an unmitigated nullification of the values and interests underlying the right at issue." *Id.* at 18a. The court observed that "the costs of remedial action here would be significant" because reversing petitioners' convictions would require "a remand for a new trial in ten consolidated cases whose original trial occurred almost five years ago, spanned approximately two months, and involved well over one hundred witnesses." *Ibid.* And in light of "[t]he practical costs" of correcting the public-trial error and "the mitigated costs of inaction," the court declined to exercise its discretion to correct the error because it could not say that the courtroom closure "'seriously affect[ed] the fairness, integrity, or public reputation of judicial pro-

ceedings.'" *Ibid.* (citation omitted; second set of brackets in original).

b. With respect to Hernandez's, Kelly's, Sistrunk's, and Villega's convictions for conspiring to distribute five or more kilograms of cocaine and 280 grams or more of crack cocaine, in violation of 21 U.S.C. 841(b)(1)(A) (2012) and 21 U.S.C. 846, the court of appeals concluded that the jury had erroneously based its drug-quantity findings on the amount of drugs involved in the conspiracy as a whole. Pet. App. 45a; see *id.* at 39a-45a; see also *id.* at 34a (observing that Cruz had not challenged the jury's verdict with respect to his drug-conspiracy conviction). The court explained that "the statutory maximum term of imprisonment [should] be determined according to the amount of drugs involved in the conspiracy as a whole," *id.* at 51a, but it concluded that "a jury, in determining drug quantity for purposes of the mandatory minimum term of imprisonment, may attribute to a defendant only those quantities involved in violations of § 841(a) that were within the scope of the conspiracy, or in furtherance of it, and were reasonably foreseeable to the defendant as a natural consequence of his unlawful agreement." *Id.* at 39a.

The court of appeals determined, however, that petitioners were not entitled to relief on plain-error review because the error the court perceived in the drug-quantity findings did not affect their substantial rights. Pet. App. 45a. The court observed that the evidence was sufficient to support the conspiracy-wide drug weight quantities that set the statutory maximum term of imprisonment under Section 846; that Kelly, Sistrunk, and Villega had each received sentences above the statutory minimum term set by Section 841(b)(1)(A), and thus had failed to show that any error

with respect to the statutory minimum had affected the sentences they actually received; and that the court was vacating Hernandez's sentence on other grounds. *Id.* at 45a & n.38, 51a-52a, 55a-56a.

c. Judge Restrepo dissented. Pet. App. 63a-70a. He would have granted plain-error relief on petitioners' public-trial claim, reversed petitioners' convictions, and remanded for a new trial. *Id.* at 63a.

ARGUMENT

Petitioners contend (20-1523 Pet. 11-19; 20-7868 Pet. 8-19; 20-7889 Pet. 8-15) that the court of appeals erred in declining to grant plain-error relief based on the district court's closure of the courtroom during jury selection. Cruz, Hernandez, Kelly, and Villega (20-1523 Pet. 20-27; 20-7868 Pet. 19-21) additionally contend that that the court of appeals erred in declining to grant plain-error relief on their claim of error in the jury's drug-quantity findings for petitioners' drug-conspiracy convictions. The court of appeals' decision was correct in both respects and does not conflict with any decision of this Court, another court of appeals, or a state court of last resort. In addition, this case would be an unsuitable vehicle in which to review either question presented. Further review is unwarranted.

1. a. "In all criminal prosecutions, the accused shall enjoy the right to a * * * public trial." U.S. Const. Amend. VI. In *Presley* v. *Georgia*, 558 U.S. 209 (2010) (per curiam), this Court confirmed "that the Sixth Amendment right to a public trial extends to the *voir dire* of prospective jurors." *Id.* at 213. In doing so, the Court looked to *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501 (1984), which "held that the *voir dire* of prospective jurors must be open to the public under the First Amendment," and *Waller* v. *Georgia*, 467 U.S. 39

(1984), which held that the Sixth Amendment public-trial right extends to pretrial suppression hearings. *Presley*, 558 U.S. at 212. As the Court explained in *Presley* and *Waller*, however, the "right to an open trial" is not absolute and "may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Id.* at 213 (quoting *Waller*, 467 U.S. at 45); see *id.* at 215 ("There are no doubt circumstances where a judge could conclude that threats of improper communications with jurors or safety concerns are concrete enough to warrant closing *voir dire*."); see also *Weaver* v. *Massachusetts*, 137 S. Ct. 1899, 1909 (2017) (explaining that "the public-trial right * * * is subject to exceptions," including where the trial court "mak[es] proper factual findings in support of the decision to" close the proceedings).

This Court has classified deprivation of the public-trial right as a "structural error" that, if preserved, is not subject to harmless-error analysis. See, *e.g.*, *United States* v. *Marcus*, 560 U.S. 258, 263 (2010) (citation omitted). When a defendant fails to object to an alleged error in the district court, however, he may not obtain appellate relief based on that asserted error unless he establishes reversible "plain error" under Federal Rule of Criminal Procedure 52(b). See *Greer* v. *United States*, 141 S. Ct. 2090, 2096-2097 (2021); *Puckett* v. *United States*, 556 U.S. 129, 134-135 (2009). To establish reversible plain error, a defendant must show "(1) 'error,' (2) that is 'plain', and (3) that 'affect[s] substantial rights.'" *Johnson* v. *United States*, 520 U.S. 461, 467 (1997) (quoting *United States* v. *Olano*, 507 U.S. 725, 732 (1993)) (brackets in original). If those first three prerequisites are satisfied, the court of appeals has

discretion to correct the error based on its assessment of whether "(4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Ibid.* (quoting *United States* v. *Young*, 470 U.S. 1, 15 (1985)) (internal quotation marks omitted; brackets in original). That inquiry "is meant to be applied on a case-specific and fact-intensive basis," *Puckett*, 556 U.S. at 142, and "the defendant has the burden of establishing each of the four requirements for plain-error relief," *Greer*, 141 S. Ct. at 2097. "Meeting all four prongs" of the plain-error test "is difficult, 'as it should be.'" *Puckett*, 556 U.S. at 135 (citation omitted).

b. The court of appeals correctly determined that petitioners failed to satisfy the fourth requirement for plain-error relief because they did not establish that the closure of the courtroom during jury selection "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." Pet. App. 18a (quoting *Olano*, 507 U.S. at 736) (brackets in original). In making that determination, the court of appeals acknowledged that the district court's closure order "to some degree compromised the values underlying the public-trial right." *Id.* at 17a. But in the circumstances of this case, it found several "countervailing factors suggesting that those values were in other respects substantially vindicated." *Id.* at 18a.

As the court of appeals recognized, the closure in petitioners' case shares many of the same features as the closure underlying the collateral ineffective assistance of counsel claim at issue in *Weaver* v. *Massachusetts*, which this Court determined had not led "to basic unfairness" or "a fundamentally unfair trial." 137 S. Ct. at 1913. First, "although the closure encompassed all of the jury-selection phase, those proceedings lasted only

two days," and "the public had access to all other phases of the trial, which in total lasted longer than seven weeks." Pet. App. 17a. Second, "a transcript of the proceedings was produced and later disclosed," thus ensuring that the public had "'access to the content of the proceeding.'" *Ibid.* (citation omitted). Third, "knowledge both of the media's attention to the trial and of the transcript's production * * * may have had a similar effect on the proceedings' participants as real-time public access would have had, keeping them 'keenly alive to a sense of their responsibility and to the importance of their functions.'" *Ibid.* (quoting *Waller*, 467 U.S. at 46) (citation omitted). Fourth, "although the general public was not, absent authorization, able to be present at jury selection, * * * 'there were many members of the venire who did not become jurors but who did observe the proceedings.'" *Ibid.* (quoting *Weaver*, 137 S. Ct. at 1913). Finally, the record contains "no suggestion of misbehavior by the prosecutor, judge, or any other party; and no suggestion that any of the participants failed to approach their duties with the neutrality and serious purpose that our system demands." *Ibid.* (quoting *Weaver*, 137 S. Ct. at 1913).[2]

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[2] Cruz, Hernandez, and Villega observe (20-1523 Pet. 14 n.2) that "[t]here was a *Batson* objection in this case," and therefore contend that the court of appeals was incorrect to state that "'there has been no suggestion of misbehavior by the prosecutor,'" Pet. App. 17a (citation omitted). After defense counsel raised a *Batson* challenge in the district court, however, the government explained that it had struck the juror in question because the juror had "multiple relatives who had been criminally convicted and imprisoned, including for drug trafficking." *Id.* at 21a. Having heard the government's explanation and determined that no other similarly situated juror (of any race) remained on the panel, defense counsel effectively abandoned the *Batson* challenge before the district court and did

c. Petitioners contend that a violation of the public-trial right "constitutes a *per se* reversible error" on plain-error review, and that the court of appeals accordingly should have reversed their convictions without requiring any case-specific showing as to the effects of the error on the fairness, integrity, or public reputation of judicial proceedings. 20-7889 Pet. 4; see 20-1523 Pet. 17 n.4; 20-7868 Pet. 8-12. Petitioners' contention is unsound. This Court has itself applied the fourth requirement of plain-error review to deny appellate relief irrespective of whether an error is considered structural. See *Johnson*, 520 U.S. at 468-470; *United States* v. *Cotton*, 535 U.S. 625, 633-634 (2002). The Court has repeatedly "emphasized that a '*per se* approach to plain-error review is flawed,'" *Puckett*, 556 U.S. at 142 (quoting *Young*, 470 U.S. at 17 n.14), and this case is no exception.

Adopting petitioners' proposed approach of automatic reversal whenever the public-trial right is violated, even where a defendant failed to raise a contemporaneous objection, would unsettle the "careful balanc[e]" that Rule 52(b) strikes between the "need to encourage all trial participants to seek a fair and accurate trial the first time around" and the "insistence that obvious injustice be promptly redressed." *United States* v. *Frady*, 456 U.S. 152, 163 (1982). Indeed, such an approach would create incentives for defendants *not* to object to violations of the public-trial right at a time when those violations could be corrected (whether through opening of the courtroom to the public or through

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not pursue it on appeal. See *ibid.* ("At no point during the hearing or afterward did the District Court or defense counsel suggest that * * * the Government's proffered reasons were pretextual * * * or that any other circumstantial evidence suggested racial bias.").

documentation of the district court's reasons for closing it), instead holding their objections in reserve to raise only if they are dissatisfied with the outcome of the trial—gamesmanship that would be almost impossible to identify on a case-by-case basis. See *Puckett*, 556 U.S. at 134 (discussing need to avoid gamesmanship); *United States* v. *Vonn*, 535 U.S. 55, 73 (2002) (same).

Petitioners Cruz, Hernandez, and Villega contend (20-1523 Pet. 15-18) that this Court's statements that a court of appeals should exercise its discretion to remedy an unpreserved error only if the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings," *Olano*, 507 U.S. at 732 (citation omitted), are "dictum" and "arguably mistaken." 20-1523 Pet. 16. Those petitioners took the opposite position in the court of appeals, however, where they recognized that the fourth requirement of the plain-error standard directs that "the court of appeals should exercise its discretion to correct the forfeited error if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." 17-3373 C.A. Reply Br. 3 (quoting *Rosales-Mireles* v. *United States*, 138 S. Ct. 1897, 1905 (2018)). See 17-3373 C.A. Br. 29 (arguing that petitioners had satisfied "[t]he final prong" of the plain-error standard); 20-1523 Pet. 12 (explaining that petitioners' appellate arguments regarding the application of the plain-error standard appeared in Hernandez's brief). Petitioners have thus forfeited, if not waived, any claim that the plain-error standard does not include the fourth requirement that this Court has repeatedly recognized. See, *e.g.*, *Cotton*, 535 U.S. at 633-634; *Olano*, 507 U.S. at 733. And that requirement is correct for the reasons given in this Court's decisions.

Petitioners Cruz, Hernandez, and Villega also take issue (20-1523 Pet. 13-15, 17) with the court of appeals' case-specific application of the fourth plain-error requirement. To the extent that their arguments are in fact case-specific, as opposed to a repackaging of their flawed argument for per se reversal, their factbound disagreement about the application of the fourth plain-error requirement to the particular circumstances of this case does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

d. Petitioners additionally contend (20-1523 Pet. 11, 18-19; 20-7868 Pet. i, 8-10; 20-7889 Pet. i, 4,) that this Court should grant certiorari to determine "whether a structural error inherently 'affects substantial rights'" under the third requirement of the plain-error test. 20-1523 Pet. 11. During the proceedings below, however, the court of appeals "declin[ed] to conduct an inquiry at prong three" because its "conclusion at prong four simply render[ed] a decision on that question unnecessary." Pet. App. 10a n.9; see *id.* at 10a. Because this Court is one "of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), it should not address in the first instance petitioners' arguments as to the third requirement of plain-error review. See *Byrd* v. *United States*, 138 S. Ct. 1518, 1527 (2018) (noting that "it is generally unwise" for this Court "to consider arguments in the first instance"); *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012) (declining to review claim "without the benefit of thorough lower court opinions to

guide our analysis of the merits"). And doing so could not affect the outcome here unless the Court were also to find error in the court of appeals' application of the discretionary fourth plain-error element.

In any event, the classification of public-trial error as "structural" for purposes of determining whether the government can ever establish that a *preserved* error was "harmless 'beyond a reasonable doubt,'" *Neder* v. *United States*, 527 U.S. 1, 7 (1999) (citation omitted), does not excuse petitioners from making all four showings that this Court has held Rule 52(b) requires in order to obtain relief on an *unpreserved* claim of error—including an effect on substantial rights. In the context of post-conviction review—where, as with claims of unpreserved error on direct appeal, the burden of establishing prejudice rests on the prisoner rather than the government—this Court recently held that a prisoner must make a case-specific showing of prejudice in order to obtain relief on a public-trial claim. See *Weaver*, 137 S. Ct. at 1913-1914. The Court explained that, notwithstanding the undisputedly structural nature of the error, "the costs and uncertainties" of requiring a new trial were high and the "finality interest is more at risk," justifying imposition of the normal prejudice standard. *Id.* at 1912. Although the finality concerns are not as acute in the direct-review context, the cost of reversing a prejudice-free verdict remains high, and sandbagging and other concerns likewise counsel in favor of applying the normal prejudice requirement of Rule 52(b). See *Puckett*, 556 U.S. at 141-142 (requiring prejudice analysis in plain-error context for error that, while not structural, would not require harmless-error analysis if preserved).

e. No conflict exists between the decision below and the decisions of other courts of appeals or state courts of last resort. In arguing otherwise, petitioners principally contend (20-1523 Pet. 17-18; 20-7868 Pet. 12-14; 20-7889 Pet. 10-11) that the decision below conflicts with *United States* v. *Negrón-Sostre*, 790 F.3d 295 (1st Cir. 2015), in which the First Circuit concluded that a courtroom closure during jury selection satisfied the fourth requirement of the plain-error standard. *Id.* at 306. But as the court of appeals observed (Pet. App. 15a-16a n.12), *Negrón-Sostre* predated *Weaver* and rested on the First Circuit's earlier decision in *Owens* v. *United States*, 483 F.3d 48 (2007), see *Negrón-Sostre*, 790 F.3d at 306, which the First Circuit has since recognized was abrogated by *Weaver*, see *Lassend* v. *United States*, 898 F.3d 115, 122 (1st. Cir. 2018), cert. denied, 139 S. Ct. 1300 (2019). And although the court of appeals perceived some disagreement with *Negrón-Sostre*, see Pet. App. 15a n.12, it also emphasized the case-specific nature of the analysis and outcome here, see *id.* at 15a-18a. *Negrón-Sostre* thus does not establish that, following *Weaver*, the First Circuit would disagree with the decision below.

Likewise, no conflict exists between the decision below and the Second Circuit's decisions in *United States* v. *Gupta*, 699 F.3d 682 (2012), and *United States* v. *Gomez*, 705 F.3d 68, cert. denied, 571 U.S. 817 (2013). In *Gupta*, the Second Circuit vacated the defendant's conviction because the district court had closed the courtroom for the entirety of jury selection, but the court of appeals did so only after finding that the defendant had not forfeited his public-trial claim. 699 F.3d at 690. Because the Second Circuit thus did not apply the plain-error standard in *Gupta*, that case does not

show that the Second Circuit would disagree with the application of the fourth plain-error requirement in petitioners' case. And in *Gomez*, the Second Circuit rejected the defendant's plain-error challenge to the exclusion of his family from the courtroom during jury selection, finding that that exclusion "cannot be viewed as one that affected the fairness, integrity, or public reputation of judicial proceedings." 705 F.3d at 76. That decision accords with the decision below.

Nor does any conflict exist between the decision below and *State* v. *Brightman*, 122 P.3d 150 (Wash. 2005), or *State* v. *Martinez*, 956 N.W.2d 772 (N.D. 2021). In *Brightman*, the Supreme Court of Washington did not address the plain-error standard in Fed. R. Crim. P. Rule 52(b) or a state equivalent, 122 P.3d at 156, and thus did not consider whether the public-trial error in that case "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736; see *Brightman*, 122 P.3d at 154-156. Although the Supreme Court of North Dakota did consider that question in *Martinez*, it did so in the context of applying the North Dakota Rules of Criminal Procedure, not federal Rule 52(b). 956 N.W.2d at 791.

Finally, while Sistrunk briefly asserts (20-7889 Pet. 12-13) that the decision below conflicts with the Sixth Circuit's decision in *United States* v. *Simmons*, 797 F.3d 409 (2015), he acknowledges that *Simmons* addressed a *preserved* public-trial claim. The decision accordingly did not even concern the plain-error standard that Sistrunk acknowledges (20-7889 Pet. 4) governs in this case, let alone apply it in a manner that conflicts with the approach taken by the court of appeals here. And while Kelly contends (20-7868 Pet. 15-16) that the decision below erroneously "fail[ed] to follow" the Third

Circuit's earlier decision in *United States* v. *Syme*, 276 F.3d 131, cert. denied, 537 U.S. 1050 (2002), which "assume[d]" that a structural error "would constitute per se reversible error even under plain error review," *id.* at 155 n.10, the court of appeals correctly determined that that statement from *Syme* is non-binding dictum and contrary to this Court's precedent. Pet. App. 11a n.10. In any event, Kelly's assertion of an intracircuit division of authority within the Third Circuit does not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

f. In any event, this case would be an unsuitable vehicle for addressing the first question presented because of the "sparse record" concerning the practical effect of the district court's closure order. Pet. App. 16a. Although Cruz, Hernandez, and Villega contend that family members of Cruz and Hernandez attempted to attend jury selection and were excluded based on the district court's order, 20-1523 Pet. 15, the record contains no evidence that anyone objected to the district court's order and no evidence that any individual or news organization either sought authorization to attend jury selection or was "turned away after attempting to attend the proceedings." Pet. App. 16a. The limited record on the public-trial issue would make this case an unsuitable vehicle in which to make rules governing the fourth plain-error requirement, which "is meant to be applied on a case-specific and fact-intensive basis." *Puckett*, 556 U.S. at 142.

2. Although the court of appeals observed that only Hernandez and Sistrunk pressed the argument below, see Pet. App. 39a, 45a, Cruz, Hernandez, Kelly, and

Villega all now contend (20-1523 Pet. 20-27; 20-7868 Pet. 19-21) that the drug-quantity findings underlying their convictions for conspiring to distribute controlled substances, in violation of Section 846, are plainly erroneous and require vacatur of their sentences on all drug-related counts and on the RICO conspiracy count. No further review is warranted.

a. Under 21 U.S.C. 846, a defendant who "conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." And 21 U.S.C. 841(b)(1)(A)(iii) provides that unlawful drug distribution in violation of 21 U.S.C. 841(a) "involving" 280 grams or more of cocaine base carries a statutory minimum prison term of ten years, and a statutory maximum prison term of life. In petitioners' case, the court of appeals determined that the jury should have assessed the amount of drugs foreseeable to each defendant, rather than the overall amount attributable to the conspiracy as a whole, to determine whether that ten-year statutory minimum applied. Pet. App. 39a-45a. Because petitioners had not raised that issue in district court, however, the court of appeals applied plain-error review and correctly determined that petitioners had not shown that the error the court perceived had affected their substantial rights. *Ibid.* In light of the trial evidence, the jury would have concluded that each petitioner's conspiracy offense involved at least 280 grams of cocaine base. See *id.* at 53a-54a.

As the court of appeals observed, one trial witness testified that, "in the early years just after 2002, he received 1 kilogram of crack from each of Hernandez, Kelly, and Cruz." Pet. App. 53a. The same witness

testified that in later years, when he was working closely with Sistrunk and others, he brought 500 to 1000 grams of crack back from New York every couple of days, and he distributed and saw his friends distribute "many kilos of crack." *Ibid.* (citation omitted). Additional evidence showed that Villega aided Hernandez in the collection of a drug debt, distributed drugs himself, and frequented a basement from which heroin and 61 grams of crack cocaine was seized. *Ibid.* In any event, the fact-bound issue of the precise drug quantity foreseeable to petitioners in this case does not warrant this Court's review.

b. Cruz, Hernandez, Kelly, and Villega urge (20-1523 Pet. 20-27) this Court to grant review to consider a novel interpretation of the drug statutes that the court of appeals' decision does not address. In their view (*id.* at 26 n.15), no matter how much crack cocaine conspirators agree to distribute, anticipate distributing, or actually do distribute, the punishment for the conspiracy as a whole cannot be greater than the punishment for the largest single transaction the conspiracy encompassed. Thus, even where, as here, the evidence shows that the defendants engaged in a years-long conspiracy to distribute controlled substances in amounts far exceeding the threshold levels in Section 841(b)(1)(A), they could not be sentenced as provided there so long as they restricted the size of individual distribution events.

As Cruz, Hernandez, and Villega acknowledge (20-1523 Pet. 25), no court of appeals has adopted their theory. While Cruz, Hernandez, and Villega (*id.* at i) contend that the courts of appeals have adopted *other* approaches to determining the quantity of drugs involved in a conspiracy to distribute a controlled substance, they identify no circuit that would disagree with the

Third Circuit's bottom-line determination that any error in the jury's drug-quantity findings in this case did not affect petitioners' substantial rights. And although Kelly contends (20-7868 Pet. 19-20) that the decision below conflicts with the court of appeals' earlier decision in *United States* v. *Rowe*, 919 F.3d 752 (3d Cir. 2019), the court of appeals relied on *Rowe* in its decision here, explaining that *Rowe* provided "the legal framework governing our inquiry," Pet. App. 35a, and that its decision in petitioners' case "follow[ed] from the basic principles of our precedent," including *Rowe*, *id.* at 43a. Kelly does not explain why the court of appeals was wrong to conclude that its decision accorded with *Rowe*, and in any event, any intracircuit division of authority within the Third Circuit does not warrant this Court's review. See *Wisniewski*, 353 U.S. at 902.

Nor does conflict exist between the court of appeals' decision and *Alleyne* v. *United States*, 570 U.S. 99 (2013), in which this Court determined that facts that increase a statutory minimum penalty must be found by a jury beyond a reasonable doubt. *Id.* at 116. *Alleyne* did not consider the application of Section 841(b)(1)(A) or 846 and does not otherwise cast doubt on the court of appeals' determination that any error in the jury's drug-quantity findings in petitioners' case did not affect petitioners' substantial rights.

c. At all events, this case would be an unsuitable vehicle in which to address petitioners' statutory argument because petitioners failed to raise this claim in district court. Pet. App. 45a. As a result, the court of appeals reviewed petitioner's claim only for plain error, *ibid.*, and the same stringent standard would apply before this Court. See Fed. R. Crim. P. 52(b); *Olano*, 507 U.S. at 731-732. Especially in light of petitioners'

inability to identify any court that has previously adopted (or even entertained) their novel interpretation of Section 846, petitioners could not establish that the error they allege here was "plain," nor could they show that it "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 467 (citation omitted).

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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