No. 01-687

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

LEONARD COTTON, MARQUETTE HALL, LAMONT THOMAS, MATILDA HALL, JOVAN POWELL, JESUS HALL, AND STANLEY HALL, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence requires a court of appeals automatically to vacate the enhanced sentence, notwithstanding that the defendant did not object to the sentence in the district court, the government introduced overwhelming proof of the fact that supports the enhanced sentence, and the defendant had notice that the fact could be used to seek an enhanced sentence.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 261 F.3d 397.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 2001. The petition for a writ of certiorari was filed on October 31, 2001, and granted on January 4, 2002. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *.

2. The relevant provisions of Sections 841 and 846 of Title 21 of the United States Code (1994 & Supp. V 1999) are reproduced in the Appendix to the Petition at 36a-47a.

STATEMENT

1. In October 1997, a federal grand jury in the District of Maryland returned an indictment charging respondents and others with conspiring between February 1996 and May 1997 to distribute and to possess with the intent to distribute 5 kilograms or more of cocaine and 50 grams or more of cocaine base, in violation of 21 U.S.C. 846 and 841(a)(1). J.A. 1, 47-48. A superseding indictment returned in March 1998 extended the time period of the conspiracy to December 1997 and added five more defendants. The superseding indictment charged a conspiracy to distribute and to possess with the intent to distribute a "detectable amount" of cocaine and cocaine base, without alleging that any specific or threshold amounts of drugs were involved in the conspiracy. J.A. 58-59. At their arraignments on both indictments, respondents were informed that the maximum penalty for the conspiracy offense was life imprisonment. Gov't C.A. Br. 45.

2. The evidence at trial established that respondents operated a drug trafficking organization that distributed substantial quantities of cocaine and cocaine base (also known as crack cocaine) in Baltimore, Maryland. The organization was headed by respondent Stanley Hall, Jr. The organization purchased cocaine in kilogram quantities from a dealer in New York, manufactured it into crack cocaine, and bagged it for distribution to dealers who sold the drugs to their customers. The government's witnesses included, in addition to cooperating co-conspirators, FBI agents and Baltimore police officers, who testified about undercover

drug purchases, arrests and searches of members of the conspiracy, and searches of their residences. That testimony established that the arrests and searches resulted in the seizure of approximately 380 grams of cocaine base, as well as cocaine, drug paraphernalia, firearms, and currency. Pet. App. 3a, 6a; Gov't C.A. Br. 4-28.

The district court instructed the jury that it could find the defendants guilty if it found beyond a reasonable doubt that they conspired to distribute and possess with intent to distribute "cocaine hydrochloride *and* cocaine base," but that it "need not be concerned with the quantities." The court added that, "as long as you find that a defendant conspired to distribute or possess[] with intent to distribute *these controlled substances*, the amounts involved are not important." Supp. C.A. App. 8, 13; see Pet. App. 6a. The jury found the seven respondents guilty. Pet. App. 3a-4a.

3. The district court sentenced respondents pursuant to the graduated penalties set forth in 21 U.S.C. 841(b). As relevant here, Section 841(b)(1)(A) prescribes "a term of imprisonment which may not be * * * more than life" for drug offenses involving at least 5 kilograms of cocaine or at least 50 grams of cocaine base. Section 841(b)(1)(C), however, prescribes "a term of imprisonment of not more than 20 years" for drug offenses involving any detectable quantity of a Schedule II controlled substance, such as cocaine or cocaine base.

The presentence reports (PSRs) prepared by the United States Probation Office determined that respondents' base offense level under the Sentencing Guidelines was 38, the level applicable to offenses involving 1.5 kilograms or more of cocaine base. See Sentencing Guidelines § 2D1.1(c)(1). Respondents objected to that determination, but they did not dispute that their conspiracy offense involved at least 50 grams of cocaine base. See Pet. App. 28a (Wilkinson, C.J., concurring in part and dissenting in part) (noting that

respondents "did not argue that the conspiracy distributed less than 50 grams of cocaine base").[1]

The district court found, based on the trial testimony, that respondent Matilda Hall was responsible for at least 500 grams of cocaine base, and that the other respondents were each responsible for at least 1.5 kilograms of cocaine base. Applying the Sentencing Guidelines, the court sentenced respondents Matilda Hall and Jovan Powell to terms of 30 years' imprisonment, and the other respondents to terms of life imprisonment. Pet. App. 3a-4a.

4. On appeal, respondents argued that their sentences were invalid under this Court's intervening decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), because drug quantity was not alleged in the superseding indictment or proved to the jury beyond a reasonable doubt. The court of appeals vacated respondents' sentences and remanded for resentencing to terms of not more than 20 years' imprisonment. Pet. App. 7a-16a.

Because respondents had not raised an *Apprendi* claim in the district court, the court of appeals held that the claim was reviewable under the plain-error standard. Under that standard, an appellate court may correct an error not raised below only if the error is "plain," "affect[s] substantial rights," and "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Olano*, 507 U.S. 725, 731, 732 (1993); see Fed. R. Crim. P. 52(b); see also Pet. App. 8a (citing *Olano*).

The court of appeals noted that it had previously held in *United States* v. *Promise*, 255 F.3d 150 (4th Cir. 2001) (en banc), petition for cert. pending, No. 01-6398 (docketed Sept. 20, 2001), that "because drug quantity 'must be treated as an

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[1] Several respondents argued that their base offense levels should be reduced to 32, 34, or 36, but each of those levels entails responsibility for at least 50 grams of cocaine base. See U.S. Pet. Reply 4-5 n.2; see Sentencing Guidelines § 2D1.1(c)(2), (3) and (4).

element of an aggravated drug trafficking offense[]' under 21 U.S.C. § 841, the failure to charge a specific threshold drug quantity in the indictment and to submit the quantity issue to the jury constitutes plain error." Pet. App. 8a (quoting *Promise*, 255 F.3d at 156). *Promise* also concluded that the omission of drug quantity from the indictment affects a defendant's substantial rights whenever the defendant receives a term of imprisonment greater than that authorized by Section 841(b) for offenses involving any detectable quantity of the drug. The *Promise* court had not resolved, however, whether that error "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings,' so that we should exercise our discretion to recognize the error." *Ibid.* The court in this case "answer[ed] that question in the affirmative." *Ibid.*

The court of appeals, citing *Ex parte Bain*, 121 U.S. 1 (1887), and *Stirone* v. *United States*, 361 U.S. 212 (1960), held that "an indictment setting forth all the essential elements of an offense is both mandatory and jurisdictional." Pet. App. 10a. Accordingly, the court concluded that "the district court exceeded its jurisdiction in sentencing [respondents] for a crime with which they were never charged, thus depriving them of the constitutional right to 'answer' only for those crimes presented to the grand jury." *Id.* at 11a. The court also noted that in *Silber* v. *United States*, 370 U.S. 717 (1962) (per curiam), the Court reversed the defendant's conviction based on a defect in the indictment, even though the defendant had not raised the error in either the court of appeals or this Court. Pet. App. 12a-13a. "Likewise," the court stated, "*sentencing* a defendant for an unindicted crime also seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* at 14a.

The court of appeals rejected the government's argument that the error in imposing sentences based on a fact not alleged in the indictment did not warrant reversal under the

plain-error standard because the evidence overwhelmingly established that respondents' offenses involved the 50 grams of cocaine base needed to support sentences of up to life imprisonment under 21 U.S.C. 841(b)(1)(A)(iii). The court held that the strength of the evidence was "not a relevant consideration" in determining whether to reverse a sentence based on an omission from the indictment. Pet. App. 15a. The court reasoned that "a reviewing court may not speculate about whether a grand jury would or would not have indicted a defendant for a crime with which he was never charged," and that to do so would "usurp the role of the grand jury" and "result in nothing less than a constructive amendment of the indictment, * * * which itself is reversible plain error." *Id.* at 15a, 16a.

Chief Judge Wilkinson dissented in part. See Pet. App. 23a-35a. Relying on *Johnson* v. *United States*, 520 U.S. 461, 469-470 (1997), he concluded that respondents could not satisfy the fourth, discretionary component of the plain-error test. He noted that the evidence that respondents participated in a conspiracy to distribute at least 50 grams of cocaine base was "overwhelming." Pet. App. 23a, 24a. "[I]t would constitute a manifest injustice," he explained, "to reduce [respondents'] sentences when the evidence undeniably demonstrates that they committed the greater statutory offense." *Id.* at 23a. Although the superseding indictment did not specify drug quantity, he found it "difficult to believe that [respondents] lacked notice that they faced 21 U.S.C. § 841(b)'s strictest penalties." He observed that the initial indictment alleged the threshold drug quantity and that, in light of the evidence at trial, respondents' "counsel clearly were aware that the government could seek the elevated penalties available under 21 U.S.C. § 841(b)(1)(A)." *Id.* at 28a-29a.

Finally, Chief Judge Wilkinson criticized the majority for "inappropriately replac[ing] the discretionary, case-by-case

assessment dictated by the fourth prong" of the plain-error test "with an essentially categorical approach when the error consists of an indictment defect." Pet. App. 30a. Here, he emphasized, the majority's approach undermines Congress's policy to impose more stringent punishment for more serious violators, because it equates the punishment of "the conspiracy's kingpin and its underlings." *Id.* at 34a. In addition, he observed that the majority's approach unfairly disregards the fact that the superseding indictment was fully in accordance with then-prevailing law to support the enhanced sentences imposed and that, in light of the overwhelming proof, there is no doubt that the grand jury, if asked, would have included the necessary drug-quantity allegations in the indictment. *Id.* at 29a-30a. Overturning respondents' sentences in such circumstances, he concluded, cannot be justified on plain-error review. *Ibid.*

SUMMARY OF ARGUMENT

I. In *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court made clear that any fact, other than a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be charged in a federal indictment, submitted to a jury, and proved beyond a reasonable doubt. In the federal drug laws, statutory maximum sentences increase when greater drug quantities are involved in the offense. Accordingly, in light of *Apprendi*, the imposition of a sentence above the otherwise-applicable statutory maximum for a drug offense is error if the enhancing fact of threshold drug quantity is not alleged in the indictment. The district court committed error in this case by imposing enhanced sentences in the absence of such an allegation. Contrary to the view of the court of appeals, however, that error does not require automatic reversal of the enhanced sentences.

This Court has made clear that most constitutional errors can be harmless, see *Neder* v. *United States*, 527 U.S. 1, 8

(1999), and that when the defendant forfeits an objection by failing to raise it in the district court, the more stringent standard of plain-error review applies, see *Johnson* v. *United States*, 520 U.S. 461, 465-467 (1997). The error in this case is not so serious as to amount to a "structural" defect that cannot be reviewed for harmlessness. And even if it were, the error does not automatically warrant reversal on plain-error review when the defendant failed to object in the district court.

A. In *Neder*, the Court held that the failure to secure a required finding from the petit jury is subject to harmless-error review, and that the error is harmless when the record makes it "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." 527 U.S. at 18. An analogous approach applies to the failure to secure a required finding from the grand jury. The grand jury affords far less powerful protection for the accused than the petit jury. The grand jury finds only probable cause, while the petit jury must find guilt beyond a reasonable doubt. The grand jury operates on majority vote, while a federal petit jury must be unanimous. The grand jury does not hear from the target and need not hear exculpatory evidence, while a petit jury hears the accused's defense. And a grand jury's refusal to indict leaves the prosecutor free to try again, while a petit jury's acquittal ends the defendant's jeopardy. Indeed, the grand jury is not even an essential component of due process applicable to the States, while the petit jury is. In light of *Neder*'s holding that harmless-error review applies to the failure to secure a required finding from the petit jury, harmless-error review must also apply to failures to secure required findings from the grand jury.

B. A reviewing court can readily apply harmless-error principles to the erroneous imposition of a sentence based on a fact not alleged in the indictment. When the record

establishes that any rational grand jury would have found the omitted fact, and the defendant had adequate notice that the fact would affect his sentence, the absence of an allegation necessary to support the enhanced sentence does not affect substantial rights, but rather is harmless error.

C. Harmless-error analysis does not usurp the role of the grand jury. The duty of the grand jury is to indict when the evidence shows probable cause to believe that the defendant committed a crime. Outside of the unique context of racial discrimination in the selection of the grand jurors, see *Vasquez* v. *Hillery*, 474 U.S. 254 (1986), normal principles of harmless-error analysis apply to the grand jury. See *United States* v. *Mechanik*, 475 U.S. 66 (1986).

Neither *Stirone* v. *United States*, 361 U.S. 212 (1960), nor *Silber* v. *United States*, 370 U.S. 717 (1962) (per curiam), requires otherwise. Those cases preceded this Court's comprehensive adoption of harmless-error analysis in *Chapman* v. *California*, 386 U.S. 18 (1967). In addition, the defendants in those cases made timely objections in the district court, the defendant in *Stirone* raised fair notice concerns, and the Court in *Silber* did not purport to articulate a universally applicable rule of reversal.

D. Even if the error of imposing an enhanced sentence in the absence of a required allegation in the indictment were considered "structural" error, it is subject to the plain-error rule when the defendant fails to object in the district court. *Johnson*, 520 U.S. at 468-469. In *Johnson*, the Court assumed that the failure to obtain a petit jury finding on an element was "structural error," but held that when the evidence on that element was overwhelming and uncontroverted, the error did not "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings." 520 U.S. at 469-470. The same conclusion applies when the evidence establishes that any rational grand jury would have

found probable cause to believe the fact that was necessary to support the enhanced sentence.

E. The omission of drug quantity allegations is not jurisdictional error. The Grand Jury Clause of the Fifth Amendment accords the accused a personal constitutional right to be tried and sentenced on an indictment that alleges all essential facts. A violation of that right, however, does not impair the jurisdiction of the court. See *Lamar* v. *United States*, 240 U.S. 60, 64 (1916) (Holmes, J.). *Ex parte Bain*, 121 U.S. 1, 13 (1887), is not to the contrary. The jurisdictional language in that case dates from a era in which *only* jurisdictional errors were cognizable on habeas corpus, leading to an expansive use of that term by the Court. The language of *Ex parte Bain* is no longer an accurate description of indictment errors, as is shown by later authority.

II. The sentences in this case should be affirmed. Respondents did not object to their enhanced sentences in the district court, and therefore the plain-error standard applies. Even under the harmless-error standard, the imposition of enhanced sentences without the inclusion of threshold drug quantities in the indictment does not require reversal in this case.

In light of the nature of the conspiracy and the evidence at trial, any rational grand jury would have found that respondents' offense involved a sufficient quantity of drugs to authorize a maximum sentence of life imprisonment. And the omission of drug quantity from the superseding indictment did not deprive respondents of fair notice of the applicability of enhanced penalties. Like other defendants indicted before *Apprendi*, respondents could not have reasonably believed that their sentences for drug conspiracy would be limited to the penalties for the lowest quantity of the drug involved in the offense. In this case, respondents also had notice from the original indictment that increased

drug quantities would boost the statutory maximum sentence.

Even assuming that the error in this case affected substantial rights, it still does not warrant reversal under the plain-error standard. An error not raised below justifies reversal only when the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Johnson*, 520 U.S. at 467. In light of the compelling evidence of drug quantity in this case, and the longstanding pre-*Apprendi* practice that prevailed in the federal courts, this case does not involve the sort of "particularly egregious error[]," *United States* v. *Young*, 470 U.S. 1, 15 (1985), that warrants plain-error relief. Indeed, it would be the refusal to apply the graduated penalties that Congress provided —effectively reducing a drug kingpin's sentence to that of a street-level dealer—that would undermine respect for judicial proceedings.

ARGUMENT

I. THE IMPOSITION OF A SENTENCE THAT EXCEEDS THE OTHERWISE-APPLICABLE STATUTORY MAXIMUM BASED ON A FACT NOT ALLEGED IN THE INDICTMENT IS SUBJECT TO HARMLESS-ERROR AND PLAIN-ERROR REVIEW

Since *Chapman* v. *California*, 386 U.S. 18 (1967), this Court has recognized that constitutional error in a criminal case does not always mandate reversal. The harmless-error standard, which applies when the defendant made a timely objection in the district court, requires an appellate court to "disregard errors that are harmless beyond a reasonable doubt," *i.e.*, errors that "do[] not affect substantial rights." *Neder* v. *United States*, 527 U.S. 1, 7 (1999); Fed. R. Crim. P. 52(a). The plain-error standard, which applies when the defendant did not object in the district court, also requires

an appellate court to disregard errors that do not affect the defendant's substantial rights; but it further requires affirmance even when they do, provided that those errors do not "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings." *Johnson* v. *United States*, 520 U.S. 461, 467 (1997); see Fed. R. Crim. P. 52(b).

In this case, because respondents did not object in the district court to the imposition of a sentence in excess of the otherwise-applicable statutory maximum based on a fact not alleged in the indictment, the court of appeals applied the plain-error standard. Pet. App. 7a. The court concluded, however, that *any* sentence that exceeds the otherwise-applicable statutory maximum based on a fact not alleged in the indictment must be reversed, without regard to whether the defendant raised any objection at trial, whether a grand jury would necessarily have found the omitted fact, and whether the defendant had adequate notice that the fact would be relevant to determining the statutory maximum sentence. That conclusion is incorrect. While the sentencing court did err in this case, the type of error at issue is subject to plain-error review, and a reviewing court should affirm when it is clear that a rational grand jury, if asked, would have found the omitted fact and that the defendant had adequate notice that the fact would be at issue and could increase the sentence.

A. A Sentence That Exceeds The Otherwise-Applicable Statutory Maximum Based On A Fact Omitted From The Indictment Is Error

1. The Fifth Amendment's Grand Jury Clause states: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. Amend. V. The function of the grand jury right is to provide an accused with notice of the charge against him so that he may prepare a defense; to enable assertion of the right not to be put in jeopardy a

second time for the same offense; and to assure that the charge is "founded upon reason" and not "dictated by an intimidating power or by malice and personal ill will." *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962); *United States* v. *Miller*, 471 U.S. 130, 134-135 (1985); *Russell* v. *United States*, 369 U.S. 749, 764 (1962); see also *United States* v. *Mechanik*, 475 U.S. 66, 73-74 (1986) (O'Connor, J., concurring); *Berger* v. *United States*, 295 U.S. 78, 82 (1935); *Hale* v. *Henkel*, 201 U.S. 43, 59 (1906); 3 Joseph Story *Commentaries on the Constitution* § 1779 (1833) (observing that the "important public functions" of the grand jury are to provide an accused with "full notice of the charge" against him and to protect against "vindictive prosecutions, either by the government, or by political partisans, or by private enemies") (reprinted in 5 *The Founders' Constitution* 295 (Philip B. Kurland & Ralph Lerner, eds., 1987)). The Grand Jury Clause entitles an accused to an indictment that sets forth each essential element of the offense with which he is charged. See, *e.g.*, *Almendarez-Torres* v. *United States*, 523 U.S. 224, 228 (1998); *Miller*, 471 U.S. at 136.

An indictment returned by the grand jury, however, is not indispensable to a fundamentally fair criminal proceeding. The Court has held that the right to a grand jury indictment is not applicable to the States through the Fourteenth Amendment. *Hurtado* v. *California*, 110 U.S. 516 (1884). In *Hurtado*, the Court upheld the commencement of a state prosecution by an information prepared by a prosecutor, after a determination of probable cause by a magistrate. Rejecting the view that a grand jury indictment is an intrinsic feature of due process, the Court observed that the method of initiating the prosecution was "merely * * * preliminary" and "can result in no final judgment, except as the consequence of a regular judicial trial, conducted precisely as in cases of indictments." *Id.* at 538. Today, the right to grand jury indictment remains one of the few criminal

procedural protections in the Bill of Rights that have not been made applicable to the States. See *Albright* v. *Oliver*, 510 U.S. 266, 272-273 (1994); *Alexander* v. *Louisiana*, 405 U.S. 625, 633 (1972). And fewer than half of the States require grand jury indictments in all felony cases as a matter of their own constitutional or statutory law. 1 Sara Sun Beale et al., *Grand Jury Law and Practice* § 1:1, at 1-3, § 1:7, at 1-32 & n.1.1 (2d ed. 2001) (hereinafter *Grand Jury Law*).

2. In *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court held, as a matter of constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. *Apprendi*, which involved a state court conviction, did "not address the indictment question separately." *Id.* at 477 n.3. The Court's holding, however, was based in substantial part on the conclusion that, under the common law and thereafter, facts that increased the punishment for a crime had to be charged in the indictment and found by the jury. See *id.* at 478-481; see also *id.* at 483 n.10 (historical evidence "point[s] to a single, consistent conclusion: The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury"). *Apprendi* also noted that its holding was "foreshadowed" by the Court's statement in *Jones* v. *United States*, 526 U.S. 227 (1999), that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." 530 U.S. at 476 (quoting *Jones*, 526 U.S. at 243 n.6). Under the reasoning in *Apprendi*, facts that must be proved to the jury beyond a reasonable doubt to support an increase in the statutory

maximum prison sentence must also be alleged in an indictment in a federal case.[2]

3. Before *Apprendi*, the courts of appeals had uniformly concluded that threshold drug quantities that increased the statutory maximum sentence under 21 U.S.C. 841(b) were sentencing factors that did not have to be charged in an indictment or proved to a petit jury beyond a reasonable doubt. See *United States* v. *Sanchez*, 269 F.3d 1250, 1266-1267 & n.30 (11th Cir. 2001) (en banc) (discussing pre-*Apprendi* cases), petition for cert. pending, No. 01-8100 (docketed Jan. 15, 2002). After *Apprendi*, the courts of appeals have uniformly concluded that threshold drug quantities must be charged in an indictment in order to support an increase in the statutory maximum sentence under Section 841(b). See, *e.g.*, *United States* v. *Thomas*, 274 F.3d 655, 663 (2d Cir. 2001) (en banc) (citing cases from eight other circuits). That conclusion follows from the analysis in *Apprendi* and the nature of the sentencing scheme in Section 841(b).

Section 841 defines drug trafficking offenses and establishes graduated penalties depending on the presence of various aggravating facts. For example, when a defendant has been found guilty of a drug offense involving *any* detectable quantity of a Schedule II controlled substance (such as cocaine or cocaine base, see 21 U.S.C. 812), Section 841(b)(1)(C) authorizes "a term of imprisonment of not more than 20 years." If, however, a defendant's offense involves at least 500 grams of cocaine or at least 5 grams of cocaine base, he is subject to a term of imprisonment that "may not be less than 5 years and not more than 40 years." 21 U.S.C. 841(b)(1)(B)(ii) and (iii). And if his offense involves at least 5 kilograms of cocaine or at least 50 grams of cocaine base, he

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[2] No question of how *Apprendi* principles apply in a capital case, cf. *Ring* v. *Arizona*, No. 01-488 (to be argued Apr. 22, 2002), is at issue here.

is subject to a term of imprisonment that "may not be less than 10 years or more than life." 21 U.S.C. 841(b)(1)(A)(ii) and (iii). Drug quantity can therefore raise the statutory maximum sentence under Section 841. Consequently, under *Apprendi*, the amount of cocaine or cocaine base involved in a drug trafficking offense must be alleged in the indictment in order to support a sentence above 20 years' imprisonment.[3]

In this case, the superseding indictment did not allege the threshold quantity of drugs involved in the offense, and respondents did not waive the right to indictment. Although *Apprendi* was decided after the district court proceedings, it is applicable here because the case is still pending on direct review. See *Griffith* v. *Kentucky*, 479 U.S. 314 (1987). Accordingly, the imposition of sentences above 20 years' imprisonment in this case was error. The error was also "plain" after *Apprendi* within the meaning of Federal Rule of Criminal Procedure 52(b). See *Johnson*, 520 U.S. at 467-468 ("[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration.").[4]

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[3] Similar quantity-based increases apply to other controlled substances, such as heroin, LSD, and methamphetamine. In addition, enhanced sentencing ranges apply to defendants with prior drug felony convictions. For example, a defendant with one prior drug felony conviction is exposed to a sentence of up to 30 years' imprisonment under 21 U.S.C. 841(b)(1)(C); of 10 years' to life imprisonment under 21 U.S.C. 841(b)(1)(B); and of 20 years' to life imprisonment under 21 U.S.C. 841(b)(1)(A). Offenses that result in bodily injury or death also receive enhanced punishment under the subparagraphs of Section 841(b).

[4] The conclusion that under *Apprendi* threshold drug quantities must be charged in a federal indictment and proved to the jury in order to support a sentence above the otherwise-applicable statutory maximum does not require a determination that drug quantity is formally an "element" of the offense under Section 841 or Section 846. Whether drug quantity is viewed as an "element," see, *e.g.*, *United States* v. *Thomas*, 274 F.3d at 663

The error, however, does not mandate automatic reversal of respondents' sentences. Like most constitutional errors, the omission of an element or sentence-enhancing fact from an indictment does not entitle a defendant to relief when it is harmless (when the defendant's objection is preserved for appeal), or when it fails to satisfy the stringent plain-error standard (when the objection has been forfeited). Properly analyzed, the error in omitting a required allegation from an indictment does not necessarily affect substantial rights or impair the fairness, integrity, or public reputation of judicial proceedings. And, contrary to the court of appeals' position, the error is not "jurisdictional" in character, but involves the violation of a personal constitutional right.

B. The Imposition Of An Enhanced Sentence Based On A Fact Omitted From The Indictment Does Not Intrinsically "Affect Substantial Rights"

This Court has recognized that "most constitutional errors" in federal criminal prosecutions are subject to harmless-error review. *Neder* v. *United States*, 527 U.S. 1, 8 (1999). The Court explained in *Neder* that, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." *Ibid.* (quoting *Rose* v. *Clark*, 478 U.S. 570, 579 (1986)). The omission from the indictment of a fact that increases the statutory maximum sentence does not implicate the defendant's right to counsel or the impartiality of the adjudicator. And there is no sound basis for overcoming the

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(en banc), or as a sentencing factor subject to the constitutional constraints of *Apprendi*, see *Sanchez*, 269 F.3d at 1268 ("*Apprendi* does not affect our prior statutory construction of § 841(b) as setting forth purely sentencing factors"), the issue in this case is the same: whether the failure to allege drug quantity in the indictment requires automatic reversal of a sentence that exceeds the otherwise-applicable statutory maximum.

"strong presumption" that the error here is therefore subject to harmless-error review. *Neder* holds that harmless-error analysis applies to a failure to obtain a petit jury finding on an offense element. The same conclusion applies to the failure to obtain a similar finding from a grand jury.

1. In *Neder*, the Court listed examples of "the very limited class of cases" that are exempt from harmless-error review:

> *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (complete denial of counsel); *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (biased trial judge); *Vasquez* v. *Hillery*, 474 U.S. 254 (1986) (racial discrimination in selection of grand jury); *McKaskle* v. *Wiggins*, 465 U.S. 168 (1984) (denial of self-representation at trial); *Waller* v. *Georgia*, 467 U.S. 39 (1984) (denial of public trial); *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993) (defective reasonable-doubt instruction).

Neder, 527 U.S. at 8; accord *Johnson*, 520 U.S. at 468-469. The Court explained that those "structural" errors "deprive defendants of 'basic protections' without which 'a criminal 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.'" *Neder*, 527 U.S. at 8-9 (quoting *Rose*, 478 U.S. at 577-578). The errors in that small class "are so intrinsically harmful as to require automatic reversal (*i.e.*, 'affect substantial rights') without regard to their effect on the outcome." *Id.* at 7.[5]

The Court determined in *Neder* that the error at issue—the district court's failure to submit the materiality element of the offense to the petit jury—did not fall within that narrow category. The Court reasoned that, "[u]nlike such

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[5] *Neder* involved a case in which the error was preserved. As the Court made clear in *Johnson*, 520 U.S. at 466-467, even if an error is found to be "structural," automatic reversal is not required on plain-error review, where the error was forfeited.

defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." 527 U.S. at 9. Instead, the error is harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.* at 15, 18 . That test is met, the Court found, when the record evidence supporting the omitted element was "so overwhelming" that the defendant had not even contested it. *Id.* at 16. While the Court recognized that the constitutional guarantee of a trial by jury serves as a protection against "oppression and tyranny," it held that "where a defendant did not, and apparently could not, bring forth facts contesting the omitted element, * * * the error [in failing to submit the element to the jury] does not fundamentally undermine the purposes of the jury trial guarantee." *Id.* at 18-19.

2. It follows from *Neder*'s holding—that the failure to obtain a petit jury finding on an element of an offense is not a structural error—that the failure to obtain a grand jury finding on an element or sentencing-enhancing fact is not a structural error either. The omission of a grand jury finding does not render a criminal prosecution "fundamentally unfair or an unreliable vehicle for determining [the degree of punishment]." *Neder*, 527 U.S. at 9. If anything, the Fifth Amendment right to a grand jury indictment is lower on the hierarchy of constitutional rights applicable in a criminal case than the Sixth Amendment right to a trial before a petit jury.

First, as noted above, the right to indictment by a grand jury, unlike the right to trial before a petit jury in a criminal case, does not apply to the States through the Fourteenth Amendment. Compare *Hurtado*, 110 U.S. at 538 (Fifth Amendment right to indictment not applicable to the States),

with *Duncan* v. *Louisiana*, 391 U.S. 145 (1968) (Sixth Amendment right to jury trial applicable to the States). It is hard to see why a right that is not constitutionally required in a state prosecution becomes so "fundamental" as to "defy analysis by 'harmless error' standards," *Neder*, 527 U.S. at 7, whenever it is infringed in a federal prosecution.

Second, the grand jury's return of a charge is only the opening act in a criminal proceeding; the main event is the trial. See *United States* v. *Williams*, 504 U.S. 36, 51 (1992) (the grand jury's "finding of an indictment is only in the nature of an enquiry or accusation, which is afterwards to be tried and determined") (quoting 4 William Blackstone, *Commentaries on the Laws of England* 300 (1769)); accord *Respublica* v. *Shaffer*, 1 Dall. 236, 237 (Pa. 1788). The grand jury is not the final arbiter of the facts. A grand jury indicts based solely on probable cause, and, absent a plea of guilty, the essential facts must be proved at trial, beyond a reasonable doubt.

This Court has held that errors at the charging stage may be rendered harmless by subsequent developments in the prosecution. In *United States* v. *Mechanik*, 475 U.S. 66 (1986), the Court concluded that the defendants were not entitled to reversal of their convictions because of an error in the grand jury proceedings. In that case, two witnesses appeared simultaneously before the grand jury, in violation of Federal Rule of Criminal Procedure 6(d). The error, the Court acknowledged, "had the theoretical potential to affect the grand jury's determination whether to indict these particular defendants for the offenses with which they were charged." 475 U.S. at 70. But the Court concluded that "the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt." *Ibid.* Accordingly, the Court held that "any error in the grand jury proceeding

connected with the charging decision was harmless beyond a reasonable doubt." *Ibid.* *Mechanik* illustrates that an error that impairs the grand jury's role does not inherently vitiate a later criminal conviction and sentence.

Third, although a function of both the grand jury and the petit jury is to protect against oppression and vindictiveness, see *Neder*, 527 U.S. at 19; *Wood*, 370 U.S. at 390, the petit jury provides stronger protection for the accused than the grand jury. The prosecutor has no obligation to present exculpatory evidence to the grand jury, and a target has no right to appear before the grand jury or to submit evidence on his own behalf. See *Williams*, 504 U.S. at 51-55. The grand jury sits only to find probable cause, while the petit jury must find guilt beyond a reasonable doubt. The grand jury decides by majority vote, while the petit jury in a federal case must be unanimous. Compare Fed. R. Crim. P. 6(a) and (f) with *United States* v. *Gaudin*, 515 U.S. 506, 510 (1995), and Fed. R. Crim. P. 31(a). And if a grand jury refuses to return an indictment, the prosecutor may try again, before the same grand jury or a different one; if a petit jury acquits the defendant, however, the Double Jeopardy Clause bars any retrial. See generally *Williams*, 504 U.S. at 47-50; *United States* v. *Calandra*, 414 U.S. 338, 342-344 (1974); *Grand Jury Law*, § 1.6, at 1-29; John Frederick Archbold, *Pleading and Evidence in Criminal Cases* 65-68 (15th ed. 1862) (describing 19th Century grand jury practice in England).[6]

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[6] Other structural protections for the defendant at the trial stage are not afforded at the grand jury stage. In contrast to the public trial right protected by the Sixth Amendment, which exists "for the benefit of the accused," *Waller* v. *Georgia*, 467 U.S. 39, 46 (1984) (internal quotation marks omitted), the grand jury hears evidence in secret. See Fed. R. Crim. P. 6(d) and (e). And the grand jury may consider categories of evidence that may not be considered by the petit jury, including evidence that has been obtained in violation of the Constitution. See *United States* v. *R. Enters., Inc.*, 498 U.S. 292, 298 (1991) ("The same rules that, in an

These consideration compel the conclusion that the failure to submit an issue of fact to the grand jury does not stand on a higher plane than the failure to submit an issue of fact to the petit jury. The Court concluded in *Neder* that such errors at the petit jury stage of a prosecution are not "so intrinsically harmful as to require automatic reversal (*i.e.*, 'affect substantial rights') without regard to their effect on the outcome." 527 U.S. at 7. The same conclusion must apply to similar errors at the grand jury stage of a prosecution.

C. An Indictment's Omission Of A Fact Required To Support The Sentence Is Harmless Error If A Rational Grand Jury Would Have Found The Fact And The Defendant Had Notice That The Fact Was At Issue

1. *Proof Of The Omitted Fact And Adequate Notice Render The Error Harmless*

A reviewing court can readily apply harmless-error principles to the imposition of a sentence that exceeds the otherwise-applicable statutory maximum based on a fact not contained in the indictment. The basic question is whether the omission of the fact from the indictment caused prejudice to the defendant. See *United States* v. *Olano*, 507 U.S. 725, 734 (1993) (In order to "affect substantial rights" for purposes of Federal Rule of Criminal Procedure 52 (a) and (b), "in most cases * * * the error must have been pre-

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adversary hearing on the merits, may increase the likelihood of accurate determinations of guilt or innocence do not necessarily advance the mission of a grand jury, whose task is to conduct an *ex parte* investigation to determine whether or not there is probable cause to prosecute a particular defendant."); see also *Calandra*, 414 U.S. at 349-355 (declining to extend Fourth Amendment exclusionary rule to grand jury proceedings); *Costello* v. *United States*, 350 U.S. 359, 361-364 (1956) (declining to extend rule against hearsay to grand jury).

judicial: It must have affected the outcome of the district court proceedings."). If the reviewing court determines, beyond a reasonable doubt, that a grand jury would have found the omitted fact, if it had been asked to do so, and that the defendant had notice that the fact was at issue and could affect his sentence, the error did not affect the defendant's substantial rights. Such a defendant would have received the same sentence if the right to a grand jury finding on the enhancing fact had been observed.

With respect to the strength of the evidence: The error in cases such as this one deprived the defendant of his right to a grand jury finding that there was probable cause to believe a particular fact—here, that a conspiracy involved a particular quantity of drugs. To determine whether a defendant was prejudiced by the absence of a grand jury determination on that fact, the relevant inquiry is "whether the record contains evidence that could rationally lead to a contrary finding." *Neder*, 527 U.S. at 19. To resolve that question, a reviewing court has an independent obligation to review the entire record, see *United States* v. *Lane*, 474 U.S. 438, 448 n.11 (1986) (harmless-error inquiry "requires a review of the entire record"); *United States* v. *Hasting*, 461 U.S. 499, 509 n.7 (1983) ("entire record" must be considered), including evidence submitted at sentencing.

Where the petit jury has found the same fact at trial beyond a reasonable doubt, or where the defendant has admitted to the fact at his guilty plea colloquy, a reviewing court can confidently conclude that the grand jury would also have found that fact under a less rigorous standard of proof. See *United States* v. *Patterson*, 241 F.3d 912, 914 (7th Cir.) ("Once the petit jury finds beyond a reasonable doubt (or, on plain error review, once the court concludes that the evidence was so strong that the petit jury was bound to find) that a particular drug and quantity was involved, we can be confident in retrospect that the grand jury (which acts under

a lower burden of persuasion) would have reached the same conclusion."), cert. denied, 122 S. Ct. 124 (2001); cf. *Mechanik*, 475 U.S. at 67 ("[T]he petit jury's verdict of guilty beyond a reasonable doubt demonstrates *a fortiori* that there was probable cause to charge the defendants with the offenses for which they were convicted."). Similarly, where evidence at sentencing sufficiently establishes the existence of the sentence-enhancing fact, and a defendant offers no basis for reaching a contrary finding, a reviewing court can confidently conclude that the grand jury would have found probable cause to believe the fact as well.

With respect to notice: The express allegations of an indictment are not the only means by which a defendant may receive notice of the facts potentially affecting his sentence. In many cases, for example, a reviewing court may conclude that an earlier indictment, a bill of particulars, or a prosecutor's statements at arraignment or another preliminary proceeding gave the defendant ample notice of the need to defend against a fact not alleged in the current indictment. Furthermore, in pre-*Apprendi* drug prosecutions such as this one, defendants and their counsel were well aware that facts such as drug quantity, although not alleged in the indictment (or submitted to the jury at trial), would be relevant at sentencing to determine the severity of the sentence. Section 841(b) itself makes clear the relevance of drug quantity to the applicable sentence. See *United States* v. *Buckland*, 277 F.3d 1173, 1182 (9th Cir. 2002) (en banc) ("Congress's intent * * * is apparent: to ramp up the punishment for controlled substance offenders based on the type and amount of illegal substance involved."). And uniform circuit law declared that drug quantity was a central issue to be determined at sentencing. See *United States* v. *Sanchez*, 269 F.3d at 1266.

This analysis of whether a defendant's substantial rights are affected by the district court's erroneous reliance at

sentencing on a fact not found by the grand jury appropriately balances "society's interest in punishing the guilty" against the constitutional guarantee of grand jury indictment in federal felony prosecutions. Cf. *Neder*, 527 U.S. at 18-19. The grand jury's function of protecting against prosecutorial overreaching and vindictiveness is not "fundamentally undermine[d]," *id.* at 19, where the grand jury finds all of the facts essential to the defendant's conviction and sentence, with the exception of the single fact at issue, and where the reviewing court concludes that any rational grand jury also would have found that fact, if asked to do so. The grand jury's notice function also is not undermined where the reviewing court concludes that the defendant received timely notice from other sources of the need to defend against a fact omitted from the indictment.[7]

2. *Harmless-Error Review Does Not Usurp The Role Of The Grand Jury*

The court of appeals concluded that, even though a reviewing court is required by *Neder* to determine whether a petit jury would have found a fact that it erroneously was

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[7] A third purpose served by requiring an indictment—protecting the defendant's ability to "plead it in the future as a bar to subsequent prosecutions," *Miller*, 471 U.S. at 135—is not impaired in any respect by the failure of an indictment to allege a fact that enhances the sentence. The respondents in this case, for example, could not be prosecuted in the future for the drug conspiracy alleged in the indictment, even if a second indictment were to allege an enhanced quantity of drugs. The Double Jeopardy Clause protects a defendant from being punished twice for the same conspiracy. See *Rutledge* v. *United States*, 517 U.S. 292, 297-300 & n.12 (1996) (presumption against multiple punishment for the same offense applies to convictions for violations of the CCE statute, 21 U.S.C. 848, and drug trafficking conspiracy, 21 U.S.C. 846). And a single conspiracy is the same "offense," whether or not it has additional objects. See *Braverman* v. *United States*, 317 U.S. 49, 54 (1942) ("The conspiracy is the crime, and that is one, however diverse its objects.") (internal quotation marks omitted).

not asked to consider, a reviewing court cannot determine whether a grand jury would have done so. The court of appeals reasoned that "speculat[ing] about whether a grand jury would or would not have indicted a defendant for a crime with which he was never charged * * * would usurp the role of the grand jury, which * * * is 'not bound to indict in every case where a conviction can be obtained.'" Pet. App. 15a (quoting *Vasquez* v. *Hillery*, 474 U.S. 254, 263 (1986) and *United States* v. *Ciambrone*, 601 F.2d 616, 629 (2d Cir. 1979) (Friendly, J., dissenting)). There is no basis in history or this Court's decisions to distinguish the grand jury from the petit jury in this regard.

a. *The historical evidence*. Just as the role of the petit jury is to convict whenever there is proof beyond a reasonable doubt that the defendant committed a crime, the role of the grand jury is to indict whenever there is probable cause to believe that the defendant committed a crime. The grand jury charges delivered by earlier members of this Court, sitting on circuit, reflect the understanding that a grand jury has a "duty" to indict if the evidence provides probable cause to believe that the accused committed the offense. See, *e.g.*, *Charge to Grand Jury*, 30 F. Cas. 992, 993 (C.C.D. Cal. 1872) (Field, J., in chambers) (noting the grand juror's "duty to the government, or more properly speaking, to society, to see that parties against whom there is just ground to charge the commission of crime, shall be held to answer the charge"); *Charge to Grand Jury—Neutrality Laws*, 30 F. Cas. 1021, 1023 (C.C.D. Ohio 1851) (McLean, J., in chambers) ("If it shall appear from the evidence that shall be given, that any of our citizens have violated the above law, it will be your duty to indict them."); 2 *The Documentary History of the Supreme Court of the United States, 1789-1800* 30 (Maeva Marcus, ed., 1988) (Chief Justice Jay's Charge to the Grand Jury of the Circuit Court for the District of New York, Apr. 12, 1790) ("In a word Gentlemen

your Province and your Duty extend (as it has been before observed) to the Inquiry and Presentment of all offenses of every kind committed against the United States in this District or on the high Seas by Persons in it.").[8]

Today, as well, the model grand jury charge approved by the Judicial Conference of the United States does not contemplate that grand jurors exercise unfettered discretion in determining whether to indict. Rather, the model charge directs grand jurors that "you should vote to indict where the evidence presented to you is sufficiently strong to warrant a reasonable person's believing that the accused is probably guilty," and cautions grand jurors not to "judge the wisdom of the criminal laws enacted by Congress" or to "be concerned about punishment in the event of conviction." *Grand Jury Law* § 4:5, at 4-14 to 4-15, 4-17.

The oath taken by grand jurors similarly requires decisions based on the evidence, not personal predilection. As this Court has noted, "in this country as in England of old the grand jury has * * * pledged to indict no one because of prejudice and to free no one because of special favor." *Costello* v. *United States*, 350 U.S. 359, 362 (1956). The oath traditionally administered to grand jurors directs that "you shall present no one for envy, hatred, or malice; *neither shall you leave any one unpresented for fear, favor or affection, hope of reward or gain*, but shall present all things truly as they come to your knowledge, according to the best of your understanding." George J. Edwards, *The Grand Jury* 96-97

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[8] See also, *e.g.*, *Charge to Grand Jury—Neutrality Laws and Treason*, 30 F. Cas. 1024, 1026 (C.C.D. Mass. 1851) (Curtis, J., in chambers); 3 *The Documentary History of the Supreme Court of the United States, 1789-1800* 292-293 (Maeva Marcus, ed., 1990) (Justice Patterson's Charge to the Grand Jury of the Circuit Court for the District of Vermont, Oct. 3, 1798); 2 *The Documentary History of the Supreme Court of the United States, 1789-1800* 171 (Justice Wilson's Charge to the Grand Jury of the Circuit Court for the District of Virginia, May 23, 1791).

(1906) (emphasis added); accord *Grand Jury Law* § 4:4, at 4-13 (quoting substantially similar oath currently administered to federal grand jurors); 2 Joseph Gabbett, *The Criminal Law* 269 n.(a) (1843).

This Court's decisions have consistently described the role of the grand jury as protecting the "innocent" against improperly motivated accusations, not as protecting those persons who, although sympathetic personally or politically, are probably guilty. See, *e.g.*, *Williams*, 504 U.S. at 51; *United States* v. *Dionisio*, 410 U.S. 1, 16 (1973); *Wood*, 370 U.S. at 384. That appears to have been the original understanding of the Grand Jury Clause as well. At the ratifying convention in Massachusetts—which was one of three States to propose a constitutional amendment providing a right to grand jury indictment—a delegate argued that such a right was necessary to prevent "the most innocent person in the commonwealth" from being "dragged from his home [and] his friends" and subjected to "long, tedious, and painful imprisonment" before his ultimate acquittal at trial. 5 *The Founders' Constitution* 260 (statement of Abraham Holmes).

It has, of course, long been understood that a grand jury occasionally will not indict even when probable cause is established, just as a petit jury occasionally will not convict where guilt beyond a reasonable doubt is conclusively shown. But that does not mean that such nullification, by either the grand jury or the petit jury, is a right that courts must encourage, as distinguished from a power that courts must tolerate for reasons of public policy. See, *e.g.*, *United States* v. *Washington*, 705 F.2d 489, 494 (D.C. Cir. 1983) (per curiam opinion of panel including Ginsburg, J.) ("A jury has no more '*right*' to find a 'guilty' defendant 'not guilty' than it has to find a 'not guilty' defendant 'guilty,' and the fact that the former cannot be corrected by a court, while the latter can be, does not create a right out of the power to misapply the law."); *United States* v. *Thomas*, 116 F.3d 606, 615 (2d

Cir. 1997) ("[T]he power of juries to 'nullify' or exercise a power of lenity is just that—a power; it is by no means a right or something that a judge should encourage or permit if it is within his authority to prevent."). The power of a petit jury to nullify despite the evidence does not preclude harmless-error analysis, as *Neder* makes clear. See *United States* v. *Kerley*, 838 F.2d 932, 938 (7th Cir. 1988) (Posner, J.) ("[A jury] has the *power* to acquit on bad grounds, because the government is not allowed to appeal from an acquittal by a jury. But jury nullification is just a power, not also a right, as is shown among other things by the fact * * * that a trial error which favors the prosecution is harmless if no *reasonable* jury would have acquitted, though an actual jury might have done so."). Likewise, the power of a grand jury to refuse to return an indictment despite facts establishing probable cause does not preclude a court from reviewing for harmless error—and concluding that an error was harmless because any rational grand jury would have found probable cause to believe a particular fact, if asked to do so.

b. *This Court's jurisprudence.* This Court's decision in *Vasquez* v. *Hillery*, 474 U.S. at 263, on which the court of appeals relied (Pet. App. 15a), does not hold that a court can never conduct harmless-error review by asking whether a grand jury would have found a particular fact.

In *Hillery*, the Court held that purposeful racial discrimination in the selection of the grand jury cannot be harmless error. In the course of explaining that holding, the Court stated that the grand jury "does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not." 474 U.S. at 263. Rather, the Court stated, the grand jury has the power to select "a greater offense or a lesser offense." *Ibid.* "Moreover," the Court continued, "[t]he grand jury is not bound to indict in every case where a conviction can be obtained." *Ibid.* (quoting *Ciambrone*, 601 F.2d at 629 (dissenting opinion)). Ac-

cordingly, "even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come." *Ibid.* That discussion does not preclude harmless-error analysis in this case.

Hillery itself intimated that the inability to determine with certainty what the grand jury would have done precludes harmless-error review *only* in cases of racial discrimination or similarly fundamental error. See 474 U.S. at 263-264 ("discrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review"). Subsequent decisions of this Court make clear that, outside the unique context of invidious discrimination in its selection, ordinary principles of harmless-error analysis apply to the grand jury. Shortly after *Hillery*, the Court explained that the result in that case was "compelled by precedent directly applicable to the special problem of racial discrimination." *Mechanik*, 475 U.S. at 71 n.1. The Court stated that *Hillery* also rested on the view that "racial discrimination in the selection of grand jurors is so pernicious, and other remedies so impractical, that the remedy of automatic reversal was necessary as a prophylactic means of deterring grand jury discrimination in the future, and that one could presume that a discriminatorily selected grand jury would treat defendants of excluded races unfairly." *Ibid.* The Court concluded that "these considerations have little force outside the context of racial discrimination in the composition of the grand jury." *Ibid.*; see *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 256-257 (1988) (distinguishing *Hillery*'s automatic reversal rule as necessitated by racial discrimination, and describing *Hillery* as one of the "isolated exceptions" to the harmless-error rule). Because the failure to include an ele-

ment or sentence-enhancing fact in an indictment is not a "special problem" like racial discrimination, *Hillery* is inapposite here.

The Court's suggestion in *Hillery* that the grand jury has unfettered discretion not to indict, despite the existence of probable cause, was therefore not essential to the decision in that case. *Hillery* was independently justified by "[t]he overriding imperative to eliminate th[e] systemic flaw [of racial discrimination] in the charging process." 474 U.S. at 264. Equally important, *Hillery*'s description of the grand jury's freedom of action relied exclusively on Judge Friendly's dissenting opinion in *Ciambrone*, 601 F.2d at 629. The sources cited in that dissent, however, do not authoritatively establish that the grand jury historically enjoyed complete discretion. To the contrary, the historical evidence described above (at 26-28) reveals that grand jurors were expected to act in accordance with law and to indict when the evidence established probable cause.[9]

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[9] The only relevant historical source cited by Judge Friendly's dissent—which largely addressed a wholly different question involving prosecutorial misconduct before the grand jury—was a state court grand jury charge advising that "[t]he grand jury may even refuse to indict although its attention is called to a clear violation of law." 601 F.2d at 629 n.2 (quoting *Charge of John Raymond Fletcher, Associate Judge, Seventh Judicial Circuit Court of Maryland, to the Grand Jury for Calvert County on May 7, 1955*, 18 F.R.D. 211, 214 (Md. Cir. Ct. 1955)). That instruction, however, contradicts the prevailing historical practice, as discussed in the text. Judge Friendly also cited three judicial opinions: *United States* v. *Cox*, 342 F.2d 167, 189-190 (5th Cir.) (Wisdom, J., concurring specially), cert. denied, 381 U.S. 935 (1965); *In re Kittle*, 180 F. 946, 947 (S.D.N.Y. 1910); and *United States* v. *Asdrubal-Herrera*, 470 F. Supp. 939 (N.D.Ill. 1979). None cites historical materials showing that the grand jury had unfettered discretion not to indict when probable cause was found. The closest is the reference in *Asdrubal-Herrera* to an English grand jury in 1681 that returned "its now famous verdict of 'ignoramus' " after being charged in Lord Shaftesbury's case that failure to return a bill where there was probable cause would be a crime. 470 F. Supp. at 942.

3. *This Court's Cases Do Not Support A Rule of Automatic Reversal*

The court of appeals cited two other decisions of this Court—*Stirone* v. *United States*, 361 U.S. 212 (1960), and *Silber* v. *United States*, 370 U.S. 717 (1962) (per curiam)—as support for its view that the omission of an element or sentence-enhancing fact from an indictment is automatically reversible. See Pet. App. 9a-13a. Neither case requires that conclusion.

In *Stirone*, the Court held that a defendant was deprived of his Fifth Amendment right to a grand jury indictment when the government proved an element at trial in a way that departed from the way that element was alleged in the indictment. The Court declined to treat the deviation from the indictment as harmless error, reasoning that a deprivation of "the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury * * * is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." 361 U.S. at 217.

Stirone was decided before this Court's comprehensive adoption of harmless-error analysis in *Chapman* v. *California*, 386 U.S. 18 (1967). As Justice Stewart noted in his concurrence in that case, before *Chapman*, the Court had "steadfastly rejected any notion that constitutional violations might be disregarded on the ground that they were 'harmless.'" *Id.* at 42 (collecting cases). Because *Stirone* was decided in an era in which constitutional errors generally required per se reversal, that decision does not control the analysis in this case. As noted above, the Court

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The judge's charge in that case supports the view that a grand jury *cannot* refuse to indict when probable cause exists. That the grand jury there may have refused to do so anyway reveals only an unreviewable power, not a right.

recognized in *Neder* that most constitutional errors can be harmless, and it did not identify *Stirone* as belonging to the "very limited class of cases" that involve an exception to that rule. See 527 U.S. at 8.

Moreover, *Stirone* presented fair notice concerns that ordinarily are not presented in cases like this one. In *Stirone*, "the charging terms (or allegations in the indictment) [were] materially broadened and altered to such a significant extent as to constitute an entirely new or different theory of the case." *McCoy* v. *United States*, 266 F.3d 1245, 1253 (11th Cir. 2001). The indictment in *Stirone* charged that an extortion violated the Hobbs Act, 18 U.S.C. 1951, by obstructing commerce in sand. At trial, however, the district court, over the defendant's objection, permitted the jury to find an effect on commerce through interference with shipments of steel. 361 U.S. at 213-214. The concerns raised by the changed focus of the trial in *Stirone* are not present when an indictment omits a fact that is intrinsic to the charged crime and that all parties expect to be relevant to the sentence. In contrast to an indictment that is broadened by presenting a wholly new or different theory of the case, "allegations in § 846 or § 841 indictments that charge generally that a defendant conspired to possess or possessed with intent to distribute [a given drug] are not even broadened when a precise amount of [that drug] is proven at trial or at sentencing." *McCoy*, 266 F.3d at 1253-1254. Indeed, "[p]roof that supports only a precise drug quantity falls within [the defendant's] broader drug conspiracy charge and, if anything, narrows the allegations in the indictment to that amount." *Id.* at 1254.

In *Silber*, the Court exercised its power, "[i]n exceptional circumstances," to notice errors that were not raised on appeal, "if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." 370 U.S. at 718. Applying that

standard, the Court held that the indictment error in *Silber*, which was raised and decided in the district court, warranted reversal of a conviction under a supervening decision of the Court (*Russell* v. *United States*, 369 U.S. 749 (1962)), even though the defendant had not asserted the indictment error on appeal. 370 U.S. at 717-718. The Court did not hold that *all* indictment errors in violation of the Fifth Amendment necessarily require reversal under that standard. In any event, *Silber*, like *Stirone*, predates *Chapman's* articulation of harmless-error analysis.[10]

D. The Error Of Imposing An Enhanced Sentence Based On A Fact Omitted From The Indictment, When Not Raised In The District Court, May Not Warrant Relief On Plain-Error Review

Even if the error in this case were held to affect a defendant's "substantial rights," it would not automatically warrant relief. Respondents did not object in the district court, and they therefore cannot prevail without satisfying the requirements of the plain-error rule of Federal Rule of Criminal Procedure 52(b).

1. As a general rule, a federal defendant's failure to make a timely objection in district court forfeits that objection. See *Johnson*, 520 U.S. at 465 (noting "the familiar principle that a right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it") (internal quotation marks omitted); *United States* v. *Olano*, 507 U.S. 725,

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[10] In addition, *Stirone* and *Silber* involved claims that were properly preserved at trial. See *Stirone*, 361 U.S. at 217-219 (noting that defendant had objected to the introduction of the evidence that departed from the indictment's allegations, to the court's instructions allowing the jury to convict on that theory, and to the entry of judgment); *Silber*, 370 U.S. at 717 (noting that defendant raised objection in district court). The Court thus had no occasion in those cases to address the analysis that would have applied if, as in this case, the claim was never raised in the district court.

731 (1993). Rule 52(b) provides, however, that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." See *Olano*, 507 U.S. at 731 (observing that Rule 52(b) "provides a court of appeals a limited power to correct errors that were forfeited because not timely raised in district court"). This Court has explained that plain-error analysis under Rule 52(b) consists of four inquiries:

> [B]efore an appellate court can correct an error not raised [in the trial court], there must be (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Johnson, 520 U.S. at 466-467 (brackets, citation, and internal quotation marks omitted).

In *Johnson*, the defendant argued that, despite her failure to object at trial, she was not obligated to meet the exacting plain-error standard of Rule 52(b), because the error in her case—the failure to submit an element of the offense to the jury—was so serious as to amount to "structural" error. The Court rejected that claim, holding that *all* claimed errors in federal criminal trials, regardless of their nature or seriousness, are subject to plain-error analysis under Rule 52(b) when the defendant does not make a timely objection in the district court. 520 U.S. at 466. The Court reasoned that an exception to Rule 52(b) for serious or structural errors "would be [a] creation out of whole cloth * * * which we have no authority to make." *Ibid.*

Under *Johnson*, even a conclusion that a particular type of error is "structural," or "so serious as to defy harmless-error analysis," means only that such an error always "affects substantial rights," thus satisfying the third of the four requirements for plain-error relief. See *Johnson*, 520 U.S. at 468-

469. Under the fourth requirement, a prejudicial error (including a structural one) that would clearly be grounds for relief if it was properly preserved is not a proper ground for relief if it was not preserved, unless it also "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 469-470; see *Neder*, 527 U.S. at 34-35 & n.1 (Scalia, J., dissenting) ("It is a universally acknowledged principle of law that one who sleeps on his rights—even fundamental rights—may lose them.").

Accordingly, a violation of the Grand Jury Clause in trying or sentencing a defendant on an indictment that omits an offense element or sentence-enhancing fact is subject to the plain-error standard of Rule 52(b) if the defendant fails to raise the claim of error in the district court. Even if the error were found to affect substantial rights, therefore, a reviewing court may reverse the conviction or sentence only if the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 469-470.[11]

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[11] With respect to indictment errors, Rule 12(b)(2) of the Federal Rules of Criminal Procedure states that, although "[d]efenses and objections based on defects in the indictment" "must be raised prior to trial," defenses and objections based on an indictment's "fail[ure] to show jurisdiction in the court or to charge an offense * * * shall be noticed by the court at any time during the pendency of the proceedings." Although the court of appeals cited that provision in passing (Pet. App. 13a), it did not hold that the rule relieved respondents of the need to show plain error. The court of appeals' conclusion that respondents must satisfy the plain-error standard is correct. Not only do cases such as this not involve a failure "to show jurisdiction in the court or to charge an offense," Fed. R. Crim. P. 12(b)(2), but the error does not relate to the indictment alone; rather, the error involves the imposition of a sentence above the otherwise-applicable statutory maximum based on a fact not alleged in the indictment. In any event, Rule 12(b)(2) does not excuse a defendant from having to meet the requirements of the plain-error standard of Rule 52(b) when he has not made a timely objection in the district court.

2. The Court's decision in *Johnson* illustrates the application of that approach when a defendant has been deprived of a procedural right involving the determination of facts bearing on guilt or punishment. After concluding that the record evidence "overwhelming[ly]" established the issue that had been omitted from the petit jury instructions, this Court rejected the defendant's argument that the error nonetheless "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." 520 U.S. at 470. "Indeed," the Court said, "it would be the reversal of a conviction such as this which would have that effect." *Ibid.* The Court noted that reversal for non-prejudicial error "encourages litigants to abuse the judicial process and bestirs the public to ridicule it." *Ibid.* (quoting Roger J. Traynor, *The Riddle of Harmless Error* 50 (1970)).

A district court's imposition of a sentence based on a fact not submitted to the grand jury likewise does not inherently affect the fairness, integrity, or public reputation of judicial proceedings. The "fairness" and "integrity" of the proceedings are not called into question when the evidence of the omitted fact is overwhelming and the defendant has not presented evidence to controvert it. The absence of any fundamental unfairness is further supported when the district court, though erroneous in hindsight, proceeded entirely in accordance with then-established law. And to allow a defendant to avoid the punitive consequences of a fact that he could not plausibly contest would, as the Court noted in *Johnson*, undermine rather than enhance the public reputation of the criminal justice system. See 520 U.S. at 470. *Johnson* recognizes that petit jury errors do not warrant reversal under the plain-error standard when a reviewing court concludes that the petit jury would have found an uncontested fact, if asked. Nothing in the nature or role of the grand jury requires a different approach.

E. The Error Is Not A "Jurisdictional" Error, Immune From Harmless-Error And Plain-Error Review

While purporting to apply plain-error review, the court of appeals stated that the district court "exceeded its jurisdiction" by imposing sentences on respondents that exceeded the otherwise-applicable statutory maximum based on a fact not alleged in the superseding indictment. Pet. App. 8a-9a. The court's characterization of the error in this case as "jurisdiction[al]" is incorrect and is not supported by this Court's decisions. Imposition of an enhanced statutory sentence in the absence of an indictment charging the sentence-enhancing fact, although a constitutional error, is not an error that goes to the district court's jurisdiction.

1. All federal courts have an independent obligation to assure that subject-matter jurisdiction exists over a case at all relevant times. A lack of subject-matter jurisdiction in a district court requires the reversal of its judgment without any inquiry into prejudice. See *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 583-584 (1999). But the error at issue here—a discrepancy between the facts alleged in the indictment and the facts relied on at sentencing—is not analogous to a lack of subject-matter jurisdiction.

The right to a grand jury indictment is a personal right of the accused. The language of the Grand Jury Clause parallels the language of other clauses of the Fifth Amendment that define personal rights, not jurisdictional prerequisites. For example, the Double Jeopardy Clause, which immediately follows the Grand Jury Clause, states: "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. That language does not constrain the power of the courts to try a person twice for the same offense. It instead recognizes a personal right of the defendant that is subject to waiver, see *United States* v. *Broce*, 488 U.S. 563 (1989), and to principles of procedural default, see *Peretz* v. *United States*, 501 U.S.

923, 936 (1991) (stating in dicta that the absence of an objection at trial waives a double jeopardy defense). A defendant likewise may waive the right to a grand jury indictment. See Fed. R. Crim. P. 7(b) (defendant in a non-capital case may waive his right to indictment and allow the government to proceed by information); *Barkman* v. *Sanford*, 162 F.2d 592 (5th Cir.), cert. denied, 332 U.S. 816 (1947). A true absence of subject-matter jurisdiction, however, cannot be waived. *United States* v. *Griffin*, 303 U.S. 226, 229 (1938).

This Court has made clear that the failure of an indictment to allege any offense does not deprive the convicting court of jurisdiction to enter judgment. In *Lamar* v. *United States*, 240 U.S. 60, 64 (1916), the Court rejected a defendant's claim that "the court had no jurisdiction because the indictment does not charge a crime against the United States." Justice Holmes, writing for a unanimous Court, explained:

> [N]othing can be clearer than that the district court, which has jurisdiction of all crimes cognizable under the authority of the United States * * * acts equally within its jurisdiction whether it decides a man to be guilty or innocent under the criminal law, and whether its decision is right or wrong. The objection that the indictment does not charge a crime against the United States goes only to the merits of the case.

Id. at 65.

The Court reaffirmed that conclusion in *United States* v. *Williams*, 341 U.S. 58, 66 (1951), which held that a ruling "that the indictment is defective does not affect the jurisdiction of the trial court to determine the case presented by the indictment." In *Williams*, the district court dismissed an indictment that charged the defendants with perjury in a prior trial on conspiracy charges under 18 U.S.C. 241. Pointing to the court of appeals' subsequent decision that the conspiracy indictment did not state an offense under Section

241, the district court reasoned that the court that tried the conspiracy charges had "no jurisdiction." 341 U.S. at 65. This Court rejected that conclusion, holding that under 18 U.S.C. 3231, the district court had "jurisdiction of the subject matter, to wit, an alleged violation of a federal conspiracy statute," and that the court of appeals' subsequent finding that "the facts stated in the indictment do not constitute a crime" did not deprive the trial court of jurisdiction. 341 U.S. at 66, 69; see *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 89 (1998) ("[T]he absence of a valid * * * cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case.")

2. In concluding that the district court did not have "jurisdiction" to impose enhanced sentences on respondents, the court of appeals relied on *Ex parte Bain*, 121 U.S. 1 (1887). That reliance was misplaced.

In *Ex parte Bain*, the Court granted habeas corpus relief to a defendant who was tried on a narrower theory than the indictment had alleged. The Court found that, as a result of the change in the indictment, "the jurisdiction of the offence is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment." 121 U.S. at 13. The indictment error, the Court concluded, thus had the character of a jurisdictional defect that justified relief on habeas corpus review. See *id.* at 14 (citing, *e.g.*, *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873), and *Ex parte Wilson*, 114 U.S. 417 (1885)). *Ex parte Bain*'s reasoning in finding jurisdictional error, however, is inconsistent with prior decisions of this Court and has been superseded by later developments in the law. *Ex parte Bain* thus does not control the question presented in this case.[12]

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[12] The specific holding of *Ex parte Bain* was overruled in *United States* v. *Miller*, 471 U.S. at 144-145, which holds that it does not violate the Grand Jury Clause to try a defendant on a narrower charge than that

Long before *Ex parte Bain*, this Court considered and rejected the proposition that a defective indictment that fails to allege an offense deprives the convicting court of jurisdiction to enter judgment. In *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201 (1830), the Court, in an opinion by Chief Justice Marshall, denied habeas corpus relief to a prisoner who claimed that "the indictment charges no offence for which [he] was punishable in that court." The Court reasoned that, even if the judgment "was erroneous," that did not mean that the court lacked jurisdiction to enter it. *Id.* at 200; see *Ex parte Parks*, 93 U.S. 18 (1876) (declining to review on habeas corpus a claim that the indictment did not charge any federal offense).

The jurisdictional reasoning in *Ex parte Bain* responded to the fact that, at that time, habeas corpus relief could be granted *only* when the court that rendered judgment lacked jurisdiction. See *Schlup* v. *Delo*, 513 U.S. 298, 317 (1995) ("[T]he writ originally performed only the narrow function of testing either the jurisdiction of the sentencing court or the legality of Executive detention."); *Preiser* v. *Rodriguez*, 411 U.S. 475, 485 (1973) (Under "[t]he original view," the "relevant inquiry was confined to determining simply whether or not the committing court had been possessed of jurisdiction."). *Ex parte Bain* is one of a series of cases in which the Court expanded the notion of "jurisdictional" error to include constitutional violations, although there was no colorable claim that the court lacked subject-matter juris-

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alleged in the indictment. The Court in *Miller* reaffirmed the different principle, also derived from *Ex parte Bain*, that a broadening of the charges beyond those alleged in the indictment does violate the Grand Jury Clause. *Id.* at 142-144. But the Court did not have any occasion to apply that principle on the facts of that case, did not characterize such an error as "jurisdictional," and did not consider whether and how principles of procedural default apply to claims of improper "broadening" of the charges.

diction to adjudicate the case. See, *e.g.*, *Ex parte Wilson*, 114 U.S. at 429 (claim that offense was within class of cases requiring prosecution by indictment); *Ex parte Lange*, 85 U.S. at 176-177 (double jeopardy claim).

Ultimately, however, after a long period of expansion of the category of "jurisdictional" errors to serve this function, the Court held that its power to grant habeas corpus relief existed whenever the judgment under review involved constitutional error. See *Custis* v. *United States*, 511 U.S. 485, 494 (1994); *Waley* v. *Johnston*, 316 U.S. 101, 104-105 (1942) (per curiam); see also *Wainwright* v. *Sykes*, 433 U.S. 72, 79 (1977) (by the time of *Waley*, the Court "openly discarded the concept of jurisdiction—by then more a fiction than anything else—as a touchstone of the availability of federal habeas review"); *Vance* v. *Hedrick*, 659 F.2d 447, 449-451 (4th Cir. 1981) (summarizing the expansion of the grounds for granting habeas relief), cert. denied, 456 U.S. 978 (1982). In light of that development, the use of the term "jurisdictional error" to describe any failing other than an utter lack of power in the court to adjudicate generally has become obsolete. And the post-*Ex parte Bain* decisions of the Court in *Lamar* and *Williams* establish that an indictment's failure to charge an offense does not deprive a federal court of jurisdiction. It necessarily follows that, where an indictment alleges a complete offense but merely omits to allege a sentence-enhancing fact, a district court's error in imposing an enhanced sentence based on that fact is not jurisdictional in character.

II. THE SENTENCES IN THIS CASE SHOULD BE AFFIRMED UNDER EITHER THE HARMLESS-ERROR OR THE PLAIN-ERROR STANDARD

As noted, respondents did not object in the district court to the imposition of sentences that exceed the otherwise-applicable statutory maximum under 21 U.S.C. 841(b) based on a fact, threshold drug quantity, that was not alleged in the superseding indictment. Accordingly, since respondents raised their *Apprendi* challenge to their sentences for the first time on appeal, that challenge is properly reviewed under the plain-error standard. But whether the challenge is considered under the harmless-error standard of Rule 52(a) or the plain-error standard of Rule 52(b), the sentences should be affirmed because respondents' "substantial rights" were not affected by the district court's erroneous reliance at sentencing on a fact not alleged in the superseding indictment. And the sentences should be affirmed under the plain-error standard (even if the error did affect substantial rights) because the district court's error, while plain in light of *Apprendi*, does not "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 467.

A. The Error Did Not Affect Respondents' Substantial Rights

As explained above (at 22-25), in order to ascertain whether a defendant's substantial rights were affected by a district court's imposition of an enhanced sentence based on a fact not alleged in the indictment, a reviewing court should consider two questions: whether a rational grand jury, applying the probable-cause standard, would have found that fact, and whether the defendant had adequate notice that the fact was at issue. If the reviewing court answers both questions in the affirmative, the error did not affect the defendant's substantial rights, and the sentence should be sus-

tained, whether on harmless-error or plain-error review. Under that inquiry, the district court's error here—sentencing respondents to terms of 30 years' and life imprisonment under 21 U.S.C. 841(b)(1)(A) based on a threshold drug quantity not alleged in the indictment—could not have affected respondents' substantial rights.[13]

1. A rational grand jury would undoubtedly have found probable cause that respondents' conspiracy involved at least 50 grams of cocaine base, an amount authorizing a maximum term of life imprisonment under 21 U.S.C. 841(b)(1)(A).

At trial, the government introduced approximately 380 grams of cocaine base that had been seized from the organization's stash houses on North Duncan Street in Baltimore and from the conspirators and their residences. See Pet. App. 6a ("approximately 380 grams of cocaine base * * * *were actually seized* from the various conspirators and 'stash houses'"); see also, *e.g.*, 7 Tr. 189-196; Gov't Exh. D-15 (officers seized 80 grams of cocaine base from 229 North Duncan Street and arrested respondent Jesus Hall on the roof as he attempted to flee); 7 Tr. 215-230; Gov't Exhs. D-16A, D-16B (officers arrested respondent Jovan Powell as he came out of 213 North Duncan Street and seized 158 grams of cocaine base from the house); 11 Tr. 16-17, 26-35; Gov't Exh. D-20 (officers executed search warrant at 213 North Duncan Street, arrested respondent Stanley Hall, Jr., in front of the house and respondent Leonard Cotton as he ran up the stairs, and seized 22 grams of cocaine base from the stairs and elsewhere in the house); 16 Tr. 18-22; Gov't Exh. D-29 (officers executed search warrant at Jovan Powell's

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[13] When a claim of error has been preserved in the district court, the government bears the burden of establishing that the error did not affect the defendant's substantial rights. When a claim of error has *not* been preserved, however, the defendant bears the burden of proof on that question. See *Olano*, 507 U.S. at 734.

residence and seized 51 grams of cocaine base from his sweatpants). Respondents stipulated to the quantity of cocaine base in each of the government's exhibits. 18 Tr. 151-154; Gov't Exh. 253; J.A. 23.

In addition to that evidence, the government presented the testimony of several of respondents' co-conspirators, who testified to activity in the course of the conspiracy involving large quantities of cocaine base. See Pet. App. 26a-28a (Wilkinson, C.J., concurring in part and dissenting in part) (describing some of "the most incriminating evidence regarding the quantity of cocaine base," including testimony of two conspirators that, on multiple occasions, they packaged kilogram-quantities of cocaine base and testimony of another conspirator that he sold $10,000 to $12,000 of cocaine base per week for more than a month).

As Chief Judge Wilkinson noted in dissent, "there is no question that [respondents] participated in a conspiracy to distribute more than 50 grams of cocaine base." Pet. App. 24a. Even considering *only* the 380 grams of cocaine base seized by law-enforcement officers (and not the additional amounts of cocaine base testified to by the government's witnesses at trial), any rational grand jury would necessarily have found probable cause that the conspiracy involved at least 50 grams of cocaine base, less than one-seventh the amount seized.[14]

Indeed, the grand jury found in the original indictment (filed October 3, 1997) that the conspiracy involved "five kilograms or more" of cocaine and "50 grams or more" of cocaine

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[14] At sentencing, respondents challenged the determination in their PSRs that they were responsible for *1.5 kilograms or more* of cocaine base and therefore should be assigned a base offense level of 38 under the Sentencing Guidelines. They did not, however, dispute that their conspiracy involved *at least 50 grams* of cocaine base, the threshold amount that triggers a sentence of up to life imprisonment under 21 U.S.C. 841(b)(1)(A).

base. J.A. 48. The superseding indictment (filed March 19, 1998) did not repeat those allegations with respect to threshold drug quantity, alleging instead a conspiracy involving "a detectable amount" of each controlled substance. J.A. 59. But there is no reason to suppose that the grand jury meant to retract its earlier findings (which, under the prevailing view of the law, were not required in an indictment). The superseding indictment extended the duration of the conspiracy by seven months (for a total of 22 months) and added five defendants (for a total of 14 defendants). The superseding indictment alleged, for example, that the activities of the conspiracy included the street-level distribution of cocaine at an intersection in Baltimore "twenty-four hours per day, seven days a week." J.A. 62. The superseding indictment also alleged, among other things, that one defendant "transported kilogram quantities of cocaine from New York to Baltimore at the direction of Stanley Hall, Jr.," the leader of the organization; that another defendant "took delivery of kilogram quantities of cocaine for the organization"; and that three defendants "obtained multi-ounce quantities of cocaine" from the organization for distribution. J.A. 60-61. The superseding indictment alleged that the conspirators used at least 11 different residences, vacant houses, and other such locations "to stash and secrete their drugs, drug proceeds, firearms, and other drug paraphernalia." J.A. 61. It is clear from those allegations that the grand jury, if asked, would have included in the superseding indictment an allegation that the conspiracy involved at least 5 kilograms (about 11 pounds) of cocaine and at least 50 grams (less than 2 ounces) of cocaine base.

2. Respondents were on ample notice that, if they were convicted of the conspiracy offense, the quantity of drugs involved in the conspiracy would be critical to determining their sentences.

Like other defendants who were indicted before *Apprendi*, respondents were on notice that, under the prevailing practice uniformly approved by the courts of appeals, drug quantity need not be alleged in the indictment (or proved to the petit jury at trial beyond a reasonable doubt) in order to authorize an increase in the statutory maximum sentence. See pp. 15, 24 *supra*. Accordingly, respondents cannot plausibly claim to have been misled by the omission of a drug quantity allegation from the superseding indictment into believing that the government would limit its proof to establishing a quantity of drugs sufficient only to authorize a sentence under the default statutory provision (in this case, 21 U.S.C. 841(b)(1)(C)) or that their sentences would be limited to the penalty corresponding to that quantity.

In this case, moreover, respondents had specific notice from the original indictment that the grand jury had found that the conspiracy involved at least 5 kilograms of cocaine and at least 50 grams of cocaine base, either of which quantity is sufficient to authorize a maximum term of life imprisonment under 21 U.S.C. 841(b)(1)(A). The superseding indictment, while not specifying those quantities, charged respondents with participating in a multi-level conspiracy, which extended over nearly two years, included many individuals, and involved large amounts of drugs, which were sold for large amounts of money. See Pet. App. 28a-29a (Wilkinson, C.J., concurring in part and dissenting in part) (observing that it is "difficult to believe that [respondents] lacked notice that the faced [Section 841(b)'s] strictest penalties").

3. A reviewing court can therefore confidently conclude both (1) that any rational grand jury would have found that respondents' conspiracy involved at least 50 grams of cocaine base and (2) that respondents were on notice that the quantity of cocaine base involved in the offense would affect their sentences upon conviction. Consequently, respondents'

substantial rights were not affected by the absence of a grand jury determination on drug quantity in the superseding indictment.

B. The Error Did Not Seriously Affect The Fairness, Integrity, Or Public Reputation Of Judicial Proceedings

Even if this Court were to conclude that the error did affect respondents' substantial rights, the Court should not exercise its discretion to correct that error. For several reasons, the error does not "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 467.

First, as explained above, respondents would have received the same sentences if they had been accorded the right to an indictment alleging drug quantity. No serious question exists that the grand jury would have found that the conspiracy involved the requisite threshold amount of cocaine base. Cf. *Johnson*, 520 U.S. at 470.

Second, when the indictment, trial, and sentencing occurred in this case, the district court's imposition of enhanced sentences under 21 U.S.C. 841(b) without an allegation of threshold drug quantity in the indictment was consistent with long-standing practice that had been approved by every court of appeals that had considered the question. Thousands of enhanced sentences were imposed under that practice. Against that background, the imposition of enhanced sentences, although erroneous in hindsight, is not so "egregious," see *United States* v. *Young*, 470 U.S. 1, 15 (1985), as to threaten the fairness, integrity, or public reputation of judicial proceedings. See Pet. App. 29a-30a (Wilkinson, C.J., concurring in part and dissenting in part) ("It is one thing to vacate a conviction or sentence where the prosecutor failed to indict in accordance with the current state of the law. It is quite another thing to vacate a conviction or sentence based on an indictment that was entirely

proper at the time.") (quoting *United States* v. *Mojica-Baez*, 229 F.3d 292, 310 (1st Cir. 2000), cert. denied, 121 S. Ct. 2215 (2001)).

Finally, as in *Johnson*, it is reversal, rather than affirmance, of respondents' sentences that could pose such a threat. Congress designed the graduated penalties in 21 U.S.C. 841(b) to ensure that more serious drug offenders would receive more severe punishments. Congress's purpose is undermined where the kingpin of a cocaine conspiracy, such as respondent Stanley Hall, Jr., is subject to the same statutory maximum sentence as any street-level cocaine dealer, simply because the grand jury was not asked to find a fact, threshold drug quantity, that it surely would have found if asked to do so. A categorical rule that all such defendants must be resentenced under the default provision of 21 U.S.C. 841(b)(1)(C) creates an appearance of unfairness by ignoring gradations in culpability among drug offenders. And it risks bringing disrespect on the judicial system to allow the most culpable defendants to avoid the enhanced sentence that Congress deemed appropriate, no matter how overwhelming the evidence establishing threshold drug quantity or other facts triggering such a sentence. As Judge Wilkinson wrote in dissent, it would be a "miscarriage of justice" to "disregard Congress's clear intent" that "kingpins are punished more vigorously than petty dealers" when "there is no question at all that the defendants here distributed the requisite drug amounts under 21 U.S.C. § 841(b) to merit the sentences." Pet. App. 33a-35a; cf. *Johnson*, 520 U.S. at 470.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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