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

PETITION FOR A WRIT OF CERTIORARI

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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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The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on August 10, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides, in pertinent 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 are reproduced at App., *infra*, 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). 1 C.A. App. 71-72. 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. 1 C.A. App. 85-86. 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 City, 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, a number of 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. App., *infra*, 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 App., *infra*, 6a. The jury found the seven respondents guilty. App., *infra*, 3a.[1]

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) pre-

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[1] In addition, the jury found defendant Darlene Green guilty and found defendant Roger Evans not guilty. App., *infra*, 3a-4a & n.1. The 15-year sentence imposed on Darlene Green was left intact by the court of appeals and is not affected by the question raised in this petition. See *id.* at 7a.

scribes "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 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. App., *infra*, 3a-4a.

4. On appeal, respondents argued that their sentences were invalid under *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. App., *infra*, 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. App., *infra*, 7a-8a. 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 App., *infra*, 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 (filed Sept. 20, 2001), that "because drug quantity 'must be treated as an 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." App., *infra*, 8a (quoting *Promise*, 255 F.3d at 156). *Promise* also concluded that an indictment error under *Apprendi* affects a defendant's substantial rights whenever the defendant receives a term of imprisonment greater than that authorized by Section 841(b)(1)(C) for offenses involving any detectable quantity of drugs. The *Promise* court had not resolved, however, whether the indictment 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." App., *infra*, 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 when the indictment had omitted an offense element, even though the defendant had not raised the

error in either the court of appeals or this Court. App., *infra*, 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 indictment error 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 their sentences 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. App., *infra*, 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. App., *infra*, 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 prong of the plain-error test. He noted that the evidence that respondents participated in a conspiracy to distribute more than 50 grams of cocaine base was "overwhelming." App., *infra*, 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." *Id.* at 28a. He observed that the original 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." App., *infra*, 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.*

REASONS FOR GRANTING THE PETITION

The court of appeals held that, whenever a district court imposes a sentence that exceeds the otherwise applicable statutory maximum based on a fact that was not alleged in the indictment, the sentence must automatically be reversed on plain-error review—regard-

less of the existence of overwhelming evidence supporting that fact and the defendant's notice that the government could seek an enhanced sentence based on the fact. The court of appeals' decision is incorrect. Just as a failure to obtain a petit jury finding on an element does not require reversal on plain-error review, if the omitted fact was essentially uncontested and supported by overwhelming evidence, see *Johnson* v. *United States*, 520 U.S. 461, 469-470 (1997), a failure to obtain a grand jury finding on a fact that enhances the statutory maximum sentence does not require reversal, if the evidence was similarly overwhelming and the defendant did not contest the evidence while on notice of the need to do so.

The court of appeals' decision deepens a conflict in the circuits on whether an indictment's omission of a sentence-enhancing fact automatically warrants reversal where, as here, the defendant received a sentence greater than the maximum authorized by statute without reference to that fact. The question has arisen with particular frequency in federal drug prosecutions, such as this one, in which the indictment was returned, the case tried, and the sentence imposed before *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). But those are not the only cases implicating the question of whether, or how, this Court's decisions on plain-error and harmless-error review apply to indictment errors. Because the question is recurring and important, this Court's resolution of the conflict is warranted.

A. The Court Of Appeals' Rule Of Automatic Reversal Is Out Of Step With This Court's Plain-Error And Harmless-Error Precedents

The Fifth Amendment makes the grand jury the principal charging body in the federal system. Under

this Court's precedents, however, automatic reversal is unwarranted when an indictment omits to allege a fact necessary to support a criminal punishment above the otherwise-applicable statutory maximum. The omission of such an allegation, like most constitutional errors, is subject to plain-error and harmless-error review.

1. In *Apprendi*, 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." 530 U.S. at 490. Although *Apprendi* did "not address the indictment question separately," *id.* at 477 n.3, its holding 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).

Before *Apprendi*, the courts of appeals 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 a grand jury indictment or proved to a petit jury beyond a reasonable doubt. See *United States* v.

Sanchez, No. 00-13347, 2001 WL 1242087, at *11 (11th Cir. Oct. 17, 2001) (en banc) (discussing pre-*Apprendi* cases). After *Apprendi*, the courts of appeals have uniformly concluded that threshold drug quantities must be charged in a federal indictment and proved to a jury beyond a reasonable doubt to support an enhancement in the statutory maximum sentence. See *United States* v. *Promise*, 255 F.3d 150, 156-157 (4th Cir. 2001) (en banc) (citing cases from seven other circuits), petition for cert. pending, No. 01-6398 (Sept. 20, 2001). That conclusion follows from the logic of the Court's reasoning in *Apprendi* and the nature of the statutory scheme in Section 841(b).[2]

Under the graduated penalties set forth in 21 U.S.C. 841(b), 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 be not 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 is subject to a term of

[2] The government previously argued in the lower courts that *Apprendi* should not be extended to the indictment stage of a federal criminal prosecution. In *Promise*, 255 F.3d at 156-157, and *Sanchez*, 2001 WL 1242087 at *18, *49 n.51, the en banc Fourth and Eleventh Circuits rejected that contention, and all of the other circuits that have addressed the question have held that *Apprendi* requires drug quantity to be charged in a federal indictment to support an increase in the statutory maximum sentence. The government does not contend otherwise here.

imprisonment that "may not be less than 10 years or more than life." 21 U.S.C. 841(b)(1)(A)(ii) and (iii).[3]

Under that scheme, sentences above the 20-year statutory maximum authorized by Section 841(b)(1)(C) depend on the presence of a penalty-enhancing fact, such as the fact here that respondents' offenses involved at least 50 grams of cocaine base. Under *Apprendi*'s reasoning, that fact must be alleged in the indictment to support a sentence above 20 years' imprisonment. As the court of appeals concluded, therefore, the imposition of sentences of more than 20 years' imprisonment in this case was error because of the omission of threshold drug quantity allegations from the superseding indictment.[4]

2. The court of appeals was incorrect, however, in holding that the *Apprendi* indictment error automatically requires reversal of respondents' sentences, despite the overwhelming evidence that respondents' offenses involved a sufficient quantity of drugs to trigger those sentences and respondents' notice that the government could seek enhanced sentences based on drug quantity. See App., *infra*, 15a (observing that, "[w]hile

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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] *Apprendi*, although decided after the return of the superseding indictment, applies here because the case is still pending on direct review. See *Griffith* v. *Kentucky*, 479 U.S. 314 (1987).

the government may well be correct as a factual matter" that the evidence "overwhelmingly establishes" drug quantities necessary to authorize respondents' sentences, "the quantum of evidence is not a relevant consideration when the error stems from a defect in the indictment"); *id.* at 14a-15a n.5 ("we do not consider post-indictment notice to be relevant").

This Court has recognized that "most constitutional errors can be harmless," and has "found an error to be 'structural,' and thus subject to automatic reversal, only in a 'very limited class of cases,'" such as those involving a denial of counsel, a biased trial judge, or racial discrimination in jury selection. *Neder* v. *United States*, 527 U.S. 1, 5, 8 (1999) (quoting *Johnson* v. *United States*, 520 U.S. 461, 468 (1997)). In contrast to those errors that have been held to be "structural," the Court explained in *Neder*, a jury "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." *Id.* at 9. The omission of an element from an indictment, like the omission of an element from a jury instruction in *Neder*, does not necessarily render a criminal proceeding "fundamentally unfair" or "unreliable." It is thus not a circumstance in which automatic reversal is required.

Moreover, the claim of error in this case, as in many cases that involve sentences imposed before *Apprendi*, was not raised in the district court. As this Court has made clear, all claimed errors in federal criminal trials, regardless of their nature or seriousness, are subject to the plain-error rules set out in Rule 52(b) of the Federal Rules of Criminal Procedure when the defendant does not make a timely objection in the district court. See *Johnson*, 520 U.S. at 466-467 (in order for an appellate court to correct an error that was not raised in the trial

court, there must be (1) an error, (2) that is "plain," (3) that "affect[s] substantial rights," and (4) that "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings"). "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, '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.'" *United States* v. *Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). Even a conclusion that a particular type of error is "structural," or "so serious as to defy harmless-error analysis," suggests only that such an error may always "affec[t] 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 (quoting *Olano*, 507 U.S. at 736).

Here, as in *Johnson*, relief on plain-error review is not warranted, because the indictment error does not call into question the fairness, integrity, or public reputation of the judicial proceedings resulting in respondents' sentences. 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," the quantity necessary to trigger a sentence of life imprisonment under Section 841(b)(1)(A)(iii). App., *infra*, 24a; see also *id.* at 26a-28a (describing some of "the most incriminating evidence regarding the quantity of cocaine base" involved in

respondents' offenses). It is also "difficult to believe that [respondents] lacked notice that they faced [Section 841(b)'s] strictest penalties," especially since the original indictment expressly charged them with participation in a conspiracy involving, *inter alia*, at least 50 grams of cocaine base and the factual presentation involved quantities that supported "the elevated penalties available under" Section 841(b)(1)(A). *Id.* at 28a-29a. Under these circumstances, overturning respondents' sentences is an unjustified response to the omission of a drug quantity allegation from the indictment. Cf. *Johnson*, 520 U.S. at 469-470 (declining to reverse a conviction on plain-error review when a petit jury instruction omitted an element on which the evidence was "overwhelming" and "essentially uncontroverted").

3. In concluding that a sentence that exceeds the otherwise applicable statutory maximum based on a fact not alleged in the indictment must automatically be reversed under the plain-error standard, the court of appeals reasoned, in reliance on *Ex parte Bain*, 121 U.S. 1 (1887), that a district court "exceed[s] its jurisdiction" to impose such a sentence. App., *infra*, 9a. *Bain* does not justify that conclusion.

In *Bain*, this Court granted collateral relief after the trial court permitted the government to strike a portion of the indictment and try the defendant on a narrower theory than the one set forth in the indictment. Although the Court characterized the error as one that deprived the trial court of "jurisdiction," 121 U.S. at 13, that characterization is contrary to the Court's precedents. See, *e.g.*, *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201 (1830) (Marshall, C.J.) (explaining that, even if the habeas petitioner were correct in claiming that "the indictment charges no offence for which [he] was punish-

able in that court," such an error would not mean that the trial court lacked jurisdiction); *Lamar* v. *United States*, 240 U.S. 60, 65 (1916) (Holmes, J.) (explaining that an "objection that the indictment does not charge a crime against the United States goes only to the merits of the case," not to the district court's jurisdiction).

The characterization in *Bain* appears to have resulted from the fact that, at that time, habeas 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"). Subsequently, however, the Court recognized that its authority to award habeas relief exists whenever the judgment under review involves constitutional error, regardless of whether the error could be described as "jurisdictional." 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"). The use of the term "jurisdictional error" to describe an error other than an utter lack of power even to adjudicate the merits of a motion is thus generally obsolete.

Today, the omission from the indictment of an essential element (or sentence-enhancing fact) is appropriately understood as a constitutional error, not a jurisdictional error. It involves a violation of the Fifth

Amendment right to be tried for a federal felony offense only after an indictment has been returned. That error should be evaluated under the same harmless-error and plain-error standards that are applicable to other deprivations of a defendant's constitutional rights.[5]

The court of appeals also cited *Stirone* v. *United States*, 361 U.S. 212 (1960). App., *infra*, 9a-10a, 11a. 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 manner that departed from the way in which that element was alleged in the indictment. The Court went on to observe that such a deprivation "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 the 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

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[5] The conclusion that an indictment's failure to allege an essential element of an offense is not a fatal defect that deprives the district court of jurisdiction is confirmed by the fact that the right to a grand jury indictment may be waived. See Fed. R. Crim. P. 7(b) (defendant in a non-capital case may waive right to indictment and allow the government to proceed by information). But a true absence of subject-matter jurisdiction cannot be waived. See *United States* v. *Griffin*, 303 U.S. 226, 229 (1938) ("lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties"). As the Eleventh Circuit has explained, "[t]he constitutional right to be charged by a grand jury is a personal right of the defendant and does not go to the district court's subject matter jurisdiction because it may be waived." *McCoy* v. *United States*, No. 00-16434, 2001 WL 1131653, at *2 (11th Cir. Sept. 25, 2001).

violations might be disregarded on the ground that they were 'harmless.'" *Id.* at 42-43 (Stewart, J., concurring) (collecting cases). *Stirone*, which was decided in an era in which constitutional errors generally required per se reversal, therefore does not control the analysis in this case. As noted above, the Court recognized in *Neder* that most constitutional errors can be harmless, and did not identify *Stirone* as one of the "very limited class of cases" that involve an exception to that rule. See 527 U.S. at 8; see also App., *infra*, 31a (Wilkinson, C.J., concurring in part and dissenting in part) (noting that this Court has "not include[d] indictment defects in its list of structural errors").[6]

Nor does *Silber* v. *United States*, 370 U.S. 717 (1962) (per curiam), on which the court of appeals also relied (see App., *infra*, 12a-13a), establish that an indictment error requires reversal in all circumstances. *Silber*

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[6] Moreover, *Stirone* involved a claim of error that was properly preserved at trial. See 361 U.S. at 214. The Court thus had no occasion to address the analysis that would have applied if the claim had been raised for the first time on appeal. This case, like many similar cases decided by the courts of appeals in the wake of *Apprendi*, involves a claim of indictment error that was not raised in the district court and thus is reviewed under the plain-error standard. *Stirone* is also inapplicable here because, in contrast to a case like *Stirone*, in which "the charging terms (or allegations in the indictment) are materially broadened and altered to such a significant extent as to constitute an entirely new or different theory of the case, * * * allegations in § 846 or § 841 indictments that charge generally that a defendant conspired or possessed with intent to distribute cocaine base are not even broadened when a precise amount of that alleged cocaine base is proven at trial or at sentencing. Proof that supports only a precise drug quantity falls within [the defendant's] broader drug conspiracy and, if anything narrows the allegations in the indictment to that amount." *McCoy*, 2001 WL 1131653, at **4-5.

recognized that this Court may, "[i]n exceptional circumstances," 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. The Court, applying that standard, 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, even though the defendant had not asserted the indictment error on appeal. But the Court did not hold that all indictment errors in violation of the Fifth Amendment necessarily require reversal under that standard. See App., *infra*, 32a-33a (Wilkinson, C.J., concurring in part and dissenting in part) (discussing *Silber*). In any event, *Silber*, like *Stirone*, predates this Court's articulation of harmless-error analysis in *Chapman*, and this Court has not had an opportunity to address the effect of *Chapman* on those earlier holdings.

B. The Courts Of Appeals Are In Conflict On The Proper Disposition Of Claims Of Erroneous Omissions From Federal Indictments, And This Court's Resolution Of That Conflict Is Warranted

1. The courts of appeals have fallen into an irreconcilable conflict over whether the omission of an allegation of threshold drug quantity always warrants reversal of a sentence that exceeds the statutory maximum authorized by Section 841(b) without regard to drug quantity.

The Eleventh Circuit has "consistently applied plain error and harmless error review to *Apprendi* claims that an indictment failed to include a specific drug quantity," and has affirmed enhanced sentences, despite the omission of a drug quantity allegation from

the indictment, if no rational jury would have convicted the defendant "without concluding that [he] was responsible for a drug amount sufficient to justify the enhanced sentence." *United States* v. *Cromartie*, No. 00-13957, 2001 WL 1167785, at ** 2-4 (Oct. 3, 2001) (per curiam). The en banc court reaffirmed that point in *Sanchez*, 2001 WL 1242087, at **15-16 (rejecting the argument that *Apprendi* indictment error is "structural" or "jurisdictional"). See also *United States* v. *Swatzie*, 228 F.3d 1278, 1281-1284 (11th Cir. 2000), cert. denied, 121 S. Ct. 2600 (2001). Similarly, the First and Seventh Circuits have applied the plain-error standard to *Apprendi* indictment errors and have upheld enhanced sentences where it is clear that any rational jury that convicted the defendant would have found, if asked, that the offense involved the enhancing quantity of drugs. See, *e.g.*, *United States* v. *Terry*, 240 F.3d 65, 74-75 (1st Cir.), cert. denied, 121 S. Ct. 1965 (2001); *United States* v. *Patterson*, 241 F.3d 912, 914 (7th Cir.) (per curiam), cert. denied, No. 00-10365 (Oct. 1, 2001); *United States* v. *Nance*, 236 F.3d 820, 825-826 (7th Cir. 2000), cert. denied, No. 00-9633 (Oct. 1, 2001); see also App., *infra*, 33a (Wilkinson, C.J., concurring in part and dissenting in part) (noting circuit conflict).

In contrast, the Fifth Circuit has concluded that automatic reversal of enhanced sentences is required when drug quantity is not alleged in the indictment, see *United States* v. *Longoria*, 259 F.3d 363, and *United States* v. *Gonzalez*, 259 F.3d 355, although the court has granted rehearing en banc to reconsider that position, see 262 F.3d 455 (2001). The Eighth Circuit has taken the same position, at least when the defendant is convicted after a trial and has not stipulated to drug quantity, *United States* v. *Maynie*, 257 F.3d 908 (2001), and on October 18, 2001, it denied the government's

petition for rehearing and rehearing en banc. And the Fourth Circuit's holding in this case accords with the position articulated by a majority of the en banc court's members in *Promise*, *supra*. See App., *infra*, 14a.

2. The circuit conflict about the application of plain-error or harmless-error review to the omission of drug quantity from indictments charging drug-trafficking offenses is indicative of a broader conflict about whether the omission of an offense element from an indictment invariably requires reversal.

The Tenth Circuit, sitting en banc, recently overruled prior precedents and held, under *Neder*, that omission of an offense element from an indictment is subject to harmless-error analysis. *United States* v. *Prentiss*, 256 F.3d 971, 981-985 (2001) (per curiam) (affirming conviction under harmless-error standard where indictment charging arson committed in Indian country under 18 U.S.C. 81 and 1152 failed to allege Indian and non-Indian status of victim and defendant).[7] The Tenth Circuit expressly disagreed with recent decisions of two other circuits—*United States* v. *Tran*, 234 F.3d 798 (2d Cir. 2000), and *United States* v. *Spinner*, 180 F.3d 514 (3d Cir. 1999)—that hold that the omission of an element from the indictment is a "jurisdictional" error that requires automatic reversal. *Prentiss*, 256 F.3d at 982. Similarly, the First Circuit has held that the failure to allege the type of firearm in an indictment under 18 U.S.C. 924(c) does not require automatic re-

[7] In *United States* v. *Jackson*, 240 F.3d 1245, 1247-1249, cert. denied, No. 00-10251 (Oct. 1, 2001), a case decided before *Prentiss*, the Tenth Circuit held that the failure to charge drug quantity in an indictment under 21 U.S.C. 841 is not susceptible to plain-error or harmless-error review when the sentence exceeds the otherwise applicable statutory maximum. The Tenth Circuit has not addressed the relationship between *Jackson* and *Prentiss*.

versal of a conviction for an aggravated offense, when the evidence of firearm type was overwhelming and the defendants had adequate notice that firearm type was at issue. *United States* v. *Mojica-Baez*, 229 F.3d 292, 308-311 (2000), cert. denied, 121 S. Ct. 2215 (2001).

In contrast, the Second Circuit held in *Tran* that the omission of the type of firearm from an indictment charging a violation of 18 U.S.C. 924(c) deprived the district court of jurisdiction to sentence the defendants for an aggravated offense based on the type of firearm. See 234 F.3d at 808-810; see also *id.* at 809 & n.2 (expressly disagreeing with *Mojica-Baez*). The en banc Second Circuit is reconsidering the reasoning of the *Tran* panel in *United States* v. *Thomas*, Nos. 98-1051 et al., a case involving a claim of indictment error under *Apprendi* in a drug prosecution under 21 U.S.C. 841. See 248 F.3d 76, 78 (2d Cir. 2001) (ordering rehearing en banc and requesting briefing on the soundness of *Tran*'s reasoning). Other courts have also ruled that indictment errors are necessarily fatal. See, *e.g.*, *United States* v. *Cabrera-Teran*, 168 F.3d 141, 144-147 (5th Cir. 1999) (district court was without jurisdiction to accept guilty plea where indictment charging illegal reentry under 8 U.S.C. 1326 failed to allege that defendant had been arrested); *Spinner*, 180 F.3d at 515-516 (omission of interstate commerce element from indictment charging access fraud under 18 U.S.C. 1029(a)(5) was "jurisdictional defect" that required automatic reversal of conviction).

As those decisions illustrate, omissions of an essential allegation from an indictment can result from intervening clarifications of the law by appellate courts as well as from oversights by prosecutors in drafting indictments. Although federal prosecutors have, since the Court's decision in *Apprendi*, routinely charged thresh-

old drug quantities in indictments when sentencing will be governed by 21 U.S.C. 841, the question whether indictment errors automatically require reversal will continue to arise outside the context of *Apprendi* and Section 841. The recurring question of how to treat indictment errors, which has recently been addressed by three en banc courts and is pending before two others, requires the reconciliation of this Court's precedents and can be finally and uniformly resolved only by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2001

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 99-4162 to 99-4164, 99-4175, 99-4189 to 99-4191
and 99-4197

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

LEONARD COTTON, A/K/A COOCH,
DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DARLENE GREEN, A/K/A SPRINKLES,
DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MARQUETTE HALL, A/K/A BUTT NAKED,
DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

LAMONT THOMAS, A/K/A TREE,
DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MATILDA HALL, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOVAN POWELL, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JESUS HALL, A/K/A WEEDY, A/K/A JESSE HALL, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

STANLEY HALL, JR., A/K/A BOONIE, DEFENDANT-APPELLANT

[Argued: Apr. 4, 2001]
[Decided: Aug. 10, 2001]

Before: WILKINSON, Chief Judge, and LUTTIG and GREGORY, Circuit Judges.

LUTTIG, Circuit Judge:

Stanley Hall, Jr. and seven other members of a drug organization (collectively "appellants") were convicted of one count of conspiracy to distribute and possession with intent to distribute cocaine hydrochloride and cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 846. Appellants raise a number of challenges to their convictions and sentences. For the reasons that follow, we affirm the convictions, and vacate and remand for resentencing.

I.

Stanley Hall, Jr. ("Hall, Jr."), the leader of a vast drug organization, was the principal supplier of drugs in the 200 block of North Duncan Street in Baltimore, Maryland. According to testimony adduced at trial, Hall, Jr., with the assistance of a number of the other appellants, obtained a supply of cocaine in kilogram quantities from a dealer in New York City, and then "cooked" the cocaine into crack and "bagged" it for distribution. Hall, Jr. would then distribute the drugs to his dealers, including the other appellants, who would, in turn, sell cocaine and crack to their customers.

In October 1997, federal authorities obtained search warrants for the residences utilized by the appellants for their drug trade. Following the seizure of drugs, drug paraphernalia, currency, and weapons, appellants were arrested and charged with a single count of conspiracy to distribute and possession with intent to distribute cocaine hydrochloride *and* cocaine base. J.A. 86.

Appellants were convicted by a jury of the sole count of the indictment.[1] The district court sentenced Hall, Jr., Leonard Cotton, Lamont Thomas, and Marquette and Jesus Hall to life imprisonment upon finding, by a preponderance of the evidence, that over 1.5 kilograms of cocaine base was attributable to each from their participation in the conspiracy. J.A. 822-23 (Hall, Jr.); J.A. 573-74 (Thomas); J.A. 507 (Cotton); J.A. 723 (Jesus Hall); J.A. 505 (Marquette Hall). Based on the same finding regarding drug quantity, the district court sentenced Jovan Powell to 30 years imprisonment. J.A.

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[1] The jury acquitted one defendant, Roger Evans.

769-70. Matilda Hall also received 30 years imprisonment based on the district court's finding, by a preponderance of the evidence, that she was responsible for more than 500 grams, but less than 1.5 kilograms, of cocaine base from her participation in the conspiracy. J.A. 667-68. Finally, Darlene Green was sentenced to 15 years imprisonment based upon the district court's attribution of more limited quantities of cocaine base to her. J.A. 541.

Following sentencing, appellants filed a motion for a new trial on the basis of newly discovered evidence, and this appeal was stayed pending the district court's resolution of that motion. The district court subsequently denied the motion.

II.

Appellants argue that the district court erred when it sentenced them based upon its findings regarding the quantity of a drug—cocaine base—carrying a potentially higher statutory penalty, because the jury's verdict was ambiguous with regard to which drug was the object of the conspiracy. Thus, they contend that pursuant to our decision in *United States v. Rhynes*, 196 F.3d 207 (4th Cir. 1999), *vacated in part on other grounds*, 218 F.3d 310 (4th Cir. 2000) (en banc), the lack of a special jury verdict form requiring the jury to determine specifically whether the conspiracy involved cocaine hydrochloride, cocaine base, or both, constrained the district court to sentence appellants based on the drug carrying the lower statutory penalty.

In *Rhynes*, the jury was instructed that it could find defendants guilty if they distributed or possessed with intent to distribute *any* of the drugs charged as part of the conspiracy, which included marijuana, cocaine,

heroin, or cocaine base. 196 F.3d at 237. Because the jury returned a general verdict of guilty, we held that the district court's instruction created ambiguity as to whether the jury found a conspiracy to distribute all the drugs, a single drug, or some combination thereof. *See id.* at 238. As a result of such ambiguity, we held that the district court could not impose a "sentence in excess of the statutory maximum for the least-punished object on which the conspiracy conviction could have been based." *Id.*

In the present case, there is no *Rhynes* error because the jury was unambiguously instructed that a conspiracy conviction could be based only upon a finding —as charged by the government in the indictment —that appellants conspired to distribute or possessed with intent to distribute cocaine hydrochloride *and* cocaine base.[2] S.A. ("In order to establish the offense of conspiracy to distribute and possess with intent to distribute cocaine hydrochloride *and* cocaine base *as charged in the indictment*, the government must prove two elements, beyond a reasonable doubt.") (emphasis added); S.A. 13 [8] ("If you find that the materials

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[2] Nor does the jury instruction cited by appellants compel a contrary conclusion. S.A. 6 ("You are instructed that, as a matter of law, cocaine hydrochloride and cocaine base are both controlled substances as those terms are used in these instructions and in the indictment and the statutes I just read to you. You must, of course, determine whether or not the materials in question were, in fact, either cocaine hydrochloride, or cocaine base."). For, in instructing the jury on the definition of "controlled substance," the district court was not charging the jury on what it must find to convict appellants of conspiracy, but, rather, was instructing the jury that either cocaine hydrochloride or cocaine base qualify as "controlled substance[s]," as that term is defined in 21 U.S.C. § 802(6).

involved in the charged conspiracy were cocaine hydrochloride *and* cocaine base, you need not be concerned with the quantities, so as [sic] long as you find that a defendant conspired to distribute or possessed with intent to distribute *these controlled substances*, the amounts involved are not important.") (emphasis added). Furthermore, the evidence was sufficient in this case if not overwhelming to support a "construction" of the verdict that the jury found a conspiracy with regard to cocaine base *and* cocaine hydrocholoride where, *inter alia*, approximately 380 grams of cocaine base and 85 grams of cocaine hydrochloride *were actually seized* from the various conspirators and "stash houses." *See United States v. Green*, 180 F.3d 216, 226 (5th Cir. 1999) (stating that "even where there is a conspiracy general verdict, the sentencing court can still conclude that the jury found, beyond a reasonable doubt, guilt for more than just one object-offense" when the jury has *not* been instructed in the alternative and the evidence "would support such construction of the verdict actually obtained"); *United States v. Watts*, 950 F.2d 508, 515 (8th Cir. 1991) (stating that where an indictment was phrased in the conjunctive and "evidence of all three drugs was introduced," the court "did not elicit an ambiguous or unclear verdict from the jury").

Accordingly, we are "more than confident, that the jury was convinced beyond a reasonable doubt that both cocaine [hydrochloride] and [cocaine base] were involved" and that appellants were convicted of *a single multi-drug* conspiracy. *Green*, 180 F.3d at 226. Because we can discern no ambiguity in this jury verdict, we conclude that the district court did not err in sentencing

appellants based upon the relevant penalty provisions for cocaine base.

III.

Appellants (except Darlene Green, who was sentenced to a term of less than 20 years imprisonment)[3] also contend that their sentences are invalid under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), because a specific threshold drug quantity was neither alleged in the indictment nor proven to the jury beyond a reasonable doubt. Because appellants failed to raise this argument before the district court, we review for plain error. *See* Fed. R.

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[3] Darlene Green raises two challenges to her sentence, neither of which has merit. First, Green argues that the district court erred in failing to grant a two-level downward adjustment on the ground that she was a "minor participant" in the conspiracy. *See* U.S.S.G. § 3B1.2(b). Green admitted at trial, however, that she was a drug dealer, and, of course, in convicting her, the jury found that she was a member of the drug conspiracy. Thus, as we have previously held, a district court does not clearly err in declining to grant a dealer a downward adjustment for "minor participation" because a "seller" possesses "a central position in a drug distribution conspiracy." *United States v. Brooks*, 957 F.2d 1138, 1149 (4th Cir.1992).

Second, Green contends that the district court erred in granting her a two-level upward adjustment for obstruction of justice. We reject Green's argument because there was ample evidence from which the district court concluded that Green provided "materially false information" to the jury that went far beyond a mere denial of guilt. *United States v. Romulus*, 949 F.2d 713, 717 (4th Cir. 1991); *see also United States v. Gormley*, 201 F.3d 290, 294 (4th Cir. 2000) (holding that the district court did not err in imposing an obstruction of justice enhancement where defendant's false statements went beyond "merely denying his guilt").

Crim. P. 52(b); *United States v. Olano*, 507 U.S. 725, 731-32, 113 S. Ct. 1770, 123 L.Ed.2d 508 (1993).

In *United States v. Promise*, 255 F.3d 150 (4th Cir. 2001), this court, sitting *en banc*, held that because drug quantity "must be treated as an element of an aggravated drug trafficking offense" under 21 U.S.C. § 841, *Promise*, 255 F.3d at 156, the failure to charge a specific threshold drug quantity in the indictment and to submit the quantity issue to the jury constitutes plain error, *see id.* at 159-60. We further concluded that such error affects defendants' substantial rights where, as here, the defendants are sentenced to a term of imprisonment greater than that set forth in section 841(b)(1)(C) for a conviction based on an undetermined quantity of drugs, *see id.* at 160-62, and the defendants can demonstrate that their sentence is "longer than that to which [they] would otherwise be subject," *United States v. Angle*, 254 F.3d 514, 518 (4th Cir. 2001) (en banc).

However, the question left open by *Promise* is whether the failure to charge drug quantity in the indictment and to submit it to the jury "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings,'" *Olano*, 507 U.S. at 736, 113 S. Ct. 1770 (quoting *United States v. Atkinson*, 297 U.S. 157, 160, 56 S. Ct. 391, 80 L.Ed. 555 (1936)), so that we should exercise our discretion to recognize the error. We now answer that question in the affirmative.

A.

Our initial task is to define the nature of the error in this case. The appellants argue that the district court erred not only by failing to instruct the jury on an essential element—drug quantity—of an aggravated drug offense, but that the district court exceeded its

jurisdiction by sentencing them for a crime with which they were never charged.[4] We agree.

In this case, the government indicted the appellants for a violation of section 841 based upon "a mixture or substance containing a detectable amount of cocaine base, commonly known as 'crack.'" J.A. 86. Yet the district court, in turn, sentenced seven of the appellants to a term of imprisonment greater than twenty years, the maximum penalty provided for a violation of section 841(b)(1)(C) based upon "an identifiable but unspecified quantity" of cocaine base, *Promise*, 255 F.3d at 156. Consequently, by sentencing the appellants to a term of imprisonment greater than that provided for in section 841(b)(1)(C), the appellants received a sentence for a crime—an aggravated drug trafficking offense under section 841(b)(1)(A)—with which they were *neither* charged *nor* convicted.

The Fifth Amendment to the United States Constitution requires that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." The Supreme Court has explained that "an indictment found by a grand jury [is] indispensable to the power of the court to try the petitioner for the crime with which he was charged," *Ex Parte Bain*, 121 U.S. 1, 12-13, 7 S. Ct. 781, 30 L.Ed. 849 (1887), and "that a court *cannot* permit a defendant to be tried on charges that are not made in the indictment against him," *Stirone v. United States*, 361 U.S. 212, 217, 80 S. Ct. 270, 4 L.Ed.2d 252

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[4] In contrast, the government argues, as it did in *Promise*, that the error is merely instructional because drug quantity need not be charged in the indictment, an argument that a majority of this court rejected in *Promise*. *See Promise*, 255 F.3d at 156-57.

(1960) (emphasis added). Thus, when an indictment fails to set forth an "essential element of a crime," "[t]he court . . . ha[s] no jurisdiction to try [a defendant] under that count of the indictment." *United States v. Hooker*, 841 F.2d 1225, 1232-33 (4th Cir. 1988).

And, of course, a district court cannot impose a sentence for a crime over which it does not even have jurisdiction to try a defendant. Indeed, the Supreme Court explained just last year in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), that the "'indictment must contain an allegation of every fact which is *legally essential* to the punishment to be inflicted,'" 530 U.S. at 490 n.15, 120 S. Ct. 2348 (emphasis added) (quoting *United States v. Reese*, 92 U.S. 214, 232-33, 23 L.Ed. 563 (1875)), because "[t]he judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury," *id.* at 483 n.10, 120 S. Ct. 2348. Thus, because an indictment setting forth all the essential elements of an offense is both mandatory and jurisdictional, and a "defendant cannot be 'held to answer' for any offense not charged in an indictment returned by a grand jury," *United States v. Tran*, 234 F.3d 798, 808 (2d Cir. 2000), a court is without "jurisdiction to . . . *impose a sentence* for an offense not charged in the indictment," *id.* (emphasis added); *id.* ("[A] prosecutor cannot make [a] jurisdictional end run, and then urge the court to sentence the defendant for an offense for which the defendant was neither charged nor convicted.").

To hold otherwise would be to allow the court to impermissibly broaden the indictment on its own accord during the sentencing phase. To be sure, the district court's actions in this case did not technically result in a

constructive amendment of the indictment as the court did not broaden "the possible bases for *conviction* beyond those presented by the grand jury." *United States v. Floresca*, 38 F.3d 706, 710 (1994) (en banc) (emphasis added). But there is no question that "the effect of what it did was the same," *Stirone*, 361 U.S. at 217, 80 S. Ct. 270, because the district court sentenced the appellants for a crime with which they were never charged. *See Promise*, 255 F.3d at 188-89 (Motz, J., joined by Widener, Michael, King, JJ., concurring in part and dissenting in part, and dissenting in the judgment) ("[A]lthough the government presented the grand jury with an indictment containing only the elements necessary to charge [the defendant] with a violation of § 841(b)(1)(C), the district court sentenced him to the more serious crime defined in § 841(b)(1)(A); the court did not formally amend the indictment, but its sentence had the same effect."). In doing so, the district court encroached upon the prerogative of the grand jury, because only the grand jury has the power to broaden the charges "after an indictment has been returned." *Stirone*, 361 U.S. at 215-16, 80 S. Ct. 270.

Accordingly, the district court exceeded its jurisdiction in sentencing the appellants 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.

B.

Having identified the nature of the error committed by the district court, we must resolve the question that plagued an evenly divided court in *Promise*—that is, whether we should exercise our discretion to correct the error where an indictment fails to charge drug

quantity and the district court sentences a defendant to a term of imprisonment that exceeds the statutory maximum set forth in section 841(b)(1)(C). *Compare Promise*, 255 F.3d at 164 (Wilkins, J., joined by Wilkinson, C.J., and Williams and Traxler, JJ.) (holding that "[i]t would be a miscarriage of justice to allow [the defendant] to avoid a sentence for the aggravated drug trafficking crime that evidence overwhelmingly demonstrates he committed"), *with id.* at 190 (Motz, J., joined by Widener, Michael, and King, JJ.) ("Certainly, sentencing a man for a crime for which he has been neither charged nor convicted seriously affects the fairness, integrity, and public reputation of judicial proceedings."). Because we believe that the "nature of the error" is "fundamental," *United States v. David*, 83 F.3d 638, 648 (4th Cir. 1996), that the "plain error was committed in a matter so absolutely vital to defendants," *Wiborg v. United States*, 163 U.S. 632, 658, 16 S. Ct. 1127, 41 L.Ed. 289 (1896), and, most importantly, that the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings," *Olano*, 507 U.S. at 736, 113 S. Ct. 1770 (quoting *Atkinson*, 297 U.S. at 160, 56 S. Ct. 391), we "feel ourselves at liberty to correct it," *Wiborg*, 163 U.S. at 658, 16 S. Ct. 1127.

The Supreme Court has recognized that there are cases in which an error may seriously affect the fairness, integrity or public reputation of judicial proceedings even "independent of the defendant's innocence." *Olano*, 507 U.S. at 736-37, 113 S. Ct. 1770. One such case is *Silber v. United States*, 370 U.S. 717, 82 S. Ct. 1287, 8 L.Ed.2d 798 (1962) (per curiam), in which the Court considered whether to notice a defect in an indictment. In its short per curiam opinion, the Supreme Court concluded that the defect in the indictment

constituted *reversible* plain error even though the error was not raised in *either* the Court of Appeals or the Supreme Court. *Silber*, 370 U.S. at 717, 82 S. Ct. 1287; *see also United States v. Brown*, 995 F.2d 1493, 1504 (10th Cir. 1993) (holding that the failure to charge an "essential element" of a crime in the indictment is an error "which should be noted by an appellate court *sua sponte* as plain error"); *United States v. Clark*, 412 F.2d 885, 887-88 (5th Cir. 1969) (concluding that the failure of the indictment to state a criminal offense "constitutes plain error within the meaning of [Fed. R. Crim. P.] 52(b) and warrants reversal by a reviewing court"); *Chappell v. United States*, 270 F.2d 274, 276 (9th Cir. 1959) (deciding that where the indictment did not state a criminal offense, it "constitute[d] plain error within the meaning of Rule 52(b)"); *cf.* Fed. R. Crim. P. 12(b)(2) (stating that the failure of the indictment to "charge an offense . . . shall be noticed by the court at any time during the pendency of the proceedings").

To be sure, the error in *Silber* was that the defendant was *convicted* based upon an indictment that did not charge a crime, whereas here the error is that the defendant was *sentenced* more harshly based upon an element that was not charged in the indictment. We do not believe, however, that this is a substantive distinction. We cannot imagine that the Supreme Court would believe itself bound to notice the error when a conviction is based upon a crime with which a defendant was not charged on the one hand, but, on the other hand, decline to recognize the error under the equally (or possibly more) egregious circumstance where a defendant is sentenced based upon a crime that was not charged in the indictment *nor even presented to the petit jury*. *See Tran*, 234 F.3d at 809 ("If the district

court acts beyond its jurisdiction by trying, accepting a guilty plea from, *convicting, or sentencing a defendant* for an offense not charged in the indictment, *this Court must notice such error and act accordingly to correct it*, regardless of whether the defendant has raised the issue." (emphases added)). Indeed, in both cases, the district court acts without jurisdiction. *See supra* at 404.

Our conclusion that the error should be noticed is further reinforced by *United States v. Floresca*, 38 F.3d 706 (4th Cir. 1994) (en banc), in which we corrected plain error when the district court constructively amended the indictment by instructing the jury on a different subsection of a criminal statute, *even though the indictment charged a federal crime*. 38 F.3d at 709, 714. There, we recognized the fundamental nature of the error—namely, that "[the defendant] was held accountable in a federal court for an 'infamous crime' for which he was never indicted by a grand jury." *Id.* at 713-14. We did not hesitate to say "that convicting a defendant of an unindicted crime affects the fairness, integrity, and public reputation of federal judicial proceedings in a manner most serious." *Id.* at 714.

Likewise here, we have no trouble concluding that *sentencing* a defendant for an unindicted crime also seriously affects the fairness, integrity or public reputation of judicial proceedings. Indeed, it appears from the separate opinions in *Promise* that at least six members of this court would also so hold.[5] *See Promise*, 255 F.3d

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[5] While we do not consider post-indictment notice to be relevant, it appears that even the four members of the court who declined to recognize the error in *Promise* would recognize the error here. For, post-indictment notice, which they found there to be "critical[ ]," is absent in this case. 255 F.3d at 163-65 (Wilkins,

at 189-90 (Motz, J., joined by Widener, Michael, and King, JJ.); *id.* at 167-69 (Niemeyer, J., joined by Gregory, J.).

C.

The government argues that we should decline to recognize the error in this case because the evidence adduced at trial overwhelmingly establishes the threshold drug quantities for an aggravated drug trafficking offense. While the government may well be correct as a factual matter, the quantum of evidence is not a relevant consideration when the error stems from a defect in the indictment.

First, 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. *See Promise*, 255 F.3d at 190 ("A court cannot rely on its own view of what indictment a grand jury could or would have issued if the grand jury was never presented with a charge, or what verdict a petit jury could or would have reached if the petit jury was never presented with an indictment.") (Motz, J., joined by Widener, Michael, and King, JJ.). To do so would usurp the role of the grand jury, which, as the Supreme Court has recognized, is "'not bound to indict in every case where a conviction can be obtained.'" *Vasquez v. Hillery*, 474 U.S. 254, 263, 106 S. Ct. 617, 88 L.Ed.2d 598 (1986) (quoting *United States v. Ciambrone*, 601

J., joined by Wilkinson, C.J., and Williams and Traxler, JJ.); *id.* at 192 n.3 (Motz, J., joined by Widener, Michael, and King, JJ.) ("Presumably, even overwhelming and uncontroverted evidence of a defendant's guilt, without post-indictment notice, is insufficient to persuade the court *not* to notice an error like that at issue here.") (emphasis in original).

F.2d 616, 629 (2d Cir. 1979) (Friendly, J., dissenting)). For that reason, we explained in *Floresca* that "it is 'utterly meaningless' to posit that any rational jury *could* or *would* have indicted [the defendant for a different crime], because it is plain that this grand jury *did not*, and, absent waiver, a constitutional verdict cannot be had on an unindicted offense." 38 F.3d at 712 (emphasis in original).

Second, to the extent the government argues that we should decline to notice the error because the *petit jury* would have convicted appellants of an aggravated drug trafficking offense based on the overwhelming evidence adduced at trial, we reject that proposition as well. For the government's position ignores the basic principle that the grand jury and petit jury are separate and independent. Because it is well settled that the petit jury cannot usurp the role of the grand jury, it is no less evident that we cannot place ourselves in the position of the petit jury, and then, in turn, assume the role of the grand jury. In effect, this would result in nothing less than a constructive amendment of the indictment, *see Promise*, 255 F.3d at 167-68 (Niemeyer, J., joined by Gregory, J.), which itself is reversible plain error, *Floresca*, 38 F.3d at 714.

Accordingly, we vacate and remand for resentencing with instructions to sentence the appellants (except Darlene Green) to a term of imprisonment not to exceed 20 years.

IV.

After the appellants filed this appeal, they learned that James Gibson, one of the government's principal cooperating witnesses, may have lied on the witness stand. Specifically, Mary Koch, who had been designated as a Special Assistant United States Attorney to assist in the federal case against the appellants, admitted in a related state drug prosecution that she believed that Gibson's testimony at trial was inconsistent with the information he provided to the government prior to trial. According to Koch, Gibson had not been truthful in relating the involvement of his daughter, Matilda Hall, in the conspiracy.

After appellants learned of Koch's testimony, we stayed the appeal pending the district court's resolution of appellants' motion for a new trial based upon Gibson's allegedly perjurious testimony. After a full hearing on the matter, the district court denied appellants' motion, holding that even if the prosecution knowingly used perjured testimony, the materiality element for a due process violation had not been established because there was no "'reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *United States v. White*, 238 F.3d 537, 540-41 (4th Cir. 2001) (quoting *Kyles v. Whitley*, 514 U.S. 419, 433 n.7, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995)). In denying the motion, the district court rendered detailed factual findings with regard to each appellant, specifically assessing the effect of Gibson's testimony on the trial, and the additional evidence supporting the verdicts.

Appellants argue that the district court erred in denying the motion for a new trial. We disagree. As dem-

onstrated by the district court's findings, the government presented overwhelming evidence—separate and apart from Gibson's testimony—establishing: (1) that each of the appellants participated in the conspiracy; (2) their respective roles in the conspiracy; and (3) the vast amounts of crack being distributed by them. *Cf. White*, 238 F.3d at 540 (holding that though the government may have failed to disclose exculpatory testimony, "in light of the overwhelming evidence" of defendant's involvement in narcotics sales, there was no reasonable probability that a defense based upon that testimony would have been successful). Consequently, Gibson's testimony was, in large measure, merely cumulative of the testimony provided by numerous other cooperating witnesses.[6]

Therefore, after thoroughly reviewing the record and the district court's findings, we affirm on the district court's reasoning that there is no "reasonable likelihood that the false testimony could have affected the judgment of the jury."

V.

Finally, Jovan Powell argues that the district court erred when it failed to strike the testimony of police officer Michael Fries, who recounted that when he stopped Powell, Powell was in the possession of a key to

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[6] Alternatively, appellants argue that they were entitled to a new trial under Fed. R. Crim. P. 33 on the basis of newly discovered evidence. This argument is without merit, however, because a new trial based upon newly discovered evidence is unavailable where "evidence . . . is merely cumulative or impeaching," absent exceptional circumstances which are not present in this case. *See United States v. Custis*, 988 F.2d 1355, 1359 (4th Cir. 1993).

a residence that contained vast quantities of crack cocaine. First, Powell asserts that Fries and his partner did not possess reasonable suspicion to perform an investigative stop under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968). Second, Powell contends that even if the officers had reasonable suspicion, they were not entitled to seize the key. We reject both of Powell's arguments.

A.

Under *Terry*, "[t]he police can stop and detain a person for investigative purposes 'if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot.'" *Park v. Shiflett*, 250 F.3d 843, 850 (4th Cir. 2001) (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L.Ed.2d 1 (1989)). "While 'reasonable suspicion' is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop." *Illinois v. Wardlow*, 528 U.S. 119, 120 S. Ct. 673, 675-76, 145 L.Ed.2d 570 (2000).

Here, the evidence establishes that Fries and his partner had reasonable suspicion to perform a *Terry* stop. Fries, an experienced street crimes and drug enforcement investigator, testified that he knew, based on his prior experience patrolling the area on "almost a daily basis," J.A. 101, that Powell was leaving a residence located in a "problem[ ]" neighborhood, J.A. 101. *See United States v. Lender*, 985 F.2d 151, 154 (4th Cir. 1993) ("Courts are not remiss in crediting the practical experience of officers who observe on a daily basis what transpires on the street."). Consequently, when

he noticed that the dwelling contained "busted out" windows and a pit bull "looking out of the front windows upstairs," J.A. 108, Fries and his partner decided to leave their patrol car and investigate the situation. When they approached Powell, Fries "questioned him as to what he was doing inside the house." J.A. 110. Powell then became visibly nervous "and answered . . . by stating he didn't live there and he wasn't in there." J.A. 111.

In denying Powell's motion to strike Fries' testimony, the district court explained that since the officers had actually witnessed Powell leaving the residence, they "had reason to believe [Powell] was lieing [sic] to them," and that Powell's dubious response coupled with the suspicious circumstances of the encounter furnished the officers with reasonable suspicion to believe that "criminal activity may be afoot." S.A. 37.

Hence, we agree with the district court that, based upon the officers' observations, they possessed reasonable suspicion to perform a *Terry* stop.

B.

Powell alternatively argues that even if the *Terry* stop was supported by reasonable suspicion, the officers did not have the right to seize the key. Powell's assertion is without merit because the confiscation of the key was lawful under the "plain view" doctrine. *See Minnesota v. Dickerson*, 508 U.S. 366, 374, 113 S. Ct. 2130, 124 L.Ed.2d 334 (1993) (extending the "plain view" doctrine to items seized pursuant to a lawful *Terry* stop).

"Under that doctrine, if police are lawfully in a position from which they view an object, if its incriminating

character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant." *Id.* First, the officers were "lawfully in a position from which they view[ed]" the key, since they were merely driving by when they viewed the object in question. Indeed, Fries indicated during his testimony that the officers noticed the key in Powell's hand as Powell was exiting the residence, prior to when the officers left the patrol car. J.A. 108, 110.

Second, the object's "incriminating character [was] immediately apparent" after the officers' lawful encounter with Powell. When the officers inquired about Powell's presence in the house, his answer indicated not only that he had no possessory interest in the residence, but that, contrary to the officer's observations, he had not been present in the house either. Thus, it was "immediately apparent" to the officers that the key was "incriminating evidence" that might have been related to any number of crimes, *United States v. Jackson*, 131 F.3d 1105, 1109 (4th Cir. 1997), including, most notably, a burglary or some other type of property crime, *see, e.g.*, Md. Ann. Code art. 27, § 30 ("A person may not break and enter the storehouse of another with the intent to commit theft, a crime of violence, or arson in the second degree."); *see also Dorsey v. State*, 231 Md. 278, 189 A.2d 623, 624 (1963) ("'Actual breaking . . . may consist of lifting a latch, drawing a bolt, raising an unfastened window, *turning a key or knob*, pushing open a door kept closed merely by its own weight.'" (emphasis added)) (quoting L. Hochheimer, Criminal Law § 277, at 310 (2d ed. 1904)).

Third, the officers had a "lawful right of access to the object." As the Supreme Court has explained, this requirement "is simply a corollary of the familiar principle

. . . that no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.'" *Horton v. California*, 496 U.S. 128, 137 n.7, 110 S. Ct. 2301, 110 L.Ed.2d 112 (1990); *United States v. Legg*, 18 F.3d 240, 244 (4th Cir. 1994). Here, the officers had reasonable suspicion to believe not only that there was criminal activity, but that the key itself represented evidence of a crime. Thus, an exigent circumstance was unavoidably created because the key and any incriminatory evidence contained inside the house could have been destroyed had the officers not seized the key at that particular moment. *See Schmerber v. California*, 384 U.S. 757, 770-71, 86 S. Ct. 1826, 16 L.Ed.2d 908 (1966) (stating that the destruction of evidence is an exigency that justified a warrantless search); *Taylor*, 90 F.3d at 907 (holding that the threat of "imminent destruction of evidence of [criminal] activity" created an exigent circumstance).

Accordingly, we hold that neither the *Terry* stop nor the seizure of the key violated Powell's rights under the Fourth Amendment.

CONCLUSION

For the reasons stated herein, we affirm the convictions, and vacate and remand for resentencing with respect to all the appellants except Darlene Green.

It is so ordered.

WILKINSON, Chief Judge, concurring in part and dissenting in part:

I concur in the affirmance of the convictions.[1] I respectfully dissent from the decision in Part III to notice the sentencing error in this case. In light of the overwhelming evidence presented, the district court concluded that the defendants were responsible for the distribution of 1.5 kilograms of cocaine base—thirty times more than the 50 grams necessary under 21 U.S.C. § 841(b)(1)(A) to merit the sentences they received. Because it would constitute a manifest injustice to reduce these defendants' sentences when the evidence undeniably demonstrates that they committed the greater statutory offense, I would decline to notice the error.

I.

Seven of the eight appellants challenge their sentences with *Apprendi* claims. Despite an allegation of drug quantity in the initial indictment, a drug quantity was not alleged in the superseding indictment nor found by the petit jury beyond a reasonable doubt. All of the appellants were sentenced to terms of imprisonment that exceed the twenty-year maximum set forth in 21 U.S.C. § 841(b)(1)(C) for unspecified drug quantities. Five of the appellants, Stanley Hall Jr., Leonard Cotton, Lamont Thomas, Marquette Hall, and Jesus Hall, were sentenced to life imprisonment. Two others, Jovan Powell and Matilda Hall, were sentenced to 30 years imprisonment. The appellants did not raise this challenge in the district court because the Supreme Court had not yet decided *Apprendi*.

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[1] In doing so, I join in all but Part III of the majority opinion.

Under *United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770, 123 L.Ed.2d 508 (1993), before an appellate court can correct an error not raised at trial, "there must be (1) error, (2) that is plain, and (3) that affect[s] substantial rights." *Johnson v. United States*, 520 U.S. 461, 466-67, 117 S. Ct. 1544, 137 L.Ed.2d 718 (1997) (alteration in original) (internal quotations omitted). "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 affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* (alteration in original) (internal quotations omitted).

Under the reasoning of this court's recent decision in *United States v. Promise*, 255 F.3d 150 (4th Cir. 2001) (en banc), the district court committed plain error in sentencing the defendants to more than the twenty-year maximum permitted by 21 U.S.C. § 841(b)'s catch-all provision. *See Promise*, 255 F.3d at 159-60; 21 U.S.C. § 841(b)(1)(C) (maximum sentence of imprisonment of not more than twenty years if drug quantity has not been determined by a jury beyond a reasonable doubt). Furthermore, *Promise* makes clear that this error affected the defendants' substantial rights. *See Promise*, 255 F.3d at 160-62.

I do not believe, however, that this court ought to notice the error in this case. Quite simply, there is no question that the defendants participated in a conspiracy to distribute more than 50 grams of cocaine base. In fact, the evidence is overwhelming that the quantity of drugs in question exceeded § 841(b)(1)(A)'s "threshold" amount. The majority does not dispute this point and in fact acknowledges the overwhelming nature of the evidence against the defendants. *See ante* at 402-03 (noting that "approximately 380 grams of

cocaine base and 85 grams of cocaine hydrochloride *were actually seized* from the various conspirators"); *ante* at 408 (stating that there was "overwhelming evidence" apart from cooperating coconspirator James Gibson's testimony establishing "the vast amounts of crack distributed by [the defendants]").

Courts may decline to notice a plain error when evidence of defendants' guilt is overwhelming. *See*, e.g., *Johnson*, 520 U.S. at 469-70, 117 S. Ct. 1544 (refusing to notice plain error when evidence of guilt was "overwhelming" and largely uncontested); *United States v. Bowens*, 224 F.3d 302, 314-15 (4th Cir. 2000) (same); *United States v. Johnson*, 219 F.3d 349, 354 (4th Cir. 2000) (same); *United States v. Cedelle*, 89 F.3d 181, 186 (4th Cir. 1996) (declining to notice plain error and stating that "[c]entral" to the question of whether to notice a plain error affecting substantial rights "is a determination of whether, based on the record in its entirety, the proceedings against the accused resulted in a fair and reliable determination of guilt"); *United States v. Nance*, 236 F.3d 820, 823, 826 (7th Cir. 2000) (declining to recognize plain error of sentencing defendant to more than the twenty-years provided by 21 U.S.C. § 841(b)(1)(C) where the indictment did not state any drug quantity because the evidence against defendant was overwhelming); *United States v. Mojica-Baez*, 229 F.3d 292, 307-12 (1st Cir. 2000) (declining to notice error when indictment failed to charge defendant for using a semi-automatic weapon). *See also Promise*, 255 F.3d at 160-65 (Wilkins, J., joined by Wilkinson, Williams, and Traxler, JJ.).

Here, the government presented, *inter alia*, testimony from seven of the defendants' coconspirators[2] and thirty-five Baltimore City police officers and FBI agents about the nature and extent of the defendants' far-flung narcotics enterprise. Among the most incriminating evidence regarding the quantity of cocaine base (crack) is the following:

- Carla Malloy testified that in the summer of 1996 she went to a Marriott hotel in Baltimore with defendants Stanley Hall Jr., Leonard Cotton, Lamont Thomas, Jesus Hall, and Nicole Baylor. At the hotel, the group bagged one kilogram of cocaine base into ziplocks. Baylor confirmed the occurrence of this incident.

- Malloy testified that she later went to a Super 8 motel with Hall Jr. and Jesus Hall to bag one-half of a kilogram of crack.

- Baylor testified that she too bagged crack on a second occasion with Thomas at a Super 8 motel. During this incident, they bagged one kilogram of crack given to them by Hall Jr.

- Korey Britton testified that from mid-November 1996 to December 27, 1996, he sold approximately $10,000 to $12,000 of crack per week as a street runner for Hall Jr.

- Malloy testified that between December 1996 and midJanuary 1997, Hall Jr. provided crack to Cotton and Thomas in quantities of one-eighth of a kilogram (125 grams).

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[2] The following coconspirators served as government witnesses: Carla Malloy, Nicole Baylor, Korey Britton, Timothy Roday, James Gibson, Kowana Huntley, and Roxanne Kennedy.

- Malloy also testified that after January 1997 she was present on four occasions when Hall Jr. cooked cocaine powder into crack. Thomas was present on two of these occasions.

- Malloy further testified that during that same time period, she and Thomas purchased ounce quantities (28 grams) of crack from Hall Jr. for distribution.

- Britton testified that he was with Hall Jr. when Hall Jr. cooked one-quarter of a kilogram of cocaine powder into crack. Hall Jr. and Britton then delivered the crack to Cotton.

- Timothy Roday testified that in 1996 and 1997, Matilda Hall either personally provided him with crack or directed him to pick up drugs from one of her sons or their workers. Roday estimated that during this time he paid Matilda Hall a total of approximately $15,000 for the crack cocaine he purchased from her and the Hall Jr. organization.

- Britton and Malloy both testified that they retrieved crack from the inside of 847 McHenry Street for Matilda Hall. Malloy stated that she took a pocketbook that contained one-quarter ounce (7 grams) of crack cocaine out of a linen closet.

- Britton testified that he delivered one-eighth of an ounce (3.5 grams) of crack to Darlene Green at Matilda Hall's request. On another occasion, Matilda Hall took an 8 ball (3.5 grams) of crack out of her bra and asked Britton to hide it for her in the trash.

- The testimony of the cooperating coconspirators was corroborated by numerous Baltimore City police officers. In particular, various state arrests and searches between February 1996 and April 1997 resulted in the seizure of a combination of 795 ziplock

bags and clear bags containing approximately 380 grams of cocaine base.

- Additionally, pursuant to a federal search warrant of Jovan Powell's residence executed on October 17, 1997, the government seized 51.3 grams of crack found in a pair of Powell's sweat pants.

- Finally, during sentencing, the defendants did not argue that the conspiracy distributed less than 50 grams of cocaine base. Various defendants disputed the amount of crack that should be attributed to them based on their role in the conspiracy. They also argued that the cooperating co-conspirators' testimony should not be credited. However, none of them disputed the amount of crack actually seized by the police officers and federal agents.

It is true that the superseding indictment did not specify the amount of drugs in question. Nor did the government subsequently file an information contending that defendants were accountable for more than 50 grams of cocaine base. Still, contrary to the majority's assertion, *see ante* at 407 n.5, it remains difficult to believe that defendants lacked notice that they faced 21 U.S.C. § 841(b)'s strictest penalties. First, all seven of these defendants received actual notice from the initial indictment, which specified the threshold drug quantity with which they were charged. Specifically, the initial indictment charged defendants with conspiring to "distribute and possess with intent to distribute . . . 50 grams or more of a mixture or substance containing a detectable amount of cocaine base . . . in violation of Title 21, United States Code, § 841(a)(1)." Second, because the government was presenting evidence that the defendants distributed 1.5 kilograms of cocaine base and 150 kilograms of cocaine, defendants' counsel

clearly were aware that the government could seek the elevated penalties available under 21 U.S.C. § 841(b)(1)(A). Given the overwhelming evidence and the lack of any unfairness to the defendants, I would not recognize the error.

There is no injustice in holding these defendants accountable for participating in a conspiracy to distribute more than 50 grams of cocaine base. The true injustice comes from this court reducing their sentences and ignoring the effects that their vast drug distribution ring had upon the citizens of Baltimore. Ignoring the evidence and the societal effects of the defendants' actions is what "seriously affects the fairness, integrity [and] public reputation of judicial proceedings." *Olano*, 507 U.S. at 732, 113 S. Ct. 1770 (internal quotations omitted).

II.

The majority does not make a case of injustice based on the facts of this case and does not argue that the defendants are not accountable for the drug quantity the district court attributed to them. Instead, the majority focuses solely on the nature of the error—the failure of the superseding indictment to allege a specific drug quantity—in reaching its conclusion to recognize the plain error. I agree fully with the majority's statements about the general importance of a defendant's right to be indicted by a grand jury. However, in the course of its tribute to grand jury indictments, the majority misses two crucial points.

First, the indictment in this case was valid at the time it was filed. "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." *United States v. Mojica-Baez*, 229 F.3d 292, 310 (1st Cir. 2000). The government had no way to predict the about-face that would later be undertaken by the Supreme Court in *Apprendi* and by this court in *Promise*.

There can be no doubt that had the prosecution been aware of the rule this court would later announce in *Promise*, it would have made certain that the superseding indictment mirrored the initial indictment. Specifically, it would have included the statement from the initial indictment that defendants conspired to "distribute and possess with intent to distribute . . . 50 grams or more of a mixture or substance containing a detectable amount of cocaine base." Nor is there any question, given the overwhelming evidence, that had the prosecutor included this language the grand jury would have indicted the defendants and the petit jury would have found the defendants guilty beyond a reasonable doubt.

Second, the majority inappropriately replaces the discretionary, case-by-case assessment dictated by the fourth prong of *Olano* with an essentially categorical approach when the error consists of an indictment defect. The Supreme Court has stressed that an appellate court must exercise discretion under Rule 52(b) when deciding whether to recognize a plain error that affects a defendant's substantial rights. *See Olano*, 507 U.S. at 737, 113 S. Ct. 1770 (stating that "a plain error affecting substantial rights does not, without more, satisfy the [requirement that the error seriously affect the fairness, integrity, or public reputation of judicial proceedings], for otherwise the discretion af-

forded by Rule 52(b) would be illusory"); *United States v. Young*, 470 U.S. 1, 16 n.14, 105 S. Ct. 1038, 84 L.Ed.2d 1 (1985) (stating that a "per se approach to plain-error review is flawed"). *See also United States v. David*, 83 F.3d 638, 648 (4th Cir. 1996) ("It seems to us, as apparently it did to the Court in *Olano*, that only by examining the particulars of each case can the 'careful balancing' reflected in the plain error rule be preserved."); *United States v. Patterson*, 241 F.3d 912, 913 (7th Cir. 2001) ("When the appellate standard is plain error (as opposed to harmless error), even the clearest of blunders never *requires* reversal; it just *permits* reversal.").

For the majority to select a category of errors a priori that must be corrected on plain error review is inconsistent with the mandate of *Olano* to examine the facts of each case and the proceeding as a whole. Its approach cannot be squared with that of the Supreme Court. The Supreme Court knows how to adopt categorical approaches and has indicated a willingness to do so under the third prong of *Olano*. *See Johnson*, 520 U.S. at 468-69, 117 S. Ct. 1544 (recognizing categorical approach to structural errors that presumptively satisfy the third prong of *Olano* and listing classes of cases that present structural errors). However, the Court has never adopted a categorical approach under the fourth prong of *Olano*. Furthermore, the Court did not include indictment defects in its list of structural errors. *See Johnson*, 520 U.S. at 468-69, 117 S. Ct. 1544 (gathering "very limited class of cases" that present structural errors). Thus, it is hard to believe that the Supreme Court would require all indictment defects to be noticed under the fourth prong of *Olano* when they do not even

qualify as structural errors that affect a defendant's substantial rights under prong three.

In *Johnson*, the petitioner argued that *Olano* did not apply because the error she complained of was structural. *Id.* at 466, 117 S. Ct. 1544. The Supreme Court rejected this argument and stated that "the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure." *Id.* The Court went on to apply *Olano* based on the specific facts of the case. *See id.* at 469-70, 117 S. Ct. 1544 (holding that even if the error complained of was structural and affected substantial rights, the fourth prong of *Olano* was not met because of the "overwhelming" and "essentially uncontroverted" evidence of petitioner's guilt). Indictment defects will justify recognition on plain error review in some cases. However, in cases such as this one, the indictment defect has not affected the fairness of the proceedings and should not be noticed. Moreover, other errors not selectively culled by the majority for categorical treatment under the fourth prong of *Olano* may potentially have a severe impact on the fairness and integrity of judicial proceedings in a particular case. This is why the *Olano* case-specific inquiry is critical.

The majority stresses that the Supreme Court in *Silber v. United States*, 370 U.S. 717, 82 S. Ct. 1287, 8 L.Ed.2d 798 (1962), found reversible plain error when an indictment did not charge the defendant with a crime. *See Silber*, 370 U.S. at 717-18, 82 S. Ct. 1287. However, the Court did not hold that all grand jury errors must be recognized on plain error review or that every failure of an indictment to charge all of the elements required for a defendant's sentence must be noticed by an appellate court. Furthermore, several of

our sister circuits have declined to recognize plain error when defendants were sentenced more strictly based on elements not charged in their indictments. The First, Seventh, and Eleventh Circuits have properly recognized that this type of indictment defect may have only the most negligible effect on the fairness and integrity of a judicial proceeding. *See Mojica-Baez*, 229 F.3d at 310-12 (declining to notice plain error when indictment failed to charge defendant for using a semi-automatic weapon during a robbery because there was no objection at trial, no lack of notice, and "no reason to think the grand jury would have had any trouble in rendering an indictment specifying the weapons used"); *United States v. Nance*, 236 F.3d 820, 823, 826 (7th Cir. 2000) (declining to recognize plain error of sentencing defendant to more than twenty years when indictment did not state any drug quantity because the evidence against defendant was overwhelming); *United States v. Patterson*, 241 F.3d 912, 914 (7th Cir. 2001) (same); *United States v. Swatzie*, 228 F.3d 1278, 1284 (11th Cir. 2000) (stating that even if district court's *Apprendi* error with regard to defendant's drug conviction satisfied the first three steps of the *Olano* analysis, the court would decline to notice the error due to overwhelming evidence of defendant's guilt).

III.

The injustices of reducing the defendants' terms of imprisonment from life or thirty years to a twenty-year maximum are manifold. The majority errs by not weighing these injustices against the gravity of the indictment defect. The integrity of this country's criminal justice system depends on the most culpable violators receiving more stringent punishments than

those less-culpable violators. In this case, the evidence is clear that defendant Stanley Hall Jr. was the kingpin of a drug conspiracy that distributed over thirty times the statutorily required amount of crack cocaine to warrant a life sentence. Under Congress' intended sentencing scheme, Hall Jr. and the conspiracy's other key players justifiably received more stringent penalties than those individuals who were less essential to the conspiracy's success. However, by reducing their sentences under 21 U.S.C. § 841(b), this court erases the differences in punishment and condemnation between the conspiracy's kingpin and its underlings.

Moreover, changing the rules of the game after it has already been fairly played does a profound disservice to the individuals whose lives have been affected by the drug trade. In one sweeping motion, this court nullifies the sacrifices made by law enforcement officers, prosecutors, and trial courts in enforcing this country's drug laws. Furthermore, the majority overlooks the ultimate sacrifice paid by the victims of the drug trade. Seen as part of the overall drug problem, the drugs at issue here may be a mere drop in the bucket. But seen in terms of individual lives, the consequences of this sort of drug distribution are incalculable. Though the victims may be unknown and unnamed insofar as this record is concerned, as a result of the defendants' crimes, some individuals somewhere are spending their lives in the service of a chemical addiction.

Congress has properly expressed its condemnation of drug distributions and their consequences. And it has calibrated the penalties associated with drug distribution so that kingpins are punished more vigorously than petty dealers. It is unfortunate to disregard Congress' clear intent 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 they received. Under *Olano*, we are to notice a plain error only if a miscarriage of justice would result. Here, the true miscarriage of justice is the court's failure to respect Congress' attempt to deal with a problem which so compromises the life prospects of America's most vulnerable citizens.

APPENDIX B

Section 841(a) and (b) of Title 21 of the United States Code (1994 & Supp. V) provides:

(a) Unlawful acts

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

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

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

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

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

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

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

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

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

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its

> isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was

such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

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

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

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

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

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

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior con-

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

(C) In the case of a controlled substance in schedule I or II, or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the de-

fendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment

of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have

become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed—

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use—

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18, or imprisoned not more than five years, or both.

(7) **Penalties for distribution.**

(A) **In general.** Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18.

(B) **Definition.** For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

Section 846 of Title 21 of the United States Code provides:

§ 846 Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.